

DOI: 10.14197/atr.201216612

## Villains and Victims, but No Workers: Why a prosecution-focussed approach to human trafficking fails trafficked persons

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### Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

Please cite this article as: I Thiemann, ‘Villains and Victims, but No Workers: Why a prosecution-focussed approach to human trafficking fails trafficked persons’, *Anti-Trafficking Review*, issue 6, 2016, pp. 126–129, [www.antitraffickingreview.org](http://www.antitraffickingreview.org)

The focus on prosecutions in anti-trafficking responses sets trafficking up as a criminal act with two polar opposites, the trafficker as the perpetrator and the trafficked person as the victim. This approach is problematic, as it ignores the complex interplay of economic inequalities between countries of origin and destination countries, as well as the role of destination countries’ immigration controls and labour regulations in creating the conditions which render people vulnerable to human trafficking.<sup>1</sup> While other crimes such as domestic violence or sexual violence in conflict have strong structural dimensions, counter-trafficking policies can be particularly problematic, as they not only obscure structural issues but sometimes actively contribute to measures which render certain groups more vulnerable.<sup>2</sup>

Immigration is restricted in most destination countries for human trafficking, but there is nonetheless demand for cheap and exploitable labour. Exploitable labour is characterised as labour which is paid below national minimum wage standards, exceeds regular workers’ permitted working hours, and is easily retained. Foreign nationals are more likely to be exploitable as they have fewer opportunities to change their occupation or their employer: regular migrant workers are often tied to their employer through their work permits, whereas irregular migrants are likely to stay with their employer due to fears of deportation and lack of other options.<sup>3</sup>

In certain sectors, even citizen employees lack labour protections and are particularly vulnerable to exploitation. These sectors include sex work, which in most countries is not considered to be work at all, as well as domestic work, certain types of care work and agricultural work, all of which are exempt from labour regulations and lack possibilities for collective bargaining. Equally, female workers are more vulnerable. They are often disempowered vis-à-vis their employers due to lesser protections in part-time or short-term work,<sup>4</sup> different remuneration levels for men and women and a greater risk of sexual violence and harassment at the workplace. Thus, female migrant workers who enter labour sectors with low labour protections are at a heightened risk of exploitation, particularly if they engage in domestic care work or sex work, as these categories of work are almost invariably exempt from laws and regulations that impose obligations on employers and protect workers.

Unsurprisingly, people are trafficked almost exclusively into those professions and industries in which labour protections are fragmented or non-existent.<sup>5</sup> Furthermore, a lot of the challenges faced by trafficked persons are similar to those encountered by irregular migrants. While the divisions are clear in theory, the threshold between

<sup>1</sup> For more information on the diverse impact of immigration policies in countries of destination on migrants’ rights, see: B Anderson, *Us and Them? The dangerous politics of immigration control*, OUP, Oxford, 2013; R Andrijašević and B Anderson, ‘Conflicts of Mobility: Migration, labour and political subjectivities’, *Subjectivity*, vol. 29, 2009.

<sup>2</sup> For a more detailed discussion, see: R Andrijašević and B Anderson, ‘Anti-Trafficking Campaigns: Decent? Honest? Truthful?’, *Feminist Review*, vol. 92, 2009, p. 151; R Andrijašević, ‘Beautiful Dead Bodies: Gender, migration and representation in anti-trafficking campaigns’, *Feminist Review*, vol. 86, 2007, p. 24.

<sup>3</sup> Andrijašević and Anderson, p. 152.

<sup>4</sup> L F Vosko, *Managing the Margins: Gender, citizenship, and the international regulation of precarious employment*, OUP Oxford 2009, pp. 19–20; See also S Fredman, ‘Women at Work: The broken promise of flexicurity’, *Industrial Law Journal*, vol. 33, 2004, p. 299.

<sup>5</sup> For example, trafficking continues to be problematic in areas such as domestic work, agricultural work and sex work, which are often under-regulated or lacking in legislative protection, see e.g. J Fudge, ‘Precarious Migrant Status and Precarious Employment: The paradox of international rights for migrant workers’, *Comparative Labor Law & Policy Journal*, vol. 34, issue 1, 2012; V Mantouvalou, ‘Human Rights for Precarious Workers: The legislative precariousness of domestic labor’, *Comparative Labor Law & Policy Journal*, vol. 34, issue 1, 2012; T Sanders and K Hardy, ‘Sex Work: The ultimate precarious labour?’ *Criminal Justice Matters*, vol. 93, 2013.

what constitutes human trafficking, migrant smuggling and even regular migration is blurry.<sup>6</sup> It is therefore important to question the line that is drawn between voluntary migration and human trafficking and to view exploitation and vulnerability on a continuum, rather than as clearly identified categories.<sup>7</sup>

Immigration laws and policies often aim at more tightly controlled borders, more restrictive visa regulations as well as more extensive police investigations and raids, claiming that they will control or at least deter trafficking by reducing irregular migratory processes.<sup>8</sup> This approach legitimises government agencies' continued focus on border control and immigration regimes and ignores that trafficked persons often suffer the highest level of exploitation after their arrival in the destination country, not before or during their journey.<sup>9</sup> Stronger borders are likely to force migration further underground, rather than prevent irregular migration and human trafficking. More clandestine movement increases the potential violence and abuse to which migrants, particularly women, are subjected, and makes facilitating cross-border movement, forced labour and exploitative practices both necessary and more profitable.<sup>10</sup>

Focussing on trafficking as a category distinct from other forms of migration restricts the problem to the crimes perpetrated by traffickers and employers, who exploit trafficked persons' limited access to their basic human rights. However, these limitations are not *imposed* by the traffickers, but are in fact due to immigration restrictions and the lack of labour protections for migrant workers. Indeed, these are the main sources of all migrants' vulnerabilities to precarious working and living conditions.<sup>11</sup> Traffickers merely exploit this structural problem.

The response to human trafficking and exploitation of migrant workers despite stronger border controls has been to focus on prosecuting the intermediaries who benefit from supplying trafficked persons' labour to an employer. This focus on prosecutions allows states to be perceived as 'doing something' to prevent the exceptional crime of human trafficking. It also allows for the category of a 'victim of trafficking', who has temporary and conditional rights as a victim of a crime until the time he or she is needed for criminal proceedings. Such an approach normalises trafficked persons' status as aliens who are by default excluded from labour rights and human rights.<sup>12</sup> Obscuring the connection between trafficking, immigration controls and labour rights prevents a rights-based approach, which protects the human rights, including labour rights, of all workers.<sup>13</sup>

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<sup>6</sup> J O'Connell Davidson, 'New Slavery, Old Binaries: Human trafficking and the borders of "freedom"', *Global Networks*, vol. 10, 2010, p. 244, p. 249; I van Liempt, *Navigating Borders: Inside perspectives on the process of human smuggling into the Netherlands*, Amsterdam University Press, 2007, pp. 40–41; A T Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A critical review of the 2005 European Convention and Related Instruments', *European Journal of Migration and Law*, vol. 8, 2006, p. 163, 166.

<sup>7</sup> J O'Connell Davidson, pp. 249–251.

<sup>8</sup> A Lepp, 'Trafficking in Women and the Feminization of Migration: The Canadian context' *Canadian Woman Studies*, vol. 21, 2002, p. 96; B Anderson and R Andrijasevic, 'Sex, Slaves and Citizens: The politics of anti-trafficking', *Soundings*, 2008, p. 135, 144.

<sup>9</sup> R Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking*, Palgrave Macmillan, Basingstoke/New York, 2010, pp. 19–20, 83–87; A T Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and treaties.', *Forced Migration Review*, vol.12. no. 8, 2002.

<sup>10</sup> A Lepp, 'Trafficking in Women and the Feminization of Migration', *Canadian Woman Studies/Les Cahiers de la Femme*, volumes 21/22, numbers 4/1, p. 96; B Anderson and R Andrijasevic, 'Sex, Slaves and Citizens: The politics of anti-trafficking', p. 144.

<sup>11</sup> C Costello, 'Migrants and Forced Labour: A labour law response' in A Bogg et al. (eds), *The Autonomy of Labour Law*, Hart, Oxford/Oregon, 2015.

<sup>12</sup> Anderson and Andrijasevic, 'Sex, Slaves and Citizens'.

<sup>13</sup> H Shamir, 'A Labor Paradigm for Human Trafficking', *UCLA Law Review*, vol. 60, 2012; C Costello and M Freedland, *Migrants at Work*, OUP, Oxford, 2014.