

Managing Migration: Is border control fundamental to anti-trafficking and anti-smuggling interventions?

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Abstract

Over the last several decades, globalisation and a growing concern over security issues, including transnational crime and terrorism, has shaped migration policies and the priorities of states. As migration rose to the top of many government agendas, a rapid tightening and regularisation of borders ensued in an attempt to keep undesirable, high-risk migrants out of potential destination countries. Concomitantly, transnational crimes, such as trafficking in persons and the smuggling of migrants, have been increasingly defined as border security problems. This article examines the extent to which border control is fundamental to anti-trafficking and anti-smuggling interventions, situating the debate within the wider nexus of globalisation and the securitisation of migration. Based upon their work with the United Nations Office on Drugs and Crime (UNODC) Regional Centre for Southeast Asia and the Pacific, the authors take the standpoint that given it is the sovereign right of each state to control its border and regulate migration, the human rights of migrants must be considered within this *realpolitik*. Clearly, though, this claim is highly political and contentious. In the article, we explore some of the tensions and contradictions that have emerged in this debate, and then develop an argument to suggest that it is possible for states to combine managed migration and strict border controls with

the protection of human rights in the current context of globalisation.

Key words: trafficking in persons, migrant smuggling, migration, border controls, criminal justice, human rights

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Introduction

Over the last several decades, two main factors have shaped migration policies and the priorities of states. The first factor is the increased flow of goods, capital, ideas, and information as a result of globalisation. Labour markets subsequently internationalised, and new opportunities opened up in potential destination countries for a growing supply of both skilled and unskilled migrants from less developed source countries. For labour-sending countries, urbanisation, internal rural to urban migration, growing working-age populations, rising education attainment, widening income disparities, and environmental change have become key aspects influencing a person’s decision to migrate.¹ At the same time, for labour-receiving countries, demographic changes, specifically population decline and population aging, coupled with labour and skill shortages, have created employment incentives for migrant workers.² Our future will continue to be characterised by migration, as transportation and communication technologies continue to

¹ I Goldin, G Cameron and M Balarajan, *Exceptional People: How migration shaped our work and will define our future*, Princeton University Press, Princeton, 2011, p. 153; pp. 214–241.

² G Hugo, ‘Demographic Change and Labour Mobility in the Asia-Pacific - Implications for business and regional economic integration: Synthesis’ in G Hugo and S Young, *Labour Mobility in the Asia-Pacific Region: Dynamics, issues, and a new APEC agenda: A survey and analyses of governance challenges on labour migration for APEC economies*, Institute of Southeast Asian Studies, Singapore, 2008, pp. 3–12.

reduce distances and expand social networks between source and destination countries. What is more, all this has occurred against a broader backdrop of tightened immigration policies and border controls in an attempt to manage migration.

The notion of managed migration brings us to the second factor, namely the growing concern over security issues, including transnational crimes and terrorism. Following the September 11, 2001 attacks, policy makers identified migrants as a potential security risk and concluded that migration needed to be effectively managed because national security was at stake.³ Migration rose to the top of many government agendas,⁴ and a rapid tightening and regularisation of borders ensued in an attempt to keep undesirable, high-risk migrants out of potential destination countries.⁵ New surveillance and biometrics technologies for border control, including fingerprinting, iris recognition, and facial scanning burgeoned, making it more difficult to produce counterfeit travel documents. Borders also began to shift, and in some cases, have been pushed offshore as states have introduced preemptive measures, including systems to enable better information exchange, stricter visa requirements, and the inclusion of non-state parties (e.g. airlines) to act as gatekeepers.⁶ Concomitantly, states argued that in the era of globalisation, such measures would prove invaluable to combat transnational crimes, such as trafficking in persons and the smuggling of migrants.⁷ As a result, smuggling

³ The securitisation of migration actually began in the 1990s. In 1991, for example, the European Commission called for the integration of migration issues into its external policies. The events of September 11 heightened the agenda. See, for example, C Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy', *International Affairs*, vol. 79, no. 3, 2003, pp. 619–638.

⁴ F B Adamson, 'Crossing Borders: International migration and national security', *International Security*, vol. 31, no. 1, 2006, pp. 165–179.

⁵ I Goldin, G Cameron, and M Balarajan, *op. cit.* p. 121.

⁶ As Bridget Anderson notes, border control is not just about conditions of entry, but also about conditions of stay. Border enforcement has also shifted 'inland' (e.g. through tightened employer regulations and penalties, increased workplace inspections, removals of overstayers). For a detailed analysis, see: B Anderson, *Us and Them? The dangerous politics of immigration control*, Oxford University Press, Oxford, 2013, p. 88 & pp. 115–136.

⁷ For example, see: A Downer, 'Australia Leads the Way on Passport Biometrics', *Media Release*, 4 June 2003, retrieved 7 January 2013, http://www.foreignminister.gov.au/releases/2003/fa060_03.html.

and trafficking have been increasingly defined as border security problems.

It is within the wider nexus of globalisation and securitisation of migration that this debate on border control and trafficking in persons is situated. Although trafficking falls within the mandate of various international agencies, the topic of border control in anti-trafficking interventions from a United Nations Office on Drugs and Crime (UNODC) perspective generates an interesting debate. On the one hand, UNODC is the only UN entity focussed on the criminal justice element of trafficking in persons and the smuggling of migrants. Consequently, border management is a key programming area. Moreover, as the guardian of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons* (Trafficking Protocol) and the UN *Protocol against the Smuggling of Migrants by Land, Sea and Air* (Smuggling Protocol) supplementing the UN *Convention Against Transnational Organized Crime*, UNODC fully supports states parties in strengthening border controls to prevent and detect trafficking in persons and migrant smuggling as outlined in Article 11 of both Protocols.⁸

On the other hand, UNODC acknowledges that this claim is highly political and contentious. Critics maintain that arguments about sovereignty and nationalism are not fundamental reasons for states to control migration. Rather, they purport, overly restrictive migration policies and tighter border controls simply result in serious political, economic, social, and human costs to states and migrants alike. Another common criticism is that security-driven agendas are accompanied by the marginalisation

⁸ Article 11:1 of the UN *Protocol against the Smuggling of Migrants by Land, Sea and Air* states: 'Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.' Similarly Article 11:1 of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons* states: 'Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.'

of migrants' human rights.⁹ Although largely articulated in relation to wider migration policies, such debates are beginning to stimulate broader dialogue about the role of border controls in anti-trafficking interventions.¹⁰

The perspective of this article will be somewhat different from the mainstream where much of the literature is critical not just of border controls, but also of a criminal justice response to trafficking in persons. We suggest that it is possible for states to combine tightly managed migration systems and strict border controls with the protection of human rights, first by examining some of the tensions and contradictions that have emerged in this debate, and second by defending our argument against the criticisms made by those who are critical of tighter border controls and security frameworks. To conclude, we offer suggestions for consideration and further debate on how states might reconcile what might be seen as conflicting agendas to develop more effective anti-trafficking responses.

Controlling Borders: Are sovereign states losing control in a globalised world?

A large body of literature exists on the changing nature of the state and the erosion of state sovereignty. For some, the

⁹ See: J Todres, 'Widening Our Lens: Incorporating essential perspectives into the fight against human trafficking', *Michigan Journal of International Law*, vol. 33, no. 1, 2011, pp. 53–76; A Mountz, *Seeking Asylum: Human smuggling and bureaucracy at the border*, University of Minnesota Press, Minneapolis, 2010, p. 170; J Lobasz, 'Beyond Border Security: Feminist approaches to human trafficking', *Security Studies*, vol. 18, no. 2, 2009, pp. 319–344; M Lane, 'Myths about Migration: Historical and philosophical perspectives', *History & Policy*, 2006, retrieved 8 April 2013, <http://www.historyandpolicy.org/papers/policy-paper-39.html#counting>; A Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and treaties', *Forced Migration Review*, vol. 12, 2002, pp. 25–28.

¹⁰ A Schloenhardt, 'Prevented, Suppressed, and Punished!? Twelve years of the Trafficking in Persons Protocol', *The University of Queensland Human Trafficking Working Group*, 23, 2012, p. 25, retrieved 9 April 2013, <http://www.law.uq.edu.au/documents/humantrafficking/international-law/UN-TiP-Protocol-2000-Commentary-Analysis.pdf>; B McSherry and S Kneebone, 'Trafficking in Women and Forced Migration: Moving victims across the border of crime into the domain of human rights', *The International Journal of Human Rights*, vol. 12, no. 1, 2008, pp. 67–87.

increasing concern over border control in relation to migration reflects a decline in state power in the age of globalisation.¹¹ One scholar, Melissa Lane, has posited that states should acknowledge the limits on their power as well as their abilities to control migration in general, and irregular migration in particular. She argues further that notions of sovereignty and nationalism are not unconditional arguments for greater state control of migration. Powerful forces drive people to migrate, and states will therefore never succeed in their attempts to control migration. Subsequently, there is a continuous tension between the interests of states and the interests of migrants.¹²

Others have argued that the decision to migrate is made within the context of restrictive government migration regimes and border control policies, which, in turn, have generated a growing demand for clandestine migration services, including smuggling across borders, procuring of fraudulent passports and visas, and arranging of false employment opportunities. Consequently, journeys are becoming more perilous, and thousands of migrants die each year while attempting to make unauthorised border crossings.¹³ This theory carries weight as we have seen that the market for clandestine migration services is linked at least in part to the widening of border surveillance, largely aimed at stemming the flow of irregular migrants from entering into, or residing in, destination countries.¹⁴ Because migrants believe their lives can be improved through migration, people seek out the services of third parties willing to facilitate both regular and irregular forms of migration, just as critics suggest. Research carried out by UNODC and others has shown that much of the migration in Asia, and indeed worldwide, is facilitated, and even initiated, by third parties.¹⁵ Migrants

¹¹ S Sassen, *Losing Control? Sovereignty in an age of globalization*, Columbia University Press, New York, 1996. Also see: M Bosworth, 'Border Control and the Limits of the Sovereign State', *Social & Legal Studies*, vol. 17, no. 2, 2008, p. 199–215.

¹² M Lane, *op. cit.*

¹³ J O'Connell Davidson, 'Absolving the State: The trafficking-slavery metaphor', *Global Dialogue*, vol. 14, no. 1, 2012, p. 32 & p. 39; G Hugo, pp. 22–24.

¹⁴ I Goldin, G Cameron, and M Balarajan, p. 121.

¹⁵ UNODC, *Migrant Smuggling in Asia: A thematic review of literature*, UNODC, Bangkok, 2012; G Hugo, *op. cit.*

worldwide often seek out third parties who are directly or indirectly known to them and who are part of a locally established network to reach their destination. Often these individuals are not traffickers, but are small-scale smugglers - friends, relatives, acquaintances, or migrant workers themselves - with established links between source and destination countries. But by turning to third parties, many migrants jeopardise their savings, health, and security. Moreover, a large number end up in exploitative situations, with their welfare, rights, and lives under severe threats.¹⁶ One just has to look at the struggles of the Australian government in its attempts to combat the smuggling of migrants by sea to know that human, social, and economic costs to both states and migrants can be exacerbated by the same policies and measures that are meant to address the problem.

Even 'legal' recruitment and migration processes have become increasingly complex due to the involvement of third parties.¹⁷ A trend in official labour programmes causing concern has been the increased transaction costs being borne by the migrants themselves, while brokers and private agents enjoy large profits. For example, although the Government of Thailand established formal migration schemes from Cambodia, Lao PDR, and Myanmar, they tend to be slower, less flexible, and more expensive than informal arrangements, a situation which largely is due to the excessive fees of intermediaries. Under these formal schemes, intermediaries (recruitment agencies) in sending countries and in Thailand are responsible for procuring and registering migrant workers, organising pre-departure orientation and training, and acting as mediators in the event of labour disputes between workers and employers. Governments, on the whole, are not involved in the processes.

¹⁶ K Tamas and J Palme, 'Transnational Approaches to Reforming Migration Regimes' in K Tamas and J Palme (eds.), *Globalizing Migration Regimes: New challenges to transnational cooperation*, Ashgate, Aldershot, 2006, p. 3.

¹⁷ G Hugo, p. 23; also see: S Molland, 'Is 'Safe Migration' Along the Thai-Lao Border Truly 'Safe'?', *Asia Pacific Memo*, 2012, retrieved 10 January 2013, [http://www.asiapacificmemo.ca/is-safe-migration-along-the-thai-lao-border-truly-safe](http://www.asiapacificmemo.ca/is-safe-migration-along-the-thai-lao-border-truly-safewebhttp://www.asiapacificmemo.ca/is-safe-migration-along-the-thai-lao-border-truly-safe).

What is more, the system is neither highly regulated nor transparent, making it easy for both authorised and unauthorised recruitment agencies to take advantage of migrants who, in turn, understand little about the complex and time-consuming application procedures. Although the formal migration schemes aim to prevent migrant workers from paying excessive fees, the actual cost of formal recruitment is high, much higher than the costs associated with irregular forms of migration.¹⁸ For example, it is estimated that the brokerage fees for one passport under Thailand's national verification plan, which enables irregular migrant workers in Thailand to acquire legalised status through the issuance of temporary passports, has reached US\$500-700 per passport, equivalent to several months' wages.¹⁹ Migrants, predominantly from Cambodia, Lao PDR, and Myanmar, have no choice but to take out large loans to cover the costs. As Graeme Hugo points out, the migration industry continues to grow, and a key problem with regular and irregular systems is the excessive rent-taking involved in both source and destination countries.²⁰ We do not dispute this depiction. Migrants are susceptible to abuse, exploitation, and trafficking, and in part this is due to the costs of migration and the involvement of third parties, often resulting in migrants facing situations of leveraged debt. Research carried out by the United Nations Inter-Agency Project (UNIAP) on Human Trafficking found that debt bondage and the use of brokers significantly increased the risk of exploitation and trafficking. Data involving Cambodian deportees from Thailand showed that male migrants, in particular, were almost twice as likely to be cheated or trafficked as female migrants, primarily because the risk of being exploited or trafficked increased one and a half times for every broker involved, and men used brokers more often than women.²¹

¹⁸ S Chantavanich, *The Mekong Challenge: An honest broker – Improving cross-border recruitment practices for the benefit of government, workers and employers*, International Labour Organization, 2008, retrieved 27 May 2013, <http://www.ilo.org/public/english/region/asro/bangkok/child/trafficking/downloads/buildingknowledge/anhonestbroker.pdf>.

¹⁹ Interview, A Hall, IPSR Foreign Expert, Mahidol University, 11 January 2013.

²⁰ G Hugo, p. 42.

²¹ United Nations Inter-Agency Project (UNIAP) on Human Trafficking, *Human Trafficking Sentinel Surveillance. Poipet 2009-2010*, UNIAP, Bangkok, 2010, p. 49.

But then the question becomes, what should be the role of border controls in combatting the problem when much of the problem has to do with the involvement of third parties, excessive rent taking, corruption, and mismanagement of migration systems? For many observers, restrictive borders and migration systems are the problem, not the solution. Critics maintain that, aside from traffickers, states are the principal violators of migrants' human rights. Frontline border and immigration officials often participate or are complicit in the aforementioned activities. What is more, thousands of migrants are held each year in detention for considerable periods of time while officials attempt to determine if a person is smuggled, trafficked, or an asylum seeker.²² At the least, states fail to prevent and protect human rights violations committed by those who exploit others for economic gains. In each of these ways, the state has impeded or failed to uphold human rights, just as critics have noted.

Primary Responsibility for Human Rights Rests with the State

This line of reasoning is valid as far as it goes, but in our opinion, it does not go far enough. For it is also true that genuine human rights protections for migrants, whether trafficked or not, can only be enforced and upheld by sovereign states or by intergovernmental and nongovernmental organisations (NGOs) working with their assistance. Ultimately, the primary responsibility rests with the state to address trafficking in persons and uphold the migrants' human rights. This is the reality that a feasible and meaningful discussion on the role of border controls in anti-trafficking responses must take into account. To ignore or deny it will only serve to worsen the present situation. States are not going to open their borders to the free flow of migrants, no matter how much they are criticised. Even if one concedes that states are losing control, having a sense of control over one's border, as Will Kymlicka

²² J O'Connell Davidson, p. 39.

argues, is of the utmost importance.²³ First, it reduces fear, makes citizens feel secure, and takes some of the heat out of political debates on migration. Second, in most countries, there is little support for large-scale migration as well as a strong moralistic objection to rewarding irregular migrants who enter under false pretences. Third, it is easier for migrants to integrate into countries like Australia and Canada, where migration is managed and the result of state selection because large numbers of irregular migrants often result in a backlash against multiculturalism.²⁴

None of these points makes a case as to why border controls should have a role to play in anti-trafficking responses *per se*; rather, they show that sovereignty and nationalism are still powerful norms influencing border controls and migration policies. Yet, however one appraises the overall relationship between border controls, regulated migration systems, trafficking in persons, and human rights, the analysis and suggestions that follow are constructed on a premise that few critics can dispute. Our premise is that most state border controls, as they currently stand, are neither preventing trafficking nor upholding the human rights of victims. For the most part, border controls worldwide fail to prevent and detect trafficking in persons. However, this needs to be fixed.

States See Border Control as an Important Element to Anti-trafficking Interventions

Given that it is the sovereign right of each state to control its border and regulate migration, it is also imperative that we see how the human rights of migrants can fit within the *realpolitik* of migration control. Again, one might ask why? To this question, our response is straightforward. States, for the most part, have adopted a criminal justice approach to address

²³ W Kymlicka, *Multiculturalism: Success, failure, and the future*, Migration Policy Institute, Washington, DC, 2012, pp. 22–23.

²⁴ *Ibid.*

trafficking in persons. The main principles that form the basis of this approach are captured in the Trafficking and Smuggling Protocols as well as other international agreements, such as the *Council of Europe Convention on Action against Trafficking in Human Beings*. As of September 2013, 117 countries have ratified the Trafficking Protocol, requiring states to criminalise all forms of trafficking, prosecute and punish traffickers, strengthen national borders to combat the problem, promote cooperation among states, and protect and assist victims. As Chantal Thomas argues, ‘These international instruments suggest that states have not relinquished sovereign territorial prerogative - they have employed international law to enhance rather than to impede it.’²⁵ Because both Protocols acknowledge the sovereign right of states to control their borders and regulate migration, UNODC fully supports this position and works with states, as part of its mandate, to promote adherence to the two Protocols and assist states in their implementation.

Admittedly, the anti-trafficking frameworks developed by a number of states have more to do with political prerogatives than the legal obligations of the Trafficking Protocol. Nonetheless, as Gallagher and Holmes note, ‘The securing of general agreement on the nature of the problem [trafficking in persons] and the direction and scope of required solutions is widely lauded as evidence of real and tangible progress.’²⁶ Regardless of arguments against it, the instrument is a clear signal that trafficking in persons, at least in the eyes of the states, is a criminal justice issue of which border controls are an important part. Does it suggest the reluctance of states to respect the rights of migrants? Perhaps to some, but as Susan Kneebone points out, the weak support for the *UN Convention on the Protection of the Rights of All Migrant Workers* intimates that the ‘security-criminal justice dialogue

²⁵ C Thomas, ‘What Does the Emerging International Law of Migration Mean for Sovereignty?’ *Cornell Legal Studies Research Paper Series*, no. 13–72, p. 43.

²⁶ A Gallagher and Holmes, ‘Developing an Effective Criminal Justice Response to Trafficking in Persons: Lessons from the Front Line’, *International Criminal Justice Review*, vol. 18, no. 3, September 2008, p.320.

succeeded when a rights dialogue failed'.²⁷ Notwithstanding the support states give to the Trafficking Protocol and its Article 11, which mandates the strengthening of border controls to prevent and detect trafficking in persons, significant practical challenges remain in doing this effectively and with a human rights approach.

Possible Ways Forward for Consideration and Debate

What then is to be done? First and foremost, we need to address the practical obstacles faced by states in terms of translating Protocol obligations into effective actions, especially in relation to border controls and managed migration systems. Identified below are a few fundamental constraints states are facing, coupled with some suggestions for consideration and further debate on how states might reconcile tightly managed migration systems and strict border controls with the protection of human rights in the current context of globalisation. It is worth noting that we do not present anything new. Change, however, does not occur in the short run; thus, the suggestions below are some actions that should be prioritised.

Strengthen Capacities to Identify, Protect, and Assist Trafficking Victims

A constraint in border control provisions is the prompt and accurate identification of victims.²⁸ In this regard, we agree with critics that victims of trafficking are more likely to be identified as persons in breach of migration laws and deported or incarcerated, often without question. One of the main reasons for this stems from the definition of trafficking provided by the Trafficking Protocol. The definition does not offer a

²⁷ S Kneebone, 'The Refugee-Trafficking Nexus: Making good (the) connections', *Refugee Survey Quarterly*, vol. 29, no. 1, 2010, pp. 137–160.

²⁸ Victim identification is a complex issue. For a good overview, see A Brunovskis and R Surtees, *Out of Sight? Approaches and challenges in the identification of victims*, Fafo, 2012, p. 8, retrieved 11 April 2013, <http://www.fafo.no/pub/rapp/20255/20255.pdf>.

clear distinction between the experiences of trafficked victims and that of other groups of migrants. Rather, trafficking is seen as a subset of irregular migration, and also as a phenomenon distinct from smuggling. The linkages and overlaps are overlooked largely because the two Protocols make a clear distinction between the two phenomena. However, since practices of trafficking are intertwined with smuggling, especially manifest in the Southeast Asian region, it is often difficult for border officials to distinguish a trafficked migrant from a smuggled one. Subsequently, there is a predisposition to label and treat them all as irregular or smuggled migrants, which typically results in deportation even if the migrant has been trafficked.

Based on the realities described above, one possible solution, which is being lobbied for in the United Kingdom (UK), is the appointment of a non-partisan Anti-Trafficking Commissioner to bring consistency and accountability to government interventions. The Commissioner would be authorised to conduct unannounced visits, launch independent investigations, and promote the interests of victims. The recommendation stems from a report by the Centre for Social Justice, a UK based think tank, which examined the national response to trafficking in persons.²⁹ Released in March 2013, the report also suggests the establishment of a single competent authority to oversee victim identification to ensure the UK response is victim-centred and that human rights are protected.³⁰ Both of these recommendations offer potential solutions to structural problems.

In addition to increased calls for oversight, the report also found evidence that victims can be properly identified at border controls as long as staff members understand that a trafficked person is first and foremost a victim, not an illegal migrant.³¹ In this

²⁹ Centre for Social Justice, *It Happens Here: Equipping the United Kingdom to fight modern slavery*, Centre for Social Justice, 2013, p.19, retrieved 19 June 2013, [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).

³⁰ *Ibid.*, p. 20.

³¹ *Ibid.*, pp. 90–91.

regard, the need for well-trained, experienced frontline border and immigration officials cannot be underestimated. Yet, training as an effective anti-trafficking intervention is highly contested. The system is one in which frontline officials (i.e. the state) determine the status of the migrant, specifically whether she or he qualifies as a trafficking victim. From the perspective of critics, the system suffers from serious flaws. Because each state judges for itself whether a particular migrant will receive assistance or be deported, critics argue the system itself contributes to their vulnerability. Migrants, whether trafficked or not, will continuously fear frontline officials given their socio-legal status.³² Training will never resolve this structural issue. Once more, we do not dispute this and acknowledge that victim identification can be a double-edged sword. But because it is the state that decides who counts as a victim of trafficking, it is critical that frontline officials have the proper knowledge and skills; otherwise, all victims of trafficking will be identified as irregular migrants.

In our experience, frontline officials are often ill equipped to identify and assist victims. This situation is tied in part to the linkages and overlaps of trafficking and smuggling. But it also reflects the lack of a general understanding that trafficking in persons and the smuggling of migrants are part of a continuum in the migration process, and that a smuggled person one day may be a trafficked person the next. Border and immigration officials need continuous support, resources, training, and mentoring to effectively fulfil their duties, not just in identifying and assisting victims, but also in managing initial aspects of an investigation in suspected cases of trafficking, including the preservation of evidence and detention of suspects. Gallagher and Holmes note that the *Council of Europe Convention on Action against Trafficking in Human Beings* explicitly states that the accurate identification of victims is critical to the provisions of protection and assistance, and failure in this regard will likely result in a denial of their human rights.³³ Identification

³² B Anderson, 'Where's the Harm in That? Immigration enforcement, trafficking, and the protection of migrants' rights', *American Behavioral Scientist*, vol. 56, no. 9, 2012, pp. 1241–1257.

³³ A Gallagher and Holmes, p. 326 & p. 329.

and protection procedures of frontline border and immigration officials should be independently assessed on a regular basis (e.g. by a non-partisan Anti-Trafficking Commissioner) to ensure they are responsive, consistent, and transparent.

Greater engagement with frontline border and immigration officials (for example, through training and capacity building activities) in the Southeast Asian region has also opened up opportunities for agencies like UNODC as well as NGOs to influence and promote human rights. State officials have more contact with organisations that advocate for the rights of trafficked and smuggled migrants. Whether this has improved the rights of migrants is open for debate, but at least the potential exists for human rights concerns to be integrated into frontline border control and immigration work.

Maximise the Resources for Border Control and Immigration as Part of a Multi-faceted Approach to Combat Trafficking

Another fundamental constraint is the lack of appropriate resources to effectively manage migration. Not all states have the resources of the United States government, for example, which spent close to US\$18 billion on federal immigration enforcement during the 2012 fiscal year. This amount was 24% higher than the total combined budgets for the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration, the Secret Service, the U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, Firearms and Explosives, a 2013 study by the Migration Policy Institute (MPI) found.³⁴ Border control at entry points has become effective,³⁵ but MPI also acknowledged that enforcement alone is not sufficient to effectively deal with the broader challenges that both regular and irregular migration pose to the state.³⁶ Herein lies an important point. Border

³⁴ D Meissner, D Kerwin, M Chishti and C Bergeron, *Immigration Enforcement in the United States: The rise of a formidable machinery*, Migration Policy Institute, 2013, p. 9, retrieved 14 January 2013, www.migrationpolicy.org/pubs/enforcementpillars.pdf.

³⁵ For example, levels of apprehension fell to historic lows along the U.S.-Mexico border in 2011 if this is taken as a measure of effectiveness (*Ibid.*, p. 26).

³⁶ *Ibid.*, p. 13.

controls and managed migration systems do have a role in anti-trafficking responses, but should be seen as just one part of a multi-faceted and comprehensive approach to trafficking in persons. Other elements are also critical, although the details are beyond the scope of this discussion.³⁷

That said, we do suggest that states maximise the resources provided to border and immigration enforcement, specifically for the protection of trafficking victims in particular, as well as the human rights of migrants in general. This objective is paramount to an effective anti-trafficking response that involves tightened borders and regulated migration systems. Protection resources can be maximised by adding new resources into the system and better utilising the resources that exist. All states under both Protocols have a legal obligation to protect the rights of trafficked and smuggled migrants. Increased resources as well as proper training on how to uphold the human rights of all migrants, not just trafficking victims, are positive starting points.

Following on from this recommendation is the need to improve the governance of migration systems in both source and destination countries. Institutional mechanisms can be developed to protect migrant workers, including frameworks to ensure the protection of migrant workers' rights, the licensing and regulation of recruitment agencies, the negotiation of bilateral agreements, and the training of migrant workers prior to departure, as well as the provision of protection and repatriation programmes that take the principle of non-refoulement into account. Some states have enacted such measures; yet, they still fail to protect migrants from abuse and exploitation. A key reason for this is corruption and vested interests in maintaining existing exploitative systems for financial gains.³⁸ Tackling these systemic problems of corruption, involvement of third parties, and the mismanage-

³⁷ For example, elements that form a comprehensive approach to addressing trafficking in persons range from comprehensive legal frameworks to accounts of the underlying social, political, and economic realities that fuel trafficking in persons.

³⁸ G Hugo, p. 26.

ment of migration systems will be challenging, but is there really an alternative?

Policies Based on Empirical Evidence

A final major constraint that needs to be addressed is the lack of timely, comprehensive, and accurate data³⁹ related to the scope and scale of trafficking in persons and the smuggling of migrants. Systems to collect data are inconsistent across countries and are not often maintained in a way that makes the information amenable to analysis. As a result, there is an inadequate picture of cross-border movements around the world. Reliable data are required to systematically analyse the causes, dynamics, and impact of migrant smuggling and trafficking in persons in source, transit, and destination countries. In this regard, border and immigration officials have important roles in intelligence gathering. The analytical and investigative capacities of some countries need to be enhanced, but evidence-based knowledge is crucial to developing effective policies and counter-measures that address trafficking in persons and migrant smuggling. Improved research and data collection will strengthen more proactive, comprehensive, and informed policies and responses.⁴⁰ Indeed, critics are right in saying that restrictive migration policies and border controls are not often based on empirical evidence but on misinformation and pressure from interest groups.⁴¹

Conclusion

The need for human rights protections for migrants, whether trafficked or not, is both evident and growing. States need to be convinced that migrants' rights are integral to their security, border, and migration management policies and objectives.

³⁹ *Ibid.*, p. 2.

⁴⁰ See the UNODC's Voluntary Reporting System on Migrant Smuggling and Related Conduct (VRS-MSRC) at www.unodc.org/southeastasiaandpacific/en/2013/04/bali-process/story.html.

⁴¹ G Hugo, p. 1.

The primary responsibility rests with the state to address trafficking in persons and uphold trafficked persons' rights. Tensions between sovereignty and protection are nothing new, and it is time to consider how states might combine tightly managed migration and strict border controls with the protection of human rights in the current context of globalisation. We think this effort is deserving of support. Otherwise, we are no closer to practical solutions than we were over a decade ago when the Trafficking Protocol came into existence.

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