

Gendered Chattels: Imported Child Labour and The Response to Child Trafficking

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(KSG – Draft only)

"The border is very busy, lots of stuff moving back and forth... Say you needed to get some kids. This guy would offer a woman a lot of money, and she'd take birth certificates from the U.S. – from Puerto Rican children or darker-skinned children – and then she would go into Mexico through Tijuana... And then they'd go shopping... We went into this house that had a goat in the front yard and came out with a 4-year old boy.... The boy cost \$500 – the parents were told he would go to adoption agencies and to a better life.... When we crossed the border at Juarez, all the border guards wanted to see was a birth certificate for the dark-skinned kids".¹

"Mexican officials see sex trafficking as a U.S. problem, If there wasn't such a large demand, then people – trafficking victims and migrants alike – wouldn't be going up there".²

INTRODUCTION

Imported child labour, or child trafficking, takes many forms. Like other commodities moved across borders, it is tailored to particular markets, priced according to the balance between supply and demand, and precisely differentiated into a range of product categories – by gender, age, appearance, nationality and type of labour³. And in line with trends in global trade, it is escalating in scale and diversifying in form – a broader range of available commodities and a vastly expanded network of exporting and importing countries. Unlike most other large scale labour migrations⁴, this trade violates both domestic and international law. But whether the transportees – the child labourers themselves – are held responsible for the illegal presence, if and when this comes to official attention, depends to a considerable degree on their gender: trafficked girls are more likely to be considered victims who need saving, rescuing, protecting; trafficked boys by contrast are more likely to be considered responsible for their irregular migration and punished. Gendered assumptions about childhood and migration drive much of the public response to child trafficking. So do divergent public attitudes to sexual and labour exploitation.

¹ Andrea, former sex worker, quoted in Peter Landesman, "The Girls Next Door", New York Times January 25, 2004. [hereafter Landesman].

² US Embassy official, quoted in Landesman.

³ Transnational adoption is not included in this discussion because child labour exploitation is not a feature even though other elements of child trafficking, such as commodification frequently are.

⁴ The exception ofcourse are smuggled and trafficked migrants.

The differing responses to child trafficking are remarkable since a child who is moved across borders for purposes of exploitation is, as a matter of widely ratified international law, deemed incapable of having consented to his or her migration: “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve ...[the threat or use of force or other forms of coercion..]”⁵. Whether or not the child has in fact been coerced (by being kidnapped or sold) or has acquiesced (by being tricked, ordered or persuaded) is irrelevant. He or she is, by law, a victim of the crime of trafficking. Moreover, gender and type of exploitation are, according to the law, irrelevant. In theory, child sexual and labour exploitation are equally intolerable. Child trafficking is the only type of trafficking where evidence of coercion is unnecessary, a reflection of the view that this form of transborder trade is abhorrent whatever the circumstances or motives behind it.

The legal definition of child trafficking reflects a particular conception of childhood, incorporated into current international law – the child as object of adult protection rather than autonomous subject or agent. Whereas adults can choose to subject themselves to migration for exploitative work, including sex work or harsh labour, children cannot. Two consequences flow from this. First, imported child labourers whatever their gender or the nature of their exploitation, should not, according to law, be punished or held responsible for finding themselves in an illegal situation. They are crime victims, entitled to protection, support and rehabilitation. In terms of state obligations, it is irrelevant whether they are also illegal migrants or clandestine workers. Second, prosecuting cases of child trafficking should not require complex evidentiary investigation into the child's state of mind as might be the case with an adult; the fact of cross border exploitation itself should legally be sufficient to secure a conviction.

In practice, the gap between legal theory and state intervention remains vast. Despite an enabling legal framework, the phenomenon continues unabated and growing. Moreover public responses to child trafficking are confusing and inconsistent when viewed as a whole; they include both protective and punitive measures, they reflect political agendas that are incompatible with uncompromising condemnations of child trafficking. It appears that gender plays a significant role, but one that is never acknowledged.

THE PHENOMENON

First a word about the phenomenon itself. Most public attention has been focused on the use of imported child labourers for sex work – nigerian teenagers in the UK⁶, honduran 12 year olds in the US⁷, mexican children in the US and Canada⁸, pre-teen nepali girls on in India⁹, laotian children in Thailand, russian, ukrainian, moldovan and albanian teenage

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 3(c). The full text of the definition of trafficking in persons and a discussion follow below.

⁶ Internet News Network, "Trafficking nightmare for Nigerian Children", November 26, 2001.

⁷ Casa Alianza, Report on Trafficking of Children in Central America and Mexico, December 2001.

⁸ Solidarity Center, The Struggle for Worker Rights in Mexico, (Washington D.C., The American Center for International Labor Solidarity, 2003) 29.

⁹ Calcetas-Santos, 71.

girls in Western Europe, Israel and the gulf states, Romanian girls in Cyprus, Italy and Turkey, Romanian boys in Berlin and Amsterdam¹⁰. Indeed the term child trafficking is often confused with child sex trafficking, or sex trafficking more generally as if the two were synonymous.

Certainly there is evidence that the scale of child sex trafficking is mushrooming, and that children, particularly teenage girls, represent a growing proportion of the trafficked population. In some places, the very fact of being a young girl is a risk factor, a likely prelude to gender determined commodification. Trafficking may be as dangerous a social evil for some populations of teenage girls as HIV/AIDS infection is for others. For example, according to Unicef and Save the Children, 80% of those sex trafficked from Albania and Moldova, a key sex trafficking source area, are children. Even more disturbing, perhaps, is the fact that the average age of the commodified child is declining. This is true in Eastern Europe¹¹, but also in parts of Asia. According to the Special Rapporteur on the Sale of Children, Child Pornography and Child Prostitution: "The demand for virgin girls [among Nepali girls trafficked to India] is increasing and the age of girls being trafficked to India is decreasing, with the average age in the last decade falling from between 14 and 16 years old to between 10 and 14 years old at present"¹². Gendered chattel indeed.

But trafficked child labour is not just for sex. Though there is a consensus that the overall numbers of trafficked children are astronomical (the ILO estimates that 1.2 million children are trafficked each year¹³) it is not clear whether child sex trafficking is, as the ILO claims¹⁴, the most prevalent form of imported child labour, a difficult question since estimates of the scale of the phenomena vary enormously and reliable quantitative research is difficult¹⁵. There is however no dispute that other forms of child labour across borders are also widespread and deeply exploitative. Child domestic work in particular involves very large populations of migrant children, though this form of imported labour surfaces as a major rights issue much less frequently than child sex trafficking.

Stories abound of wealthy immigrant or diplomatic families importing child servants from their countries to replicate life styles back home, often using the services of professional smuggling and trafficking rings for the purpose, to disguise the true reason for the child's journey. But a far more common and neglected issue is child domestic

¹⁰ Ofelia Calcetas-Santos, Report on the Special Rapporteur on the sale of children, child prostitution and child pornography E/CN.4/1997/95, February 7, 1997, para 56. 57. [hereafter Calcetas-Santos].

¹¹ The agencies report "a decline in the average age of children/women being trafficked for prostitution" Ed Vulliamy, "Streets of Despair", The Observer October 3, 2004.

¹² Calcetas-Santos, para 71.

¹³ <http://www.ilo.org/public/english/standards/ipecc/themes/trafficking/>

¹⁴ ILO/IPEC, Unbearable to the human heart: Child trafficking and action to eliminate it (Geneva: ILO. 2002) xi.

¹⁵ According to an ILO study on Albania, "some cases of trafficking of children outside Albania for commercial sexual exploitation have been reported, although these are far outweighed by the numbers reported to be trafficked across borders for other forms of exploitation, mainly domestic labour, beggin and agricultural work". National Institute for Statistics, Albania for IPEC Rapid Assessment of Trafficking in Children for Labour and Sexual Exploitation in Albania, (Geneva: ILO-IPEC. 2003) 12.[hereafter Albanian Child Trafficking]

work imported not trans- but intra-continent, from across the border. A European example of this practice is the traffic of Albanian children into Greece where border crossing is easy and inexpensive and does not even require documents¹⁶. The phenomenon of child labour is particularly endemic to many Asian countries: where domestic sources dry up, imported ones take their place. In Thailand for example, where indigenous child workers are increasingly scarce, child labourers, mainly female, are imported from neighbouring states to fill the gap – 7-11 year old Laotian, Cambodian, Burmese and Chinese children imported as child carers or babysitters, 12- 17 year olds hired as domestic servants¹⁷.

But the range of imported child labour goes beyond domestic or sex work. Gendered, physical attributes of childhood, such as size and appearance, are commercially exploitable and drive some of the market demands. Thus tiny south asian boys (4 year olds and upwards) are kidnapped or bought from families to ride racing camels in middle eastern gulf states – kid jockeys; mexican babies are rented out to single undocumented migrants seeking to cross the southern US border posing as a family unit, baby as prop. Stereotypes of innocence or vulnerability associated with childhood are also commodified and cashed out in a wide range of situations: albanian boys (typically between 11 and 16)¹⁸ are bought and deployed as shop lifters, beggars or hawkers on the streets in Italy or Greece; haitian children are imported to beg in the Dominican Republic¹⁹ and indian children, some of them purposely maimed by parents or relatives to become more effective beggars, are trafficked to Saudi Arabia²⁰. Foreignness itself is also a relevant attribute: according to UNICEF, an estimated 200,000 children are trafficked in west and central Africa each year to work on cocoa plantations, and in other types of harsh agricultural work where national children would not be used²¹. Children are also trafficked for purposes of armed conflict, factory work, construction and in a range of other contexts.

DEMAND, SUPPLY and RELEVANT FACTORS

Clearly the main reasons why children are trafficked for labour are determined by the market – flourishing demand, endless supply and as a result, particularly in the case of child sex work, enormous profits. According to a recent report on the US pornography industry, porn revenue is larger than the combined revenues of all professional football, baseball and basketball franchises; child pornography alone generates \$3 billion annually²². The reasons behind the flourishing demand and the endless supply are not however so clear.

¹⁶ Albanian Child Trafficking 7.

¹⁷ ILO-IPEC report, 53.

¹⁸ Albanian Child Trafficking, 7.

¹⁹ Childimmigration Mailint list, <http://lists.lirs.org/mailman/listinfo/childimmigration>, visited September 23, 2002.

²⁰ Calcetas-Santos, para 72.

²¹ Financial Times, December 21, 2004, 13.

²² Sunday Herald, "Porn to Die", April 11, 2004.

There are several possible explanations for why, given condemnation of slavery and imported child labour, demand persists. First, though disapproval is certainly widespread it is by no means universal, despite the contrary public pronouncements of international organizations, treaties and politicians. In many parts of the world with substantial imported child labour, there is deep rooted acceptance of the phenomenon. This takes two forms, a generic one and one specific to imported children. The generic form holds that work is beneficial for children, and that even oppressive forms of child labour are acceptable as sources of family income and training. This is true in many poor countries. In Albania, "work is generally considered to be educational rather than harmful to children" (12). Child domestic work in Asia is not only endemic but perceived as "natural" and unremarkable by the majority of the population, a concomitant of both children's obligations to support their families, parents' rights to control their children's lives as they see fit and children's lack of independent rights²³. Seeing children caring for younger children, gardening, cooking, sweeping, washing or running tea stalls is an utterly normal and unremarkable occurrence. So the answer to the question "why children" would, for many, be "why not"? The more specific reason behind acceptance of imported child labour derives from the "othering" that occurs where foreign, non national children are concerned. The sentiment that these are not "really" children, because they are hardened by experience, or have different cultural expectations, or simply are not children "like our children" is pervasive. This process of othering renders imported child labour preferable to indigenous child labour, easier to justify, less likely to require accountability. Gender distinctions feed into this process, docile Asian girls, hardworking latin american boys, a form of essentialist stereotyping which commodifies and dehumanizes the child.

A second reason why demand for imported child labour continues to be high is profitability. Governments continue to endorse the benefits of globalized economic development. Cheap, malleable and vulnerable - imported child labour costs little and has a high yield. As global competition, including the emergence of China as a major source of cheap labour, drives down manufacturing costs, the search for labour savings is ever more ruthless. It undercuts collective bargaining gains and workers' rights established over previous decades. Some players are particularly affected. The political marginality and social powerlessness that characterizes all children is exacerbated in the case of non national children – particularly those that are separated from their families. Adults closely connected to them are more likely to be abusive or self interested than protective. Indeed kinship networks, based on regional or clan association, are a prime engine fueling their recruitment, transport and placement in a range of exploitative industries. Many of these businesses are closely intertwined with the mainstream white economy – they are the invisible, black or grey underpinning, the subcontractors that control recruitment and supply the labour intensive products to mainstream businesses, many of them multinationals and household names. For example, Wal-Mart, the largest and most profitable retail supermarket in the world, was recently convicted of using child labourers in several of its US plants; in May 2000, the state of Maine fined Wal-

²³ ILO-IPEC, Bharati Pflug, 1.

Mart for child labour law violations in every one of its 20 stores in the state²⁴. According to the AFL-CIO trafficked mexican and guatemalan children are present in large numbers in poultry and meat packing plants in the US mid west²⁵. A report by the Argentinian NGO Defence for Children International details the significant presence of Bolivian and Paraguayan children from indigenous backgrounds in Argentinian agricultural and industrial production²⁶. As the ILO notes, “The recent rise in labour trafficking may basically be attributed to the imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside.[. . .]”²⁷. Migrant child labour fills the gap in specific industries, a buffer between domestic labour force and domestic employer.

Thus a cost/benefit analysis explains the use of imported child labour. This balance has not been significantly altered by international efforts. Infact arguably ineffective but high profile immigration control serves the current contradictory political agenda well – it leaves in place an uninterrupted supply of low cost and vulnerable labour, and yet provides an answer to the political constituency calling for the militarization of borders and criminalization of migration. And indeed states continue to erect increasingly stringent exclusionary mechanisms, both at their borders and well beyond. The familiar tool kit of pervasive visa requirements, carrier sanctions, militarized border controls including sniffer dogs, retinal and other biometric scanning techniques, detention, stringent pre departure checks at departure points, international computerized data storage, analysis and comparison on a hitherto unprecedented scale, and a host of exclusionary laws and policies complicate the immigration landscape. For example, the US has militarized its Mexican border to an extent unimaginable in any other civilian context, even equipping its border guards with infrared night-vision goggles. As a result of these measures, while business and affluent travellers continue to have access to globalized mobility through rapid scrutiny channels, other constituencies experience border crossing as a major and increasing organizational, financial and emotional challenge. One consequence of this escalation of immigration control is that, when it comes to trafficking, children are particularly desirable transportees: they are a better investment than adults because states are more reluctant to deport children so the costs of transport are less likely to be wasted, and children acquire linguistic and other employment related skills more rapidly than their adult counterparts so they produce a high yield. There is anecdotal evidence of this phenomenon in parts of China, in Albania and other East European communities²⁸.

²⁴ Steven Greenhouse, "Wal-Mart agrees to Pay fine in Child Labor Cases", New York Times February 12, 2005, A1.

²⁵ Human Rights Watch report; personal communication AFL-CIO interview with migrant workers section head, Feb 25, 2005.

²⁶ Defence for Children International in Collaboration with the Secretariat for Human Development and Family welfare, Ministry of Health and Social Welfare, republic of Argentina, June 1989, and personal communication, March 2005.

²⁷ ILO (2004) *Towards a Fair Deal for Migrant Workers in the Global Economy*, International Labour Conference, 92nd session, report VI.

²⁸ Separated Children in Europe/Save the Children Report ; Peter Kwong, Forbidden Workers; check ref.; AFL-CIO Immigrant Workers Division, Washington DC. interview

Third, related to the first two reasons, the political will (despite protestations to the contrary) to curtail the demand itself is lacking; the pornography and broader sex industry flourish, without serious government interference; agricultural and manufacturing interests in cheap labour generate powerful political lobbies in support; and in countries where imported child domestic work is widespread, policy makers and political lobbies are themselves consumers of the services, not critics or opponents; constituencies who are directly affected either have no incentive to press for state action because they benefit as consumers or lack the political clout as workers to do so effectively²⁹. As a result there is little demand and fiscal support for inspections, prosecutions, health and safety monitoring of sweatshops, or state intervention of other kinds.

THE SUPPLY OF CHILD LABOUR FOR EXPORT

Turning to the supply side, many of the mechanisms adopted to address the abundant supply of imported child labourers and sex workers have been ineffective, even counterproductive. These mechanisms are beset by the general problems that have dogged policy initiatives to reduce child labour generally – societal attitudes in the source countries, and the lack of educational opportunities and other poverty escape routes: not necessarily poverty per se, but accepted responses to poverty. Neera Burra has argued it is not poverty that produces child labour, but child labour that produces poverty – the severing of family ties, the acceptance of employment instead of education as the formative experience for children, the absence of a political will to invest in social and economic alternatives to child labour (eg collectivised housework, investment in labour saving domestic appliances, community child care provision)³⁰. Public awareness and a sea change in social perceptions are required, a seeming impossibility.

But a century ago, public attitudes to child labour (trans border child labour was not an issue then, but the principles are the same) in the US changed dramatically within the space of a couple of decades. Though by the mid nineteenth century urban middle class American children were already constructed as unemployable and thus economically worthless, this was not the case for poor children from the urban and rural working classes³¹. As late as 1870, according to the census, one in eight children in America was in employment, supplementing family income or providing essential housework and child care. By the 1930s however, child labour was taboo across all social classes. The economic historian Viviana Zelizer has documented this "profound transformation in the economic and sentimental value of [American] children"³² – the manner in which, within the space of forty years, children went from being labourers, economic assets and future security for their parents to being economically "worthless". She argues that, though child labour laws and compulsory education clearly played a part, as did changing family patterns and the creation of the household wage enabling women to become fulltime housewives, a key factor was "the independent effect of cultural factors redefining the

²⁹ ILO interview, Geneva, December 2004.

³⁰ Neera Burra, *Born to Work: Child Labour in India* (New Delhi: Oxford University Press, 1998)

³¹ Viviana Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (Princeton, Princeton UP: 1994 edition) [hereafter Zelizer]. The rest of the information in this paragraph is drawn from this remarkable book.

³² Zelizer, 1.

value of children in the US" (11). A similar dynamic is conceivable today. In countries where child labour is largely an imported phenomenon, the process is already partially under way; it needs to spread from "our children" to non citizen children.

Apart from demand and supply, imported child labour depends on the possibility of physical movement across borders. Some states have addressed the problem by focusing on this aspect of the phenomenon. Two sets of policies stand out: the erection of extra migration hurdles for child migrants suspected of being trafficked, particularly young girls, and "rescue" strategies which remove children from the clutches of traffickers at or close to the border and return them to parents and home communities. Moreover some states, particularly in Eastern Europe and Central America, are increasingly relying on immigration agents and border control officials to carry out child welfare and protection functions absent from the domestic welfare system. While there is an important role for suitably trained and supported border control agents in stemming the exploitative transport of children across borders³³, without this additional input the increase of power in the hands of border control officers can have perverse and rights violative effects. Anecdotal accounts of border control agents demanding sex from girls in return for permission to travel³⁴ exemplify the dangers of increasing exclusionary powers simpliciter: at worst children are simply returned across the border without protection or to the families that facilitated their traffic in the first place; young girls who seek to travel in search of employment opportunities are stigmatized. The UN High Commissioner for Human Rights has argued that subjecting girls to additional border exit checks is a form of unjustified discrimination, which raises the hurdles for girls legitimately seeking to leave the country without providing more constructive or structural solutions; in the same vein others have argued that "rescue" strategies simpliciter which return girls to unchanged home situations ignore the choices which produce child trafficking in the first place, and expose the girls to the risk of re-trafficking³⁵.

LEGAL RESPONSES TO CHILD TRAFFICKING

Three discrete but related bodies of international law are relevant to the problem of child trafficking or imported child labour – the human rights framework, the labour rights approach and finally the anti slavery/anti trafficking measures which target the problem specifically. Gender specific preoccupations are reflected both in the framing of the laws and in their implementation.

³³ A good example of a creative approach to this question is the IOM initiative currently being developed in collaboration with the Honduran Ministry of Justice on the Guatemala/Honduras border, to establish a shelter for the 100 odd children repatriated by bus from the US, through Mexico and Guatemala, to Honduras every week (30% of the 300 migrants returned every week). Border control agents, working together with psychologists and social workers, are putting in place a system to screen all the children returned to establish whether they are travelling with relatives or exploiters, and to formulate guidelines for intervention.

³⁴ Personal communication – Nicaraguan social services agency, Costa Rican IOM representative – ISS Consultation, Guatemala 2005; Separated Children in Europe Conference 2003.

³⁵ Ratna Kapur, report on Gender, Migration and Human Rights, Indian Feminist Research Center (check ref).

Children's Rights Law

International law has recognized the distinctive needs of some groups of child migrants, including exploited children, for close to a century³⁶. The Children's Rights Convention (CRC), which defines a child as "every human being below the age of 18"³⁷ brings together previous provisions in a comprehensive series of protections, many of which are relevant to the situation of trafficked children. The overarching principles of the CRC, which apply to all children irrespective of status, are two: that the "best interests of the child shall be a primary consideration" in all actions concerning children (art.3(1)); and that "a child who is capable of forming his or her views [should have] the right to express those views freely in all matters affecting the child" (art 12 (1)). These principles have important implications for trafficked children³⁸, essentially requiring states to treat them as children first, and undocumented migrants second.

In practice trafficked children find themselves both infantilized and demonized following state intervention in their situation. These approaches do not satisfactorily advance children's human rights. But they are not accidental. And they reflect the inherent tension, deeply rooted in our current conception of children, between the two central CRC principles just quoted. On the one hand there is the "best interests" principle which frames the child as a passive beneficiary of protective adult decision making, being "helped" by adult protectors who speak and act on the child's behalf. The "protected" child is not an agent, so he or she cannot by definition consent to or be held responsible for any aspect of the trafficking context, including illegal border crossing or irregular work. The role of intervention guided by this principle is to take over the situation and change the circumstances, to protect without questioning the child's view of the situation. On the other hand, art 12 codifies the principle of autonomy, agency, giving "voice" to the child as an actor in his or her own right. The acting child empowered with a voice and rights, is also a responsible agent who can be held culpable and punished - hence the punitive aspect of law which results in trafficked children being denied mentorship, subjected to adversarial questioning even detention while their circumstances are investigated³⁹.

Gender plays a key role in determining which of these two principles governs intervention. Trafficked girls are cast as innocent victims, requiring protection but not consultation. A clear example of this approach are the heightened checks and extra procedural hurdles routinely imposed on girls, and only on girls, travelling abroad across certain borders. The intention is to protect the girls from exploitation, the effect is to discriminatorily raise the bar for exit on the basis of gender. "Rescue" and moral "reeducation" strategies are another example of this gendered approach – best interest

³⁶ J. Bhabha, "Children, Migration and International Norms" in ed. T. Alexander Aleinikoff and V. Chetail, Migration and International Legal Norms (The Hague: T.M.C. Asser Press. 2003) 203-4. [hereafter Bhabha, norms].

³⁷ "... unless, under the law applicable to the child, majority is attained earlier", CRC Art. 1.

³⁸ Some migration destination states, such as the UK and Germany, have entered reservations to the CRC which stipulate that its provisions cannot affect implementation of domestic immigration and nationality law. Bhabha norms, 213. The remainder of this paragraph draws on heavily on parts of that chapter.

³⁹ Bhabha norms, 211-212.

trumps agency as the driving force behind intervention. While such approaches are entirely appropriate for young children, a more interactive and dialogic strategy would make much more sense for adolescents. It would complicate the convenient assumption that adolescent girls recruited and transported for exploitative labour abroad are always coerced or tricked; it would force policy makers to address societal factors that make migration to exploitation a desirable and reasonable option.

By contrast, trafficked boys, imported as agricultural, factory or domestic labourers, are most frequently cast as agents, willing and culpable illegal workers, who can be held responsible for their irregular status, and punished accordingly. This explains the prevalence of adversarial and punitive policies including detention and summary deportation towards significant populations of trafficked male children (central americans in the US, Albanians in Europe, Laotians and Chinese in Thailand).

Labour Rights Law

An alternative framework for protecting the rights of trafficked children is labour rights law. The International Labour Organization (ILO) has been at the forefront of standard setting for nearly a century, and several of its conventions are especially relevant to imported child labourers: the 1973 Minimum Age Convention (C 138) and the 1999 Convention on the Worst Forms of Child Labour (C 182). The latter extends beyond traditional labour law boundaries to include prostitution of trafficked children - until recently considered to be a question purely of human rights. These conventions treat migrant children and national children together as victims of the larger problem of child labour exploitation, and do not differentiate between them, as human rights law does, on the basis of their national origin or immigration status. The inclusive and destigmatizing focus of the ILO approach to standard setting with its emphasis on workers' actual situations rather than on individual moral responsibility for their situation or their immigration or citizenship status has not sufficiently impacted on human rights law or on state practice.

Anti slavery and anti trafficking measures

The most focused legal approach to the issue of child trafficking has historical roots that go back to the earliest international human rights instruments, dealing with sexual slavery of women and children, the so-called "white slave trade". Gender plays a critical role in framing the issues and the priorities. The treaties were motivated by moral outrage about European women and girls being kidnapped or enticed to foreign countries for "immoral purposes." While instances of such trafficking were in fact probably rare, the stories so aroused popular concern that a series of international agreements were drafted to facilitate the interception and swift repatriation of these women. The first pieces of international legislation—the International Agreement for the Suppression of the White Slave Traffic, and the International Convention of the same name—appeared in 1904 and 1910. Then, in 1921 and 1933, the League of Nations drafted two more conventions on trafficking, and in 1949 the United Nations consolidated all this previous legislation into the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. As law-enforcement instruments they were largely toothless, but they laid the conceptual foundations that were to guide national and international

trafficking policy for the next three quarters of a century, and their influence continues upto the present time. Common to all these international instruments is a preoccupation with the initial reasons for transport, rather than with the present needs of the transportees. This explains the partial scope of protection. All five legal instruments address trafficking only for the purposes of prostitution, not for forced labour or other, similarly rights-violative conditions of servitude. All but the 1949 Convention restrict their focus to women and girls only, despite the fact that men and boys may also be trafficked and face similar deprivations of liberty.⁴⁰

The separation between anti slavery and anti sexual trafficking initiatives is remarkable, reflecting a pervasive and gendered disjuncture between attitudes to sexual exploitation (which produce indignant outrage) and labour exploitation (much more acceptable) still evident today⁴¹. Furthermore, the few rights provisions in the laws are vague and peripheral, and tend to be optional rather than obligatory on states.⁴² Again, as with the application of children's rights principles, public policy is locked into the typology of the "pure, innocent" female-victim.⁴³

Until the latter part of the 20th century the international legal framework addressing exploitative migration concentrated on the intentions of the traffickers, and attempts to criminalize the practice, rather than on the needs of those trafficked. But as undocumented migration became a contemporary concern of states—and as it became clear that trafficking flows, including large numbers of children, were not leading *out of* but *into* the developed world—so the emphasis shifted and immigration control, exclusion and border security concerns came to predominate. The scope of protection for trafficked persons generally is broader than under the earlier international conventions, but the trafficking of "women and children" is still singled out for particular emphasis. The connection between gender and victimhood persists, and with an implicit assumption that sexual exploitation is the principle evil being targetted. Indeed at the first experts' meeting in 1998 to discuss new international instruments dealing with

⁴⁰ Anti-slavery legislation was being drafted concurrently in international fora—the League of Nations produced the Slavery Convention in 1926, and the United Nations produced the [Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery](#) in 1956—but this was considered a separate issue from trafficking. Despite their now obvious compatibility, neither sphere of legislative activity informed the other (Bruch 2004: 7).

⁴¹ Anti-slavery legislation was being drafted concurrently in international fora—the League of Nations produced the Slavery Convention in 1926, and the United Nations produced the [Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery](#) in 1956—but this was considered a separate issue from trafficking. Despite their now obvious connections, neither sphere of legislative activity informed the other (Bruch 2004: 7). The gender based separation of forced labour is still in evidence today – viz the special preoccupation with trafficking of "women and children".

⁴² The pre-League of Nations instruments suggest that states entrust victims' assistance to "charitable institutions." No mention of what such assistance should entail. The 1949 Convention introduces a few new protection provisions: it allows aliens to participate in proceedings against their traffickers (article 5); forbids states to force prostitutes to register or carry special ID cards (article 6); makes the "temporary care and maintenance" of victims prior to repatriation the state's responsibility (article 19.1); and it calls on states, albeit vaguely, to encourage public and private social services to facilitate prevention and victims' rehabilitation (article 16). This is still very weak as protection goes.

⁴³ Bruch 2004: 4.

transnational organized crime, the instrument on trafficking in persons for exploitation was to be called "trafficking of women and children". This was later amended to a "Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children", a residue of focus on issues that outrage public morality rather than an across the board concern about coercive cross border exploitation. The Protocol, known as the Trafficking Protocol, is one of three protocols to the United Nations Convention against Transnational Organized Crime; it was speedily ratified and is already in force.

The definition of trafficking in the Trafficking Protocol is complex:

Trafficking in persons shall mean 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. 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. ... The consent of a victim of trafficking in persons to the intended exploitation Shall be irrelevant where any of the means set forth [above] have been used. The recruitment, transportation, transfer.... Of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth [above].

Under this definition, any child recruited, transported or harboured "for the purpose of exploitation" is covered since consent is irrelevant, and proof of coercion unnecessary. The difficulty with this definition is that it is focussed on the intention motivating the coercive transport – its purpose - not the current condition or status of the migrant child him or herself. The trafficking definition requires exploitation. However exploitation itself, however, is undefined and the absence of a human rights standard is problematic. Identification of trafficked children still remains a major problem, and one that the international legal framework does little to address.

The trafficking protocol delineates three broad problem solving strategies. These mirror the three key areas of relevant public policy – criminalization of the trafficker (and with it enhanced border control); remedial social protection in the destination states after child trafficking has come to light – including a range of reactive therapeutic and welfare services; and fundamental socio-economic and political restructuring in the state of origin. A brief consideration of these three strategies, and of the resources (economic and political) allocated to implementation suggests why child trafficking continues to increase rather than decrease.

The first is criminalization: The trafficking protocol requires state parties to criminalize the relevant conduct of traffickers, to establish and implement domestic law enforcement mechanisms directed at the traffickers, and to cooperate with other states to strengthen international prevention and punishment of these activities. It makes clear that trafficked

children (like other trafficked persons) should not be subject to criminal prosecution because of their illegal entry. Infact these measures have been unsuccessful sofar. Trafficking convictions have been remarkably low; profitability from child trafficking does not appear to have declined; the pornography and sex industries are unscathed, protected by powerful vested interests and largely beyond the reach of effective law enforcement. The powerful and persistent reach of trafficking networks into home communities of trafficked persons deters potential victims from giving evidence; complicity of state officials, in both home and destination states at all levels of government, from border control officers, to visa issuing departments, to criminal investigation squads, reduces pressure to prosecute; and slow and ineffective collaboration both within states⁴⁴ and between them ensure that the trafficking networks largely operate beyond the reach of law enforcement agents, even where the will to prosecute and convict exists. Taking stock of these defects, states are increasingly experimenting with new institutional structures to respond to the challenges. In the US, for example, a new Center to Eliminate Smuggling and Trafficking in Persons has been established as an inter agency body, with staff drawn from the Department of Homeland Security, the State Department and the Department of Justice. The directorship of this center is held by a senior official from one of these departments (currently DHS) and rotates across departments every 4 years. Similar organizational experiments exist in Europe. While these initiatives do not address the problem of corruption and lack of transparency in enforcement, they do create an institutional basis for more effect intervention.

Second, the trafficking protocol addresses the need for social protection of trafficked persons and provides for a broad range of protective measures. Though the requirements are couched in optional rather than mandatory language ("each state shall consider implementing.... In appropriate cases..."; ".. shall endeavour to provide": "shall consider adopting legislative or other apporprate measures") they establish a useful and facilitatory framework for intervention to enhancing human rights protections for trafficked persons. Article 6(3) in particular reflects the extensive inputs of human rights organizations into the protocol's drafting process. It requires states to consider "implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons"; this includes cooperation with ngos, and provision of housing, counselling, medical psychological and material assistance, employment and training opportunities. It even requires states to consider adopting legislation to enable trafficking victims to remain in their country "temporarily, or permanently, in appropriate cases (art. 7). If domestically enacted, adequately funded and energetically enforced, these measures would constitute significant benefits for trafficked persons. In practice however, supportive resources are scarce and there is little evidence so far of effective intervention. The gendered division of intervention is clearly evident: girls who have been trafficked for sexual exploitation have in some cases been effectively supported,

⁴⁴ The 1996 GAO report on Trafficking in the US documented serious defects in liason between state authorities charged with prosecuting traffickers. [get ref] A study carried out in the UK on the prosecution of trafficking by UK police departments across the country (Liz Kelly, Prosecution of Trafficking, North London Univeristy 2001 – check ref.) arrived at an identical conclusion. EU studies of the impact of anti-trafficking measures indicate a similar lacuna in enforcement.

through fostering programs⁴⁵, rehabilitation schemes and psycho social intervention. The extent to which these measures have impinged on the problem is limited both by the low rate of identification of cases, and by the frequency with which trafficked children once identified are recaptured or drawn into the networks by their exploiters. Stories of menacing cults, of ruthless threats and of other forms of gross intimidation appear in the media with depressing regularity. By contrast, examples of supportive intervention with children trafficked for labour exploitation are virtually non-existent – boys employed in agricultural or industrial production are rarely to be found in rehabilitation programs. Once detected, they tend to be detained⁴⁶, prior to deportation or repatriation back to their countries of origin⁴⁷. Recent evidence from social work organizations in home countries of trafficked children suggests that abusive and pathological family backgrounds, rather than poverty simpliciter, are strongly correlated with likelihood of being trafficked⁴⁸. If this is the case, repatriation is both a rights violative and a counterproductive strategy.

Third, and with most potential in the long term but least effect in the short, the protocol requires states parties to concretely address the root causes of vulnerability to trafficking by "tak[ing] or strengthen[ing] measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity" (art 9(4)). Little progress has been made in implementing these strategies which would require both macro economic development programs, and restructuring of international and national public spending priorities. Benchmarking strategies supervised by joint national and international bodies, policy toolkits that included high level multidisciplinary teams implementing social and economic strategies, investment in educational institutions for children, training of trainers (both teachers and social work agencies), employment generation schemes complemented by fair trade agreements and collective bargaining rights are examples of mechanisms that would address the root causes of vulnerability to sex and labour trafficking, but that do not feature as current political priorities in anti trafficking debates.

CONCLUSION

I have suggested that current government intervention is driven by contradictory goals and impinges little on the problem of child trafficking. However it satisfies politically significant constituencies concerned with the issue. Market driven demand for trafficked

⁴⁵ Midwest Immigrants Rights Center report on intervention with victims of sex trafficking; (check); Observer report on Nigerian sex slaves in UK; European Commission Experts Report on trafficking with EU and work of EU funded NGOs eg STRADA; ECPAT reports.

⁴⁶ See Amnesty International report on Children in Detention; Women's Commission on Refugee Women and Children, Parent or Guard? Immigrant Children in Immigration Custody; Human Rights Watch, Slipping Between the Cracks.

⁴⁷ Recent UK policy towards trafficked Albanian children is a good example of this policy; the US regularly repatriates Mexican and other central American child labourers without investigating their abusive circumstances in the destination or home environment – see Casa Alianza reports; evidence submitted to Senate during debate on Feinstein Bill – Unaccompanied Alien Child Protection Act.

⁴⁸ Corporacion Hogar, Quito, Ecuador; Global Infancia, Asuncion, Paraguay; JUCONI, Guayaquil, Ecuador; International Social Service.

children is satisfied by ineffective controls and feeble sanctions, whilst at the same time calls for immigration control are answered by border fortification and punitive detention policies, sporadic but visible rescue operations and onerous visa requirements.

A rights based policy needs to be janus faced. It needs to aggressively and creatively look inwards and inform the incountry treatment of trafficked children. But it also needs to look outwards and take stock of circumstances in countries of origin and transit, so that the exclusion or deportation policies adopted by the destination state do not lead to foreseeable human rights violations abroad⁴⁹.

What would the domestic policies informed by such a rights based approach to child trafficking look like? The international norms outlined above, derived from human rights law, labour law and international criminal law provide a useful and realistic framework. At a minimum, domestic policies should include diligent and energetic enforcement of health and safety and other labour standards in work place, so that a far greater proportion of child slavery and slavery like situations, affecting both boys and girls, are detected. Domestic policies should also be directed at the goal of strengthening the position of trafficked children against their exploiters. These children should have exit strategies from exploitative relationships which do not confront them with the catch 22 of detention, “moral reeducation” or deportation. Most trafficked children qualify for refugee status given the risks of retrafficking following repatriation. So, where appropriate, they should be afforded legal representation to enable them to apply for this status; eventually, once granted refugee status, they would be eligible to seek family reunification, within the state of refuge, for immediate relatives where this was possible and appropriate. At a minimum, states need to be compelled by their electorates to adopt rights based policies that are non discriminatory, that recognize the fundamental entitlements to basic protections of all children within their jurisdiction irrespective of gender, nationality or immigration status.

The links between gross exploitation of trafficked children and current migration and labour policies could be made explicit by subjecting these policies to a human rights audit. This audit would provide pointers that would reveal the relation between the militarization of certain parts of borders and the increase in fatalities and extreme violations (clandestine entry, hidden child labour throughout sections of the service and informal economy). It would also highlight the gendered assumptions that drive both the commodification of children, and the legal responses to it. On the positive side, a human rights audit of an enabling set of policies which increased vulnerable populations' control over their own resources and choices might impinge on the factors that contribute to child trafficking. Addressing the proliferation of child trafficking by compromising an exclusionary immigration policy will only become politically feasible when the silent complicity supporting migrant child labour is ended. The demand for these gendered chattels has to be the prime target of an effective rights enhancing policy. And it would

⁴⁹ International courts have established conclusively that states are responsible for human rights violations committed outside their jurisdiction on deportee, where the deporting state could have foreseen the violations, see *Soering v UK* (1989) 11 EHRR 439; *Ng v Canada*, Human Rights Committee Communication No. 469/1991, 5 November 1993.

seem to be a necessary preoccupation for politicians and opinion leaders concerned to advance freedom, democracy and a public space of basic civility. More than what is owed to others, such a policy is a demand we place on ourselves, a set of necessary conditions for the decency of our own society.