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Special Issue: Human Rights at the Border

Editorial

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Managing Migration: Is border control fundamental to anti-trafficking and anti-smuggling interventions?

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From the Horn of Africa to the Middle East: Human trafficking of Eritrean asylum seekers across borders

Book Review

Who are the 'Us' and who are the 'Them'?
A review of *Us and Them? The Dangerous Politics of Immigration Control*

ANTI-TRAFFICKING REVIEW

Special Issue: HUMAN RIGHTS AT THE BORDER

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The *Anti-Trafficking Review* (ISSN 2286-7511) is published by the Global Alliance Against Traffic in Women (GAATW), a network of over 100 NGOs worldwide focused on advancing the human rights of migrants and trafficked persons.

The *Anti-Trafficking Review* promotes a human rights-based approach to anti-trafficking. It explores trafficking in its broader context including gender analyses and intersections with labour and migrant rights. It offers an outlet and space for dialogue between academics, practitioners, trafficked persons and advocates seeking to communicate new ideas and findings to those working for and with trafficked persons.

The *Review* is primarily an e-journal, published annually. The journal presents rigorously considered, peer-reviewed material in clear English. Each issue relates to an emerging or overlooked theme in the field of anti-trafficking.

Articles contained in the *Review* represent the views of the respective authors and not necessarily those of the editors, the Editorial Board, the GAATW network or its members. The editorial team reserves the right to edit all articles before publication.

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Biao Xiang

Editorial: Human rights at the border

- (1) Everyone has the right to freedom of movement and residence
within the borders of each state.
 - (2) Everyone has the right to leave any country, including his own,
and to return to his country.
- Article 13, Universal Declaration of Human Rights

The question of boundaries is the first to be encountered; from it
all others flow. To draw a boundary around anything is to define,
analyse and reconstruct it, in this case select, indeed adapt,
a philosophy of history.
— Fernand Braudel¹

It is with great honour that I introduce the second issue of the *Anti-Trafficking Review* (ATR). The first issue received an overwhelming response and has placed the journal at the forefront of rigorous analysis and debate relating to human trafficking and human rights. It raised the topic of accountability in anti-trafficking. This issue hopes to further strengthen the ATR's position as a global, reputable journal on human trafficking.

Strengthening the quality of research, analysis, and reflexivity in the trafficking sector is much needed, and I echo Anne Gallagher's observation as guest editor of the first issue that standards in anti-trafficking research tend to be less rigorous than in other fields of study. My aim as a guest editor is to contribute to addressing this shortfall by bringing together a

¹ Quoted in O Löfgren, 'The Nationalization of Anxiety: A history of border crossings' in U Hedetoft (ed.), *The Postnational Self: Belonging and identity*, University of Minnesota Press, London, 2002, p. 250.

set of diverse and insightful articles focussing on the nexus of borders and human rights. It is also my hope that this issue will work towards narrowing the divide between practitioners and academics in anti-trafficking. This is reflected in the varied range of contributors. The last few years have witnessed a significant increase in publishing relating to human trafficking worldwide. However, there is limited measured debate and appraisal of this literature within the anti-trafficking sector. For this reason we have decided to include a book review as a way of highlighting recent major publications.

The question of borders, migration control, trafficking and human rights raise contested and controversial questions. The editorial team has attempted to include different perspectives, reflected in the debate section in particular. Needless to say, all papers have been subject to double blind peer review.

This Issue: Rights at the border

The central paradox is this: efforts to combat human trafficking are heavily premised on the importance of borders; yet, there is a dearth of specific empirical focus on borders in trafficking research and programming. The significance of this conundrum is reinforced by the fact that borders pose significant human rights implications for migrants and trafficked persons. Hence, the need for a special issue with a focus on human rights at the border.

Although human trafficking may not always involve cross-border mobility, there is no doubt that international borders are central to how trafficking is conceptualised and acted upon. For example, the Trafficking Protocol makes it clear that trafficking may not necessarily occur across international borders.² This point is often highlighted when contrasting human trafficking with people smuggling. Yet, Article 11 of the Protocol makes

² United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, United Nations, New York, 2000.

specific stipulations requiring states to strengthen border control, a point that is reflected in the debate section in this special issue. Borders, it seems, are smuggled in through the backdoor. Borders are ubiquitous in trafficking discourse, which ranges from bilateral and regional Memorandum of Understandings (MOUs) (often focussing on borders through repatriation programmes and cross-border law enforcement) to cross-border programmes implemented by UN agencies and NGOs, and visual representation of trafficking (such as images of border check-points in awareness raising campaigns). Hence, there is arguably a conceptual excess in the focus on borders.

Although borders express the territorial power of the nation-state, they also play a significant role in creating meaning. Borders are material expressions of boundaries. And, as the epigraph by Fernand Braudel alludes to, boundaries allow social, economic and political practices to be made legible and thereby possible to act upon.³ Yet, the practical translation of such formalisation is often much more opaque in practice.⁴ Indeed, borders are often thought of as hazy no-man's-lands at the margins of the state, attracting a range of illicit activities. At the same time, borders constitute a technology for both expressing and acting out state power. International borders are often – in either real or imagined ways – heavily policed and militarised, albeit this has been ‘decentred’, as several of the issue contributors and others scholars have pointed out.⁵ And the ways cross-border migrants act and are acted upon raise important implications for human rights.

This issue addresses the problematic of how borders in the context of anti-trafficking practice intersect with upholding

³ J C Scott, *Seeing Like a State: How certain schemes to improve the human condition have failed*, Yale University Press, New Haven, 1998.

⁴ M Baud and W van Schendel, ‘Toward a Comparative History of Borderlands’, *Journal of World History*, vol. 8, no. 2, 1997, pp. 211–242.

⁵ ‘Decentered’ refers to how border control does not only take place at borders but also within a jurisdiction (e.g. deportation crackdowns) as well as abroad (e.g. visa applications and screening ahead of arrival). See also, N P De Genova, ‘Migrant “Illegality” and Deportability in Everyday Life’, *Annual Review of Anthropology*, vol. 31, no. 1, 2002, pp. 419–447; B Anderson, *Us and Them? The dangerous politics of immigration control*, Oxford University Press, Oxford, 2013.

human rights for migrants. Put simply: Do borders and border control contribute to the protection of migrants, or are borders part of the problem? The latter makes the nexus of human rights and borders an oxymoron; the former makes it tautological.⁶ The essays in this special issue address this problematic in a range of ways.

The Debate Section: The role of border controls in the response to human trafficking

Is border control central to the protection of trafficked persons' human rights? According to the Trafficking Protocol, it seems so. Article 11 on Border Measures makes this explicit by asserting: 'States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.'⁷ This demand on states (and their adherence to it) has been the subject of considerable controversy. Many anti-trafficking campaigners and researchers have been rather hostile to the suggestion that border control is compatible with the principles of human rights protection, a point not missed by several of the contributors to this issue.

The debate section starts off with a thought-provoking essay by Miller and Baumeister titled 'Managing Migration: Is border control fundamental to anti-trafficking and anti-smuggling interventions?' They provide nuanced reflection upon Article 11 based on their engagement with the United Nations Office on Drugs and Crime (UNODC), which is the lead UN agency on law enforcement in anti-trafficking. Acknowledging the common criticisms of border control in anti-trafficking, they remind us

⁶ I borrow this analogy from David Chandler's analysis of the historical intersection of military operations and humanitarianism. See: D Chandler, 'The Road to Military Humanitarianism: How the human rights NGOs shaped a new humanitarian agenda', *Human Rights*, vol. 23, no. 3, 2010, pp. 678–700.

⁷ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, United Nations, New York, 2000, pp. 6–7.

that any analysis of anti-trafficking must be based on the existence and enforcement of border controls, as opposed to a hypothetical scenario of open borders. Any examination of anti-trafficking, they suggest, needs to take the realpolitik of border control as a premise for discussion. Miller and Baumeister suggest concrete ways in which anti-trafficking, in the context of border control, can be moved forward (such as appointing an independent, bi-partisan trafficking commissioner, as has been recommended in the UK). They also point out that UNODC's engagement with border control and law enforcement has opened up a space where a UN agency has been able to engage sections of governments which have traditionally had minimal exposure to human rights norms.

In contrast, in 'Who's Who at the Border? A rights-based approach to identifying human trafficking at international borders', Marika McAdam points to the difficulty of identifying trafficked persons at borders given that their status is premised on an exploitative outcome of their migration, which, in most cases, has not yet taken place. Although victim identification may appear as a technical question of methods (i.e. how do you identify a trafficked person?), McAdam points out that it has a direct human rights impact due to the high risk of misidentification. Despite an astonishing increase in victim identification manuals, training and procedures, the actual operationalisation of these often do not address inherent problems. A key challenge is that many of these guidelines place emphasis on the 'exploitative' phase of trafficking, thereby significantly reducing its application to border policing efforts. Yet, it is precisely border officials who are often tasked with identifying trafficked persons. Furthermore, she argues that strengthened border control can exacerbate risk for migrants, and consequently result in a possible increase in trafficking (a point echoed by several other contributors). Rather than attempting to equip border guards with victim identification procedures, McAdam argues that human rights protection ought to apply more broadly.

Thematic Articles Section

The politics of victim identification is explored further by Ham, Segrave and Pickering in their article ‘In the Eyes of the Beholder: Border enforcement, suspect travellers and trafficking victims’. They base their analysis on the micro-social politics of how border officials in Australia and Thailand carry out screening of potential trafficking victims. In this process, there is an important dichotomy which operates between two subjectivities: trafficked persons and irregular migrants. Through numerous interviews with immigration officials, Ham, Segrave and Pickering show that not only is such victim identification often contingent upon racialised and gendered stereotypes, but it also involves a highly subjective process where individual border officials deploy considerable discretion in the ways in which they determine migration status and identify possible victims of trafficking. This can include interpretations of intent and agency based on suitcase contents – an issue which often surfaces in cases related to suspected sex work.

The ways in which victim identification privileges objects as opposed to persons is further elaborated by Smith and Marmo in ‘Examining the Body through Technology: Age disputes and the UK border control system’. The concern here is not material possessions but how the body becomes a key concern in victim identification. Focussing on the UK, they examine the use of x-ray in border policing in order to determine age in the identification of refugees and trafficked persons. Not only does this reflect an important shift in the ways ‘truth’ and evidence are produced, where there is a shift from biography (testimony) to biology (the body), but it also raises important questions regarding the motivations behind such technologies of knowing. Smith and Marmo argue that rather than being a mechanism for ensuring human rights for trafficked persons, it serves as an anti-immigration control. They also highlight how such technologies are not new but constitute a longer trend of UK border control that has used x-ray. As such, they are not merely critiquing this from a human rights point of view, but with historical analysis they also point out that this recycling of governance technologies over the years raises important

questions in terms of change and continuity of border control over time.

Moving away from examining instrumental ways in which victim identification is operationalised, the next essay is more concerned with the ways in which the border produces victim subjectivities. In 'Shaping the Victim: Borders, security, and human trafficking in Albania', James Campbell considers the ways in which border control and anti-trafficking have emerged in Albania in the context of regional integration into the European Union. Campbell places emphasis on how the border is productive, arguing that the border enables a differentiated articulation of migrants. Through border-focussed anti-trafficking measures, a 'trafficked person' identity is produced as people from 'outside' the border come back, whereas a 'sex worker' subjectivity is produced and applied to people with similar characteristics 'inside' Albania itself. It is important to consider the context of pre-EU ascension, Campbell shows, where several international organisations (such as the IOM and OSCE) have contributed financial and technical support for anti-trafficking. As such, Campbell draws attention to how border control and anti-trafficking emerge discursively where the border allows for cascading, differentiated identity making.

Policy reform is addressed by Avendaño and Fanning in 'Immigration Policy Reform in the United States: Reframing the enforcement discourse to fight human trafficking and promote shared prosperity'. In the recent immigration reform bill passed by the U.S. Senate (the Border Security, Economic Opportunity, and Immigration Modernization Act), Avendaño and Fanning note, as others have, the awkward simultaneous move towards stronger protection for workers, such as pathways to citizenship, with a renewed emphasis on border control. Drawing on their extensive advocacy work, they illuminate how the strengthening of border control in fact can result in more precarious migration. Rather than providing a general argument against border control, they frame their discussion in terms of a detailed analysis of the new bill. Acknowledging that border-enforcement is unlikely to go away entirely, they argue that advocacy needs to focus on more open conduits for migrants, coupled with improved protection and labour standards.

In the next essay ‘Health and Rights at the Margins: Human trafficking and HIV/AIDS amongst Jingpo ethnic communities in Ruili City, China’, Elena Shih examines the context in which anti-trafficking has emerged as a key policy concern along the China-Myanmar border. Focussing on Ruili in Yunnan Province, China, she reminds us to appreciate the broader political context in which anti-trafficking emerges as it intersects with well-established, often punitive, campaigns to curb HIV/AIDS and drugs. Shih’s ethnographic focus on Jingpo minority women brings to light the precarious and marginalised status of minority groups in this border area where a focus on border control contributes to a willed lack of effort in addressing the social, economic and health problems the Jingpo face. Shih reminds us how a specific focus on anti-trafficking obfuscates broader human rights concerns for men and women as well as ethnic minorities.

The significance of contextualising border control and anti-trafficking is further explored by Lijnders and Robinson in their paper ‘From the Horn of Africa to the Middle East: Human trafficking of Eritrean asylum seekers across borders’. Focussing on Eritrean migration to Israel, they document in great detail the commonality of abduction, forced movement and often highly exploitative migration processes. Their numerous interviews with Eritrean migrants in Israel and Ethiopia do not only document human rights violations but also illuminate how international borders contribute to the structuring of mobility as well as abuse. This well-researched paper places specific focus on how the border area contributes to trafficking as it becomes a gathering place for Eritrean refugees in search of refugee camps. This has created a context where local borderlanders are able to target these migrants for kidnapping and extortion which can amount to trafficking. Eritrean respondents point to the involvement of members of the Rashaida ethnic group involved in abductions and kidnappings. Due to their historical positioning in the border region and cross-border political ties, members of the group are able to freely straddle the border region and engage in such conduct with impunity. Lijnders and Robinson’s data point to the prevalence of border officials’ complicity in the violations and abuse.

Book Review

Finally, in ‘Who are the “Us” and Who are the “Them”?’ Biao Xiang provides an analytical and insightful review of Bridget Anderson’s recent book *Us and Them? The dangerous politics of immigration control*. As he points out, this book is of utmost importance not only to anti-trafficking practitioners and scholars but everyone engaged with migration and migration policies more broadly. Focussing on the UK, Anderson provides a history of migration control. A key claim the book makes is that migration politics and border control are underpinned by notions of a community defining itself with values, as opposed to membership based on civic criteria like citizenship. Biao Xiang suggests in his review that ‘us’ and ‘them’ (now defined as values) can be taken further, as it seems to imply not division, but universalising claims of belonging. The relevance of this is clear in relation to trafficking: Xiang suggests that the ‘us’ defined by compassion for trafficked persons does not refer to a particular identity (in this case, British), but a universal humanity. At the same time, as Anderson so eloquently shows, it is precisely border control that allows an awkward consensus amongst the state and citizens, making it possible to react morally to a political problem without acknowledging how border control is complicit in the marginalisation, as well as actively producing the violations that it claims to combat. The book is important for practitioners and scholars on human trafficking because it shows how a broader, historicised analysis of border control allows for fresh insights into what underpins such policies. I wholeheartedly agree with Xiang that all students of migration studies should read this book at least once.

Several themes shine through the contributions. All engage with the question of how border controls structure migration and their implications for human rights. As such, the central question pertains to policy, i.e. what are the appropriate policy options? Although several contributors are critical of the ways in which borders and immigration control affect human rights of migrants and trafficked victims, they all differ in demonstrating why this is so. Many consider policy

as technology. A key concern lies in the practicality of victim identification in the context of border control (Ham, Segrave and Pickering: it's biased; McAdam: it's inherently contradictory; Smith and Marmo: it constitutes a recycling of old failed methods; Campbell: it produces poly-directional, different subjectivities). Within this discussion, we get the closely-related problem of the relationship between the production of truth and identity. Testimonials by migrants are increasingly seen as dubious, thus redirecting border control officials towards scrutiny, not only of documents but also luggage possessions (Ham, Segrave and Pickering), as well as the body itself (Smith and Marmo). Hence, what many contributors in this issue demonstrate is not just the importance of how the border works spatially (Lijnders and Robinson, Campbell) but also how victim identification relies less on the spoken word (testimony, interview) and privileges material objects (travel documents, luggage possessions) and the body itself (x-ray scans).⁸ The human rights implication of this is highly problematic as thresholds for victim identification are increasingly moved away from person to matter. That is to say, the human person is paradoxically obliterated through a language of protection, care and human rights.

Finally, all contributors collectively show the ways in which anti-trafficking at the border is highly contested, yet its dynamics not very well understood. Collectively, the essays illuminate human rights at the border by drawing on social science theory, different methodological approaches as well as grounded policy analysis. In doing so, they bring to light how controversies regarding border control and human rights for trafficked persons should not be framed polemically but opened up to a range of questions which require careful empirical,

⁸ The emergence of biolegitimacy (embodied truth telling) where the biographical is moving to the material and biological has been analysed in the context of asylum seekers but has not been extensively examined in human trafficking literature. See: D Fassin and E d'Halluin, 'The Truth from the Body: Medical certificates as ultimate evidence for asylum seekers', *American Anthropologist*, vol. 107, no. 4, 2005, pp. 597–608; D Fassin, 'Another Politics of Life is Possible', *Theory, Culture & Society*, vol. 26, no. 5, 2009, pp. 44–60.

methodological and analytical consideration. It is precisely such a mix which makes the ATR such an exciting focal point for serious and thoughtful analysis and discussion regarding human trafficking.

By way of conclusion, I would like to thank the Editorial Board for their assistance in putting together this special issue. A very special thanks goes to Rebecca Napier-Moore who has been extremely helpful throughout our collaboration on this issue. I would also like to thank Bandana Pattanaik and Alfie Gordo for their continuous support of the publication. Vijaya Vanamala was essential to publication, as a tireless copyeditor. Appreciation goes to the authors for the considerable patience they have shown throughout the review process. Finally, a big thanks goes out to the anonymous peer reviewers who devoted considerable time in reviewing submissions.

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Managing Migration: Is border control fundamental to anti-trafficking and anti-smuggling interventions?

Rebecca Miller and Sebastian Baumeister

Abstract

Over the last several decades, globalisation and a growing concern over security issues, including transnational crime and terrorism, has shaped migration policies and the priorities of states. As migration rose to the top of many government agendas, a rapid tightening and regularisation of borders ensued in an attempt to keep undesirable, high-risk migrants out of potential destination countries. Concomitantly, transnational crimes, such as trafficking in persons and the smuggling of migrants, have been increasingly defined as border security problems. This article examines the extent to which border control is fundamental to anti-trafficking and anti-smuggling interventions, situating the debate within the wider nexus of globalisation and the securitisation of migration. Based upon their work with the United Nations Office on Drugs and Crime (UNODC) Regional Centre for Southeast Asia and the Pacific, the authors take the standpoint that given it is the sovereign right of each state to control its border and regulate migration, the human rights of migrants must be considered within this *realpolitik*. Clearly, though, this claim is highly political and contentious. In the article, we explore some of the tensions and contradictions that have emerged in this debate, and then develop an argument to suggest that it is possible for states to combine managed migration and strict border controls with

the protection of human rights in the current context of globalisation.

Key words: trafficking in persons, migrant smuggling, migration, border controls, criminal justice, human rights

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Introduction

Over the last several decades, two main factors have shaped migration policies and the priorities of states. The first factor is the increased flow of goods, capital, ideas, and information as a result of globalisation. Labour markets subsequently internationalised, and new opportunities opened up in potential destination countries for a growing supply of both skilled and unskilled migrants from less developed source countries. For labour-sending countries, urbanisation, internal rural to urban migration, growing working-age populations, rising education attainment, widening income disparities, and environmental change have become key aspects influencing a person's decision to migrate.¹ At the same time, for labour-receiving countries, demographic changes, specifically population decline and population aging, coupled with labour and skill shortages, have created employment incentives for migrant workers.² Our future will continue to be characterised by migration, as transportation and communication technologies continue to

¹ I Goldin, G Cameron and M Balarajan, *Exceptional People: How migration shaped our work and will define our future*, Princeton University Press, Princeton, 2011, p. 153; pp. 214–241.

² G Hugo, 'Demographic Change and Labour Mobility in the Asia-Pacific - Implications for business and regional economic integration: Synthesis' in G Hugo and S Young, *Labour Mobility in the Asia-Pacific Region: Dynamics, issues, and a new APEC agenda: A survey and analyses of governance challenges on labour migration for APEC economies*, Institute of Southeast Asian Studies, Singapore, 2008, pp. 3–12.

reduce distances and expand social networks between source and destination countries. What is more, all this has occurred against a broader backdrop of tightened immigration policies and border controls in an attempt to manage migration.

The notion of managed migration brings us to the second factor, namely the growing concern over security issues, including transnational crimes and terrorism. Following the September 11, 2001 attacks, policy makers identified migrants as a potential security risk and concluded that migration needed to be effectively managed because national security was at stake.³ Migration rose to the top of many government agendas,⁴ and a rapid tightening and regularisation of borders ensued in an attempt to keep undesirable, high-risk migrants out of potential destination countries.⁵ New surveillance and biometrics technologies for border control, including fingerprinting, iris recognition, and facial scanning burgeoned, making it more difficult to produce counterfeit travel documents. Borders also began to shift, and in some cases, have been pushed offshore as states have introduced preemptive measures, including systems to enable better information exchange, stricter visa requirements, and the inclusion of non-state parties (e.g. airlines) to act as gatekeepers.⁶ Concomitantly, states argued that in the era of globalisation, such measures would prove invaluable to combat transnational crimes, such as trafficking in persons and the smuggling of migrants.⁷ As a result, smuggling

³ The securitisation of migration actually began in the 1990s. In 1991, for example, the European Commission called for the integration of migration issues into its external policies. The events of September 11 heightened the agenda. See, for example, C Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy', *International Affairs*, vol. 79, no. 3, 2003, pp. 619–638.

⁴ F B Adamson, 'Crossing Borders: International migration and national security', *International Security*, vol. 31, no. 1, 2006, pp. 165–179.

⁵ I Goldin, G Cameron, and M Balarajan, *op. cit.* p. 121.

⁶ As Bridget Anderson notes, border control is not just about conditions of entry, but also about conditions of stay. Border enforcement has also shifted 'inland' (e.g. through tightened employer regulations and penalties, increased workplace inspections, removals of overstayers). For a detailed analysis, see: B Anderson, *Us and Them? The dangerous politics of immigration control*, Oxford University Press, Oxford, 2013, p. 88 & pp. 115–136.

⁷ For example, see: A Downer, 'Australia Leads the Way on Passport Biometrics', *Media Release*, 4 June 2003, retrieved 7 January 2013, http://www.foreignminister.gov.au/releases/2003/fa060_03.html.

and trafficking have been increasingly defined as border security problems.

It is within the wider nexus of globalisation and securitisation of migration that this debate on border control and trafficking in persons is situated. Although trafficking falls within the mandate of various international agencies, the topic of border control in anti-trafficking interventions from a United Nations Office on Drugs and Crime (UNODC) perspective generates an interesting debate. On the one hand, UNODC is the only UN entity focussed on the criminal justice element of trafficking in persons and the smuggling of migrants. Consequently, border management is a key programming area. Moreover, as the guardian of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons* (Trafficking Protocol) and the UN *Protocol against the Smuggling of Migrants by Land, Sea and Air* (Smuggling Protocol) supplementing the UN *Convention Against Transnational Organized Crime*, UNODC fully supports states parties in strengthening border controls to prevent and detect trafficking in persons and migrant smuggling as outlined in Article 11 of both Protocols.⁸

On the other hand, UNODC acknowledges that this claim is highly political and contentious. Critics maintain that arguments about sovereignty and nationalism are not fundamental reasons for states to control migration. Rather, they purport, overly restrictive migration policies and tighter border controls simply result in serious political, economic, social, and human costs to states and migrants alike. Another common criticism is that security-driven agendas are accompanied by the marginalisation

⁸ Article 11:1 of the UN *Protocol against the Smuggling of Migrants by Land, Sea and Air* states: 'Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.' Similarly Article 11:1 of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons* states: 'Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.'

of migrants' human rights.⁹ Although largely articulated in relation to wider migration policies, such debates are beginning to stimulate broader dialogue about the role of border controls in anti-trafficking interventions.¹⁰

The perspective of this article will be somewhat different from the mainstream where much of the literature is critical not just of border controls, but also of a criminal justice response to trafficking in persons. We suggest that it is possible for states to combine tightly managed migration systems and strict border controls with the protection of human rights, first by examining some of the tensions and contradictions that have emerged in this debate, and second by defending our argument against the criticisms made by those who are critical of tighter border controls and security frameworks. To conclude, we offer suggestions for consideration and further debate on how states might reconcile what might be seen as conflicting agendas to develop more effective anti-trafficking responses.

Controlling Borders: Are sovereign states losing control in a globalised world?

A large body of literature exists on the changing nature of the state and the erosion of state sovereignty. For some, the

⁹ See: J Todres, 'Widening Our Lens: Incorporating essential perspectives into the fight against human trafficking', *Michigan Journal of International Law*, vol. 33, no. 1, 2011, pp. 53–76; A Mountz, *Seeking Asylum: Human smuggling and bureaucracy at the border*, University of Minnesota Press, Minneapolis, 2010, p. 170; J Lobasz, 'Beyond Border Security: Feminist approaches to human trafficking', *Security Studies*, vol. 18, no. 2, 2009, pp. 319–344; M Lane, 'Myths about Migration: Historical and philosophical perspectives', *History & Policy*, 2006, retrieved 8 April 2013, <http://www.historyandpolicy.org/papers/policy-paper-39.html#counting>; A Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and treaties', *Forced Migration Review*, vol. 12, 2002, pp. 25–28.

¹⁰ A Schloenhardt, 'Prevented, Suppressed, and Punished!? Twelve years of the Trafficking in Persons Protocol', *The University of Queensland Human Trafficking Working Group*, 23, 2012, p. 25, retrieved 9 April 2013, <http://www.law.uq.edu.au/documents/humantrafficking/international-law/UN-TiP-Protocol-2000-Commentary-Analysis.pdf>; B McSherry and S Kneebone, 'Trafficking in Women and Forced Migration: Moving victims across the border of crime into the domain of human rights', *The International Journal of Human Rights*, vol. 12, no. 1, 2008, pp. 67–87.

increasing concern over border control in relation to migration reflects a decline in state power in the age of globalisation.¹¹ One scholar, Melissa Lane, has posited that states should acknowledge the limits on their power as well as their abilities to control migration in general, and irregular migration in particular. She argues further that notions of sovereignty and nationalism are not unconditional arguments for greater state control of migration. Powerful forces drive people to migrate, and states will therefore never succeed in their attempts to control migration. Subsequently, there is a continuous tension between the interests of states and the interests of migrants.¹²

Others have argued that the decision to migrate is made within the context of restrictive government migration regimes and border control policies, which, in turn, have generated a growing demand for clandestine migration services, including smuggling across borders, procuring of fraudulent passports and visas, and arranging of false employment opportunities. Consequently, journeys are becoming more perilous, and thousands of migrants die each year while attempting to make unauthorised border crossings.¹³ This theory carries weight as we have seen that the market for clandestine migration services is linked at least in part to the widening of border surveillance, largely aimed at stemming the flow of irregular migrants from entering into, or residing in, destination countries.¹⁴ Because migrants believe their lives can be improved through migration, people seek out the services of third parties willing to facilitate both regular and irregular forms of migration, just as critics suggest. Research carried out by UNODC and others has shown that much of the migration in Asia, and indeed worldwide, is facilitated, and even initiated, by third parties.¹⁵ Migrants

¹¹ S. Sassen, *Losing Control? Sovereignty in an age of globalization*, Columbia University Press, New York, 1996. Also see: M. Bosworth, 'Border Control and the Limits of the Sovereign State', *Social & Legal Studies*, vol. 17, no. 2, 2008, p. 199–215.

¹² M. Lane, *op. cit.*

¹³ J. O'Connell Davidson, 'Absolving the State: The trafficking-slavery metaphor', *Global Dialogue*, vol. 14, no. 1, 2012, p. 32 & p. 39; G. Hugo, pp. 22–24.

¹⁴ I. Goldin, G. Cameron, and M. Balarajan, p. 121.

¹⁵ UNODC, *Migrant Smuggling in Asia: A thematic review of literature*, UNODC, Bangkok, 2012; G. Hugo, *op. cit.*

worldwide often seek out third parties who are directly or indirectly known to them and who are part of a locally established network to reach their destination. Often these individuals are not traffickers, but are small-scale smugglers - friends, relatives, acquaintances, or migrant workers themselves - with established links between source and destination countries. But by turning to third parties, many migrants jeopardise their savings, health, and security. Moreover, a large number end up in exploitative situations, with their welfare, rights, and lives under severe threats.¹⁶ One just has to look at the struggles of the Australian government in its attempts to combat the smuggling of migrants by sea to know that human, social, and economic costs to both states and migrants can be exacerbated by the same policies and measures that are meant to address the problem.

Even 'legal' recruitment and migration processes have become increasingly complex due to the involvement of third parties.¹⁷ A trend in official labour programmes causing concern has been the increased transaction costs being borne by the migrants themselves, while brokers and private agents enjoy large profits. For example, although the Government of Thailand established formal migration schemes from Cambodia, Lao PDR, and Myanmar, they tend to be slower, less flexible, and more expensive than informal arrangements, a situation which largely is due to the excessive fees of intermediaries. Under these formal schemes, intermediaries (recruitment agencies) in sending countries and in Thailand are responsible for procuring and registering migrant workers, organising pre-departure orientation and training, and acting as mediators in the event of labour disputes between workers and employers. Governments, on the whole, are not involved in the processes.

¹⁶ K Tamas and J Palme, 'Transnational Approaches to Reforming Migration Regimes' in K Tamas and J Palme (eds.), *Globalizing Migration Regimes: New challenges to transnational cooperation*, Ashgate, Aldershot, 2006, p. 3.

¹⁷ G Hugo, p. 23; also see: S Molland, 'Is 'Safe Migration' Along the Thai-Lao Border Truly 'Safe'?', *Asia Pacific Memo*, 2012, retrieved 10 January 2013, <http://www.asiapacificmemo.ca/is-safe-migration-along-the-thai-lao-border-truly-safe>.

What is more, the system is neither highly regulated nor transparent, making it easy for both authorised and unauthorised recruitment agencies to take advantage of migrants who, in turn, understand little about the complex and time-consuming application procedures. Although the formal migration schemes aim to prevent migrant workers from paying excessive fees, the actual cost of formal recruitment is high, much higher than the costs associated with irregular forms of migration.¹⁸ For example, it is estimated that the brokerage fees for one passport under Thailand's national verification plan, which enables irregular migrant workers in Thailand to acquire legalised status through the issuance of temporary passports, has reached US\$500-700 per passport, equivalent to several months' wages.¹⁹ Migrants, predominantly from Cambodia, Lao PDR, and Myanmar, have no choice but to take out large loans to cover the costs. As Graeme Hugo points out, the migration industry continues to grow, and a key problem with regular and irregular systems is the excessive rent-taking involved in both source and destination countries.²⁰ We do not dispute this depiction. Migrants are susceptible to abuse, exploitation, and trafficking, and in part this is due to the costs of migration and the involvement of third parties, often resulting in migrants facing situations of leveraged debt. Research carried out by the United Nations Inter-Agency Project (UNIAP) on Human Trafficking found that debt bondage and the use of brokers significantly increased the risk of exploitation and trafficking. Data involving Cambodian deportees from Thailand showed that male migrants, in particular, were almost twice as likely to be cheated or trafficked as female migrants, primarily because the risk of being exploited or trafficked increased one and a half times for every broker involved, and men used brokers more often than women.²¹

¹⁸ S Chantavanich, *The Mekong Challenge: An honest broker – Improving cross-border recruitment practices for the benefit of government, workers and employers*, International Labour Organization, 2008, retrieved 27 May 2013, <http://www.ilo.org/public/english/region/asro/bangkok/child/trafficking/downloads/buildingknowledge/anhonestbroker.pdf>.

¹⁹ Interview, A Hall, IPSR Foreign Expert, Mahidol University, 11 January 2013.

²⁰ G Hugo, p. 42.

²¹ United Nations Inter-Agency Project (UNIAP) on Human Trafficking, *Human Trafficking Sentinel Surveillance. Poipet 2009-2010*, UNIAP, Bangkok, 2010, p. 49.

But then the question becomes, what should be the role of border controls in combatting the problem when much of the problem has to do with the involvement of third parties, excessive rent taking, corruption, and mismanagement of migration systems? For many observers, restrictive borders and migration systems are the problem, not the solution. Critics maintain that, aside from traffickers, states are the principal violators of migrants' human rights. Frontline border and immigration officials often participate or are complicit in the aforementioned activities. What is more, thousands of migrants are held each year in detention for considerable periods of time while officials attempt to determine if a person is smuggled, trafficked, or an asylum seeker.²² At the least, states fail to prevent and protect human rights violations committed by those who exploit others for economic gains. In each of these ways, the state has impeded or failed to uphold human rights, just as critics have noted.

Primary Responsibility for Human Rights Rests with the State

This line of reasoning is valid as far as it goes, but in our opinion, it does not go far enough. For it is also true that genuine human rights protections for migrants, whether trafficked or not, can only be enforced and upheld by sovereign states or by intergovernmental and nongovernmental organisations (NGOs) working with their assistance. Ultimately, the primary responsibility rests with the state to address trafficking in persons and uphold the migrants' human rights. This is the reality that a feasible and meaningful discussion on the role of border controls in anti-trafficking responses must take into account. To ignore or deny it will only serve to worsen the present situation. States are not going to open their borders to the free flow of migrants, no matter how much they are criticised. Even if one concedes that states are losing control, having a sense of control over one's border, as Will Kymlicka

²² J O'Connell Davidson, p. 39.

argues, is of the utmost importance.²³ First, it reduces fear, makes citizens feel secure, and takes some of the heat out of political debates on migration. Second, in most countries, there is little support for large-scale migration as well as a strong moralistic objection to rewarding irregular migrants who enter under false pretences. Third, it is easier for migrants to integrate into countries like Australia and Canada, where migration is managed and the result of state selection because large numbers of irregular migrants often result in a backlash against multiculturalism.²⁴

None of these points makes a case as to why border controls should have a role to play in anti-trafficking responses *per se*; rather, they show that sovereignty and nationalism are still powerful norms influencing border controls and migration policies. Yet, however one appraises the overall relationship between border controls, regulated migration systems, trafficking in persons, and human rights, the analysis and suggestions that follow are constructed on a premise that few critics can dispute. Our premise is that most state border controls, as they currently stand, are neither preventing trafficking nor upholding the human rights of victims. For the most part, border controls worldwide fail to prevent and detect trafficking in persons. However, this needs to be fixed.

States See Border Control as an Important Element to Anti-trafficking Interventions

Given that it is the sovereign right of each state to control its border and regulate migration, it is also imperative that we see how the human rights of migrants can fit within the *realpolitik* of migration control. Again, one might ask why? To this question, our response is straightforward. States, for the most part, have adopted a criminal justice approach to address

²³ W Kymlicka, *Multiculturalism: Success, failure, and the future*, Migration Policy Institute, Washington, DC, 2012, pp. 22–23.

²⁴ *Ibid.*

trafficking in persons. The main principles that form the basis of this approach are captured in the Trafficking and Smuggling Protocols as well as other international agreements, such as the *Council of Europe Convention on Action against Trafficking in Human Beings*. As of September 2013, 117 countries have ratified the Trafficking Protocol, requiring states to criminalise all forms of trafficking, prosecute and punish traffickers, strengthen national borders to combat the problem, promote cooperation among states, and protect and assist victims. As Chantal Thomas argues, ‘These international instruments suggest that states have not relinquished sovereign territorial prerogative - they have employed international law to enhance rather than to impede it.’²⁵ Because both Protocols acknowledge the sovereign right of states to control their borders and regulate migration, UNODC fully supports this position and works with states, as part of its mandate, to promote adherence to the two Protocols and assist states in their implementation.

Admittedly, the anti-trafficking frameworks developed by a number of states have more to do with political prerogatives than the legal obligations of the Trafficking Protocol. Nonetheless, as Gallagher and Holmes note, ‘The securing of general agreement on the nature of the problem [trafficking in persons] and the direction and scope of required solutions is widely lauded as evidence of real and tangible progress.’²⁶ Regardless of arguments against it, the instrument is a clear signal that trafficking in persons, at least in the eyes of the states, is a criminal justice issue of which border controls are an important part. Does it suggest the reluctance of states to respect the rights of migrants? Perhaps to some, but as Susan Kneebone points out, the weak support for the *UN Convention on the Protection of the Rights of All Migrant Workers* intimates that the ‘security-criminal justice dialogue

²⁵ C Thomas, ‘What Does the Emerging International Law of Migration Mean for Sovereignty?’ *Cornell Legal Studies Research Paper Series*, no. 13–72, p. 43.

²⁶ A Gallagher and Holmes, ‘Developing an Effective Criminal Justice Response to Trafficking in Persons: Lessons from the Front Line’, *International Criminal Justice Review*, vol. 18, no. 3, September 2008, p.320.

succeeded when a rights dialogue failed'.²⁷ Notwithstanding the support states give to the Trafficking Protocol and its Article 11, which mandates the strengthening of border controls to prevent and detect trafficking in persons, significant practical challenges remain in doing this effectively and with a human rights approach.

Possible Ways Forward for Consideration and Debate

What then is to be done? First and foremost, we need to address the practical obstacles faced by states in terms of translating Protocol obligations into effective actions, especially in relation to border controls and managed migration systems. Identified below are a few fundamental constraints states are facing, coupled with some suggestions for consideration and further debate on how states might reconcile tightly managed migration systems and strict border controls with the protection of human rights in the current context of globalisation. It is worth noting that we do not present anything new. Change, however, does not occur in the short run; thus, the suggestions below are some actions that should be prioritised.

Strengthen Capacities to Identify, Protect, and Assist Trafficking Victims

A constraint in border control provisions is the prompt and accurate identification of victims.²⁸ In this regard, we agree with critics that victims of trafficking are more likely to be identified as persons in breach of migration laws and deported or incarcerated, often without question. One of the main reasons for this stems from the definition of trafficking provided by the Trafficking Protocol. The definition does not offer a

²⁷ S Kneebone, 'The Refugee-Trafficking Nexus: Making good (the) connections', *Refugee Survey Quarterly*, vol. 29, no. 1, 2010, pp. 137–160.

²⁸ Victim identification is a complex issue. For a good overview, see A Brunovskis and R Surtees, *Out of Sight? Approaches and challenges in the identification of victims*, Fafo, 2012, p. 8, retrieved 11 April 2013, <http://www.fafo.no/pub/rapp/20255/20255.pdf>.

clear distinction between the experiences of trafficked victims and that of other groups of migrants. Rather, trafficking is seen as a subset of irregular migration, and also as a phenomenon distinct from smuggling. The linkages and overlaps are overlooked largely because the two Protocols make a clear distinction between the two phenomena. However, since practices of trafficking are intertwined with smuggling, especially manifest in the Southeast Asian region, it is often difficult for border officials to distinguish a trafficked migrant from a smuggled one. Subsequently, there is a predisposition to label and treat them all as irregular or smuggled migrants, which typically results in deportation even if the migrant has been trafficked.

Based on the realities described above, one possible solution, which is being lobbied for in the United Kingdom (UK), is the appointment of a non-partisan Anti-Trafficking Commissioner to bring consistency and accountability to government interventions. The Commissioner would be authorised to conduct unannounced visits, launch independent investigations, and promote the interests of victims. The recommendation stems from a report by the Centre for Social Justice, a UK based think tank, which examined the national response to trafficking in persons.²⁹ Released in March 2013, the report also suggests the establishment of a single competent authority to oversee victim identification to ensure the UK response is victim-centred and that human rights are protected.³⁰ Both of these recommendations offer potential solutions to structural problems.

In addition to increased calls for oversight, the report also found evidence that victims can be properly identified at border controls as long as staff members understand that a trafficked person is first and foremost a victim, not an illegal migrant.³¹ In this

²⁹ Centre for Social Justice, *It Happens Here: Equipping the United Kingdom to fight modern slavery*, Centre for Social Justice, 2013, p.19, retrieved 19 June 2013, [http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Slavery_Full_Report_WEB\(5\).pdf](http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Slavery_Full_Report_WEB(5).pdf).

³⁰ *Ibid.*, p. 20.

³¹ *Ibid.*, pp. 90–91.

regard, the need for well-trained, experienced frontline border and immigration officials cannot be underestimated. Yet, training as an effective anti-trafficking intervention is highly contested. The system is one in which frontline officials (i.e. the state) determine the status of the migrant, specifically whether she or he qualifies as a trafficking victim. From the perspective of critics, the system suffers from serious flaws. Because each state judges for itself whether a particular migrant will receive assistance or be deported, critics argue the system itself contributes to their vulnerability. Migrants, whether trafficked or not, will continuously fear frontline officials given their socio-legal status.³² Training will never resolve this structural issue. Once more, we do not dispute this and acknowledge that victim identification can be a double-edged sword. But because it is the state that decides who counts as a victim of trafficking, it is critical that frontline officials have the proper knowledge and skills; otherwise, all victims of trafficking will be identified as irregular migrants.

In our experience, frontline officials are often ill equipped to identify and assist victims. This situation is tied in part to the linkages and overlaps of trafficking and smuggling. But it also reflects the lack of a general understanding that trafficking in persons and the smuggling of migrants are part of a continuum in the migration process, and that a smuggled person one day may be a trafficked person the next. Border and immigration officials need continuous support, resources, training, and mentoring to effectively fulfil their duties, not just in identifying and assisting victims, but also in managing initial aspects of an investigation in suspected cases of trafficking, including the preservation of evidence and detention of suspects. Gallagher and Holmes note that the *Council of Europe Convention on Action against Trafficking in Human Beings* explicitly states that the accurate identification of victims is critical to the provisions of protection and assistance, and failure in this regard will likely result in a denial of their human rights.³³ Identification

³² B Anderson, 'Where's the Harm in That? Immigration enforcement, trafficking, and the protection of migrants' rights', *American Behavioral Scientist*, vol. 56, no. 9, 2012, pp. 1241–1257.

³³ A Gallagher and Holmes, p. 326 & p. 329.

and protection procedures of frontline border and immigration officials should be independently assessed on a regular basis (e.g. by a non-partisan Anti-Trafficking Commissioner) to ensure they are responsive, consistent, and transparent.

Greater engagement with frontline border and immigration officials (for example, through training and capacity building activities) in the Southeast Asian region has also opened up opportunities for agencies like UNODC as well as NGOs to influence and promote human rights. State officials have more contact with organisations that advocate for the rights of trafficked and smuggled migrants. Whether this has improved the rights of migrants is open for debate, but at least the potential exists for human rights concerns to be integrated into frontline border control and immigration work.

Maximise the Resources for Border Control and Immigration as Part of a Multi-faceted Approach to Combat Trafficking

Another fundamental constraint is the lack of appropriate resources to effectively manage migration. Not all states have the resources of the United States government, for example, which spent close to US\$18 billion on federal immigration enforcement during the 2012 fiscal year. This amount was 24% higher than the total combined budgets for the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration, the Secret Service, the U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, Firearms and Explosives, a 2013 study by the Migration Policy Institute (MPI) found.³⁴ Border control at entry points has become effective,³⁵ but MPI also acknowledged that enforcement alone is not sufficient to effectively deal with the broader challenges that both regular and irregular migration pose to the state.³⁶ Herein lies an important point. Border

³⁴ D Meissner, D Kerwin, M Chishti and C Bergeron, *Immigration Enforcement in the United States: The rise of a formidable machinery*, Migration Policy Institute, 2013, p. 9, retrieved 14 January 2013, www.migrationpolicy.org/pubs/enforcementpillars.pdf.

³⁵ For example, levels of apprehension fell to historic lows along the U.S.-Mexico border in 2011 if this is taken as a measure of effectiveness (*Ibid.*, p. 26).

³⁶ *Ibid.*, p. 13.

controls and managed migration systems do have a role in anti-trafficking responses, but should be seen as just one part of a multi-faceted and comprehensive approach to trafficking in persons. Other elements are also critical, although the details are beyond the scope of this discussion.³⁷

That said, we do suggest that states maximise the resources provided to border and immigration enforcement, specifically for the protection of trafficking victims in particular, as well as the human rights of migrants in general. This objective is paramount to an effective anti-trafficking response that involves tightened borders and regulated migration systems. Protection resources can be maximised by adding new resources into the system and better utilising the resources that exist. All states under both Protocols have a legal obligation to protect the rights of trafficked and smuggled migrants. Increased resources as well as proper training on how to uphold the human rights of all migrants, not just trafficking victims, are positive starting points.

Following on from this recommendation is the need to improve the governance of migration systems in both source and destination countries. Institutional mechanisms can be developed to protect migrant workers, including frameworks to ensure the protection of migrant workers' rights, the licensing and regulation of recruitment agencies, the negotiation of bilateral agreements, and the training of migrant workers prior to departure, as well as the provision of protection and repatriation programmes that take the principle of non-refoulement into account. Some states have enacted such measures; yet, they still fail to protect migrants from abuse and exploitation. A key reason for this is corruption and vested interests in maintaining existing exploitative systems for financial gains.³⁸ Tackling these systemic problems of corruption, involvement of third parties, and the mismanage-

³⁷ For example, elements that form a comprehensive approach to addressing trafficking in persons range from comprehensive legal frameworks to accounts of the underlying social, political, and economic realities that fuel trafficking in persons.

³⁸ G Hugo, p. 26.

ment of migration systems will be challenging, but is there really an alternative?

Policies Based on Empirical Evidence

A final major constraint that needs to be addressed is the lack of timely, comprehensive, and accurate data³⁹ related to the scope and scale of trafficking in persons and the smuggling of migrants. Systems to collect data are inconsistent across countries and are not often maintained in a way that makes the information amenable to analysis. As a result, there is an inadequate picture of cross-border movements around the world. Reliable data are required to systematically analyse the causes, dynamics, and impact of migrant smuggling and trafficking in persons in source, transit, and destination countries. In this regard, border and immigration officials have important roles in intelligence gathering. The analytical and investigative capacities of some countries need to be enhanced, but evidence-based knowledge is crucial to developing effective policies and counter-measures that address trafficking in persons and migrant smuggling. Improved research and data collection will strengthen more proactive, comprehensive, and informed policies and responses.⁴⁰ Indeed, critics are right in saying that restrictive migration policies and border controls are not often based on empirical evidence but on misinformation and pressure from interest groups.⁴¹

Conclusion

The need for human rights protections for migrants, whether trafficked or not, is both evident and growing. States need to be convinced that migrants' rights are integral to their security, border, and migration management policies and objectives.

³⁹ *Ibid.*, p. 2.

⁴⁰ See the UNODC's Voluntary Reporting System on Migrant Smuggling and Related Conduct (VRS-MSRC) at www.unodc.org/southeastasiaandpacific/en/2013/04/bali-process/story.html.

⁴¹ G Hugo, p. 1.

The primary responsibility rests with the state to address trafficking in persons and uphold trafficked persons' rights. Tensions between sovereignty and protection are nothing new, and it is time to consider how states might combine tightly managed migration and strict border controls with the protection of human rights in the current context of globalisation. We think this effort is deserving of support. Otherwise, we are no closer to practical solutions than we were over a decade ago when the Trafficking Protocol came into existence.

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The content of this article does not necessarily reflect the views or policies of UNODC, Member States, or contributory organisations, nor does it imply any endorsement. The opinions and ideas expressed in this article are grounded in the research and technical work of the two authors in both the anti-trafficking and anti-smuggling fields.

Who's Who at the Border? A rights-based approach to identifying human trafficking at international borders

Marika McAdam

Abstract

International borders are widely touted as bastions in the fight against trafficking in persons. This article acknowledges the important role border officials play in preventing human trafficking, but calls for expectations to be tempered by deference to the conceptual complexity of cross-border trafficking and the migration processes involved. The fact that many trafficked victims begin their journeys as irregular or smuggled migrants highlights the challenge posed to border officials in identifying trafficked persons among the people they encounter. Indicators of trafficking generally relate to the exploitation phase, leaving border officials with little guidance as to how persons vulnerable to trafficking can be accurately identified before any exploitation has occurred. Ultimately, this paper advocates a pragmatic rights-based approach in designating anti-trafficking functions to border officials. A rights-based approach to border control acknowledges the core work of border officials as being to uphold border integrity, while ensuring that their performance of this role does not jeopardise the rights of those they intercept nor result in missed opportunities for specialists to identify trafficked persons and other vulnerable people among them.

Key words: trafficking, smuggling, identification, border, indicators, human rights

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Introduction: Challenges of identifying trafficked persons at borders

Early identification of trafficked victims is extolled as a cornerstone of anti-trafficking efforts.¹ Yet, as the Special Rapporteur on trafficking in persons, particularly women and children, notes, ‘the issue of identification raises a number of complex pragmatic questions, especially in concerning how, where and by whom identification should be performed’.² This article asks some of those pragmatic questions in relation to border officials charged with the responsibility of identifying people who are being trafficked or are vulnerable to being trafficked across international land, sea and air borders.

The individuals who border officials encounter are in unique circumstances and have distinct motivations, despite maybe having used similar migration routes, faced similar dangers, and at the point they encounter border controls, having similar assistance needs.³ Migration discourse offers several terms to

¹ UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1, Guideline 2; UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol), Article 11(1); Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, Article 10; Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 11(4).

² Report of the Special Rapporteur on trafficking in persons, especially in women and children, Joy Ngozi Ezeilo, A/HRC/20/18, Human Rights Council, Twentieth Session, Agenda Item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 6 June 2012, at p. 9, paragraph 31.

³ International Organization for Migration, *Human Rights and Migration: Working together for safe, dignified and secure migration*, IOM, 2010, p. 13.

‘categorise’ people, some of which are heavily politicised, and many of which have significant rights-based implications for the individual to whom they are attached. Notably, individuals deemed to have been trafficked have access to a range of entitlements owing to their status as ‘victims’, while those branded as smuggled are often stigmatised for the role they have willingly⁴ played in attempting to breach international borders, and may simply face detention and deportation.⁵ The *Commentary to the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking* explains the human rights implications of misidentification for trafficked persons: ‘If a trafficked person is not identified at all, or is incorrectly identified as criminal or as an irregular or smuggled migrant, then this will directly affect the ability of that person to access the rights to which she or he is entitled.’⁶ These rights may include shelter, access to health care and counselling, legal assistance, visas to remain in the destination country, access to reintegration programmes and compensation for their victimisation.⁷ Clearly, the stakes are high.

Yet, categories intersect and overlap. Migrants may simultaneously fit into several ‘categories’, or fall into one at the point they reach a border but be bound for another category upon reaching their destination. Notably, a person may consider him or herself to be a smuggled migrant, but in actual fact be an unknowing victim of trafficking. Border officials are called upon to categorise individuals alongside their primary work of upholding border integrity. They must facilitate cross-border movement while preventing cross-border crimes, and intercept attempts to irregularly cross borders while rendering assistance to people whose attempts to do so compromise lives and

⁴ It is important to note that while smuggled migrants are commonly understood to be willing objects of smuggling, such willingness is not an element of the international definition of smuggling of migrants.

⁵ A Gallagher, *The International Law of Human Trafficking*, Cambridge, New York, 2010, pp. 278–80; Global Alliance Against Traffic in Women, *Smuggling and Trafficking: Rights and intersections*, Bangkok, GAATW Working Paper Series, 2011, pp. 32–34.

⁶ United Nations, *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, November 2010, HR/PUB/10/2, p. 73.

⁷ UN Office for the High Commissioner of Human Rights, *op. cit.*, pp. 10–14.

safety. They may face language barriers, threats to their safety, be overwhelmed by large numbers of people seeking to simultaneously gain entrance into the territory of a state, and often lack the training and resources to confront these challenges effectively. In short, the requirements imposed on border officials to grapple with and apply complex and imprecise concepts to identify potential trafficked victims, must be considered against the reality of their work.

The Role of Border Officials: Identifying trafficking prior to exploitation

According to Article 3 of the Trafficking Protocol supplementing the United Nations Transnational Organized Crime Convention (UNTOC), trafficking requires the commission of an ‘act’ (recruitment, transportation, transfer, harbouring or receipt), by a ‘means’ (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position or vulnerability, or giving or receiving of payments or benefits to achieve consent of a person having control over the victim), for the purpose of exploitation.⁸ In cases of child trafficking, the commission of an ‘act’ for an ‘exploitative purpose’ is sufficient to achieve prosecution given that the ‘means’ element need not be proven where victims are under 18 years of age.⁹ In contrast, migrant smuggling is explained by Article 3 of the Smuggling Protocol supplementing UNTOC, as involving the facilitation of another person’s illegal entry into, or stay, in a state in which he or she is not legally entitled to be, for the purpose of financial or material gain.¹⁰ Though a smuggled migrant is not a ‘victim’ of the crime of smuggling *per se*, smuggled migrants can and often do fall victim to other crimes in the course of being smuggled, including trafficking in persons.¹¹

⁸ Trafficking Protocol, Article 3(a).

⁹ *Ibid.*, Article 3(c) and (d).

¹⁰ UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Smuggling Protocol), Article 3(a) and 6(1).

¹¹ United Nations Office on Drugs and Crime, ‘Issue Paper: A short introduction to Smuggling of Migrants’, UNODC, 2010, p. 10.

Conceptual Challenges: Exploitation

The exploitative purpose is often pointed to as a distinguishing feature between trafficking and smuggling.¹² The definition of trafficking in the Trafficking Protocol offers non-exhaustive examples of types of exploitation, but in the absence of an international definition of exploitation, knowing what is—and is not—trafficking is not easy. Emphasising this challenge in 2010, the Open-ended Interim Working Group on the Trafficking Protocol recommended that the Secretariat to the Conference of Parties to the Convention on Transnational Organized Crime prepare a series of Issue Papers to clarify several concepts. One of the concepts, noted as being inconsistently understood and applied by criminal justice practitioners, was that of exploitation.¹³

In practice, traffickers profit from the exploitation of their victims, while smugglers derive profit through payments for smuggling services. However, this does not mean that exploitation is not present in both situations. Indeed, states parties to the Smuggling Protocol are required to establish aggravating circumstances in their domestic legislation, including circumstances that ‘entail inhuman or degrading treatment, including for exploitation’.¹⁴ Trafficked persons may initially pay to be smuggled, and smuggled migrants may be exploited by smugglers or others en route and yet not be considered trafficked. For instance, a smuggler who exploits a person’s imminent migration needs by charging exorbitant smuggling fees is still a smuggler. Unscrupulous landlords who

¹² United Nations Office on Drugs and Crime, *Toolkit to Combat Smuggling of Migrants*, UNODC, 2010, p. 39.

¹³ Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010, UN Doc. CTOC/COP/WG.4/2010/6 (17 February 2010), paragraph 31(b). The United Nations Office on Drugs and Crime as the Secretariat to the Conference of the Parties in response to this recommendation has elaborated an Issue Paper on the concept of Abuse of a Position of Vulnerability (United Nations Office on Drugs and Crime, ‘Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of Trafficking in Persons’, UNODC, 2012, http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf. Issue Papers on consent, exploitation and other concepts are to follow.

¹⁴ Smuggling Protocol, Article 6(3)(b).

take advantage of migrants' irregular status en route to charge excessive fees, or opportunists who take stranded migrants to the nearest watering hole in exchange for money would not necessarily be considered 'traffickers' though they exploit the situations and vulnerabilities of migrants.¹⁵ Such forms of exploitation arguably do not amount to the type anticipated by the Trafficking Protocol, illustrating the complexity of distinguishing between phenomena. Where a migrant pays the smuggling fees by providing sexual services, it is difficult to determine whether a situation is one of smuggling or involves the grooming of a trafficked victim for sexual exploitation. Where a migrant undertakes criminal activities such as drug smuggling in lieu of payment for smuggling services, it is difficult to establish whether the person has been trafficked for exploitation in criminal activities or is simply a drug smuggler. In short, efforts to neatly distinguish crime types are marred by the fact that migrants who place themselves at the mercy of smugglers are highly vulnerable to being exploited.

Border officials may be able to identify signs that persons have already been exploited, but where victims or potential victims of trafficking are intercepted at borders before any exploitation takes place, their identification is extremely difficult.¹⁶ The fact that irregular migrants are highly vulnerable to trafficking¹⁷ raises the crucial question of whether an irregular migrant intercepted at an international border is to be classified as an irregular migrant (or smuggled, where their migration has been facilitated), or as a victim of trafficking who has not yet been exploited. Accurate identification of a trafficked victim who has not yet been exploited, in essence requires a border official not only to identify people whose migration has been facilitated by third parties, but then to also speculate on whether those parties have the requisite intent to exploit. Challenges in successfully

¹⁵ United Nations Office on Drugs and Crime, *Model Law against Smuggling of Migrants*, UNODC, 2010, p. 53.

¹⁶ A Gallagher, pp. 282–3.

¹⁷ Global Migration Group, *International Migration and Human Rights*, GMG, 2008, p. 18.

making this determination are compounded where trafficked victims proactively attempt to evade detection at borders, believing themselves at that stage to be irregular or smuggled migrants and unaware of the possibility that they are being trafficked.¹⁸ Victims of trafficking may therefore be misidentified as smuggled or ‘irregular’ migrants at borders¹⁹ as a result of error, or because these may be the most accurate categories to ascribe at the point they are intercepted, as far as border officials and even migrants themselves are concerned.

The fact that such conceptual challenges continue to blight efforts of even highly trained, specialised anti-trafficking practitioners to recognise trafficking with the totality of the crime in front of them, puts the role of border officials who may encounter the crime before its completion into sharp perspective.

Trafficking Indicators

The OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking* advise that guidelines be put in place for relevant state authorities—including border officials—to aid accurate identification of trafficked persons.²⁰ However, these recommendations and the commentary thereto, do not specify the content of such guidelines, nor specifically answer to the challenges raised above.

¹⁸ R Surtees, *Listening to Victims: Experiences of identification, return and assistance in South-Eastern Europe*, International Centre for Migration Policy Development, Vienna, 2007, pp. 95–6; UK Border Agency, *Victims of Trafficking: Guidance for frontline staff*, UKBA, London, 2013, p. 35.

¹⁹ United Nations Inter-Agency Project on Human Trafficking, *Human Trafficking Sentinel Surveillance, Poipet, Cambodia, 2009-2010*, UNIAP, 2010, p. 33, which reports results of a 2008 UNIAP study that found that 52% of returning migrants who were determined to be illegal migrants at the Poipet-Aranyaprathet border checkpoint between Cambodia and Thailand, were likely to have been trafficked or otherwise exploited.

²⁰ UN Office of the High Commissioner for Human Rights (2002), *op. cit.*, Guidelines 2(1), 2(3), 2(4), and 8(2).

Several international organisations have made indicators of trafficking available to assist practitioners in the identification of trafficked persons and situations. Key among them are the operational indicators offered by the International Labour Organization (ILO) and the European Commission, which are relevant to deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative conditions of work, coercion at destination and abuse of vulnerability at destination.²¹ The ILO also offers operational indicators to identify victims of forced labour, and specific guidance for dimensions of forced labour including ‘unfree recruitment’, ‘work and life under duress’ and ‘impossibility of leaving employer’.²² The United Nations Office on Drugs and Crime (UNODC) and the UN Global Initiative to Fight Trafficking (UN.GIFT) offer specific and general trafficking indicators for situations of domestic servitude, begging and petty crime, in addition to sexual and labour exploitation.²³ UN agencies promote the systematic dissemination, tailoring and use of both the ILO and UNODC indicators.²⁴ However, these indicators emphasise the exploitation phase of trafficking (and, to a lesser extent, the recruitment stage), and as such offer little support to border officials who must identify trafficked victims before any exploitation has taken place.

UNODC’s *Anti-Human Trafficking Training Manual for Criminal Justice Practitioners* provides several pages of indicators that mostly pertain to specific exploitative contexts, as well as fear, anxiety and injuries that may not be present at the

²¹ International Labour Office and European Commission, *Operational Indicators of trafficking in human beings*, ILO, Geneva 2009, p. 3.

²² International Labour Office, *The Cost of Coercion*, ILO, Geneva, 2009, p. 21 and p. 29.

²³ UNODC/UN.GIFT, *Human Trafficking Indicators*, retrieved 28 November 2012, http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf.

²⁴ See: *Human Trafficking, Joint UN Commentary on the EU Directive-A Human Rights Approach*, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011, p. 48; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/20/18, Human Rights Council, Twentieth Session, Agenda Item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 6 June 2012, at p. 9, paragraph 33.

point of border interception. The following advice is offered in respect of documentation:

A person presenting another person's identity and travel documentation at a border crossing or other checkpoint is a general indicator of trafficking in persons at all phases/locations in the process. In addition, the lack of documentation or travel documents on a suspected victim and fraudulent identity or travel documentation are also strong indicators of trafficking.²⁵

However, in practice a person's documentation being presented by another person at a border could be indicative of trafficking, of smuggling, of irregular migration, or more often than not, of nothing at all. Similarly, lack of documentation and fraudulent documentation may be strong indicators of trafficking but also point to smuggling or irregular migration. Thus far, a border official is no closer to seeing a potential trafficked person in the long queue of impatient travellers before him or her.

The particular challenges faced by border officials are flagged by the International Centre for Migration Policy Development (ICMPD), which acknowledges that indicators can be irrelevant or even misleading unless combined with proactive questioning and monitoring, for instance to consider the following:

- Lack of credibility of situations observed and information provided by travellers;
- Purpose of travel compared with other apparent signs, e.g. luggage, money, physical condition of travellers, profession declared, etc.;
- Luggage, e.g. quantity and type compared with statements of travellers;
- Items carried in luggage;
- Different citizenship of people in groups travelling together;

²⁵ United Nations Office on Drugs and Crime, *Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 2: Indicators of trafficking in persons*, UNODC, New York, 2009, p. 6.

- Driver answering questions for all travellers;
- Same vehicles or means of transport used several times transporting different people;
- Same passport used several times by different people;
- Observing common features of travellers, e.g. physical appearance, age etc.;
- Individuals travelling together do not know each other;
- Behaviour and body language that indicates tension, unease, etc.²⁶

Such indicators are to be commended for their specificity to border contexts.²⁷ Yet, it must also be recognised that these indicators could suggest migrant smuggling or irregular migration as much as they indicate trafficking. Having applied these indicators at a border checkpoint, in-depth investigation is still necessary to determine which crime type, if any, is at issue. This being the case, the work of border officials in identifying victims of trafficking is a prelude to the in-depth investigation that should take place following referrals. Ultimately, in light of the challenge of detecting the three requisite elements of the trafficking offence, the role of border officials must be realistically confined to what is practical in the context of their role at land, sea and air borders.

A Rights-based Approach to Identification at Borders

States are entitled to manage their borders and obliged to take measures to prevent human trafficking, but their efforts to do so must be in accordance with human rights obligations.²⁸ In the context of border management, the primacy and

²⁶ International Centre for Migration Policy Development, *Anti-Trafficking Training for Frontline Law Enforcement Officers; Training Guide*, ICMPD, Vienna, 2006, p. 46.

²⁷ Frontex, the European border agency, also offers specialised training for border officials including indicators of trafficking but as these are not publicly available, they have not been referred to here.

²⁸ UN Human Rights Council, *Human Rights of Migrants: Resolution adopted by the Human Rights Council*, 16 July 2012, A/HRC/RES/20/3, paragraph 5.

universality of human rights mean that human rights considerations trump immigration and law enforcement objectives.²⁹ Indeed, savings clauses in both the trafficking and smuggling Protocols state that nothing in either shall affect the other rights, obligations and responsibilities of states and individuals under international law, including international human rights law.³⁰ A rights-based approach accommodates the complexity of identifying diverse individuals encountered at international borders, by emphasising the human rights of all persons, irrespective of the ‘category’ they are placed in.³¹

Describing a comprehensive human rights-based approach to border management requires wide-ranging initiatives to effectively translate normative standards into practices on the ground, including implementing legislative frameworks and establishing referral processes that are beyond the scope of this paper.³² What is necessary in asserting the beginnings of a rights-based approach to strengthening borders against trafficking is emphasising the need to build the capacity of border officials to uphold the rights and dignity of all migrants

²⁹ Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situations, Geneva, 30 September 2012, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E>.

³⁰ Trafficking in Persons Protocol, Article 14(1), and Smuggling of Migrants Protocol, Article 19(1).

³¹ United Nations Human Rights Committee (HRC), *CCPR General Comment No. 15: The position of aliens under the covenant*, 11 April 1986, paragraph 2; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, 2 July 2009, E/C.12/GC/20, paragraph 30; United Nations, *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, November 2010, HR/PUB/10/2, pp. 57–60.

³² United Nations Office on Drugs and Crime, *International Framework for Action to Implement the Smuggling of Migrants Protocol*, Vienna, 2011, pp. 70–93; OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO (2011), *op. cit.*; and Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/20/18, Human Rights Council, Twentieth Session, Agenda Item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 6 June 2012, at p. 21, paragraph 88.

and ensure they have access to the protection and assistance services they need, regardless of their migration or victim status.

Non-discriminatory Protection and Assistance to Facilitate Identification

The principle of non-discrimination is a core principle in international law, and applies to everyone, regardless of their status, the circumstances in which they are found, or of the fact that they have been trafficked or smuggled.³³ At borders, this principle manifests as protection and assistance of all persons in accordance with their needs and irrespective of their status; a trafficked person who has not yet experienced exploitation will have fewer immediate assistance needs upon being intercepted, than a traumatised smuggled migrant who has endured dangerous travel conditions and mistreatment at the hands of smugglers. A human rights-based approach alleviates pressure on border guards by not requiring them to consider in the first instance whether a person has been or will be exploited, but to consider whether or not he or she is in need of protection and assistance at the point they are encountered. Equipping border officials with the capacity and means to make appropriate referrals reduces the risk that people will be miscategorised, and increases the likelihood that the service providers they are referred to will identify people vulnerable to trafficking.

Article 11(1) of the Trafficking Protocol requires states parties to ‘strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons’. Where *strengthened* border controls are interpreted

³³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20; Trafficking Protocol, Article 14(2); Smuggling Protocol, Article 19(2).

to mean *restrictive* border controls without consideration of human rights implications, migrants are more likely to turn to smugglers for assistance to circumvent border controls, exacerbating their vulnerability to trafficking but not increasing the capacity of border officials to identify them. Where border guards are required to approach individuals primarily as threats to border integrity rather than individuals with protection and assistance needs, the result is that the identification of potential victims of trafficking among them is significantly hampered. Conversely, strengthened human rights protections at borders are more likely to facilitate subsequent identification of trafficked and other vulnerable people.³⁴ A person whose basic needs are met, who is protected from further harm at the hands of those facilitating their journey, and who has access to assistance services, is empowered to provide information necessary to accurately identify trafficked persons and other vulnerable people among them. Simply detaining and deporting such persons not only violates their right to access protection and assistance services, but also exacerbates their vulnerability by returning them to situations which traffickers and smugglers can exploit.

Therefore, states not only have a duty to ensure that border security measures comply with international human rights obligations,³⁵ they also have a pragmatic interest in doing so. Conceptually, it is easier to train border officials to respect inviolable human rights of all people than it is to train them to navigate through onerous considerations in ascribing complex categories to them. Border officials cannot be expected to distinguish between an irregular migrant who is destined towards a reasonable standard of living and one who may end up in a situation of exploitation. Nor can they be expected to

³⁴ United Nations Office of the High Commissioner of Human Rights, *Report 2011*, OHCHR, 2012, p. 74, http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/12_Migration.pdf.

³⁵ UN Human Rights Council, *Human Rights of Migrants: Resolution adopted by the Human Rights Council*, 16 July 2012, A/HRC/RES/20/3, paragraph 5.

know whether the actors involved in facilitating a person's irregular migration (who may not be present at borders), have the profit motives of smugglers or the exploitative intentions of traffickers. But border officials can be charged with the responsibility of upholding the states' human rights obligations to all people at borders, whatever their status may be, and can be held to account for their failure to do so.³⁶

Vulnerability rather than Status-based Indicators

The Special Rapporteur on Trafficking stresses that states must take proactive steps to build the capacity of frontline officials for quick and accurate identification of victims.³⁷ If border officials are to be effectively enlisted in early identification of potential cross-border trafficking victims, then the indicators they are equipped with must address vulnerabilities of persons they encounter, and be offered with a view to facilitating early identification not just of trafficked victims who evince signs of already having been exploited, but also persons at risk of being trafficked, including smuggled migrants and migrants in irregular situations.³⁸

Indicators that have been elaborated thus far should not be set aside; instead, they should be recast and contextualised in the broader work of border officials and their realities on the ground. The ability of border officials to identify trafficked persons before they are exploited will be enhanced if they are

³⁶ UN General Assembly Resolution 66/172, *Protection of Migrants*, A/RES/66/172, 29 March 2012, paragraph 4(e).

³⁷ OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO (2011), *op. cit.*; Report of the Special Rapporteur on trafficking in persons, especially in women and children, Joy Ngozi Ezeilo, A/HRC/20/18, Human Rights Council, Twentieth Session, Agenda Item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 6 June 2012, at p. 21, paragraph 88.

³⁸ ILO, UNICEF, UN.GIFT, *Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation: Action against child trafficking at policy and outreach levels*, ILO, Geneva, 2009, pp. 34–5.

equipped with indicators that pertain to the irregular migration processes leading to situations of exploitation, rather than exploitative situations themselves. However, it is vital that indicators should not rush towards only the possibility of trafficking, but should support border officials to identify vulnerabilities more broadly. In practice, border officials should be sensitised to the fact that indicators can point to several conclusions, but that the human rights of migrants in irregular situations must not be overlooked merely because there is little or no indication of trafficking. In other words, where indicators reveal an irregular border crossing attempt but no exploitation, a rights-based approach would lead to vulnerability-based conclusions and result in referral, rather than leading to status-based conclusions that result in deportation.

Further, it must be acknowledged that indicators pertaining to irregular migration processes will offer border officials little assistance in identifying trafficking victims who migrate regularly. Where victims or potential victims of trafficking travel with legitimate documentation and express no particular concern, the reality is that border officials may be powerless to intervene. But where they have been sensitised to vulnerabilities to trafficking, they are in a position to raise awareness among the people they encounter. The OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking* recommend that appropriate points of intervention be identified to ensure that migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance, if required.³⁹ The central role that border officials can play in disseminating such information should be further explored.⁴⁰

³⁹ UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1, Guideline 2(4).

⁴⁰ Resolution adopted by the UN General Assembly, *Protection of Migrants*, A/RES/66/172, p. 4.

Conclusion: A realistic role for border officials

Anti-trafficking discourse and the indicators that have been offered by the international community betray an overwhelming focus on the experiences of trafficked victims in the exploitation phase, over the vulnerabilities and processes that lead there. While it is unquestionably easier to identify a person who has already been victimised than it is to identify a person who may be, it is preferable to prevent exploitation from occurring in the first place. Prevention can be enhanced by casting the net more broadly at borders to include persons *vulnerable* to exploitation as opposed to just those who have already been exploited. The reality at international borders is that persons vulnerable to exploitation may be smuggled or undocumented migrants, both according to their own perspective and according to the assessment of those they encounter. Accepting this reality is fundamental to the prevention of trafficking and other exploitative phenomena.

To overlook the role that irregular migration processes can play in cross-border trafficking phenomena is to disregard the full potential of border guards in trafficking prevention efforts. States should sensitise border officials to the vulnerabilities of the people they encounter in the course of their work, and require them to respect the human rights of every individual. Such an approach requires that states uphold their obligation to protect and assist migrants by ensuring that border officials refer vulnerable people to appropriate service providers. Where persons are not given access to protection and assistance services, the result is that states fail to uphold their human rights obligations and miss opportunities to prevent vulnerable people from being exploited. At the same time, anti-trafficking actors, including international and non-governmental organisations, should not expect border officials to take their eyes off border security to identify victims and potential victims

⁴¹ See: *Challenges and Good Practices in the Criminalisation, Investigation and Prosecution of the Smuggling of Migrants*, Note by the Secretariat, Working Group on the Smuggling of Migrants, Vienna 30 May - 1 June 2012, CTOC/COP/WG.7/2012/2, 21 March 2012, p. 2, paragraph 6; C Horwood, 'The Grim Reality of Smuggling Economics and Migrant Abuse', *Global Eye on Human Trafficking*, Issue 11, March 2012, p. 8.

of trafficking. Rather, the pressure that is brought to bear on border officials to identify trafficked persons should be framed in the context of their wider human rights obligations to all those attempting to cross borders, irrespective of their migration or victim status. In this way, a rights-based approach to border control acknowledges the core work of border officials as being to guard borders, while ensuring that the performance of this role does not jeopardise the rights of those they intercept nor deny opportunities for qualified persons to identify potential victims of trafficking among them.

Identification of trafficked victims is a complex process requiring specialist expertise. Where border officials are required to expertly grasp and apply complex criminal concepts in making crucial decisions about the potential victim status of people they briefly encounter, significant errors can result. Those errors can detract from the rights of people who are not identified as ‘victims’ but who may nonetheless have significant protection and assistance needs, and be just as vulnerable to exploitation if their journey continues.⁴¹ A rights-based approach focussed on identifying vulnerabilities ensures that people in need of protection and assistance do not fall through cracks at the borders simply because they are not identified as victims of human trafficking.

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In the Eyes of the Beholder: Border enforcement, suspect travellers and trafficking victims

Julie Ham, Marie Segrave and Sharon Pickering

Abstract

Over the past decade, the border and border policing has figured as central to identifying and responding to trafficking. This article draws on original research into immigration officers' decision-making – both at the border and within the nation – to identify the persistent preoccupation with suspect travellers. Examining research in Australia and Thailand that spans seven years, the article brings together research that demonstrates the predominance of the binary category of victim of trafficking/unlawful migrant worker and highlights the ambiguity of daily decision-making processes that categorise women who come into contact with immigration authorities. While the policy rhetoric is based on categories and risk profiles for identifying suspected victims of trafficking or those deemed at risk, we contribute to the growing body of work that has highlighted the presence of gendered and racialised stereotypes in immigration decision-making and consider implications this may have on women's mobility across and within borders.

Key words: human trafficking, gender, immigration control, sex work, decision-making, border control

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Introduction

While traditionally border control has been conceived in relation to the physical act of crossing, it is now recognised as mobile and performative; it is enforced and (re)asserted both within and outside border lines.¹ Yet, in international law the border remains a key site for the negotiation and assertion of state rights, that is, the right to determine who may enter a nation state and upon what conditions, even within the context of specific regional arrangements (for example, the European Union). While states increasingly require significant screening and approval of travellers prior to embarking on their journey (resulting in much border control occurring ahead of mobility), state agencies working at the border continue to exercise considerable power in the process of determining the status of an individual, a power that is exercised within the context of daily routine decisions that attract limited scrutiny and/or accountability. Attending to the border and the performance of the border regime, we must attend to these daily practices to better understand the everyday implications of border enforcement for the human rights of migrants.

This article draws on two research projects that included interviews with immigration officials and specifically focusses on how officers operationalise anti-trafficking information in their daily decision-making. The first project was conducted in 2006 and 2007. It examined the implementation of anti-trafficking policy efforts in Australia and Thailand. The second project, conducted in 2012 with immigration officers in Australian airports, examined decision-making on the arrival of suspect travellers. While seemingly disparate projects in focus and timelines, it is the resonance of key findings across

¹ L Weber, ‘“It sounds like they shouldn’t be here”: Immigration checks on the streets of Sydney’, *Policing & Society*, vol. 21, no. 4, 2011, pp. 456–467; L Weber and S Pickering, *Globalisation and Borders: Death at the global frontier*, Palgrave Macmillan, London, 2011; L Weber, ‘The Shifting Frontiers of Migration Control’ in S Pickering and L Weber (eds.) *Borders, Mobility & Technologies of Control*, Dordrecht, Springer, 2006; N Wonders, ‘Global Flows, Semi-Permeable Borders and New Channels of Inequality’ in S Pickering and L Weber (eds.) *Borders, Mobility & Technologies of Control*, Dordrecht, Springer, 2006.

these two projects that is the focus here – in particular, the potency of the discretionary decision-making made in the assertion of the border regime and the importance of attending to the consequences of these decisions whether they are assessments for the potential for victimisation (i.e. trafficking, as per the first project) or the intention to breach one's visa conditions that restrict or prohibit work (as per the second project).

We draw attention to the active use of simplistic, opportunistic stereotypes in decision-making processes, within the context of the administrative demands of implementing a mass migration surveillance system. By focussing on immigration officers' reflections on the use of stereotypes in discretionary decision-making, we hope to highlight the active processes of racialisation that occur in migration as well as counter the notion that stereotypes are passively reproduced constructs. We consider the consequences of these practices in relation to agency, illegality, victimisation and the upholding of human rights. In doing so, the article examines how the concern about trafficking has consistently overlapped with the sorting of non-trafficked migrants, and to interrogate the highly subjective decision-making practices that are part of Australia's national efforts to counter human trafficking.

Methodology

The two research projects that provide the foundation for this discussion involved extensive semi-structured interviews with immigration officials, in addition to other key stakeholders relevant to each project. The two projects together enable an examination of the border performance at the border and within the nation. The first project, conducted in 2006 and 2007, involved semi-structured interviews (n=50) with police and immigration authorities, international and local non-governmental organisations and victims in Australia and Thailand. The second project examines travellers' entry at the airport and draws on 2012 semi-structured interviews

(n=15) with Australian immigration officers at two major international airports in Australia. With the permission of the Australian Department of Immigration and Citizenship (DIAC), two airport sites were visited for extended periods over a nine-month duration. These visits included observation of all parts of the immigration process - (1) from the management of Advanced Passenger Information while planes were still en route to Australia, (2) to the identification of risky travellers at 'the line' or once people disembark an aircraft, (3) from observing initial conversations with those identified to ascertain whether there is data error that has erroneously flagged the person as being of concern, (4) through to formal interviews. Immigration officials were asked to describe all parts of how they came to identify risky travellers ('passenger of concern') with a specific focus on gender and were specifically asked to talk about what made for an easy or difficult 'risky' traveller to process. Both projects involved interviewing immigration officials as part of the broader project within which they were conducted, and questions pertained to immigration decision-making practices. These projects were not undertaken with the intention of being analysed together; rather, it is the parallel findings from the independent analysis of each that has sparked our effort to bring together data from both projects.² We emphasise that this article brings analysis undertaken and reported elsewhere, and the presentation of this analysis and the data is indicative rather than exhaustive, reflecting both the confines of space and the intention of this piece as commentary. The discussion that follows below focusses on the two projects independently in order to examine decision-making in different contexts: at the border and within the nation. As the discussion progresses, however, we bring to the fore our concerns regarding the implications of these findings.

² For further detail of the projects and findings, see: M Segrave, S Milivojevic and S Pickering, *Sex Trafficking: International context and response*, Willan, Devon, 2009.

At the Point of Entry: Identifying potential victims and potential offenders

The use of trafficking in persons as a specific and unique issue connected to wider issues of illegal cross-border activities has been adopted by state agencies involved in border control. This means that immigration officers are charged with assessing, on entry, both the potential of someone to become a victim of trafficking as well as assessing the likelihood that they may intend to work illegally (i.e. they have entered on a tourist or visitor visa without work rights but intend to work while in the country).³ Even those who attempt to cross the border legitimately (i.e. with a valid visa) are screened as to whether they present with suspect characteristics, travel patterns, behaviour or background.

We have found that dominant stereotypes about sex work, trafficking, and victims of trafficking play a critical role in the process of determining potential victims and potential offenders at the border crossing. This finding is consistent with Weber's earlier findings in relation to immigration officers' decisions to detain asylum seekers in the UK.⁴ Such stereotypes are relied upon in an administrative environment where officers are tasked with predicting travellers' vulnerability (to trafficking) and intentionality (of working illegally). The working cultures among immigration staff interviewed at Australian airports in 2012 reflected those working on compliance within the Australian and Thai nations in 2006, where decisions were based on administrative dichotomies (i.e. allow entry or reject entry), where the emphasis was focussed less on the vulnerability or protection of the individual (as the result is often turnaround), and more on minimising risk to the state and avoiding the difficulties of detecting, investigating and prosecuting trafficking and

³ Sex work is decriminalised and legalised (i.e. with a licensing system) in the two Australian states where this research was undertaken.

⁴ L Weber, 'Down That Wrong Road: Discretion in decisions to detain asylum seekers arriving at UK ports', *Howard Journal of Criminal Justice*, vol. 42, 2003, pp. 248–262; L Weber and L Gelsthorpe, *Deciding to Detain: How decisions to detain asylum seekers are made at ports of entry*, University of Cambridge: Institute of Criminology, Cambridge, 2000.

victimisation post-entry. This results in individual officers possessing considerable discretionary power and often relying upon subjective assessments to make determinations.

This was evidenced in discussions with immigration officers at two major international airports in Australia regarding how potential victims and potential offenders might be identified. Overwhelmingly (n=14/15 or 93%), interviewees identified sex workers as the main example of the ‘problem women traveller’. Unlike men, women suspected of coming to Australia to be involved in sex work represented two risks: risks of victimisation (trafficking) and/or the risk of working illegally (i.e. breaching tourist visa conditions). For the airport immigration officials interviewed, identifying potential trafficking victims or potential (illegal) sex workers ultimately involved scrutinising women’s agency and sexuality at the border. As detailed below, this involved scrutinising women’s luggage for sexy clothing and judging if women were perceived to be sufficiently involved in arranging their travel and have knowledge of their intended destination. This assessment was often further complicated by the legalisation and decriminalisation of sex work in the two jurisdictions studied, and the ways immigration officers understood the legality and morality of sex work as work.

Agency in Border Crossing

Immigration officers’ explanations of their assessment processes demonstrated attempts to judge ‘appropriate’ expressions of women’s agency,⁵ particularly the extent of agency in one’s migration, as critical to determining whether they were future sex workers or future victims of trafficking. A lack of curiosity or knowledge about their travel or who were ill-informed of their plans were suspected of being potential trafficking victims, as one officer explained in relation to women who enter Australia on student visas:

⁵ In this article, we use the term agency to refer to the ability to act in a given context. See L M Ahearn, ‘Agency’, *Journal of Linguistic Anthropology*, vol. 9, no. 1-2, 1999, pp. 12–15.

[T]hey could be traffick[ed]... into the sex industry... 'cause I guess I always think... as a human being you are curious. [You would expect a person to ask]... a few questions, [such as] which school am I going to [and] you would be excited about it... [T]he fact that they are not told anything at all, not even the name of a course... like nothing at all, they have no idea.... [T]he fact that they know absolutely nothing that makes me think that they really have no idea or no active decision making. (Australian airport immigration officer, 2012)

Evident across both research projects was the precarious balance in determining agency, where too little is an indicator of potential victimisation, and too much agency is an indicator of potentially working in breach of visa conditions:

[W]e search the phones as part of evidence....We have seen sort of like sexy type of messages on them, which leads us to believe that they are in the sex industry and if that was the case, there would normally be, we would think it was by choice. (Australian airport immigration officer, 2012)

Agency was assessed according to travel organisation (where organisation by a third party was interpreted as evidence of possible trafficking and independence in organising travel was likely to raise suspicion of involvement in sex work) and plans upon arrival (women perceived to be ill-informed of their plans or who articulated open-ended plans were suspected as vulnerable). While it could be argued that many travellers have travel arranged by third parties (travel agents, fellow travellers) and many may arrive with open-ended plans, these characteristics within the context of particular risk profiles (gender, race and visa) were deemed suspicious and warranted further investigation.

Sexuality at the Border

Often risk assessments relied on what women were wearing and/or whether the type of clothing in a woman's luggage was perceived to be in accord with the visa on which she was travelling. Immigration officials (n=8/15) noted that via referral from another agency that had searched the luggage of a traveller, or following their own request to search the luggage of a suspect traveller, the inclusion of 'sexy' clothing (e.g. underwear, lingerie) advanced their questioning of a woman as a potential victim of trafficking or unauthorised sex worker:

But we have to find evidence.... [so when] we are doing a baggage search [the question is]... what are their motives. If you're coming here for a holiday, why do you bring some sexy lingerie and so many, like, the sex worker?... Why do you bring those items? (Australian airport immigration officer, 2012)

However, assessments did vary depending on individual officers' attitudes towards sex work (as work), knowledge about trafficking and attitudes about profiling. A few interviewees recognised the sex industry as a work sector, and the need to be critical of risk profiles based on stereotypical assumptions of sex work as illegal or immoral:

Customs sometimes will say, 'But they are sex workers,' and I am like, 'I don't really care how they make their dollar, all I am concerned about do they have work rights, if they have work rights. That is how she wants to make her money, power to her and she probably, you know, makes more money than you and I combined. So like, you know, who is the idiot here, us or her [laughs]? (Australian airport immigration officer, 2012)

The officer quoted above was one of only two immigration officers interviewed in 2012 that challenged moralising discourses around the desirability or otherwise of sex work as work (although one of the two still reported sex workers as a category of concern).

For the majority of airport immigration officers, identifying potential sex workers was both a highly gendered process (in all interviews references to sex workers were references to women) and a racialised one.

Research on both sex trafficking and migrant sex workers in Australia has challenged public assumptions that large numbers of Asian women are routinely trafficked into Australia for the purpose of prostitution.⁶ However, immigration judgments about women travelling with sexy underwear suggests that race and gender are key considerations when predicting victimisation or the intention to work illegally, with Asian women forming the bulk of women suspected of entering Australia to work in the sex industry. The connection between sexuality and risk was evident not only in discussing women's risk of victimisation but also in explanations regarding the circumstances that warrant suspicion and therefore further inquiry:

If we are looking at possible impostors: [a profile such as] a Chinese born person travelling on a Hong Kong passport, they are in an age group of maybe 20 to 40, first time arrival to Australia, they have got a recently issued visa and they are maybe coming out of either Hong Kong or another... port, that tends to fit all our boxes [and we will]... want to have a look at them.... In most cases they are genuine, but it's worth asking those questions as to what they intend to do. (Australian airport immigration officer, 2012)

The suspect-traveller approach operationalised in Australian airports can be connected to broader perceptions that sex workers are a 'problem category' of migrant, likely to disrupt order within the nation through breaching visa prohibitions

⁶ H Jang, K Jung, B Dalton and R Wilson, *Sex Trafficking or Shadow Tourism: The lives of foreign sex workers in Australia*, Lambert Academic Publishing, Germany, 2010; L Weber and L Gelsthorpe, *Deciding to Detain: How decisions to detain asylum seekers are made at ports of entry*, University of Cambridge: Institute of Criminology, Cambridge, 2000; E Jeffreys, 'Anti-trafficking Measures and Migrant Sex Workers in Australia', *Intersections: Gender and Sexuality in Asia and the Pacific*, no. 19, 2009.

against work or by being a potential victim of trafficking. We examine the continuity of these concerns with practices within national borders, drawing on interviews conducted with anti-trafficking stakeholders in Thailand and Australia in 2006.

At the Point of Enforcement: Identifying potential victims and potential offenders

Trafficking is difficult to detect and prove within the destination country. This is despite increasing efforts around compliance and enforcement of migration status and work rights undertaken by a range of agencies.⁷ The precarious legal status of victims – as non-citizens who may be working unlawfully – translates into a complex situation where a person may be at once an unlawful non-citizen and a victim of criminal exploitation. Immigration control is increasingly occurring within the community through an expansion of border control in various forms of internal compliance and enforcement.⁸

Immigration officers play a critical role in identifying potential victims of trafficking, and it is in the context of conducting immigration compliance raids that initial contact between potential victims and authorities is often made. As an Australian law enforcement officer explained:

... the majority of [victims]... come to the AFP [Australian Federal Police]... via the Department of Immigration... where they are doing a compliance investigation, [or] a compliance raid at a brothel and they'll come across a person and they have documents

⁷ M Segrave, S Milivojevic and S Pickering (2009), *op. cit.*; M Segrave, 'Order at the Border: The repatriation of victims of trafficking', *Women's Studies International Forum*, 32(4), 2009, pp. 251–260.

⁸ L Weber, "It sounds like they shouldn't be here": Immigration checks on the streets of Sydney', *Policing & Society*, vol. 21, no. 4, 2011, pp. 456–467; K Aas, "Crimmigrant" bodies and bona fide travelers: Surveillance, citizenship and global governance', *Theoretical Criminology*, vol. 15, no. 3, 2011, pp. 331–346.

that all the investigators there have and they're aware of indicators of trafficking. (Australian law enforcement officer, Australia, 2006)

Thus immigration officers enforcing the border regime within the nation play a critical role in the identification of potential victims of trafficking. While authorities made reference to a list of characteristics/factors that give rise to suspicion of trafficking (i.e. an internal departmental or authority-developed checklist which was not publicly available in Australia or Thailand), the interpretation of the criteria for identification is also important. In the assessment of suspected trafficking cases, as a support worker identified, authorities tend to rely upon how women behave in order to interpret the situation:

I think that [they] are a victim [of]... trafficking... but the authorit[ies] will not recognise [this], they think that the women lie and some women don't cry and don't seem vulnerable enough to be victim... [When I reported a case to an authority, he] said [to me] 'I don't feel she's a victim she didn't cry'... and then 'oh she has a mobile phone'. (Thai NGO, Thailand, 2006)

Echoing the sentiments of airport immigration officers at international Australian airports in 2012, the assumptions held by immigration officers in Australia and Thailand are a critical component of decision-making contexts, particularly in relation to race/ethnicity and in relation to sex workers. Gendered narratives of 'real' victimisation were evident in the way interviewees explained the challenges in identifying potential victims.⁹ The participants in this project indicated that those who are more likely to be identified as potential victims are those perceived by authorities to be closest to the 'ideal'

⁹ N Christie, 'The ideal victim' in E Fattah (ed.), *From Crime Policy to Victim Policy: Reorienting the justice system*, St. Martin's Press, New York, 1986.

image of innocent and passive victims, subject to extremely exploitative conditions.¹⁰ This was evident in descriptions of women who are not identified as potential victims; like suspect travellers, they are the most proactive, independent, experienced sex workers:

Most of the Thai women going out are fairly organised, they know what they're getting into... they are party to human smuggling, they are party to the fact that they'll be using false documents, that they're having to pay off middle men in order to get into Japan, they are party to that. They may not be party to the fact that once they've got to Japan that they're ending up being pushed around by thugs.... [T]he Thai embassy... feels that so much pressure is being put on them to treat these women as victims of trafficking, whereas they feel that the majority are completely aware of what they're getting into.... some of them have changed their passport several times and the Thai embassy is saying you know, 'look we realise that we have to be looking out for victims but with all due respect the majority coming through are pretty hardcore'. (Government-funded organisation staff, Thailand, 2006)

In addition to being identified as a 'knowing' or 'willing' sex worker, the status as non-citizen also has an impact on assumptions about 'real' victims. As one police officer explained, the line between potential victim and illegal non-citizen was often perceived to be very unclear:

[I]t comes back to... are they a victim or [not].... and that's where the water's really muddy... because they're sort of in the middle of both worlds... Most of them only really become a victim when things go wrong for them. You know there are very few people who... go to

¹⁰ See chapter two, M Segrave, S Milivojevic and S Pickering (2009), *op. cit.*

Australia... not knowing that they're going to be involved in the sex trade [and]... it's only when that money is not forthcoming that they either decide to make a complaint or... report it to the authorities. (Australian law enforcement officer, Thailand, 2006)

The above statement reveals a consistent finding regarding the circumstances in which illegal migrant sex workers will claim victimisation. Such statements offer some insight into the perception of a 'victim' as an identity rooted in a broader social context, rather than within the context of harm perpetrated against a person. In part, many participants indicated that identifying victims according to the administrative and legal criteria was challenging, as these criteria had little relevance to the circumstances within which women lived, and (most often) did not resonate with their experiences on the ground, for example:

It's difficult... it's really confusing... it's confusing because most of the time the victims are well aware and consented to be trafficked I guess.... it's very rare that they don't know what's going on.... [So] it's confusing, it's confusing because often the victims are well aware of what's happening. (Thai law enforcement officer, Thailand, 2006)

For immigration officers the dilemmas in identifying potential victims of trafficking are related to competing pressures. They are at once required to identify potential victims, while also ensuring they fulfil their obligations in removing illegal non-citizens and upholding the border regime. Yet we know that trafficking offences are often tangled in diverse situations that may involve degrees of criminality and/or victimisation. The findings above illustrate the challenge of identifying what takes place in the decision-making process, while also revealing the subjective assumptions and stereotypes in operation in this context.

Implications

In part, these findings are not surprising; they add to the well-established research literature that individual officers use stereotypes to assess risk in immigration.¹¹ The day-to-day decision-making of border and compliance immigration officers offers a valuable site to consider how national policies and commitments to stop trafficking are challenged, reinforced or performed in practice. These assumptions adopted by immigration officers in the sorting of legitimate and suspect travellers, reveal the dependence on women's behaviour, demeanour and appearance to confirm the feasibility of women's victimisation and/or their intention to breach visa conditions (rather than work conditions or women's accounts of their experiences) and their reasons for travelling and working. As researchers actively undertaking examination of border crossings and the official and unofficial policing of borders, this article is an opportunity to note that this remains unchanged in spite of the significant developments in counter-trafficking strategies and discourse internationally. Both projects highlight the importance of recognising the connection between the identification of 'genuine' victimisation and the border. Although airport immigration officers are tasked with identifying cases of trafficking, in everyday practice this decision-making is limited to predicting rather than identifying victimisation and intention. In the second research project, immigration officers were wary when suspected victims or illegal workers' behaviour (or 'performance') didn't match the anti-trafficking narrative (or script) of the abject victim. These findings have serious rights implications. There is evidence of racial and gender-based discrimination, covered under both the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). Yet, the rights framework is limited. It requires signatory status in the nation, but also requires motivation and

¹¹ L Weber and L Gelsthorpe (2000), *op. cit.*

momentum to ensure rights are upheld. This is particularly true in relation to the role of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which is largely ignored in counter-trafficking discussions and which remains off the agenda as a priority Convention for many nation states, including Australia.¹² The projects that form the basis of this discussion are indicative of the ways in which the assertion of individual agency tends to be interpreted as entrepreneurial activity that becomes problematic for the least 'desirable' migrants. The recognition of agency as suspect and potentially 'illegal' is at odds with the commitment to preventing discrimination on the basis of race or gender. The findings presented in the discussion also suggest there are potentially serious implications for certain groups who, as reported by airport immigration officers, are subject to more scrutiny based on gender, sexuality, and race in particular. The topic of identifying sex workers at the border has received little attention in anti-trafficking research¹³ but is receiving more attention in online media.¹⁴ The extent to which the case can be made that these practices are a breach of specific human rights conventions is yet to be determined, but these projects are indicative of the need to examine this in greater detail through a more thorough review of immigration decision-making processes.

¹² M Segrave, 'Human trafficking and human rights', *Australian Journal of Human Rights*, vol. 14, no. 2, 2009, pp. 71–94.

¹³ With the exception of A Piscitelli, 2006, as cited in F Nederstigt, R Campello, and L Almeida, 'Brazil' in GAATW (ed.), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, GAATW, Bangkok, 2007, pp. 87–113.

¹⁴ L Agustin, *Border Crossing: Looking for sex-victims and sex workers*, *The Naked Anthropologist*, 9 November 2012, retrieved 9 November 2012, <http://www.lauraagustin.com/border-crossing-looking-for-sex-victims-and-sex-workers>; C Nikiforuk, *Sexism at the Border: A personal account*, *Rabble.ca*, 1 April 2013, retrieved 1 April 2013, <http://rabble.ca/news/2013/04/sexism-border-personal-account>.

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Examining the Body through Technology: Age disputes and the UK border control system

Evan Smith and Marinella Marmo

Abstract

In an effort to ascertain whether certain migrants and refugees have been telling the ‘truth’ about their age, the UK border control system has, in the past, relied on the use of skeletal x-ray to estimate the applicant’s age, and in recent years has sought to use dental x-ray for the same purpose. However using x-ray for age assessment purposes has been criticised as inaccurate in providing a reasonable estimate of age and as an unnecessary medical risk, which infringes the human rights of the applicant. This is particularly pertinent in the case of children who are victims of trafficking and unaccompanied young people who may be vulnerable to exploitation, because if declared as children, they can access a higher level of care and protection under childcare law. The article argues that the deferment to the use of x-ray to reveal the ‘truth’ in age disputes is evidence that the border control system is more concerned with keeping ‘undesirable’ people out of the UK than observing the human rights of the vulnerable people who come into contact with the system.

Key words: x-ray, age assessment, border processes, medical examination, UK Border Agency

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Introduction: The motive of suspicion

A number of scholars have characterised the border as an exceptional place where human rights are deemed by the authorities to be secondary to the maintenance of border security.¹ The UK border control system is no exception; there is a high level of pressure placed upon border control staff to detect people attempting to evade border control procedures. Thus, border control practices often start from the assumption that voluntary or forced migrants with less desirable socio-cultural and economic background are attempting to evade or deceive the system.² The default assumption of the border control system is that certain migrant groups are not who they claim they are when interacting with the system.³ Habib Rahman, Chief Executive of the Joint Council for the Welfare of Immigrants, argues that a ‘culture of disbelief and refusal... exists within the UKBA’.⁴ When the activities, priorities and resources of the border control system seem focussed on the identification of irregular migrants, trafficked persons or asylum seekers with fraudulent claims, the ability of genuine applicants to seek protection is similarly hindered and human rights abuses may occur.

¹ For example, see: M Bosworth, ‘Border Control and the Limits of the Sovereign State’, *Social and Legal Studies*, vol. 17, no. 2, 2008, pp. 199–215; A Hall, ‘“These People Could Be Anyone”: Fear, contempt (and empathy) in a British Immigration Removal Centre’, *Journal of Ethnic and Migration Studies*, vol. 36, no. 6, 2010, pp. 881–898.

² See: Commission for Racial Equality, *Immigration Control Procedures: Report of a formal investigation*, CRE, London, 1985; K Woodfield, *et al.*, *Exploring the Decision Making of Immigration Officers: A research study examining non-EEA passenger stops and refusals at UK ports*, National Centre for Social Research/ Home Office, London, 2008.

³ S Zimmermann, ‘Reconsidering the Problem of “Bogus Refugees” with “Socio-economic Motivations” for Seeking Asylum’, *Mobilities*, vol. 6, no. 3, 2011, pp. 335–352; D Bögner, C Brewin, and J Herlihy, ‘Refugees’ Experiences of Home Office Interviews: A qualitative study on the disclosure of sensitive personal information’, *Journal of Ethnic and Migration Studies*, vol. 36, no. 3, 2010, pp. 519–535.

⁴ JCWI, ‘Inspector’s Report on UKBA Marriage Visa Applications’, retrieved 11 May 2013, <http://www.jcwi.org.uk/policy/news/inspectors-report-ukba-marriage-visa-applications>.

This is not a sudden or contemporary phenomenon.⁵ There has been a long-standing belief in the UK border control system that migrants, particularly from East Europe, Asia and Africa, are falsely seeking protective status as trafficked persons or refugees. This is evidenced by a pervasive assumption of unreliability of the testimony of these groups of migrants,⁶ as well as a suspicion that documentary evidence they provide is likely to be fake, if existent at all. Authorities claim to weigh up decisions ‘on balance of probabilities’, but it is often the case that the border control staff begin from a point of disbelief⁷ and shift the burden of proof onto the ‘body’ of the person applying to enter the country. Under the intense scrutiny of the border control authorities, the focus of the authorities may shift, when convenient, to physical examination, with the body becoming the marker of ‘truth’. Writing about the refugees in the French border control system, Didier Fassin and Estelle d’Halluin point out that ‘their word is systematically doubted [and] it is their bodies that are questioned’.⁸

⁵ M Marmo and E Smith, ‘Racial Profiling at the British Borders: An historical overview of the process of selection and scrutiny’ in J Shantz (ed.), *Racial Profiling and Borders: International, interdisciplinary perspectives*, Vanderplas Publishing, Lake Mary, 2010, pp. 35–69; M Marmo and E Smith, ‘Is There a Desirable Migrant? A Reflection of Human Rights Violations at the Border: The case of “virginity testing”’, *Alternative Law Journal*, vol. 35, no. 4, 2010, pp. 223–226.

⁶ M Griffiths, ‘“Vile Liars and Truth Distorters”: Truth, trust and the asylum system’, *Anthropology Today*, 2012, vol. 28, no. 5, pp. 8–12; Joint Committee on Human Rights, *Human Trafficking* (2005–06, HL 245-I, HC 1127-I) para 74, retrieved 10 August, 2013, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/245/245.pdf>.

⁷ For references to the ‘culture of disbelief’ within the immigration control system, see: S Gibson, ‘Testimony in a Culture of Disbelief: Asylum hearings and the impossibility of bearing witness’, *Journal for Cultural Research*, vol. 17, no. 1, 2012, pp. 1–20; D Taylor, ‘The UK Border Agency Must End This Culture of Disbelief’, *The Guardian*, 22 November 2012, retrieved 10 May 2013, <http://www.guardian.co.uk/commentisfree/2012/nov/22/uk-border-agency-culture-disbelief>; H Cooper, ‘The Politics of Social Exclusion: Asylum support provisions in the UK’s Draft Immigration Bill 2009’, *Oxford Monitor of Forced Migration*, vol. 1, no. 1, pp. 9–13.

⁸ D Fassin and E d’Halluin, ‘The Truth from the Body: Medical certificates as ultimate evidence for asylum seekers’, *American Anthropologist*, 107(4), 2005, p. 598.

Methods of physically intrusive testing to determine the truth in migrants' claims are well documented to have been a practice of the British border control system. For example, the intrusive virginity check of female migrants from the Indian subcontinent is discussed elsewhere as a further form of mistrust that led to human rights abuses at the border in the 1970s.⁹ Related to this is the use of physical, sexual and mental examinations and the readiness to rely on technology such as x-ray for age assessment, when border officials do not believe irregular migrants who declare that they are under 18. Such an approach is based on the assumption that the migrant is not reliable, and the 'body' holds a truth that can be used by the border control staff to further the government's agenda of expelling or not letting in the unwanted.¹⁰ This is particularly pertinent to child victims of trafficking and unaccompanied young people who, if declared as children, can access a higher level of care and protection under childcare law.

The article mainly focusses on the use of x-ray for age assessment. This is a non-medical use of the technology and is employed solely for the administration of the border control system in an attempt to determine whether a person intercepted by the system is credible. In the following two sections, this article looks at how x-ray was used in the UK border control system in the past (section one), and the continued debate about whether to reintroduce the practice

⁹ M Marmo and E Smith, 'Female Migrants: Sex, value and credibility in immigration control' in S Pickering and J McCulloch (eds), *Borders and Transnational Crime: Pre-crime, mobility and serious harm in an age of globalization*, Palgrave, London, 2012, pp. 54–71.

¹⁰ See, for instance, the Home Office imperative of meeting demanding performance targets, such as the removal of 1400 'offenders' per month from the UK in 2009 (UK Border Agency, *Border Agency, Enforcing the Deal, Enforcement Business Plan 2008-09*, 2008, Home Office UK). See also, the recent campaigns in Romania and Bulgaria to discourage migration (<http://huff.to/140iVPV>). In relation to human trafficking, see: C Nieuwenhuys and A Pécoud, 'Human trafficking, information campaigns, and strategies of migration control', *American Behavioral Scientist*, 50(12), 2007, pp. 1674–1695; R Andrijasevic and B Anderson, 'Anti-trafficking Campaigns: Decent? Honest? Truthful?', *Feminist Review*, 92(1), 2009, pp. 151–156.

for border control purposes, particularly the decision by the UK Border Agency (UKBA) to trial the use of dental x-ray for age assessment in 2012 (section two). The article will argue that in the UK border control system, the authorities have relied on the use of x-ray in an attempt to extract ‘the truth’ from people whose testimony and documentary evidence is not believed, despite the ethical concerns raised in using medical technology for non-medical purposes and criticisms that x-ray is not a satisfactory tool for assessing age. Within this context, the criminalisation of migrants at the border and the abuse of their human rights have deep historical roots. The original application of x-ray to regular migrants, shown via archival documentation, also demonstrates how different groups of people, including pregnant women and children, were subjected to this practice, with little or no accountability for state action.

The Use of X-ray in the 1970s

In the UK, x-ray was used in controlling immigration from South Asia during the 1960s and 1970s. By this time, the largest number of migrants entering the UK for family reunification was from the Indian subcontinent. Many young men came to the UK from South Asia in the 1950s and early 1960s before the introduction of immigration controls that resulted in a decline in labour migration from this region in the early 1970s.¹¹ The majority of migrants from India, Pakistan and Bangladesh were the families of the young men who had arrived in the UK in the decades before. Several pieces of legislation had been introduced in the 1960s to limit mass migration from the British Commonwealth (the Commonwealth Immigrants Act 1962, which was amended in 1968), but the Immigration Act 1971 still allowed the wives and children (under the age of 18) to join their family members already residing in the UK.

With significant numbers of migrants (especially children under

¹¹ See: I Spencer, *British Immigration Policy since 1939: The making of a multi-racial Britain*, Routledge, London, 1997, p. 143.

the age of 18) applying to enter the UK under family reconciliation legislation, the UK authorities saw this as a loophole that could be exploited, especially as documentation regarding children was less substantial than for adults (for example, children often did not have their own passports and were simply listed on an adult's passport). The UK border control staff were especially concerned about young male migrants, who, if they were over the age of 18, would not be allowed to enter the UK (unless they could show that they were 'still fully dependent' on their parents) and who were the least 'desirable' (due to the saturation of labour capacity) in 1970s Britain.¹² To determine whether migrants were falsely claiming to be under 18 for migration purposes, the UK border control system, particularly at the British High Commissions in South Asia (where applications for entry clearance certificates were first assessed), used x-ray of the wrists to estimate the skeletal age of the applicant. In a detailed report titled *Immigration from Bangladesh: Will It Ever End?*, F.S. Miles, the High Commissioner in Dacca, wrote to the Foreign and Commonwealth office that the 'X-ray is the one scientific tool we have against bogus applications'.¹³ Although the practice had occurred for most of the 1970s, it was not until *The Guardian* published details of gynaecological examinations being conducted on migrating South Asian women in early 1979 that the practice gained visibility. At the height of the 'virginity testing' controversy in February 1979,¹⁴ details also emerged that x-ray was being taken of women and children to ascertain the age of suspected 'bogus' migrants, as well as for communicable diseases. Although chest x-ray was routinely taken for the screening of communicable diseases such as tuberculosis, skeletal x-ray had no medical use and was being used for administrative purposes only, with most visitors from South Asia looking to reside in the UK for more than six months.

¹² See: J Bhabha and S Shutter, *Women's Movement: Women under immigration, nationality and refugee law*, Trentham Books, Stoke-on-Trent, 1994, pp. 130–133.

¹³ F.S. Miles, *Immigration from Bangladesh: Will It Ever End?*, June 1979, p.5, FCO 50/660, National Archives, London.

¹⁴ E Smith and M Marmo, 'Uncovering the "Virginity Testing" Controversy in the National Archives: The intersectionality of discrimination in British immigration history', *Gender & History*, vol. 23, no. 1, 2011, pp. 147–165.

In response to the questions surrounding the use of x-ray in immigration control, the Labour Government acquiesced somewhat in the face of mounting criticism, and the then Home Secretary Merlyn Rees announced that the Chief Medical Officer, Sir Henry Yellowlees, would carry out an inquiry.¹⁵ The final report released to Parliament in April 1980 stated that ‘the use of X-rays of the bony skeleton provides a useful, fairly accurate and acceptable safe way of estimating age of children’ up to the age of 21.¹⁶ Thus, despite criticism from individuals and organisations, the border control system continued to use x-ray to assess the age of migrants. At the Annual General Meeting of the British Medical Association (BMA) in 1979, a resolution was passed that stated that ‘radiological examinations, carried out solely for administrative and political purposes, are unethical’ and proposed that the BMA ‘make the strongest possible representation to the Government to ban these practices’.¹⁷ A report prepared by Edward White for Lord Avebury, a Liberal member of the House of Lords, cited the past chair of the National Council of Radiation Protection as warning against unnecessary x-ray and claimed that ‘there is no safe level of exposure’. White also questioned the accuracy of age assessment through the use of x-ray, particularly in relation to the use of generalised data on age/bone ratio based on North American children to assess South Asian children.¹⁸

Notwithstanding this, the x-raying of children continued throughout 1980 and 1981. In January 1981, the Foreign Minister Lord Carrington stated in the House of Lords that in the last nine months of 1980, around 360 children under 21 had been x-rayed in Dacca (now known as Dhaka) and around another 300 in Islamabad.¹⁹ The following January, Parliamentary Under-Secretary for the Foreign and Commonwealth Office (FCO), David Trefgarne, announced in the House of Lords that during

¹⁵ House of Commons, *Hansard*, 19 February 1979, col. 221–222.

¹⁶ H Yellowlees, *The Medical Examination of Immigrants: Report by the Chief Medical Officer*, 1980, appendix 1, p. 3, FCO 50/677, NA.

¹⁷ Cited in: P Gordon, ‘Medicine, Racism and Immigration Control’, *Critical Social Policy*, vol. 3, no. 7, 1983, p.15.

¹⁸ *Ibid.*, pp. 15–16.

¹⁹ House of Lords, *Hansard*, 19 January 1981, col. 336w.

1981, approximately 420 children had been x-rayed in Islamabad and 262 children in Dacca.²⁰ However after Yellowlees revised his opinion about the accuracy of these x-rays in early 1982, the Home Secretary Willie Whitelaw announced that the FCO would no longer be carrying out x-ray on children for these purposes.²¹

Disputing Age of Unaccompanied Young People and Revival of X-ray Practice

Considerations surrounding the re-institution of x-ray for the assessment of age in undesirable migrants have ramifications on a number of issues related to broader forms of irregular migration. This is particularly concerning in potential cases of child trafficking. Age assessment of victims of trafficking and unaccompanied young people is fundamental in determining the level of protection the vulnerable person may receive by the destination country. This is a well-established point in the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, which echoes the *UN Convention on the Rights of the Child* principle that the child's best interests are paramount. The requirement of protecting children in recognition of their vulnerability has been embraced in Britain with the *Children Act 1989*. In 2006, UNICEF issued guidelines to protect child victims of trafficking, reinforcing that the presumption of age should be in favour of the child.²² This was re-emphasised in 2008 when the UN Committee on the Rights of the Child recommended that benefit of the doubt should be the prevailing approach to age disputed cases.²³

Yet, Larissa Barrie and Philip Mendes claim that despite this recommendation, in Britain border control aims are prioritised

²⁰ *Ibid.*, 28 January 1982, col. 1114w.

²¹ House of Commons, *Hansard*, 22 February 1982, col. 279–280w.

²² UNICEF, *Guidelines on the Protection of Child Victims of Trafficking, Child Trafficking and Migration*, New York, 2006.

²³ UN Committee on the Rights of the Child, 2008, para. 71(e).

over the principle of child protection.²⁴ The clash between border protection and protection of child rights is evident in the number of age-related disputes by the Home Office. According to recent data, in 2012 there were 328 age disputes of asylum applicants who claimed to be children, as compared to 374 such cases in 2011. This 12 per cent decrease is flagged by the Home Office as a positive in tackling a culture of disbelief. However, this trend actually reflects the 16 per cent drop in unaccompanied young people's asylum applications received in 2012 (1,168 compared to 1,398 in 2011),²⁵ rather than a decline in the culture of disbelief. In the past, the Home Office suggested that the number of age disputes is 'illustrative of a serious level of abuse of the [asylum] system',²⁶ clearly highlighting the applicants' dubious degree of credibility. This suspicion is partially fuelled by the lack of reliable documents and any other form of identification of the subjects involved. Therefore, when an immigration officer is suspicious of a false claim, a means to assess age is needed to make a decision. Age determination is usually carried out with the help of professionals including medical doctors, psychologists and social workers, and should take into account the physical, sexual and mental maturity of the child as well as other cultural and environmental factors.²⁷ However, very often the circumstances experienced by these young people accelerate their maturing process,²⁸ meaning that assessments can lack precision and can lead to long disputes, often prolonged by judicial intervention.

The idea that x-ray can offer a reliable and quick solution has been the subject of attention by the Home Office for a number

²⁴ L Barrie and P Mendes, 'The Experiences of Unaccompanied Asylum-seeking Children In and Leaving the Out-of-home Care System in the UK and Australia: A critical review of the literature', *International Social Work*, vol. 54, 2011, pp. 485—503.

²⁵ Home Office, *Immigration Statistics: October to December 2012*, London, 2013.

²⁶ Home Office, 'Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children: Consultation paper', London, 2007, para. 24.

²⁷ S Gower, 'How Old Are You? Ethical dilemmas in working with age-disputed young asylum seekers', *Practice*, vol. 23, no. 5, 2011, pp. 325—339.

²⁸ See, for example, *AE v. London Croydon* [2012] EWCA Civ 547.

of years. However, the desire of the state to rely on x-ray has been strongly contested by multiple parties. Since Whitelaw's 1982 decision to end the use of x-ray for the assessment of age in migrant children, the issue has been referred to from time to time by parliamentarians. For example, in the House of Lords debate on the Asylum and Immigration Bill 1996, Lord Avebury sought to insert an amendment which would effectively ban the use of x-ray for the assessment of age, but was rebuffed by Lord David Renton who said that '[i]t is difficult for the immigration officers, medical people, or anyone to say what those people's ages really are. If the X-ray can decide the matter, we should keep an open mind on the issue.'²⁹ The Home Office stated in 2007: 'There does appear to have been more recent research that indicates x-ray analysis (of the teeth and collar and wrist bones) can be a more reliable means of determining age than was once thought.'³⁰ The position of the Home Office is also backed by some EU member states that 'regularly use these techniques for immigration purposes'.³¹ In Belgium, Denmark, Germany, Malta, and the Netherlands, the use of x-ray of children's bones (wrist bone, collar bone or teeth) to determine age in trafficking and other migration-related claims is allowed.³² This matter was brought up again for discussion in 2009, and most recently has been revived by the UKBA in early 2012.³³

In March 2012, Zilla Howell, the Director of Asylum for the UKBA, wrote in a letter, reproduced on the website of the Immigration Law Practitioners' Association, to various stakeholders announcing that there would be a three-month

²⁹ House of Lords, *Hansard*, 20 June 1996, col. 562–563.

³⁰ Home Office, 2007, para 27.

³¹ *Ibid.*

³² European Union Agency for Fundamental Rights, *Child Trafficking in the European Union — Challenges, perspectives and good practices*, 2009, p. 54, http://fra.europa.eu/sites/default/files/fra_uploads/529-Pub_Child_Trafficking_09_en.pdf

³³ A Aynsley-Green, *et al.*, 'Medical, Statistical, Ethical and Human Rights Considerations in the Assessment of Age in Children and Young People Subject to Immigration Control', *British Medical Bulletin*, vol. 102, 2012, pp. 17–42.

trial of using dental x-ray to determine the age of asylum applicants. The letter said that many would ‘be aware of the difficulties that arise when [UKBA] are not able to establish, with any certainty, the age of an asylum applicant’ and that the UKBA were ‘keen to utilise any appropriate tool which can increase our levels of certainty (as long as it does not have a negative impact on the individual in safeguarding terms, of course)’. The trial was aimed at people assessed as adults, ‘but who continue to contend that they are children,’ and the UKBA argued that ‘participation in the pilot is completely voluntary’.³⁴

However, this proposed trial received significant criticism from immigration lawyers, medical and dental professionals and the four UK children’s commissioners, who were quoted in *The Guardian* as claiming the proposed actions were ‘a clear breach of the rights of vulnerable children and young people and may, in fact, be illegal’.³⁵ Damian Green, the Conservative Minister for Immigration, admitted in parliament that the UKBA had not discussed the trial with the Equality and Human Rights Commission, but had ‘sought legal advice on the legality of the trial’.³⁶ A month later, Bowell sent another letter announcing that the proposed trial was being halted, after the Chief Medical Officer suggested that the UKBA discuss the trial with the National Research Ethics Service (NRES). According to Bowell, the NRES ‘concluded that our proposed trial constitutes “research” and that, as such, it requires the approval of a research committee before it can proceed’. Bowell argued that this was ‘contrary to their expectations’, explaining that the view of the UKBA was that ‘the trial did not constitute

³⁴ Z Bowell, Letter to stakeholders ‘Age Assessment - Dental X-Rays’, 28 March 2012, retrieved 19 December 2012, <http://www.ilpa.org.uk/resources.php/14476/letter-from-zilla-bowell-ukba-on-plans-to-reintroduce-use-of-x-rays-for-age-assessment>.

³⁵ J Meikle, ‘UK Border Agency to trial x-rays to determine age of asylum seekers’, *The Guardian*, 30 March 2012, retrieved 5 May 2013, <http://www.guardian.co.uk/uk/2012/mar/30/uk-border-agency-x-rays-asylum-seekers>.

³⁶ House of Commons, *Hansard*, 30 April 2012, col. 1081w.

“research” and ethical approval was not therefore necessary’. *The Guardian* called this ‘a profound embarrassment for the Home Office’ and claimed that the ‘Home Office [had] refused for a month to publicly reveal whether the agency had ever sought ethical permission for the programme’.³⁷ Both Howell and the Minister for Families, Sarah Teather, said that no x-ray had yet taken place,³⁸ and the UKBA were looking into whether to proceed with the trial in the future.

Aynsley-Green, *et al.* point out the various controversial issues surrounding the assessment of age of young people in immigration control, and declare that ‘age assessment practice in the UK remains highly inconsistent’ and is therefore unreliable for border control purposes.³⁹ They highlight a primary aspect of abuse in what can be framed as a violation of conditions of health as well as medical care.⁴⁰ X-ray gives a dose of radiation, and the non-medical use of x-ray is neither safe nor ethical on these grounds. They state that the x-ray is ‘driven solely by a government’s administrative convenience and are without therapeutic benefit to the individual’.⁴¹ They also point to the unethical imposition of x-ray without fully informed consent. An examination is imposed on a powerless subject who is in no position to negotiate.

³⁷ J Meikle, ‘Border Agency Halts X-ray Programme for Child Asylum Seekers’, *The Guardian*, 27 April 2012, retrieved 5 May 2013, <http://www.guardian.co.uk/uk/2012/apr/27/border-agency-xray-asylum-seekers>.

³⁸ Z Howell, Letter to NASF members, 27 Apr, 2012, retrieved 19 December 2012, <http://www.ilpa.org.uk/resources.php/14631/zilla-howell-ukba-letter-on-dental-x-rays-trial-suspended>; House of Commons, *Hansard*, 30 April 2012, col. 1236w.

³⁹ A Aynsley-Green, *et al.*, pp. 23–27.

⁴⁰ Article 25 of the Universal Declaration of Human Rights, 1948.

⁴¹ A Aynsley-Green, *et al.*, pp. 23–27.

⁴² Cabinet Office, *The National Security Strategy of the United Kingdom*, London, 2008.

Conclusion: Does the border control system lack institutional memory?

The UK's first National Security Strategy, issued in 2008, assured the public that the government intended to implement a strong, comprehensive, and technologically enhanced border policy.⁴² The lack of confirmation that the x-ray process will not be reintroduced raises concerns on three levels. First, it shows that the border control system maintains the idea of shifting the burden of proof onto the body of individual applicants. Applicants are deemed inherently untrustworthy; therefore, the narrative they offer is ignored and the body is explored to search the truth: the body becomes the site of evidence.⁴³ Second, the institutional memory of the system does not stretch very far, as it attempts to recycle ideas that were dismissed as unsatisfactory thirty years ago. This suggests that despite legal and human rights improvement, policies of crime control and border security are still prioritised over protection of people. Third, assessing age should be part of a positive process of assessing eligibility for and granting protection of human rights, not a process of denial and rejection.

As long as emphasis within the border control system lies in attempting to maintain a 'secure' border and the idea of the border as separating the domestic British population from the threat of the migrant 'other' is fostered, there will be strict scrutiny placed upon those who attempt to navigate the system. In this situation, the applicant must submit to the interrogations of the system, while the government explores all available avenues to satisfy the administration of a 'firm' border control system. Lord Renton's quote on keeping an 'open mind' on the matter of using x-ray, despite the criticisms, for immigration purposes highlights this. The Joint Council for the Welfare of Immigrants wrote in 1985:

⁴³ F Didier, 'The Trace: Violence, truth, and the politics of the body', *Social Research*, 78(2), 2011, pp. 281–298.

⁴⁴ JCWI, 'Briefing on *Immigration Control Procedures: Report of a formal investigation* by the Commission for Racial Equality', 1985, 2, RC/RF/1/01/B, Runnymede Trust Archive, Black Cultural Archives.

Entry clearance procedures abroad are operated on the assumption that they need to be directed towards the detection of bogus applicants even if in the process genuine applicants are refused. This licenses entry clearance officers to behave like a fraud squad, rather than as neutral officials processing applications from the wives and children of British and settled men.⁴⁴

The authors of this article would argue that this still seems to be the case now.

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Shaping the Victim: Borders, security, and human trafficking in Albania

James P. Campbell

Abstract

Borders are productive sites where knowledge is gathered and migrant populations are formed. The knowledge gathered from victims of trafficking reinforces a victim narrative that represents a perceived threat to society by highlighting violence, criminality, coercion, and naivety. Using Albania as a case in point, the article looks at trafficked people and the narratives of victimhood that surround them. In the case of trafficked people, the border projected out towards other states produces a discursively defined victim of trafficking. When projected back within the national territory, the border essentially produces a criminalised sex worker. To argue this point, the article discusses the role victims of trafficking play in the EU and looks at how international norms espoused by the OSCE and IOM have prepped the Albanian border for EU ascension and created the means for governable populations within Albania.

Keywords: Albania, borders, victimhood, human trafficking, migrant population, OSCE, IOM

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Borders are highly political sites that regulate migration and discursively produce manageable populations. The productive aspects of borders extend internally and externally, leaving us with dichotomous and sometimes contradictory understandings of those traversing them. The way borders produce inclusions, exclusions, and differential citizenship is well documented, particularly in regard to the European Union (EU).¹ This paper examines how the border policies of the Eastern European states are shaped in the pre-EU ascension process to produce exclusions and inclusions, many mirroring those of the EU. My case in point is Albania, which, in the past two decades, has seen the end of decades of authoritarianism, increased migration and human trafficking, state collapse, and accordingly, an influx of international organisations such as the Organization for Security and Co-operation in Europe (OSCE) and International Organization for Migration (IOM) providing the technical expertise necessary to achieve regional standards of security and stability.

In order to study this, I look at trafficked people and the narratives of victimhood that surround them. In the case of trafficked people, the border projected out towards other states produces a discursively defined victim of trafficking. When projected back within the national territory, the border essentially produces a criminalised sex worker. In the first case, the possibility that some victims have freely chosen to engage in informal migration and/or sex work is obfuscated by narratives of coercion.² In the second, the only choice

¹ See, for example, S Mezzadra and B Neilsen, 'Border as Method, or, the Multiplication of Labor', *The European Institute for Progressive Cultural Policies*, 2008, retrieved 25 June 2013, <http://eipcp.net/transversal/0608/mezzadraneilson/en>; and S Mezzadra and B Neilsen, 'Borderscapes of Differential Inclusion: Subjectivity and struggles on the threshold of justice's excess' in E Balibar, *et al.* (eds.), *The Borders of Justice*, Temple University Press, Philadelphia, 2011, pp. 181–203. See also W Walters, 'Border/Control', *European Journal of Social Theory*, vol. 9, no. 2, 2006, pp. 187–203; and V Squire, *The Exclusionary Politics of Asylum*, Palgrave Macmillan, New York, 2009.

² See: K Kempadoo, 'Introduction' in K Kempadoo and J Doezema (eds.), *Global Sex Workers: Rights, resistance, and redefinition*, Routledge, New York, 1998, pp. 1–16. See also, R Andrijasevic, 'The Difference Borders Make: (Il)legality, migration and trafficking in Italy among East European women in prostitution' in S Ahmed, *et al.* (eds.), *Uprootings/Regroundings: Questions of home and migration*, Berg Press, Oxford, 2003, pp. 251–272; and J Berman, '(Un)Popular Strangers and Crises Unbounded: Discourses of sex-trafficking, the European political community and the panicked state of the modern state', *European Journal of International Relations*, vol. 9, no. 1, 2003, pp. 37–86.

presented is the choice to commit the crime of prostitution. By reducing sex work to a moral choice, the potential economic reasons for engaging in sex work are pushed to the wayside. To argue my point, I describe the ways in which borders are productive sites. I then discuss the role victims of trafficking play in the EU and finally look at how international norms espoused by the OSCE and IOM have prepared the Albanian border for EU ascension and created new means for governing populations within Albania.

Borders, Populations, Victims

The concept of a border contains competing and complementing trajectories.³ It can be understood as a geographical line legitimised in treaties and conventions, or as a national border, which, in theory, encloses a population homogenised by territory, markets, and history. In these conceptions, the border delimits the sovereign power of states. They are places where taxes are levied and people become subject to sovereign law.

Alongside these standard conceptions of a restrictive border, William Walters draws on the work of Michel Foucault to locate a regulatory border, which he calls ‘the biopolitical border’.⁴ This trajectory recognises the border as a filter that systematically regulates the movement, health, and security of national and transnational populations by codifying mobilities and ascribing status and risk to migrant populations. It first appears around the turn of the century, when the UK and US

³ W Walters, ‘Mapping Schengenland: Denaturalizing the border’, *Environment and Society D: Society and space*, vol. 20, no. 5, 2002, pp. 561–580.

⁴ W Walters, ‘Mapping Schengenland’. The concept of biopower and biopolitics is most famously discussed in M Foucault, ‘*Society Must Be Defended*’: *Lectures at the College de France, 1975-1976*, Picador, New York, 2003, pp. 239–264, and *The History of Sexuality, Vol. 1: An introduction*, Random House, New York, 1990, pp. 133–160. It should be noted that Walters both somewhat expands upon and departs from Foucault’s concepts. See W Walters, ‘Foucault and Frontiers: Notes on the birth of the humanitarian border’ in U Bröckling, S Krasmann and T Lemke, (eds.) *Governmentality: Current issues and future challenges*, Routledge, New York, 2011, pp. 138–164.

passed race specific migration laws, and emerges more fully in North America and Europe around the Great Depression and the First World War, when refugee crises and influxes of migrant workers led to the politicisation of immigration. It is at this time that passports and visas became almost universally required and immigrants were subjected to quarantine, medical inspection, and interviews aimed at gathering their vital information and history before being granted entrance.

As a space where knowledge of migration is gathered, the border shapes migrants into knowable, governable populations.⁵ Specifically, the tools employed to manage, regulate, and document who and what enters and exits a country — visas and passports, migrant and criminal databases, holding centres, customs officials, medical authorities and proofs of vaccination, biometric information gathering centres — are all points where knowledge is gathered. This knowledge masses people with similar profiles into populations defined by varying degrees of legitimate or illegitimate mobility, such as undocumented migrants, tourists, migrant workers, students, refugees, business people, or victims of trafficking. The migrant's ascribed category is etched onto his or her identity through biometric passports, visa limitations and migrant databases. For example, during the late 1990s, groups of migrants entering Italy together received markedly different treatment. An Albanian claiming to be from Kosovo or presenting a Kosovo ID card would have much higher likelihood of receiving asylum than an Albanian from Albania. One is understood to be a refugee, the other an economic migrant. Kosovo ID cards were readily available to anyone in Albania for the right price.⁶

⁵ Walters (2002), *op. cit.* Note that this may occur within or away from a national border. On visa regimes, see: M Salter, 'The Global Visa Regime and the Political Technologies of the International Self: Borders, bodies, biopolitics', *Alternatives: Global, local, political*, vol. 31, no. 2, 2006, pp. 167–189. On biometric borders, see: L Amoore, 'Biometric Borders: Governing mobilities in the war on terror', *Political Geography*, vol. 25, 2006, pp. 225–351. On airports, see: G Fuller, 'Life in Transit: Between airport and camp', *Borderlands e-journal*, vol. 2, no. 1, 2003, retrieved 28 April 2013, http://www.borderlands.net.au/vol2no1_2003/fuller_transit.html. On offshore holding centres, see: B Neilson, 'Between Governance and Sovereignty: Remaking the borderscape to Australia's north', *Local-Global*, vol. 8, 2010, p. 124–140.

⁶ J Harding, *The Uninvited: Refugees at the rich man's gate*, Profile Books Limited, London, 2000, pp. 18–19.

This notion of differential mobility is brought to the forefront in the analysis of trafficked people and the discourses surrounding them. Victims of trafficking are not simply identified by data stored in devices employed at borders. Indeed, a narrative steeped in assumptions of violence, criminality, coercion, and naivety informs the recognition of victims of trafficking. Such a narrative, in turn, reinforces the methods used by states and international organisations to identify them.

A victim of trafficking is primarily understood through a gendered narrative of foreign traffickers kidnapping, deceiving, exploiting, and sometimes enslaving naïve women.⁷ These narratives collapse the socioeconomic issues leading migrants to seek out the services of a migration broker into criminality. They portray all women engaging in informal migration and/or sex work as captives of ‘bad luck or poor choice’. They also simplify the varying levels of deception, coercion, illegality, and consent that sometimes occur over the course of someone being trafficked.⁸

Jacqueline Berman discusses victim narratives in the context of the state re-establishing its sovereignty in the midst of neoliberal globalisation. The women in these representations are victims, and criminalisation of their movement is the only avenue available to prevent the violation of women’s ‘sovereign bodies... and the sovereign spaces of the nation-state’.⁹ In the EU, victimhood narratives create the notion that European governments can differentiate between Eastern European non-citizens and Western European citizens and decide who belongs within the community. Such narratives are indicative of a crisis over boundaries, where ‘regional integration, immigration, new forms of capital circulation... forge the appearance of a loss of individual and national control over the parameters of everyday life’.¹⁰ As Berman points out, the problem of people

⁷ J Berman, ‘(Un)Popular Strangers and Crises Unbounded’.

⁸ J Berman, ‘Biopolitical Management, Economic Calculation and Trafficked Women’, *International Migration*, vol. 48, no. 4, 2010, pp. 93–94.

⁹ J Berman, ‘(Un)Popular Strangers and Crises Unbounded’, pp. 41.

¹⁰ *Ibid.*, 49.

illegally crossing borders to earn untaxed income through their sexuality compels the state to reinforce its control of cross-border movement through discourses of population management.¹¹ Furthermore, the borders of nearby non-member states are understood as sites of crime,¹² often in need of ‘expert’ international administration.¹³

A Brief History of Trafficking and International Administration in Albania

During the 1990s, the Balkans became defined as a space of regional insecurity that required international intervention and expertise.¹⁴ In 1991, Albania’s isolated, authoritarian regime had been replaced with a comparatively democratic government. The concurrent mass migration, mostly to Italy and Greece, led to crises in Albania and the receiving countries.¹⁵ In 1992 the IOM established a small office in Tirana, and the following year Albania became a full IOM member state.¹⁶ Major international intervention occurred during the 1997 ‘pyramid crisis’. Generally unfamiliar with market economies and with few banks in the country, Albanians sold off their homes and livestock to invest in funds and companies offering returns so high that they exceeded their assets, rendering them insolvent. When these pyramid schemes collapsed, 300,000 Albanians lost their personal funds. The ruling Democratic Party’s collusion with the schemes stoked mass

¹¹ *Ibid.*, 63.

¹² C Aradau, ‘The Perverse Politics of Four-Letter Words: Risk and pity in the securitisation of human trafficking’, *Millennium-Journal of International Studies*, vol. 33, no. 2, 2004, pp. 251–277.

¹³ R Andrijasevic and W Walters, ‘The International Organization for Migration and the International Government of Borders’, *Environment and Society D: Society and space*, vol. 26, no. 6, 2010, pp. 977–999.

¹⁴ M Merlingen, ‘Governmentality: Towards a Foucauldian framework for the study of IGOs’, *Cooperation and Conflict*, vol. 38, no. 4, 2003, pp. 372–373.

¹⁵ S Dana, T Grazhdani, and A Elbasani. ‘Migration, Return and Readmission Agreements’ in C Mackenzie (ed.), *Return and Readmission: The case of Albania*, International Organization for Migration, Tirana, 2006, pp. 8–9.

¹⁶ International Organization for Migration Tirana, ‘What We Do’, 2007, retrieved 14 August 2013, http://www.albania.iom.int/en/what_we_do.pdf.

unrest, and the state and military effectively dissolved as armed gangs took control of large portions of the country. Nearly 2000 people were killed in the civil strife and about half the country faced extreme poverty.¹⁷ In response, the OSCE established a presence in the country. Around the same time, the conflict in neighbouring Kosovo increased the IOM's presence.¹⁸ Presently, the OSCE and IOM programmes in Albania often collaborate in developing institutional structures and bringing them into harmony with the regional European institutions.¹⁹

Poverty, state collapse, and newfound potential for mobility contributed to what intergovernmental and UN agencies estimate as the trafficking of 100,000 Albanian women and girls.²⁰ The port cities of Vlorë and Durrës provided access to Italy via speedboat, and the mountains separating Albania and Greece served as trafficking hubs from where Moldovans and Romanians were sent to Western Europe and Kosovo.²¹

The Albanian government first substantively addressed human trafficking in 1998 when the Ministry of Interior established an Anti-Trafficking Task Force. The Task Force deployed anti-trafficking police units at all airports and border crossings and equipped each police chief with an anti-trafficking unit. Little protection was granted to victims detected by the expanded

¹⁷ C Jarvis, 'The Rise and Fall of Albania's Pyramid Schemes', *Finance and Development*, vol. 37, no. 1, 2000, retrieved 25 June 2013, <http://www.imf.org/external/pubs/ft/fandd/2000/03/jarvis.htm>.

¹⁸ Organization for Security and Co-operation in Europe Presence in Albania, 'Overview', retrieved 18 March 2013, <http://www.osce.org/albania/43312>; International Organisation for Migration Tirana, 'What We Do', 2007, retrieved 18 March 2013, http://www.albania.iom.int/en/what_we_do.pdf. On migration to Greece and Italy, see: World Bank, *Albania: Urban growth, migration and poverty reduction report*, 2007, p. 1.

¹⁹ M Merlingen, 'Governmentality: Towards a Foucauldian framework for the study of IGOs', pp. 364–366; and R Andrijasevic and W Walters, 'The International Organization for Migration', pp. 991–93.

²⁰ The 100,000 estimate was taken up by the influential UNICEF-UNOHCHR-OSCE-ODIHR report, *Trafficking in Human Beings in Southeastern Europe*, 2002, p. 125. While these figures are often used in the discussion of trafficking in Albania, information on trafficking in the 1990s is scant. See: Vatra Psycho-social centre, *The Evolution of Trafficking in Human Beings, 2002-2009*, 2010, p. 10.

²¹ V Hysi, 'Human Trafficking and Democratic Transition in Albania' in H Friman, *et al.* (eds.), *Human Trafficking, Human Security and the Balkans*, University of Pittsburgh Press, Pittsburgh, 2007, pp. 98–101.

police efforts.²² It was not until 2001 that the Albanian criminal code explicitly addressed the smuggling of human beings, the trafficking of women for sexual exploitation, and the trafficking of children as distinct offences. A year later, the country ratified the United Nations Convention against Transnational Organized Crime and its Trafficking Protocol, which broadly links trafficking to coercion, fraud, and deception.²³ These early changes may have helped facilitate international cooperation and develop a nascent legal structure, but comprehensive institutional reforms have been limited.²⁴

Governing Borders and Identifying Victims

The development of institutional structures came mostly from international organisations encouraging Albania to adopt regional norms. Indeed, the IOM's presence in Albania is primarily to help the state meet the EU *acquis* on migration.²⁵ Its Agenda of Migration Management encourages states to shape policies that allow for expanded avenues of legal migration, the logic being that increased legal migration will decrease reliance on traffickers. While a progressive step, the Agenda also reinforces the regulatory aspects of the border that respond more to demands for border security and knowledge procurement than to the needs of migrants. It calls for cooperation between government intelligence and immigration ministries, centralised databases of biometric data and visa information, body scanners, and biometric screening of travellers.²⁶

²² *Ibid.*, pp. 108–9.

²³ For a critique of the Convention and its Protocols, see: B Sullivan, 'Trafficking in Women: Feminism and New International Law', *International Feminist Journal of Politics*, vol. 5, no. 1, 2003, pp. 67–91; and J Doezema, 'Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol', *Gender and Development*, vol. 5, no. 1, 2002, pp. 20–27. For a survey of contesting and competing definitions of human trafficking, see: Chapter 1, 'Contested Definitions of Human Trafficking' in M Lee, *Trafficking and Global Crime Control*, Sage Publications, London, 2011, pp. 15–36.

²⁴ Hysi, 'Human Trafficking and Democratic Transition in Albania', p. 106.

²⁵ International Organization for Migration, 'Where We Work', retrieved 10 March 2013, <http://www.iom.int/cms/en/sites/iom/home/where-we-work/europa/south-eastern-europe-eastern-eur/albania.html>.

²⁶ J Berman, 'Biopolitical Management', pp. 100–101.

The OSCE's goal is to build a liberal security community.²⁷ Its presence and membership provides states with the sort of legitimacy that comes with 'acting in accordance with international standards of proper behaviour', bringing the Central and Eastern European members of the OSCE closer to the standards of the EU.²⁸ In Albania, it promotes democratisation, rule of law, and human rights and aims to conform institutions to regional standards.²⁹ These standards associate trafficking with undocumented migration and organised crime, which in turn help create degrees of differentiated mobility between EU members, EU candidates and non-candidate states.³⁰ In other words, the OSCE assists in foisting the EU's border security and migration management techniques onto non-candidates, essentially creating the groundwork for the inclusions and exclusions that make up governance in the EU.

The OSCE's anti-trafficking policy encourages all member states to develop a National Referral Mechanism (NRM), a co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, coordinating their efforts in a strategic

²⁷ E Adler, 'Seeds of Peaceful Change; the OSCE's security community-building model' in E Adler and M Barnett (eds.), *Security Communities*, Cambridge University Press, Cambridge, 1998, pp. 119–160.

²⁸ M Merlingen, 'Governmentality: Towards a Foucauldian framework for the study of IGOs', pp. 364–365.

²⁹ Organization for Security and Co-operation in Europe Presence in Albania 'Overview', retrieved 18 March 2013, <http://www.osce.org/albania/43312>. On regional standards, see: Adler, pp. 126–131.

³⁰ R Andrijasevic, 'The Difference Borders Make', *Migration, Agency, and Citizenship in Sex Trafficking*, Palgrave Macmillan, New York, 2010; and 'Problematizing Trafficking for the Sex Sector: A case of Eastern European women in the EU' in S van Walsung and T Spijkerboer (eds.), *Women and Immigration Law: New variations on classical feminist themes*, Glasshouse Press, UK, 2007, pp. 86–103. See also S Mezzadra, 'Citizen and Subject: A postcolonial constitution for the European Union?', *Situations: Project of the radical imagination*, vol. 1, no. 2, 2006, pp. 31–42; E Rigo, 'Citizens and Foreigners in the Enlarged Europe' in W Sadurski, A Czarnota and M Krygier (eds.) *Spreading Democracy and the Rule of Law?: The impact of EU enlargement on the rule of law, democracy and constitutionalism in post-communist legal orders*, Springer, The Netherlands, 2006, pp. 97–119; V Squire, *The Exclusionary Politics of Asylum*; and W Walters and J Haahr, *Governing Europe: Discourse, governmentality, and European integrations*, Routledge, New York, 2005, pp. 91–113. For a short history of Albania's EU application process, see: European Commission, 'Enlargement', retrieved 17 April 2013, <http://ec.europa.eu/enlargement/countries/detailed-country-information/albania/>.

partnership with civil society. It is designed to fit the specific needs of the implementing country, to bridge the space between government agencies and civil society, and to fix the fissures between a ‘human rights’ based approach that encourages victim rehabilitation and reintegration, and a state-centric ‘law enforcement based approach’. Protecting the rights of trafficking victims is foremost in the NRM, and the OSCE encourages a broad definition of trafficking based on coercion and deception in order to handle emergent forms of trafficking and identify likely victims.³¹ By tying the standards of democratisation with identification of trafficking victims, the NRM encourages a project that strengthens the bonds between state and civil society while encouraging regional norms.³²

Before implementing the NRM, the OSCE started the Women’s Rights and Anti-Trafficking Education (WRATE) programme. WRATE was designed to direct Albanian civil society’s attention to trafficking and strengthen NGOs. While raising awareness of the rights of women and ‘at risk groups’ such as Roma, WRATE also sensitised civil society to a victim population that was impoverished, provincial, and largely female.³³

Following WRATE, the NRM was implemented and further institutionalised in a set of standard operating procedures. These procedures, developed with input from the IOM, the Albanian government, police, and local NGOs, provide a framework with which to recognise, shape, and monitor a victim population. The Ministry of Interior’s 2010 report highlights the central role victim identification plays in anti-trafficking initiatives. In fact, the publication claims that

³¹ OSCE/ODIHR, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons - A Practical Handbook*, 2004, pp. 11–28.

³² The entities working on the NRM are the General Directorate of State Police, the Ministries of Labour, Social Affairs and Equal Opportunities, and Foreign Affairs, IOM, the National Reception Centre for Victims of Trafficking in Tirana, and the NGOs Vatra, Another Vision, Different and Equal, and ARSIS.

³³ UNICEF-UNOHCHR-OSCE-ODIHR, *Trafficking in Human Beings in Southeastern Europe*, 2002, p. 133. See also OSCE Presence in Albania, ‘Opening address of Head of the OSCE Presence in Albania, Ambassador Osmo Lipponen, at the evaluation meeting of the Women’s Rights and Anti-Trafficking Education (WRATE) project,’ 23 January 2003.

identification is the ‘most important phase of the process of protection and assistance’ and that it saves the person from traffickers by placing ‘her in the hands of support communities’.³⁴ The use of ‘her’ is indicative of the gendered nature of the identification process.

According to the standard operating procedures, identification occurs in two steps. The initial identification is conducted by police who are partly trained by the IOM and OSCE,³⁵ and involves assessing the person’s situation vis-à-vis trafficking indicators and informing the person of their rights and of the assistance available to victims or potential victims of trafficking. The indicators are broad; they include: ‘the adult informs that he/she has been misused, abused, threatened, or exploited and is satisfied to have contact with authorities’, ‘the adult does not have identification or travel documents’, ‘the adult who was promised work, education, marriage, etc. does not know how to explain the circumstances’, ‘the adult is scared or unsatisfied to have come into contact with the authorities’, ‘the adult declares to have no contact with his/her family’.³⁶

Following initial identification, an interview is carried out by state police officers and social workers. The interviewee is presented a form stating the information he or she provides will be used as impersonalised data for ‘purposes of research that contribute to the fight against exploitation and trafficking in persons’. The standard operating procedures then suggest the interviewer elicit responses from the interviewee about the ‘exploitation or intended exploitation’ and ‘abusive means of control’ they have faced, as well as provide information on their families and work histories.³⁷ The conclusion of the form

³⁴ Republic of Albania, Ministry of Interior, Office of the National Coordinator on Combating Trafficking in Persons, *Report for the Implementation of the National Strategy for the Fight Against the Trafficking in Human Beings: January-December 2010*, p. 15.

³⁵ UNICEF-UNOHCHR-OSCE-ODIHR, *Trafficking in Human Beings*, p. 136.

³⁶ Republic of Albania, Ministry of Interior, Office of the National Coordinator on Combating Trafficking in Persons, *Standard Operating Procedures for the Identification and Referral of Victims of Trafficking and Potential Victims of Trafficking*, 2011, pp. 27–28

³⁷ *Ibid.*, pp. 92–93.

limits the interviewee's status to either: 'A. Victim of Trafficking', 'B. Potential Victim of Trafficking', 'C. Person in need of help',³⁸ effectively framing the person attempting to legitimately or illegitimately cross the border as not acting in his or her own best interests. This data-gathering process effectively shapes interviewees into a population comprised of women from families with 'severe social and economic problems, divorced parents, [and] serious economic constraints'.³⁹ As a result, they are depicted as doubly victimised, both by being deceived or forced into being trafficked and by being born into poverty.⁴⁰

Such narratives bleed into the work of local NGOs, which frequently find themselves taking up EU countries' policies of outlawing prostitution, penalising sex workers and propagating the EU's layers of differential citizenship.⁴¹ Some of these NGOs go so far as to claim there is no such thing as uncoerced sex work, which they refer to as 'at will' or 'voluntary' trafficking, noting that poverty pushes women into sex work, 'not the will to have sex or to consider it as a possible profession'.⁴² Indeed, under Albanian law, prostitution is a crime 'against morality and dignity' and is punishable by up to three years in prison.⁴³ Victims of trafficking, on the other hand, are not 'punished for their actions while in the course of trafficking'.⁴⁴

³⁸ *Ibid.*, pp. 68, 75.

³⁹ Republic of Albania, Ministry of Interior, Office of the National Coordinator on Combating Trafficking in Persons, *Report for the Implementation of the National Strategy for the Fight Against the Trafficking in Human Beings: January-December 2010*, p. 23.

⁴⁰ C Aradau, p. 272.

⁴¹ B Anderson and R Andrijasevic, 'Sex, Slaves and Citizens: The politics of anti-trafficking', *Soundings*, vol. 40, 2008, p. 139.

⁴² Vatra Psycho-social Centre, *Annual Report 2009, 2010*, p. 29. See also pp. 51–52.

⁴³ Republic of Albania Legal Code Section VIII, Article 113 cited in S Schwandner-Sievers, 'Between Social Opprobrium and Repeat Trafficking: Chances and choices of Albanian women deported from the UK' in L Holmes (ed.), *Trafficking and Human Rights: European and Asian perspectives*, Edward Elgar Publishing Inc., Northampton, 2010, p. 107.

⁴⁴ Republic of Albania, Ministry of Interior, Office of the National Coordinator on Combating Trafficking in Persons, *Report for the Implementation of the National Strategy for the Fight Against the Trafficking in Human Beings: January-December 2010*, p. 19.

Internal Trafficking

Albania is no longer a transit point for human trafficking, but it remains a source,⁴⁵ meaning much of the above discussion is in regard to the movement of Albanians out of the country. That said, internal trafficking has begun to gain attention from the government and NGOs.

Internal trafficking in Albania first received attention in 2005 when the NGO Vatra published a report exposing a national network where women from north Albania were trafficked to the south and central parts of the country, while those from the southern and central regions were trafficked to Tirana, Vlorë, and Durrës.⁴⁶ Internal trafficking lacks a standard definition in Albanian law, but it is often viewed as synonymous with prostitution.⁴⁷ The distinction between a sex worker and someone who had been internally trafficked lies in the attribution of victimhood to some and punishment for those who would consent to engage in what the law understands to be acts against morality and dignity. Since the organisations shaping national anti-trafficking initiatives link victimhood to international migration, border and international migration specific identification methods play a key role in defining who is being trafficked. As such, women moving outside the country to engage in sex work are victims lacking in agency, while those engaging in sex work inside the country are understood to be engaging in crimes ‘against morality and dignity’.

⁴⁵ Republic of Albania, Ministry of Interior, Office of the National Coordinator on Combating Trafficking in Persons, *National Strategy on Combating Trafficking in Persons, 2008-2010*, p. 4.

⁴⁶ Vatra Psycho-social Centre, *Annual Report 2009, 2010*, pp. 20–22.

⁴⁷ Republic of Albania Legal Code Section VIII, Article 113 cited in S Schwandner-Sievers, p. 107.

Border Policy and the State

As Walters and Haahr point out, the process of adopting the EU's *acquis* on migration encourages pre-accession and acceding countries to contribute to the EU's internal security and defend against transnational threats by reinforcing control over their borders, regulating the cross-border movement of citizens, and punishing those who facilitate illegal migration, as well as by harmonising relationships with border police of nearby EU member and non-member states.⁴⁸ These processes encourage victim identification and reintegration, which, as I show below, push those who might clandestinely re-migrate and/or engage in sex work into more sedentary and legal labour.

This is very much the case in Albania, where the methods used to rehabilitate and reintegrate victims of trafficking can be seen as a way of managing poverty by providing victims with legal work that is viewed as legitimate and purportedly encouraging of 'responsibility'.⁴⁹ In accordance with the NRM, identified victims are referred to rehabilitation and reintegration organisations that often depict trafficking strictly as a crime of violence, coercion, and deception, perpetuating the victim narrative. Rehabilitation centres help victims overcome their psychological and physical problems and rebuild relationships with their families, offer them job training courses, and support them in opening small businesses.⁵⁰

The reintegration process varies by centre, but only slightly. At the NGO Different and Equal, reintegration occurs in three phases. The first phase involves providing the victim with accommodation, health support, and vocational training in cooking or tailoring. Once the victim is deemed responsible, she might start a job outside the shelter. Concurrent 'psycho-

⁴⁸ W Walters and J Haahr, *Governing Europe*, p. 98, 105.

⁴⁹ OSCE / Different and Equal, *Study on the Social Economic Reintegration of Victims of Trafficking in Albania*, 2009, pp. 48–54.

⁵⁰ Different and Equal, *Annual Report 2010, 2011*, p. 7.

social support' is geared towards building self-esteem and 'motivation in job performance'. Efforts are made to improve family relationships through mediated phone calls and face-to-face meetings. The second phase prepares the victim for independent living in rented apartments. She also receives training to work other gendered jobs such as a hairdresser or housekeeper, and counselling designed to develop a stable partnership. The final stage is dedicated to empowerment and ultimately a 'totally independent life' predicated upon a stable relationship leading to the 'decision to get married and have children' and a stable, yet often poorly paid, job.⁵¹

In order to understand how this fits into control and government of borders, it is helpful to consider the 19th century problem of pauperism. The discursive similarities between the pauper and the victim of trafficking are striking. In Albania, victim profiles hinge on poor financial conditions, lack of education and absent or abusive families.⁵² Similarly, paupers were the absolute poor, owning nothing and seemingly connected to no one. They represented fluidity, mobility, and promiscuity. They were ignorant and defiant of social norms and represented antisocial difference. Around pauperism, there was a 'grafting of morality on to economics' that opened up the 'political problem' of poverty to the management of the state and civil society. In the shadow of the emerging modern liberal state, interventions aimed at eliminating the perceived social danger of itinerancy involved fostering responsibility, property ownership, and traditional family ties.⁵³

The border identification methods encouraged by the IOM and OSCE and the rehabilitation methods that they encourage in local NGOs effectively turn the government of the border into the government of a population within the state. Regardless of

⁵¹ OSCE / Different and Equal, *Study on the Social Economic Reintegration of Victims of Trafficking in Albania*, 2009, p. 40–54.

⁵² *Ibid.*, p. 8. Echoed in Vatra's *The Evolution of Trafficking in Human Beings 2002-2009*, 2010, p. 24.

⁵³ G Procacci, 'Social Economy and the Government of Poverty' in G Burchell, et al. (eds.), *The Foucault Effect: Studies in governmentality*, University of Chicago Press, Chicago, 1991, pp. 151–68.

whether the rehabilitation programmes curb trafficking or the need to illegally cross borders, their very existence provides a semblance of security by encouraging employment and fostering the family ties that victims of trafficking are understood to lack. These characteristics are ostensibly the characteristics of citizens of a modern, liberal state.

Indeed, borders do not simply limit sovereignty. They are sites that profoundly influence the inner workings of states by shaping our understanding of the people who pass through them. In regard to human trafficking, borders aid in producing narratives of victimhood that place a premium on the violent and exploitative aspects of trafficking, while ignoring the agency of the people being trafficked. In doing so, they encourage differing degrees of mobility, legality, and citizenship and can, in fact, do a disservice to those compelled to migrate in order to fulfil an economic need.

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Immigration Policy Reform in the United States: Reframing the enforcement discourse to fight human trafficking and promote shared prosperity

Ana Avendaño and Charlie Fanning¹

Abstract

At the time of this writing, the United States Senate has passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744). The bill is the product of countless political compromises and would significantly transform the U.S. immigration system. This paper explores shortcomings in U.S. immigration policy, deconstructs provisions in the bill, and makes policy proposals that would protect and empower migrants who interface with the U.S. immigration system in dangerous and under-regulated environments at the border and in sending communities, in labour recruitment networks, and in the U.S. workforce. Ultimately, the paper seeks to continue an ongoing conversation that challenges the criminalisation of migration which perpetuates vulnerability, and instead forwards rights-based policies that would promote shared prosperity.

Key Words: immigration reform, labour, human trafficking, enforcement, migrant protections

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Since 1997, over 1,000 people have been freed from conditions of forced labour and debt bondage, forms of human trafficking, in the tomato fields of southern Florida.² Ricardo, a migrant worker who was forced to live in the back of a locked van, was among these trafficked workers. He was working off the debt he owed to his employer from an international labour contractor and punitive costs for living expenses. After more than a year, he escaped through a ventilation hatch in the vehicle. According to the Coalition of Immokalee Workers (CIW)—a community-based organisation of approximately 4,000, mainly immigrant, members, in Florida's agricultural regions—the suffering of Ricardo and others allowed consumers to purchase tomatoes at US\$2 a pound in the supermarket. The average worker earns about 45 cents for a 32-pound bucket and many earn less.³

The CIW has won notable gains through innovative organising strategies, but the structural economic and political forces that encourage this kind of exploitation extend far beyond the picking fields of Florida. Cross-border trafficking for the purposes of sexual and labour exploitation is very much linked to structural trends related to globalisation, inequality, and trade integration.⁴ Many violations stem from the convergence of the growing trend of international migration, the growth

² R Patel, 'Supermarkets Must Take Stand Against Slave Conditions for Tomato Pickers', *Tampa Bay Times*, 16 February 2010.

³ Coalition of Immokalee Workers, 'About CIW', 2012, <http://www.ciw-online.org/about.html>.

⁴ See: Global Alliance Against Traffic in Women, 'Beyond Borders: Exploring Links between Trafficking, Globalisation, and Security', GAATW Working Papers Series, 2010, pp. 5–6.

of largely unregulated international labour recruitment networks, and the emphasis of the global economy on cheap labour costs.⁵ From forced sweatshop labour in Southeast Asia, to indentured servitude in isolated U.S. worksites, 'layers of small-time labor procurers and contractors who work for what appear to be respectable business people who, in turn, work for others in a chain that often leads to multinational corporations'.⁶ These layers of subcontracting often protect those on top who profit from trafficking for labour exploitation from culpability, while those at the bottom exist in an underground, under-regulated environment. In the U.S., this is further reinforced by lax enforcement of labour protections and a dysfunctional immigration system that limits labour mobility.

In the U.S. debate around immigration policy, however, lawmakers tend to conceive of anti-trafficking protections as a segmented issue within the overall immigration system, instead of incorporating them into an overall frame that recognises the interplay between work, migration and exploited populations. This is especially true on the issue of border controls, where a 'law and order' narrative on border security dominates the U.S. political discourse.

Scholars have recognised the limitations of efforts to eliminate trafficking that are based on a high degree of regulation and criminalisation of cross-border movement.⁷ When the state forwards a dual mandate for enforcement agencies of restricting immigration and fighting human trafficking, it implicates itself

⁵ The total number of international migrants has been increasing in recent years. In 2005, there were an estimated 191 million migrants in the world, compared to 214 million in 2010. See: International Organization on Migration, *World Migration Report 2011: Communicating effectively about migration*, July 2011, p. 49, accessed from http://publications.iom.int/bookstore/index.php?main_page=product_info&products_id=752.

⁶ J Gray Pope, 'A Free Labor Approach to Human Trafficking', *University of Pennsylvania Law Review*, vol. 158, 2010, p. 1856.

⁷ J Chacon, 'Tensions and Trade-offs: Protecting trafficking victims in the era of immigration enforcement', *University of Pennsylvania Law Review*, vol. 158, 2010, p. 1615.

in producing vulnerability.⁸ The enforcement of immigration laws often competes with the goal of preventing human trafficking by criminalising migration and marginalising migrant communities from protections. Even when migrants enter the U.S. with work authorisation, immigration policies produce similar vulnerability by tying immigration status to a single employer. Thus, some have advocated for a ‘free labour’ approach to combat human trafficking, whereby policies that facilitate mobility and empower workers should be encouraged over strict enforcement mechanisms.⁹ In the current U.S. political context, it is worth revisiting the conversation on delinking enforcement from protections and challenging the discourse of migrant criminality that perpetuates misguided policies.¹⁰

At the time of this writing (July 2013), the U.S. Senate has passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) in a 68-32 vote. The much-awaited bill is the product of countless political compromises from many diverse groups, and although far from perfect, it is a significant improvement from previous attempts at immigration policy reform. Most notably, the bill codifies a roadmap to citizenship for a majority of the more than 11 million undocumented immigrants currently living in the U.S. It also includes important language on foreign labour contractors which requires they register with the Department of Labour (DOL), requires employers notify the DOL when using a foreign labour contractor, bans recruitment fees, and mandates contractors pay a bond to cover legal claims against the recruiter.

However, Democratic lawmakers conceded an amendment to the bill that dramatically increased funding for border security in order to gain Republican support.¹¹ The bill now mandates

⁸ B Anderson, ‘Where’s the Harm in That? Immigration enforcement, trafficking, and the protection of migrants’ rights’, *American Behavioral Scientist*, vol. 56, no. 9, September 2012.

⁹ See: J Gray Pope, ‘A Free Labor Approach to Human Trafficking’, *University of Pennsylvania Law Review*, 2010.

¹⁰ See: J Chacon, ‘Tensions and Trade-offs’, 1628.

¹¹ Known as the Corker-Hoeven Amendment.

the Secretary of Homeland Security implement a 'comprehensive southern border security strategy' before undocumented immigrants who earn provisional status under the bill are able to apply for citizenship. The strategy calls for an increase in the number of Customs and Border Patrol (CBP) agents by 20,000 (doubling the current number of agents), mandates the construction of 700 miles of fencing along the U.S.-Mexico border, funds the installation of camera systems, surveillance towers, and ground sensors among other security measures. Additionally, it requires all employers to use an electronic system of employment verification to block undocumented immigrants from working in the U.S. and an entry-exit verification system at every air and sea port. In seeking to win the support of his fellow Republicans, pro-reform Senator John McCain of Arizona assured sceptics that 'we'll be the most militarized border since the fall of the Berlin Wall'.¹² In order to become law, the bill will need to be voted on in the more conservative House of Representatives, where its fate is uncertain.

In this important political moment, anti-trafficking, labour, and migrant rights advocates must continue to forward a shared analysis of comprehensive policy proposals that empower migrants and challenge the current enforcement framework. The foreign labour contractor provision in the bill was forwarded by a diverse group of mostly U.S.-based labour and anti-trafficking groups—many in the International Labour Recruitment Working Group (ILRWG) and the Alliance to End Slavery and Trafficking (ATEST)—who worked closely with legislators to get strong recruitment regulations included in the bill.¹³ Yet, with the last-minute addition of strict

¹² D Strauss, 'Sen. McCain: US will have "most militarized" border since Berlin Wall', *The Hill*, 25 June 2013.

¹³ The Alliance to End Slavery and Trafficking (ATEST) is a coalition of U.S.-based human rights organisations working to end modern-day slavery and human trafficking; ATEST members include: the Coalition of Immokalee Workers (CIW), Coalition to Abolish Slavery & Trafficking (CAST), End Child Prostitution and Trafficking - USA (ECPAT-USA), Free the Slaves, International Justice Mission (IJM), Not For Sale Campaign, Polaris Project, Safe Horizon, Solidarity Center, Verité, Vital Voices Global Partnership, World Vision, and former U.N. Goodwill

enforcement language and the possibility that policy proposals will move further to the political right, other aspects of the immigration system may continue to put migrants at risk. Regardless of whether the bill passes, the growing focus on halting irregular migration, preventing access to work, and enforcing the temporary status of migrant workers will continue to remain a large part of the discourse. In order for the U.S. government to more effectively prevent human trafficking and get optimal societal outcomes from immigration, a stringent ‘law and order’ approach needs to be replaced with policies that both improve the proposed bill and create pathways to prosperous and fair working conditions.

This paper will attempt to continue a conversation on shifting the enforcement narrative in the U.S. by borrowing a key paradigm of the anti-trafficking community—the four Ps: prevention, protection of victims, prosecution of traffickers,¹⁴ and partnership as a framework to combat trafficking in persons.¹⁵ In the following sections, we will explore current shortcomings in immigration policy, provisions in the bill, and policy proposals that reflect this frame to protect and empower migrants at the border, in migrant origin communities, in international labour recruitment networks and in temporary worker programmes.

Ambassador Julia Ormond. The ILRWG is the first coordinated effort to strategically address abuses in international labour recruitment across visa categories; its members include: the AFL-CIO, the American Federation of Teachers, Centro de los Derechos del Migrante, CAST, the Department for Professional Employees, Economic Policy Institute, Farm Labour Organizing Committee, Farm Worker Justice, Global Workers Justice Alliance, National Domestic Workers Alliance, National Employment Law Project, National Guestworker Alliance, Safe Horizon, SEIU, the Solidarity Center, the Southern Poverty Law Center, Unite-Here, Verite, Free the Slaves, Polaris Project, and Vital Voices.

¹⁴ ‘Prosecution’ should be broadened to encompass the promotion of ‘rule of law’ so that law enforcement professionals are trained to identify victims of trafficking and victims are aware of their rights under the law. See: American Bar Association, Rule of Law Initiative, http://www.americanbar.org/advocacy/rule_of_law.html.

¹⁵ See: ‘Four “Ps”’: Prevention, Protection, Prosecution, Partnerships’, U.S. Dept. of State, retrieved July 2013, <http://www.state.gov/j/tip/4p/index.htm>.

Preventing Human Trafficking and Empowering Migrants across the U.S.-Mexico Border

The proposed increased militarisation of the U.S.-Mexico border—at an estimated cost of over 30 billion dollars over 10 years—comes despite the fact that CBP’s budget has been dramatically expanding for years and does little to protect migrants, prevent trafficking, or build partnerships that empower migrants. In 2011, CBP’s budget, in inflation-adjusted dollars, grew by 102 per cent since 2005 and 579 per cent since 1992. Additionally, the number of CBP agents has grown five-fold in the last decade.¹⁶ Ramped up border enforcement has come at a high human cost. Migrants must take increasingly remote routes across the border, as barriers and enforcement close off safer and well-travelled options. Since 1994, more than 5,600 unauthorised migrants have died in the desert in unsafe crossings,¹⁷ and at least 18 individuals have died since January 2010 as a result of ‘alleged excessive use of force by [CBP] officials’.¹⁸

Additionally, many express concerns that tight border controls make it difficult for asylum seekers to enter, thereby fuelling an underground economy in human smuggling and trafficking. Cross-border mobility becomes a business when legal migration is impossible. It is estimated that international human trafficking is a 32 billion dollar a year industry; however, its hidden nature

¹⁶ A Isacson and M Meyer, *Beyond the Border Buildup: Security and migrants along the US-Mexico border*, Washington Office on Latin America, April 2012, http://justf.org/files/Beyond_the_Border_Buildup_hires.pdf; GAO-12-106R: Border Security Fencing, Infrastructure, and Technology Fiscal Year 2011 Expenditure Plan, 14, retrieved July 2013, <http://www.gao.gov/assets/590/586348.pdf>.

¹⁷ ‘Human Rights Violations on the United States-Mexico Border’, ACLU Statement submitted to the UN High Commissioner for Human Rights, 25 October 2012, retrieved August 2013, http://www.aclu.org/files/assets/121024_aclu_written_statement_ochcr_side_event_10_25_12_final.pdf.

¹⁸ ACLU, ‘United States’ Compliance with the International Covenant on Civil and Political Rights’, Testimony to 107th Session of the Human Rights Committee, Geneva, 10 December 2012, p. 11.

makes it difficult to investigate and gather reliable data.¹⁹

The need for these dramatic increases in border security funding is not justified by facts on the ground. Net migration from Mexico is now zero or slightly negative.²⁰ Additionally, border communities in California, Arizona, New Mexico, and Texas, including major cities such as San Diego and El Paso, are among the safest in the country, with crime rates associated with breaking and entering, trespassing, and car theft well below the national average.²¹ Many migration advocates and thinkers have proposed that a policy of ‘no borders’ and freedom of mobility would better promote the human rights of migrants. While this could be the case, in the U.S. political context, border controls will continue for the foreseeable future and will likely become more strident.²² Despite its harmful provisions, S. 744 has some bright spots related to border controls. One thousand emergency stations would be established where migrant deaths occur most frequently. Independent child welfare professionals would be placed in border patrol stations to provide basic humanitarian assistance to unaccompanied children, and ensure the appropriate screening to identify victims of human trafficking.²³ For the first time, the Department of Homeland Security (DHS, the department that houses the CBP) would be required to issue policies governing the use of force by personnel along with a complaint process for dealing with

¹⁹ A Pécoud and P de Guchteneire, ‘International Migration, Border Controls, and Human Rights: Assessing the relevance of a right to mobility’, *Journal of Borderlands Studies*, vol. 21, no.1, Spring 2008, p. 72; Polaris Project, ‘Human Trafficking Statistics’, 2012, retrieved July 2013, <http://www.cicatelli.org/titlex/downloadable/Human%20Trafficking%20Statistics.pdf>.

²⁰ Southern Borders Communities Coalition, ‘Border Briefing: Why we need better borders, not more border enforcement’, February 2013, retrieved July 2013, <http://soboco.org/border-briefing-why-we-need-better-borders-not-more-border-enforcement/#note-885-3>.

²¹ *Ibid.*

²² For example, see: B Anderson, N Sharma and C Wright, ‘Editorial: Why No Borders?’ *Refuge*, vol. 26, no. 2, 2011.

²³ National Immigrant Justice Center, ‘The Good & Bad in S. 744: Border Security, Economic Competitiveness, and Immigration Modernization Act of 2013’, 2013, retrieved July 2013, http://www.immigrantjustice.org/immigrationreform/s744analysis#.UdwWfUGyD_I.

excessive use of force. Agents working within 100 miles of the U.S.-Mexico border must receive training on civil, constitutional, human, and privacy rights; use of force; screening of vulnerable migrants; cultural and social sensitivity of border communities; impact on border communities; and environmental concerns.²⁴ The bill also includes training for Border Community Liaison Officers to foster relationships, consult with and receive performance assessments from border communities.²⁵

Before the passing of this new bill, the CBP has already dedicated an office to human trafficking, coordinated training for agents in the field to recognise trafficking victims, and pursued public education efforts like the ‘No Te Engañes/Don’t Be Fooled’ campaign, which displays anti-trafficking ads in Mexico and Central America and at border crossing stations.²⁶ This initiative is part of the ‘Blue Campaign’ in which DHS engages its various agencies, law enforcement, NGOs, and the private sector in an effort to combat human trafficking. DHS agencies also produce training and informational campaign material, provide victim assistance and conduct investigative efforts, and establish partnerships, outreach, and online resources.²⁷

Similarly, the U.S. government offers an information pamphlet to applicants for temporary visa programmes in the U.S. that contains information about U.S. labour rights, including the freedom of association and right to collective bargaining, as well as specific information about rights under the visa programmes. U.S. consular officials must confirm that the

²⁴ Section 1111 of the Senate bill.

²⁵ Section 1112 of the Senate bill.

²⁶ See: M Ahlers, ‘Dramatic TV Ads Sell Anti-Human Trafficking message: “Don’t Be Fooled”’, CNN, 20 June 2011, retrieved July 2013, <http://edition.cnn.com/2011/WORLD/americas/07/19/us.human.trafficking.campaign/index.html>.

²⁷ See: U.S. DHS, ‘Blue Campaign’, 2013, retrieved July 2013, <https://www.dhs.gov/blue-campaign/blue-campaign>.

applicant has received, read and understood the pamphlet.²⁸ The pamphlet directs workers who feel that their rights have been violated to contact one of two hotlines that assist victims of human trafficking.²⁹

While these are laudable efforts, they land far from the goal of delinking enforcement and controls from anti-trafficking efforts. Anti-trafficking programmes should aim to address the marginalisation of trafficked workers by creating processes for migrants to engage without the fear of enforcement. The Department of State (DOS) needs to expand its portfolio in this regard by increasing the number of labour officers and attachés in the field and expand site visits to labour recruitment centres. Its consulates should build partnerships through the engagement of Mexican institutions and civil society groups,³⁰ especially in border regions and communities with heavy migration. Because enforcement of rights-based policies largely depends on workers being able to report violations, these kinds of initiatives prevent abuse and protect migrants crossing the border.

In the next two sections, we will more explicitly explore policies and improvements to S. 744 related to the recruitment of workers from their home countries and legal temporary work programmes in the U.S.

²⁸ United States Department of State, 'Corrected Copy - Pamphlet and Training for the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008'.

²⁹ U.S. Department of State, 'Are You Coming to the United States Temporarily to Work or Study?' 2012, retrieved July 2013, http://travel.state.gov/visa/temp/pamphlet/pamphlet_4578.html.

³⁰ For example, the Centro de Los Derechos del Migrante, based in Mexico City, with offices in Baltimore, Oaxaca, and Zacatecas meets with more than 6,000 people in 23 states across Mexico to ensure that migrants know their rights before they cross the border, <http://www.cdmigrante.org/about-cdm/organizational-background-history/>.

Regulating International Labour Recruiters

Each year, hundreds of thousands of people are recruited from abroad under a vast array of temporary visas to work in a wide range of industries in the U.S. Regardless of their visa, internationally recruited workers face common patterns of abuse, including fraud, discrimination, economic coercion and, in some cases, human trafficking.³¹ Beginning in a migrant's home country, recruitment agencies, visa sponsors, or employers charge high rates, sometimes between US\$1,000 and US\$20,000 in legal and illegal fees, for securing employment-based visas. The industry ranges in scale from large, registered recruitment firms to diffuse networks of agents and subagents operating outside state regulatory regimes. Often, workers have to borrow money at predatory interest rates or mortgage their homes to pay the fees. This debt, coupled with the fact that guest workers are frequently housed in isolated labour camps and restricted to certain employers to maintain their immigration status, creates an environment where trafficking thrives.³²

S. 744 addresses many of these abuses in a subtitle that is specifically designed to prevent trafficking of internationally recruited workers (*Subtitle F: Prevention of Trafficking in Persons and Abuses Involving Workers Recruited Abroad*). Among other things, these provisions require transparency in the recruitment chain, including disclosure to workers of the terms and conditions of employment, a signed copy of the contract with the employer, the type of visa under which the worker will be employed, the existence of any labour disputes at the place of employment, as well as information on protections for victims of trafficking. The bill establishes a government complaint process and a right to bring a civil action after a third violation.³³ It also prohibits discrimination, including

³¹ See: International Labour Recruitment Working Group, 'The American Dream up for Sale: A blueprint for ending international labour recruitment abuse', January 2013, retrieved July 2013, <http://www.cdmigrante.org/wp-content/uploads/2013/02/Final-E-version-ILRWG-report2.pdf>.

³² *Ibid.*

³³ Section 3610.

blacklisting, and makes it unlawful for an employer or foreign labour contractor or agent to charge any fee (this includes visa fees, transportation fees, legal expenses, placement fees and other costs) to a worker for any foreign labour contracting activity. Because employers may use labour recruitment agencies to reduce their responsibility for the workers they employ, often ignoring the unscrupulous tactics used by recruiters, the bill expands liability to the ultimate employer; although these provisions are very weak if the employer used DOL-registered recruiters and can claim they were not acting in reckless disregard of the provisions.

If implemented, these provisions would offer significant protections for recruited foreign workers. Anti-trafficking advocates working on recruitment issues, including the authors of this paper and members of the ILRWG and ATEST, worked closely with legislators to get the regulatory language included in the bill. However, the bill has recruitment language that could be improved, especially as it relates to the J-1 Exchange Visitor Program.

There are 14 sub-categories of J-1 visas, covering a wide array of occupations. In terms of annual admissions, the J-1 programme is the largest U.S. guest worker programme. In 2010, the J-1 visa covered nearly 320,000 visitors. The summer, work, travel programme, the interns/trainees programme, and au pairs programme alone bring in more than 150,000 workers, more than the H-2B and H-2A visa programmes (for temporary and seasonal low-wage work or agricultural work, respectively) combined.³⁴ During Senate negotiations, the au pair agency lobby, summer camp operators, hotels and ‘cultural exchange’ groups worked to get an exemption for the J-1 visa programme, falsely claiming the law would move the J-1 visa into a work

³⁴ D Costa, EPI Briefing Paper: ‘Guest Worker Diplomacy: J Visas receive minimal oversight despite significant implications for the U.S. labour market’, Economic Policy Institute, July 14, 2011; U.S. Department of State, Bureau of Consular Affairs, ‘Exchange Visitor Visas’, 2011; ‘J-1 Visa: Basic facts and figures’, U.S. Department of State, retrieved July 2013, <http://j1visa.state.gov/basics/facts-and-figures/>.

visa category and that this would cause a substantial increase in fees to families and employers and perhaps even end the programme.³⁵ In reality, employers already pay thousands of dollars in fees to sponsor agencies to cover travel, visa processing, and a 'programme fee'. As these agencies also charge fees to the J-1 recipients to cover the exact same costs, they had a clear interest in protecting their profit margins.

In the end, J-1 visa holders came away with fewer protections in the bill than other recruited workers. While they will receive information on the terms and conditions of employment before they leave their home countries, have protection from retaliation and have the possibility of immigration relief for reporting recruitment abuse, they will still face recruitment fees, capped at the discretion of DOS. Fees are one of the main reasons workers are forced to stay in exploitative working conditions, some of which amount to debt bondage. Faced with the risk of having to return to their home countries in debt or with little salary to show for their efforts, recruited workers often feel they have no choice but to remain and endure the abusive working conditions. Despite its beginnings as a cultural exchange programme, J-1 workers have faced terrible working conditions. For instance, recently, student guest workers on J-1 visas walked out of three McDonald's restaurants in Pennsylvania after being forced to work shifts of up to 25 hours with no overtime pay, receiving inadequate housing, and being threatened with deportation when they raised concerns.³⁶

In order to protect internationally recruited workers and prevent human trafficking and other exploitation, it is essential that the prohibition on fees and other protections for recruited workers remain in the bill. Leaving an entire visa category out of these protections creates a perverse incentive for unscrupulous employers to mistreat workers under the programme without fear of punishment. Yet, the J-1 issue is

³⁵ See "Advocacy", The Alliance for International Educational and Cultural Exchange, retrieved July 2013, <http://capwiz.com/alliance-exchange/home/>.

³⁶ JJ Rosenbaum, 'No More Captive Workers', *Roll Call*, June 10, 2013, retrieved July 2013, http://www.rollcall.com/news/no_more_captive_workers_commentary-225472-1.html.

just one feature of the broader structural issues with U.S. temporary worker programmes that promote relationships of dependency between migrants and their employers and sponsors. To move the debate toward a rights-based frame, these issues must be addressed.

Rights-based Policies on Labour Migration

Unlike border controls, which conjure up images of walls and detention centres, temporary worker programmes are often considered with an international development lens. In the social sciences, international migration is often viewed as a ‘global flow’ driven by economic, social, and political forces that occur across borders.³⁷ In recent years, many scholars and advocates endorse some method of liberalising migration to spur development and meet the needs of transnational capital. For instance, the Global Forum on Migration and Development has served as a major hub of discussion on the issue of temporary circular migration and has moved governments to embrace labour market flexibility over rights protections.³⁸ In the US, the Migration Policy Institute has furthered the idea of ‘circular migration regimes’ (an approach that would allow migrants to repeatedly move across borders for employment) as a ‘triple-win’—that destination countries receive needed workers, origin countries receive development-friendly remittances, and migrants receive training and more ‘opportunities for safer, legal migration from the developing world’.³⁹

In U.S. policy, circular migration is reflected in temporary worker programmes. According to the ILO, ‘There are...few real

³⁷ M Teitelbaum, ‘The Role of the State in International Migration’, *The Brown Journal of World Affairs*, vol. 8, no. 2, 2002, p. 1.

³⁸ I Omelaniuk, *Global Perspectives on Migration and Development: GFMD Puerto Vallarta and beyond*, Springer Science, 2012, p. 9.

³⁹ D Agunias and K Newland, ‘Circular Migration and Development: Trends, policy routes, and ways forward’, Migration Policy Institute, April 2007, p. 2, retrieved July 2013, http://www.migrationpolicy.org/pubs/migdevpb_041807.pdf.

differences between temporary labour migration and circular migration movements/programmes to brand the latter as an innovative tool.⁴⁰ As with temporary guest worker visa programmes, circular migration provides ‘labour without people... making it easier for employers to exploit workers, and engage in flexible hiring and firing, in line with economic and business conditions, and short term savings in integration costs’.⁴¹ This asymmetric power balance is supported by the current U.S. immigration system, where temporary workers are prohibited a path to permanent residency or citizenship. Guest workers are tied by law to their employer and, because they can only remain in the US at the will of their employers, complaints can be precarious. Unscrupulous employers confiscate workers’ passports and visas to ensure a submissive workforce. Workers who complain are often blacklisted, or threatened with deportation, which effectively nullifies workplace rights for these guest workers.⁴²

In S. 744 some of these issues were addressed in negotiations on labour migration policy between the AFL-CIO and other trade unions and the U.S. Chamber of Commerce, representing business interests. At the behest of lawmakers, the parties eventually came to an agreement on a new ‘W visa’ programme for non-seasonal, lower-skilled jobs. The idea behind the new programme is to create a ‘dual-intent’ visa, which would allow immigrant workers to come to the U.S. for both employment and residency, allowing for family reunification as well.⁴³ The visa would give workers the ability to self-petition for a green card after a period of one year and freely change employers. It was agreed that wages were to be set at a rate that would not adversely affect the wages and working conditions of U.S.

⁴⁰ P Wickramasekara, *Circular Migration: A triple win or a deadend?* ILO-ACTRAV, February 2011.

⁴¹ *Ibid.*

⁴² M Bauer and S Reynolds, *Close to Slavery: Guest Worker Programs in the United States*, Southern Poverty Law Centre, 2013.

⁴³ A ‘dual intent’ visa allows a worker to come into the country with the intent to stay or leave. It also allows the worker to apply for permanent settlement.

workers. To achieve these goals and to ensure transparency, it was agreed that the programme would include a database of employers with job openings that qualified for the programme. W visa holders could then freely change employers with the full knowledge of the jobs available to them.

The bill also phases out the H-2A temporary foreign agricultural worker programme, which permits employers to hire guest workers to fill agricultural jobs that last no longer than ten months. The H-2A programme will be replaced with a new visa programme that provides a three-year visa to work in any agricultural job, including year-round industries such as dairy with an important new protection—for the first time some of the agricultural visas will be portable; workers will be free to leave an employer and work for another agricultural employer registered to participate in the programme. Undocumented farmworkers who have worked 100 days in the U.S. in the past two years will be able to apply for a ‘blue card’ (temporary residency) during an 18-month application period that will begin seven months after enactment.

However, these portability protections are not available to migrant workers in other visa programmes, like the H-2B programme for temporary and seasonal work, the H-1B for skilled work, or the J-1 visa. These protections must be expanded to all visa categories. Additionally, few of these programmes allow migrants to remain in this country and eventually become citizens. The bill, with its employment verification requirements that seek to block undocumented immigrants from working in the U.S. and its mandate to establish an entry-exit verification system for those in the U.S. on temporary work visas, creates enforcement mechanisms that perpetuate the temporary nature of these programmes. This will only perpetuate conditions of risk for migrant workers in guest worker visa programmes and will do nothing to protect them from the risk of human trafficking.

Instead of establishing a system that excludes migrants from rights, the focus should be on empowering workers and creating conditions of shared prosperity. Immigrant workers in the U.S., regardless of visa status, should have the ability and the legal

tools available to move between employers, join together to better their working conditions, and access the same rights and protections as U.S. citizens—these principles, not enforced precarity, will contribute to preventing human trafficking and protecting migrant workers. Noncompliant employers and labour contractors, too, should be pursued and prosecuted by the federal government and barred from U.S. work visa programmes. These would need to reflect policies in the U.S. that support migrants as rights-holders and target exploitative and under-regulated worksites.

Empowering Migrants in the United States

Key to immigration policy reform must be a legalisation programme for undocumented immigrants, with a clear and broad roadmap to citizenship. From an anti-trafficking perspective, a path to citizenship is fundamentally important. This would empower immigrant workers to speak out against abuses without the fear of deportation. Secondly, as policy shifts towards inclusiveness, abusive employers would no longer have access to a large supply of exploitable workers, and, further, a channel to naturalisation is likely to encourage migrants to default on large amounts of illicit migration-related debt with less fear of retaliation and more access to justice. Workers in debt bondage would also have less incentive to work off the debt if there were a defined path for them to escape such a situation and gain legal residency and work authorisation.⁴⁴ Unfortunately, S. 744 ties its legalisation provisions for a path to citizenship to its burdensome enforcement requirements. Immigrants who earn provisional status will only be able to apply for citizenship once the Department of Homeland Security and employers are meeting stringent targets related to border

⁴⁴ G Friebe and S Guriev, 'Illegal Migration and Trafficking', Centre for Economic and Policy Research, 2002, pp.1–3, retrieved July 2013, www.researchgate.net/publication/228378217_human_trafficking_and_illegal_migration/file/32bfe510a82d51c276.pdf.

and employment enforcement. Not only do undocumented immigrants have nothing to do with border security, but the requirements prevent migrants from accessing their full rights and equal protections.

For a legalisation programme to be most effective, it would have to be accompanied by enhanced monitoring of labour laws. One of the greatest deficiencies of statutory protection is under-enforcement, particularly in low-wage industries. Many unscrupulous employers simply calculate the cost of potential penalties into a low-rate business model. The federal government's allocation to DOL to enforce these laws is miniscule. The Economic Policy Institute has found that the amount Congress appropriated to enforce labour laws and regulations amounted to only US\$1.6 billion—about 9 per cent of what was spent enforcing immigration laws last year. Furthermore, the Wage and Hour Division, the primary enforcer of non-safety related labour standards, has only about 1,100 inspectors, who are responsible for protecting over 135,000,000 workers in more than 7,300,000 establishments throughout the United States and its territories.⁴⁵ Meanwhile, in only New York, Chicago and Los Angeles, researchers found that workers in low-wage industries in the three cities lost over US\$56 million per week due to wage theft.⁴⁶ Given this, not only is there a need for increased labour inspection, there also needs to be a sufficient number of labour inspectors with special training to recognise signs of human trafficking.

As the International Labour Organization (ILO) has noted, 'Where labour standards are rigorously adhered to, workers are well unionized and labour laws are monitored and enforced

⁴⁵ D Costa, 'Huge Disparity in Funding for Immigration Enforcement vs. Labour', Economic Policy Institute, 23 January 2013, retrieved July 2013, <http://www.epi.org/blog/funding-disparity-immigration-enforcement-labour-standards/>.

⁴⁶ A Bernhardt, R Milkman, N Theodore, D Heckathorn, M Aver, J DeFilippis, A Gonzalez, V Narro, J Perelshteyn, D Polson and M Spiller, *Broken Laws, Unprotected Workers: Violations of employment and labour laws in America's cities*, Centre for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labour and Employment, New York, 2009, retrieved July 2013, www.nelp.org/page/-brokenlaws/BrokenLawsReport2009pdf.

— for all workers, indigenous or migrant — the demand for trafficked people and services is likely to be low.’⁴⁷ There need to be better protections in the U.S. for collective bargaining. Collective bargaining is an effective anti-trafficking tool; when workers can collectively bargain, they can more effectively institutionalise workplace monitoring and reverse exploitative conditions. Since 2000, unions in the U.S. have pushed for comprehensive immigration reform, in part, for this reason. The AFL-CIO reversed its longstanding restrictionist policies after seeing employers self-report to immigration authorities and use ‘sanctions’ to undermine organising drives among undocumented immigrants.

Finally, emphasis should be placed on systems that would allow victims to pursue prosecution of their employers, rather than on prosecuting migrants without legal status. S. 744 is mixed on this point. It expands the tools available to migrant survivors or witnesses of violent crimes like trafficking by increasing the number of U visas available for this purpose from 10,000 to 18,000. It also expands access to work permits for survivors of violence and trafficking and requires DHS to adjudicate individuals’ asylum, U visa, Violence Against Women Act, or other protection-based claims before prosecuting them for illegal entry or reentry.⁴⁸ To improve on this, the US should adopt the Council of Europe Convention’s norm and allow a period of reflection before testimony and should expedite processing for visas along with expanding their number.⁴⁹ The TVPA, for instance, enhances criminal penalties for traffickers and offers trafficking victims a special T visa, which gives these victims a temporary stay and a path to citizenship to ensure the prosecution of traffickers. While this act offers important protections, it is notoriously difficult to procure a

⁴⁷ ILO, ‘Trafficking in Human Beings: New approaches to combatting the problem’, May 2003, p. 4, retrieved July 2013, http://www.popcenter.org/problems/trafficked_women/PDFs/International%20Labour%20Office_2003.pdf.

⁴⁸ National Immigrant Justice Center, *op. cit.*

⁴⁹ Mark P. Lagon, ‘The Global Abolition of Human Trafficking: The indispensable role of the United States’, *Georgetown Journal of International Affairs*, Winter 2011, p. 94.

T visa; from 2002 to 2012, only 3,269 T visas were approved for victims.⁵⁰

Somewhat schizophrenically, S. 744 also seeks to impose harsh criminal penalties on people who migrate illegally to the U.S., including up to a year in prison and three years for reentering after being deported, and empowers local police to enforce federal immigration law by allowing DHS to share information with local law enforcement agencies about individuals who have overstayed their visas.⁵¹ In 2011 alone, 82,250 individuals were criminally prosecuted for immigration violations, constituting over 50 per cent of all federal prosecutions, costing \$1,023,615,633, and resulting in Latinos now representing more than 50 per cent of the federal prison population.⁵² This would only expand under S. 744 and undermines the important protections discussed above. By criminalising migration and residency in this way, migrants are forced to live and work in the shadows for fear of being detained and deported. The U.S. should align with the recommendation of the UN Special Rapporteur on the Human Rights of Migrants, Francois Crepeau, who has called for an end to the detention of immigrants, except in exceptional cases when no other options are available.⁵³

Conclusions

Human trafficking is one of the basest social problems in the modern world. With the Senate passage of S. 744, anti-trafficking, migrant, and labour advocates have a unique

⁵⁰ A Siskin and L Sun Wyler, 'Trafficking in Persons: U.S. policy and issues for Congress', *Congressional Research Service*, 19 February 2013, p. 21.

⁵¹ National Immigrant Justice Center, *op. cit.*

⁵² Detention Watch Network, 'Detention Watch Network Disheartened by Senate Immigration Bill', 27 June 2013, retrieved July 2013, <http://www.detentionwatchnetwork.org/node/3535>.

⁵³ See: UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau', 2 April 2012, retrieved July 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf.

opportunity to challenge the current U.S. discourse on enforcement and make the case for a rights-based agenda on immigration reform by capitalising on a global consensus against this form of modern day slavery. As outlined here, a rights-based agenda would include, at a minimum, enhanced monitoring of CBP practices at the border and the extension of their anti-trafficking initiatives to include partnerships with Mexican institutions; the regulation of international labour recruiters; mobility protections under work visa programmes and an end to programmes that enforce the temporary nature of labour migration; a robust roadmap to citizenship; and increased enforcement of labour protections and enhanced tools for migrants to report abuses.

By incorporating anti-trafficking language—most notably the four Ps: prevention, protection of victims, prosecution of traffickers, and partnerships—and extending it to implicate the entirety of immigration policy reform proposals, advocates can form a sharper critique of the enforcement measures and labour migration programmes that perpetuate the structures that allow human trafficking to thrive. Migrant workers need to be empowered by policies that allow them to exercise the ability to change their working conditions and have the freedom to move from abusive situations, without the fear of prosecution for immigration-related violations. Only when migrants have full rights and protections equal to all workers in the U.S. will we truly be able to root out trafficking in the U.S. and create conditions of shared prosperity through our immigration system.

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Health and Rights at the Margins: Human trafficking and HIV/AIDS amongst Jingpo ethnic communities in Ruili City, China

Elena Shih

Abstract

In 2007, China and Myanmar signed their first Bilateral Memorandum of Understanding on human trafficking. The two countries cemented this agreement with the unveiling of the first Border Liaison Office in Ruili City, located in China's southwestern Yunnan Province — one of the primary border crossing points between China and Myanmar. The government focus on human trafficking on this border intersects with decades of struggles to curb the border's porousness to drugs and HIV/AIDS. This paper is based on qualitative ethnographic participant observation and interviews with young Jingpo women living in Ruili City and investigates the risk of human trafficking as a by-product of cultural stigma associated with ethnic marginality, drugs, and HIV/AIDS. The case of Ruili warns us that the global shift towards regarding human trafficking as the single most perilous phenomenon of the current age obscures ongoing issues of vulnerability and cultural stigma for ethnic minority peoples globally. In lieu of state sponsored patrol and monitoring of the border, more attention must be paid to overlapping concerns of people living in border communities, including drug prevalence, disease, and ethnic marginalisation.

Key Words: Ruili City, Jingpo ethnicity, human trafficking, forced marriage, HIV/AIDS, cultural stigma

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On weekends, Ah Xian, a first year middle school student at Ruili City's Third Middle School, returns home to her village Banpai, 17 kilometers from Ruili City. She typically returns to an empty home: her twenty-year-old brother works as a security guard in a karaoke bar in Ruili City, her father died of AIDS-related illnesses last year, and her mother, who was sold into the family from Burma¹ twenty years ago, now spends the majority of days in her own hometown just over the China-Myanmar border. Home looks equally barren for her cousins and next-door neighbours, aged 10 and 13, whose parents have been incarcerated for drug trafficking since 2005. Growing up without the presence of parents, the vacancy of the village is a reminder of limited alternatives for life after middle school—obstacles that classify Ah Xian and her peers as at risk to human trafficking by recent transnational policy and rights agendas.

In Ruili City, on the China-Myanmar border, the flows of drugs, goods, and disease converge on the lives of indigenous and ethnic minority peoples living on both sides of the border. Ethnic minority communities in Ruili are both geographically and ethnically disenfranchised due to their isolation from China's economic hubs and state policies that offer structural benefits and systemic advantages for Han majority citizens.² The high degree of mobility in this area brings Ruili into the forefront of the fight against human trafficking. Efforts to combat human trafficking in China focus on trafficking in 'women and children' for the exclusive purposes of forced marriage, forced prostitution and child kidnapping.

¹ Throughout the paper I use 'Myanmar' to refer to the official documents and policies pertaining to the nation state. I use 'Burma', the name preferred by the Burmese democracy movement, in cases where respondents have used this language in English. Because almost all interviews were conducted exclusively in Chinese, the country was most commonly referred to by the single Chinese name: 缅甸 *Miandian*.

² See: S Hyde, *Eating Spring Rice: The cultural nature of AIDS in China's Southwest*, University of California Press, 2007; H Peters, 'Ethnicity along China's Southwestern Frontier', *Journal of East Asian Archaeology*, vol. 3, no. 1-2, 2001; R Deng, J Li, L Sringnyuang, and K Zhang, 'Drug Abuse, HIV/AIDS and Stigmatisation in a Dai Community in Yunnan, China', *Social Science & Medicine*, vol. 64, issue 8, 2007, pp.1560–1571; T Liu, 'Re-Constructing Cultural

In Ruili City, these interventions are significant given recent media and humanitarian attention³ to cross-border forced marriage trafficking between Myanmar and China. These anti-trafficking interventions have engaged the Chinese and Burmese governments through the signing of a Bilateral Memorandum of Understanding, the establishment of a Border Liaison Office with public security outposts on both sides of the border, and numerous joint meetings to discuss repatriation mechanisms for trafficked women and children. While the physical border has received focus as a critical site of government intervention, less attention has focussed on cases of internal forced marriage between ethnic minority communities in Yunnan's border regions and those living in other parts of China.⁴ Further, and central to the thesis of this paper, while trafficking is criminalised, very little attention is paid to the intersectional impact of ill-health, income inequality, ethnic marginalisation and a lack of community cohesion around anti-trafficking response.

Once labelled the lawless, yet undeveloped, Las Vegas of China, Ruili has represented a site of limited government regulation for its unbridled access to gambling, commercial sex, drugs, rare jade and other illegal commodities. In the past two decades, Chinese authorities have attempted to curb the lawless reputation of the area, systematically shutting down all of Ruili's casinos in 2005, vigilantly patrolling illegal trade in heroin,

Heritage and Imagining Wa Primitiveness in the China/Myanmar Borderlands', in *Cultural Heritage Politics in China*, Springer, New York, 2013, pp. 161–184; J Chio, 'Leave the Fields without Leaving the Countryside: Modernity and mobility in rural, ethnic China', *Identities*, vol. 18, issue 6, 2011, pp. 551–575; B Gustafsson and L Shi, 'The Ethnic Minority Majority Income Gap in Rural China during Transition', *Economic Development and Cultural Change*, vol. 51, no. 4, 2003, pp. 805–822.

³ S Oo, 'Myanmar's Brides to China Top Human Trafficking List', *The Myanmar Times*, 7 January 2013, <http://www.mmmtimes.com/index.php/national-news/3705-brides-to-china-top-govt-human-trafficking-list.html>; 'Media Field Study of Trafficking Myanmar Women to China', *China Economics Weekly*, February 2, English excerpt available in UNIAP News Digest, February 2010, pp. 3–4, www.notip.org.cn/UserImages/00001447.pdf.

⁴ In addition to the China-Myanmar border, the China-Vietnam border has also been an area of interest.

and aggressively pursuing anti-HIV/AIDS campaigns through anti-drug use campaigns.⁵ The government's strategy of linking drug-use and HIV/AIDS is problematic because it conflates the illegality and punishment of drug-related crimes with the need for protection and services to those affected by HIV/AIDS. Such policing of drugs and disease has accelerated since 2009, when Ruili became the site of astronomical capital investment due to its strategic placement along the new superhighway that will connect China to Southeast Asia via Yunnan province.⁶

It is within this context of what the Chinese government labels as 'maintaining social stability'⁷ that efforts to control human trafficking might naturally appear fitting in Ruili City. However, given the complex landscape of issues that already plague the border area, this paper asks the question: What implications does the governance of human trafficking have for the ongoing criminalisation of drugs and disease along the China-Myanmar border? The article addresses this question primarily through investigating the links between the risks of human trafficking and HIV/AIDS amongst Jingpo ethnic communities living on the China-Myanmar border. It argues that the state's focus on policing marginality on the border through anti-HIV/AIDS and anti-trafficking interventions distracts attention from the problematic economic and political challenges ethnic minority communities face, thereby increasing systemic forms of inequality and marginalisation rather than decreasing the risk of human trafficking. Critical of how trafficking is being addressed in international and Chinese contexts, this paper details anti-trafficking efforts in Ruili, unpacking the intersectional issues that are not addressed in order to systemically and meaningfully impact trafficking.

⁵ On the 14-hour overnight bus journey from Ruili to Kunming, Yunnan's capital, all commuter buses are mandatorily stopped at four checkpoints along the way, where armed police officers and border police aggressively search bus cargo and passengers for drugs, detaining travellers for up to two hours at each checkpoint.

⁶ H Le Bail and A Tournier, 'From Kunming to Mandalay: The New "Burma Road"', *Asie, Visions* 25, March 2010.

⁷ J Hu, Chinese Communist Party Central Committee on Building Socialism and Harmonious Society, and Other Important Issues by the Central Committee during the 6th Plenum, October 2006.

Methodology

The data for this paper is based on ethnographic research carried out through a local community arts project, the Border Statements Collective, which provides a no-cost public arts education as a tool of empowerment and education to ethnic minority youth living in Ruili villages. I have worked as an arts educator with the youth in this area since 2006, but most recently from 2011-2012, I interviewed women aged 16 and older to ask about their experiences with issues ranging from education, job, migration, and marriage opportunities to HIV/AIDS and human trafficking. The sample population includes both women who were trafficked according to the UN Protocol definition and/or Chinese definition, though not identified as such, as well as those who could identify trafficking in their community. My research in this area was not conducted through government channels, nor through formal affiliation with a Chinese academic institution, but through a community art project that works principally through elementary schools in two primarily Dai and Jingpo villages near Ruili. These interviews were conducted with consenting family members of participating youth, but not the youth themselves. Pseudonyms are used for the village name and interview subjects in order to protect their privacy and anonymity.

Jingpo Ethnic Communities

The Jingpo are an ethnic minority group living across the borders of China, Myanmar, and India. The majority of Jingpo people in China live in Yunnan Province, and mainly in Dehong Prefecture. However, as this paper illustrates, growing numbers of internal marriage migration have brought Jingpo persons to China's northern and eastern provinces. In Myanmar, they are usually known as Kachin or Jinhpaw and in India as Singpho; while each of these distinct ethnonyms are nation-state specific, many cultural and linguistic similarities link the Jingpo communities living in different countries. The separation of the Jingpo, Kachin, Jinhpaw and Singpho thus illustrates how political borders shape ethnic politics when nation state borders

often fracture ethnic community boundaries.⁸ Lack of legal citizenship, identity cards, access to information, and Mandarin language skills are some of the challenges that Jingpo communities in China face.⁹ The fact that the Jingpo ethnic community straddles nation-state borders complicates anti-trafficking interventions that are heavily premised on border control.

Border States and Anti-Trafficking

The nature of borders and border policing highlight the enigmatic and unintended consequences of transnational attention to human trafficking, whose interventions exist, I argue, contradictorily between state control of its border sovereignty and human security across border regions. For instance, increased border security and policing that intend to restrict undocumented border crossings often force migrants to seek out more dangerous ways of migrating.¹⁰ Similarly, the emergence of state policies that relegate citizenship or residency rights to those deemed victims of human trafficking have been critiqued alongside the simultaneous crackdown on irregular migration. These critiques have argued that the humanitarian policies that anoint a select few human trafficking victims as deserving of state assistance create exclusionary pathways for migration and citizenship for non-victim categories—typically men, or victims of labour (as opposed to sexual) exploitation.¹¹ Other scholars have traced the rise of

⁸ B Lintner, *The Kachin: Lords of Burma's Northern Frontier*, Teak House Publications, Bangkok, 1997; E Leach, *Political Systems of Highland Burma: A study of Kachin social structure*, vol. 44, Bloomsbury Academic, 1973.

⁹ M Liu and Y Hou, 'An Analysis of Western Chinese Minority Youths' Susceptibility to AIDS', *Disasters, Culture, Politics: Chinese-Bulgarian Anthropological Contribution*, vol. 1 no.1, 2009, pp. 207–221.

¹⁰ P Andreas, *Border Games: Policing the US-Mexico divide*, Cornell University Press, NY, 2001.

¹¹ W Chapkis, 'Trafficking, Migration, and the Law: Protecting innocents, punishing immigrants', *Gender & Society*, vol. 17, no. 6, 2003, pp. 923–937. For a discussion of state and international discourses around sexuality throughout China, see: P Suiming and H Yingying, "'Subjective Construction': Methodological revolution in sexuality research and potential development in Chinese context', *Sociological Studies*, 2007; E Jeffreys, *Sex and Sexuality in China*, Routledge, 2006.

the human trafficking rescue industry alongside the size and privatisation of the deportation industry.¹²

The control of China's borders is of pivotal interest to the Chinese government, whose growing wealth and prominence in the region have made it a recent hub for migration from nearby countries in Southeast Asia, including the large-scale migration of both Vietnamese and Burmese seeking economic opportunities, and the specific recent migration of Burmese fleeing militarised conflict situations.¹³

Anti-Trafficking in China

The growing prevalence of cross-border and internal migration in China is increasingly understood within international and state-level frameworks of combating human trafficking. The global concern around human trafficking has provoked a transnational movement, formally spearheaded in 2000 by the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons* (Trafficking Protocol). Housed within a more comprehensive UN Convention against Transnational Organized Crime, the Trafficking Protocol is primarily a crime prevention framework, as opposed to a human rights or protection tool. When mobilised under an authoritarian regime such as China, the Protocol, strongly reinforces a punitive approach, which results in marginality amongst the people who are supposed to be helped.

¹² L Agustín, *Sex at the Margins: Migration, labour markets and the rescue industry*, Zed Books, 2007. N De Genova and N Peutz (eds.), *The Deportation Regime: Sovereignty, space, and the freedom of movement*, Duke University Press, 2010.

¹³ The relative prosperity and safety of Ruili is likely to cause another issue as inequalities rise relative to neighbouring countries. Ruili is also an increasing point of entry for displaced persons from fighting in Burma's Kachin state. See: N Nadi 'Officials Reach out to Refugees following Fighting in Shan State', *Democratic Voice of Burma*, 16 May 2013.

In 2009, China ratified this Protocol and in 2008, it signed its first five-year National Plan of Action to combat human trafficking. Despite its public acquiescence to international treaties and party to regional cooperation initiatives like the Coordinated Mekong Ministerial Initiative Against Trafficking (COMMIT) process, China has yet to adopt the international definition of human trafficking—acknowledging only the trafficking of women and children for the purposes of forced prostitution, forced marriage and child kidnapping.¹⁴ The trafficking of men and trafficking for purposes of labour exploitation are notably missing from the Chinese definition of trafficking. Finally, the relative newness of such legislative frameworks around human trafficking often do little to engage with existing policy around labour, migrant, and gender-based rights.

China has established its hub of counter-trafficking work through the Ministry of Public Security's Inter-Ministerial Office Against Trafficking (IMOAT), which, according to the mandates of the 'public security' department, focusses primarily on prosecuting and policing trafficking, rather than on victim protection or prevention.¹⁵ IMOAT claims considerable success, boasting that 24,000 women and children were rescued victims of human trafficking in 2011.¹⁶ However, reports of such 'rescues' only offer details about the prosecution and punishment of traffickers, rather than on victim protection or rehabilitation. Given the paucity of services for victim protection in China, recent efforts have focussed on improving victim services, including a national shelter improvement project co-funded

¹⁴ China's National Plan of Action on Combating Trafficking in Women and Children (2008–2012), http://www.no-trafficking.org/reports_docs/china/china_npa_eng.pdf

¹⁵ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime*, U.N. Doc. A/55/383; China's National Plan of Action, *op. cit.*; Ministry of Public Security Inter Ministerial Office Against Trafficking in Women and Children, <http://www.mps.gov.cn/n16/n983040/n1294479/index.html>.

¹⁶ 'Chinese Police Free 24,000 Abducted Women and Children', *BBC News Asia*, 11 March 2012, <http://www.bbc.co.uk/news/world-asia-17330203>.

by UNIAP and the Ministry of Civil Affairs. However, merely ‘improving’ shelters still relegates trafficking victim service-provision through existing state structures such as the government shelters, which have a punitive history as the last-stop for a range of people including those who are homeless, mentally ill, and victims of domestic violence. Research on the experiences of victims who use these services is still scant under a regime that has traditionally stymied research, or funneled research through government-led research think tanks. Recent attempts to evaluate victim rehabilitation and reintegration services have been met with trepidation. Though not outright resistant to international research, Chinese government officials are quick to use trafficked victims’ vulnerability as a justification for limiting transparency over protection and rehabilitation practices.¹⁷ Thus, while measures to improve services exist, there is still limited transparency about the quality of protection and rehabilitation services.

In early 2007, anti-trafficking stakeholders in China gathered in Ruili City to commemorate the launching of the area’s first Border Liaison Office (BLO) to target human trafficking. The BLO is part of a series of bilateral commitments between China and Myanmar including the signing of a Bilateral Memorandum of Understanding (MOU) between the two governments.¹⁸ Focused on strengthening information sharing, intelligence exchange, arrest and prosecution of traffickers, and mutual assistance in rescuing and repatriating victims, the border checkpoints are primarily aimed at reducing cross-border trafficking and facilitating the repatriation of victims of trafficking.¹⁹

¹⁷ Fieldnotes 12/2012.

¹⁸ The Ruili BLO collaborates with its Myanmar counterpart in Muse, the town on the Myanmar side. While both sides of the China-Myanmar border are worthy of research, this paper focusses primarily on data collected from the China side.

¹⁹ UNIAP China, ‘First China-Myanmar Border Liaison Offices Meeting on Anti-trafficking and Joint Border Visit,’ *humantrafficking.org: A web resource to combating human trafficking*, 31 March 2007, <http://www.humantrafficking.org/updates/530>; Xinhua, ‘42 Trafficked Myanmar Citizens Repatriated from Thailand’, *China Daily*, 15 October 2009.

In 2010, the director of the Ruili Criminal Investigations Department reported that a total of 489 Burmese women have been repatriated since the opening of the BLO, and this number is likely to have risen, though no recent reports are available. The formal process of victim repatriation involves sending Burmese women back to their hometowns. However, numerous issues frequently emerge with regard to victims who cannot or do not wish to return home and those who prefer to remain in China with their children. Due to the fact that the BLO's functions are primarily restricted to the border, many emotional and material needs exceed the capacities of the BLO. For instance, the focus only on the physical transfer of victims for the purpose of 'repatriation' means that the BLO does not address needs of victims in destination or source communities. The bilateral processes provide public figures for official rates of repatriation, treating repatriation as a singular event rather than a process. Once again, qualitative insight or assessment into the quality of services provided is lacking. By focussing efforts on policing and patrolling the border, interventions like the BLO ignore systemic sources of risk to trafficking and other social problems in this border region, as we see below.

Drugs and Ethnic Marginalisation

Emphasising the prosecutorial dimensions of trafficking intervention echoes the narrow focus on criminality in the Chinese government's attitude towards drugs and disease. Framed primarily as problems of social disorder, their solutions are characterised by punitive as opposed to protectionist or development-based interventions. Anti-drug policies and anti-trafficking policies are linked through their focus on prosecution. Anti-trafficking interventions are not incorporated into anti-drug policies, but build on pre-existing punitive measures that marginalise people.

While opium growth in China began as early as the 18th century, the cross-border opium trade grew during the late 1970s when China sought to engage in trade with Burma. Chinese partnership appealed to Burmese partners because it

introduced more advanced technical know-how and access to global markets.²⁰ Due to its location just above the Golden Triangle, linking opium-producing areas in Vietnam, Laos, Thailand and Myanmar, Ruili was an ideal entry point for heroin distribution through China to other parts of the world. This illicit trade was a consistent staple of the cross-border economy until the economic reform era in the 1980s when sweeping attempts to formalise economic markets brought about drastic changes in the drug producing areas of Yunnan. On demand from the central government, poppy fields in Yunnan were systematically burnt to show intolerance for drug trade, and this moved much of the drug production to the Myanmar side of the border.²¹

Lacking economic opportunities for income generation, many ethnic minority persons in Yunnan turned to the illegal heroin trade and were often paid in the heroin they trafficked. Concurrently, a public health crisis developed. In 1989, Ruili was documented as the city where the first cases of HIV were discovered in China, when a study found that 146 injecting drug users (IDUs) in Ruili were HIV positive.²² In the past 20 years, Dehong Prefecture (which includes Ruili City) has consistently ranked first in rates of HIV infection and AIDS-related deaths in Yunnan Province. By the early 1990s, rates of HIV infection were highest in Ruili and three other surrounding counties. By the end of the decade, HIV had spread across the whole of Yunnan Province with severely high concentrations of 50-80 per cent in communities of IDUs.²³

²⁰ K Chin, *The Golden Triangle: Inside Southeast Asia's drug trade*, Cornell University Press, NY, 2009, p. 83.

²¹ G Fu, 'Shi Shen de Shequ Jiqi Zhongjian Zhidao—Ruili Shi Jingpo Zu Dupin he Aizibing Weihai de Chengyin Jiqi Duice', Central University for Nationalities, Doctoral Dissertation, 2006.

²² Z Wu, J Zhang and Z Li, 'Risk Factors for Initiation of Drug Use among Young Males in Longchuan, Yunnan', *Chinese Journal of Epidemiology*, vol. 20, issue 1, 1999, pp. 15–18.

²³ G Jing and N Renwick, 'China's Fight against HIV/AIDS', *Journal of Contemporary China*, vol. 17, issue 54, 2008, pp. 85–106.

In the village of Banpai where this study took place, the Chinese Center for Disease Control (CDC) reported an 80 per cent HIV infection rate amongst Jingpo men who were former IDUs. In the late 1990s, the CDC entered villages in Ruili and mandatorily tested men who had admitted to being current or former IDUs. However, children, wives and sexual partners of IDUs were frequently not tested, nor were they given education about how to reduce transmission because they did not fall into the ‘high risk group’ of drug users.²⁴ Two years ago, at the closing exhibition of a summer art programme in Banpai, the mother of one of the participants pulled my Jingpo colleague aside and asked about the health of her eight-year-old daughter: ‘Do you think that my daughter might have AIDS? They diagnosed her father many years ago, but we never got tested.’²⁵ On a separate occasion, this mother admitted that she felt ‘shy’ but felt compelled to ask: ‘Do condoms really prevent AIDS? I’m not sure if it’s ok to be together with my husband.’²⁶ Nearly a decade after her husband was initially diagnosed as HIV positive, she still lacked basic information about health, transmission, and safe practices for herself and her daughter because education has not been earmarked as a priority for intervention.

While protection and educational campaigns remain absent, what is abundantly clear to residents are messages posted at the entrance to the village warning ‘Avoid drugs, AIDS and death’. A plaque put up by the county-level civil affairs bureau labels Banpai a ‘Pilot project site for elimination of drug use and AIDS’. For residents, these signs and placards mark the uncomfortable presence of drugs and disease in Banpai. As previously mentioned, many women in Banpai have not been equipped with knowledge of harm reduction, and understand HIV infection primarily through fear and stigma campaigns. Further, those diagnosed with HIV are not given formal social or community support, and neither are their families. Ah Xian’s mother, mentioned in the introductory vignette, had already begun taking trips back to her home village after her husband

²⁴ G Fu, *op. cit.*

²⁵ Fieldnotes 8/2009.

²⁶ Fieldnotes 8/2011.

was diagnosed with HIV in 1998. In an interview after her husband's death, I asked her why she travels back so often and she responded: 'It was not meaningful to stay here. After he [her husband] got sick, he would just wake up and drink, and then he would throw bottles and things around the house. He never helped with any of the fieldwork. It wasn't just that he was sick, but that he drank too much and was scary.'²⁷ Lacking positive forms of community support, Ah Xian's father turned to alcohol and violence to deal with what he considered a death sentence, and her mother sought to distance herself from Banpai.

In other parts of China, Hildebrandt documents that the Chinese Center for Disease Control officials often associate HIV/AIDS as a problem of 'out groups'—inclusive of both sexual and ethnic minorities.²⁸ Other reports have documented discriminatory practices including mandatory testing of 'high risk' groups, mandatory drug rehabilitation sentencing, and non-consensual disclosures of infected status.²⁹ The public campaigns do little to target the root causes of HIV/AIDS risk, instead suggesting that entire populations of ethnic minorities are 'high risk' groups and thus effectively stigmatising them.³⁰

Forced Marriage as Human Trafficking of Jingpo Women

While managing the problems of drugs and disease have been a priority since the 1980s, the issues of forced marriage and

²⁷ Interview conducted in 7/2011.

²⁸ T Hildebrandt, *Social Organizations and the Authoritarian State in China*, Cambridge University Press, 2013.

²⁹ Human Rights Watch, 'Locked Doors: The human rights of people living with HIV/AIDS in China', 3 September 2003, C1507, retrieved 2 May 2013, <http://www.refworld.org/docid/3fe478e27.html>; Chinese State Council, Methods for Forced Detoxification [Qiangzhi jiedu banfa], 12 January 1995, article 6; S Hyde, *op. cit.*

³⁰ See: S Joag, 'Infected Objects: The criminalization of infected bodies through the construction of the materiality of HIV/AIDS stigma', Master's thesis for Program in Crime Social Control and Globalization, London School of Economics, 2009; G Fu, *op. cit.*

marriage migration, though longstanding practices in the area, have received more recent attention in light of the escalating Chinese attention to human trafficking. On the China-Myanmar border, forced marriage is a problem both for people from Ruili and from the Burmese communities over the border, as well as for numerous stateless communities that live in between. While existing research discusses repatriated victims of forced marriage from Myanmar to China,³¹ less is known about internal cases of forced marriage from the Chinese side of the border to other parts of China. Forced marriages hinge on a complex web of social and demographic changes in China, and very little is done by government anti-trafficking campaigns to address such heavily compromised forms of marriage.

Contemporary accounts of forced marriage within China draw on explanations of the long-standing practice of bride selling in China, particularly in ethnic minority communities, for reasons ranging from poverty, unequal gender balance (because of China's one-child policy) to deep-seated cultural practice.³² However, the complex situation of marriage and migration in Ruili reveals a more complex terrain of intersecting issues. Recently, marriage has been understood as an economic strategy within a particularly limited economy. As the marriage market grows, marriage brokers and recruiters have capitalised on the potential to exploit these marriage practices, increasing the risks in migration that female migrants face.

For instance, Gun Tang, a Jingpo woman born in Banpai, was recruited by a fellow Jingpo woman for marriage into a Han family in Shandong Province. Gun Tang initially agreed to this marriage for a one-time fee of 15,000 RMB (2,400 USD), in order to pay for her mother's debts following the sudden

³¹ Palaung Women's Organization, *Stolen Lives: Human trafficking from Palaung areas of Burma to China*, Palaung Women's Organization, 2011.

³² E Croll and E J Croll, *The Politics of Marriage in Contemporary China*, Cambridge University Press, 1981; L B Duong, D Belanger, and K T Hong, 'Transnational Migration, Marriage and Trafficking at the China-Vietnam Border' in I Attané and C Guilmoto (eds.), *Watering the Neighbour's Garden: The growing demographic female deficit in Asia*, CICRED, 2007.

death of her father. However, once Gun Tang arrived in Shandong, the recruiter received the money from her new husband's family and left abruptly without paying the fee owed to Gun Tang. Gun Tang was not permitted to contact her mother, and was told that she could not leave this family residing in a remote and isolated part of Shandong until she had a child. She did not speak Mandarin and expressed feeling socially isolated. She did not try to leave because she was unfamiliar with the area and distrustful of local Han police and government. Since she did not possess a Chinese identity card, she believed that she would be arrested for being an undocumented migrant. After two years of living together, Gun Tang said that a love bond developed between her and her husband, and she succeeded in convincing her husband to let her make a trip to Ruili. Once in Ruili, she was able to convince her husband to move to Ruili with her, and eventually he agreed. His decision, she noted, reflected how rural areas across China have limited opportunities for upward mobility and that living in a rural village in Yunnan Province was not so different to her husband.

At the end of our interview, Gun Tang shared that there are several Jingpo women in Shandong Province who were forcibly married and still have unpaid debts. Yet, despite being lied to, cheated, and duped in various forms, they choose not to return to Ruili. Gun Tang said, 'Many have kids now, and after living there so long, they just want to stay, because they are really not sure what to come back to.' In particular, she was referencing the fact that Jingpo women have become mistrustful of Jingpo men; in addition to the lack of potential marriage partners, they share a sense of futility in returning to a community affected by drugs, disease and frequent death. Gun Tang's accounts portray a complex story of forced marriage that by its definitional parameters would be classified as a case of human trafficking under both Chinese and international legal frameworks. Its complexity unfolds the challenges in Ruili's border identity, where Gun Tang's marginalised ethnic identity made her both vulnerable to trafficking and unable to seek formal assistance in Shandong. The nexus of these forms of marginality reveal conflicting

and contemporaneous moments of agency, decision-making and risk-taking that many migrants from this area face.

As has been argued by feminist scholars in other contexts, the focus on women and children as true victims leads to a dangerously dichotomous portrayal of men as criminals and perpetrators.³³ In China, human trafficking and drug related policies can be understood through the lens of carceral protectionism, for how they employ punishment and policing in order to pursue the alleged goals of social protection. What has evolved to be a gendered form of policing has consequences in Dehong, where the criminalisation of heroin trade has already increased rates of incarceration for ethnic minority men. These dichotomous identities of victim and criminal, typically organised around gender,³⁴ are harmful in China's ethnic and geographic borderland areas, where for the Jingpo in particular, 1) men are disproportionately affected by HIV/AIDS and 2) both women and men are disenfranchised by state policies that favour urban and Han majority citizens. Furthermore, this is complicated by the fact that many women and men in this area do not have citizenship, and thus do not fit eligibility criteria for social protection.

Conclusion

The social problems that exist at the nexus between borders, marginality and human rights converge for Jingpo communities in Ruili through lack of citizenship rights, uneven access to resources, the problematic ramifications of policing drugs and disease, as well as the focus on criminalisation and prosecution when addressing human trafficking. In light of the history of drugs, disease, and their policing, the recent attention to

³³ See: E Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The politics of sex, rights, and freedom in contemporary antitrafficking campaigns', *Signs*, vol. 36, no. 1, 2010, pp. 45–71; J Musto, 'Carceral Protectionism and Multi-Professional Anti-Trafficking Human Rights Work in the Netherlands', *International Feminist Journal of Politics*, vol. 12, issue 3-4, 2010, pp. 381–400; W Chapkis, *op. cit.*

³⁴ Significantly, gender is the primary means of delineating trafficking victim status, as indicated in Chinese Anti-Trafficking National Plan of Action, which defines trafficking as a problem exclusively concerning women and children.

human trafficking in China generally, and Ruili specifically, complicates the discursive and material politics of gender and citizenship for ethnic minorities in China. Government fear and stigma campaigns increase risks for women because they invoke mistrust of ethnic, social and family fabrics of support. Women are more inclined to seek migration, even dangerous migration, as an option for upward mobility.

Given the state of cultural decay in Jingpo communities, cultural interventions are needed, like those pursued by Peters (2012) and Fu (2006) which target de-stigmatisation to increase moral support within the community. These existing cultural interventions aim to rebuild communities through decreasing cultural stigma and strengthening sources of ethnic community pride. This research points to the need for further attention to community resources as ‘informal’ modes of human trafficking assistance. While Gun Tang was not able to access any formal resources—through the government and NGOs—she resolved her situation through community support and self-reliance, which often lie outside the purview of what is considered human trafficking assistance.³⁵

Prioritising human trafficking as a problem of women and children as true victims obfuscates general rights issues for men *and* women and ethnic minorities. Rather than focus on women and children as true victims through legal and policy frameworks, and the lens through which existing anti-trafficking campaigns understand risk, we should continue asking how Jingpo women and men experience the host of challenges in this area. The preliminary findings of this research suggest that the problems of human trafficking and HIV/AIDS, though they are commonly regarded as distinct in human rights and public health discourses respectively, must be understood through an intersectional framework that is attuned to the needs of community development. Finally, the

³⁵ H Peters, ‘Best Practice for Reaching the Unreached: Ethnic minorities and HIV prevention’, Regional Unit for Culture in Asia and the Pacific, UNESCO Bangkok, 2012; A Brunovskis and R Surtees, *Leaving the Past Behind: When victims of trafficking decline assistance*, Fafo, Norway, 2007; G Fu, *op. cit.*

findings here warn us that the global shift towards regarding human trafficking as the most ‘heinous’ and ‘monstrous’ phenomenon of the current age obscures ongoing issues of risk and cultural stigma for ethnic minority peoples globally.³⁶ The recent arrival of the BLO (policing borders as opposed to protecting communities) sheds light on the excitement and *newness* and *exceptionalism* of human trafficking as a buzzword. This has obscured the links between trafficking in persons and other risks people face due to multiple forms of marginalisation.

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³⁶ ‘New Action to Eradicate the ‘Heinous Crime’ of Human Trafficking,’ *The Courier*, 30 July 2013, <http://www.thecourier.co.uk/news/scotland/new-action-to-eradicate-the-heinous-crime-of-human-trafficking-1.116101>; E Skinner, *A Crime so Monstrous: Face-to-face with modern-day slavery*, Free Press, 2009.

From the Horn of Africa to the Middle East: Human trafficking of Eritrean asylum seekers across borders

Laurie Lijnders and Sara Robinson

Abstract

Each month hundreds of men, women, and children flee Eritrea as a result of grave violations of human rights committed by the Eritrean government. Travelling across borders, an estimated 36,000 Eritreans have been smuggled to Israel over the past seven years. For 31 per cent of those interviewed for this research, their migration involved abduction and forced movement for extortion among other abuses. Migrants have been abducted in Eastern Sudan near the border with Eritrea and then sold to criminal gangs along the Sudan-Egypt border. The gangs forcibly hold the migrants captive in the Northern Sinai desert. Many who made the journey reported being held hostage and subjected to brutal treatment in Eastern Sudan and the Northern Sinai desert, including gang rape of men and women, whipping, and various other methods of physical and psychological torture. Although not a traditional trafficking scenario, this paper explores the phenomenon in relation to borders. Intricate trafficking networks have exploited refugee outflows from Eritrea, turning the area around the Sudanese side of the Eritrea-Sudan border into a breeding ground for abductions, aggravated smuggling, and trafficking. While crossing borders to claim asylum may facilitate some protection from abuses perpetrated by the Eritrean government, it has created a new set of challenges for Eritrean migrants who now must find protection and safety from kidnappers. While refugees must cross borders to find safety, those same borders create the circumstances for trafficking networks to operate. Unless the

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dynamics of those involved changes, human rights abuses such as extortion, torture and human trafficking in Eastern Sudan and Sinai are expected to continue.

Key words: Eritrea, refugees, human trafficking, abductions, Eastern Sudan, Northern Sinai desert, aggravated smuggling

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Introduction¹

Each month hundreds of men, women, and children flee Eritrea as a result of grave violations of human rights committed by the Eritrean government.² Political oppression and religious persecution have led to the imprisonment or disappearance of thousands of citizens, as well as mass flight.³ Travelling across many borders, an estimated 36,000 Eritreans have made their way to Israel over the past seven years.⁴

¹ This paper is based on research conducted from May 2012 to November 2012 by a team based in Israel, with oversight and leadership from the Feinstein International Center. The conclusions in this paper reflect the preliminary findings of the research project. A final report will be published at the end of 2013. To read more about the Feinstein International Center, see: <http://sites.tufts.edu/feinstein/>.

² 'UNHCR: Eritreans continue fleeing to Ethiopia and Sudan', 23 June 2013, *Sudan Tribune*, <http://www.sudantribune.com/spip.php?article47043>.

³ Report of the Special Rapporteur on the situation of human rights in Eritrea, S Keetharuth, Human Rights Council, Twenty-third session, Agenda item 4, Human rights situations that require the Council's attention, 28 May 2013, pp. 45–48.

⁴ 'Statistics of Foreigners', Israeli Population, Immigration Border Authority, Ministry of Interior, May 2013 [in Hebrew], <http://www.piba.gov.il/PublicationAndTender/ForeignWorkersStat/Documents/560843nnew4.pdf>

The brutal violence inflicted on migrants during their journeys has been documented in several reports, the majority written by human rights organisations over the last four years: Amnesty International in 2013 and 2011,⁵ Human Rights Watch in 2012,⁶ Tilburg University in 2012,⁷ Physicians for Human Rights-Israel in 2011 and 2010,⁸ and the Hotline for Migrant Workers in 2012 and 2011.⁹ These reports detail how abducted migrants end up in makeshift places of captivity near the Sudanese town of Kassala, close to the Eritrean border. Here, they are held captive and are forced to pay ransom money.¹⁰ They are then, in most cases, transferred through a well-organised human trafficking network to the Northern Sinai desert where they are released only after ransom payments of up to USD50, 000.¹¹

⁵ Amnesty International, *Egypt/Sudan: Refugees face kidnapping for ransom, brutal treatment and human trafficking*, March 2013, <http://www.amnesty.org/en/library/info/AFR04/001/2013/en>; and 'Broken Promises: Egypt's military rulers erode human rights', Amnesty International, November 2011, pp. 41–46. <http://www.amnesty.org/en/library/asset/MDE12/053/2011/en/47be269e-b67a-42f4-835b-787f91044e04/mde120532011en.pdf>.

⁶ 'Egypt: End Sinai nightmare for migrants', Human Rights Watch, 5 September 2012, <http://www.hrw.org/print/news/2012/09/05/egypt-end-sinai-nightmare-migrants>.

⁷ M Van Reisen, M Estefanos, and C Rijken, 'Human Trafficking in the Sinai: Refugees between life and death', Tilburg University, October 2012, http://www.eepa.be/wcm/dmdocuments/publications/Report_Human_Trafficking_in_the_Sinai_Final_Web.pdf.

⁸ 'Hundreds of Refugees Held Hostage in Sinai Torture Camps Need Rescuing', Physicians for Human Rights – Israel and the Hotline for Migrant Workers, 30 November 2011, <http://www.phr.org.il/default.asp?PageID=183&ItemID=1176>; 'Hostages, Torture, and Rape in the Desert: Findings from 284 asylum seekers about atrocities in the Sinai', Physicians for Human Rights – Israel, 23 February 2011, <http://www.phr.org.il/default.asp?PageID=183&ItemID=915>; and 'Hostages, Torture, and Rape in the Sinai Desert: A PHR-Israel update about recently arriving asylum seekers', Physicians for Human Rights – Israel, 13 December 2010, http://www.phr.org.il/uploaded/PHR-Israel_Information_Sheet_on_Refugees_Captive_in_Sinai_Dec13_2010_Final.pdf.

⁹ 'Tortured in Sinai, Jailed in Israel: Detention of slavery and torture survivors under the Anti-Infiltration Law (June-September 2012)' Hotline for Migrant Workers, <http://www.hotline.org.il/english/pdf/TorturedInSinaiJailedInIsraelENG.pdf>; 'The Dead of the Wilderness: Testimonies from Sinai Desert', Hotline for Migrant Workers, February 2011, http://www.hotline.org.il/english/pdf/Testimonies_from_sinay_122010.pdf.

¹⁰ These places of captivity range from a compound, hut, house, tent, to being tied to a tree or vehicle in a forest or the middle of the desert.

¹¹ Interviews conducted between May and October 2013.

This article goes beyond this evidence and is based on 134 qualitative interviews conducted with Eritrean individuals in Israel and Ethiopia. Among the interviewees were victims of kidnapping, torture, extortion and captivity for up to a year in extortion compounds in Eastern Sudan and the Northern Sinai desert.

Aforementioned reports on the subject, as well as the testimonies gathered as part of this research, detail the extensive brutality and abuse experienced by Eritreans in extortion compounds in Sinai. Eritrean nationals have testified to gang rape of men and women, whipping, and various methods of torture, including burial in the sand, electric shocks, hanging by one's hands and legs, burning with hot-iron bars, and prolonged exposure to the sun while ransom money was extorted.

This paper sheds light on the role of borders in this abuse. Eritrean nationals are forced to flee across the Eritrean border into Sudan for safety from the brutal Eritrean government. Intricate trafficking networks have exploited this situation, turning the area around the Sudanese side of the Eritrea-Sudan border into a breeding ground for abductions, aggravated smuggling, and trafficking. While crossing borders to claim asylum may facilitate some protection from abuses perpetrated by the Eritrean government, it has created a new set of challenges for Eritrean migrants, who now must find protection and safety from kidnappers. While refugees must cross borders to find safety, those same borders create the circumstances for trafficking networks to operate.

Unless the dynamics of those involved changes, human rights abuses such as extortion, torture and human trafficking in Eastern Sudan and Sinai are expected to continue.

Methodology

This article is based on 60 qualitative interviews conducted with Eritrean individuals in Israel¹² and 74 in Ethiopia. Respondents were chosen to reflect different times of arrival to Israel and Ethiopia in order to create a better understanding of how the migration has changed over the years. The 134 respondents had arrived in Israel and Ethiopia from several weeks to five years prior to their interview. Among these interviewees were ten ransom payers, who were friends and relatives of Eritreans held hostage in the Sinai desert, and had gathered the money to pay for their release.

The interviews were conducted in restaurants and interviewees' homes and lasted between one hour and six hours, with an average of two and a half hours. The researchers have only basic Tigrinya language ability and were therefore unable to communicate directly with the interviewees. The research was conducted with two interpreters chosen because of their experience and their respected standing in their communities. They underwent brief ethics training with the researchers.

Terminology

Depending on the circumstances, the terminology 'smuggling', 'aggravated smuggling', and 'trafficking' can be used to classify the experiences of the migrants.¹³ Specifically, all migrants were smuggled. For some, that included abuses amounting to aggravated smuggling, while for others the abuses amounted to trafficking.

¹² Regarding the interviews conducted in Israel, about 20 per cent of Eritrean asylum seekers in Israel are women, and of 60 respondents interviewed in Israel, 14 were women (23%). Respondents ranged in age from 19 to 54. Over half (36) were age 18 to 29 and the rest were between the ages of 30 and 50.

¹³ For additional information on the *UN Convention against Transnational Organized Crime*, see: <http://www.unodc.org/unodc/treaties/CTOC/>. Sudan, Egypt and Israel have signed and ratified the Convention; Egypt and Israel have signed and ratified the Trafficking Protocol, while Sudan is not a party to it; Egypt accepted but did not sign or ratify the Smuggling Protocol, while Israel and Sudan are not parties to it. This information can be found as part of the United Nations Treaty Collection database: <http://treaties.un.org/>.

The term ‘smuggling’ is defined in the *Protocol against the Smuggling of Migrants by Land, Sea and Air* (Smuggling Protocol) 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’.¹⁴

Many Eritrean nationals interviewed as part of the research paid smugglers in order to facilitate their entry from Eritrea into Sudan and from Sudan to Israel. Some respondents in the research paid an agreed fee and were (eventually) taken to the Israel border without being exploited or significantly abused. One respondent stated, ‘I stayed in Sinai for a week. I had to pay three thousand US dollars. The treatment was okay.’¹⁵ Another explained, ‘The food and water is not enough but nobody died, nobody make problem. It is not horrible.’¹⁶ Such experiences do not amount to ‘aggravated smuggling’ or ‘trafficking’.

Others are abused by their smugglers and sold against their will between smuggling groups. Some of these experiences can be classified as ‘aggravated smuggling’, and other experiences meet the definition of ‘trafficking’. Aggravated smuggling, according to the Smuggling Protocol, includes circumstances ‘[t]hat endanger, or are likely to endanger, the lives or safety of the migrants concerned; or that entail inhuman or degrading treatment, including for exploitation, of such migrants’.¹⁷

While most cases of abuse along the migration route classify as aggravated circumstances of smuggling, not all experiences can be classified as trafficking. The term ‘trafficking’ as defined by the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*

¹⁴ For the full text of the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, see: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf

¹⁵ Interview, Male, 28 years old, Tel Aviv, Israel, 8 September 2012.

¹⁶ Interview, Female, 21 years old, Tel Aviv, Israel, 9 September 2012.

¹⁷ For the full text of the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, see: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf

(Trafficking Protocol), can be broken-down into three elements: 1) recruitment, 2) by means of threat or use of force, and 3) for the purpose of exploitation.¹⁸ Those abused during the journey meet the first two criteria of this definition, as they were recruited and harboured by force often via many of the mechanisms outlined in the definition, including coercion, abduction, fraud, deception, or abuse of power.

In order for individuals to meet the definition of trafficking, their experience must also fulfill the third criterion of the definition, 'for the purpose of exploitation'. While Eritrean asylum seekers are significantly exploited during the journey and the period that they are held hostage, it is less clear if they were recruited *for the purpose of* exploitation. Our research shows that Eritrean asylum seekers were exploited for ransom money, to expedite the payment process, or to intimidate other hostages into paying more quickly. This type of exploitation does not exactly match examples of exploitation given in the Protocol.

Researchers at Tilburg University classified certain experiences along this migration route as trafficking by categorising the Sinai abuse as 'forced begging'. The International Labour Organization's Convention Concerning Forced or Compulsory Labour (1930) defines forced and compulsory labour in Article 2(1) as: 'all work or service which is exacted from any person under the menace of any penalty for which the said person has not offered himself voluntarily'.¹⁹

¹⁸ The term 'trafficking' is defined by the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, as: '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'.

¹⁹ For the full text of the International Labour Organization's (ILO) Convention No.29 concerning Forced or Compulsory Labour, see: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C029.

Our research findings describe a situation in which migrants are forced to beg close friends and family for large amounts of money. As the amounts demanded are often more than their close friends and family can pay, Eritrean captives are abused to pressure them to beg relatives and acquaintances all over the world to contribute to their ransom payment. For close to five decades, Eritreans have been fleeing Eritrea and establishing diaspora communities in developed countries. Eritreans in the diaspora often contribute to the money demanded for a release from the extortion compounds in the Northern Sinai desert. Captives who do not have connections abroad often see their families forced to beg for money or sell their belongings such as jewellery, property and livestock for their release.

The researchers at Tilburg University point to the recent EU Directive which expands the definition of human trafficking to include forced begging.²⁰ Specifically, the EU Directive (2011/36) states:

In order to tackle recent developments in the phenomenon of trafficking in human beings, this Directive adopts a broader concept of what should be considered trafficking in human beings than under Framework Decision 2002/629/JHA and therefore includes additional forms of exploitation. Within the

²⁰ M Van Reisen, M Estefanos and C Rijken, 'Human Trafficking in the Sinai: Refugees between life and death', Tilburg University, October 2012, pp. 79–80, http://www.eepa.be/wcm/dmdocuments/publications/Report_Human_Trafficking_in_the_Sinai_Final_Web.pdf. While researchers at Tilburg University accurately point to forced begging as a practice similar to slavery, they also argue that abuse in Sinai is also a form of 'debt bondage', a practice similar to slavery in international law, which meets the definition of exploitation in accordance with the Protocol. However, their report does not give the full definition of debt bondage, and does not explain in detail how the experiences in Sinai meet the definition. According to the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, debt bondage arises from a pledge by a debtor of his personal services. This is not applicable to the experiences in Sinai, as Eritrean asylum seekers do not pledge services to their captors. For the full text of the Supplementary Convention, see: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>.

context of this Directive, forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour.

As many of the abuses perpetrated in Sinai are for the purpose of exploitation in the form of forced begging, we can apply the Protocol definition of trafficking to these situations.

The bulk of this paper addresses exploitative migration situations involving abduction and extortion. All migrants were smuggled. For some, that included abuses amounting to aggravated smuggling, while for others the abuses amounted to trafficking. As described above, we are applying the human trafficking framework to the situations involving abduction and extortion and talking about migration facilitators engaged in these practices as traffickers.

Human Trafficking Networks across Borders

According to the respondents in our research, individuals and groups involved in trafficking networks work out of Eastern Sudan, in the border area with Eritrea. Eritrean travellers reported either approaching migration facilitators or being abducted in Eastern Sudan; such initial interactions in most cases included contact with the members of a tribe called Rashaida. In our research, 31 per cent of the respondents were abducted in Sudan and forcibly taken into Sinai and they had no intention to come to Israel.

Even though kidnapping is often considered a stereotypical and media-driven image of trafficking, in Eastern Sudan abductions are a common reality for Eritreans crossing the border into Sudan.

Our research showed that increased incidents of kidnapping can be correlated with the tightening of asylum policies in Israel. In June 2013, Israel began implementing amendments to the Prevention of Infiltration Law, which mandates the imprisonment for at least three years of those irregularly

crossing into Israel from Egypt. Certain prolonged imprisonment influenced the migration decisions made in Ethiopia and Eastern Sudan with Eritreans hesitant and often purposely making decisions not to hire smugglers to travel to Israel. In order to continue receiving high sums of money via ransom, those involved in the trafficking networks started abducting migrants and forcibly moving them to Egypt's Northern Sinai desert.

According to 18 different interviews conducted as part of the research, the different groups involved in the kidnappings include: certain members of the Rashaida tribe, Eritrean collaborators working with smugglers, Sudanese locals, and elements within the Sudanese law enforcement authorities. Regardless of which actor carried out the actual kidnappings, all respondents reported that they eventually ended up with members of the Rashaida tribe.²¹ It was these Rashaida individuals who then sold them to members of Bedouin tribes in Sinai.

As discussed above, these abductions often take place along the Eritrea-Sudan border. In order to understand the kidnappings, we closely evaluate the geography and social implications of Eastern Sudan. The region of Eastern Sudan refers to the three Sudanese states that border with neighbouring Eritrea: the states of Gedaref, Kassala and Red Sea. Marking the split between the flatlands and deserts of the west and the mountainous areas of the east, where the border with Ethiopia and Eritrea lies, Eastern Sudan is considered a geographical frontier in itself. The region suffers from underdevelopment and social and political marginalisation. It is one of the poorest regions in the country.²²

²¹ Amnesty International confirmed the involvement of these different actors in their March 2013 report, Amnesty International, *Egypt/Sudan: Refugees face kidnapping for ransom, brutal treatment and human trafficking*, March 2013, <http://www.amnesty.org/en/library/info/AFR04/001/2013/en>.

²² J Young, 'The Eastern Front and the Struggles against Marginalization', Small Arms Survey, Graduate Institute of International Studies, May 2007, p. 8.

The smugglers and traffickers who live in the borderlands of Eritrea and Sudan exploit the unique locational ambiguity by building their lives and livelihoods around the resources that the border offers. In this case, the border area offers a constant flow of Eritrean migrants, who continue to cross the border as refugees fleeing the brutal Eritrean dictatorship. Such a circumstance provides structural conditioning for kidnapping and trafficking. As the border inherently structures refugee flows out of Eritrea and into Sudan, the border also structures human trafficking out of Eastern Sudan.

As found in our interviews, in some instances, Eritrean collaborators, local Sudanese and elements within the Sudanese authorities abducted Eritreans near the border area as they attempted to locate the refugee camps. If migrants are not intercepted by law enforcement authorities who transfer them to an asylum seekers' guest house in Kassala before being transferred to the refugee camps, they try to locate the refugee camps or urban settings on their own. The border area lacks a secure first point of contact for migrants entering Sudan and it is during this time that they are most at risk. In Hamdayet, a border town along the Eritrea-Ethiopia-Sudan border, a reception and screening centre has been established by the United Nations High Commissioner for Refugees (UNHCR) to establish a safe passage to the refugee camps. Another location for a second reception centre is currently being discussed.²³ For those unable to secure safe passage to such centres, they remain vulnerable to the trafficking networks present in this border area.

Rashaida Kidnappers

Our respondents detailed that members of the Rashaida group participated in abductions and extortion amounting to aggravated smuggling or trafficking from Sudan into Egypt. Respondents who were kidnapped recounted abduction directly

²³ Interviews with former UNHCR staff in Sudan, July 2012.

by members of the Rashaida community or by others, such as people from the local Hedareb tribe or elements within the Sudanese authorities, who sold them to Rashaida individuals. It is important to note that not all Rashaida are involved in smuggling and trafficking refugees from Eastern Sudan.

Traffickers from the Rashaida tribe are the common thread involved in the abductions of Eritrean asylum seekers among our respondents, and it is therefore important to understand the background surrounding this group. While the majority of the tribe resides in Sudan, some inhabit the northern province of Naqfa in Eritrea. They constitute a distinct ethnic group within Sudan and Eritrea, with political connections and interests in both countries. The norms and culture of the Rashaida are much more similar to the Bedouin of Saudi Arabia as opposed to other nomadic groups in Eastern Sudan.²⁴

The Rashaida tend to travel freely in the region ignoring political borders between States. They descend from the Arabic-speaking Bedouins who migrated from coastal towns in Arabia and sailed across the Red Sea and into Africa in the late 1860s. As we see below, there are multiple factors that enable their travel without restrictions.

First, the Rashaida's relatively recent migration to Africa meant they did not own tribal lands and many worked in camel pastoralism, a field which requires frequent travel across borders. Since the demand for camel meat in Sudan is low and the only big camel market is in southern Egypt, young men travelled with their surplus camels to Egypt in order to sell them.²⁵ This is still an on-going practice. The selling of

²⁴ R Perdue, A Salih, 'Cultures of the Middle East, Project paper The Rashaida Bedouin', 16 March 2008, p.1, http://campusweb.howardcc.edu/salih/culture/Arabic_2-7_Robert_Perdue-Rashayyida_Bedu.pdf; Human Rights Watch, *World Report 2012: Eritrea*. 2012, <<http://www.hrw.org/world-report-2012/world-report-2012-eritrea>>.

²⁵ I Kohler-Rollefson, B Musa, M Achmed, 'The Camel Pastoral System of the Southern Rashaida in Eastern Sudan', Commission on Nomadic Peoples, November 1991, <http://www.tearfund.org/webdocs/Website/Campaigning/Policy%20and%20research/East%20Sudan%20Analysis%202005.pdf>.

surplus camels turned out to be the closest link of Rashaida to Egypt.

Second, many Rashaida have multiple citizenships, further assisting in their ability to travel. It is not possible to know which of them is Eritrean and which is Sudanese. Some members of the community are citizens of both, or indeed may be citizens of Saudi Arabia or Yemen.²⁶ Their structural positioning in the region, created by their multiple nationalities and movement across borders has furnished their role as facilitators of the irregular and involuntary movement of Eritrean migrants, which often includes aggravated smuggling and trafficking.

Third, the rocky political history and the recurrent changes in power in the region have prompted Rashaida to frequently cross the border between Eritrea and Sudan. Members of the community move between Sudan and Eritrea whenever they need to escape political and economic pressures.

One respondent stated: 'The Rashaida in Eritrea are living close to the western border, and they have dual citizenship of Eritrea and Sudan. And these are the people who bring things, property from Sudan to Eritrea without any tax. First, the Rashaida, they don't believe in centralized government. They don't have laws because basically they don't live in cities so they cannot match with the law in the city. They cannot abide by law. They don't abide the law.'²⁷

While a variety of actors are involved in the kidnappings, all respondents we interviewed who had been kidnapped ended up in the hands of someone from the Rashaida tribe.

²⁶ S Pantuliano, 'Comprehensive Peace? Causes and consequences of under-development and instability in Eastern Sudan', NGO paper, September 2005.

²⁷ Interview, Male, 34 years old, Tel Aviv Israel, 20 August 2012.

Colluding Elements within the Sudanese Law Enforcement Authorities

In addition to the Rashaida, the Sudanese authorities are also involved in the kidnappings. Describing their involvement, one respondent said: ‘Our plan was not to come to Israel...[but] to go to Sudan and work there. When we arrived in Kassala, the police told us we were being taken to Shagarab...they covered our eyes and chained our legs and...told us we had to pay...three thousand dollars. They said if we didn’t pay, they would kill us.’²⁸ The individual is then sold to people from the Rashaida tribe who later transfer him/her to the Bedouins in the Sinai.

Sudanese law enforcement authorities who are involved in the kidnapping and selling of migrants are located in security posts in the border areas. Their location along the remote border, with no constant overview by superiors and little payment, makes them prone to involvement in illegal activities, such as profiting from the irregular cross-border movement.²⁹

Eritrean Collaborators

Eritrean collaborators collude with some Sudanese authorities and Rashaida in an intricate network of smuggling and people trafficking. One respondent recounted: ‘There was an Eritrean with the Sudanese soldiers....He told us that you are going to Israel, you don’t have to worry, and then we told him we don’t want to go to Israel, it is not our plan....And then the Rashaida started to threaten us with their guns and two Rashaida came and beat us with a stick.’³⁰

Sinai traffickers rely on the Eritreans as translators and intermediaries. The extent to which these individuals collaborate with the traffickers when it comes to torture and abuse varies from individual to individual. Some Eritrean

²⁸ Interview, Male, 25 years old, Tel Aviv, Israel, 12 and 13 July 2012.

²⁹ Interviews with former UNHCR staff in Sudan, July 2012.

³⁰ Interview, Male, 24 years old, Tel Aviv, Israel, 23 September 2012.

collaborators choose to get involved, and others are forced to work as translators, and even to abuse their fellow hostages. A respondent described this system:

One Eritrean was forced to translate. He was one of the people who was kidnapped in Sudan. They used their guns to tell him to beat people. On the other hand, there are other people who cooperate with them for the sake of money.³¹

Some collaborators were initially coerced but then perpetrated the violence beyond what they were forced to do:

This Eritrean collaborator, he came to Sinai to come to Israel, but he didn't have money and because he speaks Arabic they made him stay there for translation. He was very cruel. Sometimes, Egyptians would order him to do it. Sometimes he would do it alone - torture people, hang them, beat them....He was even more cruel than the Bedouins.³²

While the roles of the Eritrean collaborators differed between respondents, in the vast majority of cases at least one Eritrean collaborator was involved.

From the Rashaida to the Bedouin Traffickers

The network of traffickers from the Rashaida, Bedouin, and Eritrean communities as well as the transfers of ransom payments transcends the Egypt-Sudan border. While the Rashaida are based in Sudan, Eritrea, and the Arabian Peninsula, they lack a presence in Egypt.³³ Close to the Sudan-Egypt border, Eritrean migrants are sold from members of the Rashaida tribe to people of Bedouin origin. Eritrean

³¹ Interview, Male, 39 years old, Tel Aviv, Israel, 23 September 2012.

³² Interview, Male, 20 years old, Tel Aviv, Israel 12 and 13 July 2012.

³³ For more details on the Rashaida tribe and the role of many of this group in smuggling, see: UNHCR, *Refugees and the Rashaida: Human smuggling and trafficking from Eritrea to Sudan and Egypt*, March 2013, ISSN 1020-7473, retrieved 15 April 2013, available at: <http://www.refworld.org/docid/5142d9692.html>.

collaborators represent an essential part of this trafficking pathway.

Eritrean migrants find it difficult to differentiate between Rashaida and Bedouin traffickers. One respondent explained:

In some areas they are called Rashaida and in others Bedouins....They are people who do not have any recognized or settled place. For the Bedouins, some are in Egypt, some Israel, and other places. Same with the Rashaida.³⁴

Such confusion between the groups was common among respondents. While every respondent we interviewed mentioned that they were taken by several different smuggling or trafficking groups along the journey from Sudan into Egypt, there was not a clear picture by most respondents of exactly when the facilitators shifted from Rashaida to Bedouin.³⁵

In addition, the traffickers also have an intricate network of individuals who collect ransom money from Eritrean family members around the globe. Agents working with the traffickers have contacted families in Eritrea, Ethiopia, Sudan, Egypt, Israel, as well as across Europe and the United States. Transfers are conducted in-person as well as via international money transfer agencies like Western Union. Like in Sinai, both Eritrean and Bedouin collaborators are involved with facilitating ransom payments.

The actors involved in smuggling and trafficking, whether in the transfer of funding or the transfer of people, come from a variety of backgrounds. Their work transcends borders and facilitates the human rights abuses of Eritrean asylum seekers as they journey onwards to seek refuge and a better life elsewhere.

³⁴ Interview, Male, 34 years old, Tel Aviv, Israel, 20 August 2012.

³⁵ While most respondents did not know when smugglers shifted from the Rashaida tribe to Bedouin groups, few respondents did point out that the transition seemed to have happened at the banks of the Nile River. Additional research is needed to confirm this trend.

Conclusion

Understanding the actors involved is essential in drawing conclusions on how to bring trafficking in this region to an end. First, the security situation in Eastern Sudan must be improved, making it more difficult for traffickers to kidnap Eritreans. The Sudanese government must crack down on Sudanese authorities who are complicit or actively participate in the kidnappings. At present, it seems unlikely that the government in Khartoum will address this security challenge. International agencies active in the area, such as the UNHCR and the International Organization for Migration (IOM), should pressure the Sudanese government to implement comprehensive strategies to address security concerns in Eastern Sudan. The African Union should play an important role in developing a mechanism through which the governments of Eritrea, Ethiopia, Sudan and Egypt can combat kidnapping and human trafficking in the region and develop law enforcement mechanisms through which human traffickers and their collaborators can be held accountable.

Second, the Egyptian government should liberate the captives held in the Sinai trafficking compounds and hold those responsible accountable. The Egyptian government should address the problem of Egyptian authorities collaborating with smugglers and traffickers. Following the revolution in Egypt and this summer's recent events, the eyes of the world are on Egypt. The international community, in particular the Arab League, must ensure that ending the abuse of refugees in Eastern Sudan and the Northern Sinai desert are on the forefront of Egypt and Sudan's political agenda.

Lastly, the global community of Eritreans must mobilise around the issue. If Eritrean families stopped paying ransoms, the business would no longer be lucrative for the extortionists in Eastern Sudan and Sinai. Of course, this solution is impossible to implement at the individual level. Who among us would refuse to pay a ransom for a loved one? The Eritrean community can, however, pressure those who collaborate with the smugglers and traffickers and make it more difficult to

act as intermediaries — an essential aspect of the functioning trafficking network.

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Book Review

Who are the ‘Us’ and who are the ‘Them’?

Biao Xiang

Us and Them? The Dangerous Politics of Immigration Control, Bridget Anderson, 2013, 224 pages, Oxford University Press, 978-0-19-969159-3.

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There are ‘good’ citizens and ‘bad’ citizens; there are ‘good’ migrants and ‘bad’ migrants. The imagined divide between the good and the bad, Anderson argues in this outstanding book, matters more than the line between citizens and migrants in the contemporary debates about immigration in the U.K. The U.K. public is worried about the undeserving welfare-dependent citizens who are too lazy to look for jobs, as much as about the greedy migrants who steal jobs. Just like migrants have to prove to be valuable in order to be officially admitted, citizens are increasingly expected to be productive to enjoy rights. ‘Failed’ citizens such as criminals and teenage mothers are seen as less deserving than hardworking migrants. Thus the dangerous politics of migration control: it may erode the basic notion of citizenship and undermine equality in the national community. While tighter migration control often justifies itself as a means of protecting national solidarity, Anderson argues that it may achieve exactly the opposite.

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Weaving historical comparisons into sharp observations of fast-changing realities, and combining imaginative interpretations with solid empirical analyses, the book is both nuanced and powerful. For instance, a concise analysis of the incumbent government's goal of reducing 'net migration' disentangles the multiple historically constituted contradictions in the politics of migration control. The government adopted the banal statistical term to present its policy as scientific and raceless, while actually aiming at placating sometimes racist public concerns. More complex than this are the discrepancies between the migrants in statistical data (foreign born), the migrants as managed by policies (foreign nationals), and the migrants of public concerns (e.g. Muslim population and asylum seekers). The British colonial history and the post-colonial citizenship law resulted in a large number of foreign-born U.K. nationals. They made up more than 40 per cent of net migration statistics at the end of 2009 (p. 53), but they are not subject at all to migration control. We should therefore not be surprised if the policy fails, but we should be fully alert that the ineffective policy can be highly and dangerously consequential, as it may create misperceptions about history and reality.

This book is compelling because the author's intellectual sophistication directly results from her deep understanding of what happens on the ground and her engagement with on-going debates. It does not take theorisation as an aim in itself, but precisely because of this, it theorises the best. The punches are clever, and all the punches hit something out there. The sharp insights are always firmly grounded in specific problematics, yet always lead to larger questions beyond migration. All students of migration studies should read this book at least once.

Possibly as a result of the author's deep political engagement, the format of the book is slightly unusual. It focusses on a single country but covers diverse topics, ranging from the historical vagrancy regulations to citizenship laws, to current policies on labour migration, settlement, naturalisation, deportation, human trafficking, and domestic workers. It differs from the more fashionable practice that focusses on a particular type of migration but examines it transnationally. Anderson's

book reminds us that real politics remain stubbornly national, and at the same time know no boundaries between policy domains. International migration as a *phenomenon* is indeed transnational and global, but it becomes a particular *issue* only in particular local and national contexts.

The subtitle of the book, ‘The Dangerous Politics of Immigration Control’, is thus brilliantly conveyed. The main title raises another set of fascinating questions. With the question mark, Anderson decidedly challenges the divide between ‘us’ and ‘them’, but, nevertheless, she seems to suggest the anxiety for such a divide is integral to the politics of migration control because such a binary is indispensable to maintain ‘the community of value’: ‘Central to my argument is that modern states portray themselves not as arbitrary collections of people hung together by a common legal status but as a community of value, composed of people who share common ideals and (exemplary) patterns of behaviour expressed through ethnicity, religion, culture, or language—that is, its members have shared values’ (p. 2). But for me the book says something more interesting and insightful, albeit implicitly.

The book shows that what underlines current debates is *not* the cleavage between the in-group and the out-group, but a set of universalistic principles. Everyone, regardless of their racial, national and socioeconomic backgrounds, can be judged against these principles, and everyone can be located in different positions in a single continuum of value. It is inclusive and differentiating. Good citizens can slip to the bad side of the continuum when they fail to live up to these principles, and non-citizens can become deserving citizens if they prove their virtue. Universalistic principles are by definition abstract, and there are always large grey zones into which both citizens and migrants fall. These citizens and migrants need to be constantly tested. It is such universalistic principles that make it possible for citizenship and migranhood to be mutually constitutive. The British public anxiety about human trafficking as analysed in chapter seven is a case in point. Anderson suggests that ‘[t]rafficking enables “us” to congratulate ourselves on the freedom and rights within the British economy, and to respond morally and emotionally to the gap between us

and them, between privilege and suffering' (p. 152). But the 'us' here is not a stable population; it is instead a (superior) position in the moral continuum. The victims of trafficking, as Anderson points out, are subjects of 'pity rather than fear' (p. 141), and could be treated like citizens, while the traffickers and employers, foreign or local, are evils. The notion of 'harm prevention' that underlines anti-trafficking movements 'equates compulsion for the good of others with compulsion for your own good' (p. 158). The horror of trafficking does not remind the public of any specific Britishness, but evokes feelings for the entire humanity. The trafficked victims are not *Others*; they are junior selves. (The similar reactions towards trafficking and child abuse should not be a surprise.) Trafficking became 'a rare patch of common ground between NGOs, activists, and states' (p. 137) precisely because of, not despite, it being an exception. The imagined extreme conditions - the raw violence on biological bodies - enable a straightforward application of universalistic morality without being complicated by other considerations. The anxiety about trafficking 'turns "us" into moral actors, able to respond to the inequalities that are in our midst as well as far removed. We are moved by the plight of forced labourers and slaves, and are thereby enabled to access the moral high ground' (p. 154). In comparison, debates about labour or even marriage migration, for instance, cannot be as simple.

Universalistic moral concerns may have been the cause of the depoliticisation of trafficking and border control in the mainstream representation. Anderson makes a strong case about how anti-trafficking discourses leave out larger political institutions and power relations: 'We can condemn employers' threats to reveal undocumented migrants to the authorities in order to ensure their obedience, yet not question the mechanism of control itself....Concern with trafficking focuses on borders and immigration controls while missing the crucial point that immigration controls produce relations of domination and subordination, thereby leaving state responsibility for the consequences of this completely out of the picture' (p. 154). Trafficking and borders are depoliticised not because the divide between us versus them is too rigid or absolute, but on the contrary, because the division is subject to high moral principles,

and as such the border and the nation are relativised as instruments in the service of moral principles. The concrete issues that are responsible for trafficking in the first place—immigration control, international inequalities, variations in labour relations, economic deregulation—are moved into the shadows. Life, especially tragic life, becomes a fairy tale of morality.

I therefore wonder whether the phrase ‘embodiment of value’ might be more accurate than ‘a community of value’ to describe how the British public (or elite) imagine the nation. The notion of a community of value privileges community as the ontological basis of value, and sees value as a feature of the community. The image of ‘embodiment of value’ privileges value, with the nation being a form of its realisation. An embodiment is fluid, open and constantly changing. (Looking from a global perspective, the U.K. has been distinct for being relatively open to foreigners rather than being exclusive.) When the nation is imagined as an embodiment of value, the public opinion leaders are representatives of the embodiment and guardians of principles rather than community members. Community members perceive each other according to the tangible relations among them, representatives of the embodiment are judges who position themselves beyond and above the game. Community life is messy and cannot be easily judged; guardians of holy principles do not want to live in communities.

Such an imagination of the nation may be specific to the U.K. British colonialism was as much about bloody violence as about moral teaching. (Reclaiming the ‘morality’ of the western, primarily British, expansion is the main point of the recent revisionist global historiographies as championed by Niall Ferguson and others.) Britain’s transformation from an empire to a nation was relatively peaceful and civilised as compared to the colonial expansion, and this has been again attributed to its commitment to universalistic principles by liberal historiographies. The global position of the postcolonial U.K., primarily as an integral part of the U.S. hegemony, enables it to continue seeing itself as an embodiment of universalistic ethics as opposed to an ordinary nation whose

fate is subject to specific and contingent geopolitical conditions. This is not to say that the UK is free from specific geopolitical conditions, but that it is able to present such calculations in a language of universality.

If politics is about contestations over the distribution of resources among heterogeneous populations and is thus, by definition, contradictory, universalistic principles and the perspective from a transcendental third-eye are anti-politics. Politicisation is predicated on the explication of specific sociopolitical positions—positions of different groups within a nation as well as the position of the nation in the world. It is true, as Anderson established, the categories of Us and Them can never be fixed. But don't we have to identify, and even construct 'us' as a social force in order to politicise life? Can we develop a productive political life without articulating, and sometimes even essentialising, the self? As much as I admire all the intellectual projects of deconstruction, I wonder what they offer to life. The problem here is not that the U.K. public develop a sense of Us; the problem is that the Us is disembodied, ungrounded, de-historicised and socially empty. It is a subjectivity without the subject. It is not 'real'. In this condition, debates about trafficking are inevitably driven by concerns about value instead of by facts, by moral alarms instead of institutional analysis, and by emotional outrage instead of evidential scrutiny. It is not wrong to regard selves as moral actors. But it needs to be thought through what kinds of things in history have made the group of people into Us? Where does the Us stand in history and in the global politics? Nor is it problematic to pursue moral principles. But it must be remembered that any principle has to be carried out by specific groups of people in specific contexts in specific ways. Whom can we ally with, based on what strategies and actions? Instead of moving away from Us, we may need to take Us very seriously. We may have to confront the question who is the Us, or rather, what kind of Us we want to construct. Get the Us real. This can be an important step in repoliticisation.

I wish the subtitle of the book included U.K./Britain (or more precisely, metropolitan England), and the text was more careful to avoid the impression that the U.S., which is

mentioned occasionally, is basically the same as the U.K. While white men are no longer imagined as the only subject capable of entering disembodied contractual relations—which imaginary was crucial for the classical liberal thought as Anderson reminds us (pp. 146-7), the U.K. and the U.S. remain the only two nations whose experiences can be readily abstracted into general theories, so much so that the country names can be comfortably kept invisible. We may appreciate the broader significances of the U.K. experiences better if we understand its specificities more. What Anderson describes seems to resonate with developments in other parts of the world in different ways. The U.S. handling of immigration is regarded by many as a success because its weak welfare provision and deregulated economy across the board render migration integration policy unnecessary. Only the fit will survive and the ‘undeserving’ migrants as well as citizens will disappear somehow. The Singapore government has been accused of privileging ‘global talents’ at the cost of its own citizens. Japan under Abeconomics is now tightening up welfare provision to citizens while opening new channels to welcome foreign talents. In what ways can the analyses on the U.K. be applied broadly, and more importantly, how should we locate the U.K. experiences historically and globally?

Anderson’s book is also a timely invitation for deep historical research on migration. Her historical discussion is extremely illuminating, but as she is primarily concerned with contemporary debates, in some places she tends to evoke history as analogies instead of as social processes. For instance, the revisits to the vagrancy regulations in Tudor England certainly help raise important questions about current migration control, but the actual relation between the two remains unclear. The contemporary debates as analysed by Anderson could happen in any country with or without similar histories. Anderson’s analysis of colonial history is most convincing precisely because it demonstrates clearly how the current British laws and notions on citizenship are shaped by that particular history, sometimes in surprising ways. Not all political ideas and practices travel across time, and when they do, few take direct flights.

This book will be a classic in migration studies and beyond. It teaches us so much, and urges us to think so much more. We should congratulate ourselves for having another book that shows to the world why scholarship matters and what kind of scholarship matters.

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