

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

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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.

ANTI-TRAFFICKING REVIEW 2 (2013): 33–49

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).

ANTI-TRAFFICKING REVIEW 2 (2013): 33–49

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).

ANTI-TRAFFICKING REVIEW 2 (2013): 33–49

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.

ANTI-TRAFFICKING REVIEW 2 (2013): 33–49

- 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.

ANTI-TRAFFICKING REVIEW 2 (2013): 33–49

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.

ANTI-TRAFFICKING REVIEW 2 (2013): 33–49

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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