

ALLIANCE AGAINST TRAFFICKING IN PERSONS

“Stolen Lives, Stolen Money: The Price of Modern-Day Slavery” (25-26 June 2013)

Keynote Address: The Migration Law Backdrop to Human Trafficking

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Thank you.

It is an honour and a pleasure to be invited to speak to this compelling and important audience. The OSCE has a uniquely valuable role to play in battling human trafficking and the leadership of Special Rapporteur Maria Grazia Giammarinaro is proving especially innovative.

Today I want to speak to you about the migration law backdrop to human trafficking. I know that this sounds a little out of vogue, and that much attention in recent years has been devoted to loosening the anti-trafficking analysis from its migration law mooring, and that that is, in very many ways, a good thing. I am not asking you to take a step backwards. Instead I urge you to take a step sideways – to consider trafficking from the perspectives of migration law. In other words, from my perspectives.

This story has three parts. The first is to talk of trafficking and the global hardening of borders. The second is to link trafficking to the rise and return of temporary foreign work programs. And the third is to consider why concerns about trafficking moved away from migration issues in the first place, and how that original migration context continues to shape the story.

To begin:

In my hometown of Vancouver, Canada, purportedly designated as a key transit point in global human trafficking networks (at least as far as Canada goes), there are currently two trials going on. One trial is presently on a detour involving erudite legal arguments about the constitutionality of Canada's human smuggling laws. The other has taken more of a 'daytime television turn' as the accused and the key witness ('victim') trade accusations of lying to the court in a case where a wealthy couple from Hong Kong face charges, including human trafficking charges, on the basis of their treatment of their Filipina nanny.

What these trials have in common is that they each demonstrate the migration law backdrop to human trafficking, and show how migration law can, if used incautiously, create a setting which invites human trafficking to flourish.

The first of these trials involves the hardening of borders. The men on trial were in charge of a boat called the MV Sun Sea which brought close to 500 people, most of them Tamils, on a dangerous journey from Thailand to Canada almost three years ago. Most of those on board sought asylum on arrival. Some of the evidence in this trial is about the harsh conditions of the journey, its high cost for most of the passengers (including many children and women), the

unyielding rules of those on board, and how minor acts of ‘complicity’ with enforcement on board were rewarded with a bit more food or a better place to sleep. The constitutional challenge, however, is not about how to keep dangerous rules on overcrowded boats. It is about whether the current law goes so far in its effort to penalize ‘people smugglers’, that it also captures humanitarian workers and even co-travelling family members who help refugees come to Canada.

The human smuggling provision under challenge was brought into force in 2002, part of the worldwide crackdown on extralegal migration, and caught up in the security turn that followed the heinous attacks of 9/11 in the United States. It is part of a trend around the world to make increasingly significant penalties for anyone who crosses a border without authorization, or who helps anyone else to do so. The worldwide crackdown on extralegal migration began in the mid 1980s and has continued apace ever since. It is no coincidence that the global attention to human trafficking (and smuggling) that led to the Palermo protocol had gained momentum within a decade. The hardening of borders makes both human trafficking and human smuggling more lucrative. The effort of enforcing border laws makes transgressions more apparent. In addition, as the categories of people who can cross borders easily shrink, there are more and more people who will seek out assistance to cross borders. As the options for those who are vulnerable or poor or unknowledgeable or desperate shrink, the market for trafficking and smuggling grows. A border crackdown ensures a protected market for trafficking and smuggling.

There are two important corollaries to this point. The first is that the more we learn about international human smuggling, the more the line between trafficking and smuggling is blurred. The law draws a clear bright line between these two, based on consent and cost and continuing effects once one arrives at their destination. But the stories of those who make these journeys tell us something else entirely. Terms and times and incentives and routes change, consent is not contractual, it ebbs and flows. At your destination, your smuggler is often the only person you know. The clear bright line works best on paper: it serves to sort the ‘innocent victims’ from the ‘blameworthy and complicit’. This distinction does not help people, and it does not further human rights.

The second corollary is that from time immemorial, asylum seekers have relied on smugglers. When the laws are the harshest, the smugglers are the most necessary in the fight to save lives. Raoul Wallenberg and Oscar Schindler come to mind. This is not to suggest for a moment that fifty years from now we will look back on Mr. Appulonappa as an heroic figure. The trial continues. The constitutional challenge is complicated – as it should be.

[transitional statement]

The second trial, which has produced such salacious images for the tabloid press, involves allegations that a nanny was lured to Canada by her employer with the promise of permanent residency after two years, and that once in Vancouver her passport was taken away and she was virtually held captive in the family home working incredibly long hours and isolated from any form of support. The trial is hinged on which version of events to believe, but either story points up a number of key issues about migration law and human trafficking.

The first and most obvious of these is that temporary foreign workers are, by legal design, vulnerable. The number of temporary foreign work programs is on the rise in most

prosperous states these days. And states, mindful of how difficult it was to get temporary workers to depart in the 1980s and 1990s, are being extra vigilant in ensuring that people will actually leave. To balance things out a bit, temporary workers are often accorded quite a long list of 'rights', but rights on paper have often proven ineffectual. The main reason for this is that there is no legal remedy possibly to the profound inequality that comes with temporary status. It cannot be cured. Temporary status makes people profoundly unequal, and unless this is counterbalanced with other markers of privilege (money, education, citizenship in another prosperous state, race privilege etc etc), the inequality flows dramatically into vulnerability. This vulnerability is the product of migration law.

Some of the facts in this trial come directly from the text of the regulations governing Canada's live-in caregiver program – which requires caregivers to live in their employer's home, and to pay rent, to leave the country if they quit and cannot find another job... and also to have the reward of eligibility for permanent residency after two years of this kind of 'work' (servitude?). For many low-skilled workers, especially for women, this program has provided a path to citizenship in Canada. It ought not easily be dismissed because of the obvious problems with it. But it has been shown over and over and over again that the robust protection of Canadian labour laws, and Canadian constitutional human rights, and the international conventions to which Canada subscribes, are not protecting all live-in caregivers. The basic conditions of the work open the door for significant exploitation. And more law is not the answer - the law is ineffective in altering the underlying distinctions between permanent and temporary status.

Another factor this second trial brings to mind is its eerie similarity with an earlier human trafficking prosecution in Vancouver about two years ago. That earlier trial ended with an acquittal as a judge found that there was insufficient evidence to conclude that the central witnesses were, in fact, 'victims' ... they had a documented migration status and they did want to be in Canada. Was that not freedom enough? The press reports of the current trial do seem to indicate that the same argument is being run in this case.

As in the human smuggling trial, this prosecution shows us that the law is a pretty blunt instrument, often not well tooled enough for the facts of human frailty, human agency, and human desperation that underpin human trafficking.

Indeed one of the things that is important about this trial is that a charge of human trafficking - this enormous global crime with 27 million victims - has been laid against a couple who have allegedly harmed one victim, and who could be charged (and have in fact been charged) in any number of other ways. It is clear that prosecutors want more convictions...to date there has been only one in Canada for international human trafficking, despite a mitt-full of new laws, and many many millions of enforcement dollars.

Instead, in Canada, most enforcement action, and most prosecutions, have been directed at what is now called 'domestic trafficking'. And it is to this development that I now want to turn.

Over the past decade, as the world has turned its concerted attention to human trafficking, we have all discovered that the most egregious harms of human trafficking are not that migration law is infringed in the process. Our global attention to human trafficking, which began with attention to international crime and to a particular type of migration law infringement, has now grown importantly. As a global community we have come to understand that human trafficking

involves a vast number of human beings, treated in some of the most inhumane ways imaginable, and indeed unimaginable. We are now paying more attention to labour exploitation, to child labour, to forced marriage, to debt bondage... All of these things are criminalized in our societies, and have been criminalized for a long time. In Canada, we are paying more attention to the unique vulnerabilities of aboriginal youth. Anything that pushes us to pay more attention to these endemic harms, to devote more time and energy and money to trying to change them, is a good thing. Indeed, one of the absolutely most valuable things about our now-more-than-a-decade-long focus on human trafficking is that we no longer understand it solely in a border-crossing context.

And here I want to make two points. The first is straightforward: there is a very real risk that one reason we are moving away from the international framing and the border context, is that it is simply too difficult. Given the combined effects of pressure to raise trafficking prosecution rates and at the same time to strengthen borders, it is difficult or impossible to develop successful strategies. The backdrop of migration law to human trafficking is too important. And an inattentive attraction to migration law enforcement can take us in a dangerous direction with regard to trafficking.

The second point about the shift to domestic trafficking discourse, is that much good has come from cutting the linkage between human trafficking and migration enforcement, and we need to draw appropriate lessons from that. Taking the migration law backdrop of the fight against human trafficking into account does not mean moving migration enforcement to the forefront. Rather, it means understanding the role the migration law plays in both making human trafficking lucrative and valuable, and in heightening vulnerability so that individuals become more easily victimized. Migration laws are certainly part of the problem here – and we need to factor that into the solutions in a way that we have not adequately done so far.

To conclude, then, as you launch your discussions over the next two days, I would like to offer five points towards a ‘migration savvy’ action plan to combat human trafficking. (I know these plans of action typically have 10 points, but it is early on the first day, so perhaps you can build from here.)

1. Asylum seekers need to cross borders. It is their international human right to do so. Closing borders to those most in need in our international community makes these especially vulnerable people extra vulnerable to human traffickers, in precisely the environment where the trafficking industry has honed its skills. We need innovation and openness in matters of asylum (asylum visas perhaps?) to make significant inroads into the trafficking industry.
2. Temporary foreign workers need basic guarantees of freedom. This involves much, much more than long lists of employment rights, it involves actions on the ground that alter the rules of the game. The lack of a right to remain ensures that temporary workers are in a profoundly unequal situation. This inequality needs to be foregrounded in designing these programs. Simply according these workers the same rights as those to whom they are not equal does not protect them.

3. People without migration status must not be treated as criminals. The vulnerability of those without status is tenfold that of people with only temporary status. Every point of access (to food, to shelter, to health care...) that they are denied is an opportunity for those who would exploit them. Furthermore, an incentive to remain 'invisible' helps ensure that 'victims' will never be located.

4. The Refugee Convention, which has over more than half a century proven the most effective human rights protector for non-citizens should be pressed further into service both as a model for protecting victims of trafficking, and as a model for forms of complementary protection for those who have been trafficked.

5. Finally, we must work to build a legal framework for blurring the clear bright line between trafficking and smuggling. These boxes are about policing our borders, and while they do a good job of assigning blame, they distract from a clear-headed focus on exploitation, on harms, vulnerability, complicity and human agency.

This distinction provides an easy out for those of us in prosperous industrialized states. By sorting people into these boxes, we are able to turn our attention away from the deep fissures of inequality around the world which compel people to make horrible, invidious, choices....to consent, to risk. It is the conditions of those choices, the limits of that agency, that we need to continue to work to understand as we move forward. There is a big long spectrum on which trafficking and smuggling can be located – we need to pay attention to its full length.

This challenge is before you over the next two days. I urge you to confront it head on.

Thank you for your attention.