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Trafficking Versus Smuggling: Malaysia's Anti-Trafficking in Persons Act¹

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The first decade of the twenty-first century has witnessed unprecedented global action against human trafficking. Governments have fallen over themselves in their efforts to be seen to be tough on human trafficking and sensitive to the plight of those who fall victim to it. In some cases, these attempts have been a response to pressure from powerful lobby groups concerned with the human rights of victims but in others they have been prompted by geopolitical concerns about the massive movement of people that has characterised globalisation. These latter concerns have dominated international policy responses to human trafficking, which are invariably framed in border security terms – states are encouraged to stop illegal cross-border flows, rescue 'victims', detain 'illegals' and prosecute evil 'traffickers' and 'smugglers'. The positioning of human trafficking as a border security issue, rather than a human rights issue, has occurred alongside a massive investment in border control techniques designed to address illegal migration flows. This has created inevitable confusion amongst policy makers and policing agents about the differences between human trafficking and irregular migration.

At the international level, these issues have been dealt with through the creation of two separate protocols that tackle illegal acts associated with the movement of people. The *United Nations Convention Against Transnational Organized Crime* (UNODC 2004) contains a Trafficking Protocol and a Migrant Smuggling Protocol.² According to the definitions contained in these protocols, while trafficking is deemed to occur in both legal and illegal migration streams, and within and across national borders, smuggling only involves the illegal movement of people across national borders. The crucial distinction between the two, however, is the forced labour or slavery-like conditions that *always* characterise trafficking, which is understood to be inherently exploitative and not *incidentally* exploitative, as is the case with smuggling (Kempadoo 2005: xii). In reality, however, the boundaries between smuggling and trafficking are far less clear than these definitions suggest. The individuals and groups that manage the recruitment and smuggling of migrants are frequently the same as those involved in human trafficking. Individuals who have been smuggled may find themselves working in the same industries as persons who have been trafficked and may be subject to the same exploitative practices. Conversely, victims of trafficking may be treated as undocumented migrants if they are caught outside

a trafficking context. For this reason, some scholars suggest that it might be best to jettison the distinction altogether on the grounds that it leads to unnecessary confusion and poor policy and policing outcomes (cf. Brock *et al.* 2000; Grewcock 2003; O'Connell Davidson and Anderson 2006).'

Nation states have a vested interest in maintaining the distinction between human trafficking and people smuggling because it provides a clear basis on which to maintain border control. In an era of globalisation, border control has become a matter of symbolic performance for governments, many of whom rely on the myth of 'loss of border control' to justify increasingly restrictive economic and social policies (Anderson and O'Dowd 1999; Pickering 2004). Human trafficking and people-smuggling laws thus seek to restrict immigration by prosecuting illegal entries (those who have been smuggled) or rehabilitating and repatriating 'victims' of trafficking. Many of these efforts have had a negative effect on the human rights of migrants and refugees (Ford, Lyons and van Schendel 2012).

Malaysia is a case in point. The country is home to a large undocumented migrant population, consisting of temporary labour migrants, refugees and displaced persons, and victims of trafficking, as well as a large documented migrant labour workforce (Ford 2010). Regardless of their migration status, a significant number of these migrants arrived on falsified and fake documents and face a range of exploitative practices that include confinement and restricted freedom of movement; bonded labour and debt bondage; deception; violence and abuse; poor working conditions; and non-payment of wages (Wong 2005). While these acts are commonly perpetrated by employers and migration agents, government authorities, including customs, immigration and police officers have also been implicated in cases of abuse and mistreatment of migrants (Ford 2006).

In the first decade of the twenty-first century, the Malaysian government has faced increasing pressure to improve its treatment of its large migrant population. To address international criticism and to improve the treatment of victims of trafficking, the government introduced an Anti-Trafficking in Persons (ATIP) Act in 2007, which was subsequently amended in 2010 to include crimes associated with migrant smuggling. The first section of this chapter traces the emergence of the Act, while the second documents and analyses national and international responses to it. The chapter argues that the Malaysian example offers important insights into the ways in which international pressure can be brought to bear on the drafting of national laws dealing with human trafficking and smuggling. It demonstrates that the geopolitics of regional border control is increasingly shaping Malaysian responses to its large migrant population. In particular, the distinction between smuggling and trafficking is becoming an important means for Malaysian authorities to strengthen border protection while, at the same time, paying lip service to international demands to address 'the most heinous of crimes'.³ In the absence of human rights laws that address the exploitation of migrants, these anti-trafficking and anti-migrant smuggling laws have done little to address the system-wide factors that create and sustain endemic abuse of the labour rights of temporary labour migrants.

The Anti-Trafficking in Persons and Anti-Migrant Smuggling Act

Malaysia's ATIP Act was gazetted in 2007 and at that time focused exclusively on trafficking in persons which it defines as 'the recruiting, transporting, transferring [sic], harbouring, providing or receiving of a person for the purpose of exploitation', where 'exploitation' includes 'all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs' (Parliament of Malaysia 2007). Closely modelled on the UN Trafficking Protocol, the ATIP Act is made up of three separate elements: (i) an *action* (e.g. recruitment); (ii) a *purpose* (exploitation); and (iii) a *means* (e.g. coercion or deception). In the 2007 ATIP Act, the definition of 'means' includes threat; use of force or other forms of coercion; abduction; fraud; deception; abuse of power; abuse of the position of vulnerability of a person; or the giving or receiving of payments or benefits to obtain the consent of a person (Parliament of Malaysia 2007). Also in common with the UN Protocol, the ATIP Act makes it clear that consent is not a relevant defence.

The Act stipulates that a trafficked person is not liable for criminal prosecution in respect of his/her illegal entry into Malaysia or his/her possession of fraudulent documents. A person suspected of being a trafficked person is placed in temporary custody to appear before a magistrate within 24 hours, whereupon the magistrate can make an interim protection order for a period of 14 days, during which time an investigation is made. If, after the investigation, the magistrate is satisfied that the person has been trafficked and is in need of care and protection, the person is placed in a shelter. For citizens or permanent residents of Malaysia, the order places the trafficked person in a shelter for up to two years. Foreign nationals are placed in a shelter up to three months, whereupon they are released to an immigration officer, who is responsible for facilitating his/her return to the country of origin. If the person is deemed not to have been trafficked, they are immediately dealt with under the Immigration Act, which stipulates that entering and staying in Malaysia without a permit is punishable with a fine of up to 10,000 ringgit (US\$3,320), imprisonment of up to five years and whipping (caning) of not more than six strokes.

Despite receiving initial international praise for introducing the ATIP Act, the Malaysian government has faced a growing perception that the Act was ineffectual in addressing the country's place as a trafficking 'hotspot'. This view was taken by the US State Department, which, in its 2009 TIP Report, relegated Malaysia to Tier Three.⁴ Among the claims made in the 2009 *Trafficking in Persons Report* are that the Malaysian government had failed to prosecute employers who 'subjected workers to conditions of forced labour' and recruiters who used deception or debt bondage to 'compel migrant workers into involuntary servitude' (US Department of State 2009: 199). In response to these criticisms, plans were made to amend the law under the 2010 National Action Plan on Combating Human Trafficking, which declared the government's intention to strengthen border security and cooperation between government agencies and foster strategic alliances with foreign partners, to increase the number of shelters, to conduct a rigorous public awareness campaign and, in the medium term, amongst other measures, to reduce the number of foreign workers (Government of Malaysia 2010: 13).⁵

The amendments to the ATIP Act came into effect in November 2010. The amended Act, which is now called the Anti-Trafficking in Persons and Anti-Migrant Smuggling Act, introduced new offences related to 'migrant smuggling' which it defines as:

arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful.

(Parliament of Malaysia 2010)

The new law introduces a new category of illegal immigrant – smuggled persons. This group is treated no differently to other types of illegal entrants. Unlike victims of trafficking, they are not immune from prosecution for illegal entry, unlawful residence or procurement of fraudulent travel or identity documents. The most significant change introduced by the law relates not to the treatment of those who have been smuggled but to the prosecution of those involved in smuggling. In particular, the amended Act stipulates that the penalties and fines for those found guilty of migrant smuggling are higher where the person committing the offence intends that the smuggled migrant will be exploited after entry, where the smuggled migrant is subject to cruel, inhuman or degrading treatment or where the smuggled person is subject to a risk of death or serious harm (Clause 26B). However, even in these circumstances, and unlike victims of trafficking, the smuggled person is not provided with additional protection or assistance.

The Home Minister Hishammuddin Hussein announced that the amendments to the ATIP Act were made in recognition of the fact that human trafficking and migrant smuggling were 'closely linked and interlinked, particularly in the context of exploitation of foreign labour and migrants' (Malaysiakini 2010). In the attached Explanatory Statement for the revisions, the ATIP Amendment Act stipulates that the reason for the inclusion of the section dealing with migrant smuggling is as follows:

The amendment is necessary to deal with the current influx of illegal migrants from conflict countries who are seeking better life either in Malaysia or third countries and who, in particular, are using Malaysia as a transit point while they await their onward journey to possible countries. These migrants are distinct from trafficked persons in that they normally seek and finance the illegal migration themselves and the only danger of exploitation faced is cruel or inhuman or degrading treatment or being endangered in the course of their journey. Further, under international law, Malaysia is under a humanitarian obligation to ensure the safety of such migrants while they are on Malaysian territory. The influx of these illegal migrants also posed a security threat to Malaysia as their methods of entry and exit are generally illegal.

(Parliament of Malaysia 2010: 18, emphasis added)

The explanatory clause makes it clear that the amended Act aims to address the unlawful entry of migrants from 'conflict countries' seeking a 'better life' in Malaysia or a third country. These migrants presumably include refugees from Burma, Iraq and Afghanistan, who make up a significant proportion of Malaysia's illegal migrant population (Amnesty International 2010a).⁶ Many of these refugees transit in Malaysia en route to Australia, which, unlike Malaysia, is a signatory to the United Nations Refugee Convention. There is no doubt that the Malaysian government is under a considerable amount of pressure from Australian authorities to deal with these potential asylum seekers. Many observers, including Malaysian non-governmental organisations (NGOs), regard the amendments to the ATIP Act to be a direct response to this pressure. In the words of Aegile Fernandez, Coordinator of the Anti-Trafficking Program of Tenaganita, Malaysia's premier migrant labour NGO, 'the Australian s' finger- prints were all over the amendments ' (Interview, Kuala Lumpur, 18 October 2010). It is a widely held view that the Australian government wanted to see the punishment for smuggling brought into line with the existing tougher penalties for human trafficking, to act as a stronger deterrent to smugglers.

Notably, the explanatory clause makes no reference to the large number of undocumented migrants who enter Malaysia as temporary labour migrants from neighbouring countries, despite the government's own admission that Malaysia is home to over one million such workers, the majority of whom are from Indonesia.⁷ Many of these migrants are subject to the same forced labour or slavery-like working conditions that documented migrant workers face. The curious absence of these labour migrants in the explanatory clause deserves some attention. A somewhat cynical view would attribute it to the state's own interest in having access to a large irregular workforce. The Malaysian authorities have demonstrated an aggressive stance towards undocumented workers at times of economic downturn but turn a blind eye when demand for unskilled labour is strong (Ford 2006). Failure to explicitly refer to these migrant workers in the explanatory clause may reflect the government's unwillingness to formally recognise the presence of these workers.

A less sceptical view may attribute it to the state's intention to use the offence of human trafficking to pursue labour rights abuses of undocumented workers. Included in the amendments to the Act have been two changes to the definition of human trafficking which support the latter interpretation. Firstly, an additional section was included in the offence of human trafficking so that the prosecution need not prove the movement or conveyance of a trafficked person for the offence of trafficking to have been committed. Instead, the prosecution needs only to prove that the trafficked person was subject to exploitation as a consequence of coercion. This could potentially allow for prosecutions of forced labour or slavery-like practices by employers or subcontractors who were not involved in the migration process. Secondly, and most significantly, the definition of 'human trafficking' under the Act has also been amended. It now refers to:

all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act.

(Parliament of Malaysia 2010, emphasis added)

The reason for the inclusion of the phrase 'all actions involved in acquiring or maintaining the labour or services of a person through coercion' in the new definition of human trafficking is unclear. It could be interpreted as an attempt to clarify that the Act applies to all forms of labour exploitation (not just sexual exploitation) and applies to all persons involved in recruiting and employing labour migrants.⁸ In other words, it could foreseeably include recruitment agents, employment agencies, outsourcing companies and employers. However, as the discussion below suggests, there is no evidence of any political will to use the crime of trafficking in pursuing labour rights abuses despite lobbying by local NGOs to see the Act applied in all cases of forced labour.

What the new law has done is to create a legal framework for the punishment of those involved in smuggling (by stipulating offences related to conveying, harbouring, etc.) – a laudable achievement, given the Malaysian government's previous lack of action on this front. What it fails to do, however, is offer undocumented migrants and refugees protections similar to those provided to victims of trafficking. As the deplorable state of Malaysia's detention centres and the ongoing violent and aggressive behaviour of the volunteer citizens' police force, the People's Volunteer Corps (Ikatan Relawan Rakyat or RELA) attest,⁹ the amended act has done little to address the fact that irregular migrants and refugees continue to be vulnerable to exploitation and trafficking.

National and international responses to the ATIP Act

In the period immediately after the original ATIP Act was introduced, there was a strong interest amongst migrant worker advocates in using it to prosecute cases of labour exploitation of migrant workers. For example, the Women's Aid Organisation (WAO), a feminist NGO working to eradicate violence against women (both Malaysian nationals and foreigners residents in Malaysia), was eager to use the anti-trafficking legislation to address violence perpetrated against migrant women:

We are looking forward to the prospect of using the new national Anti-trafficking Bill as a mechanism to prosecute employers. Documented workers who are not paid or whose personal documents are withheld are victims of trafficking because they are engaged in forced labour.

(Interview with WAO Policy Officer, Kuala Lumpur, 27 September 2007)

Although WAO believed that many migrant domestic workers could be considered victims of trafficking under the Act, they felt that the government was unlikely to prosecute employers and, in the absence of any test cases, they were uncertain about how the Act could actually be used to pursue violations of labour rights. Instead, WAO intended to harness the anti-trafficking legislation in a high-profile 'shaming' campaign designed to force the government to amend national legislation affecting temporary labour migrants. It was hoped that the legislation could be used as a leveraging tool to address the significant gap in national labour laws which exclude migrant domestic workers. For this reason, WAO was working with the Malaysian Bar Council to encourage lawyers to use the ATIP Act, the

Committee on the Elimination of Discrimination Against Women and the Federal Constitution in cases involving migrant domestic workers:

What we are hoping to achieve is right now in the short term is to have cases in the courts, using the ATIP Act for a start. Then we can document from there what's been going on. And then probably later on, with the documentation, we can go on to do further campaigns. But now we don't have documentation as evidence.

(Interview with WAO Policy Officer, Kuala Lumpur, 11 June 2008).

The documentation to which the WAO Policy Officer refers is case material that would demonstrate if and how the ATIP Act could be used in labour rights cases involving domestic workers. The major issue confronting WAO was the lack of information about trafficking cases. While they had heard that in 2008 thirty-nine women had been 'rescued' under the Act, they had no idea what type of cases the women were involved in, whether the women were in shelters or had been repatriated and which cases would actually go to court. Despite concerns about implementation, WAO was unwavering in its view that many domestic workers would meet the definition of trafficking victims and that the ATIP Act provided a productive arena in which to address labour rights issues because it offered new hope to migrant worker advocates in a context where there have been few other positive outcomes for a very long time.

Malaysia's leading migrants' rights organisation, Tenaganita, was also pleased with the introduction of the ATIP Act, which it believed could be used to pursue issues of trafficking for forced labour. It claimed that, under the Act, large numbers of foreign domestic workers would fall under the definition of a 'victim of trafficking' and over sixty per cent of employment agents involved in the recruitment of domestic workers would end up behind bars as 'traffickers' (Interview with Aegile Fernandez, Kuala Lumpur, 11 June 2008). Tenaganita also claimed that it was clear that the male migrant workers involved in thirty-six cases it had handled where there had been a dispute with outsourcing companies were in a trafficked situation (Tenaganita 2007b). Like WAO, however, while Tenaganita was hopeful that the Act would be used to address instances of labour trafficking it believed there was little political will to do so. For this reason, in 2008 together with other NGOs (including WAO) it started lobbying the Malaysian Bar Council to demonstrate the relevance of the ATIP Act for labour rights violations of documented workers in the hope that a test case could be brought before the courts. Tenaganita wanted to see the Malaysian government review all policies, regulations and laws that contravene or are in conflict with the Act and develop a comprehensive labour migration management program led by the Ministry of Human Resources (Tenaganita 2007a: 61). In Tenaganita's view, the ATIP Act would be a central pillar in such a labour management programme.

One reason why the anti-trafficking framework was being touted as a way of dealing with problems faced by labour migrants is that Malaysian labour laws have proved ineffective in dealing with labour rights abuses. Both WAO and Tenaganita concluded that if economic migrants experience a range of 'trafficking-like practices' then perhaps

trafficking laws (rather than labour laws) offered a solution. This is a view shared by a number of international development agencies and international NGOs, who argue that all migrant workers subject to exploitative labour practices are 'victims of trafficking' (Rosenberg 2003; UNODC 2003; Sugiarti, Davis and Dasgupta 2006). This has led to a situation in which cases of forced labour and debt bondage of documented temporary labour migrants are used as evidence of the prevalence of trafficking (cf. ASI 2003; IOM 2007; Amnesty International 2010b). For example, Anti-Slavery International includes documented migrant domestic workers in its description of victims of trafficking, arguing that a 'sophisticated system of debt-bondage and forced labour' characterises the domestic work industry (Ould 2004: 62). Similarly, Human Rights Watch (2008: 40) concludes that trafficking is widespread amongst migrant domestic workers.

Both WAO and Tenanganita claimed that pursuing labour rights issues under the ATIP Act could prove to be a more productive pathway than using existing labour laws. In their assessment, the framework provided by the existing labour laws was adequate but these regulations were rarely enforced in relation to migrant workers in the informal sector (particularly domestic workers and sex workers) and never in relation to undocumented workers. They pointed to systemic corruption and weak political will as other key factors that reduced the effectiveness of existing labour laws. Neither organisation, however, has been willing to openly discuss the potential problems associated with framing all forms of exploitation involving temporary labour migrants as trafficking. The ATIP Act not only establishes a victim's status but also determines the ways in which a victim will be treated. Under the ATIP Act this usually involves removal from the situation of exploitation, a period of shelter (detention) during which time evidence is collected and statements are recorded and repatriation. In many cases, migrant workers may not want any of these things to occur – they may want to continue working for their employer (but with wages paid and/or decent working hours), they may want to leave the workplace to find new work and, in the case of those who find themselves undocumented, they may be best helped by having their immigration status regularised. Malaysia's anti-trafficking law cannot provide these outcomes. It may thus be premature to push for labour trafficking tests cases in a context where we know very little about the cases that have been pursued under the ATIP Act and even less about the impact that arrests and prosecutions are having on the Lives of individual migrants.

These concerns may partly explain why the Malaysian Trade Union Council (MTUC) has been much more reluctant to use the ATIP Act to address labour rights abuses, despite acknowledging that 'labour trafficking' is widespread in Malaysia. When the Act was introduced in 2007, MTUC Secretary General, Rajasekaran, was quoted as saying:

The workers are brought here and put to hard labour and paid a pittance, if paid at all ... We consider them as victims of trafficking as well – the government must look at the larger picture that is trafficking.

(cited in Kuppasamy 2007)

Moreover, in his view, 'there is no danger in using the anti-trafficking framework, and in the absence of anything better it should be used' (Interview, Kuala Lumpur, 18 August 2009).

Nonetheless, the MTUC was much less sure that the ATIP Act could be used to pursue labour rights abuses. It was mindful that the government was very 'sensitive' about its relegation to Tier Three status and did not want to see the number of trafficking cases grow through the pursuit of labour rights abuses under the ATIP Act. When we spoke to an MTUC Officer in 2008, we were told that MTUC had received advice from the Ministry of Labour that it did not want any negative publicity surrounding accusations of trafficking and would prefer that labour issues were dealt with through the labour courts instead. As part of its strategy to avoid trafficking claims, the government called on MTUC to bring any cases of non-payment of wages to the Ministry for Labour for them to handle, a strategy the union was much more comfortable using (Interview with Parimala Moses, Kuala Lumpur, 12 June 2008).

The 2010 revisions to the ATIP Act sparked concern amongst local and international NGOs worried that the law would conflate human trafficking with migrant smuggling and, in doing so, adversely impact on the human rights of victims of human trafficking. These concerns reflect a widely held view that migrant smuggling and human trafficking are separate and distinct phenomena. In an open letter sent to the Malaysian Prime Minister Najib Razak on 8 September 2010, Phil Robertson, the Deputy Asia Director of Human Rights Watch, claimed that by referring only to situations of *coercion* in the definition of trafficking, the revised law narrows the legal definition from that spelt out in the UN Trafficking Protocol, which includes other means such as abduction, fraud and deception (Human Rights Watch 2010). However, the significance of this amendment is unclear because although the definition of 'human trafficking' contained in the amended law has been changed to emphasise the involvement of coercion, those clauses that deal with offences and punishments stipulate that human trafficking of adults is still an offence when there is no coercion (Clause 12) or where threat, coercion, abduction, fraud, deception, etc. occurs (Clause 13).

Malaysian NGOs are also concerned about the implications of including migrant smuggling offences in the ATIP Act. Aegile Fernandez claims that within the Act the distinction between the two issues is unclear and therefore it would be 'difficult for the various enforcement agencies to differentiate between the two' (cited in Loo 2010).

Tenaganita argues that there are very few 'documented' victims of trafficking – the majority of victims are smuggled migrants. According to Aegile, the new law, rather than stopping trafficking, would result in trafficking victims getting 'lost in the crowd' of irregular migrants and would greatly weaken Malaysia's already ineffective systems for identifying and prosecuting the crime (Interview, Kuala Lumpur, 18 October 2010).

Concern about the potential confusion between the two sections of the Act appears to be well founded. Where an individual is found to have entered Malaysia unlawfully, the distinction between human trafficking and migrant smuggling rests on the

interpretation of the new phrase inserted into the definition of human trafficking: 'all actions involved in acquiring or maintaining the labour or services of a person through coercion'. Therefore, in making a distinction between a victim of human trafficking and a smuggled migrant, an investigating officer would need to establish whether the circumstances surrounding his/her entry involved coercion for the purposes of acquiring or maintaining that person's labour or services. This is why the definition of 'coercion' and its relationship to Clauses 12 (no coercion) and 13 (other means such as fraud, deception, etc.) is important. The new Clause 26B makes it clear that purpose (exploitation) is not in itself grounds to determine whether a person has been trafficked and therefore the focus shifts back to coercion.

Human Rights Watch believes that the amendments will make it more likely that victims of human trafficking will be treated as undocumented migrants and be subject to deportation, arguing that the new law contravenes 'international best practice', which demonstrates that a focus on smuggling 'is likely to damage efforts to counter trafficking because it shifts the emphasis from countering exploitation of individuals, the hallmark of trafficking, to controlling immigration' (Human Rights Watch 2010). In particular, Human Rights Watch is concerned that the new provisions related to people smuggling do not protect the rights of undocumented migrants, including refugees and may, in fact, further exacerbate violations of migrant's human rights.

Although Tenaganita shares this view, it has observed unexpected benefits for smuggled asylum seekers as a result of the conflation between the two categories. Afghani 'victims of trafficking' are now routinely detained at the Kuala Lumpur International Airport detention centre, where suspected victims of trafficking are interviewed by Tenaganita on the invitation of Immigration Department officials. These interviews have revealed that, although the detainees are asylum seekers, they are unwilling to identify themselves in this way because they feared that being registered as official refugees in Malaysia would weaken their claims to obtain refugee status in Australia. Tenaganita suspects that, in these instances, the government was using the ATIP Act to bring its treatment of refugees into line with international conventions without having to formally recognise refugees (Interview with Aegile Fernandez, Kuala Lumpur, 18 October 2010).

Conclusion

The Malaysian example highlights a range of interconnected issues that deserve greater attention by policymakers, human rights advocates and scholars. Firstly, it reveals that ongoing geopolitical pressure can in fact undermine anti-trafficking efforts in favour of border security issues. The role played by the United States in promulgating counter-trafficking laws and policy initiatives has been well documented. What has been given much less attention, however, is what happens when concerns about border control trump anti-trafficking efforts. There is no doubt that the Malaysian authorities are subject to pressure from the United States to address trafficking for sexual exploitation and, increasingly, forced labour, and from the Australian government to better manage the

inflow of asylum seekers who transit in Malaysia. The 2010 amendments to the ATIP Act, which were motivated by the Malaysian government's own preoccupation with managing undocumented migration, coalesced with the Australian concerns and resulted in a human trafficking law that is predominantly about protecting borders and not the rights of migrants. Against this backdrop, it is easy to understand why states cling to the distinction between human trafficking and human smuggling, which is in effect a structural by-product of the need to accommodate different state responses to migration control and border security.

Secondly, this example demonstrates that, counterintuitively, human trafficking laws are not designed to address the exploitation and abuse of migrants subject to forced labour or slavery-like conditions, despite increasing attempts by US-based groups to do so. Instead, they can only ever deal with a small group of migrants who can prove 'coercion' and 'exploitation'. The international Labour Organization notes that the introduction of the UN Trafficking Protocol poses challenges to policy makers because it requires states to deal with forced labour as a criminal offence rather than a labour violation (Andrees and van der Linden 2005). But in contexts such as Malaysia, where there is little political will to use labour laws to address the systemic abuse of migrants or where migrant workers are not covered by labour laws because of their migration status and/or the type of work that they perform, policy makers may face no such dilemma. Our detailed account of the evolution of the ATIP Act shows that the Malaysian government's increasing emphasis on migrant workers as victims of trafficking has little to do with the protection of labour rights.

Recent changes to the ATIP Act indicate that the Malaysian government may be amenable to addressing labour exploitation under the criminal offence of human trafficking, although this remains to be seen. However, in an environment where the public is already accustomed to seeing 'illegals' as a security threat, using the offence of human trafficking as a means to improve employment conditions may be a double-edged sword. Even if there was interest in doing so, it is unlikely that such an approach would improve conditions for the vast majority of migrants subject to abuse because the law aims to identify specific cases of deception and exploitation against individual persons, rather than the structural factors that support the continuing mistreatment of migrant workers. The recent inclusion of migrant smuggling into the Act also does little to address systemic exploitation because it places further emphasis on illegal cross-border movement rather than the economic and employment conditions that support labour rights abuses. Under the Act, the vast majority of migrants who face systemic exploitation will continue to be treated as 'illegal' migrants and thus face continuing mistreatment as either undocumented workers or immigration detainees.

Given the vast amount of evidence pointing to the ongoing and systemic abuse of documented and undocumented migrants in Malaysia, it is difficult to understand why international and local NGOs continue to support the legal fiction of a distinction between human trafficking and human smuggling, and why they are pushing for human trafficking test cases amongst the large migrant labour workforce. Despite the guarded optimism of

migrant activists, we are unlikely to witness an increase in the number of successful trafficking prosecutions amongst migrant workers. Neither are we likely to see a reduction in the exploitation and abuse of documented and undocumented migrants living and working in Malaysia. The ATIP Act is primarily a border control mechanism, and as such has at its core the protection of the Malaysian nation state.

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Notes

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² These are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air (United Nations 2000).

³ This phrase is frequently used to describe both human trafficking and human smuggling. See, for example: US Department of Homeland Security (2012).

⁴ Initially placed in Tier Three in 2001, Malaysia's Trafficking in Persons (TIP) ranking improved the following year and it stayed in Tier Two until 2006. In 2007, however, the US Department of State relegated Malaysia to Tier Three and issued a strong condemnation of the Malaysian government for its inactions on human trafficking (US Department of State 2007: 143). Malaysia responded by passing the ATIP Act and, in the following year, it was promoted to the Tier Two Watch List. It was demoted again in 2009 but was reinstated on the Watch List in 2010.

⁵ Perhaps recognising the entrenched character of labour rights abuses, the National Action Plan recommends the reduction in the number of foreign workers, rather than any specific improvements in national labour laws.

⁶ It is estimated that there are over 100,000 refugees in Malaysia, the majority from Burma. Malaysia is not a signatory to the UN Refugee Convention and its treatment of refugees has received international condemnation.

⁷ Figures on the number of undocumented migrants vary. Amnesty International estimates that there are an estimated 2.2 million irregular migrant workers in Malaysia (Amnesty International 2010a: 5).

⁸ The issue of 'fraudulent labour recruitment or exploitation of forced labour' was raised as an issue of concern in the 2010 *Trafficking In Persons Report*. Its inclusion in the revised Act could be seen as an effort to appease the United States.

⁹ RELA agents are authorised by law to examine people's identification documents and investigate their immigration status. RELA raids also lead to arrest, detention and other penalties for immigration offences. There have been numerous allegations of RELA agents subjecting people to humiliation, physical abuse, theft and extortion (Amnesty International 2010a,b).