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Author: Dr. Kat Hadjimatheou

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1. Introduction

Over the last decade, trafficking in human beings has been increasingly recognized a problem of global significance. Today, commitments to tackle trafficking feature prominently in the mission statements and strategies of national and international law enforcement agencies. For EU member states commitments to tackle trafficking are legally binding following the adoption in 2013 of the EU Directive on Trafficking in Persons.¹ That document places binding obligations on EU countries to take proactive measures to prevent and prosecute trafficking and to protect its victims. It also describes the successful identification of victims of trafficking as necessary to the ability to meet these obligations and gives border guards and border police a crucial role to play in victim identification.² In response, the border forces of national member states as well as the EU border agency FRONTEX have developed training, methods, and protocols to equip staff with the skills to distinguish victims of trafficking in human beings from other kinds of travellers. Despite these efforts, identifications³ at the border remain extremely low, especially when compared to identifications by police, other government officials, and NGOs.⁴ This may seem surprising, given the centrality of cross-border movement to traditional and popular understandings of trafficking. It suggests one of three conclusions: that borders present less of an opportunity to identify victims of trafficking than has generally been supposed; that methods of identification currently used are not effective; or a combination of both of the above. This is significant. Challenges to the effective identification of victims of trafficking raise moral as well as legal issues. Victims of trafficking are often trapped in conditions in which their basic human rights are routinely violated. States have humanitarian duties to provide them with the kind of assistance and protection that would restore or facilitate the restoration of those rights and freedoms. In order to fulfill these duties, state agents must be able to distinguish accurately victims of trafficking from other kinds of migrants, travellers, and workers. This paper examines these issues and puts forward some tentative recommendations, which will be tested in forthcoming empirical work with border forces.

¹lex.europa.eu/LexUriServ/LexUriServ.do?uri

² It is one of many authoritative international documents emphasising the role of border guards in this respect. See, for example, 'Guidelines for the Identification of Victims of Human Trafficking' DG Home Affairs, 2013. At http://ec.europa.eu/dgs/home-affairs/e-library/docs/thb-victims-identification/thb_identification_en.pdf. Last accessed 26/09/14. See also UNODC *Toolkit to Combat Trafficking in Persons* (2008) p.257 (1). http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf. Last accessed 18.10.14

³ The question of what constitutes an identification appears to vary between jurisdictions. This is discussed later in the paper. Here, identifications is taken to mean both formal, legally significant designation as a victim and referrals of those suspected to be victims to official entities with the authority to make formal designation (as in the UK).

⁴ See quarterly statistics from UK Home Office National Referral Mechanism. In each of the last quarter of 2013 and the first quarter of 2014 less than 1% of referrals were made by the UK border force. Most (more than 1/3 each, respectively) were made by UK police and the Home Office. See <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics>. Last accessed 25/09/2014.

The paper begins by describing the practice of trafficking as defined in international law, drawing attention to some of the controversies that have arisen in relation to the definition of trafficking in the Palermo Protocol. It then provides an account of the moral wrongs of trafficking, describing them as a combination of exploitation and coercion that also involves the objectification of victims. The paper then highlights confusions and controversies about the proper scope of trafficking and draws attention to two related attempts to narrow that scope to cover only the most severe kinds. The first of these defines trafficking as a gross violation of human rights. The second reframes it as modern slavery. Both these approaches to conceptualizing trafficking and motivating urgent responses to it ground claims for a moral right of victims to be rescued and both moral and legal rights to receive redress, restitution and reparation, and to corresponding obligations on states.

State obligations with respect to the rights of victims of trafficking give rise to a secondary obligation to try to identify victims, because identification is a necessary preliminary to the provision of rights. In practice, the identification of victims of trafficking assumes a working definition of victimhood that can be applied directly. This section describes and critically examines one such definition, proposed by the ILO in conjunction with the European Commission and described as 'operational indicators for the identification of victims of trafficking. The discussion raises concerns about the consistency of the ILO's list of operational indicators with the definition of trafficking put forward in the Palermo Protocol, and highlights some of the potential difficulties that arise in relation to the application of this method in practice. The section concludes by noting that the actual identification of victims of trafficking necessarily involves some method of investigation capable of determining whether the indicators listed in the ILO or alternative definitions are present or not with respect to a specific individual. The successes and limitations to such methods of investigation applied at borders are the subject of the final section of this paper.

The final section of the paper examines current efforts in the EU and more broadly to identify victims of trafficking at borders. It identifies the challenges the border-crossing context poses to the successful identification of victims of trafficking and considers how these might be addressed through changes to current practice. It characterizes the approach adopted by many (if not most) border forces in the EU as a form of profiling. It considers the ethical issues that arise in connection with four broad areas of border guard activity in this respect: the use of profiling to assess credibility; the use of privacy-intrusive tactics by border guards to uncover indicators of trafficking; the use of ethnic and gender profiles; and the use of stereotypes and broad discretion by individual border guards. The paper concludes by setting out 6 tentative recommendations for border guard practice in relation to the identification of victims of trafficking. In a forthcoming piece of research, these recommendations will be tested and revised through discussions with border guards.

2. What is trafficking?

2.1 The Palermo Protocol

The legal definition of trafficking provided in the 2000 Palermo Protocol is taken as the starting-point of the discussion of trafficking in this paper. The Protocol is the anti-trafficking appendix to a UN convention tackling organized crime. It provides a good point of departure from which to examine contemporary understandings of trafficking, for at least three reasons. First, while legal definitions of trafficking vary between treaties and jurisdictions, something approaching a global consensus exists around the authority of the Protocol's definition. Thus legal variations on this definition tend to add to rather than substantially alter it, remaining ultimately compatible with it, and it is taken as authoritative by a broad range of actors in the field of anti-trafficking, from NGOs to law enforcement agencies. Second, it is the point of reference for most methods developed to identify victims of trafficking, including those used at borders. Third, it relates trafficking to existing crimes, such as slavery, about whose nature and seriousness we already have established views.

The Palermo Protocol defines trafficking as:

...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁵

This definition is often understood as having three distinct components, which are individually necessary and jointly sufficient for trafficking:

- (1) an *act* of recruitment, movement, harbouring, or receipt of a person,
- (2) by *means* that are to a minimal extent coercive
- (3) for the *purpose* of exploitation

Three features of this definition makes it depart from common sense or lay understandings of trafficking in a way that is notable. First, trafficking need not involve transactions of a financial nature, nor indeed transactions within any economic market as such, for the exploitation clause (3) to be fulfilled. In doing so it proposes a legal concept of trafficking that is broader than profiting from engagement in an illicit market of some kind. Second, while the Protocol is addressed to acts of trafficking that are "transnational in nature and involve an organized criminal group" (Article 4), the legislative guides to the Protocol make

⁵Protocol to prevent, suppress, and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organised Crime (Palermo Protocol), Article 3(a), 2000.
http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_20traff_eng.pdf

clear that under domestic law trafficking need not involve international transport, nor indeed need it involve any significant element of transportation at all.⁶ Instead, as the very broad set of activities under '1' suggests, almost any handling of human beings can qualify as an 'act' with respect to trafficking. This represents a significant move away from the image of trafficking as the transport of people for trade. Third trafficking need not involve organized criminal gangs.⁷ On the contrary, it may be perpetrated by a single individual operating alone and this individual may not be involved in nor have any intention of becoming involved in any other kind of criminal activity at all. We can clarify the implications of these three aspects of the definition for the scope of trafficking by providing a couple of real examples of trafficking.

1. Teenage girls in the UK are targeted by adult men, who pretend to be their 'boyfriends' in order to gain confidence and power to sexually abuse them, in a practice officially referred to as 'Internal Child Sex Trafficking' (ICST). Here, the 'means' condition is met by the use of deception and abuse of power and the 'exploitation' condition is met by the sexual activity the girls are pressured to perform. Perpetrators often also supply girls to their associates to sexually abuse, but as a recent article analyzing police data on this practice reveals, "the majority of the abuse appeared to be motivated by non-commercial reasons" (Brayley et al. 2011: 137). Despite the absence of financial transactions, the extraction of sexual favours involved in ICST falls within the understanding of 'exploitation' presented above.
2. There have been instances of families in Afghanistan arranging forced marriages for their daughters as a means of repayment of debt or to settle disputes they have with other families (Cullen Du-Pont, 2009: 14) In some such cases, the families into which girls are married are their neighbours or relations. They continue to live in the same village as their family following the forced marriage and may have regular contact with them. This example shows how the geographical element of the 'act' involved in trafficking may in practice be insignificant. It also shows how trafficking (as defined in the Protocol) may be unconnected to criminal gangs or indeed any other kind of criminality.

This expansion of traditional understandings of trafficking to include coercive handling of human beings for exploitation suggests, as is often pointed out, that the core of trafficking is no longer located in the act (transport) but in a combination of coercive means and exploitative ends (UN ESCAP, 2003: 26). In order to understand the practical scope of this contemporary understanding of trafficking, we must first clarify what it intends by coercion and exploitation.

⁶ "The element of transnationality is one of the criteria for applying the Convention and the Protocols, but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences" United Nations Office on Drugs and Crime. 2004. Legislative Guides to the United Nations Convention Against Transnational Organized Crime and Its Protocols, 276.

⁷ Ibid.

2.2 Understanding trafficking as coercion and exploitation.

The Palermo Protocol does not define coercion and exploitation. However, it does provide indicative lists of the kinds of acts that fall within each category. This section examines the text of the Protocol's definition to articulate the concepts of coercion and exploitation that appear to underpin those categories. It also draws attention to some potential difficulties in the ways that coercion and exploitation overlap and are distinguished in the wording of the definition.

2.2.1 Coercion

Coercion is understood in the Protocol as:

“the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”

What do the elements in this list have in common? It is consistent with common-sense understandings of coercion to say that one person coerces another into doing something when they impose their will on them by dominating their powers of action entirely (say, by abduction) or by manipulating the alternatives to so acting in such a way that they are much more harmful to the individual than obeying. While we can imagine people being forced into doing things just in virtue of being in a particularly unlucky situation in life, the Palermo Protocol is only concerned with *acts of coercion between individuals*. So, while it might be normal to describe as forced a person's decision to work as a prostitute when it is the only realistic alternative to letting their children go hungry, a situation of poverty does not qualify as coercive under the Protocol.

The use of violence to make someone do something is coercive because violence is usually very painful and harmful and it is reasonable for people to prefer almost anything to it. Threats of violence are coercive for the same reasons. Deception and fraud are also coercive means of getting people to do things, because they involve manipulating those people into believing that doing the thing in question is the best (or least bad) option available to them, when in fact it is not.

An abuse of power occurs when an individual uses their position of relative power over another person to obtain benefits or advantages that the power does not authorize them to claim. Take, for example, a teacher who promises a student a better grade than they deserve if they engage in sexual activity with them. This

teacher is abusing their power to assess and rate academic merit by using it to acquire sexual favours.

Consistent with the understanding of coercion outlined above, the extent to which an abuse of power is coercive depends on how reasonable the alternatives to refusal are. One such factor is the nature of the options given to the person who is being manipulated. The worse off the person is made by refusal to cooperate with the demands, relative to where they would be if power had not been abused, the more coercive the abuse of power is. To illustrate: it is more coercive for a teacher to threaten to downgrade a student from an A to a C for refusing to provide sexual favours, than it is for them to promise to reward such favours with an A-plus. In the first case refusal to cooperate results in the student being made significantly worse off than they were in the absence of the abuse of power, while in the second case they are only made worse off relative to where they would be had they yielded to the teacher's demands.

But the extent to which an act is coerced is also determined more fundamentally by how badly off one is (or believes they will be) made in *absolute* terms by a refusal to carry it out. In the case of the student who is offered an upgrade from an A to an A-plus, a refusal to cooperate leaves them in what remains a very advantageous position relative to most students and in society more broadly. The offer of an A-plus is one they can easily afford to refuse and so can hardly be described as coercive. Take, by way of contrast, the example of an aid worker who makes distribution of food to a refugee camp resident dependent on the provision of sexual favours. The aid worker abuses their power in a way similar to the teacher described in above. Yet the aid worker's abuse of power is more coercive because a refusal to cooperate makes the recipient of aid very badly off in absolute terms (though no worse off than they would have been had the offer not been made).

Some abuses of power are at the same time abuses of a position of vulnerability, which are also included in the Protocol's list of coercive means.⁸ This is the case when something about the disadvantage at which a person finds themselves renders them subject to manipulation or coercion. Like power, vulnerability can be a quality people have relative to others who stand in specific positions of influence over them. This is obviously the case in the example of the aid worker given above, because the refugee is at risk of starvation, and needs what the aid worker has in order to survive. But vulnerability can also characterise certain states of being that render people subject to manipulation by more or less anyone. These states of being are recognized in the laws of a number of countries and include typically: childhood, pregnancy, infirmity, mental or physical disability, illegal status⁹ and, in some

⁸ For a detailed analysis of what this criterion entails in practice for law-enforcement and other officials, see the UNODC's 'Guidance note on 'abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol', 2012.

http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf. Last accessed 18/10/14.

⁹ "...illegal or precarious administrative situation, pregnancy, ill health or an infirmity or

jurisdictions, poverty and being female. Increasingly, structural factors (such as poverty, educational opportunities, gender discrimination, racial inequality) have become recognized as important sources of vulnerability to trafficking (UNODC, 2008). Measures to address structural vulnerability to trafficking are now acknowledged to be the most promising approach to preventing trafficking in humans (ibid.)

While abusing one's power or another's vulnerability in order to make someone else do something is generally considered unfair and manipulative, it is more controversial whether it should always be considered tantamount to coercion.

The final, more straightforward example of coercive means given in the Palermo Protocol is "the giving or receiving of payments or benefits to achieve the consent of a person having control over another person". This refers to the act of paying someone to force a person who is within their control to do something. Though such payment itself is not directly coercive, it is an act of what we might call secondary coercion.¹⁰ Bringing such actions within the understanding of coercion in the context of trafficking has the effect of expanding the criminal responsibility for trafficking to those who enter into market transactions with the trafficking industry and therefore both benefit personally from it and help to sustain it.

2.2.2 Exploitation

As with coercion, the Protocol does not define exploitation. Instead, it provides a list of actions that must be considered exploitative under any anti-trafficking law drawn up by signatories to the treaty.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

These practices can be divided into two categories corresponding to different kinds of exploitation. The first category involves forms of exploitation that are coerced. It includes forced labour, servitude, and slavery. The second category involves exploitation in the form of the commodification of things that should not be bought or sold. It includes the trade in organs and other human tissue¹¹ and potentially and – more controversially – the exploitation of the prostitution of others and sexual

physical or mental disability", (Luxembourg Criminal Code 379bis)

¹⁰ Though the Protocol does not spell this out, in practice a person would have to be aware that their payment was for actions performed under coercion in order to be prosecuted for trafficking. Nevertheless, even if none of the clients providing such payments were aware that the services they received were performed under coercion, the individual in question should still be treated as a victim of trafficking.

¹¹ Trend reported in harvesting and trafficking of human eggs to be used in IVF. European Parliament Resolution on the Trade in Human Egg Cells. Official Journal of the European Union. C 320 E. 15 Dec. 2005

exploitation more generally.¹²

In order to understand why these practices are considered exploitative it is useful to present a definition of exploitation. For the purposes of this paper, we do not need a definition that works for all forms of exploitation. It is sufficient to sketch a definition that describes well the kind of exploitation involved in the sorts of practices that laws against trafficking aim to tackle. With this in mind, we can say that exploitation occurs when a transaction takes place in which one party takes advantage of the other party's position of relative disadvantage, in order to impose terms on the transaction that benefit themselves unfairly.¹³ It is consistent with this definition that a transaction can be exploitative even if it does not leave the exploited person any worse off in absolute terms than they would have been had they not accepted the terms of the transaction. Thus the refugee who agrees to have sex with the aid worker may consider themselves better off as a result of having done so than they would have been had they refused and been left without food for a week. But the fact that they are better off does not mean they were not exploited. It is only necessary for exploitation that a transaction makes the exploited person worse off than they would have been had the transaction been conducted fairly (Meyer, 2008).

This definition of exploitation is relatively uncontroversial because it does not align itself to any specific account of fairness in transactions. For example, it is consistent with the libertarian view that the fair rate of remuneration is whatever the invisible hand of the market determines it to be; but it is also consistent with the view of some socialists that the fair rate of remuneration corresponds to an equal share of the profits of a collective enterprise. Both libertarians and socialists can accept the definition of exploitation given above and yet continue to disagree (as they surely will) over which actual transactions qualify as exploitative.

Necessarily exploitative practices under the Protocol

2.2.2.1 Forced labour, slavery, and servitude

The Palermo Protocol's assertion that forced labour, slavery, and servitude must always be considered examples of exploitation can be supported by most accounts of fairness. This is because a transaction whose terms are forced on one party by the other is non-consensual and consent is (in all but exceptional circumstances) necessary for fairness in transactions.

2.2.2.2 The removal of organs

By contrast, the Protocol's inclusion of 'the removal of organs' in its list of necessarily exploitative practices presupposes an account of fairness in transaction that is more contestable. It is true that most legal systems reflect the popular view that the commodification of organs is exploitative and should be criminalized. But this position is coming under increased pressure, mainly from those who recognize

¹² This provides some support for the tendency in contemporary political rhetoric to conflate trafficking with slavery, a move that has provoked criticism among some legal theorists (Chuang, 2013; McGeehan, 2013)

¹³ This definition of exploitation draws from Mayer 2008.

the potential of a legalized trade in organs to address the considerable suffering caused by the current global shortage of healthy organs available for transplantation (e.g. Taylor, 2005; Hippen, 2005). If the sale of organs has a) clear and important benefits both to those whose lives are saved through transplant and to those whose situation of poverty is significantly alleviated through payment and b) is legitimized via meaningful and informed consent given by the latter, then it may be difficult to see why it should be considered any more exploitative than other, accepted practices (Dworkin, 1994:155-61).

But the inclusion of the 'removal of organs' in the Palermo Protocol's list of exploitative practices could be explained without reference to claims that the sale of organs is inherently exploitative. Organs might just be part of a special class of things that it would be unfair and harmful to pressurize people into selling. This is the claim that underpins what is perhaps the most compelling line of current ethical objection to the legalization of a market in organs. This line of argument rests on the claim that a market in organs, though not necessarily exploitative, would become unavoidably so in practice. For example, Simon Rippon argues that the commodification of organs is bound to introduce changes in the ways we think about them: from parts of ourselves we are free to donate, to 'excess' assets we could be called upon to cash in when necessary. This, argues Rippon, will bring about harmful social and legal pressures on individuals to sell them:

"Would those in poverty be eligible for bankruptcy protection, or for public assistance, if they have an organ that they choose not to sell? Could they be legally forced to sell an organ to pay taxes, paternity bills or rent? How would society view someone who asks for charitable assistance to meet her basic needs, if she could easily sell a healthy 'excess' organ to meet them?" (Rippon, 2014: 148)

In the context of the Palermo Protocol's definition of trafficking, organ removal is always carried out under pressure, because it follows some kind of initial coercion by definition. If we accept that organs belong to a special class of things that people should not be pressured into having removed, then this initial coercion is sufficient to render organ removal inevitably exploitative, because it limits the extent to which such removal can be considered genuinely voluntary.

Even if we do not accept this argument, there are other reasons why even if only mild coercion were involved in the handling of individuals for organ removal would be sufficient to render the practice exploitative. Whether or not one agrees that a market in organs would be inevitably exploitative, we can agree that as a medical procedure organ removal is both deeply intrusive and irreversible, and that this has implications for the conditions under which it should take place. Specifically, these features suggest that a *very high threshold of consent* should be required before organ removal is permitted. Even if someone ultimately consents to the removal of an organ, the fact that coercive means have been used to draw them into a situation in which consent seems the least bad option available means that the consent falls short of what is required. Thus the initial coercion involved in trafficking for organ

removal is by itself sufficient to treat such removal as presumptively exploitative, even if the person is reimbursed generously. For this reason, we might accept that organ removal in the context of trafficking is nearly always exploitative.

Most kinds of labour do not fall within this class of special things that people should be spared pressure to sell. This is because there is no general consensus about whether it is exploitation worthy of criminalization to employ someone who has been deceived or coerced into a situation in which taking the job seems the least bad option available. Take the case of someone who is transported in violation of immigration laws to another country on the understanding that they will be given work at minimum wage as a waitress, only to be told once they arrive that they will in fact be paid at a rate well below the minimum wage, though they are free to try to find other options for themselves. In this case a person has been transported (act) by coercive means (deception) for the purposes of exploitation (paying them far below the fair rate). The Palermo Protocol does not preclude such practices from qualifying as trafficking, but neither does it insist that they must; rather, it is left up to individual signatories to decide for themselves. We may contrast this open-minded approach to labour in general with the clear prohibition on removal of organs.

2.2.2.3 The exploitation of prostitution and sexual exploitation

The Protocol's stance on prostitution and sexual exploitation lies somewhere between its position on labour and its position on the removal of organs. This reflects the deep disagreement in the anti-trafficking movement about whether sex is, like organs, in a special class of things that people should not be allowed to sell or whether it is, like labour, something that should not be forced but can be freely traded.

Why should people not be allowed to sell sex? One argument is that the sale of sex is alienating and therefore should be paternalistically outlawed (Miriam, 2005 3-4). Another argument is that consent to enter the sex trade should be discounted because it is always put forward under coercive conditions (e.g. of poverty or vulnerability). Another possible argument is, similar to that put forward in relation to organ removal, that the threshold for consent should be very high and pressure to sell should not be tolerated. Given the intimate nature of the exchange and the potential impact on the individual's future experience of sexual exchanges, so fundamental for the romantic relationships that give meaning to people's lives. Also, being forced to have sex, even if one is paid, is generally speaking more harmful than being forced to undertake other kinds of acts. Firstly, it usually involves violence, second, even when violence is absent, the intimate nature makes it humiliating and deeply intrusive of bodily privacy. This latter point also applies to pornography. These are reasons to distinguish sex work from labour.

At the same time, it is incontrovertible that some individuals do choose freely to sell sex even when there are other options available, because they judge it to be in their interests. There is, for example, a movement amongst sex workers to have their labour recognized as legitimate and as meriting legal and regulatory protections

afforded to other kinds of employment.¹⁴ They argue that criminalizing the sex industry creates conditions of vulnerability amongst those who work voluntarily in it. They agree that people should not be coerced into selling sex but insist that this is not an inevitable side effect of respecting the rights of those who choose to do so. These are reasons to insist that prostitution that both follows initial coercion *and is exploitative* must be considered an example of trafficking. Unlike with organ removal, which must necessarily be considered trafficking if it follows an initial act of coercion, prostitution is only necessarily trafficking if it both follows an initial act of coercion *and is exploitative* (perhaps in virtue of being coerced or pressured or undertaken under conditions that breach standards of safety).

Perhaps trying to reflect these concerns, which themselves reflect a legal tradition of attempting to criminalize pimping,¹⁵ the Protocol includes in its illustrative list of actions that are exploitative in the context of trafficking, the ‘exploitation of prostitution and sexual exploitation.’ This ambiguity makes sure that the combination of the initial coercion plus exploitation in the context of sex work is sufficient for trafficking. Whether or not one agrees with the Protocol’s compromise on this issue, we should recognize that its equivocation on the nature of the exploitation of prostitution and of sexual exploitation is a rational response to these controversies. It is one way of making sure that the issue of trafficking for sex is given sufficient emphasis without attempting an inevitably controversial definition of the boundaries of that practice.

3. The wrongs of trafficking

Coercion and exploitation are both ways of wronging or mistreating people. Trafficking is defined in terms of both of these kinds of treatment and is therefore best understood as what we might call a compound wrong.

Coercion is wrong because it violates conditions of autonomy. Autonomy is usefully defined as ‘the capacity to be one’s own person, to live one’s life according to reasons and motives that are taken as one’s own and not the product of manipulative or distorting external forces’ (Christman, 2009). Autonomy is a central value of the liberal political tradition and motivates many of the human and civil rights we consider most fundamental. From freedom of conscience and religion to the right to vote to the right to divorce and practice birth control, nearly all basic rights are underpinned at least in part by respect for individual autonomy. Autonomy is a condition of being able to pursue one’s own well-being, because individuals are generally speaking best-placed to decide what is in their own interests. Autonomy is also a condition of being truly free. A life lived under the rule of a benevolent master whose decisions always tracked precisely the interests of the

¹⁴ See, for example, the International Prostitutes Collective, which campaigns for workers rights of sex workers: <http://prostitutescollective.net> English Collective of Prostitutes. In some jurisdictions they have union rights.

¹⁵ There is a legal tradition of regulating prostitution as a business. See, for example, UK provisions prohibiting ‘controlling a prostitute for gain’ and keeping a brothel under Section 33 of the 1956 Sexual Offences Act.

ruled is less valuable than one lived with the freedom to make one's own mistakes. For these reasons all violations of autonomy are serious moral wrongs.

Exploitation was defined earlier as taking advantage of the other party's position of relative disadvantage, in order to impose terms on a transaction that benefits oneself unfairly. The moral wrong involved in exploitation is often thus presented as a matter of taking unfair advantage: leaving someone worse off than they would have been had fair terms of exchange been respected (Mayer, 147). But this leaves out something distinctive and additional about the unfairness involved in exploitation, and especially exploitation carried out in the context of trafficking: objectification.

Exploitation always involves treating people as a tool or means to one's own purposes (in more philosophical terms, 'instrumentalising' them). Instrumentalisation is one way in which people are *objectified*- i.e. treated not as human beings with interests, purposes, and rights which should be respected, but as an object not deserving of moral status or concern. In the context of exploitation for trafficking, this objectification often occurs as a result of the coercive nature of the exploitation. Thus with trafficking, instrumentalisation always occurs alongside other kinds of objectification, especially treating people as if they can be violated (through physical force, being compelled to take drugs, etc.) owned, and traded in return for other objects.¹⁶ It is the toxic combination of coercion and exploitation that produces these deeply objectionable kinds of objectification. At a fundamental level, trafficking is wrong because it fails to treat people with the *respect* they deserve, by denying or ignoring their status as beings with rights. It is also wrong because it fails to treat people with the *concern* they deserve, by refusing to give sufficient (or sometimes any) weight to their feelings, desires, interests and well-being more generally. Any transactions involved in trafficking are unfair because they yield benefits to the exploiter that can be claimed only at the expense of the rights and interests of the exploited.

Coercion is generally considered to be more objectionable morally speaking than exploitation. There are at least two obvious reasons for this. First, taking advantage of someone's position of relative vulnerability to exploitation is not as bad as putting at an unfair disadvantage and thus creating vulnerability to exploitation (Mayer, 147). Second, as noted above, exploitative transactions can and often do leave people better off than they would have been (other things being equal) without the opportunity to transact, but people are never better off having been forced or tricked into accepting exploitative conditions than they would have been had the choice been genuinely theirs. As we will see in the following section, the coercive element of trafficking is also fundamental to its status as a serious human rights abuse.

¹⁶ For a list of the possible forms of objectification see Nussbaum, 1995: 257.

4. The scope of trafficking

Coercion and exploitation or coercive exploitation?

Coercion and exploitation are distinct concepts and distinct wrongs. However, in the context of trafficking it would be a mistake to view them as separate acts. As mentioned above, trafficking is often described in terms of its 3 constituent components: the handling of a human being (the act) in a way that is coercive (the means) in order to exploit them or facilitate their exploitation (the purpose). While it is undoubtedly useful to analyse trafficking in this way, it is important not to interpret the sequence in which they are presented as corresponding to the order in which they occur in time. Rather, coercion should be understood as characterising the exploitation involved in trafficking *as well as* the initial handling of the person that facilitates exploitative treatment. Inclusion of non-coercive exploitation in the definition of trafficking would expand the category to include acts that lack the elements of control or ownership that should distinguish trafficking from less objectionable forms of exploitation.

To illustrate how this might occur, consider the fictional case of an illegal migrant looking for work as a day-labourer. He waits at the side of the road every day hoping that one of the trucks from the construction firms working nearby will stop and hire him for a day's black market building work. One day a truck stops, and the person inside promises the man €80 to work for 12 hours on a building site. A number of the man's acquaintances have been badly injured on sites so the man asks if they provide hard hats and other safety gear. The people in the truck assure him that they do. However, when he arrives at the site, this is revealed to be a lie, and he spends the day working in conditions that breach health and safety and employment regulations quite flagrantly. At the end of the day the man is dropped off again at the side of the road but is only given €50, with the excuse that he put other workers off by complaining too much about the poor health and safety standards.

Is this man a victim of trafficking? If we understand the act, means, and purpose as occurring sequentially, then yes: he has been recruited (an act) under conditions that were deceptive (that he would be paid €80 instead of €50, that some minimal safety measures would be in place), for the purpose of exploitation (using the man's position of disadvantage as an illegal migrant to extract from him work paid at a rate far below what anyone would consider fair, under illegal and dangerous conditions). Yet an examination of the kinds of mistreatment typically associated with trafficking reveals a significant difference in the severity of the coercion and exploitation experienced by the man in our example and those experienced by many if not most documented victims. Take, for example, the following description taken from the UNODC website in 2012:

Women make up two-thirds of the world's human trafficking victims. The vast majority of these female victims are young women who are lured with false promises of employment and are then imprisoned, beaten or threatened with violence, have debt imposed and are stripped of all control over their lives. Women make up two-

*thirds of the world's human trafficking victims. The vast majority of these female victims are young women who are lured with false promises of employment and are then imprisoned, beaten or threatened with violence, have debt imposed and are stripped of all control over their lives.*¹⁷

One immediate difference we can note between the description of these women's plight and that experienced by the person in our fictional example is the severity of the coercion: where the man was merely deceived, the women have been beaten, imprisoned, and subject to the imposition of debt. Another is the frequency of the coercive acts: whereas the man was subject to deception in a one-off episode, leaving him free to walk away, leaving his mistreatment in the past, the women are subject to persistent and reiterated coercion, with the cumulative effect that they are 'stripped of all control over their lives'. Morally speaking, the women suffer violations of autonomy and forms of objectification that are far more severe and damaging than those suffered by the man. Despite the stark contrast in the gravity of their harms, the Palermo Protocol accommodates both the kinds of mistreatment. There are two sources of this accommodation. The first is the broad interpretation of coercion so that even relatively minor deception or non-serious abuse of power is sufficient for trafficking. The second is the lack of a stipulation that the exploitation and not only the initial act of handling should be coerced.

This paper proposes that the rights and interests of those victims of serious coercion and exploitation would be better served by a definition of trafficking that featured both of these limiting elements, and thus excluded one-off incidents of mildly coercive exploitation such as that described above. Lumping together all forms of coercive exploitation in a single category is problematic because it expands the focus beyond the very serious wrongs associated with grave violations of autonomy and forms of objectification, and thus potentially dilutes the urgency lent to measures of anti-trafficking. This is undesirable because grave kinds of trafficking, like those described on the UNODC website and quoted above, *are* deeply objectionable and their prevention *should* be prioritized by states over less severe examples of mistreatment. There are also potentially undesirable implications for the kind of claims to redress, reparation, and assistance that would be available to victims were trafficking to include mildly coercive violations of labour laws.

Deciding where a threshold or other kinds of formal distinction between trafficking and related wrongs should lie is difficult. This difficulty arises, perhaps inevitably, from the decision to define trafficking in terms of coercion and exploitation rather than movement or trade. Whereas an act either does or does not involve movement or trade, acts can be more or less coercive and more or less exploitative. The following section examines two approaches to trafficking that impose a threshold or limitation on understandings of trafficking that would exclude all but the most objectionable kinds of acts currently covered by the definition provided in the Palermo Protocol. The first is the framing of trafficking in international legal

¹⁷ <http://www.unodc.org/unodc/en/frontpage/2012/November/put-yourself-in-my-in-my-shoes-a-human-trafficking-victim-speaks-out.html>

discourse and practice as a *serious abuse* or *gross violation* abuse of human rights. The second is the trend amongst US and EU politicians and state institutions to conflate or equate trafficking with slavery and indeed to re-define it as 'modern slavery'.

4. 1 Trafficking as a serious human rights abuse

The 2011 EU Directive on trafficking identifies it as a 'gross violation of human rights'.¹⁸ Gross violations are a distinct category in international human rights law. Exploitation is not included in the definition of gross violations of human rights, but severe forms of coercion (abduction, torture including psychological torture and threats of death to individuals and their families, serious ill-treatment such as beatings, rape and sexual abuse) are. Thus it is the coercive element of trafficking that qualifies it as a gross violation of basic human rights. In this respect the law reflects the moral position, outlined above, that coercion, especially severe coercion is a more serious wrong than exploitation and suggests, in line with what was proposed above, that unless the exploitation involved is itself coercive, it is difficult to categorise it as a grave moral wrong.¹⁹

Legally speaking, it is their subjection to gross violations of human rights that gives victims of trafficking legitimate claims to justice- not only in the form of judicial redress but also in the form of reparations or compensation and other forms of assistance.²⁰ In other words, the fact that people have been deeply damaged by their victimization yields rights not only to see perpetrators punished but also to be given positive assistance by the state. A moral rationale for these kinds of rights is supported partially by reference to the fact that victims have often 'been stripped of all control over their lives' for significant periods of time. People who are under the total control of others need rescuing. And if their human rights are to be reinstated they must be given the opportunity and means to rebuild their lives and liberate themselves from their state of victimhood.

In practice, these opportunities and means include temporary or permanent residents' permits in countries into which they have been trafficked and in which they have no prior legal right to live or work; opportunities to stay in sheltered accommodation and receive psychological and other assistance; a right to a period

¹⁸ Article 1. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

¹⁹ See, for example, OECD 'Trafficking in Persons as a Human Rights Issue', 2008 <http://www.oecd.org/dac/gender-development/44896390.pdf>. 'Human Trafficking: Joint UN Commentary on the EU Directive- A Human Rights Approach' 2011 http://www.unodc.org/documents/human-trafficking/2011/UN_Commentary_EU_Trafficking_Directive_2011.pdf

²⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>. Last Accessed 18/10/14

of reflection before deciding whether they want to assist police in criminal proceedings;²¹ witness protection if they decide to testify against traffickers; educational opportunities; financial assistance to help set up a business, and so on. As will be discussed in more detail later on, such measures of justice also have preventive effects, because they reduce the vulnerability that makes those particular individuals continue to be attractive prospects for traffickers. However, in order to genuinely fulfill rights of reparation assistance and redress, such measures must be effective in reducing vulnerability and this may entail the commitment of significant resources and long-term, focused strategies to combat its causes.

4.2 Trafficking as modern slavery

Trafficking is now generally recognized as a serious violation of human rights, in virtue at least of its coercive features. However, recent years have seen efforts to redefine it more narrowly as *the* human rights violation *par excellence*: slavery. The human right against slavery enjoys a unique level of global legal recognition and moral support. Slavery is deeply wrong because it is the ultimate violation of a person's autonomy, denying as it does the existence of any rights gained by virtue of one's status as a person. Reframing trafficking as slavery-- as the US and EU member states and institutions are doing with increasing prominence--²² therefore has the potential to harness the considerable force of the global consensus against slavery in support of anti-trafficking.

However, such a move also entails a reinterpretation of the Palermo Protocol's definition of trafficking. Given that the practices that fall under the category of trafficking are probably more varied than straightforward ownership for labour associated with the slave trade this reinterpretation involves either an expansion of the concept of slavery to accommodate trafficking offences, or a narrowing of the concept of trafficking. In practice, a bit of both appears to have occurred. On the one hand, trafficking has been re-described as 'modern slavery' with the insertion of the word modern taken to indicate the range of contemporary practices amounting to slavery but not conforming to traditional models of slave-owning and trade. On the other, official and legal descriptions of trafficking have become more focused on the systematic and persistent nature of the coercion and the severity of the varieties of objectification inflicted on victims. The following text from a judgement of the European Court of Human Rights illustrates this trend:

[Like slavery], trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and

²¹ Practice between EU jurisdictions differs but in 2004 it was recommended that this be for no less than 3 months by the EU expert group on human trafficking, see the following link for the full report http://ec.europa.eu/home-affairs/doc_centre/crime/docs/opinion_expert_group_09_06_16_02_en.pdf

²² The Obama TIP (trafficking in person's) Office considers the core of the concept of trafficking to be "the many forms of enslavement, not the activities involved in international transportation." See <http://www.state.gov/j/tip/what/>. Last accessed 18/10/14.

put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements were often circumscribed. It involves the use of violence and threats against victims who live and work under poor conditions' (ECtHR, *Rantsez v. Cyprus and Russia*, para 281).

This contemporary conflation of trafficking and slavery has been criticized on two grounds. The first is that it narrows the scope of anti-trafficking policies in ways that lead to the neglect of less severe but nonetheless serious and persistent forms of coercive exploitation (Chuang, 2013). The second is that it reinforces the perception of trafficking as a problem of individual wrongdoers taking advantage of unlucky victims rather than a problem with structural causes (i.e. determined by economic policies, gender and race relations, market distortions and restrictive migration practices), for which states hold primary responsibility (Anderson et al, 2008; Baker, 2013; Chuang, 2013).

The view put forward in this paper is that these criticisms do not provide decisive reasons to reject the conflation of trafficking with modern slavery. Rather, they highlight two important *risks* associated with such conflation, rather than consequences that are in some way inevitable. There is no reason why an especial focus on severe forms of trafficking should come inevitably at the expense of less severe instances. On the contrary, it may be that the current breadth of the Palermo Protocol's definition makes trafficking too diverse a category to be coherently tackled through a single criminal justice approach or strategy. This itself may be a barrier to uptake by governments and law enforcement agencies of effective anti-trafficking programmes. Similarly, there is no obvious reason why slavery should be seen as purely a matter of natural individual evil preying on natural individual weakness or why the structural causes of slavery cannot be recognized alongside these flaws in individual moral character. More generally, we should note that the reframing of trafficking as *modern* slavery itself suggests that trafficking in persons is intended to be understood as different in significant ways from traditional practices of slave trading and ownership. These differences are highlighted in policy and other documents on the topic, which underline practices like forced labour and sexual exploitation as modern variations on ancient forms of coercive exploitation. Finally, to the extent that the risks that arise in relation to the conflation of slavery and trafficking are significant, they can and should be managed. By themselves, they do not provide a reason to abandon the framework of modern slavery as a conceptual apparatus for understanding the wrongs of trafficking.

There are, however, other risks associated with the framing of trafficking as slavery that are not routinely highlighted in the literature. Like victims of other kinds of gross violations of human rights, victims of slavery have a right to be *rescued*. Their autonomy, in the sense of their capacity to act freely in accordance with their interests, has been so thoroughly obliterated that they cannot be expected to report their criminals let alone take other measures to liberate themselves from their situation. They also have the right to be reinstated in their enjoyment of the full range of human rights. This means, as noted above, being protected, to some

minimum standard, from further enslavement.

Rights to rescue and restitution and the corresponding duties they give rise to are interrelated in the following important way. If states do not²³ provide the opportunities and means needed to reduce vulnerability to trafficking to that minimum standard, then those attempting to rescue victims of trafficking may meet with resistance to such rescue from the victims themselves. For it may be worse, from the perspective of victims of trafficking, to be rescued and then sent back to the place from which one was trafficked than it is for one to continue a life of abuse. No statistics supporting this view are available but anecdotal evidence of people refusing to be rescued, or going back to traffickers, or committing suicide once rescued, abounds (Brennan, 2013 cited in Chuang, 2013: 9; Pickering, 2013: 15). This is a serious challenge for states. It suggests that measures to guarantee the rights of victims of trafficking that stop at rescue, which may be easier to achieve for resource-strapped state agencies than rescue, redress, *and* reparation, may be ineffective or self-defeating and may indeed drive trafficking further underground. As will be discussed below, these concerns have implications for the kind of anti-trafficking measures adopted at borders.

Of course, rights to rescue, redress, and restitution cannot be protected if there is a failure to identify victims in the first place. But, as noted above, victims cannot be expected to come forward to report the crimes they have been subjected to. This creates additional moral obligations on states to take proactive measures to identify victims. These obligations are widely recognized in the anti-trafficking legal and policy literature. For example, the Commentary to the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking explains the human rights implications of non-identification for trafficked persons:

‘If a trafficked person is not identified at all, or is incorrectly identified as criminal or as an irregular or smuggled migrant, then this will directly affect the ability of that person to access the rights to which she or he is entitled.’²⁴

As noted above, these rights may include shelter, access to health care and counselling, legal assistance, visas to remain in the destination country, access to reintegration programmes and compensation for their victimisation.²⁵ But we may add to this list two more rights. The first is the right not to be deported to a place where their human rights will be systematically abused. This right may be engaged if victims of trafficking are misidentified as illegal migrants. The second is the right to be presumed innocent. This right may be infringed or violated if victims of trafficking are wrongly identified as criminals and punished as such.²⁶ Figure 1 below illustrates

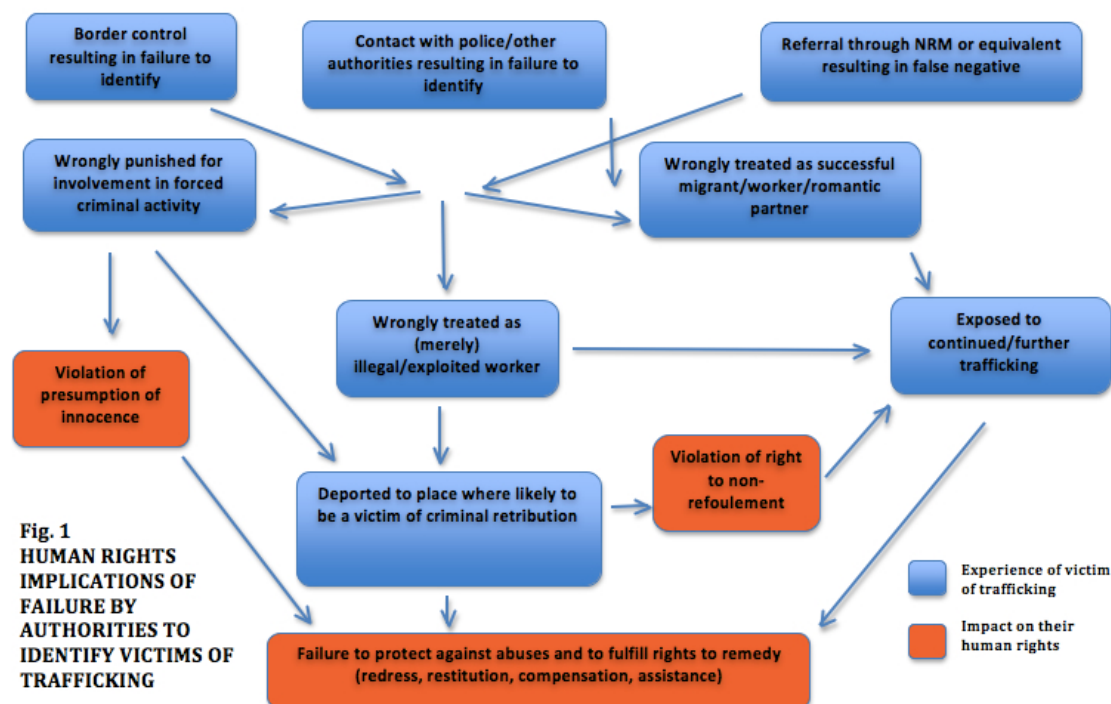
²³ It is not important to specify here whether this is due to inability or insufficient will.

²⁴ United Nations, Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking, November 2010, HR/PUB/10/2, p. 73.

²⁵ UN Office for the High Commissioner of Human Rights, op. cit., pp. 10–14.

²⁶ Examples include the case of victims of trafficking being criminalized for growing cannabis in farms they were forced to work in, Migrant Rights Centre Ireland (2014) in list of

the potential impact of misidentification on the human rights of victims of trafficking.



Before turning to a consideration of methods employed to identify victims of trafficking and thus protect and guarantee the rights identified above, it is important to acknowledge criminal justice understandings of trafficking and to highlight the differences between them and the human rights approaches described above. As well as having the legal status of a human rights violation, trafficking is classified a serious crime. Providing an account of trafficking as a serious crime is necessary if people are to be expected to accept the use of intrusive state measures to tackle it, especially when these measures intrude on the privacy or other interests of victims of trafficking. Given that some such measures have in some jurisdictions been targeted at potential victims of trafficking at the border (as will be discussed in more detail below) it is important to clarify the basis on which they are usually justified.

4.3 Trafficking in persons as a serious crime

Serious crime always involves a serious moral wrong. Serious crimes are also usually victimizing. In the UK, the seriousness of crime also tracks: the number of victims, the vulnerability of the victims, the culpability, number, and organization of perpetrators, and- less obviously- the financial rewards.

While the coercive element of trafficking is a necessary condition of its status as a human rights violation, both and either the coercion and the exploitation involved in trafficking can alone justify its legal and political status as a serious crime. As noted

references below. See also a UK legal case brought by a Moldovan woman against the UK <http://www.theguardian.com/uk/2011/apr/11/sex-trafficking-home-office-damages?INTCMP=SRCH>

above, exploitation alone is not always nor indeed typically considered a violation of basic human rights, partly because it often makes both parties to a transaction better off overall than they were before, even if they are worse off than they would have been had a fair price been paid.

Serious crime, in contrast, can include crimes for which there is no coercion, but the financial gain to the perpetrator and/or loss to the victim is significant.²⁷ Significance here can be understood in relative terms, so the loss to the victim can become significant if it involves the loss of a substantial proportion of their income relative to what they would have earned had they been justly remunerated. In the case of trafficking, both the financial gain to the perpetrator and the loss to the victim are typically significant. The seriousness of trafficking thus increases according to both the extent to which it uses coercive means *and* the extent to which it is exploitative.

The seriousness of crime also tracks the vulnerability of victims. So trafficking in humans becomes more serious, incurring greater sentences and justifying more intrusive preventive measures, the more vulnerable the victims are. This is recognized in the EU Directive on Trafficking and in US approaches to prosecuting trafficking. It also reflects the moral position that taking advantage of people's vulnerability to coercive exploitation is a serious moral wrong. As will become clear in the following section, current efforts to identify victims of trafficking include efforts to determine the extent of people's vulnerability.

5. Anti-trafficking Practice: Identifying Victims

This section examines one method for identifying victims of trafficking that has in some form or another become standard practice for many countries and institutions responsible for victim identification: the International Labour Organisation's use of indicators of trafficking.

Operationalising the Palermo Protocol's definition of trafficking for victim identification: the ILO method

In 2009 the International Labour Organisation (ILO), in collaboration with the European Commission, published a list of what they termed 'operational indicators of trafficking in human beings'. This document aims to provide an operational definition of trafficking.²⁸ It does this by translating the kinds of coercion and exploitation, which are described in the abstract in the Palermo Protocol, into a

²⁷ See the description of serious crime given in Guelke, SURVEILLE, D2.2 'Paper with Input from End-Users', 2013. At <http://www.surveille.eu/PDFs/D2.2.Paper%20with%20Input%20from%20End%20Users.pdf>

²⁸ 'Operational Indicators of Trafficking in Human Beings'.

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf. Last accessed 21/10/14.

detailed list of actual practices. In other words, it provides a definitive list of practices that constitute coercion and exploitation in the context of human trafficking. This list is designed for the purpose of identifying cases and victims of instances of trafficking in practice. Evidence of the presence of the indicators it identifies would be admissible in a trafficking prosecution.

Six categories of indicators are identified in the ILO document: indicators of deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitation, coercion at destination, abuse of vulnerability at destination. The emphasis given to vulnerability of victims may assist in distinguishing the severity of the case of trafficking, especially if evidence for it collected during identification is submitted as evidence in a prosecution. These categories remain the same across four kinds of trafficking addressed by the ILO: trafficking of adults/children for labour exploitation and trafficking of adults/children for sexual exploitation. But the content of the categories changes according to the nature of the exploitation.

The ILO divides the individual practices listed within these categories into 'strong', 'medium' or 'weak' indicators of trafficking and also provides a formula for deciding whether any particular combination of specific indicators is sufficient for trafficking, or whether it is a related but distinct kind of coercion or exploitation. This method supports the attribution of one of four statuses to individuals assessed by state agencies: successful migrants/workers (no deception, no exploitation, no coercion); exploited migrants/workers (exploitation without deception or coercion); victims of deception and exploitation (without coercion); and victims of trafficking (deception, exploitation, and coercion). This latter aspect of the system of indicators is important as it provides a method for distinguishing victims of trafficking from victims of other kinds of related wrongdoing. This means it can provide a starting point for identifying and potentially addressing these kinds of wrongdoing as well as trafficking, thus going some way to meet the concerns of Cheung and others, reported above, that an excessive focus on the most severe kinds of coercion and exploitation will lead to neglect of less severe cases. It can also provide a basis for distinguishing victims of wrongdoing from non-victims.

To illustrate, one of the sets of indicators is reproduced below:

INDICATORS OF COERCIVE RECRUITMENT

Strong Indicator

Violence on victims

Medium Indicators

Abduction, forced marriage, forced adoption or selling of victim

Confiscation of documents

Debt bondage

Isolation, confinement, or surveillance

Threat of denunciation to authorities

Threats of violence against victim

Threats to inform family, community, or public

Violence on family (threats or effective)

Withholding of money (ILO, 2009: 4)

Before considering how this method is applied in practice and how it informs efforts to identify victims of trafficking at the border, it is worth noting two points that require some explanation. First, the ILO elevates deception to a defining aspect of trafficking much like coercion and exploitation. Thus trafficking is defined by the ILO as a combination of exploitation, coercion *and* deception. While deception might be a common feature of trafficking, it is unclear why it is taken as the ILO as necessary for trafficking. The ILO document offers no explanation in support of this departure from the Protocol's definition.

One way of trying to understand why deception might be considered necessary for trafficking is to think about what the inclusion of deception adds, or what might be missing without it. One possibility might be that the presence of deception would explain in part people's willingness to hand over some initial control to their traffickers. If people are not necessarily deceived about the conditions in which they will be living then the possibility remains open that they have entered voluntarily into what they know is going to be a coercive and exploitative situation in which they lose control over their lives and their human rights are routinely abused. Acknowledging this possibility is problematic, because it gives a role to consent or voluntariness in trafficking and therefore throws into question the propriety of rescue as a response. If there exists people who do not want to be rescued (perhaps because the alternatives to their trafficked situation are even less desirable) then reasons will have to be put forward for rescuing them against their will. This complicates the notion of rescue and potentially undermines the moral case for it.

Forced rescue from slavery-like conditions into which people have voluntarily contracted could be justified on grounds other than the duty to rescue. These grounds could be a) paternalistic (e.g. for the good of the victim as this is defined by the rescuer) b) based in the need to prevent harm to those non-voluntary victims of trafficking who will inevitably proliferate as long as the system as a whole is permitted to continue, or c) based in a concern that freedoms (e.g. the freedom to contract oneself into slavery) are not justified if they make the worst-off worse off than they would have been otherwise. The availability of the option in a free market with widespread poverty and an oversupply of labour would lead to a race to the bottom in which individual labourers continually undercut each other until slave labour becomes expected (Hardin, 1990:95). But if trafficking is understood as necessarily deceptive then the possibility of voluntary entrance into trafficking, and all the thorny issues this raises, is excluded. Whatever the rationale for making deception a necessary condition of trafficking, it remains problematic because deception seems to add little to either the nature or severity of the victimization suffered by those who find themselves trafficked.

Further questions with the ILO approach arise in relation to its methodology. First, the reasons for which individual indicators are designated as strong, medium and weak are not given. This is problematic because in a number of cases the reasons for the designations are not obvious. For example, it is unclear whether the fact that, in

the category reproduced above, violence is the only strong indicator of coercive recruitment, and why, for example, forced marriage, abduction, or threats of violence are only medium indicators. It is similarly unclear whether the designation as strong, medium or weak has to do with the prevalence of that coercive practice or the degree to which it is coercive. Finally, the methodology used to determine the formula for which combinations should amount to trafficking is not transparent. Without access to the reasoning behind these features of the indicators it is difficult to assess them critically.

It is significant that the ILO method is based on EU Anti-Trafficking Sub Group's intention to "develop harmonized definitions and associated indicators that will facilitate greater comparability of data across EU member states on the crime area under consideration". A potential conflict arises between the aim of facilitating comparability of data and providing a sound and reliable basis on which victim status can be established. This may occur when, as a recent survey of empirical work on trafficking (Weitzer 2014) points out, local data is much more informative about the trends in and practices currently constituting trafficking than international data, because of significant regional and even metropolitan variations. Indicators are more likely to correspond to actual trafficking practices if they are tailored to the local data, but tailoring them to the local data may limit the extent to which they are appropriate bases for international comparisons.

The ILO's indicator-based approach can be directly applied via interviews with people who have already been identified as potential victims of trafficking and examination of evidence. Yet such processes are too intrusive, time-consuming, and resource-intensive to apply as an initial means of sorting potential victims from other kinds of workers or travellers. This is especially true at borders in the EU, where the numbers of individuals who must be checked are often very high and where the need to maintain a fast flow of passengers is essential. As a result, border forces around the world have developed their own, first-step approaches for sorting and identifying victims of trafficking. It is to a consideration of these approaches that this paper now turns.

6. The role of border guards in identifying victims of trafficking.

Now that we have examined what trafficking is, who its victims are, and what specific rights and duties are created by that status, we can turn to an examination of how victims are identified at borders. Border control presents an opportunity to detect and prevent crime and threats to airport security by identifying and intercepting illicit goods, criminals, and victims of cross-border crime.²⁹ One of the main difficulties encountered in the investigation and prosecution of trafficking in human beings is the initial identification of cases and victims.³⁰ Because victims of

²⁹ See US airports' 'behavior detection program', in use since 2003 <http://www.airport-int.com/news/airport-security-agents-to-undergo-further-training.html>

³⁰ See EUROJUST as in footnote 14 above

trafficking are often brought to a country from another country and ‘disappear into exploitation’³¹ once they have entered, borders are often highlighted as a site of a vital opportunity to identify victims. As the Executive Director of Frontex declares in his foreword to the agency’s anti-trafficking training manual: “A human being can be trafficked inside a country or across borders. In turn, border control — with its systematic checks — has a unique role and ability to intervene, prevent and combat trafficking in human beings.” (Frontex, 2012:7) Border forces in the EU, the USA and Australia have legal duties to receive training and apply techniques to identify victims of trafficking. Training programmes, protocols and monitoring of results are routinely produced both by border forces and by international organisations to help border guards in this task.³²

Despite these duties and these actions, the empirical evidence available in this area suggests that identification of victims at borders is shockingly poor. For example, according to the latest statistics from the UK’s national crime agency on the results of the national referral mechanism, in the first quarter of 2014 only 5 referrals (less than 1% of total referrals) came through the UK border force. Significantly, all of those were children (who are significantly easier to identify as being trafficked than adults) and all were identified by multi-agency specialist units, rather than the actions of guards undertaking routine border control.³³ In the previous 3-month period this number was even lower- at 0. In 2011 when the UN Special Rapporteur on Trafficking in Persons delivered a country report on Australia, no victims of trafficking had been identified at airports.³⁴ These figures appear to support Pickering’s assertion that “[b]order crossing lies at the heart of the definition of trafficking, and yet is often largely irrelevant because trafficking is rarely identifiable at the border” (Pickering, 2013a: 16).

This final section of the paper examines the challenges to successful identification of victims and the border. It considers how well they are met by current approaches and also how well they could realistically be met by alternatives, given the challenges identified. This has implications for our understanding of what we can reasonably expect of border guards in relation to their obligations to identify victims

³¹ The Centre for Social Justice, 2013, ‘It Happens Here: Equipping the United Kingdom to Fight Modern Slavery’ Section 4.3.3.
[http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Slavery_Full_Report_WEB\(5\).pdf](http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Slavery_Full_Report_WEB(5).pdf)

³² See, for example, summary of country research reports ‘Identification and Protection of Victims of Trafficking: training of border police and customs officials in identifying and providing assistance to victims of trafficking’ International Organisation for Migration (2005). At
http://www.vlada.si/fileadmin/dokumenti/si/projekti/IOM_izobrazevanje_policistov_carinik_ov.pdf/ Last accessed 21/10/14.

³³ See UK National Referral Mechanism Statistics.
<http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/311-national-referral-mechanism-statistics-january-to-march-2014/file>

³⁴ See UNHCHR Report of the Special Rapporteur on Trafficking in Persons, Country Report on Australia, 2011, para.40. At
<http://www.ohchr.org/en/Issues/Trafficking/Pages/annual.aspx>. Last accessed 21/10/14

of trafficking. It also considers the ethical risks arising from approaches to the identification of victims of trafficking at borders. It draws on criminological work in this area, on training manuals and guidance for border guards, on reports on the effectiveness of anti-trafficking measures and on ethical scholarship on the risks associated with surveillance techniques such as profiling, lie-detection and other methods of airport security. The aim is to test the issues identified here in a series of interactions with border guards in the UK and with Frontex in which border guards will discuss their experiences of identifying victims of trafficking.

6.1 Challenges to the identification of victims of trafficking at the border

The successful identification of victims of trafficking faces a set of challenges that apply whatever the context. As Cheung notes

“... victim identification typically requires victims to come forward and report the abuse, while successful prosecutions require victims to actively cooperate in the criminal proceedings. But there are strong disincentives against victims doing either, given the attendant risks of deportation, prosecution for crimes committed during the course of the trafficking, retaliation by the traffickers, and retraumatization by the judicial process”. (Cheung 2013: 175)

In addition, the border as a site of victim identification faces a distinct set of challenges that arise from conflicts between the duty to try and identify victims of trafficking and different and other purposes of border control. These are listed below:

The need to ensure a fast flow of travellers through borders

Some potential conflicts arise between the obligation to try to identify victims of trafficking and the need to ensure speedy cross-border mobility. This occurs when the time and resources required to identify victims of trafficking result in a slowdown of passenger flow. In principle, when these two aims conflict, the former should take priority over the latter. Unlike the duty to protect victims of trafficking, which is a moral and a legal duty, the duty to ensure speedy border crossings is purely professional. Fast movement across borders is sometimes conflated with free movement, thus elevating it to the status of a human rights issue.³⁵ But there is no

³⁵ See, for example, the GLOBE FP7 Security project on developing a comprehensive border strategy: “European land and sea borders are becoming a challenge to monitor as the global economic crisis renders Europe much more attractive to migrants. At the same time, Europe takes pride in free movement and privacy, which often contradict security requirements. ...The EU wants to outline an integrated border management strategy capable of allowing smooth entry into its territory while guaranteeing its security; it wants to balance the challenge of illegal immigration *with protection of fundamental rights*[my italics]. Such a new strategy must consider the increasing flows of travellers while ensuring mutual cooperation among European countries.” http://cordis.europa.eu/result/brief/rcn/6497_en.html

human right to fast movement across borders. And it is doubtful whether the economic and personal interests protected by fast movement outweigh the interests people have in being protected from trafficking.

The extent to which the duty to prevent trafficking actually conflicts with the need to ensure fast passenger flow in practice depends on the methods used and the provision of resources. The conflict will be worse the more resources are diverted from normal border control to anti-trafficking, and the more anti-trafficking initiatives involve the scrutiny of travellers passing through the border. From the survey of guidance and training documents conducted as background to this paper, the extent to which border guards are expected to integrate attempts to identify victims into routine border checks is unclear. It is also unclear whether it is normal practice for border guards in EU jurisdictions to have ultimate responsibility for the designation of 'victim' status on individuals. The lists of 'indicators' typically included in training for front-line guards are very lengthy and varied. And, as we saw with the description of the ILO method above, designating final victim status is a potentially lengthy procedure. Given this, it is inevitable that pressures to speed up border flows will translate into pressures to notice less about travellers, ask fewer questions and accept more responses given.

This conflict could be addressed by extra government expenditure on specialist units to surveil travellers and identify victims of trafficking by pulling people out of line, monitoring travel patterns and acting on information gained through intelligence and country trends.³⁶ Methods of targeting resources only at those individuals who appear to be high-risk, such as profiling, could also reduce the impact on queues, especially when compared to random or blanket screening methods. Though, as will be discussed shortly, profiling raises a distinct set of ethical issues that are much addressed in the literature on the ethical and legal risks of surveillance.³⁷

The prevention of illegal migration

Border checks are simultaneously opportunities to identify and protect victims of serious crime and opportunities to prevent illegal migration. Border guards are required to use surveillance to do both. The regimes for dealing with irregular migrants and those for dealing with victims of trafficking are different. Illegal migrants can claim none of the rights to rescue or restitution owed to victims of trafficking. They are usually held in detention centres and deported. Victims of trafficking are often (though not necessarily) also illegal migrants. Ethical reasons

³⁶ As is current practice in the UK (see for example, the recent report of anti-trafficking operations at London's Gatwick Airport, <http://www.wscountytimes.co.uk/news/crime/anti-trafficking-operation-held-at-gatwick-airport-1-6368104>) and the Netherlands, in the form of special Filter (Sluicesteam) units at Amsterdam Schiphol airport (see Council of Europe, Group of Experts on Action Against Trafficking in Human Beings, 'Report on the Netherlands', 18 June 2014, paragraph 123). At http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2014_10_FGR_NLD_w_cmnts_en.pdf. Last accessed 18.10.14

³⁷ See SURVEILLE deliverable D4.2, DETECTOR Deliverable, See also

related to the prevention of harm and the protection of the vulnerable suggest that it is one's status as a victim of trafficking rather than one's status as an illegal migrant that should determine one's treatment at the hand of immigration and other authorities.

A problem arises because it is easier to identify illegal migrants than victims of trafficking and many victims of trafficking are also illegal migrants. Border guards may also be better at identifying illegal migrants than victims of trafficking, given the sensitive questioning normally required to establish the latter kind of status. This raises questions about whether border guards should be given the authority to make this final designation or whether such decisions should be delegated to other more specialist agents. At the time of writing, the responsibilities and authority of border guards in this respect varies between jurisdictions. In the UK, it is limited to making official referrals of individuals deemed to be victims of trafficking to specialist agents for assessment through what is known as the National Referral Mechanism. In the light of the specific pressures characterizing border control and the need for objective and accountable decision-making in this respect, both of which are discussed in more detail below, such a division of labour seems sensible.³⁸

It has been argued that efforts to strengthen borders against illegal migration increase vulnerability to trafficking as people must resort to criminal channels to travel abroad for work. It has also been argued that such efforts have led border guards to prioritize the identification and deportation of illegal migrants over the identification of victims of trafficking, leading to misidentifications of the latter as the former (Anti-Slavery International, 2013).³⁹

This latter argument seems to be most plausible in relation to cases in which victims of trafficking have been coerced into illegal travel. In these cases, people have been subject to violations of their human rights, which can at least in principle be detected at the border. There is some evidence that in some cases these are the only kinds of victims border guards are being trained to detect. For example, in Pickering's research from Australia, border guards appeared to be looking for individuals who had been coerced or deceived into travel, and thus already 'officially' victims, rather than individuals who may be at risk of trafficking.⁴⁰ This leads them to look for individuals who are 'passive and unknowing' (Pickering, 2013: 62).

³⁸ UN Special Rapporteur noted that interviews at which social workers or psychologists are not present may be less effective at identifying victims given the understandable fear of deportation, detention, or eventual reprisals. (Report para.44)

³⁹ UNODC An unintended consequence of efforts directed principally at illegal migration can be the misidentification and inadvertent re-victimization of trafficked persons.(p.9) See 4.3.3 For a discussion of this issue in the media see 'Is she a victim or an illegal immigrant? UK border agency decides' 18/03/13. <http://www.opendemocracy.net/ourkingdom/david-rhys-jones/is-she-victim-or-illegal-immigrant-uk-border-agency-decides>

⁴⁰ Pickering, 2013: 62

But it is less plausible if the indicators of exploitation and coercion are not yet present. This is likely to be the case in the majority of instances.⁴¹ It is even more problematic if individuals are willing illegal migrants, perhaps having consented to be smuggled, as evidence suggests many are at the moment of travel.⁴² In such cases, people may typically not have yet been subject to victimization, and may not even be aware of their impending victimization. In which case the question arises whether it is possible to distinguish these individuals from illegal migrants and, more fundamentally, whether border guards even have a duty to attempt to distinguish such individuals, given that such individuals would not meet the criteria for victimhood set out in the operational definition of trafficking provided by the ILO and thus could legitimately claim none of the rights to redress, restitution, or reparation.

Nevertheless, there is still a duty of care to those individuals to try to intervene to prevent trafficking before it occurs. One approach to addressing this problem could be to recognise this third category of travellers, namely those identified as being at risk or serious risk of trafficking. While it is likely to remain very difficult to identify such individuals, there may be ways of doing it, and of tailoring the response to this at-risk status. For example, people at a very high risk may be detected via association with known traffickers. These individuals may not qualify for the full range of rights available to victims of trafficking, but they in which case they would have claims to some protection from being trafficked or indeed re-trafficked if their handlers are prosecuted. Other at-risk individuals may also be detected, with lesser accuracy, via the use of profiles based on intelligence about the locations and methods of known criminal gangs or regional trends in criminality. These may qualify for other kinds of intervention, like warnings and information about how to get help if they do become victimized. As noted by the UNODC, the preventive effects of such ‘information campaign’ measures may be limited, given that they do not create new alternatives for individuals that would address their conditions of vulnerability.⁴³ Nevertheless,

⁴¹ As the UK’s Crown Prosecution Service put it in its guidance for identifying victims of trafficking for criminal justice purposes: ‘in some cases the distinction between a smuggled and trafficked person will be blurred and both definitions could easily be applied. It is important to examine the end situation when the victim is recovered to determine whether someone has been smuggled or trafficked.’ The option of examining the end situation is not open to border guards. CPS ‘Legal Guidance: Human Trafficking and Smuggling’ at http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/. Last Accessed 21.10.14

⁴² ‘Most victims of forced labour fall into a trap while seeking decent employment abroad.’ (ILO, 2005, 5)

⁴³ ‘However, such programmes fall short because they fail to provide potential victims with an alternative course of action. If the emphasis of prevention programmes is placed exclusively on increasing the awareness of potential victims, prevention is limited. By failing to provide alternatives, such interventions place the onus for prevention of exploitation on the individual him- or herself. Potential victims remain equally vulnerable before and after viewing posters, films and television advertisements.’ UNODC Background Paper ‘An Introduction to Human Trafficking: Vulnerability, Impact and Action’, 2008. See also USA Government Accountability Office (GAO) report ‘Human Trafficking: monitoring and

they are still important and must have a place in a broader arsenal of anti-trafficking measures. Another, potentially more controversial response to the identification of at-risk individuals might be a kind of preventive surveillance via the maintenance of databases of people. There are signs in the UK, for example, that databases are being constructed to house the details of individuals encountered at borders who are deemed to be 'at risk' of trafficking. It is unclear as yet who has access to this information and what contexts it might be used in in the future.⁴⁴

Despite these challenges, guidance documents for border guards typically indicate that the focus of anti-trafficking at the border is still the identification of those who would qualify as victims of trafficking according to the ILO indicators. These efforts at identification are mainly based on the profiling of travellers at borders- though, as we will see, the terminology of profiling is not always embraced by those who coordinate such efforts. The discussion now turns to a consideration of the use of profiling at the border for the identification of victims of trafficking.

6.2 Profiling for anti-trafficking at the border

Profiling refers to a method of sorting people for differential treatment. It involves the use of statistical evidence, intelligence, and/or generalizations about the correlation between certain traits and other behaviours or tendencies as a basis for targeting attention and resources. It is used by doctors to target medical intervention to those most likely to need it, by insurance agencies to judge an individual's likelihood to claim and thus the premiums they should pay, and by border guards to select individuals whose free entry might be undesirable or illegal, for further checks. Surveillance techniques are used to gather the intelligence or evidence needed to support the profile. For example, information about people's health, age, ethnicity, family background, and lifestyle is collected and correlated by medical professionals in order to see who, for example, is at risk of diabetes. In the context of border control, people's gender, age, travel patterns and histories, the features of their travel documents, and their behaviour on arrival at borders are used to determine whether they should be treated as a legitimate traveller, a potential criminal, or an illegal migrant. Profiling as a means of increasing security and fighting crime at the border is often proposed as a more efficient alternative to random or blanket forms of screening (i.e. screening everyone). It can enable fast flow while avoiding subjecting large numbers of innocent individuals to inconvenience or interferences with privacy. And the availability of reliable

evaluation of international projects'. 2007. At <http://www.gao.gov/products/GAO-07-1034>. Last accessed 18/10/14.

⁴⁴ See, for example, the recent declaration by Detective Inspector Jacqui Jenkins, from Sussex Police's public protection team, in relation to a preventive action taken place at London's Gatwick Airport "anybody who was spoken to and thought to be at risk to this kind of offence had their details recorded'. See 'Anti-trafficking Operation held at Gatwick Airport' *West Sussex County Times*, 21/10/14. At <http://www.wscountytimes.co.uk/news/crime/anti-trafficking-operation-held-at-gatwick-airport-1-6368104>. Last accessed 21/10/14.

intelligence about some cross-border crimes means that in many cases profiling promises in principle to be more effective than random screening. As a result, the use of sophisticated profiling techniques to enhance airport security and fight cross-border crime is currently encouraged in the EU through, for example, EC funding of security research.⁴⁵ Profiling techniques for use at the border are often developed with the express intent of detecting criminals and especially terrorists. The detection or identification of victims of trafficking is not as yet a driving force behind this kind of innovation.

Many recent official approaches to identifying victims of trafficking at the border define themselves in terms of the use of indicators, rather than profiling.⁴⁶ This is confusing, because it suggests that they employ something along the lines of the ILO method. In fact it is much closer to profiling as defined here. As noted above, the ILO approach identifies acts and experiences that constitute coercion and exploitation. In contrast, the use of 'indicators of trafficking' for police and border guards is a list of characteristics or traits displayed by individuals that could indicate coercion or exploitation at the hands of traffickers. These indicators are better described as proxies for victimhood, rather than, as in the ILO indicators, elements constitutive of trafficking. They include physical signs, body language, behavioural traits, travel patterns, ethnicity and gender, credibility, possessions, amongst other things.⁴⁷ All of

⁴⁵ See HORIZON 2020 Security Call BES-14-2012
<http://ec.europa.eu/research/participants/portal/desktop/en/opportunities/h2020/topics/1096-bes-14-2014.html>

⁴⁶ Including Frontex, The UK Border Force, US homeland security.

⁴⁷ See, for example, the list of primary indicators set out in a document provided to the author by a UK Metropolitan Police officer and anti-trafficking consultant entitled 'Identifying Victims of Trafficking, A compilation of Global Guidelines'.

1. Injuries from weapons, such as knives, guns, clubs; visible injuries or scars, such as cuts, bruises, burns or rope burns; head, face, and mouth injuries from being struck in the head and the face
2. Brands or scarring indicating ownership
3. Evidence of other physical abuse
4. Visible emotional distress
5. Not in possession of identity or travel documents
6. Fearful of police or officials, unusual distrust of law enforcement
7. Does not know how identity or travel documents were obtained or was escorted through the process
8. Someone else obtained all official documents
9. Someone else made all travel arrangements
10. Had to pay a fee to someone to arrange travel and transportation
11. Was smuggled across borders
12. Heightened sense of general fear (for self and family)
13. Does not appear to have money but does have a mobile phone
14. Is withdrawn and refuses to talk
15. Is excessively afraid of being deported
16. Has had their journey or visa arranged by someone other than themselves or their family
17. Does not have possession of their own travel documents
18. Has false papers, and these have been provided by another person

these things can be and are ascertained via surveillance techniques such as smart CCTV, the use of databases, monitoring by technologies or specially trained agents. Despite falling squarely within the definition of profiling, the use of such indicators is contrasted in some guidance documents with profiling. This might be down in part to a conflation of profiling with broad profiles containing a handful of ethnic, gender, and age traits, and to a desire to distance what border guards do in this respect from approaches used to identify criminals at borders. But it may also be explained by a desire to recognize the diversity of victims of trafficking and to avoid simplistic descriptions, which could not capture all possible risk profiles. For example, the FRONTEX training manual points out that victims of trafficking have few easily observable traits and characteristics in common, as the forms of exploitation they might be subjected to are many and varied and it suggests that this makes profiling unsuitable as an approach to identifying them.⁴⁸

Ultimately, it is not vitally important whether the approach used is described as profiling or as the use of indicators. The ethical issues arise in the same way as they do for other kinds of profiling.

Profiling: the ethical issues

The use of profiling raises many ethical issues, including privacy intrusions, stigmatization, and discrimination (Hadjimatheou, 2013). An additional set of issues arises from its use of generalisations, which inevitably results in the creation of false positives (people wrongly identified as victims) and negatives (victims whom the profile fails to identify). Though less efficient, blanket or random forms of screening might avoid some of the ethical risks of profiling, in particular those arising from the targeting of individuals, i.e. discrimination, stigmatization and prejudice. All of these issues arise in connection with the use of profiling for the identification at the border of victims or people at risk of being victims of trafficking. We have already seen how misidentification of victims of trafficking can have serious consequences for individuals' enjoyment of human rights.

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19. Fits current profile for those at risk of exploitation
 20. Has entered the country illegally
 21. Anxious/distressed- want to know where they are, use the phone etc.
 22. May have been drugged or held captive prior to the flight
 23. Females may wear wigs and often wear 'old style' clothes but may have modern, westernised, skimpy clothes in their luggage, often with British labels
 24. Females are submissive and cowed, uncommunicative and tense and often fail to make eye contact
 25. On arrival a solicitor or legal representative has been informed by a third party of their arrival and attempts to make contact with Immigration or Social Services
 26. Does not know or understand the terms of the employment contract they signed. Contract was in a language they could not read. Terms of contract are illegal under general business practices.

⁴⁸ The manual was provided to the author by FRONTEX anti-trafficking team on the understanding that it would not be quoted directly.

Profiles are blunt tools that indicate risk. Thus they are only suitable as first-stage sorters.⁴⁹ For this reason, this paper suggests that the fact that an individual fits a profile should only be grounds for designating them as a *potential* victim or *at risk of* victimization. Thus it could be grounds for further, more intrusive investigation or for second-line questioning.

6.3 Ethical risks associated with profiling credibility and with intrusions into privacy

Assessing credibility is one of the ways in which border guards detect criminals, illegal migrants, victims of smuggling and victims of trafficking. In this respect victims or potential victims of trafficking may be indistinguishable from victims of smuggling or illegal migrants. They may be lying to cover up their intention to work rather than have a holiday, or because they are travelling on a false passport, or because they are repeating a script given to them by their smugglers or traffickers.

Some efforts have been made to utilize the results of psychological research to develop indicators of suspiciousness, including deception, which can be measured by automated technological systems. For example, lie-detector technologies being developed specifically for use at borders.⁵⁰ These promise to speed up the process of border security checks and reduce both discrimination and intrusiveness (e.g. by ignoring gender/ethnic traits and involving no body or bag searches).⁵¹ But it remains to be seen whether their claims to be able to detect the criminal intentions behind certain emotional and physiological responses to questions and other stimuli are accurate: there is currently no objective evidence of their effectiveness.⁵² And it is not clear at this stage what a positive indication of deception would justify in terms of further action by border guards other than further questioning. The less accurate the tests are, and the more they are relied upon as a basis for further potentially more intrusive or interfering action, the more problematic they are morally speaking. Erroneous decisions will be made, leading to people being treated as suspicious/vulnerable when they are not or not recognized as such when they are.

⁴⁹ The European Migration Network in a recent report suggests that in some jurisdictions profiling is indeed used as a first-stage sorting tool, and is followed by more in-depth interviewing procedures (EMN 2013).

⁵⁰ See, for example, the description of the project 'Building a Passive Lie-Detector for UK Border Control' <http://www.visual-computing.brad.ac.uk/case-studies/building-passive-lie-detector-uk-border-control>

⁵¹ See, for example, WeCU technologies, an apparently predictive technology whose entrance into the market five years ago was widely reported. The technology is described in this article from the UK's Daily Mail in 2010. <http://www.dailymail.co.uk/home/moslive/article-1336571/Terrorism-Can-really-stop-bomber-asking-Are-terrorist.html>

⁵² RAND Corporation (Paul K. Davis, Walter L. Perry, Ryan Andrew Brown, Douglas Yeung, Parisa Roshan, Phoenix Voorhies) *Using Behavioral Indicators to Detect Potentially Violent Acts* (2013) http://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9724/RAND_RB9724.pdf

Other methods used to detect credibility are more immediately privacy-intrusive. For example, the results of recent work with border guards in Australia reports that text messages and online activity (e.g. social media presence) are monitored by border guards to check consistency and credibility and gather clues of intent to work illegally (Pickering, 2013). Confiscating a mobile phone and monitoring voice and SMS messaging can reveal very intimate exchanges. Viewing of an open-source social media account is less intrusive but nonetheless requires justification as it would also reveal personal information irrelevant to the purposes of preventing trafficking. Neither action would be justified in the absence of any ground to suspect trafficking (e.g. in Australia it appears that border guards sometimes access passenger lists and check Facebook profiles for passengers in advance of their arrival in Australia.⁵³ In the EU and in the UK such measures could not be justified on the basis that they can help identify illegal migrants. Reading people's personal messages is only justified in terms of the prevention of serious crime, and illegal migration is not a serious crime under EU jurisdictions.

Trafficking on the other hand, is a serious crime. It might be argued that very privacy intrusive actions by border guards are justified if they are likely to turn up evidence that could prevent victimization of individuals at the hands of traffickers. This is correct in principle, but it is really quite unclear whether such measures would be effective in revealing impending victimization. And additional issues arise from the unusual practice of targeting of the victim for intrusions, rather than the perpetrator. It is possible that a traveller might refuse access to their device, even when it is explained that the purpose of the check is to ensure that they are not about to be subject to serious human rights abuses (this goes beyond merely trying to identify inconsistencies in accounts but includes also trying to identify links with known or suspected traffickers). In such a case, it seems that confiscation of the device in order to access the messages would be unacceptably paternalistic. Because it would entail coercive interference with an individual's liberty in the pursuit of what is 'good' for them when they have explicitly rejected that conception of their own good. It is possible that such intrusion might be justifiable on non-paternalistic grounds, but only if there is sufficient evidence to suggest that the phone data contains information that could be used to prevent the trafficking of *other* individuals. While such a case is not inconceivable, it is unlikely to occur very often. Generally speaking, therefore, forcibly accessing an individual's telephone data for

⁵³ See the following quotes from border guards describing their own practice in Australia "And when we do put them in detention, we have their phone, so we see messages and all that. And we look into that, or we Google their name or Google their—just one of the things we ask is have you been known by any other name, or do you have another name, do you use other names? Basically we use a lot of the internet. We use Facebook. We use other things when we're researching while the inspector is inside, so we do our work outside and basically do that. (AIS8) 'Cause you can surf the net, find the person and see what they say in their blog or what they have advertised themselves in the link in. Sometimes they would advertise that they're working here. [Laughs] Yeah we've got interpreters, teachers, tutors, advertised nannies advertising themselves ... I think it is. So that's evidence basically even before the person arrives. So it's so much more interesting actually now. You can do a lot more researching before the flight actually gets here. (AIS7) (Pickering, 2013a: 13)

surveillance on the basis that they fit the profile of a victim of trafficking should not be routine practice.

Luggage searches are less problematic, given that they are generally an expected surveillance feature of international travel. However, the practice of searching for provocative clothing to reveal an undisclosed intention or enforced plan to work in the sex industry, which is present in both Australia and the UK, should be used with caution. As is evident in both Australian and UK practice in this area,⁵⁴ evidence of intention or plan to work in the sex industry should not by itself be taken as decisive reason to consider someone to be at *no* risk of trafficking, because exploitation and coercion are more present in the sex industry than in other industries, and this may be sufficient reason to warn individuals whom one suspects of planning to work there, or adopt other measures of surveillance. Neither, however, should evidence of a plan to work in the sex industry be taken as evidence of victimhood. In other words, the autonomy characterizing the decision to travel and to work might be evidence that victimization has not yet taken place, but neither should it be taken as evidence that the individual is not at risk of victimization.

6.4 Ethical risks of profiling gender and ethnicity

Two kinds of ethical issues arise with the use of gender or ethnic profiles at borders for the identification of victims of trafficking. The first arises from the possible use of overly broad profiles, which lead to the misidentification of individuals as victims of trafficking. Examples include all women between certain ages travelling alone being preventively turned back at the border or even prevented from travelling on the basis that they are either victims of trafficking or at a high risk of becoming victims. For example, there is evidence that overly broad profiles have been used by some European border forces to treat all unaccompanied, young female migrants from certain source countries presumptively as victims of trafficking for prostitution (on treatment of Brazilian women see, for example, Piscitelli, 2006). This risks offending individuals, treating them in discriminatory ways and interfering illegitimately with their freedom of movement.

The second issue arises when people who fail to fit a profile are misidentified as not being at risk. As the discussion above suggested, victims of trafficking have a right to

⁵⁴ Pickering quotes an interviewee border guard: “[W]e search the phones as part of evidence, and they often have, sort of, similar kinds of contacts both in their own country and in Australia. We have seen sort of like sexy type of messages on them, which leads us to believe that they are in the sex industry, and if that was the case, there would normally be, we would think it was by choice. (AIAS1)” See also the following quotes from border guards She claims that “[w]hile well intentioned, this interpretation misunderstands the nature of trafficking— as trafficking is not determined by the amount of experience a worker has in a sector, but by the existence of exploitative conditions in the workplace or the migration process” (Pickering, 2013:11) See also indicators for UK police and border staff given in footnote 43 above “Females may wear wigs and often wear 'old style' clothes but may have modern, westernised, skimpy clothes in their luggage, often with British labels” (Ibid.)

be rescued. People at risk of trafficking have a right to be protected. If broad ethnic or gender profiles are being used in ways that divert attention away from certain ethnic groups, a situation may come about in which some people in need are being identified and rescued and others ignored because of general assumptions about the kinds of ethnicities trafficked. As a result, people from certain ethnic groups may have a higher chance of being rescued than others. That can be criticized legitimately as unfair.

6.5 Profiling, stereotypes, personal judgements and oversight

A 2003 study of how border guards decide which asylum seekers to detain showed that stereotypes play a significant role in the making of such decisions (Weber, 2003). Pickering's work on the practices of Australian border guards confirms this, indicating that "stereotypes are much relied upon and that this has not changed in spite of the significant developments in counter-trafficking strategies and discourse internationally" (Pickering, 2013b:64). Excessive reliance on stereotypes carries risks of misidentification, which, as discussed above, are ethically significant.

There are at least two reasons why the influence of stereotypes about victims of trafficking might persist in spite of all the awareness raising and training provided in recent years. First, the guidance given is complicated. Lists of indicators of trafficking included in guidelines and training for border guards are typically very long and varied. Sometimes they include conflicting behaviours. For example, flirtatious, overly-familiar, aggressive, secretive, nervous, and fearful behaviour all feature in lists of behavioural indicators of victimhood provided to border guards. While the variety given may lead to lists of indicators that are accurate, and especially more accurate than simplistic profiles including a handful of traits, it may render the list too difficult to apply effectively in practice. In these circumstances, it would be understandable that border guards under pressure would resort to stereotypes. What this means, however, is that any gains in accuracy are outweighed by the losses in effectiveness.

Second, the indicator-based approach to anti-trafficking is low-tech, relying on the skills of human interviewers to elicit responses that reveal the presence of indicators of trafficking, and to follow those indicators up. As a result, the decision-making practices are 'highly subjective', involving a discretionary judgement-call (Pickering, 2013b:53). The extent to which victims of trafficking are successfully identified depends on the willingness to apply the method and the skills of the individual border guard. This means there is likely to be significant variation between the numbers of victims identified by specific staff. This variation could in theory be reduced by the use of one standardized profile which, when matched, would trigger a more in-depth investigation in the 'second line' of border control. Such measures would also be more amenable to monitoring via oversight mechanisms, enabling some accountability and identification of best practice.

7. Tentative recommendations, to be tested through empirical research

From the discussion in this paper we can conclude that there is a need to revise expectations of anti-trafficking at the border in general, and of the particular role played by border guards in particular.

1. The responsibility to make a final decision about whether an individual is a victim of trafficking should not be made by border guards but should go through an independent mechanism which employs social workers and/or psychologists in interviews and is authorized to take evidence, such as the UK's National Referral Mechanism.
2. The role of front line border guards should be first to implement standardized, simple, clear procedures that can be memorized as much as possible and implemented without much independent judgement. These procedures should be a first-step in sorting potential victims and at-risk individuals from other travellers.
3. At least 1 new category of individuals should be added to that of 'victim of trafficking' and should be the target of identification at airports: individuals at risk of becoming victims of trafficking. Gradations of risk should be distinguished within this category. Appropriate protective measures should be triggered in response to each gradation of risk (including dissemination of information about the kind of help available and where to get it; searches and questioning to detect connections with known or suspected traffickers; and potentially surveillance via databases). Border guards should be trained so as to understand clearly what constitutes victimhood of trafficking and the differences between this status and that of individuals at risk of trafficking.
4. It should be made clear in guidance to border guards that all potential victims of trafficking should be treated with the same sensitivity and not only those 'proven' to be victims or meeting official criteria for victimhood.
5. The use of specialist, multi-agency anti-trafficking units at borders should be encouraged as this can help to avoid the difficulties arising from potential conflicts between the need to identify victims and the need to manage flow and to detect and prevent illegal migration and smuggling.
6. Serious intrusions into privacy (e.g. scrutiny of mobile phone data) should not be routine surveillance practice at airports.
7. Surveillance of mobile phone data should only take place where consent is given, unless there is evidence of crime of a sufficient weight (in accordance with jurisdictional police regulations) to justify confiscation. Less serious intrusions into privacy, such as accessing of social media and other online profiles should only take place where there are sufficient grounds for suspicion (again, in accordance with local practice) to believe trafficking is

taking place. Such kinds of intrusions should be recorded and monitored by independent agents for necessity, proportionality and effectiveness.

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