

Human trafficking and human rights

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Anti-trafficking efforts have a long tradition of engaging a human rights advocacy approach. However, the approaches adopted have been clearly gendered in their focus and, as Kapur identifies (2005), quite narrow in their scope, as they have focused primarily on the trafficking of women into the sex industry (sex trafficking), sex work and sex workers (Kapur 2005). This article argues that there is much to be gained through examining the potential for the promotion of anti-trafficking efforts that engage with international human rights instruments beyond the existing trafficking-specific framework, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (an Optional Protocol to the Convention Against Transnational Organized Crime 2000). The central argument here is that the current international approach to trafficking in persons is focused primarily on law and order, where criminal justice efforts are at the foundation of the framework to address and eradicate this practice. The parameters of the overarching convention clearly establish an agenda that emphasises the trafficking in persons as cross-border criminal activity. This article draws upon the author's research on the Australian response to people trafficking and on *Freedom, Respect, Equality, Dignity: Action*, the major NGO report to the UN Committee on Economic, Social and Cultural Rights regarding Australia's implementation of the International Covenant on Economic, Social and Cultural Rights (ANACLC, HRLRC and KLC 2008). It is argued that the framework of this offers an alternative position from which to advocate for a more comprehensive understanding of, and response to, trafficking in persons.

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Introduction

Since the first formal recognition of human-trafficking¹ in the international sphere in 1949, mobilisation around this issue has come in waves; it has not been sustained as a priority issue on the global agenda over the past six decades. With each re-emergence of this issue, it has come to be framed and understood in different ways. It was first recognised within the context of a 'white slave trade' in the early 19th century, and in 1949 it was specifically identified as 'trafficking' within the Convention for the Suppression of the Traffic in Persons and Exploitation of the Prostitution of Others (Trafficking Convention) (see Wong 2005; Doezema 1998). Following the development of this convention, little interest was focused upon the issue until the late 20th century, where a range of shifts — socially, politically and economically — within the national and international contexts brought about a renewed concern with trafficking in persons. Activism throughout the 1990s saw a reinvigorated anti-trafficking campaign sweep across the globe, securing in the process the attention of the international community — as reflected in UN commitments in 1993 in Vienna and the following year in Beijing (see Outshoorn 2005; Gallagher 2001). The culmination of the extensive activism was the introduction of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (commonly referred to as the Palermo Protocol) within the UN Convention Against Transnational Organized Crime (2000) (the TOC Convention).² This Protocol established trafficking in persons as an international priority and formalised the international framework for recognising and responding to this issue. In order to examine the adoption and utilisation of the Palermo Protocol within Australia, it is necessary first to outline the

- 1 Note on terminology: Throughout this article, 'human trafficking', 'people trafficking' and 'trafficking in persons' are used interchangeably to refer to the deceptive or coercive practices involved in cross-border migration for the purposes of exploitation, as defined within the Palermo Protocol. 'Sex trafficking' is used to refer specifically to the practice of trafficking in women into sexual servitude. 'Sex work' and "'illegal" sex work' (where sex work is either illegal or undertaken without a work visa) are used here to refer to the provision of sexual services for payment. While recognising that these have been and continue to be highly contested terms, as argued by Segrave and Milivojevic (2005), the author argues that concentrating exclusively on terminology has historically prohibited the development of efforts to challenge contemporary anti-trafficking efforts. Similarly, the term 'victim' is used here for reasons of brevity and due to the adoption of the term 'victim' within the international anti-trafficking discourse. This is also a contested term (see Gibson, Law and McKay 2001; Doezema 2000), but some of the key issues related to the problematic and selective granting of the label 'victim' are canvassed in the article.
- 2 The TOC Convention and the Palermo Protocol were adopted at the 55th session of the General Assembly of the United Nations on 15 November 2000 (Resolution A/RES/55/25) (UNODC 2009). The TOC Convention has 147 signatories, and 147 parties (ratification), while the Palermo Protocol has been signed by 117 nation states, and ratified by 124 (UNODC 2009).

development of that protocol and the parameters of the convention within which it is located.

A brief history of the international response to trafficking

The Palermo Protocol was the product of an extensive negotiation process that was largely dominated by well-established tensions between alternative feminist approaches to trafficking in persons, particularly in relation to sex trafficking. For the purposes of this article, I will canvass the contours of this debate by focusing on the key political platforms utilised to progress anti-trafficking agendas; however, it must be noted as a caveat that the intention of this discussion is to identify the broad trends and concerns rather than to detail the specific and intricate details of the historical developments since the early 1990s.³

Since the early 19th century, feminist advocacy has played a significant role in the push for the international community to recognise trafficking as a social, legal and political priority (see Doezema 1998). Reproducing an exhaustive account of the history of international engagement with trafficking from the late 19th century to the present day is unwarranted for the purposes of this discussion (see Williams and Masika 2002; Doezema 1998). What is pertinent here is the recognition that there has been continuity in the core issues driving anti-trafficking campaigns over time. The concerns have informed the way in which trafficking in persons has been mobilised and responded to in both the international and the national spheres.

Overwhelmingly, trafficking campaigns have been dominated by a gendered, moral agenda — preoccupied (almost exclusively) with the trafficking of women into prostitution (sex trafficking) (see Doezema 1998; Wong 2005; Outshoorn 2005). This was highlighted by the 1949 UN Trafficking Convention, which was concerned specifically with the trafficking of women into the sex industry (Wong 2005, 73; Doezema 2000).

When anti-trafficking campaigns re-emerged in the late 1980s, sex trafficking once again came to the fore as an international concern. This resurgence of interest followed the expansion of feminist inquiry and advocacy that had galvanised around First World/Third World issues arising under conditions of globalisation, such as 'mail-order brides' and 'sex tourism' (Murray 1998, 51; Sassen 2000). The subjects of the feminist anti-trafficking campaign subsequently shifted from the 'white' Anglo-

3 This article does not intend to re-canvass the detailed background of the events and activism leading to the introduction of the Palermo Protocol, as this has been attended to comprehensively by authors including Wong (2005) and Outshoorn (2005).

Saxon women around whom campaigns for protection revolved in the late 1800s, to focus on victims of trafficking as migrant 'Others' — most often, according to Doezema, characterised as "'passive" unemancipated women from the developing world' (Doezema 1998, 44; Doezema 2000). These concerns were further supported by an emerging body of research from organisations such as the International Organisation for Migration (IOM). A number of the reports in the early 1990s resonated with the international community, including a groundbreaking IOM report in 1995 that detailed the rapid expansion of trafficking patterns from Central and Eastern Europe, with particular attention focused upon the movement of illegal sex workers out of the former Soviet Union (IOM 1995). Consistent with earlier feminist anti-trafficking campaigns, the focus remained on issues of prostitution, women's victimisation and their vulnerability (Doezema 1998; Murray 1998).

However, when sex trafficking reappeared on the international stage, a more intense debate ensued between neo-abolitionists (led by the Coalition Against Trafficking in Women, one of the most prominent groups advocating this approach; see Raymond and Hughes 2001; Raymond 2003; Leidholdt 2003) and the more recently established neo-regulationists (led by the Global Alliance Against Trafficking in Women (GATW); see also Kempadoo 1998; Murray 1998; Doezema 2001), and this debate transferred from the academic and activist sphere to the international sphere. Both campaigns fought for international attention to return to trafficking. When it did, the major debates continued to be dominated by gendered, moral positions, where debates concentrated upon whether *all* migrant sex workers could be assumed to be 'trafficked persons'. Linking trafficking to sex work propelled consent to become a pivotal issue in the debate.

However, while these debates connected the contemporary engagement with this issue to the historical foundations, the broader concerns occupying the international community had changed significantly. Within the Global North in particular, there was an increased political consciousness of the susceptibility of national borders to a wide array of contemporary 'threats'. Transnational organised crime dominated the national and international political agenda as a major concern, including the role of syndicates in the clandestine movement of people (Chuang 2006). Contemporary concern emphasised the cross-border nature of this practice, identifying it as an emerging exploitative practice connected to emerging transnational organised crime trends (Wong 2005, 74). While other approaches were put forward, such as the human rights framework, these were less successful in capturing the attention and imagination of the international community (see Gallagher 2001). Primarily, the response to trafficking has gained traction through the convergence of contemporary concerns around transnational organised crime and the sexual exploitation of innocent women — where the portrayal of victimisation and criminalisation relies

heavily on stories of innocent and naive Third World women and children being the victims of male-dominated 'syndicates' (Berman 2003).⁴ This context has been critical to the mobilisation of trafficking in persons at the global level.

The contemporary international framework

While other international and regional instruments exist that make reference to trafficking in persons,⁵ it was through the adoption of the TOC Convention by the UN General Assembly in 2000 that a clear global statement against this phenomenon was secured.⁶ The establishment of the TOC Convention was borne out of the increasing preoccupation in the developed world (particularly the US and Europe) with cross-border organised crime as a new and emerging 'threat' to the security and stability of nation states (Kempadoo, Sanghera and Pattanaik 2005; Berman 2003). Unlike criminal justice issues within the nation, this new threat required an international commitment to cooperation to work towards its eradication. The TOC Convention served to consolidate transnational crime (in all its forms, as articulated within the convention and the three supplementary protocols⁷) as an international priority while also establishing a framework that inscribed a global formulation of 'the problem' and detailed the structure and form of a series of measures to be imposed by state parties to combat transnational organised crime. These measures were dominated by legal interventions and strategies, including introducing a domestic criminal offence regime, adopting agreements for cross-border mutual legal assistance, and fostering law-enforcement cooperation.

4 For further discussion of these developments, see Segrave, Milivojevic and Pickering in press; Wijers 1998.

5 These include the Convention on the Elimination of All Forms of Discrimination Against Women; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child (CRC); Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Pornography; ILO Worst Forms of Child Labour Convention No 182; Rome Statute of the International Criminal Court; Slavery Convention; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; European Convention on Action Against Trafficking in Human Beings; Inter-American Convention on International Traffic in Minors; and SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

6 See above, note 2.

7 In addition to the Palermo Protocol, the other two protocols were the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. The former protocol was adopted with the convention on 15 November 2000 and the latter was adopted on 31 May 2001 (UNODC 2009).

It was within this framework, as noted above, that trafficking in persons was galvanised internationally as an issue that features organised crime *and* the sexual exploitation of innocent women and children. The anti-trafficking campaign became attached to the momentum for an international commitment to addressing all forms of transnational crime and, following a lengthy period of negotiation, the Palermo Protocol was established as the international framework for the definition of and the required response to trafficking in persons (see Chuang 2006; Wong 2005; Biemann 2002). Defining trafficking in persons within the broader framework of the TOC Convention marked the boundaries of the international approach to this issue, where 'countering' organised crime through criminal justice measures is a major priority (UNODC 2007). It also created a protocol that focuses predominantly on the trafficking of women into sexual servitude and the issue of consent (Berman 2003). While the final definition remains a subject of debate, particularly among feminists, since the protocol was established (see, for example, Agustin 2007; Kempadoo, Sanghere and Pattanaik 2005; Doezema 2002) the definition embodied within the protocol has played a significant role in framing and delimiting the anti-trafficking responses adopted by nations and independent (local, national and international) organisations (see, for example, Segrave, Milivojevic and Pickering in press for an analysis of responses in Australia, Thailand and Serbia).

The adoption of the Palermo Protocol was significant in developing both a definitional and an operational framework with international consensus. Within this framework the definition became more inclusive than definitions adopted decades earlier, identifying that the phenomenon occurs in a range of industries and that it affects men, women and children. Further, exploitation became the 'key actionable element in the trafficking process', shifting the emphasis away from consent (Raymond 2002, 495). However, while nation states that become signatories are encouraged to *consider* implementing measures providing for trafficked persons' physical and psychological recovery and to *endeavour* to provide for their physical safety, they are *obliged* within the protocol to criminalise organisation, assistance or participation in the trafficking of persons (Palermo Protocol, Arts 6–8). By connecting trafficking in persons to transnational organised crime, efforts to 'combat' transnational crime networks through criminal justice efforts that target illicit cross-border activity are emphasised as playing a significant role in addressing trafficking in persons (Berman 2003). Indeed, the utilisation of the TOC framework was identified as a more effective approach than a human rights-based approach, whereby 'effectiveness' was tied to measures to identify and apprehend offenders (UNODC 2007).

Finally, consistent with UN conventions and protocols generally, the enforceability of the Palermo Protocol is limited. Nations are not legally bound to adopt the full suite of measures and guidelines, nor is there a process for enforcing a specific

interpretation of this instrument in national legislation and policy practices. Thus, the protocol established a significant yet largely *symbolic* framework that provides an internationally agreed upon agenda for responding to this issue.⁸

An important parallel development to the international framework was the United States proclaiming its role as the 'global sheriff' on efforts to address trafficking, through its development of a comprehensive legislative and administrative regime to monitor and assess national and international measures to address this issue (Chuang 2006). The US legislated 'minimum standards for the elimination of trafficking' through the *Trafficking Victims Protection Act of 2000*, which are applied domestically and internationally (Chuang 2006, 449). The Office to Monitor and Combat Trafficking in Persons (OMCTP) was established within the US Department of State to work towards the elimination of trafficking in the US and internationally (USDOS 2002, 4) and to undertake an annual assessment of individual countries' responses to trafficking annually (published in the *Trafficking in Persons Report* (TIP Report)).

While all elements of the TIP Report — from the nations selected as 'countries of interest', to the investigation and review process, to the ranking system — have been the subject of increasing criticism (see, for example, Chuang 2006; WCRWC 2007; Berman 2003), the US-defined norms have played a significant role in influencing governments to introduce anti-trafficking laws and policies (Carrington and Hearn 2003; Coomaraswamy 2003). Critically, the assessment process has largely sought the development and implementation of domestic and cross-border criminal justice efforts, focusing on law enforcement outcomes as indicators of success (USDOS 2006). While the most recent US TIP Report (USDOS 2008) is indicative of a shift towards a more inclusive understanding of trafficking in persons, it has been the more exclusive agenda of a gendered criminal justice framework that has been advocated for by the US in 'encouraging' other nations to develop 'comprehensive' anti-trafficking efforts, as noted by Chuang (2006). Thus, within the two influential international frameworks, the Palermo Protocol and the annual US TIP Report, trafficking in persons has been conceptualised as and mobilised within a gendered law-and-order framework, where women and children are primarily conceived of as victims and where nation states are responsible for enabling and enacting legal responses to this specific form of cross-border exploitation. Rights, within this context, are related specifically to rights in relation to victimisation and criminalisation.

8 Indeed, while this continues to be the subject of debate and contestation, the framework itself remains unchanged. It has been noted in the author's research (Segrave, Milivojevic and Pickering in press) that for policy makers, independent organisations, and local and national authorities, the international framework is drawn upon to guide and justify anti-trafficking efforts.

The Australian response

In Australia, it was not until October 2003 that the Australian government publicly acknowledged and engaged with sex trafficking as a national priority, with the announcement of the Commonwealth Action Plan to Eradicate Trafficking in Persons (see Segrave 2004; Alcorn and Minchin 2003). This first substantive policy commitment to this issue from the Australian government mirrored the international framework described above, with an approach designed to eradicate this 'repugnant and pervasive form of transnational crime' (Attorney-General's Department 2004, iii). The whole-of-government policy response was comprised of a wide range of initiatives that included a specialised police unit, a migration officer located in Thailand, new visa arrangements, a victim support package, funding to support repatriation support services in source countries, legislative amendments and ratification of the Palermo Protocol (Minister for Immigration and Multicultural and Indigenous Affairs 2003). It was announced as a comprehensive package developed to 'enhance the detection, investigation and prosecution of traffickers, improve the range of support available to victims and help prevent trafficking of persons' (Minister for Justice and Customs 2003). However, the 'comprehensive' nature of this response to trafficking in Australia was not dissimilar to state policy approaches adopted internationally (Grewcock 2003, 120; Berman 2003), where the main focus has been on criminality, border surveillance, policing cooperation, and resolution through prosecution and repatriation. While the package was introduced to address the 'full cycle of trafficking', the process of implementation revealed the focus on law and order, as legislation and enhanced policing processes were quickly established. In 2004, at the opening of the Australian Institute of Criminology annual conference, a senior Australian federal minister emphasised the importance of this approach, citing prosecution outcomes as both a key priority and the most tangible evidence of progress in the 'fight' against trafficking by policy makers. Critically, the provision of victim support has been tied to victim cooperation and participation in criminal investigations and/or prosecutions (see Segrave 2004).

Critiquing the dominant response

The response to trafficking, both within Australia and internationally, reflects the current focus upon criminalisation, victimisation and migration. Through invoking the familiar rhetoric of law and order, the emphasis on law enforcement goes relatively unquestioned, overshadowing alternative considerations and approaches (Grewcock 2003, 121; Hogg and Brown 1998). This assessment of the current response is drawn both from an analysis of the policy framework and from research conducted by the author (see Segrave, Milivojevic and Pickering in press; Segrave in press), as well as by other emerging analyses of aspects of the Australian policy response (for example, Pearson 2007; Burn and Simmons 2005). As I will outline below, such responses adopt

a narrow understanding of trafficking and effectively decontextualise this form of exploitation. There are two concerns raised by the current response that will be canvassed briefly. First, the law-and-order narrative enables a singular, narrow, case-by-case focus where the role of the state is contained within the status of 'rescuer'. Second, this narrative engenders a 'logical' response that is restricted to prevention and prosecution.

Within the current framework, trafficking is synonymous with individualised exploitation. Destination nations respond at the point of exploitation — that is, when and where the offence or the victim comes to the attention of authorities, most often within Australia (and elsewhere) through immigration officials (Berman 2003). Thus, the border and the enforcement of the border regime are critical to identifying and responding to trafficking. This enables migration to be configured as problematic where women are vulnerable to being exploited in places 'away from home' (Sharma 2003). As a consequence, the response to trafficking and its eradication may be thought of as requiring not only the familiar reactive efforts that relate to victimisation, criminalisation and prosecution, but also preventative efforts relating to people's movement. Thus, in part, trafficking in persons is another 'threat' to the nation that requires the escalation of enhanced border policing efforts (Andreas 2000). In relation to trafficking, this has resulted in increased efforts to detect and prevent trafficking, in addition to efforts to prevent the emigration of 'vulnerable' women in some nations (Berman 2003; Milivojevic and Pickering 2008). This results often in reactive efforts, where, for example, the identification of Thai women as an 'at risk' population for sex trafficking results in heightened scrutiny of their applications to come to Australia and an increased burden on women travelling independently to demonstrate their capacity to support themselves (Thai Women's NGO 2005). By focusing on migration, we are not attending to the disparity of global movement and the freedom with which some people may cross borders and the significant lack of freedom for others to embark upon legal, authorised transnational movement (Sharma 2003; Bauman 2000). We also are reduced to playing a game of catch-up, reflected by anecdotal reports that those seeking to exploit migrant sex workers coming to Australia simply shifted their focus away from Thai women to Korean women, who are more easily able to migrate to Australia (Roxon et al 2004). This is an issue that requires further elaboration, particularly in terms of engaging with the role of border security and immigration/emigration constraints established by nations under the rubric of 'anti-trafficking protection efforts' (Segrave in press).

Connected to these concerns is the fact that for destination countries, the major focus remains upon the detection of victims and the prosecution of traffickers — that is, the state steps in as the 'benevolent rescuer' to find victims and punish traffickers. As noted in research conducted by the author, one international representative

identified that the Australian response to trafficking is focused on prosecution, as this is 'the best way to feel like you're doing something' (Segrave, Milivojevic and Pickering in press). Such approaches effectively simplify this issue, evading, for example, an examination of the responsibility of destination countries in creating or contributing to the conditions that enable such practices to occur. It also results in unintended consequences, reflected in this participant's recognition that criminal justice processes and 'stricter border enforcement [can] result in higher premiums [so that] the impact on trafficking is not to reduce it but to shift practices and increase profits' (in Segrave, Milivojevic and Pickering in press). Further, such responses engage a narrow, gendered sexualised understanding of victimisation that limits the ability of women and men trafficked into industries other than the sex industry to be recognised or prioritised, while also refusing to recognise victims of trafficking as active, rights-bearing transnational migrants. This is reflected in the difficulties associated with identifying 'real' victims of trafficking, as victims of trafficking rarely appear to be naive, enslaved women who have been subject to the most extreme forms of sexual, physical and psychological abuse; rather, indeed, in research conducted by the author and her colleagues, one Australian law enforcement officer noted that 99 per cent of 'sex slave victims' are women who have been 'living the high life' in Australia who then become angry because they have not been paid enough for their work (Segrave, Milivojevic and Pickering in press). Such attitudes raise many areas for further investigation; however, for the purpose of this article, the point that is being made is that the current policy framework is far too narrow and limited to enable any significant progress to be made in order to address any form of people trafficking.

It is through the identification and brief elaboration of these two points that an alternative framework within which to locate trafficking in persons can be articulated. From this point, it will then be argued that in order to respond to trafficking in persons in a more comprehensive and holistic way, we need also to attend to trafficking in persons as a practice that can occur in a range of industries, to women and men as well as children, and to challenge the role of destination countries. Primarily, to date, nations such as Australia are focusing on criminalisation and victimisation, where support for victims is framed within a victim/trauma model with an emphasis on emotional and welfare support systems, and where the criminal justice process is the main priority. Trafficking has been treated as a separate and distinct phenomenon. This is not the first attempt to distinguish an alternative way of engaging with trafficking in persons; indeed, Dorevitch and Foster (2008) have advocated for the utilisation of refugee law while McSherry and Kneebone (2008) and Gallagher (2001) have advanced the case for a broader human rights perspective. However, as will be elaborated below, there has been little engagement of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Thus, the discussion now turns to

draw upon the understanding of people trafficking outlined above to put forward the case for the ICESCR to be recognised as providing a solid existing framework through which nation states can be called to account and, in so doing, be pressed to undertake efforts that will potentially reduce the vulnerability of all migrant workers, particularly temporary migrant workers, to all forms of exploitation, particularly exploitation related to labour.

*Laying an alternative foundation: globalisation, migration, labour and exploitation*⁹

There is a well-established scholarship articulating patterns emerging under conditions of globalisation, including the women's movement across national and international borders and the feminisation of the low-skilled, low-wage workforce in both the Global North and the Global South (Sassen 2000). Within this context, many factors have contributed to women's opportunity, ability and desire to migrate and have given rise to shifts in global migration patterns (Sassen 2003; Papastergiadis 2000; Coomaraswamy 2003; Truong 1998; Sassen 2000; Pettman 1996; Berman 2003; Agustin 2003). While it has been acknowledged that some aspects of this movement may be identified as forced or unwilling migration, it has also been argued that we must attend to the complexity of factors contributing to global transnational migration patterns and avoid the reliance on a simplistic 'push'/'pull' dichotomous narrative. As Coomaraswamy has articulated, we need to attend to the 'wide variety of reasons ... women [are increasingly ready and able] to migrate, ready to cross borders in an attempt to survive and better their lives' (Coomaraswamy 2003, 22).

Further, it has been well established that the same processes that have given rise to the contemporary patterns of gendered migration flows have concomitantly given rise to specific practices of coercion and exploitation (Berman 2003, 58; Ehrenreich and Hochschild 2003; Sassen 2003; Andreas 2000). Women's bodies and the movement of women's bodies, with or without their consent, have become a vehicle for economic growth and a source of dependable income and profit for a range of actors (see Sassen 2000). In such a context, as I and others have articulated elsewhere (Kapur 2005; Sassen 1998; Coomaraswamy 2003; Segrave in press; Segrave 2004; Segrave, Milivojevic and Pickering in press), women's desire and willingness to find any opportunities to migrate in order to benefit from the need for women to fulfil various forms of low-skilled, low-wage employment abroad have given rise to further opportunities for others to exploit them (Andreas 2000). Thus, it may

9 This articulation of an alternative framework for trafficking has been outlined similarly elsewhere; see Segrave in press.

be argued that trafficking of women into sexual servitude is not a 'unique' form of gendered, sexualised exploitation, but rather one of many forms of 'clandestine ... cross-border economic activity' that have taken shape and proven extremely profitable over the past two decades (Andreas 2000, 5). From this perspective we can begin to identify the interconnections between trafficking, other forms of exploitative labour and other forms of clandestine cross-border movement and activity. We can also engage critically with the almost-exclusive emphasis on criminalisation and victimisation as the central features of trafficking, and instead bring to the fore issues related to migration, labour and gender, which are too often left outside the law-and-order framework (Berman 2003, 39).

Separating migration and labour exploitation: an alternative approach to people trafficking

Efforts to engage with human rights paradigms and approaches to anti-trafficking efforts have recently included the targeting of migration rights, mobility and border controls (see Pecoud and de Guchteneire 2006; Haynes 2004). These efforts have demonstrated that it is possible and necessary to engage with current migration policies and international human rights instruments and to find approaches that seek to empower transnational migrants, rather than relying on advocating for protection through increased border controls (Sharma 2003).

Key arguments have been put forward for a more comprehensive and fully realised recognition of the right to mobility as a strategy to curb the opportunities for cross-border exploitation (see Pecoud and de Guchteneire 2006). Within this context, trafficking in persons is connected to an array of existing and emerging clandestine economic activities as articulated above, including the smuggling of people and goods and the emergence of document fraud and other illegal/irregular migration facilitation services (see Andreas 2000). In part, such arguments are built upon an understanding that state migration policies and border control processes have 'actually structured, conditioned, and even enabled (often unintentionally) clandestine border crossings' (Andreas 2000, 7). They are also built upon the need to shift our perspective in order to bring to the fore the perspective and location of transnational migrants and to recognise that for those from the Global South, in particular, current border control policies are exclusionary and disempowering in their selective articulation of legitimate and illegitimate border-crossing activity (Kapur 2005). However, while it is clear that there are important potential avenues for exploring alternative approaches to trafficking in relation to the connection between migration and human rights (see McSherry and Kneebone 2008), there is also a need to avoid contributing to a simplistic conflation of trafficking with migration (Kapur 2005). There are significant opportunities enabled through engaging with the transformative potential and possibilities of, in

part, pursuing anti-trafficking efforts that hook onto well-established international agreements and the human rights framework on labour rights. In order to explore this, I will first identify how this alternative approach was triggered by research into the Australian response to people trafficking.

Implementing contemporary responses to trafficking

While advocating for equity in the recognition of, and access to, the right to mobility plays an important role in effective anti-trafficking campaigns, it is also necessary to look more closely at trafficking as it is 'found' within the context of the destination country. My own research on efforts to implement the Australian response to trafficking undertaken in Australia and Thailand over 2005–06 raised a number of important issues, of which three underpin the issues being explored here (see also Segrave, Milivojevic and Pickering in press). These findings point first to the difficulties in detecting trafficking cases; second to the relatively 'rare' event of 'slave' labour and extreme forms of exploitation; and third to the recognition that, for many of those found in exploitative conditions, their needs, priorities and concerns most often do not meet the expectations of their rescuers.

In Australia and Thailand, trafficking in persons comes to the attention of authorities most often at the point of exploitation, *not* in the process of movement across a border (Segrave in press; Segrave, Milivojevic and Pickering in press). While it is referred to as an organised cross-border crime, the act of crossing the border rarely involves force or kidnapping, as much as this appeals to imaginative and dramatic representations. Indeed, trafficking is in many ways a crime that comes into being retrospectively, as it is only in what happens after the border crossing that elements of deceit may be identified. Thus, it is within the country of destination that individuals come to the attention of authorities — often, in Australia, within the context of an immigration raid — and in the 'moment' they are found there is a decision made as to whether an individual is a legal or illegal non-citizen and/or whether he or she may potentially be a victim of trafficking. In this 'moment' of decision making, it is rare for the context within which someone is found to reflect an extreme form of slavery (particularly, in relation to sex trafficking, the titillating imaginary of women tied to beds), but more often exploitative situations where individuals are working under unacceptable conditions they did not agree to; where they are undertaking different employment from that which they agreed to; and where they are being underpaid or working in conditions of debt bondage, in which significantly inflated repayment fees are being deducted from their wage to repay those who facilitated their immigration and/or employment. Further, while the emphasis in both Australia and Thailand has been on detecting these cases within the sex industry (regulated/unregulated and illegal), such scenarios are evident within a range of industries (Deumert et al 2005; Moore and Knox 2007).

What this points to is the importance of the *conditions* of labour, rather than to the extreme end of traumatic, slave-like exploitation. Critically, talking to those who work with victims of trafficking and to the victims themselves, it is clear that while counselling and prosecution may seem like the 'right' thing to do, more often women (in both countries it is most often the women trafficked into the sex industry who are recognised by authorities as victims) are concerned about their ability to return to the workforce to recuperate lost earnings and to begin making some money. These women have little time or patience for cooperating with criminal justice processes that are lengthy and which provide them with no guarantee of support or assistance when the case is completed (Segrave, Milivojevic and Pickering in press). This is not true of all cases; indeed, research conducted in Australia, Thailand and Serbia found that some women are interested in pursuing criminal justice outcomes (Segrave, Milivojevic and Pickering in press). Yet the predominant findings point to investigation and prosecution efforts as lengthy and problematic experiences for women, whose status in the destination country remains precarious and whose immediate concerns (such as money for themselves or their families, or to pay growing debts) remain largely unaddressed. It is also critical to reinforce that such an argument does not dismiss or deny that some women *are* traumatised by experiences of exploitation; rather, it suggests that there is a significant mismatch between how the state conceptualises the needs of victims and how it responds to the experiences and needs of women who are identified as victims. The argument suggests that the current articulation of victimhood does not extend to enable multiple identities and/or to recognise complex and diverse needs and desires. Yet it is clear that women who may be victims of trafficking may also, at the same time, see themselves as migrant labourers whose immediate needs and concerns are directly linked to this latter status. It is here that another important platform from which to campaign for the protection of persons trafficked into all forms of labour presents itself: the ICESCR, specifically Arts 6 and 7, which relate to the right to work and the right to just and favourable conditions of employment.

Trafficking, labour rights and the ICESCR

The ICESCR guarantees the progressive realisation of a number of important human rights, including the right to work and to safe and favourable conditions of work. It imposes upon state parties the requirement to provide the UN Committee on Economic, Social and Cultural Rights (CESCR) with periodic reports on compliance with the obligations. It is not, however, an instrument without limitations. These limitations have been well documented, including the absence of any individual complaints mechanism and the embedded understanding that the rights it guarantees will take time to be fully realised (Otto and Wiseman 2001). Further, while there are obligations for state parties to the ICESCR to report to the CESCR, there is no

effective enforcement mechanism either to uphold the reporting guidelines or to ensure that recommendations and rulings of the CESCR are fully implemented (Otto and Wiseman 2001). It is not my intention here, however, to continue or further the debate on the role of the ICESCR. Rather, what I am suggesting is that locating trafficking within this framework enables the reconfiguration of labour as a key issue in trafficking. This is important because it enables a platform from which to begin to make nation states accountable for conditions of exploitation within the regular and irregular labour force (as trafficking in persons occurs in both), rather than continuing the displacement of nation state responsibility to simply 'rescue' victims and prosecute traffickers. Within this context, the nation is also made accountable to the international community. While there also exist other relevant international agreements, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (December 1990, entered into force July 2003), the ICESCR has greater potential because it does not exclude particular groups — such as students, who are excluded from the CMW — and because this convention has not yet been signed or ratified by Australia.

The role of NGOs has been noted as critical to the CESCR reporting process (see Otto and Wiseman 2001), as it allows the committee to access details and information that are historically absent from government reports in order to come to a well-informed conclusion on the implementation of the ICESCR. The importance of NGO contributions was reasserted by the CESCR in mid 2008, when the Australian National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre's report to the CESCR on Australia's efforts to implement and uphold its responsibilities as a signatory to the ICESCR was referred to as a standard-setting document that provided a comprehensive, well-evidenced articulation of Australia's efforts under all sections of the covenant. In this report, for the first time, trafficking in persons was specifically addressed. The key points raised will be canvassed briefly.

Under Arts 6 and 7 of the ICESCR, the right to 'freely chosen work' and 'to the enjoyment of just and favourable conditions of work' is upheld. In the report, it was argued that 'the trafficking of women into sexual servitude (also known as "debt bondage"), may involve a range of exploitative practices that include sexual, physical, psychological, criminal and labour exploitation' (ANACLC, HRLRC and KLC 2008, 46). Thus, it was argued that there are two key concerns relating to Australia's obligations under the covenant. The first is that:

... the criminal justice approach to trafficking provides no recognition of the rights of trafficked persons or those in positions of debt bondage, nor is there any clear commitment to safeguarding their rights as workers. Victims of trafficking/sexual servitude are not

identified as victims of exploitation within the workplace. [ANACL, HRLRC and KLC 2008, 46.]

The second concern is that those who are identified as victims of trafficking are most often non-citizens and, in many cases, illegal non-citizens. As a consequence, they have limited rights within Australia, as the current visa system in place only enables individuals to remain in Australia if their case is being investigated and/or prosecuted by authorities, such that it is tied to their status as victims and does not 'recognise Australia's obligation to acknowledge their exploitation as an abuse within the workplace' (ANACL, HRLRC and KLC 2008, 48).¹⁰ Such claims and challenges offer, if nothing else, a platform from which to reconceptualise and reorient dominant responses to trafficking.

Conclusion

Human rights frameworks have been the subject of intense and ongoing feminist examination and critique (see Lambert, Pickering and Alder 2003). Post-colonial feminists have more recently challenged the mobilisation of human rights as an exercise in upholding 'the economic and political interests of the elite of global capitalism' (Lambert, Pickering and Alder 2003, 25). Kapur has argued that 'the story of the transnational migrant subject must be told in the context of globalisation' (2005, 137). It is through contextualising individual experiences and looking to the broader political/social/economic factors impacting on these experiences that we can begin to challenge the ways in which we think about the law and rights. Too often, victims of trafficking are generalised and mythologised as innocent, Third World women whom 'we' (that is, those in the Global North) must pity and seek to protect. Through

10 The current visa provisions in Australia for victims of trafficking enable suspected victims to be granted immediate access to a Bridging Visa F for up to 30 days while the Australian Federal Police (AFP) investigates the case and determines whether there is a case to pursue and whether the victim will be necessary for the pursuit of the case. Women may decide whether they are willing to cooperate with authorities. Those who are willing and able to assist are eligible for a Witness Protection Visa, which can only be applied for by an agency such as the AFP on a woman's behalf. This visa enables access to ongoing victim support provisions. Following the finalisation of a case, there also exist provisions within the visa regime for those 'who, as a result of their contribution to an investigation or the prosecution of people-trafficking offenders, are deemed at risk of harm if they return to their home country' to be eligible to remain temporarily or permanently in Australia (Attorney-General's Department 2004, 12). By 2007, 58 temporary visas and no permanent visas had been granted since January 2004 (USDOS 2008). Those who are not eligible to remain are repatriated back to their country of origin if they have no other migration avenue available to them (Blackburn in JCACC 2004, 23).

recognising the interconnections between contemporary conditions of globalisation, migration and exploitation, we can begin to disrupt the dominant gendered narrative of victimisation that succeeds in allowing nation states to control and contain the 'trafficking story'.

What has been argued here is the importance of recognising the transformative potential of engaging with the framework of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in order to reconfigure the ways in which we respond to victims of trafficking. Recognising victims of trafficking as transnational migrant workers places a responsibility on nation states to ensure the upholding of established fundamental rights to working conditions. Further, with the progression of the Optional Protocol to the ICESCR, this framework also presents a possibility for individuals and groups to pursue violations of their economic, social and cultural rights at the international level (Office for the High Commissioner for Human Rights 2008) — that is, the possibility of reconfiguring the response to human trafficking on the international stage. We can then move human trafficking out of the confines of the Convention Against Transnational Organized Crime in order to better understand the connection between mobility, labour, exploitation and regulation and to lay a platform for protection and empowerment. ●

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