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# **The Borders that Disadvantage Migrant Women in Enjoying Human Rights**

**Lourdes Peroni\***

*This article launches a frame to investigate the inequalities underlying the human rights violations migrant women may experience. Drawing on intersectionality theory and on Ratna Kapur's concept of 'normative boundaries of belonging', the article puts forward the notion of 'intersecting borders of inequality'. The notion interrogates three types of borders that may construe migrant women as outsiders or lesser members in society: formal, normative and practical borders. The article demonstrates that scrutinising the ways in which these borders intersect illuminates some of the structures disadvantaging migrant women and invites imagining wider responses to tackle these disadvantages. To illustrate these arguments, the article uses examples of the European Court of Human Rights' case law.*

## **Keywords**

borders, European Court of Human Rights, inequality, intersectionality, migrant women

## 1. INTRODUCTION

In producing or reinforcing 'relations of dependency and power' through immigration controls,<sup>1</sup> States may disadvantage migrant women in enjoying human rights and engender conditions ripe for human rights abuses. Think of immigration norms that make domestic workers – who in practice are often women – dependent on their

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<sup>1</sup> Bridget Anderson, 'Where's the Harm in That? Immigration Enforcement, Trafficking, and the Protection of Migrants' Rights' (2012) 56 American Behavioral Scientist 1252.

employers for legal status.<sup>2</sup> Employers may take advantage of the dependent or precarious status produced by immigration norms to control and exploit domestic workers.<sup>3</sup>

Recent human rights scholarship has investigated whether, to what extent, and how international human rights law may tackle the inequalities underlying this kind of human rights abuses. Human rights scholars have discussed the role of immigration norms and practice in creating or aggravating these inequalities as well as the (in)capacity of international human rights law to challenge these norms and practice.<sup>4</sup> Importantly, some of these scholars have exposed the gendered nature of immigration norms regulating migrant women's relations in different spheres, including work and family relations.<sup>5</sup>

Building on these scholarly efforts, this article interrogates how the borders sustained by immigration controls intersect with other borders to disadvantage migrant women in their enjoyment of human rights. In particular, it scrutinises the borders that formally, normatively, and practically construe migrant women as outsiders or lesser members in society. In making these arguments, the article borrows Ratna Kapur's notion of 'normative boundaries of belonging'.<sup>6</sup> These boundaries are sustained by dominant societal assumptions about sexuality, family and culture that inform law's responses to migrants.<sup>7</sup> The arguments further draw on intersectionality theory,<sup>8</sup> understood as interacting *structures* of inequality (for example, sexism, racism, immigration norms) rather than as interacting *categories* of identity (for

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<sup>2</sup> eg Virginia Mantouvalou, 'Human Rights for Precarious Workers: the Legislative Precariousness of Domestic Workers' (2012) 34 *Comparative Labor Law and Policy Journal* 141-3.

<sup>3</sup> *ibid.*

<sup>4</sup> eg Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017); Fulvia Staiano, *The Human Rights of Migrant Women in International and European Law* (Eleven International Publishing 2016); Siobhan Mullally, 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014).

<sup>5</sup> Staiano (n 4).

<sup>6</sup> Ratna Kapur, *Makeshift Migrants and Law: Gender, Belonging, and Postcolonial Anxieties* (Routledge 2010) 39-55.

<sup>7</sup> *ibid.* 4.

<sup>8</sup> Kimberlé Williams Crenshaw, 'Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies' (1989) 1 *The University of Chicago Legal Forum* 139.

example, sex, race, migration status).<sup>9</sup> It is therefore ‘structural intersectionality’<sup>10</sup> that informs the arguments in this article.

The article demonstrates that the notion of intersecting borders of inequality has the ability to put disadvantaging structures front and centre in the analysis of migrant women’s human rights claims. The notion does not only illuminate the State’s role in creating, reproducing and reinforcing these structures. It additionally opens up a wider set of responses to tackle the State’s contributory role to disadvantage. To illustrate how intersecting borders of inequality may work in practice, the article uses cases of the European Court of Human Rights (the ECtHR or the Court) as examples.

## 2. ‘INTERSECTING BORDERS OF INEQUALITY’

This part introduces the notion of ‘intersecting borders of inequality’ as a lens to see and challenge the disadvantages underlying the violations of migrant women’s human rights. The notion does not take identity categories such as sex, race, and migration status as the starting point in the human rights analysis. Rather, it turns the disadvantaging structures themselves into points of departure.<sup>11</sup> For example, the focus is not sex but sexism, not migration status but immigration norms. Through the lens of intersecting borders, the analytical gaze thus starts moving *outwards-inwards*: from the disadvantaging structures to the individual. Only then does it move inwards-outwards and may continue moving back and forth. The individual, therefore, does not disappear from the scene but is viewed in context.

Locating the analytical point of departure in the structures themselves offers several benefits. It ensures that the human rights analysis does not get stuck on individual attributes, identity or group characteristics. In so doing, it encourages interrogating what may be wrong in society and its institutions rather than what may

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<sup>9</sup> Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis’ (2013) 38 *Signs: Journal of Women in Culture and Society* 797-800.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.* 796. I follow renewed intersectionality efforts seeking to ‘foreground the social dynamics and relations that constitute subjects, displacing the emphasis on the subjects and categories themselves as the starting point of inquiry’.

be ‘wrong’ with the group or individual.<sup>12</sup> The approach thus facilitates scrutinising something feminists like Martha Fineman advocate for interrogating: the role of the State in (re)producing vulnerability and disadvantage.<sup>13</sup> It additionally escapes falling into stigmatising views of vulnerability and disadvantage.<sup>14</sup> In making structures the starting point of the inquiry, the proposed lens shows how vulnerability and disadvantage are societally shaped and not natural attributes of certain individuals or fixed identity dimensions of certain groups. As migration scholars put it, ‘migrants are not naturally vulnerable; rather the state is deeply implicated in constructing vulnerability through immigration controls and practices’.<sup>15</sup>

To see these disadvantaging structures, the notion of borders is analytically useful because it suggests something that lies outside the individual or group and thereby directs the gaze outwards. Moreover, borders evoke in their most basic sense lines and divisions through which ‘[h]ierarchies of belonging and of exclusion’<sup>16</sup> may be created, reproduced or reinforced. Borders are not here understood as territorially fixed lines.<sup>17</sup> They are understood as shifting and as following and surrounding people inside State territory.<sup>18</sup> The language of borders, moreover, has a strong symbolic appeal in the sphere of migration. After all, border control seems to be the core business of immigration norms and practice.

The borders that may most obviously disadvantage migrant women are formal borders, which are here understood as State norms and practices establishing the conditions of entry and stay<sup>19</sup> as well as the requirements of formal citizenship. These

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<sup>12</sup> On the need to move from what is ‘wrong’ with the individual or group towards what is wrong with society and its institutions, see Martha Albertson Fineman, ‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *The Elder Law Journal* 71.

<sup>13</sup> Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008-2009) 20 *Yale Journal of Law and Feminism* 1.

<sup>14</sup> *ibid* 8 (arguing that vulnerability is stigmatising when applied exclusively to certain groups). See also Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 *International Journal of Constitutional Law I•CON* 1056.

<sup>15</sup> Bridget Anderson, Nandita Sharma and Cynthia Wright, ‘Editorial: Why No Borders?’ (2009) 26 *Refuge* 8.

<sup>16</sup> I borrow ‘hierarchies of belonging and of exclusion’ from Bridget Anderson and Vanessa Hughes ‘Introduction’ in Bridget Anderson and Vanessa Hughes (eds), *Citizenship and its Others* (Palgrave Macmillan 2015) 3.

<sup>17</sup> Anderson, Sharma and Wright (n 15) 6.

<sup>18</sup> In understanding borders this way, I follow *ibid*.

<sup>19</sup> Bridget Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’ (2010) 24 *Work, Employment and Society* 309 (arguing that immigration controls ‘are not simply about conditions of entry across the border, but about conditions of stay’).

borders do not operate only at the territorial edges of a State.<sup>20</sup> They operate beyond these edges, both outside and inside State territory.<sup>21</sup> They follow people inside,<sup>22</sup> as they try to access employment, health care, education and justice.<sup>23</sup> Formal borders thus create, police, and enforce people's migration statuses. Migration status, in turn, delineates not just entry and residence rights but also rights in family, work, political and economic spheres.<sup>24</sup>

Borders in this formal sense, however, are not the only ones that may limit human rights enjoyment for migrant women. In fact, formal borders may not always come into play. Immigration norms or practice may authorise a woman to enter, reside, and work in another State territory temporarily or permanently. Yet the limited advantages that these formal borders allow<sup>25</sup> will not necessarily shield her from the disadvantages other borders may cause.<sup>26</sup> Formal borders may intersect with other borders, including practical ones. Practical borders, for present purposes, are those that arise from the factual reality of migrating. Examples include lack of (or limited) social networks in the receiving State and language skills different from those of the majority in this State.

Formal borders may also intersect with subtle borders that are difficult to spot. Kapur's notion of 'normative boundaries of belonging' offers an insightful lens to recognise these subtle borders. According to Kapur, conformity or non-conformity with dominant societal assumptions about sexuality, family, and culture draws the lines between 'belonging and non-belonging' and renders some people non- or lesser members of society'.<sup>27</sup> To use one of her examples: normative sexuality may be 'heterosexual, marital, monogamous, reproductive, and non-commercial'.<sup>28</sup> Those

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<sup>20</sup> Anderson, Sharma and Wright (n 15) 6.

<sup>21</sup> Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016) 316.

<sup>22</sup> Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006) 4.

<sup>23</sup> Anderson, Sharma and Wright (n 15) 6.

<sup>24</sup> Costello (n 21) 2.

<sup>25</sup> Bosniak (n 22) 111. Bosniak notes that 'as noncitizens, or aliens, they are denied certain basic political and social rights, including the right to vote and certain rights of social provision. And they are always potentially subject to the immigration enforcement authority of the state'.

<sup>26</sup> Other borders may come into play to exclude even those who hold formal citizenship. *ibid* 117 (arguing that 'possession of citizenship status alone does not guarantee achievement of economic citizenship').

<sup>27</sup> Kapur (n 6) 8, 202.

<sup>28</sup> *ibid* 43.

whose sexuality deviates from these normative expectations are more likely to be denied the rights and benefits linked to citizenship.<sup>29</sup>

The next parts illustrate the ways in which intersecting borders facilitates recognising the inequalities underlying the human rights violations migrant women complain of. ECtHR cases are used for illustrative purposes. In nearly all these cases, the ECtHR finds in the applicants' favour. In some of these cases, it acknowledges some structural barriers (especially formal borders). Despite recognising some of the barriers underlying the violations, the recognition is rather *ad hoc* and tends to miss the practical and normative borders as well as the intersections between them.

This article does not, however, aim to make generalisable descriptive claims or to critique the Court's approach in its case law concerning migrant women. Nor does it intend to offer a comprehensive analysis of this area of the ECtHR's case law. The aim, rather, is to use these cases to illustrate the normative benefits of applying an intersecting borders frame in human rights analysis. As the examples below demonstrate, the frame gives a fuller and more systematic picture of the intersecting disadvantages migrant women may experience and of the State's role in creating, reproducing or reinforcing these disadvantages. The examples further show that, as a result, intersecting borders may help to identify additional human rights violations, to develop State obligations with transformative potential or to refine the content and scope of already developed ones.

### 3. THE BORDERS BEHIND INDIVIDUAL 'CHOICE' AND 'FAILURE'

Through the cases discussed below, this part shows how, viewed through the lens of intersecting borders, migrant women's (in)abilities are not merely the result of their personal choices or failures. Their individual (in)abilities, rather, are shaped by different inequality structures sometimes created, reproduced or reinforced by the State.

#### 3.1. BEYOND PERSONAL CHOICE

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<sup>29</sup> *ibid* 8.

Inattention to the role of intersecting borders may lead to blaming the migrant woman entirely for the disadvantage she experiences while deflecting the blame from the State. *Haydarie and Others v. the Netherlands* illustrates how this blindness serves to construe the applicant's disadvantage as her choice.<sup>30</sup> The case involved an Afghan woman legally residing in the Netherlands with one of her children and with her disabled sister.<sup>31</sup> The Dutch authorities rejected her request to reunite with three of her other children because she lacked the independent income required by immigration rules to support her children (she relied on welfare benefits).<sup>32</sup> The domestic authorities would have not maintained the income requirement in her case had she made 'serious efforts' to secure a job during a period of three years since she became entitled to work.<sup>33</sup> At Strasbourg, one of the applicant's claims was that, in assessing her situation, the Dutch authorities had failed to give weight to her 'unpaid care labour' for her sister.<sup>34</sup> In declaring her Article 8 ECHR claim inadmissible, the ECtHR notes that the applicant had not applied for any jobs and instead '*preferred to care for her wheel-chair bound sister at home*'.<sup>35</sup> The Court adds that she could have entrusted 'the care of her sister to an agency'.<sup>36</sup>

In assessing whether the applicant had made 'serious efforts' to find a job, both the domestic authorities and the ECtHR reproduce a normative border and ignore a practical one. They reproduce the normative border that assumes that unpaid care work is inactive and unproductive. As feminist scholarship has shown, these borders are gendered given that caretaking continues to be largely performed by women.<sup>37</sup> Fulvia Staiano insightfully explains the assumptions at play in *Haydarie*: 'Unpaid care work ... was considered by the national authorities not only as synonymous with inactivity and passiveness, but also as mere choice to personally carry out tasks which could well be outsourced to aid-providing bodies'.<sup>38</sup> Under these assumptions, care

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<sup>30</sup> *Haydarie and Others v the Netherlands* App no 8876/04 (ECtHR, 20 October 2005).

<sup>31</sup> *ibid* 1-2.

<sup>32</sup> *ibid* 4.

<sup>33</sup> *ibid* 5-8 and 13.

<sup>34</sup> *ibid* 12.

<sup>35</sup> *ibid* 14. Emphasis added.

<sup>36</sup> *ibid*.

<sup>37</sup> eg Martha Albertson Fineman, 'Contract and Care' (2001) 76 *Chicago-Kent Law Review* 1406.

<sup>38</sup> Fulvia Staiano, 'Care Work in the European Court of Human Rights' Case Law: Beyond Servitude and Forced Labor?' in Siobhan Mullally (ed), *Care, Migration and Human Rights: Law and Practice* (Routledge 2015) 49.



work is therefore viewed as ‘a free choice not to perform actual work.’<sup>39</sup> Carers, in turn, are viewed as ‘willingly inactive individuals [...] unworthy of accessing rights and entitlements reserved to those devoted to “actual” work’.<sup>40</sup>

Recognising the State’s role in reproducing these normative borders will probably not lead to border-dismantling demands on States. A supranational human rights court, in particular, may understand that it is for States to determine what counts as work for migration purposes. Yet awareness of the State’s role in reproducing such gendered borders may encourage imagining alternative, less intrusive demands. States, for example, may be asked to justify the application of these borders in the particular case.<sup>41</sup> If unjustified, they may be requested to mitigate the disparate consequences on the individual caretaker. States may be further demanded a procedural obligation: to consider the effects of not regarding care as proper work on the individual (female) caretaker/job seeker. In fact, an objective and complete assessment of *Haydarie*-like circumstances cannot ignore these effects. As Fineman argues, ‘[c]aretaking labor interferes with the pursuit and development of wage labor options. Caretaking labor saps energy and efforts from investment in career or market activities, those things that produce economic rewards’.<sup>42</sup>

The other border operating to condition Haydarie’s efforts to find a job is the practical border of language. The State tacitly reinforces this practical border by ignoring its disadvantageous impact on an individual’s job search efforts. The active attitude that the State expected from the applicant assumes that she already speaks the language. The ‘serious efforts’ required from her included actively looking for work, registering at employment agencies, responding to vacancy openings, writing job applications, and carrying out ‘labour-market oriented studies’.<sup>43</sup> The State further reinforces the practical border by ignoring the applicant’s language efforts in order ‘to improve her chances on the labour market’.<sup>44</sup> Four months after Haydarie became entitled to work, she had passed a first Dutch exam and nine months later another

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<sup>39</sup> *ibid* 50.

<sup>40</sup> *ibid*.

<sup>41</sup> States may argue, for example, that granting equal value to non-paid care work and paid work for the purpose of family reunification may represent an excessive economic burden on the State.

<sup>42</sup> Martha Albertson Fineman, ‘Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency’ (2000) 8 *Journal of Gender, Social Policy and the Law* 20.

<sup>43</sup> *Haydarie and Others v the Netherlands* (n 30) 5-6.

<sup>44</sup> *ibid* 12-14. The ECtHR does acknowledge the language efforts but ultimately does not attach any weight to it.

one.<sup>45</sup> In becoming aware of the operation of this type of border, supranational human rights adjudicators may demand procedural State obligations. States may be asked to assess whether the language barrier conditions the individual job-search attitude and whether individual efforts to overcome the language barrier count towards ‘serious efforts’ to find a job.

### 3.2. BEYOND PERSONAL FAILURE

Inattention to the intersecting borders at work may also lead to understanding migrant women’s disadvantages as the result of their personal failure. In the first two cases now discussed – *Moser v. Austria*<sup>46</sup> and *Soares de Melo v. Portugal*<sup>47</sup> – the States cast the women as responsible for the inadequate material conditions that endangered their children’s welfare. In these two cases, the States create and enforce formal borders. In turn, these formal borders interact with practical borders reinforced by the Austrian State and with normative borders reproduced by the Portuguese State. The interacting borders serve to justify drastic State intervention: removal of the children from their mothers. In the third case examined under this sub-heading, *Zhou v. Italy*,<sup>48</sup> formal borders are not work. However, practical borders are reinforced and normative borders reproduced by the State. The interaction of these borders serves to construe the woman as parentally incapable and to justify similar radical interference with her right to family life.

The applicant in *Soares de Melo* was a national of Cape Verde.<sup>49</sup> She was unemployed and virtually the sole caretaker of ten children, as the father was often absent from the household.<sup>50</sup> Following her failure to comply with an agreement reached with the Children and Youth Protection Commission,<sup>51</sup> seven of her youngest children were placed in different institutions with a view to adoption.<sup>52</sup> The agreement included obligations to look for a job, to improve her children’s housing conditions and send them to school, to regularise her status in Portugal and to undergo

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<sup>45</sup> *ibid* 3.

<sup>46</sup> *Moser v Austria* App no 12643/02 (ECtHR, 21 September 2006).

<sup>47</sup> *Soares de Melo v Portugal* App no 72850/14 (ECtHR, 16 February 2016).

<sup>48</sup> *Zhou v Italy* App no 33773/11 (ECtHR, 21 January 2014).

<sup>49</sup> *Soares de Melo v Portugal* (n 47) 1.

<sup>50</sup> *ibid* 7-8.

<sup>51</sup> *ibid* 9, 18 and 22.

<sup>52</sup> *ibid* 34.

sterilisation.<sup>53</sup> The applicant in *Moser*, in turn, was a Serbian national authorised to live and work in Austria until 1997.<sup>54</sup> In 1999, however, a five-year residence prohibition was issued against her for illegal employment.<sup>55</sup> Later on the same year, she married an Austrian national and, around six months later, gave birth to a child who was separated from her and whose biological father was allegedly not her husband.<sup>56</sup> The child's custody was transferred to a welfare institution and his care entrusted to foster parents<sup>57</sup> because the applicant lacked adequate accommodation, financial means and a clear residence status.<sup>58</sup>

In both *Soares de Melo* and *Moser*, the ECtHR found in favour of the applicants' Article 8 ECHR right to respect for family life. The lack of response by social services to Soares de Melo's material distress and the introduction of sterilization as a condition to keep her parental rights influenced the Court's decision against Portugal.<sup>59</sup> The ruling against Austria followed the Court's finding of several failings at the domestic level. The Austrian authorities failed to consider all possible alternatives to custody transferring; to ensure regular contact between the applicant and her son following their separation; and to sufficiently involve the applicant in the decision-making process.<sup>60</sup>

In the two cases, formal borders work in a similar way. The Austrian authorities understood that Moser's 'unstable' situation 'was not enhanced by her unlawful residence in Austria [that] did not entitle her to financial aid'.<sup>61</sup> The Portuguese authorities noted that the irregular status of some members of the Soares de Melo family was a barrier to social benefits.<sup>62</sup> Both the Austrian and Portuguese authorities regarded irregular migration statuses as the source of ineligibility for State-sponsored benefits. Thinking of what is going on in *Soares de Melo* and *Moser* from the perspective of formal borders reveals that the real source of ineligibility is not the applicants' statuses. The real source is migration law that construes certain categories of migrants as irregular and that does not entitle them to certain State-sponsored

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<sup>53</sup> *ibid* 99.

<sup>54</sup> *Moser v Austria* (n 46) 1 and 7.

<sup>55</sup> *ibid* 7.

<sup>56</sup> *ibid* 9-10.

<sup>57</sup> *ibid* 18.

<sup>58</sup> *ibid* 16-18 and 25.

<sup>59</sup> *Soares de Melo v Portugal* (n 47) 111 and 118.

<sup>60</sup> *Moser v Austria* (n 46) 73.

<sup>61</sup> *ibid* 18.

<sup>62</sup> *Soares de Melo v Portugal* (n 47) 23.

benefits. From this perspective, the role of the State in reinforcing the applicants' precarious material conditions becomes visible. In rendering them ineligible for State support, the Austrian and Portuguese States denied them access to resources that might have enabled them to improve these conditions for the children.

Now, recognising the State's role in disadvantaging some individuals through formal borders may not lead international human rights law to demand States to reconsider, let alone dismantle, these borders. Having 'long been a key site of national assertions',<sup>63</sup> migration is a sphere in which States resist human rights demands<sup>64</sup> and in which international human rights law tends to defer to States.<sup>65</sup> States are often reluctant to acknowledge their contributory role especially in the context of irregular migration.<sup>66</sup> Yet illuminating the State's role is an important step towards envisaging demands that may help alleviate disadvantage. States, for example, may be required to justify these borders<sup>67</sup> and, if unjustified, asked to mitigate their disadvantageous impact under certain individual circumstances.

The latter is what the ECtHR actually does in *Soares de Melo* and *Moser*. In *Soares de Melo*, the Court implicitly expected the Portuguese State to have substantively addressed the disadvantageous impact of formal borders on the applicant. The Portuguese authorities, the Court stated, had not tried to 'fill in' ('*comblar*') the applicant's material deficiencies by means of additional financial assistance aimed at covering the family primary needs and child day care.<sup>68</sup> In *Moser*, the Court tackled the negative impact procedurally: the Austrian authorities had failed to take measures such as 'clarifying the applicant's residence status'.<sup>69</sup> The demands made by the Court in the two cases illustrate ways in which a supranational human

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<sup>63</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (CUP 2009) 17.

<sup>64</sup> eg Mullally (n 4) 146.

<sup>65</sup> eg Costello (n 21) 317: 'authorizing entry and stay—are traditionally understood as intrinsic and central to statehood. This characterization has meant that oftentimes when human rights law is invoked, there is excessive deference to States' sovereign prerogatives'.

<sup>66</sup> eg Mullally (n 4) 152 (making this point in the context of trafficking).

<sup>67</sup> On the need to abandon the 'statist migration control assumption' according to which 'excluding aliens needs no justification' see Costello (n 23) 24 and 317. She states: 'Even if we treat the control of immigration and some aspects of asylum as subject to a degree of discretionary power, this does not mean we should not scrutinize the impact of the exercise of those powers on human rights, just as other exercises of public power are scrutinized'.

<sup>68</sup> *Soares de Melo v Portugal* (n 47) 106.

<sup>69</sup> *Moser v Austria* (n 46) 70.

rights court may ask States to mitigate the disadvantages created by formal borders without asking reconsideration of these borders altogether.

The formal border in *Moser* interacts with a practical one: the applicant's scarce family and social support networks. The option of placing the applicant's child with relatives or other persons close to him was not available in her case.<sup>70</sup> The State had not itself put in place this practical border. However, and like in *Haydarie*, it tacitly reinforced the disadvantage created by the lack of social support by ignoring its detrimental implications for the individual. States may be required to take into account the impact of this practical border on the individual's capacity to offer adequate accommodation to their children. An objective and complete assessment of the individual's circumstances cannot actually ignore this impact. Moreover, States may be asked to fully assess all possible alternatives before separating the child from the parent. In fact, the ECtHR expected the Austrian State to have explored all the possibilities that would have enabled the applicant and her son to remain together.<sup>71</sup> It turned out that placement in a mother-child centre was an option legally available to them.<sup>72</sup>

The formal border in *Soares de Melo* intersects with two normative ones: coupled motherhood and nuclear family. These borders construe the applicant's forms of family and mothering as 'deviant' and therefore as the 'wrong' types of arrangements to raise children. According to the Lisbon Court of Appeal, the fact that the applicant was separated from the children's father was 'enough to show moral negligence'.<sup>73</sup> The applicant is here negatively judged because she no longer had a relationship with the children's father. The Supreme Court further holds her single-parent household to the 'norm' of the heterosexual nuclear family: '[t]here is a particularly dangerous situation when the biological family is unstructured, the father is absent from the daily life of the children and the mother shows great emotional and professional instability'.<sup>74</sup> The statement suggests that, without a father, the family is unstructured and that, without his support, the mother is unstable. The reasoning of

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<sup>70</sup> *ibid* 45 and 57. Under Austrian law in force at the time, transferring the child's custody to the Youth Welfare Office was possible only if this option was not available.

<sup>71</sup> *ibid* 70-1.

<sup>72</sup> *ibid* 70. Austrian law did not exclude foreigners from admission to mother-child centres.

<sup>73</sup> *Soares de Melo v Portugal* (n 47) 41.

<sup>74</sup> *ibid* 47. Author's translation.

the domestic courts shows that, despite longstanding feminist critiques,<sup>75</sup> the societal aspiration ‘to complete the “family” by the addition of a man’<sup>76</sup> remains very much alive. Susan Boyd has shown how women may be penalised in child custody assessments for failing to live up to normative motherhood: ‘a “good” mother will do so in the context of a heterosexual, nuclear family model’.<sup>77</sup>

Similar borders associated with normative motherhood play out in the last case examined in this part: *Zhou v. Italy*. This time, the expectation is that a woman will be ‘selflessly available to her children, taking primary care of them’.<sup>78</sup> *Zhou* exemplifies how, though formal borders may be absent, other borders may still work to the detriment of migrant women. The applicant was a Chinese national and single parent living and working full time in Italy.<sup>79</sup> It is unclear from the facts of the case whether she was living there legally. After day-care arrangements made by social services had failed, the applicant entrusted the care of her son to a couple in the neighbourhood while she was at work.<sup>80</sup> Social services disagreed with her choice of this couple and, without exploring further arrangements, reported the situation to the public prosecutor who in turn requested the opening of adoption proceedings.<sup>81</sup> Her son was placed for adoption, following an expert opinion declaring her incapable of exercising parental role.<sup>82</sup> The expert concluded that the applicant’s parental inability was due to a health condition developed during her child’s delivery and to her lack of time to care for him.<sup>83</sup>

In finding a violation of her right to family life, the Court condemned the Italian authorities for not having made adequate and sufficient efforts to respect the applicant’s right to live with her child.<sup>84</sup> The State, according to the Court, should have taken measures to preserve the family link.<sup>85</sup> The Court accepted that the

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<sup>75</sup> eg Susan B Boyd, ‘Motherhood and Law: Constructing and Challenging Normativity’ in Vanessa E Munro and Margaret Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 269.

<sup>76</sup> Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 125.

<sup>77</sup> Boyd (n 75).

<sup>78</sup> *ibid.*

<sup>79</sup> *Zhou v Italy* (n 48) 1 and 5.

<sup>80</sup> *ibid* 7-8.

<sup>81</sup> *ibid* 9-10.

<sup>82</sup> *ibid* 18, 19 and 22.

<sup>83</sup> *ibid* 18.

<sup>84</sup> *ibid* 61.

<sup>85</sup> *ibid* 59.

applicant was incapable of caring for her son and that her care inability was partly due to her health condition.<sup>86</sup> It noted, however, that the Italian courts should have helped her overcome the difficulties by means of adequate social assistance<sup>87</sup> and that the experts should have examined the possibility of improving her childcare ability.<sup>88</sup> Framed in these terms, the applicant's parental inability is narrowly understood as arising exclusively from personal difficulties and the demands on the State as demands to 'fix' an individual inability.

Looking at *Zhou* through the lens of intersecting borders allows seeing that the applicant's care inability was more broadly shaped by structural factors to which the State had contributed. The factors include practical borders inherent in the lack of family to count on for childcare and, as stated above, normative expectations about women's role in the family. The two borders interact to construe the applicant as incapable of exercising her parental role and therefore as unfit to raise her child. There are several indications in the case that *Zhou* had no one to leave the child with.<sup>89</sup> In assessing the applicant's situation, the domestic authorities ignored the impact of the lack of social or family support on her childcare capacity. In so doing, and like in *Haydarie* and *Moser*, the authorities reinforced the disadvantage created by these borders for the individual. As noted before, a complete and objective evaluation of the individual circumstances should consider the negative implications of this practical border. In addition, and as argued in *Moser*, States may be asked another procedural obligation: to evaluate all available support measures before radically breaking up the family.

While the practical border is ignored in the domestic assessment of *Zhou's* situation, the normative border is enforced. The expert conclusions, on which the Italian courts relied to place the child for adoption, signal gendered expectations about women's place and role in society. *Zhou*, according to the expert, was not capable of caring for her child in part because she 'had no time to look after the child because of her work' (*elle n'avait pas le temps de s'occuper de l'enfant à cause de son*

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<sup>86</sup> *ibid* 57.

<sup>87</sup> *ibid* 59.

<sup>88</sup> *ibid*.

<sup>89</sup> *ibid* 5, 7 and 8. She was no longer together with her partner. She claimed that her highly variable work schedule did not allow her to take care of her son '*toute seule*'. Social services had made several (failed) attempts to find day-care placement for the child. When the host family arranged by social services announced that they would no longer take care of the child, *Zhou* asked a couple in the neighbourhood to care for him.

*travail*').<sup>90</sup> Informing this conclusion is the gendered division of labour that expects women to stay home and undertake the primary role of childcare. Zhou is thus punished (her child is taken away from her) for transgressing normative motherhood: she is a 'bad' mother for placing work above childcare. Feminist critiques of child custody decisions in other jurisdictions have shown how 'the ideal mother stereotype continues to play a role in favouring the "home-sphere" mother, which forces a woman to either adhere to the stereotype or risk losing her child'.<sup>91</sup>

Both in *Zhou* and in *Soares de Melo*, the normative borders enforced by the domestic decisions implicitly consist of gender stereotypes that express and reinforce women's inferiority in relation to men. Women are respectively considered as belonging in the home-sphere and as morally suspect without a male partner. Moreover, the stereotypes informing the domestic assessments of the applicants' parental role are not innocuous. They serve to cast the applicants' relationship with their children as deficient and to justify the drastic removal of their children. International human rights law has already recognised that subordinating stereotypes cannot justify interference with human rights.<sup>92</sup> Allowing States to rely on these stereotypes would imply accepting that discrimination is a legitimate objective for States to pursue.<sup>93</sup> Evidence of harmful stereotypes in domestic assessments of parental capacity may lead to additional violations of non-discrimination. States may not only be required to refrain from harmfully stereotyping in the individual case. They may be additionally demanded positive obligations to eradicate stereotypes in domestic decision-making.<sup>94</sup> The latter type of demand, especially, holds a transformative potential because it requires working towards dismantling discriminatory normative borders.<sup>95</sup>

Normative borders, however, may not always consist of stereotypes that (re)produce the subordinate status of certain groups in society. Think of the above-

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<sup>90</sup> *ibid* 18. Author's translation.

<sup>91</sup> Emily Winograd Leonard, 'Expecting the Unattainable: Caseworker Use of the 'Ideal' Mother Stereotype against the Nonoffending Mother for Failure to Protect from Child Sexual Abuse Cases' (2013) 69 *New York University Annual Survey of American Law* 327.

<sup>92</sup> *eg Gonzalez et al ('Cotton Field') v Mexico* Series C 205 (16 November 2009) and *Konstantin Markin v Russia* App no 30078/06 (GC ECtHR, 22 March 2012).

<sup>93</sup> *eg* Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 *Human Rights Law Review* 707.

<sup>94</sup> This may include an obligation of means to train authorities so that they make decisions on the basis of facts instead of stereotypes. See *eg Cotton Field Case* (n 92) operative para 22.

<sup>95</sup> See generally Timmer (n 93).



discussed borders of nuclear family as proper family in *Soares de Melo* or paid work as ‘real’ work in *Haydarie*. They do not reflect discriminatory attitudes in and of themselves and may not necessarily be illegitimate to maintain. Yet these borders are not neutral: they reflect dominant cultural expectations that may have disparate consequences on those who fall short of such expectations. As seen earlier, then, States may be asked to either justify reproducing this kind of normative borders or to mitigate their disparate impact on some individuals and groups.

#### 4. THE BORDERS BEHIND INDIVIDUAL ABUSE AND INDIVIDUAL VULNERABILITY

This part discusses two high-profile cases to illustrate how, viewed through the lens of intersecting borders, abuse and exploitation of migrant women are not seen as the mere result of individual abusive behaviour. Nor are they seen as the exclusive product of the individual victim’s vulnerabilities. Instead, abuse and exploitation are understood as shaped by the complex interaction of structures that the State may create, reproduce or reinforce.

##### 4.1. BEYOND THE EVIL EMPLOYER

The first case, *Siliadin v. France*,<sup>96</sup> offers an opportunity to reflect on how formal and practical borders may engender exploitation conditions and on how normative borders may negate State protection against exploitation. Siwa-Akofa Siliadin, a Togolese woman, arrived in France with a tourist visa when she was fifteen years old to work at a couple’s home until her plane ticket had been repaid and her migration status regularised.<sup>97</sup> In reality, however, she became an unpaid domestic worker.<sup>98</sup> The couple ‘lent’ her to another couple, for whom she carried out home care and childcare tasks for several years without payment, without identity documents, without a day off, and in poor living conditions.<sup>99</sup>

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<sup>96</sup> *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005).

<sup>97</sup> *ibid* 10-11.

<sup>98</sup> *ibid* 11.

<sup>99</sup> *ibid* 12-15.

The Court ruled that the French law had not offered her effective protection due to the lack of provisions specifically criminalising forced labour and servitude,<sup>100</sup> both of them prohibited by Article 4 ECHR. The Court looked at the applicant's age and migration status to assess whether her situation amounted to forced labour. In establishing whether she worked under 'the menace of penalty' – one of the features characterising forced labour in international labour law<sup>101</sup> – the Court concluded that her situation was equivalent:

She was an adolescent girl in a foreign land, *unlawfully present* on French territory and in *fear of arrest* by the police ... Mr and Mrs B. nurtured that fear and led her to believe that *her status would be regularised*.<sup>102</sup>

The Court's references to the applicant's unlawful presence, fear of arrest and promise of regularisation of her status signal the operation of formal borders. Though in the judgment there is hardly any information on the French immigration rules, let us assume for the sake of the argument that the French State restricted legal migration routes for domestic workers thereby producing a high level of irregularity in the sector.<sup>103</sup> Human rights scholars have discussed the links between immigration norms, irregularity in the domestic work sector, abusive employment conditions, deportability, and limited access to State protection.<sup>104</sup> The deportability associated with 'illegality'<sup>105</sup> acts as 'a formidable obstacle' to demanding protection against abuses<sup>106</sup> and further reinforces migrants' vulnerability to abuse.<sup>107</sup> As a migration scholar notes, '[p]recarious work for those working illegally is not simply at the whim

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<sup>100</sup> *ibid* 142 and 145-48.

<sup>101</sup> Forced Labour Convention, adopted on 28 June 1930 by the General Conference of the International Labour Organisation, Art 2.

<sup>102</sup> *Siliadin v France* (n 96) 118. Emphasis added.

<sup>103</sup> On the links between limited legal migration channels for domestic workers, the high irregularity in the sector, and exploitation, see eg Cliodhna Murphy, 'Access to Justice for Undocumented Migrant Domestic Workers in Europe: the Consequences of Constructed Illegality' in Siobhan Mullally (ed), *Care, Migration and Human Rights: Law and Practice* (Routledge 2015) 111. On the role of the State in constraining vulnerability by denying legal status, see Bridget Anderson, 'Mobilizing Migrants, Making Citizens: Migrant Domestic Workers as Political Agents' (2010) 33 *Ethnic and Racial Studies* 1, 69.

<sup>104</sup> eg Mullally (n 4) and Stoyanova (n 4) 380-7.

<sup>105</sup> Nicholas P De Genova, 'Migrant 'Illegality' and Deportability in Everyday Life' (2002) 31 *Annual Review of Anthropology* 419.

<sup>106</sup> Jaya Ramji-Nogales, 'Migration Emergencies' (2016) Research Paper No 2016-55, Legal Studies Research Paper Series, Temple University Beasley School of Law 17.

<sup>107</sup> Mantouvalou (n 2) 142.

of individual employers, but structurally produced by the interaction of employment and immigration legislation'.<sup>108</sup> Attention to the role of immigration norms has enabled some human rights scholars to suggest State obligations capable of addressing the disadvantaging effects of these norms. Stoyanova, for example, proposes that States adopt a regulatory framework that enables migrants to report abuses to the authorities without risking deportation.<sup>109</sup>

The Court's reasoning in *Siliadin* further signals the operation of a practical border: minimal social networks to count on for support.<sup>110</sup> In determining whether the applicant's services amounted to servitude, the Court says:

As a minor, she had no resources and was *vulnerable* and *isolated*, and had *no means of living elsewhere* than in the home of Mr and Mrs B. ... She was entirely *at Mr and Mrs B.'s mercy*, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.<sup>111</sup>

Isolation and no means of living elsewhere are among the circumstances that, in the Court's view, prevented the applicant from changing her situation and therefore turned her services into servitude.<sup>112</sup> Family and friends might have enabled the applicant to break the isolation and dependency underpinning her servitude. As seen earlier, though States do not create this kind of practical border, they may reinforce it by ignoring its negative impact on the women concerned. Again, acknowledging this reinforcing role is important because it allows thinking about possible mitigating responses. These responses may include procedural ones such as taking into account the role of this practical border in reinforcing domestic workers' dependence when designing responses to labour exploitation.

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<sup>108</sup> Anderson (n 21) 311. The 'figure of the abusive employer', she adds, 'throws a shadow over the role of the state in constructing vulnerability'.

<sup>109</sup> Stoyanova (n 4) 387.

<sup>110</sup> *Siliadin v France* (n 96) 22. One of the French courts actually pinpointed this border when it noted that *Siliadin* had 'no friends and almost no family to help her'.

<sup>111</sup> *ibid* 126. Emphasis added.

<sup>112</sup> *ibid* 128-9.

A third border operating in *Siliadin* is ‘the normative assumption that women’s primary work is in the home’.<sup>113</sup> Lurking behind the low value given to domestic work in many societies<sup>114</sup> are perceptions that this work flows ‘naturally from women’s genetic endowments rather than knowledge and skills acquired through education’.<sup>115</sup> From the information available in the *Siliadin* judgment, it is hard to tell whether domestic work enjoyed such a low societal value and legal protection in France. Yet the reasoning of one of the domestic courts reveals that these gendered views of domestic work played out in the particular case. The Versailles Court of Appeal concluded that the applicant had not worked in conditions incompatible with human dignity because ‘carrying out household tasks and looking after children [is] *the lot of many mothers*’.<sup>116</sup> Implicit in this statement is, like in *Zhou*, the kind of normative border that naturalises ‘women’s roles within the reproductive sphere as housekeepers, maids, and caregivers’.<sup>117</sup>

*Siliadin*, however, was not threatening but upholding this normative border. Contrary to *Zhou*, she was carrying out ‘women’s work’. Her conformity to normative borders serves to naturalise her alleged exploitation and to undermine her access to justice. The Versailles Court of Appeal does not see the exploitative conditions in which *Siliadin* worked because it assumes that her tasks are in any event the kind of tasks women carry out in their houses. The assumption that carrying out housework and child care is, or ought to be, women’s role in the family blinds the French court to the fact that *Siliadin* was performing these tasks for someone else’s children without payment. The normative border implicitly works to close off any investigation into her actual work conditions and, ultimately, to legitimise her work as free and exploitable. As discussed in *Zhou* and *Soares de Melo*, normative borders consisting of stereotypes such as this should be considered illegitimate reasons to restrict human rights and lead to analysing the case as one of discrimination. Additionally, recognising these borders and their role in undermining women’s equal

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<sup>113</sup> Ratna Kapur, ‘The ‘Other’ Side of Globalization: the Legal Regulation of Cross-Border Movements’ (2003) 22 *Canadian Woman Studies* 8 (arguing that this normative assumption renders migrant women vulnerable to labour exploitation).

<sup>114</sup> Domestic work is often characterised as ‘unproductive and unskilled’. Encarnacion Gutierrez-Rodriguez, ‘Domestic Work—Affective Labor: on Feminization and the Coloniality of Labor’ (2014) 46 *Women's Studies International Forum* 46.

<sup>115</sup> Shahra Razavi and Silke Staab, ‘Underpaid and Overworked: a Cross-National Perspective on Care Workers’ (2010) 249 *International Labour Review* 412, cited by Satiano (n 40) 52.

<sup>116</sup> *Siliadin v France* (n 96) 44. Emphasis added.

<sup>117</sup> Kapur (n 6) 82.

access to justice may lead to demanding States preventive obligations such as judicial training to combat harmful stereotypes.<sup>118</sup>

#### 4.2. BEYOND THE EVIL TRAFFICKER<sup>119</sup>

The last case discussed in this article, *Rantsev v. Cyprus and Russia*,<sup>120</sup> exemplifies how normative and formal borders may intersect to reflect and reinforce power imbalances between (female) migrant workers and their (male) employers. Combined, these borders sustain the inequalities that may give rise to exploitation and other abuses.<sup>121</sup> The case, moreover, shows how formal borders may create regular routes to enter, reside, and work within a State territory albeit precariously and unsafely.

*Rantsev* concerned the death, under suspicious circumstances, of Oxana Rantseva,<sup>122</sup> a Russian woman admitted to Cyprus to work in a cabaret on an artiste visa.<sup>123</sup> Following Cypriot immigration policy requiring prospective employers to procure the visa for artistes,<sup>124</sup> the owner of the cabaret where Oxana Rantseva was going to work obtained an artiste visa on her behalf.<sup>125</sup> A few days after she started working, she tried to escape but was tracked down by her employer who took her to the police and requested her detention and deportation for being ‘illegal’.<sup>126</sup> The police established that she was not ‘illegal’ and asked her employer, who was considered ‘responsible for her’, to pick her up.<sup>127</sup> Cypriot immigration policy required cabaret managers to report to the migration authorities if artistes did not show up for work or breached the contract otherwise.<sup>128</sup>

The Court found, among other human rights violations, that Cyprus had breached Article 4 ECHR, which it read as prohibiting human trafficking.<sup>129</sup> It

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<sup>118</sup> See Simone Cusack, ‘Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-based Violence Cases’ (2014) <<https://rm.coe.int/1680597b20>> accessed 26 June 2017.

<sup>119</sup> Anderson (n 1) 1252. This and the previous sub-heading are inspired by Anderson’s critiques of focusing on ‘the evil employer and trafficker’ that pass over the State’s role in illegalizing workers.

<sup>120</sup> *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010).

<sup>121</sup> Anderson (n 1) 1252. Through immigration controls, States ‘produce and reinforce relations of dependency and power’ and, in so doing, construe migrants’ vulnerability to abuse and exploitation.

<sup>122</sup> *Rantsev v Cyprus and Russia* (n 120) 21-23 and 25.

<sup>123</sup> *ibid* 13-16.

<sup>124</sup> *ibid* 115.

<sup>125</sup> *ibid* 15.

<sup>126</sup> *ibid* 17-19.

<sup>127</sup> *ibid* 20.

<sup>128</sup> *ibid* 117.

<sup>129</sup> *ibid* 282.

critiqued the artiste visa scheme for not offering ‘practical and effective protection’ against trafficking and exploitation.<sup>130</sup> It also reproached the Cypriot authorities for failing to take measures to protect Oxana Rantseva despite ‘a credible suspicion’ that she might have been trafficked or exploited.<sup>131</sup> The Court’s Article 4 ECHR reasoning turns full attention to the role of formal borders in encouraging abusive employment relationships for female migrant artistes. The Court finds unacceptable measures encouraging cabaret owners ‘to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes’.<sup>132</sup> Moreover, it considers that one of the main police failures was asking the employer to collect Oxana Rantseva instead of releasing her.<sup>133</sup> In interrogating formal borders, this kind of reasoning thus spotlights one of the mechanisms encouraging trafficking and exploitation in Cyprus: strong dependency of artistes on their employers.<sup>134</sup> The reasoning illuminates how formal borders may structure migrant women’s employment relations unequally and precariously.<sup>135</sup>

A normative border further sustains the formal border in *Rantsev*. Contrary to the previously examined cases – where the domestic authorities’ language signals normative borders – in *Rantsev* these borders are more difficult to recognise.<sup>136</sup> Feminist scholars, however, have thrown light on these borders by applying an anti-stereotyping approach,<sup>137</sup> an approach that may help identify many but not all normative borders. Informing both the requirement that the agent procured the artiste visa, and the police understanding that the artiste was under the agent’s custody was the gender stereotype of women as ‘the (sexual) property of their employers’.<sup>138</sup> The immigration requirement and the police attitude suggest that ‘the agents in this system are the (male) cabaret owners and not the women themselves’.<sup>139</sup> The immigration

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<sup>130</sup> *ibid* 293.

<sup>131</sup> *ibid* 298.

<sup>132</sup> *ibid* 292.

<sup>133</sup> *ibid* 298.

<sup>134</sup> Mantouvalou (n 2) 154. The Court’s scrutiny of formal borders is informed by numerous reports critiquing the artiste visa regime in Cyprus. *Rantsev v Cyprus and Russia* (n 122) 291.

<sup>135</sup> Vladislava Stoyanova, ‘*L.E. v. Greece*: Human Trafficking and the Scope of States’ Positive Obligations under the ECHR’ (2016) 3 *European Human Rights Law Review* 295.

<sup>136</sup> See also Timmer (n 93) 734.

<sup>137</sup> *ibid*.

<sup>138</sup> *ibid* 732.

<sup>139</sup> *ibid*. See also Vladislava Stoyanova, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case’ (2012) 30 *Netherlands Quarterly of Human Rights* 188.

rules requiring cabaret owners to deposit money in a bank to cover artistes' possible repatriation expenses<sup>140</sup> further reinforce the view that the former 'owned' the latter.<sup>141</sup>

Unlike in most of the cases examined up until now – in which normative borders inform domestic authorities' decisions – in *Rantsev* normative borders underlie immigration policy itself. Moreover, the normative borders are practically enforced through the police attitudes discussed above. Looking at *Rantsev* through the intersection of formal and normative borders reveals the State's contributory role to the exploitation of migrant artistes in two ways: by formally establishing a strong dependency on their employers and by normatively reproducing their commodification (women as objects managers can dispose of).

One important implication flowing from seeing *Rantsev* through the intersecting borders lens is that the problem is not framed as one of an individual abusive employer or trafficker. The problem, instead, is understood as partly shaped by immigration policy and cultural attitudes that render more than one woman vulnerable to trafficking and exploitation.<sup>142</sup> Framing the problem more broadly allows for envisioning responses beyond criminal punishment of individual perpetrators. In fact, in *Rantsev*, the ECtHR frames positive obligations quite broadly. These obligations are aimed not just at *punishing* traffickers and *protecting* victims but also at *preventing* trafficking.<sup>143</sup> One of the obligations asked by the Court actually interferes with State immigration control prerogatives. State immigration rules, the Court notes, 'must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'.<sup>144</sup> This kind of demand may push States towards transforming those formal borders at the root of vulnerability to trafficking.<sup>145</sup> Formulated in such broad terms, the demand in principle leaves States a margin to decide how to address these concerns. In circumstances like those of

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<sup>140</sup> *Rantsev v Cyprus and Russia* (n 120) 115.

<sup>141</sup> *Stoyanova* (n 142) 188-9.

<sup>142</sup> See Timmer (n 93) 733 (highlighting Cyprus' economic interest in the sex industry as another factor underlying the exploitation of artistes in Cyprus).

<sup>143</sup> *Rantsev v Cyprus and Russia* (n 120) 283-89.

<sup>144</sup> *ibid* 284.

<sup>145</sup> See Mullally (n 4) 151 (noting that the 'next step of opening up safer migration status is not one that is usually taken, however, reflecting a wider reluctance on the part of States to recognize the links between access to safe migration routes, application of human rights norms to immigration law and policy, and the potential to reduce migrant women's vulnerability to trafficking').

*Rantsev* this could mean amending the artiste visa scheme so as to unwind artistes' dependency on their employers.<sup>146</sup>

## 5. CONCLUSION

In launching the notion of intersecting borders of inequality, this article has sought to draw attention to three types of borders that may disadvantage migrant women in enjoying human rights: formal, normative and practical borders. Rather than claiming that these are the sole disadvantaging barriers migrant women may face, the article hopes to invite reflection on other borders.

Through the lens of intersecting borders of inequality the bad things that happen to many migrant women are no longer viewed as the mere result of individual choice, vulnerability, failure, abuse, or misfortune. These bad things are understood as shaped by constraining practical realities, by normative expectations about family, parenthood and sexuality, and by immigration norms that produce unequal power relations. In essence, the notion of intersecting borders facilitates understanding that the disadvantages migrant women may face are not simply individual but structural.

Focusing on the borders that cross us rather than on who crosses these borders<sup>147</sup> may further help recognising the inequalities that other individuals or groups standing at similar intersections may experience. One can perfectly imagine a migrant man trapped in the kind of circumstances Siliadin was trapped because of formal and practical borders: dependence on an employer for regularising his migration status and absence of family networks to turn to for support. Imagining a non-migrant woman in the same circumstances as Zhou is not hard either. An Italian single mother who moves to another part of the country may find herself without family to count on for day care support and be expected by the authorities to give up her work to take care of her child.

Emphasising the borders that burden some but not others also encourages imagining responses that may go beyond 'fixing' the individual. Some of these

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<sup>146</sup> See however Stoyanova (n 142) 177: 'In practice, this aspect of States' positive obligations means that the artiste visa as a legal channel for migration should be eliminated'.

<sup>147</sup> Sarah Keenan, 'A Border in Every Street' (29 June 2017) <<https://thedisorderofthings.com/2017/06/29/a-border-in-every-street/>> accessed 2 July 2017 (following Cross Border Collective's 'we don't cross borders, borders cross us').



responses may hold a transformative potential. Think of State obligations to work towards eradicating harmful stereotypes from domestic decision-making by, for example, training decision-makers. Think also of the kind of State obligation articulated by the ECtHR in *Rantsev*: address immigration norms that encourage, facilitate or tolerate trafficking. Other State obligations may more modestly seek to prevent or mitigate – substantively or procedurally – the detrimental implications of borders for certain individuals. Mitigating obligations come to mind specially to address the disadvantages caused by practical borders that States have not directly contributed to or by normative borders that States may legitimately sustain. *Haydarie*, for instance, offers an occasion to reflect on how States may be demanded a procedural duty to address these borders: to take into account the limitations caused by language barriers and unpaid care work on an individual’s job-seeking efforts.

Dismantling borders of inequality may not always be possible. States do not necessarily create practical borders such as those arising from insufficient family or social networks. Normative borders, in turn, are deeply ingrained and normalised in society. They are therefore difficult to recognise, let alone change. At times, normative borders operate discreetly, even silently, and certainly diffusively across the kind of domestic decisions that tend to escape attention: those of administrative bodies and lower courts. Even those normative borders that may be easier to spot given the use of discriminatory language (for example, the coupled motherhood border used to question Soares de Melo’s morality) cannot be dismantled overnight. Demolishing these borders requires deep changes in dominant cultural attitudes. Transforming formal borders comes with a different set of challenges, as immigration control is considered ‘a central substantive aspect of sovereignty’.<sup>148</sup> The tensions between international human rights law and State sovereignty take on a particular dimension in the context of migration.<sup>149</sup> In this area, human rights do not only challenge ‘States’ relative jurisdictional independence from international authority [but also] States’ plenary territorial powers’.<sup>150</sup>

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<sup>148</sup> Linda S Bosniak, ‘Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers’ Convention’ in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers 2004) 329.

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.*

The role of supranational human rights courts like the ECtHR in addressing the borders of inequality is actually limited, if not marginal. In fact, as *Haydarie* exemplifies, a supranational human rights court may reproduce and reinforce these borders. It is thus vital to ‘remain realistic and somewhat skeptical about the importance of any law, national or international, in achieving social change’.<sup>151</sup> Scepticism, however, does not mean that attention to formal, normative and practical borders is futile. Attention to these borders may not just discourage (international human rights) law from reproducing and reinforcing disadvantage. It may encourage (international human rights) law to remain alert to its potential to fix these borders and to seize opportunities to comprehensively tackle disadvantage within this potential.

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<sup>151</sup> Hilary Charlesworth, ‘What Are ‘Women’s International Human Rights’?’ in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 68.