

anti trafficking review

Special Issue - Trafficking in Minors

Editorial: Trafficking in Minors: Confronting complex realities, structural inequalities, and agency

Thematic Articles

Between Theory and Reality: The challenge of distinguishing between trafficked children and independent child migrants

Putting Childhood in Its Place: Rethinking popular discourses on the conceptualisation of child trafficking in Ghana

'Why Was He Videoing Us?': The ethics and politics of audio-visual propaganda in child trafficking and human trafficking campaigns

Child Trafficking vs. Child Sexual Exploitation: Critical reflection on the UK media reports

'Little Rascals' or Not-So-Ideal-Victims: Dealing with minors trafficked for exploitation in criminal activities in the Netherlands

Ganged Up On: How the US immigration system penalises and fails to protect Central American minors who are trafficked for criminal activity by gangs

Commercial Gestational Surrogacy: Unravelling the threads between reproductive tourism and child trafficking

Short Articles

The Perfect Victim: 'Young girls', domestic trafficking, and anti-prostitution politics in Canada

Online Child Sexual Exploitation in the Philippines: Moving beyond the current discourse and approach

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ANTI-TRAFFICKING REVIEW

Special Issue

TRAFFICKING IN MINORS

Issue 16, April 2021

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The *Review* is primarily an e-journal, published biannually. The journal presents rigorously considered, peer-reviewed material in clear English. Each issue relates to an emerging or overlooked theme in the field of anti-trafficking.

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Editorial: Trafficking in Minors: Confronting complex realities, structural inequalities, and agency

Brenda Oude Breuil and Borislav Gerasimov

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On the tenth anniversary of the *Anti-Trafficking Review*, and with 2021 proclaimed the International Year for the Elimination of Child Labour,¹ this Special Issue on 'Trafficking in Minors' is well-timed. You might even say it comes a bit late, considering the topic's central place in the representation of human trafficking, which is in itself an urgent matter that has been widely discussed in previous issues of the journal. If there is one topic in the trafficking discourse that evokes particularly emotional outrage and a passionate, oftentimes moralistic 'call to arms', it is child trafficking. Without becoming cynical about many doubtlessly well-intentioned actions to protect children from being victimised, some critique is needed here. One only has to enter 'child trafficking' into an internet search engine and watch the images generated—big, innocent eyes looking straight into the camera in silent protest; small bodies curled up in helpless, foetal positions; hands protectively held up to block invisible evils; and faces distorted in expressions of agony and fear, with mouths covered by tape with 'Help' written on it, or by adult hands—to understand that stereotypical and symbolic depictions of children are oftentimes (ab)used to raise the stakes. Children are currency in political praxis and public discourses, as they symbolise the continuity of communities, feelings of 'home' and belonging, and that which is most valuable in people's lives. If children are maltreated, it feels as if the communities they belong to are endangered, too.

¹ United Nations General Assembly, Resolution adopted by the General Assembly on 25 July 2019, A/RES/73/327; see also 'International Year for the Elimination of Child Labour', retrieved 19 March 2021, <https://endchildlabour2021.org>.

The affective appeal and political currency of the topic of trafficking in minors—and the related issue of child labour—do not do a great service to the empirical study of the phenomenon. With the emotional stakes so high, academic and non-academic researchers, as well as civil society actors and policymakers, are quickly drawn into (or unwillingly ascribed) polarised positions, perceived as either serving the ‘abolitionists’ (claiming, *tout court*, that child trafficking should be eradicated), or being ‘liberal relativists’ (assumed to relativise child trafficking and child labour as cultural practices that one should try to understand). This polarisation clouds observation and analysis as well as actions evolving from them in many ways, as illustrated by the contributions in this Special Issue.

A first challenge in the study of trafficking in minors is *studying it at all*. Notwithstanding its central position in (social) media representations of human trafficking and the fact that children account for around one-third of all identified victims globally,² its empirical, academic study leaves much ground to be explored. There is a respectable pile of NGO reports on the phenomenon, but they often lack academic rigour and are just as often part of the ‘politics of trafficking’ (and what Laura Agustín aptly labelled ‘the rescue industry’³). Moreover, research on trafficking for sexual exploitation is, in the broader trafficking study field, overrepresented and overshadows other forms of trafficking in minors, such as trafficking for forced labour or exploitation in criminal activities. In this Special Issue we have thus prioritised articles that are based on empirical studies—over, for example, literature studies or (quantitative) country reviews—and focus on these other, less studied forms of trafficking. Notwithstanding the explicit invitation to empirical researchers in the call for papers, methodologically sound, in-depth, empirical studies on trafficking in minors were in the minority. This need not surprise us. Research on (and with) minors, so caught up in a discourse of vulnerability and protection, is methodologically challenging. The group of victimised minors, as well as that of potential traffickers, is hard to access and researchers often resort to approaching minors through the organisations protecting them—with a biased group of respondents as a result. Moreover, ethical requirements in some countries—sometimes more concerned with protecting the research organisations’ names than protecting minors against potential research harms⁴—make empirical research among (potentially) victimised minors *without* the mediating interference of child protection organisations next to impossible.

² UNODC, *Global Report on Trafficking in Persons 2020*, United Nations, Vienna, 2021.

³ L M Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry*, Zed Books, London, 2007.

⁴ See D Siegel and R de Wildt, *Ethical Concerns in Research on Human Trafficking*, Springer, London, 2016, in particular part III (Boyd and Bales; Marcus and Curtis; Horning and Paladino) and part I, chapter 6 (Zhang).

A second challenge in researching trafficking in minors is to critically address *socio-economic and political root causes and structural inequalities* through this jungle of politicised discourse, stereotypical imaginations, sweeping numbers, unverified claims, and ‘quick-fix’, repressive solutions. Inequalities hamper the research on two (and possibly more) levels. On the one hand, macro-level, geopolitical inequalities are not only at the basis of the phenomenon—with the demand for trafficked minors going, typically, ‘from the West to the Rest’ and the supply vice versa—but also hinder in-depth understanding of it. With the ‘Global North’ still dictating the research agenda, the theoretical framework, and the normative starting points and means to address it, local understandings of the processes behind trafficking in minors are often ignored. As we can see in the contributions of, for example, Koomson and Abdulai, Dottridge, and Okyere, Agyeman and Saboro in this Special Issue, this carries the risk of producing superficial understandings of the phenomenon that *create harm*, rather than improving victimised minors’ (and their parents’ or guardians’) living conditions.

On the other hand, *micro-level inequalities* hamper research as well, with minors generally finding themselves in a subordinate position vis-à-vis adults. The own, insiders’ accounts of trafficked minors are often missing in academic studies due to the aforementioned methodological and ethical challenges of involving them in such studies. Trafficked minors are legally defined as incapable of making informed decisions at all, and policies aimed at addressing their living conditions and the protection they should receive are mostly failing to take their expert knowledge into account. Anti-trafficking policies may, furthermore, reflect and exacerbate existing gender inequalities, as Durisin and van der Meulen and Oude Breuil discuss in this issue. We were able to address the lack of minors’ voices in trafficking studies and policies only to a limited extent, with their perspectives being voiced in the contributions of Koomson and Abdulai, and of Soltis and Taylor Diaz. The lack of academic articles departing from minors’ own perspectives may, we hope, be taken as an invitation or, rather, an urgent call, for future researchers to take up this challenge and inventively apply qualitative, participatory, visual, and virtual methods to study trafficking in minors through the minors’ own eyes.

A third challenge in the study of and approach to trafficking in minors is to address *new developments* in this field, as well as existing aspects of the phenomenon that take a different meaning in contemporary conditions. To pick just a few random recent examples: the (sensationally mediatised) concerns about ‘missing children’ in the so-called ‘refugee crisis’ in Europe, and accompanying suggestions that they have become victims of child trafficking;⁵ the prevalent use of social media

⁵ See, for instance, No author, ‘Migrant Crisis: More than 10,000 children “missing”’, *BBC*, 31 January 2016, retrieved 25 March 2021, <https://www.bbc.com/news/world-europe-35453589>.

by minors all over the world and the potential new risks of exploitation this may evoke (as well as the climate of moral panic among adults about youths' internet behaviour);⁶ or the recently experienced difficulties of prospective parents to pick up their newborns of surrogate mothers in foreign countries without being charged with 'child trafficking'—as well as further dramatic developments in this field due to closed borders in pandemic times.⁷ Such developments need our attention: be it to distinguish 'real' issues from media-induced moral panics, and 'trafficking in minors' from other, related but distinct phenomena, or to gain in-depth understanding of the exploitative processes at work. In this Special Issue we have therefore included an insightful contribution by Hyder-Rahman on conceptual complexities of the label 'child trafficking' in the phenomenon of reproductive tourism, and a short article by Gill focusing on Philippine youths' involvement in producing online sexual content in order to contribute to their own or their families' income.

A fourth and final challenge concerns not so much our knowledge on trafficking in minors, but our *response* to it. From existing studies on approaching trafficked minors, we can distil seven principles that should be adhered to in order for an intervention to be successful: the intervention should start from a human rights (rather than a criminal law) perspective, it should be child-focused, culturally sensitive, aimed at addressing root causes, based on sufficient knowledge of the phenomenon among all involved parties, integral (that is, involving collaboration of different institutions in the field of child protection as well as law enforcement, adhering to the aforementioned principles), and transnationally oriented.⁸

Undoubtedly, adhering to all these principles is a complex undertaking. The contributions in this Special Issue elaborate on some of the challenges. Several contributions confirm the need to step away from merely criminal law-focused interventions, and emphasise the need to address structural root causes linked to the migration and work of minors (for example those by Dottridge or Okyere, Agyeman, and Saboro). They also show that the criminal law perspective and

⁶ See, for instance, L Lamberink, 'Internet Child Exploitation Sees "Drastic Increase" in Yukon: RCMP', *MSN*, 24 March 2021, <https://www.msn.com/en-ca/news/canada/internet-child-exploitation-sees-drastic-increase-in-yukon-rcmp/ar-BB1eUM6w>.

⁷ See, for instance, A Wipatayotin, 'Surrogate Babies Stranded by Covid', *Bangkok Post*, 30 January 2021, <https://www.bangkokpost.com/thailand/general/2059463/surrogate-babies-stranded-by-covid>.

⁸ These seven principles are retrieved from a systematic literature study conducted by the author, in A Bos, K Loyens, V Nagy and B Oude Breuil, *Uitbuiting van Minderjarigen in de Criminaliteit in Nederland*, Utrecht University, Utrecht, 2016. The weak point here is that these studies generally pinpoint what *should* work, based on literature and on 'bad examples' from practice, but it has not (always) been substantiated by evidence on what *does* work.

approach may be counterproductive, especially in cases where what is termed ‘trafficking’ but is, in fact, children’s work away from home, is part of family subsistence strategies. Other contributions (such as those by Krsmanovic and Oude Breuil) show the differences in governments’ treatment of their own citizens versus migrants and point out that existing intervention strategies often take as a starting point the living conditions of white citizens and, thus, do not work out well for minors belonging to mobile, racialised or ethnic minority groups. This results in social assistance interventions for the former and criminal law interventions for the latter, furthering criminalisation and stigmatisation of migrant and/or non-white families. Similarly, the contribution of Soltis and Taylor Diaz highlights the inhumane treatment of migrant children by immigration authorities even when their exploitation has been recognised.

We hope that the articles featured here will provide new evidence and food for thought about trafficking in minors and the responses to it. As the International Year for the Elimination of Child Labour progresses, we also hope they will contribute to the existing calls to better understand what exactly needs to be eliminated and how.⁹

This Special Issue

The issue opens with an article by **Mike Dottridge** who reviews the development of policies and interventions against child trafficking in three countries—Benin, Vietnam, and the United Kingdom. Based on his decades of experience in the anti-trafficking field, Dottridge argues that these (and many other) countries fail to adequately distinguish between the crime of child trafficking and adolescents’ independent migration for work. He suggests that this is, at least in part, because there is no internationally accepted understanding about the age at which children habitually start engaging in work, including away from home. This leads to authorities in different countries applying very general assumptions—for example, that all *vidomègon* in Benin or all undocumented Vietnamese children working illegally in the UK have been trafficked. He concludes that states should recognise that for some children it may be beneficial to migrate and start earning before they turn 18, and prioritise economic and social measures in order to address patterns of migration and exploitation.

⁹ No author, ‘Open Letter: Change course on the International Year for the Elimination of Child Labour’, *OpenDemocracy*, 27 January 2021, <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/open-letter-change-course-international-year-elimination-child-labour>.

The next article, by **Bernard Koomson and Dawuda Abdulai**, also examines the importance of local understandings of childhood, but in the context of fishing communities on Lake Volta in Ghana. Based on empirical research among working children, their parents, and key informants, they demonstrate that the community's conceptualisation of a child is most commonly as someone below the age of 13. Consequently, the participation of children above 13 in fishing, including while away from home, is seen by the community as work socialisation and a way to assist the children's families—not as crime, as prescribed by Ghana's *Human Trafficking Act*. The authors call for the consideration of a *social age* category within existing child rights and human trafficking laws in Ghana: this would help shift the focus of anti-trafficking interventions away from an abolitionist agenda and towards a protectionist one that reduces the risk of harm for children rather than removing them completely from specific economic activities, as has been the normal practice.

The community's perceptions of abolitionist interventions are highlighted in the next article, by **Sam Okyere, Nana K Agyeman and Emmanuel Saboro**. The authors analyse campaigns against child trafficking in Ghana and, more specifically, those utilising videos recorded during anti-child trafficking raids on Lake Volta. Their analysis is based on data from eighteen interviews with families of children who were taken during raids, as well as with other community members. The authors describe the shock and grief experienced by the children's families who felt that their children were 'stolen' from them by the NGOs and police who conducted the raids. The community also thought they were grossly misrepresented and stigmatised in NGO campaigns depicting them as forcing their children into trafficking and 'slavery'. Okyere, Agyeman, and Saboro argue that this is part of a broader trend in campaigns against human trafficking and child trafficking of using unsettling images and videos of poverty and abjection to raise funds. Despite some recent progress and recognition in the field that such representations can be extremely problematic, they argue that there is little incentive for NGOs to change their ways because these representations continue to capture the attention of audiences—and the dollars of donors.

Continuing the theme of representations of child trafficking, the article by **Elena Krsmanovic** discusses how media in the United Kingdom portray the sexual exploitation of British children differently from that of non-British trafficked minors. Based on an analysis of 151 media articles, Krsmanovic argues that the former regurgitate the 'white slavery' myth and stigmatise particular ethnic communities in the country, while the latter problematise primarily the presence of foreign criminals and foreign minors in the country. Furthermore, while the articles about British minors emphasise the need for stronger child welfare and victim support services, reports about trafficked foreign minors only promote harsher policing and prosecution of traffickers as the solution. This differential treatment of the problem, the author suggests, presents a distorted picture and hinders the development of effective strategies to combat it.

The presentation of child trafficking as a problem typical of certain ethnic communities is also evident in the article by **Brenda Oude Breuil**. She examines the less well-known form of child trafficking for exploitation in criminal activities in the Netherlands and finds that such cases are conceptualised by frontline actors as a ‘Roma problem’, leading to blind spots in the identification of trafficking cases among other ethnicities. Itinerant groups, more often than not collectively labelled as ‘Roma’, are further criminalised in the process. Another perception bias was found in the acknowledgement of girls and boys as victims to this crime: frontline actors were more inclined to grant victim status to girls, seeing boys as guilty ‘little rascals’ who should be punished. Oude Breuil concludes with a call to identify cases of trafficking of minors for exploitation in criminal activities through a focus on the characteristics of the *phenomenon*, rather than of the *victims*, to prevent further stigmatisation, and to consider whether a criminal justice approach is in the best interest of the child in cases where minors’ criminal activities directly benefit family survival strategies.

The next article, by **Katherine Soltis and Madeline Taylor Diaz**, also focuses on child trafficking for exploitation in criminal activities but in the context of the United States. Based on their experience of working in a non-profit organisation that provides legal assistance to migrants and victims of trafficking, the authors highlight the failure of the US immigration system to protect Central American minors exploited for criminal activities by gangs. They provide an overview of the hurdles their clients have to go through to obtain immigration relief, which had only become more cumbersome under the Trump administration. This is part of the broader trend, in the US and elsewhere, towards ‘crimmigration’ and in contravention to the US government’s obligations under the UN Refugee Convention and the domestic *Trafficking Victims Protection Act*. The authors recommend the incorporation of principles regarding the capacity of minors and the culpability of trafficking victims into the immigration system, in order to ensure that trafficked minors receive the protection they are entitled to.

While these six articles revolve primarily around the issue of child trafficking in the context of migration and work, the final thematic article addresses a different, but equally important and controversial issue. **Nishat Hyder-Rahman** disentangles the sometimes overlapping but nonetheless distinct issues of commercial gestational surrogacy (CGS) and child trafficking. Through meticulous analysis of international law, she explores the intersections between CGS, the sale of children, and child trafficking vis-à-vis the child and demonstrates that anti-trafficking legislation is not an appropriate response to CGS or ‘reproductive tourism’, despite the attempts of several countries to conflate the two. She emphasises that CGS is about building families, while child trafficking is about exploiting a child, and labelling CGS as ‘child trafficking’ unnecessarily punishes all parties—the child, the intended parents, and the surrogate. She concludes that CGS requires carefully crafted laws that attend to the particular

vulnerabilities of each party and prevent exploitative practices—measures that go beyond the remit of human trafficking laws.

As outlined above, we prioritised the inclusion of conceptual and empirical articles on child trafficking in the context of migration and labour, as well as lesser-known forms (such as exploitation in criminal activities) and emerging issues (such as reproductive tourism) over child trafficking for sexual exploitation. However, we decided to accept two short articles, both of which deal in some way with children in the sex industry, to address this gap, but also because of the important and original perspectives they take.

In the first short article, **Elya M Durisin and Emily van der Meulen** discuss how recent concerns about human trafficking in Canada have shifted from a preoccupation with Eastern European women towards the sexual exploitation of Canadian girls and young women. Through a brief review of statements made during the parliamentary debates on the *Anti-Human Trafficking Act*, 2017, they show how policymakers' declared concerns about the sexual exploitation of 'young girls' become superimposed on adult women. The authors argue that this infantilises women and legitimises the criminalisation of consensual adult sex work, which has been shown to negatively affect sex workers.

In the other short article, **Melinda Gill** focuses on the problem of online child sexual exploitation (OCSE) in the Philippines. This issue is typically seen as situations where children are forced to create sexual content online by family members or other adults, and the state has responded with awareness-raising campaigns and spectacular raids. However, more recent evidence shows that in many cases children engage in such activities on their own or with the help of peers, making these government responses miss the point. Like Dottridge, and Koomson and Abdulai, Gill's article evokes further reflection on the delicate interplay between the agency of minors and their exploitation (and eventual harm). On the policy level, Gill proposes to address OCSE through long-term interventions, which reduce poverty, improve educational and employment opportunities, and strengthen access to sexual and reproductive health education for both girls and boys, as well as their families.

Conclusion

One common thread in the contributions in this Special Issue is that the legal definition of trafficking in minors—and, by extension, the approaches to victimised minors that follow from this legal categorisation—is oftentimes a black-and-white simplification of complex realities. There is a plethora of exploitative situations children can find themselves in, and they exhibit different degrees of agency in those situations, depending on social, economic, political, cultural, and individual conditions in their lives. If the contributions in this Special Issue can

teach us one thing, it is that we need to consider these contextual factors carefully to be able to understand, in-depth, the suffering of individual minors from the exploitation they encounter in their lives, and how they deal with it, as well as how to best address it. The ‘fight’ against trafficking in minors (and, relatedly, child labour) must not be seen in isolation from larger socio-economic and political issues related to development, access to education, healthcare, decent work and social protections, or discrimination based on race, gender, ethnicity, class, caste, etc. Thus, we have to critically observe and continue to question whether proposed legislation, policies, or interventions *truly* address these root causes and have the best interest of minors at heart or, rather, aim primarily at protecting rich nations and their citizens from the insecurities these minors confront them with.

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Thematic Articles: Trafficking in Minors

Between Theory and Reality: The challenge of distinguishing between trafficked children and independent child migrants

Mike Dottridge

Abstract

The offence of child trafficking appears to have a clear definition in the UN Trafficking Protocol and in laws based on it. In practice, this is an illusion. This article reviews the experiences of three countries (Benin, the United Kingdom, and Vietnam), in two of which anti-trafficking laws and policies regard a broad swath of children who migrate to earn a living, without being subjected to coercion, as victims of trafficking. It questions whether the definitions in international law and in the laws of many countries of what constitutes the crime of trafficking committed against a child are appropriate to distinguish between adolescent migrants in general and those who are victims of crime (at the hands of a trafficker) in particular. It suggests that this is in part because there is no international understanding about the ages at which children habitually leave home to find work and what should be done to protect them when they do. It concludes that a possible result of considering a very broad range of children to be ‘trafficked’ is that measures to protect and assist those who suffer acute harm are inadequate.

Keywords: child trafficking, independent child migrants, child domestic work, *vidomègon*, cannabis cultivation

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Introduction

In November 2000, the United Nations (UN) adopted a convention and three protocols intended to facilitate action against transnational organised crime, including a protocol on human trafficking and another on helping migrants cross borders illicitly ('migrant smuggling'). Notwithstanding that international legal framework and its inclusion in national laws, governments, non-governmental organisations (NGOs) and the collective 'international community' have difficulty in coming to terms with the rights and needs of adolescents who work away from home, either in their own country or after crossing international borders. Although a vast proportion of the world's children start work before reaching adulthood, their rights at work are often poorly defined and the extra protection needed by those working away from home (by themselves) are scarcely recognised—mainly because of an assumption that children should be able to grow up with their parents and attend school until they reach adulthood. This assumption is exacerbated by the negative attitude of politicians in wealthier countries towards undocumented migrants from poorer countries, which denies the legitimacy of their efforts to migrate and earn a living. It labels independent child migrants as 'unaccompanied children' who require 'protection', meaning that they are likely to be prevented from earning money, even if they want to.

The information presented here about child migrants and trafficked children focuses on the experiences of three countries (Benin,¹ the United Kingdom and Vietnam), in two of which anti-trafficking laws and policies have come to regard a broad swath of children who migrate to earn a living, without being coerced, as victims of trafficking. In the first case (Benin), most of the children concerned are girls who work away from home in their own country, while in the second (Vietnamese children who travel to the UK), most are boys. The data was gathered over a quarter century, partly in the course of monitoring the effects of projects designed to stop human trafficking (in Benin and Vietnam) and also from secondary sources. The author visited Benin several times in the 1990s and between 2005 and 2010 to observe or evaluate the efforts of NGOs trying to prevent child trafficking. He visited Vietnam twice for the purpose of evaluating regional anti-trafficking programmes and was subsequently involved in compiling a bibliography of publications about human trafficking in the country. While developing methods for monitoring official responses to human trafficking, he has monitored publicly available information about Vietnamese adolescents involved in undocumented migration to the United Kingdom (UK).

¹ The references to 'Benin' in this article are all to the Republic of Benin in West Africa, not to the city of Benin in neighbouring Nigeria, which is also the place of origin of substantial numbers of trafficked women as well as girls.

This article explores whether the definitions in international and national laws of what constitutes the crime of trafficking committed against a child are appropriate and adequate to distinguish between adolescent migrants in general and those who are victims of crime (at the hands of a trafficker) in particular. I argue that they are flawed and that there is a virtually unbridgeable gap between the international consensus about when children can work away from home and the reality lived by millions of children.² Categorising adolescent children who migrate to earn money away from home as victims of a criminal activity (“trafficking”) is probably not an appropriate way of addressing large-scale migration. Moreover, inconsistencies exist in the way that national definitions of the crime of human trafficking are applied, both for prevention and protection purposes.

The Theoretical Framework: International and national law

The internationally recognised legal definition of trafficking in persons is in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (2000). It defines the crime of trafficking in cases involving adults in terms of a set of actions (such as recruitment or receipt of a person) and a set of abusive means used to achieve these actions (such as the threat or use of force), all carried out for the purpose of certain forms of exploitation. The Protocol lists categories of exploitation that countries ratifying it are expected to identify as purposes of trafficking, such as the exploitation of the prostitution of others, forced labour, and practices similar to slavery. It also allows for other types of exploitation to be added.

In the case of anyone under 18 years, the Protocol modifies the way the crime is defined, saying there is no need for abusive means to be used, for example when recruiting a child, for it to be considered a trafficking offence. In short, as far as children are concerned, the UN Trafficking Protocol defines as a trafficking offence any situation in which a young person is recruited, transported, transferred, harboured or received for the purpose of exploitation, whether the recruitment involves luring or abducting a child or the child is recruited

² The International Labour Organization’s published estimates of the number of children in child labour indicate that in 2016 there were 152 million child labourers in the world, with almost half in ‘worst forms’ of child labour and more than four million reported in forced labour (ILO, *Global Estimates of Child Labour: Results and trends 2012-16*, Geneva, 2017). The ILO’s review of trends since 2000 suggests that, if the pace of the reductions achieved between 2012 and 2016 is maintained, by 2025 there will still be 121 million child labourers (ILO, *Ending Child Labour by 2025: A review of policies and programmes. Executive summary*, Geneva, 2018).

voluntarily. If a child is recruited or moved with their agreement, the key distinction between a case of trafficking and one of recruitment into acceptable employment focuses on the nature of the young person's subsequent experience at work or while being exploited: whether the child is (or is intended to be) subjected to one of the forms of exploitation listed by the Protocol. Some of these, such as forced labour, are not defined clearly when it comes to children.³

Complex Realities

In Europe and elsewhere, it was apparent before the year 2000 that children were being moved between and within countries for a variety of exploitative purposes (so, under the definition in the new Protocol, they were being trafficked). Nevertheless, legislators, policymakers, police, prosecutors, and childcare professionals all assumed, initially, that trafficking in children chiefly involved recruiting girls to make money from engaging in commercial sex. In practice, other exploitative purposes included begging, pickpocketing, and working in what the International Labour Conference labelled 'worst forms of child labour' (in ILO Convention No. 182, 1999). Some earned money for their parents and others handed their earnings to someone else. The diversity of the licit or illicit ways in which children earned money brought assumptions made by officials into question. Nevertheless, for many years officials around the world continued to regard the children who were involved in these activities as criminals, rather than victims of crime. For example, prior to 2003, officials in Greece detained Albanian children who were found begging for money in public, perceiving them to be in Greece illegally, causing a public nuisance, and committing other offences.⁴

A common pattern was that national authorities acknowledged that children who were their own nationals were trafficked and exploited overseas but were reluctant to acknowledge that foreign children were trafficked into their country,

³ An additional complication concerns the age at which a child is recruited, for international standards stress the importance of each country specifying a minimum age for entry into employment (set at 14, 15 or 16 years). Although the ILO intimated in 2009 that recruiting children to work before the minimum age should be regarded as 'trafficking', this is not part of the UN Protocol's definition of child trafficking (see ILO, UNICEF and UN.GIFT, *Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation*, Textbook 1: Understanding child trafficking, 2009). Further, public opinion and law enforcement agencies in many developing countries do not accord the same importance to respecting the minimum age set by national law and international conventions, which international organisations are bound to use as their point of reference.

⁴ Terre des Hommes Foundation, *The Trafficking of Albanian Children in Greece*, Lausanne, 2003.

or that children were being trafficked within the borders of their own country. For example, the Vietnamese authorities expressed concern that Vietnamese girls and women who married foreigners were victims of trafficking. They were also concerned about adolescent Vietnamese girls in brothels in neighbouring Cambodia at the beginning of the century. However, they did not regard Cambodian children who were brought to beg in Ho Chi Minh City as ‘trafficked’.⁵ Although perceptions of what ‘trafficking’ involves have changed in Vietnam in the past decade, law enforcement officials and policymakers there (as elsewhere) have found it difficult to assess which children should be viewed as ‘trafficked’ and what, if anything, should be done about them.

How Three Countries Have Defined Cases of Child Trafficking

The Republic of Benin (West Africa)

The Republic of Benin acquired notoriety as a source of trafficked children in April 2001, only months after the UN Trafficking Protocol was adopted. A ship carrying undocumented West African migrants, including dozens of children, to oil-rich Gabon was turned back by the Gabonese authorities. When nothing was heard from the ship subsequently, media speculated that it had disappeared and that ‘child slaves’ on board might have been thrown overboard. This apparent disappearance occurred only a few months after a television documentary shown in the UK reported that child migrants were being subjected to slavery on cocoa farms in Côte d’Ivoire, so a British government minister suggested (mistakenly) that the children on the *Etireno* were destined to work on cocoa farms.⁶ When the ship arrived back at its port of departure, Cotonou in Benin, 43 children disembarked: 23 were aged between five and 14, while 17 were older boys.⁷ All were referred for assistance to local NGOs. Western journalists reported that there were fewer children than expected and they did not look like slaves.

Under pressure from donors and international organisations from 2001 onwards, Benin adopted a series of laws on child trafficking, though none has been based on local assessments of what constitutes unacceptable forms of work for children. Consequently, when cases of severe maltreatment of child workers

⁵ F M David, A Gallagher, P Holmes and A Moskowitz, *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region*, ASEAN Secretariat, Jakarta, 2011.

⁶ C Harman, *A Bar Too Far - Chocolate and child slavery*, Just Food, 20 April 2001, retrieved 6 January 2020, https://www.just-food.com/analysis/a-bar-too-far-chocolate-and-child-slavery_id93799.aspx.

⁷ M Dottridge, *Kids as Commodities? Child trafficking and what to do about it*, Terre des Hommes, Geneva, 2003, p. 17.

were revealed, the term ‘trafficking’ was invoked to accuse those who recruited children and found them jobs of being criminals, rather than concentrate on changing the behaviour of employers (in the case of child domestic workers) and the views of the general public on what is or is not acceptable treatment of an adolescent or younger working child. In a developing region where hundreds of thousands (possibly millions) of children leave home each year to earn a living elsewhere, the concept of ‘migrant smuggling’ has not been helpful, for in this region with international borders separating people belonging to the same ethnic group, it is not necessarily crossing an international border that puts a young migrant at greater risk of being exploited or abused.⁸

One consequence of the Trafficking Protocol was that some donors initiated programmes on the assumption that *all* independent child migrants were victims of traffickers and that those responsible for helping them travel safely or employing them should be prosecuted. This approach may have had good intentions (to stop children living and working in abusive situations). However, it was largely counterproductive for many of the children concerned. By failing to distinguish between children who wanted to earn their living and who were working in tolerable circumstances, on the one hand, and those who were being badly treated or subjected to cruel, inhuman, or degrading treatment (and who were in urgent need of protection), on the other, donors and the international agencies they supported may have actually increased the amount of suffering that occurred.

The different concepts of child migration and child trafficking were more confused in Benin than in many other countries. In the southern part of Benin, girls as young as ten routinely left home to provide assistance in another household. This practice was known as *vidomègon*, and was regarded as legitimate by local people, even though some children were treated as skivvies by their employers. The abuse of child domestic workers who ‘live-in’ with their employers began to be documented systematically in the 1990s in Benin, along with neighbouring Nigeria and Togo and countries to which children from Benin were taken to work, such as Gabon. Researchers noted that each year, many hundreds of children from Benin were taken across the sea to work for West African households in Gabon, often in dangerous conditions in open canoes.⁹ When the first findings of research concerning foreign-born working children in Gabon were published in 2000, all 133 West African girls and one boy

⁸ Such divisions are also found in other regions, for example dividing a single ethnic community between Bangladesh and India.

⁹ See A F Adihou, *Résumé du Rapport Final sur le Trafic des Enfants entre le Bénin et le Gabon*, Anti-Slavery International and Enfants solidaires d’Afrique et du monde (ESAM), 2000.

who were interviewed in Gabon were described as ‘trafiquées’.¹⁰

In 2003, a further child trafficking scandal engulfed Benin when 261 children from Benin were found working in a gravel quarry outside the city of Abeokuta in neighbouring Nigeria. The Nigerian authorities said they had been ‘trafficked’ and repatriated them amidst much publicity. However, it turned out that 26 of those returned to Benin as ‘children’ were actually young adults aged over 18, while 48 others were aged 16 or 17 (old enough to be legally employed, even if quarry work was regarded as inappropriate work for young people of their age). None of these 74 young people was offered the option of remaining in Nigeria and continuing to work there, despite a regional treaty recognising their right to do so. They were bundled out of Nigeria along with the younger children found alongside them. Soon after they reached home, some of the repatriated children were observed to leave again, apparently determined to continue their quest for an income elsewhere.¹¹

These events in Benin prompted two different responses. At regional level in West Africa, a group of NGOs and international organisations decided to collect fuller information about independent child migrants in the region and to identify better ways of describing their situation and protecting them, rather than assuming they were being trafficked. This took several years and a great deal of discussion among the organisations involved.¹²

At national level in Benin, the authorities came under pressure from abroad, notably from the United States (US) and the European Union, to adopt a new law to punish traffickers. In theory, Benin’s authorities could have found out what sorts of work the general public thought were acceptable for children to engage in when they left home, and a new law could have focused on the forms of ill-treatment and exploitation that the public regarded as unacceptable, or on jobs that caused children particular harm. This option would have required the authorities to assert their independence with respect to influential donors

¹⁰ This was translated incorrectly into English as ‘trafficked’, although the French term refers to people who are ‘smuggled’; ‘traite’ is the correct translation of human trafficking as defined in the UN Trafficking Protocol. However, this usage and error were common in West Africa and other regions prior to 2000.

¹¹ O Feneyrol, *Les Petites Mains des Carrières de Pierres. Enquête sur un trafic d’enfants entre le Bénin et le Nigéria*, Terre des Hommes Foundation, 2005.

¹² The resulting report contains detailed information on popular perceptions of children working away from home in West Africa and what can be done to protect and support them. See O Feneyrol, *Quelle Protection pour les Enfants Concernés par la Mobilité en Afrique de l’Ouest et du Centre? Nos positions et recommandations*, Projet régional commun d’étude sur les mobilités des enfants et des jeunes en Afrique de l’Ouest: African Movement of Working Children and Youth, ENDA Jeunesse Action, ILO, IOM, Plan International, Save the Children, Terre des Hommes and UNICEF, Dakar, 2011.

and powerful countries, such as the US which had adopted its own law against trafficking in persons in 2000, requiring the US government to assess annually whether other countries were taking adequate action to stop trafficking in persons. Regrettably, but not surprisingly, Benin's legislators took a second option, using the wording from definitions offered by UN organisations and adopting measures which satisfied the demands of donors, even though these were unlikely to be implemented. In 2006, Benin adopted a law to stop anyone under 18 from moving away from home without an official permit (Law 2006-04 concerning the Movement of Minors and the Suppression of Child Trafficking in Benin). This introduced a very broad definition of a child trafficking victim as 'any child migrant who is not attending school and who is living in a household without his/her own parents or guardian and who has been brought there by someone who made a profit', that is to say, including independent child migrants who were assisted in finding a job by a person who was remunerated for their services, regardless of whether the child and their parents found these services helpful. It also introduced a permit system which was difficult for ordinary people to use.¹³

A study published in 2007 by Benin's Ministry of Family and Children and UNICEF estimated that over 40,000 Beninese children were 'victims of trafficking' according to the new (2006) law and that each year almost 15,000 children were trafficked.¹⁴ The implication was that a massive two percent of the country's children were in the hands of criminals, even though the employment of children as live-in domestics and in many other jobs was widely regarded as acceptable. The estimate of 40,000 was repeated by the media and in international conferences for most of the following decade.¹⁵

The 2007 study noted that just 2,066 children out of 40,000 were 'moved by a broker' while the 38,000 others migrated voluntarily but ended up being 'exploited'. In 40 per cent of the cases, exploitation was assumed to occur because the child concerned was employed as a live-in domestic. Ironically, the study omitted all mention of adolescent girls reported several years earlier to be earning money from commercial sex for 'pimps' and traffickers in Cotonou: the

¹³ The negative implications for children of Benin's policies on child trafficking are examined in detail in N Howard, *Child Trafficking, Youth Labour Mobility and the Politics of Protection*, Palgrave Macmillan, London, 2017.

¹⁴ Centre de Formation et de Recherche en matière de Population (CEFOP), *Etude Nationale sur la Traite des Enfants. Rapport d'analyse*, Ministère de la Famille et de l'Enfant et l'UNICEF, Cotonou, 2007.

¹⁵ In 2015, for instance, in a report for the International Labour Conference and a broadcast by Radio France International (RFI): D Bousquet, 'Les Enfants Esclaves au Bénin', *RFI*, 16 April 2015, retrieved 4 March 2021, <http://www.rfi.fr/fr/emission/20150416-benin-esclavage-enfants-passerelle>.

unpublished research, of which the authorities were aware, identified adolescent Nigerian girls in Cotonou who had been brought there from Nigeria's Edo State.

Gabon adopted a law prohibiting the employment of children under 15 as early as 2004 but little was done to implement it. The journeys involving adult and child migrants from Benin across the Bight of Benin to Gabon and neighbouring Equatorial Guinea continued, despite new laws in Benin and Gabon, and remained just as dangerous: for example, in March 2015, a boat carrying more than 150 undocumented migrants to Gabon was reported by Reuters to have capsized off the coast of Nigeria, drowning 45. A survivor said that many on board were women and children from West Africa.

For a decade and a half Benin's anti-trafficking laws focused specifically on children employed away from home, without the practice of employing *vidomègon* being prohibited or regulated and without significant measures being taken to improve the treatment of child domestic workers. Each year, the US *Trafficking in Persons* Report (hereafter: TIP Report) suggested Benin's laws and policies were flawed and needed to conform more closely with the provisions of the US's own law of 2000, outlining standards that US legislators expected every country in the world to observe. Finally, in 2018, Benin adopted a new penal code, defining (in article 499) a crime of human trafficking when adults are the victims, rather than only children. The wording of the offence, including the forms of exploitation identified as 'purposes of trafficking', is broadly in line with the UN Trafficking Protocol's definition. However, it includes an additional provision concerning children, defining any case in which a child's natural parent or guardian makes use of the services of a child under 14 years of age for profit as a form of exploitation linked to trafficking and therefore an offence.

Was the use of criminal law ever viable to stop both extreme cases of child exploitation (whether in Benin or abroad) and more conventional cases of child employment regarded by much of the population as acceptable or even beneficial to children? The Benin authorities reportedly told US diplomats in 2020 that 44 cases of child trafficking had resulted in prosecutions in 2018 and that a further 28 suspected child traffickers had been prosecuted in 2019.¹⁶ If there were indeed 15,000 children trafficked each year, or even only 1,500, this meant that the criminal justice system responded to only a handful of cases. The US authorities appeared relatively satisfied in their 2020 TIP Report, as they noted a substantial increase in the previous year in prosecutions of suspected traffickers of adults. However, the Benin experience demonstrates that using criminal law to address a pattern of child labour, including children working away from home, is not an effective or efficient strategy when the numbers are large and when

¹⁶ US Department of State, *Trafficking in Persons Report*, Washington DC, 2020, p. 113.

doing so flies in the face of public opinion. The employment of *vidomègon* has continued to prompt criticism in media abroad. However, media publicity and references in international reports have brought few benefits to the children concerned. The conventions and protocols adopted at ILO and UN conferences¹⁷ have not led to improvements in the lives of young people, such as better working conditions or less harsh treatment at work, which they were entitled to expect.

Children Moving from Vietnam to the United Kingdom: The situation in Vietnam

The second pattern reviewed here concerns Vietnamese children who travel to the UK to earn money. This requires a brief review of the situation in Vietnam, as well as the UK. Vietnam is one of the few countries in the world that does not regard 16- and 17-year-old adolescents as children (adulthood is reached at 16 years of age, rather than 18, the age stipulated by the UN Convention on the Rights of the Child). This introduces a disconnect between the way the authorities in Vietnam and those in other countries to which Vietnamese adolescents migrate view cases of 16- and 17-year-olds and how the authorities should respond.

Vietnam initiated action against human trafficking early this century, joining the Coordinated Mekong Ministerial Initiative Against Trafficking (COMMIT) set up in 2004 with other Greater Mekong Subregion states. It launched its first national plan against trafficking in women and children the same year (setting out activities from 2004 to 2010). It signed an initial bilateral Memorandum of Understanding about human trafficking with neighbouring Cambodia in 2005, followed by others with Thailand and China. However, the authorities assumed that human trafficking was primarily about prostitution which had been categorised as a ‘social evil’ since 1975. Recruiting a woman into prostitution was an offence and the penal code also prohibited ‘trading in children’, which was interpreted to mean buying or selling a child (under 16) for profit. Vietnam also had strict laws against unofficial emigration, such as Penal Code article 275, making it an offence to organise or force people to run away abroad or stay in foreign countries.

In practice, prior to 2010, the Vietnamese authorities focused on two trafficking-related issues: first, marriages contracted by Vietnamese women outside Vietnam, which they regarded with suspicion¹⁸ (in China many Vietnamese were forced or tricked into marriage in rural areas where there were shortages of women of marriage age); secondly, adolescent girls and women who were taken to brothels

¹⁷ Such as the UN Convention on the Rights of the Child (1989) and the ILO’s Convention No. 182 on Worst Forms of Child Labour (1999).

¹⁸ See D Bélanger, ‘Marriages With Foreign Women in East Asia: Bride trafficking or voluntary migration?’, *Population & Societies*, no. 469, 2010, pp. 1-4, <https://corpus.ulaval.ca/jspui/handle/20.500.11794/11308>.

in Cambodia and China (on the outskirts of Phnom Penh and in Hekou in China's Yunnan province). This initial focus intensified with the distribution of an Inter-Ministerial Circular in 2008, outlining procedures for statutory agencies to identify and protect girls or women who had been trafficked.¹⁹ The implications were that boys and men were not recognised as victims of traffickers, that situations of exploitation for anything except prostitution did not involve trafficking (even when the workers involved were subjected to harsh abuse), and that cases involving internal trafficking did not merit attention.

The approach changed from 2010 onwards, when the authorities modified their understanding of trafficking. Vietnam adopted a new anti-trafficking law in 2011 and acceded to the UN Trafficking Protocol in 2012, by which time the author had visited Hanoi twice (in 2005 and 2011) to evaluate anti-trafficking programmes and confirmed on both occasions that officials with anti-trafficking responsibilities were largely unaware of any Vietnamese being trafficked to Europe. The wording of the 2011 *Law on Prevention and Suppression Against Human Trafficking* resembled the text of the UN Protocol, listing a series of 'prohibited acts' that include trafficking in persons and also recruitment, transportation, harbouring, transfer and receipt of persons for the purposes of sexual exploitation, forced labour, organ removal or 'other inhuman purposes'. The new law seemed more straightforward than the UN Protocol, in that it made no reference to abusive means (to carry out the actions deemed to constitute trafficking). The law consequently does not differentiate between adults and children as victims in the way that the offence is defined (as the UN Protocol does).

The 2011 law contained provisions to protect trafficking victims. Article 24 requires the authorities to identify a relative of a trafficked child who is under 16 to come and fetch her (or him) or, in the absence of relatives, to find someone else who can accompany the child to their habitual residence. Alternatively, the authorities can refer a child who is 'helpless' and has no place of residence to a state-run institution or a residential facility run by an NGO that supports victims. In practice, the children referred to residential institutions in Vietnam are girls who have experienced commercial sexual exploitation abroad, not unaccompanied Vietnamese children found in Europe, according to NGOs. Indeed, virtually no data have been made public about children identified as 'trafficked' in Europe and subsequently returned to Vietnam, either by countries from which children have been returned or by the authorities in Vietnam.

¹⁹ *Guidelines on Process and Procedures of Identification and Reception of Trafficked Women and Children from Abroad*, Inter-Ministerial Circular 03/2008/TTLT-MPS-MOD-MOLISA.

Like Benin, Vietnam has seen large numbers of children under 16 recruited to work away from home in other parts of the country (mainly in cities). However, the response has been quite different to Benin's, with the authorities taking much less interest in such cases, whatever the nature of the children's work or exploitation. This was made easier because some of the NGOs providing assistance to working children, child beggars, and adolescent girls in the commercial sex sector suspected that the authorities would punish them if they publicised the cases.

Children from Vietnam Arriving in the United Kingdom

Developments on the other side of the world in the United Kingdom ran to some extent in parallel. The UK signed the UN Trafficking Protocol in 2000 and ratified it in 2006. Initial amendments to UK law were piecemeal, based on an assumption that trafficking was an immigration offence (involving foreign nationals brought to the UK) that occurred mainly to make money from commercial sex. This changed after December 2008, when the UK ratified the Council of Europe Convention on Action against Trafficking in Human Beings (2005), which required state parties to take a broader approach and to protect the rights of trafficking victims. Public opinion in the UK was also shocked by the drowning of 23 cockle pickers in 2004, all believed to be undocumented Chinese migrants, with the result that the UK adopted a law to regulate the activities of 'gangmasters' (individuals contracted to provide 'gangs' of workers for a specified time).

More relevantly, a new wave of Vietnamese irregular migration into the UK started early in the twenty-first century. Most Vietnamese arriving in the UK were men and adolescent boys: the UK authorities regarded anyone under 18 as a child, with particular protection rights. The occupation for Vietnamese boys (and adults) that received most publicity in the UK was that of 'cannabis gardeners' looking after illegally-grown cannabis, initially in houses which appeared to be under repair (windows and doors were shuttered and plants grown under artificial light), and later, on a larger scale, at underground facilities and farms. Undocumented Vietnamese adolescents and adults also found work in nail bars or restaurants serving Vietnamese food.

The British authorities investigated the illicit migration routes from Vietnam to Europe and the UK and how migrants earned a living after their arrival. In 2007, the UK government set up two new institutions: the first to investigate cases of human trafficking involving adults, and the second, the Child Exploitation and Online Protection (CEOP) Centre, with a mandate on child trafficking (as well as online abuse). CEOP published its first report about child trafficking in the UK in 2007, noting that 22 Vietnamese children had been identified in 2006 as trafficking victims; half of them were boys, the other half girls. Six had been arrested on cannabis farms. The report commented that Vietnamese

migrants were ‘transported...in debt bondage’.²⁰ A further CEOP report in 2009 noted that young Vietnamese aged between 15 and 17 who had been found by police in the UK ‘had little if any contact with the outside world; they were only known to their captors’.²¹ Already in 2009, CEOP reported that senior police managers and the prosecution service had ‘issued guidance on the treatment of children found in such criminal enterprises to ensure that no child is brought before the courts where the crime committed is a direct result of their trafficking’. Between 2010 and 2013, the prosecution services in the various parts of the UK provided advice to prosecutors about the ‘non-punishment principle’ (that someone who was trafficked should not be charged or prosecuted for the illegality of their presence in a country or their involvement in unlawful activities to the extent that such involvement was a direct consequence of being trafficked).²² However, the guidance took a long time to filter down to frontline police and prosecutors as well as, crucially, to the lawyers representing detained Vietnamese children in local courts, who went on advising their clients to plead guilty to minor offences rather than risk being referred for trial on more serious charges.

In summary, although some parts of the UK’s criminal justice system had decided by 2010 that Vietnamese children arriving clandestinely in the UK were trafficking victims, others continued to view them as criminals and sent them to prison (to young offenders’ institutions). Penalising children in this way was repeatedly challenged by child rights defenders (particularly one NGO, ECPAT UK), but the authorities continued to prosecute and convict Vietnamese children until 2013, when the Court of Appeal (Criminal Division) of England and Wales reviewed four unconnected cases of three adolescents and one adult woman, all of whom had been convicted of offences despite being thought to have been trafficked. The three adolescent boys had been found on cannabis farms. The Court of Appeal quashed all four convictions on the grounds of abuse of process as the courts had not taken into account that they had been trafficked. It did not assert simply that people who were trafficked should not be prosecuted or punished. Rather, it concluded that, ‘[t]he criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases

²⁰ A Kapoor, *A Scoping Project on Child Trafficking in the UK*, CEOP (produced on behalf of the Home Office and the Border and Immigration Agency), London, 2007, p. 32.

²¹ CEOP, *Strategic Threat Assessment. Child Trafficking in the UK*, London, April 2009, p. 46.

²² P Burland, ‘Still Punishing the Wrong People: The criminalisation of potential trafficked cannabis gardeners’, in G Craig, A Balch, H Lewis and L Waite (eds.), *The Modern Slavery Agenda. Policy, politics and practice in the UK*, Policy Press, Bristol, 2019, p. 168. Finally, in February 2021, the European Court of Human Rights, in its judgment *VCL and AN v. the United Kingdom*, concluded that the UK authorities had failed to adequately protect two Vietnamese youths who pleaded guilty in 2009 to drug-related offences. Even though they were recognised officially as trafficking victims, the Prosecution Service maintained that it had been correct to prosecute and punish the youths.

effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.²³

In the UK's case, it was consequently not just the way that the crime of child trafficking was defined in law that led to Vietnamese children being regarded as trafficking victims. It was the finding of specialist anti-trafficking agencies and the courts. From 2014 onwards, the number of people referred to the UK's National Referral Mechanism (NRM) as possible trafficking victims climbed steadily, from 2,238 in 2014 to 10,627 in 2019.²⁴ In 2015, out a total of 3,262 people referred to the NRM, 248 were children from Vietnam (along with 230 Vietnamese adults), accounting for about one quarter of the children referred to the NRM. By 2019, this number had increased to 427 children. The precise number of children who were eventually recognised by the authorities to be victims of trafficking was not clear, for they sometimes took several years to make a decision and the authorities eventually stopped publishing the results of NRM decisions. However, a 2017 study for the UK's Independent Anti-Slavery Commissioner noted that out of 1,747 Vietnamese nationals who had been referred to the NRM between 2009 and 2016, 370 (twenty-one per cent) had been 'officially' recognised as trafficking victims. Of these, almost half were reported to be between 14 and 16 years at the time they were referred to the NRM.²⁵ The same study reported that 198 out of the 370 had been subjected to 'labour exploitation', of whom 77 boys and 38 adults had been cultivating cannabis.

Meanwhile, relatively few people in the UK have been prosecuted for trafficking Vietnamese children (or adults) and few convicted in Vietnam of trafficking children to the UK, despite a series of agreements since 2009 between the two countries. Children identified as 'trafficked' by the UK authorities are usually allowed to remain in the country until they reach 18. There have been no reports of the Vietnamese authorities assisting trafficked children who have been returned from the UK, although a decade ago there were unofficial reports that some children had been returned. When Vietnamese owners of a nail bar

²³ *L, HVN, THN, and T v. R* [2013] EWCA Crim 991, para. 13.

²⁴ Statistics issued by the UK Home Office, 'National Referral Mechanism statistics UK: End of year summary 2019', 2 April 2020, <https://www.gov.uk/government/statistics/national-referral-mechanism-statistics-uk-end-of-year-summary-2019>.

²⁵ D Silverstone and C Brickell, *Combating Modern Slavery Experienced by Vietnamese Nationals en Route to, and Within, the UK*, Independent Anti-Slavery Commissioner, London, 2017, p. 7.

in Bath were tried for trafficking in 2018, the children whom they were said to have exploited were not present as witnesses. Indeed, despite comments from the judge that adolescents had been treated as commodities and exploited for ‘pure economic greed’, there were some signs that the migrants concerned were working illicitly to compensate the bar owners for their temporary upkeep, while they sought longer-term and better remunerated work.²⁶ There was repeated confirmation that Vietnamese adolescents who were earning a living illicitly felt under pressure to continue doing so, for when they were ‘rescued’ by the police and put into temporary accommodation, many walked out.²⁷ Despite the information at their disposal about the system of credit used by people in Vietnam to finance journeys of both adults and children to the UK, the British authorities took no specific action to alleviate the pressure that the migrant children’s debts imposed on them to start earning money again (rather than remaining in local authority accommodation without earning anything).

Whether Vietnamese migrants identified in the UK as undocumented are regarded as victims of traffickers or not, the numbers referred in recent years to the NRM and asylum system confirm that until late 2019 there was a pattern of irregular migration to the UK, of both adults and adolescents, with some migrants able to access official procedures that allowed them to remain in the UK, either for a few years or permanently. The British authorities declared that they wanted to end this pattern and partnered with both the Vietnamese authorities and law enforcement agencies in other parts of Europe to reduce the number of arrivals. However, little had been achieved by mid-2019, even though an unofficial transit centre for undocumented Vietnamese migrants outside the French city of Lens that had been tolerated for some years was bulldozed in 2018.²⁸

A major tragedy in October 2019 led to at least a temporary pause to this migration corridor. A lorry arriving in England from Belgium was found to contain the corpses of 39 Vietnamese migrants, three of them under 18 and seven others aged 18 or 19. The discovery was followed by the arrest of the

²⁶ BBC television, *The Prosecutors. Series 2:2. Modern-Day Slavery*, broadcast on 9 August 2018, <https://www.bbc.co.uk/iplayer/episode/b0bfdn7h/the-prosecutors-series-2-2-modern-day-slavery>.

²⁷ N Finch, *Lighting the Way: Steps that lawyers, legal guardians and child trafficking advocates in the UK can take to better identify and protect children who may have been trafficked*, ECPAT-UK, London, 2017.

²⁸ No Author, ‘A Angres Comme Ailleurs, la Politique D’Expulsion Se Poursuit!’, *La Cimade*, 27 April 2018, retrieved 4 March 2021, <https://www.lacimade.org/a-angres-comme-ailleurs-la-politique-dexpulsion-se-poursuit>.

lorry driver and others in the UK and Ireland.²⁹ Six people were eventually convicted in the UK in connection with the deaths, three for manslaughter and for unlawfully smuggling people into the UK, but none for human trafficking. Four people were convicted in Vietnam for facilitating the illicit emigration of one of those who had died. In May 2020, separate arrests of 26 people suspected of facilitating the passage of other undocumented migrants from Vietnam were announced in Belgium and France. The 39 deaths shocked the public in Vietnam's Nghe An and Ha Tinh provinces, from where most of the dead originated. In the first half of 2020, observers speculated that this would deter further large-scale emigration to the UK. Nevertheless, during the first nine months of 2020 Vietnamese migrants suspected of being trafficking victims continued to be referred to the UK's NRM in considerable numbers and were reported by the authorities to be the third-highest represented nationality after UK nationals and Albanians.³⁰ However, the statistics available did not indicate how many had reached the UK after October 2019.

Conclusion

This article has summarised two quite different patterns of child migration, both of which have been labelled as 'child trafficking'. It sought to find out if the definition of the crime of human trafficking has helped distinguish between adolescent migrants in general and those who are specifically victims of trafficking offences. It noted a tendency by the authorities in different countries to apply very general assumptions—for example, that all *vidomègon* in Benin or all undocumented Vietnamese children engaged in working illegally in the UK have been trafficked. At the same time, relatively few of the brokers and employers concerned have been convicted of trafficking children, while in the case of undocumented migration from Vietnam to the UK, some have been convicted for facilitating illicit migration.

In none of the three countries has the criminal justice system yet proved effective in addressing the patterns of child migration and the exploitation involved. Labelling the pattern that brings hundreds of Vietnamese adolescents to the UK

²⁹ See Essex Police, 'Investigation launched after 39 people found dead in lorry trailer', 23 July 2020, retrieved 4 March 2021, <http://web.archive.org/web/20210116104757/https://www.essex.police.uk/news/essex/news/news/2019/october/murder-investigation-launched-after-39-people-found-dead-in-lorry-container>; and Essex Police, 'Two guilty for the manslaughter of 39 Vietnamese men, women and children', 21 December 2020, <https://www.essex.police.uk/news/essex/news/brought-to-justice/2020/december/men-jailed-for-92-years/melrose-title>.

³⁰ UK Home Office, 'National Referral Mechanism Statistics UK', Quarters 1, 2 and 3 (January to March 2020; April to June 2020; and July to September 2020).

each year as ‘trafficking’ and expecting British or Vietnamese police to provide the response seems just as unrealistic as the expectation that entrenched patterns of child migration and employment in West Africa will stop because new laws are adopted. In effect, the international community has been hiding its head in the sand and expecting miracles, rather than working seriously to create a brighter future for young people—a future in which they do not have to travel to the other side of the world to work for criminals or subject themselves to voluntary or involuntary servitude to earn money for themselves and their families. Instead, they should be able to earn a living in decent work in their own country, or, if this remains impossible, to migrate in circumstances that guarantee their safety and have their rights as adolescent workers protected while they work abroad.

In the UK, the ‘trafficked’ label has been significant for the children concerned, in that it confers an element of ‘protection’ (allowing officially recognised trafficking victims to stay in the UK until they reach 18), though this does not appear to be regarded as a substantial advantage by the many Vietnamese adolescents who walk out of care to resume earning. In Benin and Vietnam, the assertion that children are ‘trafficked’ has not resulted in the protection of many of the children concerned. Indeed, it may have created a false sense that the criminal justice system will provide a solution to patterns of exploitation, when actually it does not—implying that quite different initiatives are required.

Alternatives to invoking criminal law and using the term ‘trafficking’ are available, such as the ILO’s Convention 182 on worst forms of child labour, but these also seek to put an immediate stop to the pattern of migration and exploitation, rather than bring about gradual change by using economic incentives and influencing social norms. In the author’s view, a radical rethink is required: one that recognises that it may well be in the best interests of some children to leave home and start earning well before they reach 18. In these circumstances, it should surely be possible to offer meaningful alternatives to more young people in the places from which significant numbers of them migrate. It is also high time that government and NGO responses to child trafficking be coordinated much more systematically with other measures concerning social and economic development.

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Putting Childhood in Its Place: Rethinking popular discourses on the conceptualisation of child trafficking in Ghana

Bernard Koomson and Dawuda Abdulai

Abstract

Popular discourses on child trafficking are generally characterised by unverifiable statistics, melodramatic representations, and emotional reactions. More so, notions of poverty, exploitation, and the protection of children from harm have driven educational and sensitisation campaigns that seek to address trafficking in children. The ensuing status quo blurs diverse cultural conceptions of childhood and its moral representations of acceptable and unacceptable labour. Drawing on qualitative data from a Ghanaian fishing community, this paper reviews the impoverished and hazardous representation of children's transportation to other fishing communities for work. It contends that the prevailing conceptualisation of child trafficking fails to account for the socio-cultural underpinnings of children's movement to other fishing communities for work. Consequently, this paper argues that it is important to situate popular discourses of child trafficking within fishing community's conceptualisation of childhood in order to provide a comprehensive understanding of the phenomenon within those communities.

Keywords: childhood, child trafficking, child returnee, socio-cultural factors, legal framework, Ghana

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Introduction

Globally, the nature and status of children has received tremendous attention from the twentieth century onwards.¹ This is particularly evident in the unanimous support for the United Nations Convention on the Rights of the Child (UNCRC) of 1990 and other parallel conventions mostly promulgated by the International Labour Organization (ILO).² This ensuing trend has led to the institutionalisation of a global model of childhood based on child rights and the abolition of worst forms of child labour (and child trafficking) in order to protect children from harm.³ Not surprisingly, state interventions within the sphere of childhoods have gained more prominence with the introduction of the aforementioned international legal frameworks.⁴ The renewed interest in the lives of children has been made possible by the contemporary description and representations of the spheres of childhoods, resulting in the creation of a typology of childhoods based on western ideals.⁵ This western bias is reinforced by the dominance of white (predominantly male) scholars in the theorisation of childhood and construction of children's rights.⁶

Consequently, what prevails is the *othering* of childhoods—the disregard for unique childhoods across different geographical spaces (for instance in Sub-Saharan Africa) and the focus on western childhoods as the ideal standard.⁷ Thus, all *other* forms of childhoods are secondary and should strive to meet the standards of *the new global model*. As a result, a much more comprehensive picture

¹ A James and A Prout, *Constructing and Reconstructing Childhood*, 3rd Edition, Routledge, New York, 2015.

² See, for example, ILO Convention No. 138 and Convention No. 182.

³ T C Nhenga, 'Application of the International Prohibition on Child Labour in an African Context: Lesotho, Zimbabwe and South Africa', Unpublished PhD thesis, University of Cape Town, 2008, retrieved 8 June 2019, https://open.uct.ac.za/bitstream/item/4601/thesis_law_2008_final_phd_thesis_tc_nhenga.pdf.

⁴ E Manful and E Cudjoe, 'Is Kinship Failing? Views on informal support by families in contact with social services in Ghana', *Child & Family Social Work*, vol. 23, issue 4, 2018, pp. 617–624, <https://doi.org/10.1111/cfs.12452>.

⁵ T Abebe and Y Ofosu-Kusi, 'Beyond Pluralizing African Childhoods', *Childhood*, vol. 23, issue 3, 2016, pp. 303–316, <https://doi.org/10.1177/0907568216649673>.

⁶ *Ibid.*, p. 1; K Hanson and N Peleg, 'Waiting for Children's Rights Theory', *International Journal of Children's Rights*, vol. 28, issue 1, 2020, pp. 15–35, <https://doi.org/10.1163/15718182-02801005>.

⁷ See, for example: S Balagopalan, *Inhabiting 'Childhood': Children, labour and schooling in postcolonial India*, Palgrave Macmillan, New York, 2014; A Twum-Danso, 'From the Singular to the Plural: Exploring diversities in contemporary childhoods in Sub-Saharan Africa', *Childhood*, vol. 23, issue 3, 2016, pp. 455–468, <https://doi.org/10.1177/0907568216648746>.

of African childhoods is often veiled,⁸ while African childhood experiences are largely belittled.⁹ This is particularly seen in the portrayal of African childhoods as realms of vulnerability and crisis,¹⁰ mostly exemplified by the statistics on high infant and child mortality, exploitation, child labour, physical and psychological abuse, street children, or trafficked children, among others.¹¹

This *othering* of childhoods has been followed by the promulgation of several international legal frameworks aimed at relieving children from vulnerabilities that may be detrimental to their growth and development. Needless to say, these global legal frameworks are etched in western cognitive categories about the distinction between childhood and adulthood. It follows the *romantic ideal* of childhood which seeks to restrict children from full societal participation as in the case of adults. For instance, children are considered out of place when transported to other places for work, and are better off growing up within their families.¹²

The UN Trafficking Protocol is one such international legal framework that has been ratified and transplanted into the legal frameworks of member states.¹³ For instance, Ghana enacted the *Human Trafficking Act, 2005* (Act 694) to address human trafficking within, to, from, and through Ghana.¹⁴ The Act prohibits the transportation of children (persons under 18 years of age) from their communities of origin to other communities for economic activities. This prevailing prohibition—entirely influenced by the Trafficking Protocol¹⁵—is part

⁸ M Kesby, F Gwanzura-Ottmüller and M Chizororo, ‘Theorising *Other*, “Other Childhoods”: Issues emerging from work on HIV in urban and rural Zimbabwe’, *Children’s Geographies*, vol. 4, issue 2, 2006, pp. 185–202, <https://doi.org/10.1080/14733280600807039>; Twum-Danso, 2016.

⁹ Abebe and Ofosu-Kusi.

¹⁰ *Ibid.*, p. 1.

¹¹ Twum-Danso, 2016.

¹² M Bourdillon, D Levison, W Myers and B White (eds.), *Rights and Wrongs of Children Work*, Rutgers University Press, Middlesex County, New Jersey, 2010.

¹³ United States Department of State, *2017 Trafficking in Persons Report*, Office to Monitor and Combat Trafficking in Persons, Washington DC, 2017, retrieved 31 October 2017, <https://www.state.gov/j/tip/rls/tiprpt/2017>.

¹⁴ M Sertich and M Heemskerk in collaboration with the Enslavement Prevention Alliance – West Africa, ‘Ghana’s Human Trafficking Act: Successes and shortcomings in six years of implementation’, *Human Rights Brief*, vol. 19, issue 1, 2011, pp. 2-7, <https://digitalcommons.wcl.american.edu/hrbrief/vol19/iss1/1>.

¹⁵ United Nations General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2000.

of global efforts aimed at the universal construction of childhood. However, this universal construction of childhood is in direct contrast to the meaning and conception of childhoods in African societies.¹⁶ Thus, the representation of African childhoods as *crisis childhoods* is problematic and fails to adequately account for the diverse nature of childhoods across different locations.

Abebe and Ofosu-Kusi have argued that the portrayal of African childhoods as *crisis childhoods* is predicated on the hegemonic discourses that describe Africa as the *dark continent* bereft of technological, economic, and political development that characterises the *developed world*. Consequently, research and scholarship primarily focus on a uniform childhood framed after existential challenges that flatten children's varied experiences and render childhood as a sheer site of intervention.¹⁷ Nonetheless, extant studies on child trafficking have indicated that attempts to frame trafficking or child labour within western discourses of childhood sit uneasily with cultural practices in Sub-Saharan Africa.¹⁸

This paper presents preliminary results of a pilot study conducted as part of a PhD research. The study departs from the *dark* portrayal of African childhoods that emphasise how Africa is *an unusual place* to instead explore the contextual conceptualisation of childhood and how it informs the understanding and description of child trafficking within a specific community. Moreover, the paper responds to the still relevant call by scholars of human trafficking to provide more systematic and empirical data on the phenomenon.¹⁹ We aim in this paper to contribute to the discourse of child trafficking and western-informed legal and policy responses at the regional and national level.

Child Trafficking in Ghana

Trafficking of children within Ghana is relatively more common than transnational trafficking,²⁰ although an ILO/IPEC study indicates that children are trafficked

¹⁶ See, for example: Nhenga, 2008; M J Kehily, *An Introduction to Childhood Studies*, 3rd Edition, Open University Press, Berkshire, 2015.

¹⁷ Abebe and Ofosu-Kusi.

¹⁸ N Howard, 'Teenage Labour Migration and Anti-Trafficking Policy in West Africa', *The ANNALS of the American Academy of Political and Social Science*, vol. 653, issue 1, 2014, pp. 124–140, <https://doi.org/10.1177/0002716213519242>; S Okyere, "'Shock and Awe": A critique of the Ghana-centric child trafficking discourse', *Anti-Trafficking Review*, issue 9, 2017, pp. 92–105, <https://doi.org/10.14197/atr.20121797>.

¹⁹ S X Zhang, 'Beyond the "Natasha" Story—A review and critique of current research on sex trafficking', *Global Crime*, vol. 10, issue 3, 2009, pp. 178–195, <https://doi.org/10.1080/17440570903079899>.

²⁰ Sertich and Heemskerck.

to Ghana from neighbouring countries, too.²¹ Statistics on the phenomenon of child trafficking are provided by the government through the Ghana Statistical Service (GSS), non-governmental organisations (NGOs), and international non-governmental organisations (IGOs). Figures provided by the GSS usually lump the incidence of child labour and child trafficking together. In 2003, for instance, the GSS indicated that between 1 and 1.4 million children were involved in child labour. The report identified specific cases of child trafficking and slavery, and suggested a qualitative assessment within communities to evaluate the extent of child trafficking.²² Additionally, an ILO/IPEC survey revealed that child trafficking is pervasive within fishing communities living along Lake Volta.²³ Similarly, a mixed methods research conducted by the International Justice Mission (IJM) on child trafficking in communities living along Lake Volta classified 57.6 per cent of the working children (444 out of 771) as trafficked.²⁴ The aforementioned research thus failed to indicate the number of children trafficked to the communities along Lake Volta, even though cases of child trafficking were identified.

Additionally, victims of child trafficking are often identified through a number of factors, including the lack of schooling, working conditions (long hours of work, and being assigned difficult, intense, or hazardous duties), and inappropriate clothing and shelter.²⁵ Child trafficking is generally perceived to be occurring in the agricultural sector (cotton, cashew, and cocoa farming), deep-water fishing, and artisanal or small-scale mining.²⁶

In reporting the factors that drive the incidence of child trafficking in Ghana, poverty remains the major cause. Left reports that children are sold for as little as USD 21,²⁷ and subjected to strenuous hours of work on a daily basis under

²¹ P A Kukwaw, *Analytical Study on Child Labor in Volta Lake Fishing in Ghana*, International Labour Organization (ILO) and International Programme on the Elimination of Child Labor (IPEC), Geneva, 2013.

²² GSS, 'Ghana Child Labour Survey', 2003, retrieved 15 January 2018, https://www.statsghana.gov.gh/docfiles/glss6/GLSS6_Child%20Labour%20Report.pdf.

²³ Kukwaw.

²⁴ K Singleton, K B Stone and J Stricker, *Child Trafficking into Forced Labour on Lake Volta, Ghana: A mixed methods assessment*, International Justice Mission, October 2016, <https://www.ijm.org/documents/studies/ijm-ghana-report.pdf>.

²⁵ *Ibid.*, p. 3

²⁶ J Einarsdóttir and H Boiro, 'The Palermo Protocol: Trafficking takes it all', *The Icelandic Review of Politics and Administration*, vol. 10, issue 2, 2014, pp. 385–396, <https://doi.org/10.13177/irpa.a.2014.10.2.10>.

²⁷ S Left, 'Sons for sale', *The Guardian*, 22 March 2007, retrieved 8 June 2019, <http://www.guardian.co.uk/world/2007/mar/22/sarahleft>.

conditions of forced labour, physical abuse, and malnutrition.²⁸ Fosterage has been implicated as another causal factor in the trafficking of children.²⁹ Hashim has indicated that the traditional practice of fostering is progressively changing from its caring image into an exploitative route for confining children to hazardous labour.³⁰ This has consequential implications for defining the boundaries between trafficking and legitimate child placement or fostering³¹ and the potential weakening of genealogical ties given the abuse of fostering by traffickers.

Whilst the literature on child trafficking in Ghana provides a broader picture on the phenomenon, it is nevertheless fraught with several challenges and gaps. For instance, there is no specific agreement on the numerical estimation of trafficked children. Whilst the GSS estimates that there are 1.2 million children involved in hazardous labour, a comprehensive identification of trafficked children is not made in the report.³² Even when community-based surveys are conducted to determine the nature and scope of child trafficking, the quest to ascertain the numerical estimates typically leads to the erroneous conceptualisation of specific migration of children to other communities as trafficking.³³ Okyere avers that conventional Ghana-centric anti-child trafficking campaigns utilise melodramatic tactics in establishing the incidence of child trafficking, while charging local culture and traditions for the occurrence of the phenomenon.³⁴ Whilst we agree that poverty and fostering may act as a driver and facilitator of child trafficking, we nonetheless argue that the transportation of children to other communities should be understood within a specific historical and socio-cultural context in which children have contributed to the income of their households. Consequently, we aimed to explore the extent to which the

²⁸ L Agbenya, 'Child Labour Trafficking in the Lake Volta Fishery of Ghana: A case study of Ogetse in the Krachi West District of the Volta Region', Unpublished Master's Thesis, Norwegian College of Fishery Science, University of Tromsø, 2009, retrieved 8 June 2017, <https://pdfs.semanticscholar.org/7f31/ce58c8d0734de7be4dd59c849130f2735a9b.pdf>.

²⁹ See, for example: UNICEF, 'Trafficking in Human Beings, Especially Women and Children', UNICEF Innocenti Research Centre, Florence, Italy, 2005; I Hashim, 'The Positives and Negatives of Children Independent Migration: Assessing the evidence and the debates', Working paper T16, Sussex Centre for Migration Research, UK, September 2006, <https://assets.publishing.service.gov.uk/media/57a08c4640f0b652dd001214/WP-T16.pdf>; Sertich and Heemskerck.

³⁰ Hashim, 2006.

³¹ UNICEF, 2005; Einarsdóttir and Boiro.

³² GLSS, 'Ghana Living Standard Survey (Round 6): Child Labour Report', August 2014, <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=25515>.

³³ Kukwaw; Singleton, Stone and Stricker.

³⁴ Okyere.

conceptualisation of childhood informs the conceptualisation of child trafficking within a fishing community in Ghana.

Research Methods

Research Design

This paper is based on an exploratory qualitative pilot study that utilised the basic qualitative research design. This research design entails a general and simple framework that allows for flexibility in respect of time and methods. It aims to construct meaning and interpret the world of the study participants.³⁵ Thus, the study was fundamentally interested in (i) how individuals interpret their experiences, (ii) how they construct their worlds, and (iii) what meaning they assign to their experiences.³⁶ Given that the study entailed a pilot exploration of a fishing community's conceptualisation of childhood and trafficking, the choice of this research design was appropriate.

Study Area and Setting

The study was conducted in selected fishing suburbs of Winneba in the Central Region of Ghana. Winneba is the district capital of the Effutu Municipality, one of the Central Region's twenty districts. It is the only urban settlement in the municipality, with a population of 40,017 people, making up 58 per cent of the district's population.³⁷

The major source of livelihood is craft and related trading activities (31.4 per cent of the working population in this area), while 16.1 per cent are engaged in agriculture, forestry, and the indigenous fishing industry. The fishing season lasts only for a very limited period in the year—mainly from August to September.³⁸ It is usual to see children playing along the beaches and interacting with the fishermen who are mostly their own parents, relatives, and acquaintances. Other activities undertaken by children along the beaches include pulling and

³⁵ S B Merriam and E J Tisdell, *Qualitative Research: A guide to design and implementation*, 4th Edition, John Wiley & Sons, Inc., San Francisco, August 2015.

³⁶ *Ibid.*

³⁷ GSS, *2010 Population and Housing Census: Summary report of final results*, Accra, May 2012.

³⁸ C Sefa-Nyarko, *Ten Years On: Impact evaluation of programmes and activities of Challenging Heights in Ghana*, Participatory Development Associates Ltd., 23 November 2016, <https://challengingheights.org/wp-content/uploads/2014/11/Challenging-Heights-Impact-Evaluation.pdf>.

maintenance of nets, and swimming in the shallow waters for leisure.³⁹ This builds the competence of children for specific roles within the indigenous fishing industry, making them attractive assistants for fishermen on Lake Volta. In several research reports, the municipality has been cited as a *source community* for the trafficking of children to settlements (Yeji in particular) along Lake Volta.⁴⁰ Accordingly, the selection of the municipality as the site for the pilot study was justified.

Research Participants and Eligibility Criteria

The study utilised the non-probability sampling technique, particularly, purposive and snowballing sampling, in recruiting participants from the research setting. Given the study's focus on the constructed realities of research participants, the researchers purposively selected participants who have stayed within the research setting for at least five years (adult participants), while children who have returned (child returnees) to the study community after living and working with fishermen along Lake Volta were selected utilising a snowballing technique. The adult participants were biological parents and guardians of child returnees. In addition, the study engaged key informants (a traditional leader, an NGO worker, and a Community Child Protection Member, CCPC) who had stayed in the community for at least five years. In line with Ghana's *Children's Act*, 1998 (Act 560), individuals who were below 18 years of age were selected as children participants. In all, the pilot study engaged 14 research participants (five parents, six children, and three key informants).

Data Collection

The qualitative study design generally collects data through interviews, observations, documentary analysis, or a combination of these.⁴¹ Interviews were conducted with the aid of a semi-structured interview guide. Interview questions were based on the objectives of the PhD research. Access to the field was obtained through the help of a gatekeeper (community volunteer) who assisted in the selection of the research participants. Some of the issues discussed included the definition of a child, community perspectives on childhood, and the conceptualisation of children's transportation to other communities for fishing. Interviews were conducted at the homes/work places of the research participants. The interview sessions lasted for an average of 35 minutes, and were conducted in Fante (the common local dialect) and audio-recorded with

³⁹ *Ibid.*, p. 5

⁴⁰ Singleton, Stone and Stricker; Kukwaw; Sefa-Nyarko.

⁴¹ Merriam and Tisdell.

the consent of the research participants. Data collection concluded on the fourteenth interview, when the researchers discovered that no new information was reported; accordingly, data saturation was adjudged to have been attained.⁴²

Data Analysis

Analysis of the data in the basic qualitative research design involves identifying recurring patterns that describe the data. Largely, the interpretation of the data represents the researchers' understanding of the participants' perception of the phenomenon of interest.⁴³ Audio-recorded discussions were transcribed verbatim by the researchers. The researchers listened to the audio recordings and translated them from Fante into English. Additionally, the researchers conducted a quality check to ensure that the transcribed data reflected the audio recordings. Following the quality checks, the first author read through the transcribed data to identify the pattern of responses. Similar codes were assigned to familiar ideas and responses such as 'teenage', 'physicality', and 'morals'. The codes were grouped into categories, which were then collated into initial themes and further refined to reflect the research objectives. For instance, codes such as 'teenage' and 'pre-teen' were combined into the theme 'age definition'. The interview data was managed manually.

Ethical Issues

The researchers respected the rights of the respondents and ensured that informed consent was sought and obtained from all participants prior to the interviews. With respect to child participants, consent was obtained from their parents or guardians before the interviews. Additionally, the status of research participants ('child' or 'parent') and pseudonym (Kojo or Akosua) were used to ensure confidentiality in the reporting of the research results.

Reliability and Validity

The study followed best practices of social research in ensuring reliability (consistency) and relevance (validity) of the data collection tools used. The study utilised a uniform semi-structured interview guide in the collection of qualitative data during the conduct of the interviews. The first author conducted the interviews, which ensured a uniform collection of data across the various research participants. Additionally, the researchers shared emerging themes with selected CCPC members and NGO officers in order to obtain useful feedback about the results and ensure the study's trustworthiness.

⁴² A Bryman, *Social Research Methods*, 4th Edition, Oxford University Press Inc, New York, March 2012.

⁴³ Merriam and Tisdell.

Findings

Conceptualisation of a Child

The definition of children within specific contexts informs the scope and nature of their socialisation process. Accordingly, this preliminary study explored the definition of children among fishing community members. The question of ‘who a child is’ evoked three different themes: ‘age definition’, ‘moral definition’, and ‘bodily definition’, respectively. The themes are discussed below.

Age Definition of Children

The definition of children by specific age categories emerged as the dominant theme among study participants’ conceptualisation of children. This entailed the situation of children within specific age categories. Specifically, most of the study participants in this category defined children as persons who have not yet attained 13 years of age, with a few others indicating that children are individuals who are yet to attain the age of 12. A study participant described a child as follows:

I believe that at 13 years of age one ceases to be a child, and that children are mostly persons who have just been born. (Ama, mother)

Similarly, a CCPC member indicated that once an individual attains 13 years of age, they are no longer considered a child:

I believe that one ceases to be a child when the person turns 13 years old. Generally, when an individual attains 13 years of age, they are not considered as a child anymore within this community. (Kofi, CCPC)

Whilst the thirteen-year benchmark remained the most attested age category, one of the research participants indicated that childhood ceases at 12 years, as individuals who have attained 12 years are capable of working:

When a person attains the age of 12, they have crossed the stage of childhood. In this community, even children as little as nine years are seen at the seashore working. (Akosua, mother)

When further probes were made with respect to children’s economic activity, study participants indicated that when individuals attain 13 years of age, they are considered capable of undertaking work within or outside the community:

Some of the children (13-year-olds) within the community work without going to school, so it is not abnormal when they are taken to Yeji to stay and work with fishermen. (Kojo, child returnee)

These quotations are indicative of how children are conceptualised within the study community. Evidently, the conceptualisation of children as under-13-year-olds by most of the study participants represents a major divergence from the definition of children provided in the UNCRC and Ghana's *Children's Act*, 1998 and the *Human Trafficking Act*, 2005, which all define children as persons below 18 years of age. More so, the personality of a *child* was aligned to specific incapacities such as the inability to work or undertake specific economic activities. Accordingly, once an individual's *body* had attained a specific number of years (in this case at least 13 years), they were adjudged to be fully capable of work, thus crossing over to the realm of adulthood with respect to work.

Moral Definition of Children

Another significant theme that emerged from the data analysis is the moral definition of children. This perspective was held by child returnees and their biological parents. Specifically, study participants indicated that children are persons who cannot differentiate between right and wrong behaviours and are mostly incapable of taking care of themselves. One of the child returnees explained as follows:

A child is someone who cannot differentiate between good and bad behaviour. I believe that if one attains 13 years of age, one can differentiate between acceptable and unacceptable behaviour. (Kofi, child returnee)

Additionally, one of the parents included the concept of vulnerability in the definition of children. Specifically, he indicated that children are vulnerable and incapable of providing adequate care for themselves:

A child is anyone who cannot decide between what is right and wrong, and mostly cannot take care of themselves. (Kojo, parent)

Furthermore, moral maturation was aligned to specific capabilities such as the ability to take care of oneself or live independently with little or no supervision from an adult. Consequently, such persons may sometimes be transported to other fishing communities to assist fishermen. One of the child returnees explained:

Children are taken at a very young age to Yeji to live with fishermen and help them in the trade of fishing. I was transported to Yeji to live and work there as a fishing assistant when I attained 13 years of age because my parents said I was mature. (Kvame, child returnee)

It appears that the definition of children significantly informed their lived experiences within the study community, as 13-year-olds are transported to other communities for work (in this case fishing). For children within the study community, work within the local fishing industry starts at a young age

(10 years) with diverse responsibilities, including the pulling and mending of nets and canoe pushing. Consequently, when such children attain the age of 13, they are considered mature for work in fishing. This is indicative of how the conceptualisation of childhood may inform a specific practice (the transportation of children to other fishing communities in Ghana for work) that is summarily described as trafficking within Ghanaian legal frameworks.

Bodily Definition of Children

Whilst the bodily definition of children registered as the least articulated perspective among the study participants, it nonetheless represented another unique description of children within the fishing communities studied. This definition related to the development of physical characteristics of adults and children, respectively. Specifically, once individuals develop bodily statures akin to those of adults, they are no longer deemed to be children. This definition was provided by children who had returned to the community after living and working with fishermen along Lake Volta. Child returnees indicated:

Children from 10 years of age onwards are expected to work in this community and on Lake Volta, especially when they develop muscular bodily features like adults. They are considered as grown-ups who have passed the stage of childhood. (Kofi, child returnee)

Similarly, one of the child returnees compared the community's perspective of children to the legal definition provided in Ghanaian legal frameworks:

I have been taught that the law says a child is someone who has not attained 18 years of age, but in this community and Yeji, when one develops bodily and physical features, they may start to work from 10 years of age and is mostly not regarded as a child in that sense. They believe you are capable of working. (Kvame, child returnee)

For child returnees, the development of an adult-like body offered reasonable grounds to be considered as persons who have moved from childhood into adulthood. Similarly, this definition related to specific capabilities such as the ability to engage in work like fishing, or enrolment in apprenticeship training which could bring economic benefits to the individual. This description of a child, too, represents a departure from the legal definition in Ghana of a child as someone under 18.

These themes provided an insight into community perspectives on the definition of a 'child', which differed considerably from the UNCRC, the African Charter on the Rights and Welfare of the Child (ACRWC), and the *Children's Act* of Ghana. In what follows, we delve into the implications that these local community definitions have for the conceptualisation of child trafficking within the study community.

Conceptualisation of Children's Transportation to Fishing Communities for Work

In this sub-section, the study explored the conceptualisation of children's movement to other communities (in this case Yeji) for fishing. Three major themes emerged from the data analysis: 'work socialisation', 'assistance to kin', and 'sold as commodities'. Detailed descriptions of the various conceptualisations are presented below.

Work Socialisation

The majority of the study participants conceptualised children's transportation to other communities for fishing as a form of work socialisation. Basically, study participants described the practice as an old phenomenon that has served as a route through which individuals are trained for the indigenous fishing sector. Consequently, the phenomenon was not regarded as criminal by community members even though it has been criminalised with the enactment of the *Human Trafficking Act*. The views of study participants have been presented below:

Most of the adult males in the community have worked in fishing in the past, even if they have stopped, so they see this as a way of training. They call the phenomenon "ntete" (training) in Fante. So they see this as normal, and they give the children to their aunts or relatives, who subsequently hand them over to fishermen who work on the Volta Lake. (Albert, NGO officer)

Similarly, one of the child returnees indicated that most fishermen had gone through the same form of training; consequently, they did not consider the practice as unlawful but a form of training that could benefit them to attain an economically independent adult life.

Most of the fishermen were trained like this. They were taken to Lake Volta in their early years as children and stayed with other fisherman till they were old and started their own vocation. So, they learnt the art and way of fishing through the same mode; consequently, the practice is not considered as illegal. (Kofi, child returnee)

This was affirmed by another child returnee who shared his experience while living and working with a fisherman in Yeji:

I know that my master was trained like this because he was also taken to Yeji at a very early age to stay with another fisherman. So the practice is not regarded as unlawful within Yeji. (Kwame, child returnee)

Additionally, one of the study participants indicated that parents and guardians mostly believe that children are leaving for other communities for work and not necessarily for exploitative purposes. The mother of one of the child returnees

explained as follows:

In this community, children who are transported to Yeji by their parents or guardians are regarded as working children and not as sold. They are taken to Yeji to live and work with fishermen. (Ama, parent)

These quotes are indicative of the way community members conceptualise children's transportation to other fishing communities for work. Specifically, they see it as based on the norms and cultural practices that have characterised children's involvement in fishing. Consequently, community members had not yet come to terms with the criminalisation of the phenomenon.

Assistance to Kin

Apart from work socialisation, a significant number of study participants indicated that children leave to other fishing communities to assist extended family relations (uncles and grandparents) in their fishing vocation. Accordingly, they argued that it is erroneous to label all cases of children's movement to other fishing communities as cases of trafficking. They indicated that children's movement from the fishing suburbs of Winneba to Yeji to assist their kin in fishing is an old practice that has thrived over the years. One of the parents of the child returnees explained:

I don't agree that I sold my child because I sent him to stay with my brother so he can assist him in his fishing work for some time, so I don't agree I have committed any offence at all because at 15 years he can work. (Akosua, mother)

Similarly, another study participant indicated that her (14-year-old) child's deviant behaviour informed her decision to take him to her brother in Yeji:

My child was sleeping at the beach among the fishermen, and he was not coming home most of the time, so I took him to my brother in Yeji who is a fisherman. So he stayed with his uncle and assisted him till the NGO brought him back. He was 14 years old before he left for Yeji. (Ama, mother)

One of the child participants affirmed that he was transported to Yeji to live with his father's brother after he had requested him from his father:

Money was not paid to my parents before I was taken to Yeji, so I went with my uncle after my father agreed for me to join him. I don't think I was sold but I was working every day without schooling. (Kwesi, child returnee)

It is evident from the interviews that children are occasionally transported to other fishing communities to assist extended family when a request is made for them.

While the involvement of kin does not immunise children from exploitation or trafficking, study participants did not consider the practice as trafficking since money was not paid to induce the movement of children. It is also probable that they considered children safe with extended family members as their biological parents have access to them and can monitor their development. The extended family is conceptualised in these communities as a basic unit for nurturing and caring for the child; consequently, children are not considered as exploited when they live with and assist other family members in their fishing vocation.

Sold as Commodities

Whilst this was the least attested theme, it registered as another conceptualisation of children's transportation to other fishing communities for work. Some child participants indicated that their parents received money when they were transported to other fishing communities for work, leading to the description of such children as commodities. One child said:

For me, I think it is a bad practice for those cases that involve money because I consider the children involved as sold. However, there are others who join a family member or relative and I don't think those cases are trafficking. (Nenyin, child returnee)

Another indicated that he was sold because he was treated like a commodity:

I believe I was sold when I was taken to Yeji because I was treated like a commodity by my father's friend. I was not going to school and I was working all day. (Kojo, child returnee)

Evidently, some child returnees indicated that children's transportation to other communities for fishing was in some instances facilitated by the payment of an initial amount, and they considered such children as victims of exploitation as per the *Human Trafficking Act*. More so, children who were placed with fishermen who were not their relatives reported issues of abuses and maltreatment during the field work. Consequently, their conceptualisation of the practice ('sold as commodities') aligned with the definition of the phenomenon as child trafficking.

Discussion and Conclusions

The findings of this study revealed varied conceptualisations of childhood based on age, body, and morality. This reflects the argument that childhood is a variable concept and differs across specific locations.⁴⁴ Impliedly, it is problematic to ascribe a universal definition of children as persons below 18 years of age

⁴⁴ Abebe and Ofosu-Kusi; Twum-Danso, 2016.

to all Ghanaian societies since their conceptualisation of childhood may differ significantly from the typology of childhood prescribed within Ghana's *Human Trafficking Act*. Put differently, whilst the local definition of children is based on their ability to utilise their bodies to undertake economic activities (in this case fishing), the legal definition has simply been transposed from the UNCRC, ACRWC, and their implicit Western ideal of childhood.⁴⁵ Consequently, it fails to take into account children's own desires and their rights to work as it pertains to the fishing community in this study.

Childhood is diversely conceptualised within some legal frameworks in Ghana. For instance, whilst the minimum age for sexual consent is 16 years of age, the acceptable age for marriage is 18 years.⁴⁶ This shows that it is possible to conceptualise childhood more flexibly depending on context. The normative practice of development practitioners applying standard minimum age criteria to childhood, whether it be a mandatory threshold for paid work or, in this case, children's movement to other communities for economic activity,⁴⁷ is problematic given that the norms and values that characterise childhood within specific communities may differ considerably. As it stands, the standardised construction of childhood ignores specific socio-cultural notions of childhood that inform the phenomenon of trafficking in children. Not surprisingly, Clark-Kazak has called for the consideration of *social age* by development practitioners engaged in child rights programmes and interventions.⁴⁸

This pilot study also revealed mixed perspectives on the conceptualisation of children's transportation to other communities for fishing. Whilst the practice is clearly identified by anti-trafficking stakeholders as a form of trafficking under the *Human Trafficking Act*, and to such a degree that over half of the working children in these communities are considered to be trafficked,⁴⁹ community members generally did not view it as such since adolescents (13-to-17-year-olds) are not regarded as children in terms of work (fishing). These findings are similar to Howard's, which indicated that community members in Southern Benin regarded the transnational movement of under-18-year-olds to Abeokuta (Nigeria) for mining as a normal practice that allows adolescents to demonstrate their capability

⁴⁵ Abebe and Ofosu-Kusi.

⁴⁶ A Twum-Danso and R Ame (eds.), *Childhoods at the Intersection of the Local and Global*, Palgrave Macmillan, Basingstoke, 2012.

⁴⁷ See, for example: Bourdillon *et al.*; R Huijsmans, 'Child Migration and Questions of Agency', *Development and Change*, vol. 42, issue 5, 2011, pp. 1307–1321, <https://doi.org/10.1111/j.1467-7660.2011.01729.x>; Howard, 2014.

⁴⁸ C R Clark-Kazak, 'Towards a Working Definition and Application of Social Age in International Development Studies', *Journal of Development Studies*, vol. 45, issue 8, pp. 1307–1324, <https://doi.org/10.1080/00220380902862952>.

⁴⁹ Singleton, Stone and Stricker.

as able members of their families.⁵⁰ This is indicative of the apparent conflict between the values regarding childhood within the study community and the provisions of international legal standards (UNCRC, ACRWC, and the Trafficking Protocol) adopted in Ghana. While international child rights legislation and western scholarly construction of childhood portrays children's lives within the study community as *other* and *lesser* childhoods, community members contested this *othering* by emphasising that in their communities' knowledge systems, these children were, rather, conforming to tradition. They were, thus, not different from the norm. Unsurprisingly, Ghana's *Human Trafficking Act* has remained ineffective in respect to arrests and prosecutions in fishing communities.⁵¹

Nevertheless, it is significant to note that some of the study participants aligned to the international legal standards on children's rights as they argued that such children had been sold like commodities. This conceptualisation can be attributed to the effects of anti-trafficking campaigns and activities by non-governmental organisations (NGOs) within the study community. Studies have indicated that anti-trafficking policy is characterised by NGO intervention within specific communities designated as trafficking endemic.⁵² Still, we argue that the designation of children's mobility for fishing as child trafficking is an imposition that does not sit well within the socio-cultural norms of the study community.

Additionally, whilst studies have indicated that the practice of sending children to other fishing communities for work (whether by kinship arrangements or not) may be detrimental to their wellbeing (particularly, health and schooling),⁵³ the research community's construction of the hazardous nature of fishing was based on the number of accidents or injuries that occur to children who work in fishing. Given that engagement with fishing activities starts at a very young age, acculturation to fishing may be attained during the period of adolescence. Thus, once adolescents are able to safely engage in fishing activities with little or no assistance from adults, they are not considered as children in that regard, leading to a different conceptualisation of the phenomenon by local people; the work is not perceived as 'hazardous' and thus, not as exploitative, under the above conditions. Moreover, children are considered capable members of their families within fishing communities and required to contribute economically to their

⁵⁰ N Howard, *Child Trafficking, Youth and Labour Mobility and the Politics of Protection*, Palgrave Macmillan, London, 2017.

⁵¹ See for example BN Lawrance, 'From Child Labour Problem to Human Trafficking Crisis', *International Labor and Working Class History*, vol. 78, issue 1, 2010, pp. 63–88, <https://doi.org/10.1017/S0147547910000128>; Sertich and Heemskerck.

⁵² Howard, 2014; Howard, 2017; Lawrance.

⁵³ Singleton, Stone and Stricker; Kukwaw; Sefa-Nyarko.

families.⁵⁴ Twum-Danso asserts that the responsibilities of children in this regard are intergenerational and evokes Article 31 of the ACRWC, which declares that every child has a responsibility towards their family⁵⁵ and may occasionally leave their communities for work elsewhere. Thus, childhoods in Africa are not fixed spatially and the problematisation of children's economic mobility is erroneous.⁵⁶ Clearly, the legal and policy framework on children's involvement in fishing in Ghana lacks adequate insight into the local context within which children's lives and their mobility for work in fishing coincide in their communities.

In summary, this study has challenged the taken-for-granted conceptualisation of childhood and the problematisation of children's mobility for fishing in Ghana. These conceptualisations are indicative of the exclusionary nature of child rights laws in Ghana, which do not reflect significant socio-cultural values on childhood and child-rearing within specific communities. Consequently, it is important to situate child trafficking in fishing communities within the contextual understanding of childhood. Practically, this calls for the consideration of a *social* age category within existing child rights laws in Ghana by way of legal reforms. This will have specific implications for anti-trafficking policy as the focus of interventions will shift from an abolitionist agenda to a protectionist one that reduces the risk of harm for children rather than removing them completely from specific economic activities (such as fishing), as has been the normal practice. Besides integrating the local conceptualisations and understandings of what children can and cannot do in to legal frameworks—improving the extent to which trafficking laws are experienced as legitimate by local communities—this would also minimise child exploitation and enhance the sustenance of indigenous industries in Ghana, such as fishing, on which so many communities depend.

⁵⁴ E T Sackey and B O Johannesen, 'Earning Identity Through Work: A study of children involved in fishing and farming practices in Cape Coast, Ghana', *Childhood*, vol. 22, issue 4, 2015, pp. 447–459, <https://doi.org/10.1177/0907568214566079>.

⁵⁵ A Twum-Danso, 'Reciprocity, Respect and Responsibility: The 3 Rs underlying parent-child relationships in Ghana and the implications for children's rights', *The International Journal of Children's Rights*, vol. 17, issue 3, 2009, pp. 415–432, <https://doi.org/10.1163/157181809X430337>.

⁵⁶ Huijsmans; see also J Boyden and N Howard, 'Why Does Child Trafficking Policy Need to Be Reformed? The moral economy of children's movement in Benin and Ethiopia', *Children's Geographies*, vol. 11, issue 3, 2013, pp. 354–368, <https://doi.org/10.1080/14733285.2013.817661>.

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‘Why Was He Videoing Us?’: The ethics and politics of audio-visual propaganda in child trafficking and human trafficking campaigns

Article retracted

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Child Trafficking vs. Child Sexual Exploitation: Critical reflection on the UK media reports

Elena Krsmanovic

Abstract

This article explores how UK media narratives construct sexual exploitation of British children as a phenomenon to be approached differently than sexual exploitation of trafficked minors who are non-British nationals. Qualitative analysis of media articles that frame infamous child sexual exploitation cases as occurrences of human trafficking shows that they bank on the motifs from the historical white slavery myth. Thereby, these articles endorse the stereotypes of white victim and foreign trafficker and obscure the diversity of trafficking victims, perpetrators, and experiences. Furthermore, comparison between media reports focusing on cases involving British minors, on the one hand, and minors from abroad, on the other hand, reveals that only the former problematise inadequate victim assistance and systemic failures in dealing with sexual exploitation of minors. This leaves structural causes of child trafficking unaddressed, promotes differential treatment of victims based on their nationality, and stigmatises whole communities as immoral and crime-prone.

Keywords: child trafficking, child sexual exploitation, UK, differential treatment of minor victims based on their nationality

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Introduction

In the first half of 2020, the year this article was first drafted, illusions of equality, universal rights, and social justice were powerfully challenged both by the disproportionate impact of COVID-19 on already disadvantaged populations, and by the Black Lives Matter protests that followed the murder of Mr George

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Floyd in the United States of America. Riding the wave of this disillusioning momentum, this article tracks discursive strategies employed by the UK media that construct trafficking of British minors for sexual exploitation as different to trafficking of foreign minors exploited in the UK sex industry. This distinction between victims, and the subsequent unequal access to victim assistance and protection, are neither UK-specific nor new phenomena. Evidence of survivors of human trafficking being discriminated against and categorised based on their country of origin, skin colour, gender, experiences, appearance, and behavioural patterns is global in scope and abundant in quantity.¹ News media play into this rhetoric and further endorse the idea that certain victims are 'legitimate', while others are not and thereby less worthy of sympathy and care.² The reporting on the phenomenon of child sexual exploitation, on the other hand, has generally received less scholarly attention.³ Particularly, the question of how the problematic framing of notable child sexual exploitation (CSE) cases, labelled as 'child trafficking' in the UK press, compares to the reporting on the exploitation of non-British children, remains underexplored. For that reason, this article focuses on the differences between the two and their potential to stigmatise immigrant communities and contribute to the differential and unequal treatment

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- ¹ See for instance R Anison, *In the Dock: Examining the UK's criminal justice response to trafficking*, Anti-Trafficking Monitoring Group, London, June 2013, <https://ecommons.cornell.edu/handle/1813/102138>; RHJM Staring, 'Human Trafficking in the Netherlands: Trends and recent developments', *International Review of Law, Computers & Technology*, vol. 26, no. 1, 2012, pp. 59–72, <https://doi.org/10.1080/13600869.2012.646797>; H Pandya and H Pandya, 'Racial Discrimination and Human Trafficking in India: Challenges ahead', *International Journal of Humanities and Social Science*, vol. 1, no. 6, 2011, pp. 97–121, http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/12.pdf; D Brennan, 'Competing Claims of Victimhood? Foreign and domestic victims of trafficking in the United States', *Sexuality Research & Social Policy*, vol. 5, no. 4, 2008, pp. 45–61, <https://doi.org/10.1525/srsp.2008.5.4.45>; J Doezema, 'Loose Women or Lost Women? The re-emergence of the myth of white slavery in contemporary discourses of trafficking in women', *Gender Issues*, vol. 18, no. 1, 1999, pp. 23–50, <https://doi.org/10.1007/s12147-999-0021-9>.
- ² E Kršmanovic, *Media Framing of Human Trafficking for Sexual Exploitation. A study of British, Dutch and Serbian media*, Eleven International Publishing, The Hague, 2020; the complete issue 7 of the *Anti-Trafficking Review*; M Pajnik, 'Media framing of trafficking', *International Feminist Journal of Politics*, vol. 12, issue 1, 2010, pp. 45–64, <https://doi.org/10.1080/14616740903429114>; and many others.
- ³ Among notable exceptions, see e.g. E Cockbain and W Tufail, 'Failing Victims, Fuelling Hate: Challenging the harms of the "Muslim grooming gangs" narrative', *Race & Class*, vol. 61, issue 3, 2020, pp. 3–32, <https://doi.org/10.1177/0306396819895727>; J Britton, 'Challenging the Racialization of Child Sexual Exploitation: Muslim men, racism and belonging in Rotherham', *Ethnic and Racial Studies*, vol. 42, issue 5, 2019, pp. 688–706, <https://doi.org/10.1080/01419870.2018.1467030>; W Tufail, 'Rotherham, Rochdale, and the Racialised Threat of the "Muslim Grooming Gang"', *Crime, Justice and Democracy*, vol. 4, issue 3, 2015, pp. 30–43, <https://doi.org/10.5204/ijcsd.v4i3.249>.

of children who experience sexual abuse and exploitation in the UK, based on their nationality.

This contribution presents an analysis of articles that treat CSE as a form of child trafficking. The analysed texts were published in British online media in the period of 2011-2015, when major sexual exploitation cases in Rotherham, Rochdale, Derby, Oxford, Telford, and Peterborough were heavily reported by the local and national media. These cases involved grooming and exploitation of hundreds of minors by groups of men over a period of over three decades and were followed by increased political and public attention to CSE.⁴ Charged conversations focusing on the ethnic background of the perpetrators became central to the CSE debate. Next to the worries linked to men grooming minors and exploiting them sexually, the British public was alarmed over the failed institutional response to exploitation of such magnitude. Lack of awareness among social workers and other professionals working with minors that were considered particularly vulnerable to this form of abuse was recognised as an underlying problem. Britons became outraged about victimised minors being failed by the system. Despite being involved with social services prior to or during their exploitation, these minors were not recognised as victims for a long time.⁵ With this increased media attention, the issue of CSE became almost synonymous with grooming and exploitation of minors by groups of adult men,⁶ described as *Muslim*, *Pakistani*, or *Asian*.⁷

In order to analyse media reporting on CSE cases, however, it is important to first untangle the distinct, but partly overlapping, terms of CSE and human trafficking. Both human trafficking and CSE are legally defined in the UK

⁴ See A Jay, *Independent Inquiry into Child Sexual Exploitation in Rotherham 1997–2013*, Rotherham Metropolitan Borough Council, 2014, <https://www.rotherham.gov.uk/downloads/file/279/independent-inquiry-into-child-sexual-exploitation-in-rotherham>, and other investigative reports by the Independent Inquiry into Child Sexual Abuse (IICSA) available at <https://www.iicsa.org.uk>.

⁵ S Hallett, “‘An Uncomfortable Comfortableness’: ‘Care’, child protection and child sexual exploitation’, *British Journal of Social Work*, vol. 46, issue 7, 2016, pp. 2137–2152, <https://doi.org/10.1093/bjsw/bcv136>.

⁶ M Melrose, ‘Twenty-First Century Party People: Young people and sexual exploitation in the new millennium’, *Child Abuse Review*, vol. 22, issue 3, 2012, pp. 155–168, <https://doi.org/10.1002/car.2238>.

⁷ In the media discourse of CSE cases in the UK, ‘Asian’ refers to South Asian communities, particularly the Pakistani community in the UK. Therefore, I use the term in this article, too, but italicised, in order to signal that it pertains to this specific group of Asian diaspora. For the same reason, italicised formatting is applied to the terms Muslim and Pakistani that refer to perpetrators involved in the reported CSE cases. For more details, see Tufail.

criminal law. Child sexual exploitation entails paying for the sexual services of a child (a person aged under 18), causing or inciting sexual exploitation of a child, controlling a child in relation to sexual exploitation, and arranging or facilitating such exploitation. UK legislators determined that a child is sexually exploited 'if on at least one occasion and whether or not compelled to do so, s/he offers or provides sexual services to another person in return for payment or a promise of payment to the child or a third person, or if an indecent image of the child is recorded.'⁸ On the other hand, British legislation stipulates that human trafficking is committed if a person arranges or facilitates the travel of another person with a view to exploit that person.⁹ In this sense, CSE is narrower than human trafficking, which can affect both children and adults and involve types of exploitation other than sexual. Another difference is the travel aspect that is central in the legal definition of human trafficking in UK law, while it may but does not need to be part of the crime act of CSE.¹⁰

Since this article is focused on the discourse of the press and not the law, the legal distinction drawn in the paragraph above is brief and simplified. However, it is important to note that British media rarely acknowledge the difference between the two phenomena, and generally equate 'child sexual exploitation' with trafficking of young British nationals by organised crime groups of *Asian* men.¹¹ Moreover, the media provide multiple definitions of CSE, such as domestic trafficking of children for money, organised child trafficking, a form of child sexual abuse, street grooming, a sexual act with a minor for which they or someone else receives payment, etc. Building on the existing literature critical of the CSE discourses,¹² this article pays particular attention to media framing of CSE cases that results in promoting differential treatment of minors who fall victim to sexual exploitation based on their nationality.

⁸ *Serious Crime Act*, 2015, <https://www.legislation.gov.uk/ukpga/2015/9/contents/enacted>.

⁹ *Modern Slavery Act*, 2015, <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

¹⁰ It is precisely this emphasis on movement that the British legislation attributes to the crime act of human trafficking that was criticised by anti-trafficking experts concerned with protecting human rights. For instance, Beddoe and Brotherton critiqued the British *Modern Slavery Act* of 2015 over potential obstacles in prosecuting cases where the movement of victim(s) is difficult to prove. See C Beddoe and V Brotherton, *Class Acts? Examining modern slavery legislation across the UK*, Anti-Trafficking Monitoring Group, London, 2016, <https://www.antislaverycommissioner.co.uk/media/1253/class-acts.pdf>.

¹¹ Krsmanovic.

¹² Tufail; Cockbain and Tufail.

Methods

In my PhD research, I analysed the framing of human trafficking for sexual exploitation in British, Serbian, and Dutch online media.¹³ The research was based on a combined quantitative and qualitative content analysis of media reports¹⁴ and interviews with journalists and anti-trafficking experts who provide information about human trafficking to the media.¹⁵ This research demonstrated that mediated accounts of human trafficking are deeply rooted in societal fears about security, hegemonic ideas about gender, hierarchy of labour mobility, erotic obsessions, and morality; furthermore, reports in all three countries were characterised by a concerning propensity towards reiteration of gender stereotypes and racial and ethnic biases towards victims and perpetrators of human trafficking.¹⁶

This article, however, is focused on a specific sub-sample of 151 media articles that framed human trafficking for sexual exploitation as CSE. This sub-sample was identified as somewhat of an anomaly in my doctoral research. Namely, while journalists in all three countries predominantly framed human trafficking as a criminal justice and prostitution-related issue, every tenth article in the UK press focused on one of the big CSE cases described in the introduction and framed them as trafficking of British youth by ethnic gangs who exploited them sexually. The decision to treat CSE as a separate frame in my original research was motivated by the large number of articles that focused on it (151 out of 1,544) and their unique features that stood out from the rest of the sample. Here, it is important to note that the narratives in the British press differed between victims who were British minors and those who were not. Another distinctive feature of the articles on British minors was calls for the establishment of a more comprehensive victim support mechanism, which was seldom a topic

¹³ Online media stand here for journalistic outlets of both tabloid and broadsheet orientation.

¹⁴ The sample for quantitative analysis consisted of 1,544 articles published in British journalistic online media, 776 in Dutch journalistic online media, and 280 in Serbian online media in the period between 2011 and 2015. The qualitative analysis in that research was conducted on a smaller sample consisting of 30 per cent of articles in the original sample. The sub-sample for the qualitative analysis was constructed with the use of stratified sampling.

¹⁵ Forty-eight interviews were completed in this research: thirty with experts in anti-trafficking (including a national anti-trafficking coordinator, representatives of NGOs, police, academics, legal experts, etc.) and eighteen with media professionals specialising in the topic of human trafficking (journalists, editors, and documentary film-makers).

¹⁶ Krsmanovic.

in articles that dealt with foreign or adult victims.¹⁷

The analysed articles were published in the journalistic online media¹⁸ in the UK between 2011 and 2015, the period when major CSE cases attracted a lot of attention due to the investigation and legal proceedings against the perpetrators. All articles were imported into the qualitative data analysis software NVivo. The analysis and coding process drew on Entman's conceptualisation of frames and their functions, which proposes that frames make some aspects of the news story more salient than others in order to promote certain problem definitions, causal interpretations, moral evaluations, and solutions for the problem described in the communicating text.¹⁹ Therefore, to analyse the data, I used a combination of predetermined coding categories: problem definitions, responsibility assigned for causing the problem(s), responsibility assigned for solving the problem(s), underlying moral judgements, and solutions offered, and emergent codes within these categories to analyse the data. I also coded images that were used to illustrate the articles using the emergent coding technique.²⁰

While this article is primarily based on the analysis of these 151 media reports using the CSE frame, which predominantly are on British nationals, in the second part of this article, I contrast these with news reports dealing with trafficking of foreign minors exploited in the UK that were scrutinised in my PhD research. In my doctoral study, at least 400 articles from the UK sample dealt with cases that involved non-British minor victims exploited in the UK sex industry.²¹ Next to the analysis of journalistic writings that encompasses both textual and visual

¹⁷ It is important to stress that the articles analysed in this contribution consider CSE to be a form of trafficking, even when it is not clear to what extent the travel element was present in the case. This is not to say that all journalistic publications in the UK confuse CSE and human trafficking. Rather, it is the search terms used to collect the data in my initial research that dictated the overlaps between trafficking and CSE narratives.

¹⁸ The journalistic outlets in the sample included tabloid media, such as the *Daily Mail* and *Daily Mirror*, which were the most represented. However, compact and broadsheet outlets such as *The Guardian* and *The Daily Telegraph*, were also well represented. The sample also included web presentations of the traditional electronic media (radio and television, e.g. the *BBC*). Finally, online platforms of daily locals had a high share in the analysed sample, accounting for approximately one-third of the sample.

¹⁹ R M Entman, 'Framing: Toward clarification of a fractured paradigm', *Journal of Communication*, vol. 43, issue 4, 1993, pp. 51–58, <https://doi.org/10.1111/j.1460-2466.1993.tb01304.x>.

²⁰ In emergent coding, codes used to categorise data emerge from the data itself.

²¹ This is a conservative estimate, since I only counted articles that explicitly mention the victim's nationality and age. The exact number is impossible to deduce because some articles would omit some of the information or use vague terms like 'youth' or 'very young' to refer to the victims.

data, this article banks on records from eleven semi-structured interviews with anti-trafficking professionals (seven) and media experts (four) who specialise in the topic of human trafficking in the UK. Speaking to anti-trafficking actors who provide information to the media allowed me to better understand why a certain way of framing trafficking was preferred and what the consequences of such reporting on the perception and suppression of human trafficking are. Most interviews were conducted in person and several over Skype or phone. I recorded the interviews, transcribed and anonymised them, and imported the transcripts into NVivo. While coding the interviews, I was looking for topics relevant to dominant frames identified in the media analysis of trafficking reports. The interview data was used to validate and contextualise the findings of the media content analysis.

Old Myth, Same Protagonists

Media narratives on human trafficking still rest upon the white slavery myth, i.e., the idea that foreign men abduct and deceive young, white, Western girls into prostitution. This myth dates back to nineteenth-century narratives that emerged in response to European and American women migrating in search for labour. The re-emergence of this myth was already recognised by scholars in the late 1990s. Doezema compared the historical white slavery myth discourse to that of trafficking in women, and recorded prominence of overlapping motifs and characters: deceived innocence and youth were linked to victims, and moral corruption and foreignness to traffickers. She identified further similarities in fears and anxieties that underpin these discourses: in connection with the white slavery myth, concerns linked to the collapse of the traditional family, women's independence, and the national identity crisis; with regards to trafficking, the fear of immigration, multiculturalism, and jeopardised traditional values.²² This section of the article explores how the white slavery myth resonates with the narratives used to describe CSE cases in the UK press.

The race and ethnicity of the perpetrators, and often their religion, are the focal point of the majority of analysed texts. For instance, one opinion piece on the Rochdale case in 2012 framed the case as a racial issue caused by *Asian men* who prey on white British girls: 'All the men were of Asian background; all the victims were white. Yet we are asked to believe this: "Commenting on the case, Greater Manchester Police Assistant Chief Constable Steve Heywood denied that it was about race. He said: 'It is not a racial issue. This is about adults preying on vulnerable young children. It just happens that in this particular area and time the demographics were that these were Asian men.'" Perhaps Mr Heywood would like

²² Doezema, p. 40.

to explain why some spokesmen for the Asian community don't agree with him.²³

In extreme cases, the guilt was extended from the perpetrators to the whole *Asian* community that was held accountable for not recognising or not reporting the abuse they were assumed to know of, based on 'the small size of their community'. Such was the case in an article published in the *Daily Mail*, where former Home Secretary Jack Straw asserted that the ethnic dimension of group grooming cases needed to be addressed, calling for harsher policing and addressing the denial within the *Asian* community, despite recognising in his statement that the majority of sex offenders in the UK are white.²⁴ Public pleas to the *Muslim* community to acknowledge this problem and condemn it should be understood as a request 'to "pledge of allegiance" to the state, nation and the hegemonic order'.²⁵

Even when issues of race, ethnicity, and religion were not explicitly tackled in the articles, the press found subtler ways to highlight their importance. Here, it helps to look at the demographic data on perpetrators and victims that was shared in the articles. Only 5 per cent of texts that frame human trafficking as CSE recognise the possibility of traffickers being white. On the other hand, close to 90 per cent highlight explicitly that perpetrators are foreign men. Most frequently used labels are *Asian*, *Pakistani*, and *Muslim*. Comparing media outlets with different political orientations yields more interesting results. For instance, looking at how a specific case is covered in conservative vs. liberal media reveals the propensity of the former to conceal the fact that these *Asian* traffickers are most frequently British citizens. They employ various strategies to this end, for example, to disclose the nationality of the foreign members of the group. Media also rely on vague terms that are easily misinterpreted, such as '*Asian* community', and 'foreign gang'. In order to portray offenders as essentially non-British, the articles would also omit information on their nationality and country of origin, but put forward phrases like 'Muslim men' or use their distinctly 'foreign-sounding' surnames (e.g. Ali, Azis, Hassan, Sultan, Khan, Ahmed, etc.) to signify their ethnic otherness. Emphasis on the neighbourhoods that the perpetrators originate from and that are known to be predominately populated by immigrants, were also used to communicate to the local readership that the perpetrators are 'foreign'. This stereotypical representation fits the white slavery

²³ D Thompson, 'Manchester Sex Trafficking Case "Not About Race" Say police. Do they expect us to believe that?', *The Telegraph*, 8 May 2012.

²⁴ M Robinson, 'Council and Police Had 127 Warnings About Sex Abuse in Town Where Asian Gang Raped Dozens of Children, Finds Damning Report', *Daily Mail*, 27 September 2012, <http://www.dailymail.co.uk/news/article-2209261/Council-83-warnings-sex-abuse-town-Asian-sex-gang-spent-years-raping-dozens-children-young-10.html>.

²⁵ Tufail.

myth and testifies of the continuing trend in reporting on human trafficking and related issues to situate foreign men as inherently evil, exploitative, and disrespectful of women. Furthermore, a recent report issued by the Home Office found that the majority of perpetrators involved in CSE cases are white men under the age of 30.²⁶ Hence, the stigmatisation of Asian communities is not the only negative effect of this media bias; it can also result in obscuring the dangers of minors being sexually exploited by white individuals. This, in turn, can have a negative effect on the awareness of risks related to both human trafficking and CSE.

The portrayal of CSE victims in the analysed sample shows similarity to the ‘white slave’ stereotype, too. Victimised minors are referred to as British children, white girls, and UK-born children. Yet, if the exploited minors were from a minority group, this information would frequently be omitted. Only six articles mention that ethnic minority British minors (four articles) and foreign children (two articles) are victimised, too. This affirmed the white slavery narrative in which all perpetrators are foreign and dark skinned, while victims are white, but stands in contrast to Doezema’s conclusion that contemporary discourses on trafficking refer to sexual exploitation of foreign women from less developed countries, mainly Eastern Europe.²⁷ While foreign victims used to be in the focus of the anti-trafficking discourse two decades ago when Doezema wrote her article, in recent years, the focus has shifted to domestic victims.²⁸ Therefore, it is likely that equating CSE with human trafficking in the public discourse serves the same purpose of promoting the idea of increased vulnerability of domestic citizens to the foreign evils supposedly inherent in the phenomenon of human trafficking. This idea and its consequences will be explored later in this article.

Vivid depictions of the violence inflicted upon the exploited youths were often provided in the articles on CSE cases. These unnecessarily detailed and dehumanising accounts of victims’ suffering were encountered in online tabloids, as well as outlets of more serious formats. An excerpt from an article published in *The Independent* exemplifies this: ‘The girls were raped, gang-raped, put to work as prostitutes, rented out for sadistic torture sessions. The girls were

²⁶ J Grierson, ‘Most Child Sexual Abuse Gangs Made up of White Men, Home Office Report Says’, *The Guardian*, 15 December 2020, <https://www.theguardian.com/politics/2020/dec/15/child-sexual-abuse-gangs-white-men-home-office-report>.

²⁷ Doezema.

²⁸ This is in line with earlier research suggesting that British media are likely to over-represent minors and domestic citizens as victims of human trafficking. For example, I have found that minors were over-represented as victims of human trafficking in the UK media in the period between 2011 and 2015. In the same period, there was a clear indication of a bias towards domestic citizens as the ‘preferred’ victim type by the UK press. For more details, see Krsmanovic.

harmed with knives, cleavers and baseball bats. They were given illegal amateur abortions. The children would lie, drugged and drunk, in squalid guesthouses and filthy flats as queues of local paedophiles and opportunistic punters queued up to have sex with them.²⁹

According to interviews with media professionals, these spectacles of violence bear huge potential to attract a desensitised audience that enjoys reading about horrific crimes. At the same time, anti-trafficking professionals identified this as one of the major obstacles in their collaboration with the media. '[The] difficulty lies in trying to raise awareness that the abuse is taking place, but avoid having media focus on the physical and sexual manifestation of that abuse.'³⁰ Consequences of such sensationalistic narratives go far beyond generating clicks and shares of news articles. Apart from dehumanising victims, voyeuristic displays of abuse are used to establish the inherently evil character of the trafficker versus the good, morally virtuous and, thus, superior character of the spectator. For example, an article based on an upsetting testimony of a victim that was taken by a dark-skinned man to a hotel room uses images from security camera footage from that hotel to show how the victim was lured into the room where she was abused. This provides a very detailed account of the victim's ordeal—one that the reader experiences through both reading her heart-breaking testimony and seeing convincing photographic evidence from the crime scene. By following the victim and her abuser from the reception to the hotel room, the reader thus becomes a post-factum witness of the minor's abuse, and consequently more invested in the story.³¹

Racial representation of perpetrators and their victims is equally homogenous in the images accompanying the analysed articles, which reinforce the white slavery myth. The sample is dominated by mugshots of *Asian* men or images of them taken in front of the court. Through the symbolic meaning of mugshots and courts, these men are thus likely to be viewed as criminal and guilty before any conviction. Tracking down the early tradition of photographing prisoners, Carney wrote that photographs 'marked their bodies with a stigma that was more than just symbolic; for in the developing culture of photographic circulation, the spectacle

²⁹ G Dent, 'How Could So Many Years of Horrendous Abuse Go Unnoticed? In this case, the guilt extends way beyond Oxford sex traffickers', *The Independent*, 16 May 2013, <https://www.independent.co.uk/voices/comment/how-could-so-many-years-of-horrendous-abuse-go-unnoticed-in-this-case-the-guilt-extends-way-beyond-8617339.html>.

³⁰ Interview, London, 11 August 2016.

³¹ E Retter, 'Shocking Hotel Footage Captures Moment Girl Aged 13 Is Lured Into Room To Be Raped by Paedophile', *Daily Record*, 9 November 2014, <https://www.dailyrecord.co.uk/news/uk-world-news/shocking-hotel-footage-captures-moment-4597368>.

of the “brand” was extended and intensified’.³² Given the significant role of media in shaping public perceptions, the stigmatising effect of such images and their wide circulation should not be neglected. Research on the impact of the CSE case in Rotherham on ordinary Muslim men showed that negative feelings among the general public towards the photographed perpetrators of CSE can extend to those who look like them.³³ Simultaneously, the one-sided racial representation of CSE perpetrators masks the fact that trafficking and child sexual exploitation are committed by white perpetrators as well.³⁴

When it comes to the portrayal of victims, all images show white individuals. When stock images are used, graphic editors usually select photographs of children that are much younger than those involved in the reported cases. In these photographs, youth and victimhood are emphasised through children’s postures and props used in the photographs. Children are often shown crying, holding stuffed animals, or curled into a foetal position—evoking feelings of empathy and a desire to protect. Yet, the empathy remains reserved to an ethnically and racially homogeneous group of children who look white/British and young.

The issue of race also emerged in the interviews with anti-trafficking professionals who were critical towards the media. They testified of difficulties they faced while trying to challenge the race narrative in their media appearances. For instance, one NGO representative said media were failing to frame the Rotherham case as gender-based violence against children because they were focusing on the ‘race issue’: ‘I mean, we were on TV and they were asking us: “Well isn’t this all about the race?” And we were saying: “No, it’s about violence against children.” So you do have competing issues and you do have competing discourses on top of that.’³⁵ This quote exemplifies how framing of the media can cloud the fundamental issue, such as violence against children, and shift the focus to perpetrators’ origin, race and, often times, religion. There are some attempts to challenge the narratives congruent with the white slavery myth.³⁶ Yet, the premise that the ethnic and religious backgrounds of the perpetrators, along with their disrespectful attitudes towards British women, make them prone to sexually exploitative and abusive behaviour is still widely

³² P Carney, ‘Crime, Punishment and the Forces of Photographic Spectacle’, in K J Hayward and M Presdee (eds.), *Framing Crime: Cultural criminology and the image*, Routledge-Cavendish, Abingdon, 2010, p. 21.

³³ Britton.

³⁴ Grierson.

³⁵ Interview with an anti-trafficking expert from the UK, London, 6 July 2016.

³⁶ See, for example, K Nguyen, ‘Asia Girls “Hidden Victims” of Sexual Exploitation in UK’, *Thomson Reuters*, 10 September 2013, <https://news.trust.org/item/20130910154928-aysic>.

spread. Voices challenging this perspective were heard mostly in the serious and left-oriented media that would sometimes oppose linking perpetrators to Islam, ‘particularly if those involved never actually displayed any form of religious motivation in the first place’.³⁷ But they were overshadowed by the hegemonic, racialised discourse. The underlying problem visible in the analysed articles was the hesitance to engage with sensitive topics and address both racist stereotypes typical of British society and the cultural taboos present among its South Asian communities, such as the taboo of sex, which I will now further elaborate on. This hesitance to have an open dialogue about CSE cases is displayed by the media and their sources—people responsible for tackling this problem in Britain.

All Victims Are Equal, But Some Are More Equal Than Others

The findings in the previous section are in line with earlier research that demonstrated how discourse used to refer to CSE cases serves to position British Muslims as a perceived racialised threat to British society.³⁸ In his analysis of the Rochdale and Rotherham CSE cases, for instance, Tufail has found that the popular discourse is centred on the notions of inferior cultures and dangerous masculinities of Muslim men. According to him, this racist discourse emerged following the release of the Independent Inquiry into Child Sexual Exploitation in Rotherham 1997-2013, and banked on colonial discourses that limited the debate on CSE and led Muslim communities in Britain to experience isolation, alienation, racist attacks, and criminalisation. I further elaborate his argument by showing how the racist discourse on Muslim perpetrators was accompanied by different victim narratives in media reporting on CSE cases (pertaining exclusively to British victims) and child trafficking cases (pertaining to the exploitation of non-British minors). Understanding of these differences is crucial to uprooting differential treatment of victims and securing equal protection of all minors who experience sexual exploitation.

Following Entman’s framing theory, I looked at the following categories to identify these differences: problems identified by the press, who is assigned the responsibility for causing these problems, who is assigned the responsibility for solving them, what solutions are suggested for the identified problems, and what are the underlying moral bases/judgements associated with the two groups of articles—those on CSE of British victims and those on non-British victims of trafficking. The most prominent difference was that media articles

³⁷ H Kesvani, ‘Sermons Preached in Mosques Will Do Nothing To Prevent Child Sex Abuse in South Asian Communities’, *Independent*, 2 July 2013, <http://www.independent.co.uk/voices/comment/sermons-preached-in-mosques-will-do-nothing-to-prevent-child-sex-abuse-in-south-asian-communities-8683505.html>.

³⁸ Cockbain and Tufail; Tufail.

focusing on CSE (and British victims) were discussing the position of victims and problematising systemic failures in recognising them and providing adequate assistance in their recovery. For instance, a report on the Rochdale case states: ‘While some organisations were consistently supportive in their response, overall child welfare organisations missed opportunities to provide a comprehensive, co-ordinated and timely response and, in addition, the criminal justice system missed opportunities to bring the perpetrators to justice.’³⁹

CSE-framed reports stressed the need for measures that strengthen institutional responses to the sexual exploitation of British minors. These measures include educating responders (the police, social services, teachers, and healthcare professionals) and promoting a multi-sectoral approach to identification, suppression, and relevant rectification action. Some articles offered more concrete solutions such as giving a specific minister formal responsibility for the issue, appointing child guardians to minors who have faced CSE, improving record keeping, and developing an offender database. Importantly, a large number of articles advocated for improving victim support, raising awareness of the issue, and investigating failed institutional responses.

On the other hand, articles that had to do with the exploitation of non-British minors were more focused on traffickers, whose presence in Britain was presented as the main problem. This meant that the solution to child trafficking proposed in these articles was to prosecute traffickers and prevent them from entering Britain in the first place. Most of these articles revolved around feelings of insecurity and fear of the Other in British society rather than around the fate of victims. Very few to none dealt with questions of adequate victim assistance, investigations of institutional failures, recovery and reintegration of victims, or including more actors in the fight against trafficking.⁴⁰ This is problematic because it creates obstacles to publicly legitimising and effectively securing rights to protection and support as well as access to justice for foreign trafficked minors and victimised minors of ethnic minorities in the UK. While articles on CSE problematise very different issues to articles on trafficking of foreign minors, they all rest on the premise of paying tribute to the (ethnic) British national community and its security, at the cost of the security and safety of ethnic minorities in the UK.⁴¹

³⁹ No author, ‘Rochdale Abuse: Social services “missed opportunities”’, *BBC*, 27 September 2012, <https://www.bbc.com/news/uk-england-manchester-19739073>.

⁴⁰ Krsmanovic.

⁴¹ Trafficking scholars focused on other European regions made similar conclusions in their studies, too. See, for instance, B C Oude Breuil and T Marguery, ‘Freedom, Security and Justice for Whom? The case study of Bulgarian street prostitution in France’, in T van den Brink, M Luchtman and M Scholten (eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement*, Intersentia, Cambridge, 2015, pp. 197–216.

The underlying moral base in the CSE-framed articles was twofold. Articles promoted the idea that it is imperative to punish crime on the one hand, and to help and protect vulnerable children on the other. What stood out in the analysis is the firm connection between the two. Helping British children and protecting their rights was inextricably linked to prosecuting criminal gangs of foreign men involved in their exploitation. This connection makes sense in terms of prevention, and perhaps securing some sense of justice for the affected individuals. Yet, as I have concluded elsewhere, it overlooks the fact that systemic and comprehensive support for victims of trafficking needs to exist irrespective of the response to the criminals. Many failures of the system in the UK to provide such support are overlooked, and institutional efforts are directed primarily at criminalisation.

Interviews with UK experts involved in assisting trafficking survivors exposed additional concerns related to differential treatments of victims based on their nationality. 'For British children, their young age and nationality was always stressed, but their race and ethnic background were frequently concealed if they were not white. For children who came from outside the UK, some media would omit mentioning the fact that victims were minors, whilst stressing that they were foreign or that they came into the UK illegally.'⁴² Anti-trafficking professionals also emphasised that some media reports portrayed older children (victims who were 16 or 17 years of age) as being lascivious and misbehaved, and suggested they were responsible for finding themselves in exploitative situations. My own analysis of CSE-framed articles did not show victim blaming by the media,⁴³ but it is worrisome that UK press outlets tend to do that when the victims are foreign.

Further negative implications concern the failure to uproot systemic biases in response to CSE and child trafficking. The interviewed anti-trafficking experts warned that biases towards victims and perpetrators found in the media circulate among anti-trafficking responders, too. They emphasised the interconnectedness: biased professionals provide information to the media and media reports influence practitioners' views. A UK police representative I interviewed reflected on media and police prejudice towards victims of CSE and child trafficking: 'I think that comes up [in the media]. And I think that is the perception within policing as well. You talk about child sexual exploitation, involving suspects from Pakistani Asian communities, you straight away think about your victims being probably white. Where, when you talk about human

⁴² Interview, London, 6 July 2016.

⁴³ In some of the articles, it was clear that children who suffered CSE encountered victim blaming on the institutional level (e.g. by the police and social services); however, the reports were critical of such systemic discrimination and oversights.

traffickers, you probably think of your victims being non-UK victims.⁴⁴

Additionally, only articles connecting CSE cases to human trafficking problematise omissions in policing work. These included police refusing to take action, considering victims as ‘child prostitutes’, deeming that children ‘seemed happy’ with their abusers, holding victims accountable if they consumed alcohol, or concluding that a 14-year-old child ‘consented’ to sex even though they were below the legal age to do so. Such criticisms are largely absent in reports on cases involving exploitation of foreign minors, which rather tend to glorify the work of the police in curbing human trafficking. Both groups of reports fail to consider if biases associated with perpetrators affected the work of the police. This is important because failure to investigate suspects that do not fit the foreign trafficker stereotype recognised by the police is likely to have a negative impact on eradicating human trafficking and CSE from British society.

The concern with the sexual exploitation of domestic minors by foreign men is deeply rooted in societal fears of the ethnic other and amplified by the discourse that asserts British borders and national identity are in crisis. In Britain, these anxieties were enhanced by Brexit campaigns that further contributed to negative attitudes towards migrants.⁴⁵ Therefore, it is not surprising that the stereotype of the foreign trafficker continues to be reiterated in mediated representations of CSE cases. However, by representing the trafficker (migrant) as the source of the problem, such articles are promoting restrictive migration measures in response to the crime of human trafficking, even though these have been proven ineffective in both curbing sexual exploitation and addressing the dependencies that leave migrants at heightened risk of it.⁴⁶ It also leads to the further marginalisation of South Asian communities in the UK. Lastly, these biases can negatively affect public awareness, and thus people’s

⁴⁴ Interview, London, 29 July 2016.

⁴⁵ A O’Neill, ‘Hate Crime, England and Wales 2016/17. Statistical Bulletin 17/17’, Home Office, London, 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652136/hate-crime-1617-hosb1717.pdf; FLEX, *Migration Advisory Committee Call for Evidence: EEA-workers in the UK labour market*, Focus on Labour Exploitation, London, 27 October 2017, http://www.labourexploitation.org/sites/default/files/publications/MAC_EEAworkersCommission_FLEXsubmission.pdf.

⁴⁶ J Berman, ‘(Un)Popular Strangers and Crises (Un)Bounded: Discourses of sex-trafficking, the European political community and the panicked state of the modern state’, *European Journal of International Relations*, vol. 9, issue 1, 2003, pp. 37–86, <https://doi.org/10.1177/1354066103009001157>; S Sassen, ‘Women’s Burden: Counter-geographies of globalization and the feminization of survival’, *Journal of International Affairs*, vol. 53, no. 2, 2002, pp. 503–524; K Kempadoo and J Doezema (eds.), *Global Sex Workers: Rights, resistance, and redefinition*, Routledge, New York, 1998.

ability to understand human trafficking, assess related risks, and protect themselves from exploitative situations.

Finally, it should be noted that media treatment of CSE as trafficking can also have a negative impact on victims of CSE who have not been trafficked. The typically punitive, crime-control approach to trafficking means that the social and economic factors that make children vulnerable are ignored. In her empirical study of experiences of children who survived CSE, Hallett concluded: ‘The current focus on grooming, and the emphasis on young people’s lack of agency, deflects attention from much wider socioeconomic structures that cause adversity, whilst also directing practice to see the needs and wishes of an individual young person as secondary to their protection.’⁴⁷

Conclusion

The media plays a significant role in supporting the efforts to address human trafficking: it can increase awareness and contribute to prevention as well as to the development of policies and responses to it.⁴⁸ Media can also play a role in monitoring institutions involved in tackling the issue, deconstructing or reinforcing stereotypes, and shaping the environment in which victims recover—be it to become more supportive or more stigmatising.⁴⁹

As this article has shown, however, stereotypical media representation of CSE cases as trafficking reinforce the white slavery myth of foreign men coming to the UK to corrupt local (white) girls and force them into prostitution. These evil foreign traffickers are, according to the analysed articles, the source of the problem. Journalists did not explore whether men originating from certain countries are indeed more likely to exploit young women, and if so, for what reasons. Lack of such investigations leaves the reader with an oversimplified, stereotypical representation. This, in turn, creates grounds for further discrimination, racism, and other underlying factors that push minority communities into further vulnerability to victimisation and over-policing by law enforcement agencies. Biases can also have a negative effect on public awareness, and thus people’s ability to understand human trafficking, assess related risks and protect themselves against exploitative situations.

⁴⁷ Hallett.

⁴⁸ Krsmanovic; S Rodríguez-López, ‘(De)constructing Stereotypes: Media representations, social perceptions, and legal responses to human trafficking’, *Journal of Human Trafficking*, vol. 4, issue 1, 2018, pp. 61–72, <https://doi.org/10.1080/23322705.2018.1423447>; G J Gulati, ‘News Frames and Story Triggers in the Media Coverage of Human Trafficking’, *Human Rights Review*, vol. 12, no. 3, 2010, pp. 363–379, <https://doi.org/10.1007/s12142-010-0184-5>.

⁴⁹ Krsmanovic.

On the other hand, the comparison of articles focusing on CSE cases of British victims and those that deal with child trafficking for sexual exploitation of non-British youths yielded other alarming findings. While media reports focused on the abuse of British minors call for more comprehensive measures of social protection, articles on trafficking of foreign minors only promote harsher policing and prosecution of traffickers. This approach leaves large gaps in addressing the root causes of trafficking and other forms of sexual abuse against minors. Additionally, media reports not only promote differential treatment of victims based on their nationality, they also take an active part in this differential treatment (e.g. by concealing that foreign victims are minors and emphasising the youth of the exploited British minors). Only by addressing these problems can the journalistic media be used to effectively support the fight against child trafficking and sexual exploitation.

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‘Little Rascals’ or Not-So-Ideal Victims: Dealing with minors trafficked for exploitation in criminal activities in the Netherlands

Brenda Oude Breuil

Abstract

Trafficking in minors for exploitation in criminal activities is a form of human trafficking that is generally not well-recognised and understood by frontline actors. This paper, based on empirical data from frontline actors, shows that this is also the case in the Netherlands. Moreover, the Dutch ethnicised understanding of the phenomenon, which is conceptualised as a ‘Roma’ problem, further obfuscates the identification of these trafficking cases, leading to a blind spot for victims of other ethnicities and differential treatment of itinerant ‘Roma’ victims compared to Dutch and resident victims. It also shows that there is a gender bias among frontline workers, with girls being more readily perceived as victims than boys, and interventions in the girls’ cases geared towards protection, whereas boys were seen as ‘little rascals’ that should be punished. The paper concludes that a focus on indicators of the phenomenon, rather than on victim profiles, could improve this situation and help frontline actors take more transparent as well as ethnic- and gender-neutral decisions.

Keywords: child, trafficking, exploitation in criminal activities, victim identification, exploitation of minors, frontline actors

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Introduction

Several years ago, Milan and Krizstían, two French-speaking boys aged 12 and 14, were arrested by the Dutch police in a posh neighbourhood.¹ They were suspected of having burglarised a villa, and apprehended after one of them tossed away a glove filled with jewellery during the chase. A few moments earlier, a car with a Bulgarian number plate was stopped in that same neighbourhood, following a burglary report. The driver had burglary tools in his trunk. He claimed that he had given the boys a ride, but that he did not know them; the boys said the same. This, however, was clumsily refuted by the driver's son when the latter made a concerned call to the police requesting information on 'his father and his two nephews', after they were taken into custody.

Forensic work on the car enabled the police to connect the boys to the car and prove their exploitation by the driver, aka their (supposed) uncle. The 'uncle' was tried and convicted of trafficking the two boys for the purpose of exploiting them in criminal activities—but not before the boys had both been detained in a youth facility for four and six weeks, respectively, as a punishment for the crime they committed. According to the Child Protection Board file meant to inform the judge on Milan's backgrounds and advise 'in the best interest of the child':

'Considering the criminal offence, the situation of [Milan], the suspicions of human trafficking, his age and circumstances, the Child Protection Board deems detention in a youth facility most fit. [Milan] should realise that he is not allowed to commit criminal offences and that this behaviour has consequences.'²

This case, retrieved from our research on exploitation of minors in criminal activities in the Netherlands,³ reveals that the road to ensuring 'the best interests of the child' in cases of minors trafficked for exploitation in criminal activities is bumpy. International and EU legislations that the Netherlands has ratified

¹ For reasons of anonymity, personal names, places, and dates have been deleted or changed.

² A Bos *et al.*, *Uitbuiting van Minderjarigen in de Criminaliteit in Nederland: Onderzoek naar de signalering aanpak en de samenwerking door professionals*, Utrecht University, Utrecht, 2016, pp. 57 and 134, https://dspace.library.uu.nl/bitstream/handle/1874/347141/WODC_rapport_Uitbuiting_van_minderjarigen_in_de_criminaliteit_in_nl.pdf.

³ This research was conducted in 2015-16 by Dr Kim Loyens and Aline Bos MSc of the Utrecht School of Governance, and Dr Veronika Nagy and Dr Brenda Oude Breuil of the Criminology Department of Willem Pompe Institute for Criminal Law and Criminology (both institutes belonging to Utrecht University), with assistance from Tineke Hendriks, Laura van Oploo and Laura van Tilborg. It was commissioned by the Dutch Ministries of Social Affairs and Employment, and of Justice and Security. It combined a governmental approach with criminological and anthropological expertise. See Bos *et al.*

state that victims of trafficking should not be held responsible (and thus not be punished) for crimes they were forced to commit.⁴ However, the boy mentioned in the Child Protection Board file was convicted of burglary and spent several weeks in youth detention. Moreover, both the police officer involved in the case, specialised in human trafficking cases, and social workers of the Child Protection Board (hereafter, 'the Board') commented retrospectively that they found this punishment 'deserved' and just.

One may then wonder: if Milan's right not to be punished was not respected when his trafficking had been proven in court, what then to expect from cases that did not even make it to court? How can we explain the punitive reaction of frontline actors⁵ who encounter victims of this crime in their everyday work? Are they well prepared to identify and deal with such cases, and are they aware of the legal regulations? And do they balance criminal justice interests and the need for protection consistently for all victims they encounter?

These issues were at the heart of our research conducted in 2015-16 on trafficking in minors for exploitation in criminal activities in the Netherlands. This form of human trafficking was then relatively unknown in the country⁶ (and beyond, as international studies on trafficking in minors are overshadowed by those on

⁴ See, *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 2005, Art. 26, and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Art. 8.

⁵ By 'frontline actors' I refer here to social actors who, because of their jobs, are the first to encounter minors (possibly) trafficked for exploitation in criminal activities, such as police officers, social workers, Child Protection Board and custody institutions' employees, etc.

⁶ A van den Borne and K Kloosterboer, *Inzicht in Uitbuiting. Handel in minderjarigen in Nederland nader onderzocht*, ECPAT Nederland, Amsterdam, September 2005, <https://www.politicacademie.nl/kennisenonderzoek/kennis/mediatheek/PDF/03-15057.pdf>; M Kaandorp and M Blaak, *Kinderhandel in Nederland: De aanpak van kinderhandel en de bescherming van minderjarige slachtoffers in Nederland*, UNICEF & Defence for Children, May 2013, https://www.unicef.nl/files/kinderhandel_in_nederland_mei_2013.pdf; V Brotherton *et al.*, *Trafficking for Forced Criminal Activities and Begging in Europe*, Anti-Slavery International, 2014, p. 6, http://www.antislavery.org/wp-content/uploads/2017/01/trafficking_for_forced_criminal_activities_and_begging_in_europe.pdf; I De Witte and M T Pehlivan, *Vulnerability of Bulgarian and Romanian Children to Trafficking in The Netherlands and in Brussels*, Defence for Children & ECPAT Nederland, Budapest, December 2014, <https://www.kis.nl/sites/default/files/bestanden/Publicaties/Vulnerability-bulgarian-romanian-children-to-trafficking.pdf>. The latter reported about 20 cases in Rotterdam between 2010 and 2013 of petty crime committed by Central and East European children in which exploitation was suspected.

trafficking for sexual and, to a lesser extent, labour exploitation). Back then, only five cases had been successfully tried in court. Besides these five proven cases, there were several ‘soft signals’ on potential cases of trafficking in minors for exploitation in criminal activities, coming from frontline actors, in particular a custody institution specialised in the care for ‘Roma’⁷ children, and the occasional police officer or social worker who had, rather haphazardly, taken an interest in this group of victims. These potential (mostly ‘Roma’) cases never made it to court—oftentimes they did not even enter the legal system *tout court*, and therefore could not be established as proven cases. With ‘hard facts’ being largely absent, and ‘soft signals’ having never been systematically verified, Dutch policymakers remained in the dark regarding the extent and characteristics of the phenomenon.

As this research took place some years ago, there have obviously been further developments in the field. Parliamentary questions have been asked following the publication of the research report,⁸ and the aforementioned custody institution has continued contributing to the visibility of the phenomenon. The so-called ‘zakkenrollersteam’ (‘pickpocketing team’) of the Amsterdam police has revealed pickpocketing exploitation structures as transnational organised crime, which has attracted considerable media attention.⁹ The visibility of trafficking in minors for exploitation in criminal activities has thus increased in the last couple of years.

Whether that has also led to a guarantee of victims’ best interests is another matter. This form of trafficking remains under-researched, both in the Netherlands and beyond, and equally, not much research has been conducted on the treatment of victims in the criminal justice system or youth protection. This article aims to contribute to filling that gap by sharing some of Dutch frontline actors’ experiences and dilemmas in identifying and dealing with minors who became victims of trafficking for exploitation in criminal activities. The obstacles they encountered are not unique for the Netherlands and, thus, the insights here may be relevant to child protection institutions in other countries.

⁷ I put Roma between quotation marks, as frontline actors use this as a container concept. Groups were considered ‘Roma’ without making further distinctions between, for example, Sinti or Ashkali, travellers, or itinerant groups from Central and Eastern Europe. Frontline actors could apply the label on the basis of self-identification by their clients, or through data on their country of birth, last names, ethnic or cultural appearance, or even ‘looks’ or ‘gut feelings’.

⁸ See Tweede Kamer der Staten Generaal, *Parliamentary questions (Appendix) 2017-2018, no. 1589*, 29 March 2018, retrieved 12 February 2021, <https://zoek.officielebekendmakingen.nl/ah-tk-20172018-1589.html>.

⁹ See, for instance, M Wagemans, ‘WNL Misdaadcollege: Rechercher slaat alarm wanneer hij telkens dezelfde jonge zakkenrollers tegenkomt [Detective raises the alarm when he encounters the same young pickpockets every time]’, *WNL Misdaadcollege*, 25 May 2020, retrieved 2 April 2021, <https://wnl.tv/2020/05/25/wnl-misdaadcollege-rechercheur-slaat-alarm-wanneer-hij-steeds-dezelfde-jonge-zakkenrollers-betrapt>.

In the following, I first elaborate on the research design and methods. Then I explain how the Dutch political context has influenced the identification of victims by frontline actors who, often unconsciously, look for ethnicised ‘usual suspects’ and victims. The next section elaborates on another narrowing of the perception on the phenomenon, namely the ‘ideal victim’ and its gendered consequences. After this, I go into the question why, more often than not, signals of trafficking for exploitation in criminal activities do not result in proper follow-ups and reactions. Finally, I draw conclusions from the research and discuss the need to focus on characteristics of the *phenomenon* of trafficking in minors for exploitation in criminal activities, rather than those of the *victim*.

Methodology

This explorative research revolved around two questions: first, what knowledge on the phenomenon already exists—the definition and characteristics of trafficking in minors for exploitation in criminal activities, perpetrator and victim profiles, the extent of the problem, its societal context, and best practices in approaching victims—and secondly, how frontline actors deal with the victims.¹⁰ We started with a systematic review of existing Dutch and international literature on trafficking in minors for exploitation in criminal activities and followed this with a qualitative, empirical study. We conducted 37 semi-structured interviews with frontline actors in four municipalities in the Netherlands, two of which were in the biggest cities, Amsterdam and Rotterdam, and the other two were smaller cities, Enschede and Ede.

We also aimed to research five cases that were as diverse as possible—in terms of the ethnicity, age, sex, and nationality of the victims; the possession or absence of a valid residence permit in the Netherlands; and in terms of whether the perpetrators were family members of the victims—in order to maximise the scope of different manifestations of the phenomenon. We first searched the public (online) legal archive. As mentioned, five cases had been successfully tried in court at the time, but they did not match our criteria of maximum diversity, as there was an overrepresentation of (supposedly) ‘Roma’ cases. Moreover, most were well-known among frontline actors, making spontaneous reflection difficult. We thus selected only one of these cases for further study and asked our frontline respondents for other cases. A complicating factor here was that policy choices targeting ‘Roma’ families, which had preceded the commissioning of

¹⁰ For the full research question and sub-questions, see Bos *et al.*, pp. 10–11.

the research,¹¹ had clearly influenced frontline actors' perceptions: they looked at the phenomenon through a 'Roma lens' and conceptualised it as a 'Roma problem'. Hence, they could only come up with 'Roma' cases. We then decided to search the databases and archives of the Dutch police and the Board for cases that matched the legal definition of trafficking in minors, and in which the purpose had been exploitation in criminal activities. The five cases eventually selected consisted of three cases that frontline actors labelled as 'Roma' cases (of which two concerned non-residents, and one held Dutch residence status) and two cases in which the victims were Dutch nationals. The cases involved exploitation through shoplifting, transporting drugs, and burglary.

For each of these five selected cases, we studied the files and conducted semi-structured interviews with at least two frontline actors involved in them. Where possible, we conducted (participant) observation during legal or child protection interventions, such as shadowing a legal guardian while intervening in a family and attending the court case of one of our case studies. We conducted additional observations in meetings of a law enforcement team that investigates child trafficking cases, and a legal entity concerned with the rapid settlement of penal cases. Finally, we validated our initial findings in two focus groups of 13 and 11 participants, respectively, consisting of frontline actors and policymakers.

Recognising the Phenomenon: An ethnicised tunnel vision

The phenomenon of trafficking in minors for exploitation in criminal activities is, compared to trafficking for sexual or labour exploitation, relatively unknown. In Europe, some insightful (mainly INGO and NGO) reports elaborate on it,¹² but most are not based on academic research, nor aimed (solely) at knowledge production, limiting their academic value. There are very few in-depth academic

¹¹ The research was commissioned following the 2011 national cooperation project, 'Tackling the Exploitation of Roma Children', a result of the call for action of several municipalities with a substantial number of Roma inhabitants. Although the commissioning body stipulated its explicit wish to extend the research beyond the Roma population, finding 'non-Roma' cases proved difficult due to these prior policy choices.

¹² See, for instance, European Forum for Urban Security, *Wandering Young People: The conditions for return*, EFUS, Paris, January 2009; Z Vidra, K Baracsi and V Sebhelyi, *Child Trafficking in Hungary: Sexual exploitation, forced begging and pickpocketing*, Center for Policy Studies, Central European University, Budapest, 2015; and J Jovanović, "Vulnerability of Roma" and *Anti-human Trafficking Policies in Serbia: Recommendations to the National Policy Network*, Center for Policy Studies, Central European University, Budapest, July 2015.

studies on this issue.¹³ From this limited data, pickpocketing, forced begging, burglary, shoplifting, street vending (e.g. illegal cigarette vending), and drug trafficking (e.g. cutting cannabis leaves or transporting drugs over national borders) come to the fore as the most prevalent forms in Europe. Particularly concerning the first four forms of criminal activities, there is a strong emphasis in research on ‘Roma’ children and children from Central and East European countries as the primary victims of such exploitation.

We should, however, be sceptical about this ‘ethnicisation’ of the phenomenon. First of all, several of the aforementioned reports were part of European or national programmes specifically aimed at addressing the socio-economic exclusion of ‘Roma groups’ and, thus, politically and policy-inspired, rather than neutral investigations. Moreover, the victimisation of minors in this crime is described in the literature as linked to socio-economic disadvantages; living in segregated, impoverished, and crime-prone neighbourhoods; and being part of families in which parents are sick, use drugs or alcohol, are unemployed, or have migrated.¹⁴ There is no apparent reason to expect children from other ethnic groups living in similar circumstances to be less victimised. In other words: disproportionate victimisation is primarily linked to deprived living conditions,¹⁵ rather than having a certain ethnic background. Thirdly, Mary Christianakis insightfully points towards a Western, Eurocentric discourse by human rights organisations and media, pitching ‘Roma childhoods’ as endangered, dangerous, and ‘other’. She shows how this can impact on interpretations of ‘Roma’ children’s work, claiming that ‘the parents, fellow Romani, and the Roma culture’ are perceived as victimisers:

¹³ However, see, for instance, E Gjermeni *et al.*, ‘Trafficking of Children in Albania: Patterns of recruitment and reintegration’, *Child Abuse & Neglect*, vol. 32, issue 10, 2008, pp. 941–948, <https://doi.org/10.1016/j.chiabu.2007.09.015>; B Oude Breuil, ‘Bienvenue Chez les Grands! Border-crossings of young migrant cigarette vendors in Marseille’, in G Craig (ed.), *Child Slavery Now. A contemporary reader*, Policy Press, Bristol, 2010, pp. 189–202; B Lavaud-Legendre and O Peyroux, ‘Mineur(e)s Nigérien(e)s et originaires des Balkans en situation de traite en France. Regards pluridisciplinaires sur les processus de l’asservissement et les échecs de la protection’, *Revue Européenne des Migrations Internationales*, vol. 30, issue 1, 2014, pp. 105–130, <https://doi.org/10.4000/remi.6779>.

¹⁴ For an overview of supposed characteristics of child victims of trafficking, see Bos *et al.*, p. 35.

¹⁵ We should, however, be careful not to over-emphasise the link between poverty and family dysfunction, on the one hand, and child trafficking on the other, or to assume a causal link here; after all, not every child coming from a poor or dysfunctional family gets trafficked. Presupposing causality here carries the danger of stigmatisation and criminalisation of poverty.

‘[The discourse claims that] their parents force them to beg, steal, engage in sexual exploitative acts, and enter into fraudulent marriages for slavery and servitude. Their childhoods are sacrificed for money by their caregivers, and therefore, their culture renders them incapable of their own self-actualization and participation in democracies. Their childhoods are, thus, dangerous and depart from the normative childhood set forth by the UN *Convention of the Rights of the Child*.¹⁶

If we follow her argument that this picture of ‘Roma’ children and their caregivers rather reflects the interests and biases of European organisations and media than the situation of ‘Roma’, we can conclude that there is no academic reason to suggest that the phenomenon of child trafficking for exploitation in criminal activities is a ‘Roma phenomenon’. There is more reason to think that the existing idea among policymakers and social workers that it *is* has resulted from an ethnic bias in research and policy that has become self-perpetuating.

Going back to the Dutch landscape, which is not detached from the European framework and its existing biases, we can conclude that there was a general lack of knowledge of the phenomenon at the time of the research. Frontline actors said they had not encountered cases of exploitation in criminal activities very often. The organisations they represented did not have any expertise on this phenomenon, apart from one or two employees who had encountered such cases. These employees oftentimes expressed feeling isolated in their organisations, and referred to their expertise as ‘in the land of the blind, the one-eyed man is king’. Frontline actors of both law enforcement and child protection were unsure whether they would be able to recognise a case of trafficking in minors for exploitation in criminal activities if they encountered one.

This observation is not unique to the Netherlands; international studies show that frontline actors have trouble identifying minor victims of trafficking as they find the legal definitions difficult to apply to concrete cases.¹⁷ With victims

¹⁶ M Christianakis, ‘Victimization and Vilification of Romani Children in Media and Human Rights Organizations Discourses’, *Social Inclusion*, vol. 3, issue 5, 2015, pp. 48–63, p. 59, <https://doi.org/10.17645/si.v3i5.250>.

¹⁷ See, for instance, D R Hodge, ‘Assisting Victims of Human Trafficking: Strategies to facilitate identification, exit from trafficking, and the restoration of wellness’, *Social Work*, vol. 59, issue 2, 2014, pp. 111–118, <https://doi.org/10.1093/sw/swu002>; A Warria, H Nel and J Triegaardt, ‘Challenges in Identification of Child Victims of Transnational Trafficking’, *Practice*, vol. 27, issue 5, 2015, pp. 315–333, <https://doi.org/10.1080/09503153.2015.1039974>.

generally not self-identifying as such, and limited time for building trusting relationships with minors,¹⁸ frontline actors struggle to recognise characteristics of exploitation in minors' narratives. Moreover, assumptions on what victims should ideally look like dissuade them from according victim status to minors who do not fit this ideal type. Especially with regard to itinerant or migrant minors, frontline actors may hold the opinion that these minors only came to the host country to profit from its social benefits, which can cloud their abilities to view them as victims.¹⁹

For itinerant 'Roma' groups, this observation takes a specific turn in the Dutch context. On the one hand, prior policy emphasis on combating exploitation within 'Roma' families sensitised frontline actors to linking exploitation in criminal activities to 'Roma' (or 'Central and East European groups', which can partly overlap with 'Roma'). When asked about exemplary cases of this form of trafficking, they showed an almost standard reaction: initial silence and a thoughtful frown, followed by: 'Oh, you mean Roma kids stealing and pickpocketing?' It was extremely difficult, if not impossible, to speak with Dutch frontline actors about this phenomenon in ethnically neutral terms. On the other hand, however, this increased visibility of itinerant 'Roma' as both perpetrators and victims did not always lead frontline actors to attribute the victim status to victimised minors, and thereby prevent the latter from being punished for the crimes they committed, as in the case described above. 'Roma' minors were thus recognised as 'usual' victims, but not always acknowledged as *deserving* victims.

¹⁸ See, for instance, P Rigby, 'Separated and Trafficked Children: The challenges for child protection professionals', *Child Abuse Review*, vol. 20, issue 5, 2011, pp. 329–334, <https://doi.org/10.1002/car.1193>; A West and D N Loeffler, 'Understanding Victim Resistance: An exploratory study of the experiences of service providers working with victims of child trafficking', *Journal of Applied Research on Children: Informing Policy for Children at Risk*, vol. 6, issue 1, 2015, p. 17.

¹⁹ See, for instance, S J Terrio, 'New Barbarians at the Gates of Paris? Prosecuting undocumented minors in the juvenile court – The problem of the 'Petits Roumains'', *Anthropological Quarterly*, vol. 81, issue 4, 2008, pp. 873–901, <https://doi.org/10.1353/anq.0.0032>; V Nagy and B Oude Breuil, 'Mobility Rules. Migrant and drifters fare well (?) in post-welfare Europe', in F De Jong and M Boone (eds.), *Overarching Views of Crime and Deviance - Rethinking the legacy of the Utrecht school*, Eleven, The Hague, 2015, pp. 527–546; G Serughetti, 'Smuggled or Trafficked? Refugee or job seeker? Deconstructing rigid classifications by rethinking women's vulnerability', *Anti-Trafficking Review*, issue 11, 2018, pp. 16–35, <https://doi.org/10.14197/atr.201218112>.

Frontline actors described their ‘Roma’ clients as ‘difficult’ and ‘elusive’, with distrust characterising the relationship.²⁰ They held stereotypical perceptions on ‘the Roma’ as one unified group and did not distinguish between habits, culture, language, or residence status of different groups present in the Netherlands. The occurrence of exploitation of ‘Roma’ minors in criminal activities was attributed to (supposed) ‘Roma’ culture and ‘their different norms and values’. As one respondent put it: ‘These children are raised in an environment in which it is normal to go on a raid with your father, mother, or uncle’.²¹ Moreover, power relations within ‘Roma’ households were sometimes accepted as ‘part of their culture’ without further looking into eventual exploitative aspects of the relationship.²² Frontline actors may then fail to further look into such cases, acknowledge these minors as victims, and approach them as such.²³ This may explain the punitive attitude of frontline (supposedly expert) actors in the case of Milan at the beginning of this article and the label of ‘little rascal’ that was pinned to him.

A more punitive approach could befall not only ‘Roma’ victims of exploitation in criminal activities, but also their parents. This was illustrated through a case study on (native Dutch) mother Petra who had been apprehended by the police when leaving a supermarket with stolen goods in her bag. She was accompanied by her two children (including her 13-year-old daughter Anna) and the neighbours’ daughter, and the police suspected Petra of having encouraged Anna to shoplift, and maybe the neighbours’ daughter as well (according to a police report filed by the neighbour). When we learnt about this case and asked the Board workers whether this could be a case of exploitation in criminal activities, they reacted with surprise and irritation, commenting that ‘this is not exactly a case in which parents encourage the children to go out and steal

²⁰ See: Bos *et al.*, pp. 82–84. This observation is not unique for the Netherlands; see on frontline and legal actors’ negative feelings towards ‘Roma’ groups also Terrio (France); V Nagy, ‘The Janus Face of Precarity–Securitisation of Roma mobility in the UK’, *Local Economy: The Journal of the Local Economy Policy Unit*, vol. 33, issue 2, 2018, pp. 127–146, <https://doi.org/10.1177/0269094218764117> (UK), and O Petintseva, ‘“Entextualisation” Across Institutional Contexts: The impact of discourse in school reports on the juvenile justice trajectories of Roma youth’, *Youth Justice – An International Journal*, vol. 19, issue 1, 2019, pp. 3–24, <https://doi.org/10.1177/1473225419830786> (Belgium).

²¹ Bos *et al.*, p. 60.

²² *Ibid.*, p. 55

²³ See also: S De Bus, O Petintseva and A Nuytiens, ‘Roma-Meisjes op de Jeugdrechtbank: De professionele actoren binnen de jeugdbescherming aan het woord’, *Tijdschrift voor Jeugd en Kinderrechten*, issue 2, 2017, pp. 84–107, <http://hdl.handle.net/1854/LU-8520408>.

things'.²⁴ However, in comparable cases of 'Roma' families, in which the role of the parents in the stealing behaviour was also not fully clear, the 'trafficking' label *had* been evoked. In trying to explain this, a Board supervisor referred to the different intervention instruments available in cases of Dutch families, on the one hand, and itinerant groups, on the other hand, who do not have registered addresses or for whom other administrative requirements are (still) not settled. The former case would be labelled as 'failed parenting', and Board workers would use youth protection intervention strategies (such as appointing a legal guardian). However, with mobile 'Roma' families, these measures would not succeed.²⁵ Criminal law intervention was then considered the only means left to deal with the situation. The lack of effective child protection interventions for itinerant groups might thus reinforce already biased perceptions of 'Roma', through the pursuit of stigmatising criminal law interventions in cases that would otherwise have been dealt with through youth protection measures.

Therefore, in the general absence of proper expertise on the phenomenon of trafficking in minors for exploitation in criminal activities, and against the background of an ethnicised—or 'Roma-ised'—Dutch context, frontline actors have trouble recognising victimised minors. Itinerant 'Roma' groups, then, are seen as the usual suspects and as fitting the stereotypical victim profile. Although they might be identified as trafficking victims, this is not a guarantee for them to also be acknowledged as such, due to their stigmatisation and the reduction of 'Roma' childhoods as deviant, with children perceived as being in danger and, sometimes, dangerous. After all, the visibilised 'usual Roma victim' is far from an 'ideal victim'. I turn to this in the next section.

Vulnerable Girls vs 'Little Rascals': A gendered approach?

Several years ago, Marina and Leila, two French-speaking girls aged 15 and 17, were caught stealing jewellery from a villa in a residential area. There were strong indications that the girls could be connected to another burglary, too. When questioned by the police, Marina immediately admitted to the burglaries; Leila appealed to her right to remain silent. There were uncertainties about the girls'

²⁴ According to them, the theft was an incident, Anna had acted on her own account, and her mother was probably unaware. However, the police file of the case indicated that the mother was aware of Anna putting things into her bag, and the public prosecutor expressed in her indictment her suspicions that the mother 'sent her children out to steal'—although without attaching the label of trafficking to it. See Bos *et al.*, p. 56.

²⁵ For similar observations on frontline actors' assessments of the failing of certain intervention modalities, due to the elusiveness of mobile 'Roma' communities, see De Bus, Petintseva and Nuytiens.

identities, their legal guardians, and their residencies, which complicated the case, as the minors could not be sent home to their parents or guardians. Through an emergency hearing the girls were placed in custody and, soon after, in a (closed) youth facility. The treatment goal was to return them safely to their families in France, and to arrange the necessary help and support.

This case strongly resembles that of Milan and Krizstían: in both cases, the minors are not Dutch residents and ‘visit’ the Netherlands to commit burglaries. Both couples invoke questions about where and with whom they live, how they ended up in the Netherlands, and who they and their legal guardians are. In each of the cases, one of the minors has previous incidents in other countries and in both cases, when questioned, one of them appealed to their right to be silent, thereby complicating the resolution of the case. All four minors do not speak Dutch, and in both cases there are indications that they might be trafficked for exploitation in criminal activities—and at least one of the involved frontline actors raised the possibility of trafficking. Finally, in both cases the victims are recognised by frontline actors as part of ‘Roma’ or travelling Central or East European communities.

The ways the cases were understood and handled by professionals, however, were entirely different. Whereas Milan and Krizstían entered into a criminal procedure and were ultimately sentenced to four and six weeks in youth detention, Leila and Marina did not spend more than a few days in a cell—the time needed to appeal for an emergency hearing. They then entered into a civil procedure, aimed at their protection. A legal guardian was appointed and they were placed in a closed child protection facility. The goal of their treatment was to find their families and ensure they received support.

How can we explain the punitive approach towards the boys, especially considering their young age (12 and 14)? The concept of the ‘ideal victim’, who is also a deserving victim, can provide some further insight here. An ideal victim is ‘a person or a category of individual who—when hit by crime—most readily [is] given the complete and legitimate status of being a victim’.²⁶ We find the label of ‘victim’ *deserved* when the victim is considered weak and vulnerable, and thus unable to prevent the crime from happening. The victimiser, ideally, is someone unknown to the victim, a stranger who exerts his power over the victim; the victim is, therefore, not to blame for the crime befalling upon them. These two allegorical figures are gendered, as ideal victims are mostly women (and children), whereas ideal perpetrators are men. Even though Marina and Leila might not be (entirely) ideal victims—as discussed in the previous section, frontline actors

²⁶ N Christie, ‘The Ideal Victim’, in E A Fattah (ed.), *From Crime Policy to Victim Policy*, Palgrave Macmillan, London, 1986, pp. 17–30, p. 18, https://doi.org/10.1007/978-1-349-08305-3_2.

often have negative perceptions towards ‘Roma’ clients, and in this case, they found the girls’ story ‘mendacious’—Marina and Leila do come closer to that ideal than the boys. Not innocent, but definitely (seen as) ‘vulnerable’.

Their vulnerability pivoted around a few characteristics, emphasised in their files by respondents: first of all, Marina was pregnant and had a black eye that she could not convincingly explain. When placed in two different closed facilities, both girls longed to go home. In the Board files, the girls were repeatedly described as ‘silent’ and ‘sad’. For the boys, this was quite different. The wording in the Board files at the beginning of this article is revealing: whereas the Board worker wrote that Marina ‘was unable to withstand external manipulation’, in Milan’s file the focus was on the need for him to ‘realise that he is not allowed to commit criminal offences’. Whereas Marina is pictured as a victim of circumstances, lacking agency, and a puppet on a string, Milan is primarily approached as an irresponsible individual who should learn to be accountable for his actions. Moreover, the police officer who handled the boys’ case, a human trafficking expert, responded to my question whether now that he knew the boys were victims of trafficking he looked at their treatment and detention differently: ‘No, not really. They *did* steal, and these boys were little rascals, you should have seen them when they were being questioned! They were tried and tested in dealing with us, and didn’t give us any information.’ It did not seem to occur to him that the fact that the boys knew how to deal with the police might not be a reflection of them being ‘little rascals’ but, rather, of being trained in how to behave in front of the police—which would strengthen the case for them being victims of (organised) trafficking. Nor did the resilient attitude of the girls, and their apparent agency—Marina, for example, escaped twice from the institution she was placed in, once by jumping out of a window, and once by taking a run during a shopping visit with a social worker, an escape prepared weeks in advance with someone’s mobile phone she had secretly managed to get her hands on—seem to make a big difference in frontline actors’ perceptions of them as the vulnerable, ‘ideal victims’.

This finding of a possible gendered approach is confirmed by the interviews with frontline actors. Some of them mentioned that they find the possibility of girls as victims of trafficking just more obvious: ‘it particularly makes a bell ring if it’s a girl’,²⁷ and one frankly reflected that in cases of boys and girls that were otherwise comparable, she would ‘intuitively’ not find the boys similarly pitiable. Another (Board) frontline actor claimed that ‘the judge perceives boys less easily as victims’; therefore, compared to boys, girls’ chances for success were perceived as higher when advising the judge to apply a protection measure instead of a criminal justice intervention in their cases. De Bus, Petintseva

²⁷ Bos *et al.*, p. 61.

and Nuytiens confirm the protective tendencies towards ‘Roma’ girls in youth justice: judges would either *not* follow up on crimes committed by ‘Roma’ girls *at all* (as the available forms of punishment or rehabilitation measures were not perceived to ‘work’ on this group), or they would place them in closed youth facilities. The reason behind the latter decision echoes the findings here: girls were seen as in need of protection from a living environment that was defined as dangerous to their wellbeing.²⁸ As a result, frontline actors may indeed often have an ‘ideal victim’ in mind when assessing trafficking cases involving minors, and girls seem to fit that image better than boys—even when they are ‘Roma’ girls.

From ‘Soft Signals’ to Decisive Action: A bumpy road

The fact that cases of exploitation of minors in criminal activities did not often make it to court is, according to our research, not only due to not *recognising* and *acknowledging* cases as such. After all, in most studied cases, at some point in the investigation process—be it a criminal investigation by the police or the gathering of information by the Board—someone did mention suspicions of trafficking. Those indications, however, seem to ‘get lost’ somewhere along the line. Here, I explore some possible reasons for that and reflect on the value of the trafficking label.

Professionals in our research would sometimes choose to not (explicitly) label a case as trafficking, even if they did recognise it as such. This was, for example, Babette’s case, a 13-year-old Dutch girl who was apprehended at Schiphol Airport for carrying a ball of cocaine in her body. There were clear indications that she had not independently chosen to do this, and the Board worker commented that she had recognised ‘loverboy-like’ characteristics²⁹ to this case: Babette was in contact with her nine-years-older boyfriend ‘24 hours a day’ via social media and was ‘emotionally dependent’ on him. She tried to protect him by not revealing his name, as ‘she loved him’. Babette had no connections to peers her age, had a troubled relationship with her mother, and suffered from unresolved mourning of her deceased father—a list of indicators (stereo)typical

²⁸ De Bus, Petintseva and Nuytiens, pp. 99–100.

²⁹ ‘Loverboy’ is a term for a recruitment strategy to engage young girls into prostitution and/or (here) into criminal activities that the so-called ‘loverboy’ is profiting from. It includes a young man making the girl fall in love with him and isolating her from her social support network. After making her emotionally dependent he would let her ‘work’ for him. See R Verwijs *et al.*, *Loverboys en Hun Slachtoffers. Inzicht in aard en omvang problematiek en in het aanbod aan hulpverlening en opvang*, Verweij-Jonker Instituut, Utrecht, December 2011, <https://www.verweij-jonker.nl/wp-content/uploads/2011/01/SUMMARY.pdf>.

for a loverboy victim. However, that label—which would immediately trigger suspicion of a trafficking case—was not mentioned in the report. The Board worker did not use it because she did not want to influence the judge and ‘stick to the facts’. Proper as this approach may be from the perspective of the neutral, informative role of the Board, it may also have contributed to the case not being recognised as a trafficking case. The Board worker did discuss her suspicions with her Royal Marechaussee³⁰ colleague, with whom she cooperated in a team that retrieved unaccompanied minors at Schiphol. This colleague, however, did not follow up on her signal, as he reckoned there were not ‘enough indications’ to start a criminal investigation.

The case is similar to observations in other cases: in order to have suspicions of child trafficking further investigated, the initial signal needs to ‘survive’ its path through several institutions. In a scenario where frontline actors lack knowledge of the phenomenon (or feel insecure about it), a signal generally does not ‘make it’ to the subsequent institutions in the child protection chain. In some cases, like the above, that is surprising and might be a lapse of judgement.³¹ A signal being duly investigated, then, comes to depend on individual frontline actors not only recognising and acknowledging a case as exploitation in criminal activities, but also standing their ground, which generally they will not, considering their insecurity on this topic. Even though the small number of case studies makes it complex to draw generalised conclusions, the data suggests that this dependency on individual frontline actors’ explicit and perseverant reporting of trafficking signals reinforces the aforementioned ethnic tunnel vision and its focus on ideal victims: where professionals have insufficient understanding of the *phenomenon*—its characteristics, modus operandi, internal communication strategies, etc.—they fall back on the (supposed) characteristics of the *victims*.³² This focus seems to give them a (false) sense of security that this ‘must be’ a trafficking case, ‘as this group is particularly prone to being linked to trafficking’.

³⁰ The Dutch Royal Marechaussee is responsible for policing the borders; protecting persons, objects, and specific places; and fulfilling international and military police tasks. See ‘Tasks of the Royal Netherlands Marechaussee’, Ministry of Defence, retrieved 16 March 2021, <https://english.defensie.nl/organisation/marechaussee/tasks-of-the-royal-netherlands-marechaussee>.

³¹ In this case, a criminal investigation did eventually start, but not until Babette’s boyfriend reported himself to the police (for unknown reasons). He was tried for violating the opium law, assault of a minor, and human trafficking. See Bos *et al.*, p. 135.

³² This was confirmed by a police officer and key respondent to this research, who asked the research team to provide him with a list of victim characteristics in order to make it easier on frontline actors to identify trafficking in minors for exploitation in criminal activities. We refused to do so for the obvious ethical reasons: such a list would, we argued, reinforce existing stereotypes and lead to biased targeting of certain (ethnic, as well as socio-economic) groups.

There were three other reasons for frontline actors in our research to not label cases as trafficking, even though they thought they might qualify as such: the label's consequences are felt to oppose either organisational interests, the criminal justice interests (in other words: the investigative and prosecution aspects), or the best interests of the child. Concerning the *organisation's interests*: in the above case, the Royal Marechaussee worker commented that exploitation in criminal activities is probable in *all* cases of drug mules involving minors, and also in some cases involving adults. He said that labelling all these cases as human trafficking—and involving a human trafficking expert—would lead him to ‘not have any drug cases left!’. Although expressed in a joking way, it does reveal an organisational interest to keep cases ‘in their own hands’, which could potentially result in underreporting human trafficking. He further explained that such labelling might not benefit the *criminal justice interests* of such cases either, since in human trafficking cases the burden of proof is ‘considerably higher’ than for other crimes. The evidence, thus, needs to be strong in order for the case to stand up in court.

Finally, frontline actors from the field of youth justice and child protection commented that labelling a case as trafficking might not be in the *best interest of the child*. Their observation is an important one, as it problematises the label itself, as well as its possible consequences. The argument, echoed in academic studies,³³ is that in some cases legally qualifying as ‘trafficking’, applying that label pulls away from addressing structural (political, economic, and social) root causes, to the benefit of (often highly symbolic) punitive criminal justice reactions. This is particularly the case if the exploitation of the minor's criminal activities is a matter of ‘family survival’: when stealing is a way to make ends meet for families living in socioeconomically deprived conditions and where the proceeds (the ill-gotten booty) directly benefit the minors themselves. Prosecuting and giving jail terms to parents for trafficking their children can have severe consequences for the children, and may make their living conditions worse. A civil intervention, geared towards protecting the children, supporting parents in raising them, and structurally improving living conditions, would yield better results. Academic studies confirm that in cases of exploitation within the family, structural causes should be addressed and a mere criminal justice approach might, indeed, not be in the best interests of the child.³⁴

³³ See, for example: J O’Connell Davidson, ‘Moving Children: Child trafficking, child migration, and child rights’, *Critical Social Policy*, vol. 31, issue 3, 2011, pp. 454–477, <https://doi.org/10.1177/0261018311405014>.

³⁴ Warria *et al.*, p. 326.

Discussion and Conclusion

This research has unveiled several problems in the identification of and approach to minors exploited in criminal activities. Most apparent is the general lack of knowledge about this form of trafficking. The characteristics of the phenomenon are not recognised by frontline actors, which leads them to focus on the ‘usual suspects and victims’, namely ‘Roma’. This not only has a (further) stigmatising effect and reinforces the perception of ‘Roma’ childhoods as deviant and inferior, it also carries the risk of failing to recognise cases with another ethnic profile, which, as this research has shown, do exist. Moreover, these biased perceptions have translated into biased approaches. Whereas in cases concerning Dutch citizens and residents, frontline actors tended towards a youth justice and protective approach, addressing structural causes, and supporting parents in their parenting efforts, cases of ‘Roma’ families without stable residence in the country were seen as more difficult to effectively intervene in. Frontline actors were then more inclined to gear towards a criminal law approach, leading to (further) criminalisation of this group.

Frontline actors also demonstrated gendered biases: girls were more easily perceived as vulnerable and identified as victims, as well as referred to civil measures aimed at protecting them, compared to boys who would be subjected to criminal law interventions. In other words, the gendered perception of the ‘ideal victim’ results in a differential motivation to punish boys for the crimes they committed (and deny their victimhood) and to protect girls (and ignore their agency).

In the absence of sufficient knowledge on this form of trafficking in minors, frontline actors are inclined to overly focus on the characteristics of (potential) *victims* as a way to detect trafficking. Drawing lists of such characteristics, however, carries the risk of stereotyping certain ethnic, socioeconomically deprived, or in other ways ‘deviant’ groups, and distributing protection and punishment unequally. A more fruitful step forward, I argue, would be to focus on the characteristics of the *phenomenon*. Focusing on indicators such as minors not being allowed to benefit from the profits of their crimes; their position of (serious) dependency vis-à-vis the commissioning adult(s); and minors being obviously trained in dealing with the police or instructed on how to escape child protection institutions, might prevent professionals from disproportionately targeting certain groups and moralistically applying a Eurocentric measuring rod of ‘good’ and ‘bad’ childhoods. It might also prevent them from assessing and approaching possible trafficking cases on the basis of such opaque and culturally biased codes.

Focusing on the characteristics of the *phenomenon* could also address frontline actors' legitimate concerns that applying the label of child trafficking may not (always) be in children's best interest, as it may distract from addressing families' varied socioeconomic situations. A focus on indicators of exploitation might help frontline actors make more transparent decisions on opting for a child protection measure, a criminal justice intervention, or both, provided that the indicators are not simplified into an 'either/or' choice (either they constitute trafficking, or they do not). Rather, they should be seen on a continuum.³⁵ On one extreme, there are cases in which applying the trafficking label is very ambiguous—for example the above mentioned family survival-related stealing, which directly benefits the child and her family—while on the other extreme, there are cases in which exploitation and trafficking are more obvious—for example in cases of organised trafficking, where the profits are high, the agency of children is severely limited, and the children do not benefit from the crimes they commit; many shades of grey exist between these two extremes. Although such an approach would not give simple and clear-cut instructions for dealing with cases of trafficking in minors for exploitation in criminal activities, it does allow for more substantial, and from an ethnic and gender perspective more neutral considerations. If, moreover, these considerations are systematically shared and discussed among frontline professionals—both within and outside their organisations—it might, in time, expand the existing knowledge of the phenomenon. More empirical academic studies could further this goal.

These combined efforts might pave the way for a better identification of trafficking in minors for exploitation in criminal activities and guarantee that children's rights are respected, including the right not to be punished for crimes they were forced to commit. They might also help shift the focus to the root causes of the phenomenon and urge governments to address the economic, social, cultural, and gender inequalities at its heart, while keeping both the best interests of children and their agency in focus.

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³⁵ See for a similar argument O'Connell Davidson, p. 465.

Ganged Up On: How the US immigration system penalises and fails to protect Central American minors who are trafficked for criminal activity by gangs

Katherine Soltis and Madeline Taylor Diaz

Abstract

This article addresses the failures of the United States immigration system to protect Central American minors who were trafficked for exploitation in criminal activities by gangs. In particular, it focuses on the ways in which the US immigration system denies humanitarian protection to Central American minors who were forced to participate in criminal activity by the *Mara Salvatrucha* (MS-13) and 18th Street gangs, and instead detains them. The article will examine this trend in the context of a larger proclivity to criminalise immigration in the US, particularly minors fleeing violence in Central America. We draw upon our experience representing Central American minors in their applications for humanitarian immigration relief to highlight how the US immigration system fails to protect this vulnerable population and penalises these children for their own victimisation.

Keywords: asylum seekers, human trafficking, minors, gangs, immigration

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Introduction

Samuel¹ grew up in a district of El Salvador controlled by the *Mara Salvatrucha* (commonly known as MS-13) gang. MS-13 marked the walls in town with graffiti—both to let the residents know of its control and as a warning to rival gang members. When Samuel was 8 years old, a gang member told him to stand watch as they robbed a local business and alert them if he saw a police officer. Samuel, unaware of the implications of the request and out of fear of retribution, did so.

The requests from MS-13 started small: to act as a lookout, to transport messages, or to buy the gang alcohol or food. Over time, threats began to accompany the demands. Gang members demanded Samuel carry drugs for them and threatened to harm him or his family if he refused. Samuel felt he had no choice but to oblige. When the gang demanded that Samuel, who was then 12 years old, go with them to fight rival gang members, he refused. As a punishment, they murdered Samuel's cousin in front of him and told him that his other family members would be next if he refused their demands again. Later, when Samuel refused to act as a lookout while the MS-13 murdered a rival gang member, he was forced to watch as the gang beheaded his friend.

Fearing for his life, Samuel fled to the United States (US) at the age of 14. However, he and thousands of Central American children like him seeking refuge in the US are frequently barred from humanitarian immigration relief and detained because of the criminal conduct they were forced to engage in by gangs.²

Despite the US's obligations under the *Trafficking Victims Protection Act* (TVPA) and the US government's professed dedication to protecting human trafficking victims, children like Samuel are often excluded from immigration protections. The TVPA and international instruments include provisions that state that victims of trafficking should not be punished for crimes they were forced to

¹ All names used in the paper have been changed to protect confidential information.

² D Uchimaya, 'Falling Through the Cracks: Gang Victims as casualties in current asylum jurisprudence', *Berkeley La Raza Law Journal*, vol. 23, 2013, pp. 109-162, p. 144, http://dspace.creighton.edu:8080/xmlui/bitstream/handle/10504/127404/Uchimaya_23BerkeleyLaRazaLJ109.pdf; JM Chacón, 'Whose Community Shield?: Examining the removal of the "criminal street gang member"', *University of Chicago Legal Forum*, vol. 2007, 2007, pp. 317-358, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1412&context=uclf>.

commit.³ However, the *Immigration and Nationality Act* (INA), the primary law governing immigration in the US, carries extreme consequences for applicants with a criminal history without regard for whether the criminal activity was the result of force or coercion. Apart from one waiver in the INA available for criminal conduct incident to trafficking—which, as discussed below, is very limited in its reach—the INA does not contain a duress defence or other exceptions for trafficking victims. Notably for children trafficked for exploitation in criminal activities, norms regarding mental capacity and legal culpability are largely absent from the INA and case law, leading to harsh and disproportionate consequences for these minors.

This article explores the draconian effects of US immigration policies on Central American minors who, like Samuel, were trafficked for criminal activity by gangs in their countries of origin. In the sections below, we begin by providing an overview of the extreme violence perpetrated by gangs in Central America as well as the gangs' practice of coercing minors into servitude. Drawing from our experience as immigration attorneys representing approximately 500 Central American minors since 2013, we will demonstrate how our immigration system routinely denies protections to Central American minors trafficked for exploitation in criminal activities and subjects them to prolonged detention. In particular, we will focus on criminal-related inadmissibility grounds, bars to asylum, and detention as these are areas in which our clients frequently face barriers to protection. Although this paper is not based on a systematic review of our cases nor is it an empirical research project, we hope that our professional observations and clients' stories will shed light on the need for expanded protections for minor trafficking victims in US immigration law.

Trafficking in Minors by Central American Gangs: The issue of coercion

Like Samuel, hundreds of thousands of Central Americans flee from their home countries to the US every year⁴ to seek protection from pervasive gang violence by the rivalling MS-13 and the 18th Street gangs. The 18th Street gang

³ See, e.g., 22 U.S.C. § 7101(b)(19) (TVPA); *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 2005, Article 26; Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, OHCHR, Geneva, 2002, Recommended Principle 7.

⁴ US Customs and Border Protection, 'U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector (FY2007 - FY 2019)', January 2020, retrieved 30 May 2020, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Nationwide%20Apprehensions%20by%20Citizenship%20and%20Sector%20%28FY2007%20-%20FY%202019%29_1.pdf.

originated in the 1960s in Los Angeles, California among Mexican youths, and the MS-13 gang originated in the 1980s, also in Los Angeles.⁵ These gangs were formed largely as a response to existing gang violence, racial tensions, and prejudice against Latinx immigrants in the United States. The prevalence of gangs in Central America grew as immigrants from the United States were deported, largely as a result of a 1996 law known as the *Illegal Immigrant Reform and Immigrant Responsibility Act* (IIRAIRA). This led to the ‘exportation’ of gang culture to Central America.

Deportees from the US brought the gangs with them, and they quickly amassed power by exploiting civil unrest, weak institutions, and poverty in post-conflict and Civil War societies. The Civil War in Guatemala from 1960 to 1996, the Civil War of El Salvador from 1979 to 1992, US military interventions and backing of coups, and US neoliberal policies played a central role in the poverty and instability in the region which created space for the emergence of violent gangs in Central America.⁶

The civil unrest caused by these gangs is enormous, such that:

Those who reside and work in seriously gang affected areas live in a state of persistent fear and hyper-vigilance and are subjected to oftentimes incomprehensible levels of psychological and physical violence. In these areas, gangs influence—or dictate directly—virtually every aspect of day-to-day life for the public at-large, and exert a perverse influence over governmental and non-governmental policies and practices.⁷

⁵ CR Seelke, *Gangs in Central America*, Congressional Research Service, 29 August 2016, retrieved 12 March 2021, <https://fas.org/sgp/crs/row/RL34112.pdf>.

⁶ E Zilberg, *Space of Detention: The making of a transnational gang crisis between Los Angeles and San Salvador*, Duke University Press, Durham, 2011; P Benson, EF Fischer, and K Thomas, ‘Resocializing Suffering: Neoliberalism, accusation, and the sociopolitical context of Guatemala’s new violence’, *Latin American Perspectives*, vol. 35, issue 5, 2008, pp. 38-58, <https://doi.org/10.1177/0094582X08321955>; JM Cruz, ‘The Root Causes of the Central American Crisis’, *Current History*, vol. 114, issue 769, 2015, pp. 43-48, <http://doi.org/10.1525/curh.2015.114.769.43>.

⁷ T Boerman and A Golob, ‘Gangs and Modern-Day Slavery in El Salvador, Honduras and Guatemala: A non-traditional model of human trafficking’, *Journal of Human Trafficking*, 2020, p. 10, <https://doi.org/10.1080/23322705.2020.1719343>.

Though the gangs have grown in size and strength since their inception, MS-13 and 18th Street rely on the recruitment of young and often poor people.⁸ While gang violence is pervasive, the recruited membership of the gangs is primarily made up of poor and disenfranchised minors and young adults. Children, particularly poor children, are viewed as easy targets for recruitment and coercion by the gangs.⁹ They are employed in the gangs' main source of revenue: street-level drug sales and extortion of small local businesses.¹⁰ In contrast to the lower level roles played by children and youths, MS-13's recent strategy has involved 'infiltrating members into the police and military, and sending selected cadres to universities to become lawyers, accountants, and MBAs', who go on to hold influential and leadership positions within the gangs.¹¹

Given the many societal factors contributing to minors' involvement with gangs, it is often difficult to determine whether a minor's participation was voluntary or the result of force and coercion such that the act would constitute trafficking under the TVPA. In contrast to the UN Trafficking Protocol's definition of trafficking in persons, which does not require force or coercion in cases involving children, the TVPA's definition of labour trafficking does not distinguish between adults and children and requires perpetrators use either force, fraud, or coercion.¹² The TVPA defines labour trafficking as: 'the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery'.¹³ Coercion, in turn, is defined as 'threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

⁸ Boerman and Golob, p. 10; D Farah and K Babineau, 'The Evolution of MS 13 in El Salvador and Honduras', *Prism*, vol. 7, no. 1, 2017, pp. 58-73. The media has used terms, often sensationalised, to highlight the demographics of the MS-13 and 18th Street gangs as young and poor, referring to the gangs as 'mafias of the poor' and a 'children's army'. See International Crisis Group, *Mafia of the Poor: Gang violence and extortion in Central America*, International Crisis Group, 6 April 2017, retrieved 30 May 2020, <https://www.crisisgroup.org/latin-america-caribbean/central-america/62-mafia-poor-gang-violence-and-extortion-central-america>; R Connell and RJ Lopez, 'An Inside Look at 18th St.'s Menace', *Los Angeles Times*, 17 November 1996, <https://www.latimes.com/archives/la-xpm-1996-11-17-mn-1539-story.html>.

⁹ Boerman and Golob, p. 1.

¹⁰ *Ibid.*, p. 10; Farah and Babineau.

¹¹ Farah and Babineau, p. 60.

¹² UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol), Article 3(c).

¹³ 22 USC § 7102(11)(B).

the abuse or threatened abuse of the legal process.¹⁴

As with other types of trafficking, it is often difficult to draw a clear line between coercion and voluntariness in these cases, and instead of seeing these two positions as dichotomous, we might, rather, approach them as two extremes on a continuum. At one end of the spectrum, youths may voluntarily join a gang or perform labour for a gang. Gang membership confers benefits for youths, including ‘camaraderie, power, protection, status, money, etc.’¹⁵ and, given these benefits, may be a desired option.

Minors may also decide to join a gang due to more subtle forms of coercion. We acknowledge the numerous factors which might play into a child’s acquiescence to demands by gang members, including poverty and the promise of pay, lack of employment opportunities, the need for protection and housing if they do not have other parental figures to care for them, and status among peers. Notably, under the US definition of trafficking, these cases would not involve coercion, although we recognise the coercive powers at play. Adding to the complexity in determining voluntariness is the fact that voluntariness may change over time. Minors who may have initially joined voluntarily face limited options should they decide they want to leave the gang. According to the lore of the gangs, there are only three ways out of their membership: prison, hospital, or death.¹⁶ As a result, minors may become victims of exploitation and coercion even though they initially joined voluntarily.

Cases at the other end of the spectrum involve acts of violence and threats to coerce minors into servitude to the gang. Cases like Samuel’s, discussed in the introduction, involve threats of violence and death against the minor and his family to coerce his labour. In another case, our twelve-year-old client was beaten by gangs so severely that he suffered a suspected traumatic brain injury. MS-13 gang members subsequently held him in their home, closely monitored his movements, and drugged him in order to coerce him into selling drugs and extorting businesses.

We have represented minors who were forced to ‘deliver or sell drugs, transport firearms, participate in extortion practices, spy on rival gangs, monitor entry points of gang territory for the entry of police and outsiders, and/or provide

¹⁴ 22 USC § 7102(3).

¹⁵ Boerman and Golob, p. 2.

¹⁶ D Gold, ‘The Redemption of MS-13’, Pulitzer Center, 20 December 2018, <https://pulitzercenter.org/stories/redemption-ms-13>.

them with other intelligence they deem to be of relevance'.¹⁷ Gang members might also force children to perform more serious acts such as violence against rival gangs, putting these children at risk of harm or detection by the police rather than their own members. Gangs often force young women to engage in sexual activities, enter forced relationships, or provide gender-normative labour. Although recent reports document that women and girls increasingly hold leadership roles within the gangs and perform tasks traditionally performed by men, gang culture is still characterised by extreme male domination and control over women.¹⁸

Notably, the status within the gangs of youths coerced into servitude, on the one hand, and gang members, on the other hand, is incredibly different. As opposed to '*gang membership*—which entails recognition as a *member* and benefits such as camaraderie, power, protection, status, money, etc.', children who are made to perform labour for the gang are in a state of 'coerced servitude, which deprives targeted youths of all personal agency, rights, or authenticity [and does not] confer *membership* status on them or involve benefits of any type'.¹⁹ Gangs often forcibly recruit young children to perform criminal activities because children can avoid criminal prosecution.²⁰ Gangs threaten harm to the children and their family members, and follow through on these threats, in order to coerce the children's servitude.²¹ Unlike gang members, who receive power, status, and money, coerced children may receive meagre benefits, such as a place to live or paltry sums of money, or no benefits at all.²²

Given that our work as immigration attorneys involves representing immigrants in humanitarian applications for relief, we predominantly see youths who are fleeing Central America out of fear of the gangs. As a result, we predominantly

¹⁷ *Ibid.*, p. 12.

¹⁸ I Aguilar Umaña and J Rikkers, *Violent Women and Violence Against Women: Gender relations in the Maras and other street gangs of Central America's Northern Triangle region*, Initiative for Peacebuilding and Interpeace, 2012, p. 12, retrieved 9 January 2021, https://www.interpeace.org/wp-content/uploads/2012/09/2012_09_18_IfP_EW_Women_In_Gangs.pdf.

¹⁹ Boerman and Golob, p. 11.

²⁰ JJ Fogelbach, 'Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras', *San Diego Int'l LJ*, vol. 12, issue 1, 2011, p. 432, <https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1100&context=ilj>.

²¹ *Ibid.*; Boerman and Golob, p. 11; P Goldberg *et al.*, *Children On the Run: Unaccompanied Children leaving Central America and Mexico and the need for international protection*, UNHCR, Geneva, 2014, pp. 94-95, https://www.researchgate.net/publication/267041912_Children_on_the_Run_Unaccompanied_Children_Leaving_Central_America_and_Mexico_and_the_Need_for_International_Protection.

²² Fogelbach, p. 432; Boerman and Golob, p. 11.

represent youths who were forced to join the gang or to continue working for the gang despite wanting to leave. In this article we, thus, focus on cases that arguably meet the definition of trafficking in the TVPA to demonstrate how the US is falling short of its obligations to protect trafficking victims. These youths, who were obviously forced into serving the gangs are, in our professional experience, generally viewed as criminals rather than trafficking victims in the US immigration system. For example, though we believe Samuel meets the legal definition of a labour trafficking victim, his past conduct renders him ineligible for most of the forms of immigration relief for which he otherwise qualifies.

As several empirical studies have described in various contexts around the world, legal and law enforcement narratives often present a black-and-white view of trafficking perpetrators and victims, furthering the ‘perfect victim’ narrative, while ethnographic accounts tend to be much more nuanced and complex.²³ In the context of children trafficked for exploitation in criminal activities, competing narratives are again at play. As these children’s legal representatives, we attempt to portray a nuanced picture of their lives to demonstrate the coercion and force they endured. However, US immigration authorities and law enforcement advance a much more black-and-white narrative that views all children with gang involvement as ‘criminals’ with little to no regard of whether the children were trafficked for criminal exploitation by the gangs or willing gang members. Part of the issue may be that children often identify themselves as ‘gang members’ and do not perceive themselves as victims. As their attorneys, we spend hours talking about their cases to understand the factors that led to their involvement, while US immigration and law enforcement authorities frequently do not make these inquiries.

A larger issue is the rhetoric perpetuated by the Trump Administration casting Central American minors seeking protection as ‘rough, tough MS-13 gang members’ and justifying its increasingly stringent immigration policies as

²³ BCO Breuil *et al.*, ‘Human Trafficking Revisited: Legal, enforcement and ethnographic narratives on sex trafficking to Western Europe’, *Trends in Organized Crime*, vol. 14, issue 1, 2011, pp. 30-45, p. 43, <https://doi.org/10.1007/s12117-011-9118-0>; G Sanchez, ‘“Circuit Children”: The experiences and perspectives of children engaged in migrant smuggling facilitation on the US-Mexico border’, *Anti-Trafficking Review*, issue 11, 2018, pp. 103-119, <https://doi.org/10.14197/atr.201218117>; G Sanchez, ‘“It’s All in Their Brain”: Constructing the figure of the trafficking victim on the US-Mexico border’, *Anti-Trafficking Review*, issue 7, 2016, pp. 97-114, <https://doi.org/10.14197/atr.20121776>; SX Zhang, ‘Woman Pullers: Pimping and sex trafficking in a Mexican border city’, *Crime, Law and Social Change*, vol. 56, issue 5, 2011, pp. 509-528, <https://doi.org/10.1007/s10611-011-9333-2>.

necessary to protect US citizens from an ‘invasion’ of dangerous criminals.²⁴ This rhetoric fails to consider that these children, including many of those who were in fact affiliated with gangs, are themselves victims of gang violence and in need of protection. This mistreatment of children who have been forced to engage in criminal activities is part of a larger immigration legal system that carries strict penalties for criminal behaviour, with few defences for trafficking victims.

Below, we will explore how the US immigration system denies protection to Central American minors trafficked for exploitation in criminal activities by gangs in three areas of immigration law: inadmissibility grounds, bars to asylum, and detention. Although this is not an exhaustive discussion of the US immigration system, we have chosen to focus on these areas because, based on our practice, we believe they are most relevant to this population.

Inadmissibility Grounds

A complex set of ‘inadmissibility grounds’ governs who is and is not eligible for admission, or lawful status, in the US. These grounds exclude individuals for a wide array of reasons, including health- and economic-related issues and past criminal and immigration violations. This section will provide a brief overview of criminal-related inadmissibility grounds and then demonstrate the harsh consequences of these grounds by providing case examples of two forms of humanitarian relief relevant to Central American minor trafficking victims: the T nonimmigrant visa (T visa) and Special Immigrant Juvenile Status (SIJS).

Overview of Criminal-Related Inadmissibility Grounds

The criminal-related inadmissibility grounds are broad and exclude not only immigrants with certain criminal convictions, but also those who have admitted to certain conduct or who are suspected by the US Government of engaging in certain conduct. The most common criminal grounds of inadmissibility apply to individuals who (1) were convicted of or admit committing a crime of moral turpitude (CIMT), which is ambiguously defined as involving conduct that is ‘inherently base, vile, or depraved’,²⁵ (2) were convicted of or who admit

²⁴ D Nakamura, ‘Trump Says the Border Crisis is About Criminals and Gangs. His administration says it is about families and children’, *The Washington Post*, 1 May 2019, retrieved 30 May 2020, https://www.washingtonpost.com/politics/trump-says-the-border-crisis-is-about-criminals-and-gangs-his-administration-says-it-is-about-families-and-children/2019/05/01/0f94d78c-6c37-11e9-8f44-e8d8bb1df986_story.html.

²⁵ *Matter of Olquin*, 23 I&N Dec. 896, 896 (BIA 2006) (citing *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001)).

committing a controlled substance violation, (3) were convicted of two or more offenses and received aggregate sentences of five years or more, and (4) anyone who the Attorney General has ‘reason to believe’ may be a drug trafficker.²⁶

Under the broad reach of these inadmissibility grounds, children may suffer severe immigration consequences. Juvenile delinquency adjudications are not treated as ‘convictions’ under immigration law, and therefore do not render an individual inadmissible for having been ‘convicted’ of a certain crime.²⁷ However, even absent a conviction, children may be found inadmissible if they have admitted to engaging in certain conduct, such as theft, marijuana possession, or aggravated assault. Additionally, no conviction is required for the Attorney General to have ‘reason to believe’ an individual is engaged in drug trafficking, and the government can point to statements made by a child to border officials, juvenile delinquency charges, or anything else that could amount to ‘sufficient evidence [which] shows such facts’ that establish an immigrant’s history of drug trafficking.²⁸

Waivers are available for certain grounds of inadmissibility depending on the form of relief, but even then, an application can still be denied based on negative discretionary factors such as criminal history. Below, we provide examples of two common forms of relief for this population, the T visa and SIJS, to show how the US Government routinely denies protection to minors trafficked for exploitation in criminal activities by gangs.

T visa

The T visa was created by the US Congress in 2000 with the enactment of the TVPA to provide immigration relief to victims of human trafficking. The T visa is the only form of immigration relief that provides an explicit waiver of inadmissibility grounds that result from human trafficking,²⁹ reflecting Congress’s goal to not hold victims of trafficking accountable for crimes they were forced to commit.

However, this waiver is not available to many Central American minors trafficked by gangs. With limited exceptions, individuals who were solely subjected to trafficking outside the US are not eligible for a T visa. Therefore, Central American minors who were subjected to forced labour in their home countries, but not in the US, are generally not eligible for this humanitarian

²⁶ The statute specifying the inadmissibility grounds is 8 USC § 1182(a).

²⁷ *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) (en banc), citing *Matter of C.M.*, 5 I&N Dec. 27 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

²⁸ *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992).

²⁹ 8 U.S.C. § 1182(d)(13).

visa and therefore cannot waive any criminal inadmissibility grounds under this waiver.

Additionally, in practice, the agency that adjudicates the applications for T visas, US Citizenship and Immigration Services (USCIS), increasingly scrutinises and denies applications for T visas and waivers for criminal activity, even when the criminal activity resulted from trafficking.³⁰ Increasing rates of denials, coupled with the Trump Administration's 2018 policy to initiate removal proceedings against applicants whose cases were denied, has severely harmed many victims of trafficking and dissuaded many others from seeking protection, particularly victims with criminal histories.³¹

For example, one of our cases involved Hector, a Honduran minor who applied for a T visa after being subjected to forced labour by MS-13 in both Honduras and the US. USCIS issued two Requests for Evidence (RFEs) questioning whether Hector deserved a waiver of the inadmissibility grounds resulting from the forced criminal activity. USCIS did not address Hector's young age at the time of the forced labour and emphasised that the severity of his past criminal history could lead to a denial, even though it was forced. Thus, Hector was placed in the absurd situation where the forced labour giving rise to his eligibility for the T visa could also render him ineligible for protection. Although Hector's T visa was eventually approved, his application was pending for several years due to USCIS's repeated RFEs. During this time, he lived in fear of being deported and harmed by the gang from which he sought protection, and he was unable to work legally or receive public benefits to recover from his exploitation.

Given the increased denials and scrutiny of T visa applications under the Trump Administration, it is apparent that trafficking victims with forced criminal histories are not receiving protections, even when a waiver is available. Therefore, not only are waivers necessary, but they also need to be adjudicated in a manner consistent with the goals of the TVPA. Below, we will see the disproportionate consequences for trafficking victims who are minors when waivers are not available.

Special Immigrant Juvenile Status (SIJS)

SIJS provides a path to status for immigrant minors, defined as under 21 years of age, for whom a juvenile court has found that reunification with one or both

³⁰ J Krajewski, 'The Hypocrisy of Trump's Anti-Trafficking Argument for a Border Wall', *The Atlantic*, 5 February 2019, <https://www.newyorker.com/news/news-desk/the-hypocrisy-of-trumps-anti-trafficking-argument-for-a-border-wall>.

³¹ *Ibid.*; K Finley, *Access to Justice in a Climate of Fear: New hurdles and barriers for survivors of human trafficking and domestic violence*, Center for Migration Studies, 29 January 2019, <https://cmsny.org/publications/finley-climate-of-fear>.

parents is not viable due to abuse, abandonment, neglect, or a similar basis under the law, and that it is not in their best interest to return to their country of origin or last habitual residence. SIJS applicants are subject to many of the inadmissibility grounds, including those based on criminal activity, with few or no waivers available.

Most notably for children who have been trafficked by gang members, there is no waiver available for SIJS recipients if immigration authorities have ‘reason to believe’ that the child has trafficked drugs or assisted a drug trafficker in trafficking activities.³² As discussed above, for a child to be inadmissible under this ground, they need not have been convicted, and USCIS in practice does not consider duress or capacity in making this finding. For example, our client Jorge was forced by his father, a member of MS-13, to transport drugs at the age of 14. He was granted SIJS based on his father’s neglect and abuse. However, Jorge’s application for Lawful Permanent Residence pursuant to SIJS was denied on the basis that there was ‘reason to believe’ he was a drug trafficker, rendering him inadmissible. This finding was based solely on his statements to law enforcement at the border and a subsequent sworn statement about his father’s mistreatment.

Effectively, Jorge’s application was denied based on the same facts which formed the basis for his eligibility for humanitarian protection—the victimisation by his father. He was not afforded the protection that was contemplated in the enactment of SIJS as a form of relief for vulnerable children. Despite arguing that he should be afforded defences based on duress and infancy, and that a denial frustrated Congress’s intent behind SIJS, the officer adjudicating his case stuck to the hard-line rule that there was sufficient ‘reason to believe’ he was a drug trafficker. As such, explicit waivers for duress and infancy should be implemented to allow children like Jorge to receive protection.

Bars to Asylum

Many articles have discussed how the US asylum system has failed to protect Central Americans fleeing gang violence.³³ In order to qualify for asylum, an applicant must establish that ‘race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant’.³⁴ Scholars and practitioners have focused

³² 8 U.S.C. § 1182(a)(2)(C).

³³ See, for example: LM Harris and MM Weibel, ‘*Matter of S-E-G*: The final nail in the coffin for gang-related asylum claims’, *Berkeley La Raza Law Journal*, vol. 20, issue 1, 2010, pp. 5-30, <http://doi.org/10.15779/Z38S36K>.

³⁴ 8 U.S.C. § 1158(b)(1)(B).

primarily on the interpretation of ‘particular social group’ (PSG), a category that courts have generally interpreted as excluding many groups related to gang violence or recruitment.³⁵ However, there has been little written on the harsh application of these bars to Central American asylum seekers, particularly minors who were trafficked for criminal activity by gangs. Below, we will discuss two of the bars most relevant to these minors: the serious nonpolitical crime bar and the persecutor bar.

Serious Nonpolitical Crime Bar

Asylum seekers can be barred from receiving asylum if ‘there are serious reasons to believe the alien has committed a serious nonpolitical crime’ outside of the US,³⁶ a category that includes robbery,³⁷ drug trafficking,³⁸ and assault.³⁹ Even though the Board of Immigration Appeals (BIA), an appellate body that reviews the decisions of immigration judges, has repeatedly stated that ‘juvenile delinquency proceedings are not criminal proceedings’, several courts have found that juvenile criminal conduct can be considered a serious nonpolitical crime for the purposes of asylum.⁴⁰

Although some courts have appeared to read a duress defence into this bar, they have generally declined to find that asylum seekers’ behaviour was under duress, even in the face of extremely coercive situations involving minors. For example, the case *Urbina-Mejia v. Holder* involved a Honduran asylum seeker who was forced to join the 18th Street gang when he was 14 years old. He testified that gang members “‘persuaded” him to join by continuously beating him for eighteen seconds’, a common initiation practice. He was threatened with death if he did not comply with the gang’s demands and was forced to extort and beat the gang’s victims. Discounting the coercion experienced by Urbina-Mejia and his young age when he was forced to join the gang, the court found that he was barred from relief for having committed a ‘serious nonpolitical crime’.⁴¹

Persecutor Bar

Under what is referred to as the persecutor bar, applicants are barred from asylum if they have ‘ordered, incited, assisted, or otherwise participated in the

³⁵ *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

³⁶ 8 USC § 1158(b)(2)(A)(iii).

³⁷ *Matter of Ballester-Garcia*, 17 I&N 592 (BIA 1980).

³⁸ *Go v. Holder*, 640 F.3d 1047 (9th Cir. 2011).

³⁹ *Zheng v. Holder*, 698 F.3d 710 (8th Cir. 2013).

⁴⁰ *Matter of Devison*, 22 I. & N. Dec. 1362, 1365 (BIA 2001).

⁴¹ *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010).

persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion'.⁴² The persecutor bar contains no explicit infancy or duress exceptions, and several articles have focused on the unjust application of the persecutor bar to child soldiers. As one commentator argued, 'Barring child soldiers from asylum protection penalizes them for having been the victims of a crime and undercuts all of the United States' efforts to protect them.'⁴³ Many Central American minors escaping gang violence may find themselves in a similar situation when facing the US immigration system: rather than receiving protection, they are treated as persecutors.

For several decades, courts declined to read an implicit duress defence into the persecutor bar, even in the case of children. One of the few circuit cases involving the applicability of the persecutor bar to children involved Amadu Bah, who as a child was forced to join the Revolutionary United Front (RUF), an insurgent group in Sierra Leone. In *Bah v. Ashcroft*, the Fifth Circuit declined to read an implicit duress or infancy exception into the persecutor bar and found that Bah was barred from receiving asylum.⁴⁴

In a short-lived victory, the BIA enunciated a duress defence in 2018 in the case *Matter of Negusie*. However, just six months after this decision, Attorney General Sessions certified the case to himself for review, a process frequently used by the Trump Administration that allows the Attorney General to overrule decisions by the BIA.⁴⁵ In November 2020, the Attorney General issued his decision in *Matter of Negusie* holding that '[t]he bar to eligibility for asylum and withholding of removal based on the persecution of others does not include an exception for coercion or duress' and that the applicant for asylum, rather than the government, bears the burden to show they are not subject to this bar.⁴⁶ As demonstrated, the broad reach of these bars precludes many minors trafficked for exploitation in criminal activities by gangs from receiving humanitarian protection, with little to no consideration of whether the minor had the mental capacity to understand the nature of their actions and whether the activity was forced. In order to avoid the harsh consequences of these bars, adjudicators need to incorporate principles of infancy and duress into their determinations.

⁴² 8 USC § 1158(b)(2)(A)(i).

⁴³ B Lonegan, 'Sinners or Saints: Child soldiers and the persecutor bar to asylum after *Negusie v. Holder*', *BC Third World LJ*, vol. 31, issue 1, 2011, pp. 71-99, p. 72, <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1003&context=twlj>.

⁴⁴ 341 F.3d 348 (2003).

⁴⁵ 27 I&N Dec. 481 (A.G. 2018).

⁴⁶ *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020).

Detention

Detention of Immigrant Children

Central American minors who have been trafficked for criminal activity by gangs are often subject to prolonged detention by the US government in jail-like settings as a result of their victimisation. The US has largely ignored widely agreed upon tenets of international law with the practice of detaining immigrant children based on their immigration status or that of their parents. The *Convention on the Rights of the Child*, to which the US is not a signatory, states that children should be detained only as a last resort, and the UN Committee on the Rights of the Child has stated that member states ‘should expeditiously and completely cease the detention of children on the basis of their immigration status’.⁴⁷

Since 2003, unaccompanied immigrant children who are apprehended by the US Department of Homeland Security (DHS) either upon entry to the US or in the interior of the country are detained in the custody of the US Department of Health and Human Services, Office of Refugee Resettlement (ORR). Detentions have increased dramatically in recent years following the surge of unaccompanied minors from Central America seeking protection in 2014. In fiscal year 2019, DHS referred 69,488 children to ORR. Children remained with ORR for an average of 66 days. Central Americans made up the majority of those children, with 30 per cent from Honduras, 45 per cent from Guatemala, and 18 per cent from El Salvador.⁴⁸

The Flores Settlement Agreement, which established national standards for the detention and treatment of children in federal custody, and the *Trafficking Victims Protection Reauthorization Act* task ORR with holding children in the ‘least restrictive setting’ and ultimately releasing them to sponsors, including parents, relatives, or other individuals.⁴⁹ In making this determination, ORR considers

⁴⁷ UN Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, paragraph 78, <https://www.refworld.org/docid/51efb6fa4.html>.

⁴⁸ Office of Refugee Resettlement, ‘Unaccompanied Children: Facts and data’, retrieved 31 May 2020, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

⁴⁹ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997); 8 U.S.C. § 1232 (TVPRA).

what danger a child poses to the community.⁵⁰ Troublingly, practitioners report that ORR has used a child's status as a victim of trafficking by gangs as a basis for finding that a child poses danger. On this basis, ORR can detain children in high-security facilities and prolong release processes, meaning a child must remain in a restrictive detention facility longer rather than being released to family.

Similarly, unsubstantiated allegations of gang affiliation have led to the prolonged detention of minors in secure facilities. For example, in 2018, multiple federal and New York state law enforcement agencies launched 'Operation Matador', a law enforcement effort with the goal of 'identifying, interdicting and investigating a wide variety of transnational border crime with a concentration on MS-13 gang activity'.⁵¹ Federal law enforcement agencies touted as a success the arrest of ninety-nine individuals who entered the US as unaccompanied minors, sixty-four of whom had received SIJS status. As many as twelve of those arrested, who were still minors at the time of their arrest, were then subjected to detention by ORR.⁵²

A lawsuit filed by the American Civil Liberties Union (ACLU) in the aftermath of Operation Matador described the arrests and subsequent detentions as having been 'based on flimsy, unreliable and unsubstantiated allegations of gang affiliation', including wearing a Salvadoran soccer jersey.⁵³ The ACLU also alleged that '[t]he agencies in charge of this effort do not undertake any meaningful review of the allegations of gang affiliation on which their decisions are based; do not inform the children, their families or their immigration counsel of the basis of these allegations; and do not provide them any opportunity to review or challenge the evidence upon which the government relies to place the children in jail-like conditions, destroy family integrity, and deny or interfere with access to relief under U.S. immigration laws'.⁵⁴

⁵⁰ ORR indicates that a child's behaviour, criminal or juvenile background (including if a child 'has been charged with or convicted of a criminal offense, or is chargeable with such an offense'), danger to self, and danger to the community are all factors relevant to making a placement decision. Office of Refugee Resettlement, 'Children Entering the United States Unaccompanied: Section 1', 30 January 2015, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>.

⁵¹ US Immigration and Customs Enforcement, 'Joint Operation Nets 24 Transnational Gang Members, 475 Total Arrests Under Operation Matador', 29 March 2018, retrieved 31 May 2020, <https://www.ice.gov/news/releases/joint-operation-nets-24-transnational-gang-members-475-total-arrests-under-operation>.

⁵² *Ibid.*

⁵³ *Gomez v. Sessions*, Case No. 3:17-cv-03615-VC (N.D. Cal. 2017) (amended complaint ¶¶ 1, 97).

⁵⁴ *Ibid.* ¶ 2.

For example, Junior, a minor who resisted gang recruitment in both Honduras and the US, was detained in a secure ORR facility following allegations he was an MS-13 gang member based on unsubstantiated claims that he had drawings of MS-13 in his schoolwork and was seen with gang members.⁵⁵ The psychological effects on children of detention are severe: Junior attempted suicide and described the detention facility as ‘a living hell’.⁵⁶ Junior’s story epitomises the devastating consequences on Central American minors of an immigration system focused overwhelmingly on criminal enforcement tactics and the demonisation of immigrant youths as gang members, instead of on humanitarian protections.

Adult Detention Based on Criminal Activities as Minors

Additionally, adults may also be detained based on allegations of gang activity and crimes committed when they were minors, with no meaningful inquiry into whether the activities were performed under duress and no exception based on infancy. Immigration judges have broad discretion in deciding whether an individual should be released on bond. The judge’s first inquiry is whether or not an immigrant poses a danger to the community, before considering flight risk or other factors.⁵⁷ As a result, many bond hearings are overwhelmingly focused on the presumed danger an immigrant may pose to society.

Although gang membership is not a crime, government attorneys from DHS, the agency tasked with prosecuting immigration cases, increasingly use allegations of gang membership to argue that an immigrant poses a danger to society and should therefore not be released from detention. Because of the lack of rigorous evidentiary standards in US immigration courts, government attorneys from DHS often submit feeble evidence and make uncorroborated claims to oppose release of immigrants from detention. These claims are often contained only in DHS’s own documents and rely on hackneyed facts such as immigrants’ clothes, associations, tattoos, or grooming. Government attorneys often also submit police reports, even when such reports did not result in arrests, charges, or convictions.⁵⁸ As an ICE officer explained, ‘The purpose of classifying him as a gang member or a gang associate is because once he goes in front of an immigration judge, we

⁵⁵ A Tsui, ‘In Crackdown on MS-13, a New Detention Policy Raises Alarms’, *PBS: Frontline*, 18 February 2018, <https://www.pbs.org/wgbh/frontline/article/in-crackdown-on-ms-13-a-new-detention-policy-raises-alarms>.

⁵⁶ *Ibid.*

⁵⁷ *In re Urena*, 25 I&N Dec. 140, 141 (BIA 2009).

⁵⁸ L Hlass, ‘The School to Deportation Pipeline’, *Ga. St. UL Rev.*, vol. 34, issue 3, Spring 2018, pp. 697-763, <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2931&context=gsulr>.

don't want him to get bail'.⁵⁹

Furthermore, immigration judges regularly rely on these unsubstantiated claims of government attorneys to find a respondent a danger to the public and as such not meriting release. As in the other contexts described above, there is no requirement that the judge consider duress or minority when reviewing such findings. For example, one of our clients was held in immigration detention as an adult and denied bond based on an allegation that he was a gang member—an unsubstantiated allegation that arose in a delinquency adjudication from when he was only nine years old.

Another client, who was detained shortly after turning 18 years old, was denied bond based on activities which occurred when he was 14 years old. Having been held as a slave by gang members from the age of twelve to fourteen, he had fled his home country after his family had to purchase his freedom. Upon arriving in the US, gang members in his home country ordered gang members in the US to continue to pursue him, resulting in altercations at his high school. The court relied upon these altercations, of which there was limited probative evidence, and which did not result in any arrest or criminal charges, to deny bond. The result was that the same individual continued to be held in detention and was brutally attacked by members of the same gang in the detention facility. Essentially, the US government's mischaracterisation of his victimhood as connoting his membership in a gang caused him to be further harmed by that same gang.

Conclusion

This article seeks to contribute to the literature on the harmful effects of the US immigration system by focusing on its particularly severe and disproportionate consequences for Central American minors trafficked for exploitation in criminal activities by gangs. This system, which is based on the 'demonization of migrants and discussions of migration as a threatening unknown',⁶⁰ is in direct conflict with the humanitarian ideals the US claims to value. Despite the US government's obligations under the *Refugee Convention* and the TVPA, the US immigration system routinely denies protection to child trafficking victims. Rather than receiving protection, children who are trafficked for exploitation in criminal activities are frequently held accountable in the US immigration system for the crimes they were forced to commit, a practice that is urgently disadvised by both the TVPA and international treaties.

⁵⁹ 'Inside ICE's Controversial Crackdown on MS-13', *CBS This Morning*, 16 November 2017, <https://www.cbsnews.com/news/ms-13-gang-ice-crackdown-thomas-homan>.

⁶⁰ CC García Hernández, 'Deconstructing Crimmigration', *University of California Davis Law Review*, vol. 52, 2019, pp. 197-253, p. 214.

An important step in moving toward an immigration system that protects human trafficking victims is incorporating principles regarding the capacity of minors and the culpability of trafficking victims—principles that have been widely accepted and adopted in other areas of law in the US and around the world. The incorporation of infancy and duress exceptions into US immigration legislation and adjudication processes would help ensure that minors trafficked for exploitation in criminal activities receive the humanitarian protection they need.

The views expressed in this article are those of the authors and do not necessarily reflect the official position of their employer.

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Commercial Gestational Surrogacy: Unravelling the threads between reproductive tourism and child trafficking

Nishat Hyder-Rahman

Abstract

Narratives of commercial gestational surrogacy (CGS) as ‘baby-selling’ often conflate or interchange the transfer of children born via surrogacy with *trafficking* in children or the *sale* of children, two sometimes overlapping but nonetheless distinct offenses. Moreover, anti-trafficking laws have been used to police cross-border CGS. But when do CGS arrangements fall within the category of legitimate ‘reproductive tourism’ and when do they amount to child trafficking? In this paper I critically explore intersections between human trafficking laws and CGS, vis-à-vis the child, charting the relevant trafficking laws in the context of international surrogacy, and analysing whether trafficking laws are an appropriate mechanism through which to regulate CGS. I conclude that while child trafficking might occur via surrogacy, CGS in itself is not child trafficking under international law.

Keywords: cross-border commercial surrogacy, reproductive tourism, child trafficking

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Introduction

The language and framework of human trafficking has often been used to describe and construct narratives of commercial gestational surrogacy (CGS¹) both in the media,² in academic literature³ and by institutions.⁴ Narratives of CGS as ‘baby-selling’ often conflate or interchange the *transfer* of children born via surrogacy with *trafficking* in children or the *sale* of children. Yet, both *trafficking* and *sale* of children are distinct, albeit sometimes overlapping criminal offenses. Conflating or interchanging these terms serves to only further confuse an area of law and policy already wrought with complexity and ambiguity. Viewing CGS through the lens of human trafficking, and in particular *child* trafficking, immediately propels discussions on the use of assisted reproductive technologies (ART) into the realm of serious organised crime. This is both a provocative (re)framing of the complexities raised by CGS and a powerful method of policing reproductive care services. But is it apposite? In this paper, I critically explore intersections between human trafficking laws and CGS,

¹ See the following section on ‘practice and law’ for full definitions.

² S Jeffreys, ‘Reject Commercial Surrogacy as Another Form of Human Trafficking’, *The Conversation*, 11 August 2014, retrieved 14 July 2020, <https://theconversation.com/reject-commercial-surrogacy-as-another-form-of-human-trafficking-30314>; C White, ‘Surrogate Parenthood for Money Is a Form of Human Trafficking’, *Forbes*, 4 April 2014, <https://www.forbes.com/sites/realspin/2014/04/04/surrogate-parenthood-for-money-is-a-form-of-human-trafficking/#723abe421202>; C Parker, ‘Scottish Catholic Church Compared Surrogacy to Trafficking’, *The Times*, 19 October 2019, <https://www.thetimes.co.uk/article/scottish-catholic-church-compared-surrogacy-to-trafficking-bddflqfzl>.

³ A Parker, ‘Reproductive Labor or Trafficking: The effect of disparate power on consent in transnational surrogacy agreements’, *J. Transnat’l L. & Pol’y*, vol. 25, 2015, pp. 155-172; F M Abdullah ‘Legal and Ethical Aspects Beyond Commercial Surrogacy: Modern form of human trafficking’, *Journal of Legal, Ethical and Regulatory Issues*, vol. 22, issue 1, 2019, pp. 1-7; J Yacoubian, S George and L Clements, ‘An Examination of Compliance With the Inter-Country Adoption Convention: Exploring surrogacy in Armenia as a form of human trafficking’, *Ariz. J. Int’l & Comp. L.*, vol. 31, no. 3, 2014, pp. 811-834; C Schurr and L Perler, ‘“Trafficked” Into a Better Future? Why Mexico needs to regulate its surrogacy industry (and not ban it)’, *Open Democracy*, 17 December 2015.

⁴ European Parliament resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, para 20-21, https://www.europarl.europa.eu/doceo/document/TA-7-2011-0127_EN.html; United Nations Human Rights Council, 37th Session, 6 March 2018, Statement by Special Rapporteur on the sale and sexual exploitation of children, M de Boer-Buquicchio, reads: ‘States, regardless of their perspectives on surrogacy, must create safeguards to prevent the sale of or traffic in children in the context of surrogacy.’ (See further the section on ‘human trafficking in the context of surrogacy’ below).

vis-à-vis the child. Before proceeding further, it is useful to see this intersection in practice through recent events in Cambodia.

In November 2016, Cambodia made international headlines when authorities issued a snap ban on all commercial surrogacy, via a directive from the Health Minister. At the time Cambodia was a popular destination for couples from around the world seeking to build a family through CGS, following the practices being shut down in neighbouring India, Thailand, and Nepal.⁵ The directive had the immediate effect of altering the status of surrogacy services from legal—by virtue of there being no laws prohibiting the practice—to something that was suddenly on dubious legal ground.⁶ The legal position of already pregnant surrogates, as well as couples and their child(ren) born through surrogacy and still in Cambodia awaiting birth and immigration paperwork to be processed, was catapulted into a state of confusion, and would remain so for quite some time. Within two weeks of the directive being issued, an Australian nurse running a surrogacy agency and two Cambodian associates were arrested, charged, and jailed for *inter alia* human trafficking offences.⁷ By 2017, the Cambodian government passed formal laws prohibiting commercial surrogacy. Some countries, such as the United States and Australia, arranged amnesty for commissioning parents partway through their surrogacy journey to collect their children without fear of arrest.⁸ Nonetheless, the Cambodian position was clear: new cases would be prosecuted.

Far from shutting down, the Cambodian surrogacy sector simply went underground. In July 2018 the Cambodian police arrested, charged, and detained 32 pregnant surrogates and five intermediaries,⁹ and in November a further 11

⁵ KS Bhangra, 'India's Lower House Passes Bill Banning Commercial Surrogacy', *BioNews*, 14 January 2019, https://www.bionews.org.uk/page_140769; J Photopoulos, 'Thailand Outlaws Commercial Surrogacy for Foreigners', *BioNews*, 23 February 2015, https://www.bionews.org.uk/page_94929; A Ilic, 'Nepalese Court Suspends Commercial Surrogacy', *BioNews*, 1 September 2015, https://www.bionews.org.uk/page_95169.

⁶ At the time, the legal status of the directive was unclear as it was not backed by specific laws.

⁷ J Willows, 'Australian Nurse Jailed for Illegal Cambodian Surrogacy', *Bionews*, 7 August 2017, https://www.bionews.org.uk/page_96122.

⁸ L Cochrane, 'Cambodia Offers Amnesty So Australians Can Collect Surrogate Babies', *ABC*, 25 November 2016, <https://www.abc.net.au/news/2016-11-26/cambodias-amnesty-for-surrogate-babies/8059714>; E Handley, 'Cambodian Surrogates Face an Impossible Choice – Forced motherhood, or years in prison', *ABC*, 12 May 2019, <https://www.abc.net.au/news/2019-05-12/cambodian-surrogates-forced-to-be-mothers-or-face-prison-time/11086640>.

⁹ M Krause, 'Pregnant Cambodian Surrogates Charged With Human Trafficking', *BioNews*, 16 July 2018, https://www.bionews.org.uk/page_137194.

pregnant surrogates and seven intermediaries, for human trafficking offences.¹⁰ The women were carrying babies for mainly Chinese commissioning parents, and the intermediaries were of both Cambodian and Chinese nationality. The reasoning of the Cambodian authorities was elucidated by the deputy director of the National Committee for Counter Trafficking: ‘They [intended to] exchange their children for money. What we prioritise as the victim is the baby inside the mother. To bear a child and then sell it is very inhumane.’¹¹ The surrogates were eventually released from detention on the condition that they would keep the children until the age of 18 (the alternative being up to 15 years imprisonment), despite the fact that as gestational surrogates (defined in the following section) they are not genetically related to the children.¹² The commissioning parents faced no legal consequences.¹³

Cambodia is not the only country where human trafficking laws have been used to police commercial surrogacy. In Spain, where both commercial and altruistic forms of surrogacy (see the following section for definitions) are illegal, many couples travel to Ukraine where commercial surrogacy is legal and regulated. However, in September 2018, the Spanish government effectively stranded almost 30 families in Ukraine, when they ceased registering the births of babies born through surrogacy (a necessary, usually straightforward procedure, in order for parents to bring their child(ren) home), citing possible medical malpractice and trafficking of children.¹⁴ Neither charge has been substantiated. More recently, Ukraine itself has announced intentions to shut down its commercial surrogacy sector: the closure of country borders and travel restrictions in an effort to control the ongoing COVID-19 pandemic left many commissioning parents unable to travel to Ukraine for the birth of their children (one clinic alone counted 50 ‘stranded’ babies) and others unable to travel home from Ukraine with their newborn(s), thus revealing the extent of the Ukrainian surrogacy market.¹⁵ Ukraine’s Ombudsman for Children described the situation as a

¹⁰ M Krause, ‘Cambodia Arrests 11 More Surrogates, as Australian Nurse Released’, *BioNews*, 19 November 2018, https://www.bionews.org.uk/page_139872.

¹¹ M Krause, ‘Pregnant Cambodian Surrogates’.

¹² E Lynam, ‘Cambodia Releases Detained Surrogates’, *BioNews*, 10 December 2018, https://www.bionews.org.uk/page_140307.

¹³ It is worth noting that this scenario is unusual: anti-trafficking discourses have typically focussed on the surrogate as the victim of exploitation, rather than the child, when considering trafficking in the context of surrogacy (see further the section on ‘human trafficking in the context of surrogacy’).

¹⁴ S Pritchard, ‘Spanish Families Stranded in Ukraine in Surrogacy Limbo’, *BioNews*, 3 September 2018, https://www.bionews.org.uk/page_138143.

¹⁵ O Grytsenko, ‘The Stranded Babies of Kyiv and the Women Who Give Birth for Money’, *The Guardian*, 15 June 2020, <https://www.theguardian.com/world/2020/jun/15/the-stranded-babies-of-kyiv-and-the-women-who-give-birth-for-money>.

violation of children's rights—stopping just short of labelling it child trafficking—and is pushing to close the sector to foreign couples at least.¹⁶ These are just a few examples of the confusion between surrogacy and child trafficking; the myriad issues these examples highlight will be discussed in the course of this paper.

When do CGS arrangements fall within the category of legitimate 'medical tourism' and when do they amount to human trafficking? This question has long perplexed lawyers, ethicists, and social scientists.¹⁷ For, as the examples above demonstrate, the same set of actions and motivations can one day be viewed as cross-border access to ART services, and as possible human trafficking the next—a dichotomy that is not to be taken lightly.¹⁸ Exponential growth in the worldwide surrogacy market—the result of a convergence between increasingly accessible ART, globalisation, demand for ART due to medical or social infertility,¹⁹ and the legal and social recognition of new family structures—means that how we regulate surrogacy across borders is a pressing issue. All parties to a CGS arrangement (the commissioning parents, surrogate, healthcare professionals, and intermediaries) ought to have clarity under the law as to whether they are exercising their rights as private citizens, or engaging in a criminal activity. Nor is it in children's best interests for criminal proceedings or legal uncertainties to linger over the conditions of their birth.

The purpose of this paper is two-fold: first, to chart and place the relevant child trafficking laws in the context of international surrogacy, and second, to analyse whether trafficking laws are an appropriate mechanism through which to regulate CGS. In doing so I hope to contribute towards an understanding of what distinguishes CGS from child trafficking, and what can be done to better delineate this distinction in law and policy. This paper proceeds in four parts. In the following section I explain the phenomenon of CGS. I set out the terms and definitions used herein and briefly summarise the legal landscape and ethical debates surrounding international CGS. I then

¹⁶ *Ibid.*

¹⁷ C Shalev *et al.*, 'Ethics and Regulation of Inter-Country Medically Assisted Reproduction: A call for action', *Israel Journal of Health Policy Research*, vol. 5, no. 1, 2016, pp. 1-12, <https://doi.org/10.1186/s13584-016-0117-0>; JA Gupta, 'Reproductive Labour or Reproductive Trafficking?: Indian women's reproductive bodies in the globalised bioeconomy', in RR Flood and JG Payne (eds.), *Transnationalising Reproduction*, Routledge, Abington and New York, 2018, pp. 95-116.

¹⁸ Surrogacy arrangements might of course constitute some other illegitimate practice that is not human trafficking.

¹⁹ W Lo and L Campo-Engelstein, 'Expanding the Clinical Definition of Infertility to Include Socially Infertile Individuals and Couples', in L Campo-Engelstein and P Burcher (eds.), *Reproductive Ethics II*, Springer, Cham, 2018, pp. 71-83.

set out the relevant international law on child trafficking; I discuss the applicability of these laws to the practice of CGS, demonstrating the inherent incongruence of classifying wholesale the practice as trafficking. Finally, I draw together my conclusions, returning to the question of what distinguishes CGS from child trafficking.

Surrogacy: Practice and law

Surrogacy is an arrangement in which a woman (the ‘surrogate’) agrees to be impregnated and carry a child for another couple or individual (the ‘commissioning parent(s)’ or ‘intended parent(s)’). Surrogacy can be conducted directly between the surrogate and intending parents. Alternatively, the surrogacy can be arranged via an agency or surrogacy clinic which can match the surrogates to intending parents, liaise between them, and coordinate the surrogacy process. These ‘agents’ or ‘intermediaries’ charge a fee for their service. In some places they are also responsible for recruiting women to be surrogates.²⁰

Surrogacy can take two forms: traditional or gestational. In traditional surrogacy, the surrogate provides her own egg, which is fertilised with the intending father’s or donor sperm, usually via an at-home insemination, and rarely via sexual intercourse. In these cases, the surrogate is genetically related to the child, as well as being the gestational carrier or birth mother. In gestational surrogacy, an embryo, created using either the intended parents’ gametes, donor gametes, or a combination of both, is implanted via in vitro fertilisation (IVF) in the surrogate. Here, the surrogate is not genetically related to the child; she gestates and births the child who might be genetically linked to one or both intended parents. Gestational surrogacy is increasingly preferred as it gives the commissioning parents the option of having a child that is genetically related through the maternal line, or using their preferred egg donor/provider. Removing the genetic relationship can also help limit bonding between the surrogate and child,²¹ enabling a smoother transfer of parental rights. Given its prevalence, and in the interests of space, this paper focuses on gestational surrogacy.

²⁰ A Pande, ‘Commercial Surrogacy in India: Manufacturing a perfect mother-worker’, *Journal of Women in Culture and Society*, vol. 35, no. 4, 2010, pp. 969-992, <https://doi.org/10.1086/651043>.

²¹ Although see: A Pande, “‘It May Be Her Eggs But It’s My Blood’”: Surrogates and everyday forms of kinship in India’, *Qualitative Sociology*, vol. 32, no. 4, 2009, pp. 379–397, <https://doi.org/10.1007/s11133-009-9138-0>.

Surrogacy remains an ethically controversial issue. The use of IVF technology, which can necessitate the destruction of embryos, the potential use of donor gametes, and the fact that gestation occurs outside the traditional, heteronormative family setting all contribute to the continued disagreement over whether the practice should be allowed on moral grounds. Further complicating the ethics of surrogacy is the fact that it can be carried out either altruistically or for payment. In the former, the surrogate is not paid; expenses necessary to establishing and carrying through the pregnancy are compensated, but she does not profit from the surrogacy. Under this model surrogacy is characterised as a benevolent act. On the other hand, in ‘commercial’, ‘for-profit’, or ‘compensated’ surrogacy the surrogate does receive a fee in addition to her expenses.

Whilst altruism and commercial surrogacy are certainly not mutually exclusive,²² the profit-making element highlights the issue of the potential exploitation of women in vulnerable positions, although it has been argued that curtailing or dismissing the ability of women to make their own choices is paternalistic and elitist,²³ that it need not be exploitative,²⁴ and that in fact *all* professionals accept money for the use of their body.²⁵ Moreover, it has been argued that surrogacy, indeed all ART, exploits women through controlling their reproductive power.²⁶ The arguable commodification of women for their wombs has been characterised as degrading,²⁷ rendering women a ‘breeder class’,²⁸

²² LB Andrews, ‘Beyond Doctrinal Boundaries: A legal framework for surrogate motherhood’, *Virginia Law Review*, 1995, pp. 2343-2375.

²³ R Arneson, ‘Commodification and Commercial Surrogacy’, *Phil. & Pub. Aff.*, vol. 21, no. 2, 1992, pp. 132-164.

²⁴ S Wilkinson, ‘The Exploitation Argument Against Commercial Surrogacy’, *Bioethics*, vol. 17, no. 2, 2003, pp. 169-187, <https://doi.org/10.1111/1467-8519.00331>; V Panitch, ‘Global Surrogacy: Exploitation to empowerment’, *Journal of Global Ethics*, vol. 9, no. 3, 2013, pp. 329-343, <https://doi.org/10.1080/17449626.2013.818390>.

²⁵ MC Nussbaum, *Sex and Social Justice*, Oxford University Press, New York, 1999.

²⁶ G Corea, *The Mother Machine: Reproductive technologies from artificial insemination to artificial wombs*, Harper and Row, New York, 1985.

²⁷ R Macklin, ‘Is There Anything Wrong With Surrogate Motherhood? An ethical analysis’, *Law, Medicine and Health Care*, vol. 16, no. 1-2, 1988, pp. 57-64, <https://doi.org/10.1111/j.1748-720X.1988.tb01051.x>.

²⁸ JG Raymond, *Women as Wombs: Reproductive technologies and the battle over women’s freedom*, Spinifex Press, Melbourne, 1995.

and in doing so reducing children to something that can be ‘bought’²⁹—thus straddling the fine line between reproductive care and potential child trafficking, which is the focus of this paper. (The trafficking of women for exploitation as surrogates is an equally pressing issue, but it is not the focus here.) CGS has been compared to prostitution,³⁰ others have conceptualised surrogacy as work/labour.³¹ These are deeply sensitive and complex ethical issues upon which there is no global consensus—a fact reflected in the considerable variation in the law and policy on surrogacy around the world. It is not the purpose of this paper to assess the ethics of surrogacy per se, however, it is helpful to bear in mind the ethical discourses underpinning law and policy.

The ethical complexities of cross-border CGS are augmented by narratives of race and class that underlie this phenomenon. Typically, this involves wealthy individuals from developed countries, travelling to developing world countries in order to seek the services of a poor woman, leading to the ‘stratification of reproduction’.³² In 1988, sociologist Barbara Rothman queried, ‘Can we look forward to baby farms, with white embryos grown in young and Third world women?’³³—a question that surely resonated uncomfortably at the height of Asia’s surrogacy sector through the 2000s and 2010s. Nearly two decades later, Amrita Pande reveals the complex and paradoxical nature of global surrogacy at the ‘intersections of reproduction, labour and globalization’ that ‘cross boundaries based on class, caste and religion and

²⁹ ES Anderson, ‘Is Women’s Labor a Commodity?’, *Phil. & Pub. Aff.*, vol. 19, issue 1, 1990, pp. 71-92; A van Niekerk and L van Zyl, ‘Commercial Surrogacy and the Commodification of Children: An ethical perspective’, *Med. & L.*, vol. 14, 1995, pp. 163-170; D Satz, *Why Some Things Should Not Be for Sale: The moral limits of markets*, Oxford University Press, Oxford, 2010.

³⁰ A Dworkin, *Right-Wing Women*, Perigee Books, New York, 1978.

³¹ L Van Zyl and R Walker, ‘Beyond Altruistic and Commercial Contract Motherhood: The professional model’, *Bioethics*, vol. 27, no. 7, 2013, pp. 373-381, <https://doi.org/10.1111/j.1467-8519.2012.01962.x>; A Pande, *Wombs in Labor: Transnational commercial surrogacy in India*, Columbia University Press, New York, 2014.

³² D Deomampo, *Transnational Reproduction: Race, kinship, and commercial surrogacy in India. Vol. 1.*, NYU Press, New York, 2016; FW Twine, *Outsourcing the Womb: Race, class and gestational surrogacy in a global market*, Routledge, New York, 2015; A Pande, ‘This Birth and That: Surrogacy and stratified motherhood in India’, *Philosophia*, vol. 4, no. 1, 2014, pp. 50-64.

³³ BK Rothman, ‘Reproductive Technology and the Commodification of Life’, in EH Baruch *et al.* (eds.), *Embryos, Ethics, and Women’s Rights: Exploring the new reproductive technologies*, Haworth, New York, 1988, pp. 95-100; S Markens, ‘The Global Reproductive Health Market: US media framings and public discourses about transnational surrogacy’, *Social Science & Medicine*, vol. 74, no. 11, 2012, pp. 1745-1753, <https://doi.org/10.1016/j.socscimed.2011.09.013>.

sometimes even race and nation’ but ‘ultimately reify structures of inequality.’³⁴ These analyses remain relevant despite the surrogacy industry moving from Asia towards Eastern Europe: disparities of class and nationality persist between surrogates and intending parents. Furthermore, Seema Mohapatra points out the hypocrisy of countries that ban surrogacy on moral grounds, whilst ignoring the phenomenon of their own citizens engaging in reproductive tourism by seeking surrogacy services abroad.³⁵

There are currently no international laws governing international surrogacy arrangements. Surrogacy is regulated solely through domestic law: some countries have banned the practice outright (France, Germany, Italy, Spain, Switzerland, China), some allow altruistic surrogacy, but not commercial surrogacy (UK, most states in Australia and Canada, Hong Kong, South Africa, Mexico), some allow commercial surrogacy (Ukraine, Georgia, some states in the USA), some allow commercial surrogacy under strict conditions for their own citizens (Israel, India), and others still have no regulation (certain states in Australia and USA). This variation in law and policy has encouraged people in countries with restrictive legal frameworks or expensive rates to seek surrogacy services abroad, in jurisdictions with a permissive or indeed no framework, and lower costs—a phenomenon known as ‘medical’ or, more specifically, ‘reproductive tourism’. Asia was once a popular destination for commercial surrogacy, with markets flourishing in Cambodia, Nepal, Thailand, India, and Laos. As these markets have shut down over the last decade (all except Laos), Eastern European nations such as Ukraine and Georgia, as well as Greece, have picked up much of the ‘lost trade’. These destinations are particularly popular as they offer CGS services at a considerably lower cost than the US, which is the only developed country where commercial surrogacy is legal and regulated. Given the prevalence of medical or reproductive tourism for surrogacy services—a trend that is still growing³⁶—I focus here on cross-border CGS.

Despite there being no specific international laws targeting cross-border CGS, the existing network of international and European laws do play a role in

³⁴ A Pande, ‘Global Reproductive Inequalities, Neo-Eugenics and Commercial Surrogacy in India’, *Current Sociology*, vol. 64, no. 2, 2016, pp. 244-258, <https://doi.org/10.1177/0011392115614786>.

³⁵ S Mohapatra, ‘Adopting an International Convention on Surrogacy—A lesson from intercountry adoption’, *Loy. U. Chi. Int’l L. Rev.*, vol. 13, issue 1, 2016, pp. 25-55.

³⁶ M Salama *et al.*, ‘Cross Border Reproductive Care (CBRC): A growing global phenomenon with multidimensional implications (a systematic and critical review)’, *Journal of Assisted Reproduction and Genetics*, vol. 35, no. 7, 2018, pp. 1277-1288, <https://doi.org/10.1007/s10815-018-1181-x>.

regulating the practice.³⁷ A number of human rights law instruments include provisions that are relevant to cross-border CGS, primarily, the UN Convention on the Rights of the Child (hereafter ‘CRC’)³⁸ and the Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography (hereafter the ‘Optional Protocol’).³⁹ Within Europe, it also includes the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights.⁴⁰ The Hague Conference on Private International Law (HCCH) began the Parentage/Surrogacy Project in 2011, and this is one of the few examples of international cooperation on the law and policy relating to surrogacy. In 2014, the HCCH published its ‘Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements’⁴¹ and it is currently developing a private international law instrument and separate protocol on the recognition of foreign judicial decisions on legal parentage in international surrogacy arrangements. Significantly, for the purposes of this paper, any document produced by the HCCH would not encompass trafficking in surrogacy, as its mandate only extends to private law matters. The potential

³⁷ R Blauwhoff and L Frohn, ‘International Commercial Surrogacy Arrangements: The interests of the child as a concern of both human rights and private international law’, in C Paulussen *et al.*, *Fundamental Rights in International and European Law*, TMC Asser Press, The Hague, 2016, pp. 211-241; B Stark, ‘Transnational Surrogacy and International Human Rights Law’, *ILSA J. Int’l & Comp. L.*, vol. 18, no. 2, 2011, pp. 369-386; Y Ergas, ‘Babies Without Borders: Human rights, human dignity, and the regulation of international commercial surrogacy’, *Emory Int’l L. Rev.*, vol. 27, issue 1, 2013, pp. 117-188; NF Bromfield and K Smith Rotabi, ‘Global Surrogacy, Exploitation, Human Rights and International Private Law: A pragmatic stance and policy recommendations’, *Global Social Welfare*, vol. 1, 2014, pp. 123-135, <https://doi.org/10.1007/s40609-014-0019-4>; S Allen, ‘Governing Transnational Surrogacy Practices: What role can national and international regulation play?’, in M Davies (ed.), *Babies for Sale: Transnational surrogacy and the new politics of reproduction*, Zed Books, London, 2017; K Trimmings and P Beaumont (eds.), *International Surrogacy Arrangements: Legal regulation at the international level*, Bloomsbury Publishing, London, 2013.

³⁸ UN Commission on Human Rights, *Convention on the Rights of the Child*, E/CN.4/RES/1990/74, 7 March 1990.

³⁹ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, A/RES/54/263, 16 March 2001.

⁴⁰ C Fenton-Glynn, ‘International Surrogacy Before the European Court of Human Rights’, *Journal of Private International Law*, vol. 13, issue 3, 2017, pp. 546-567, <https://doi.org/10.1080/17441048.2017.1385901>; K Trimmings and P Beaumont, ‘Surrogacy Before the European Court of Human Rights’, in C Fenton-Glynn, JM Scherpe and T Kaan (eds.), *Eastern and Western Perspectives on Surrogacy*, Intersentia, 2019, p. 329

⁴¹ H Baker, ‘Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements’ (Prel. Doc/ No 3 B), Hague Conference on Private International Law (HCCH), March 2014, <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>.

for human trafficking in surrogacy is mentioned in a number of the HCCH's reports (in the context of women being trafficked for exploitation as surrogates), but the distinction between a legitimate arrangement under private law and the potential breach of anti-trafficking laws is not explored at length.⁴² Finally, the child protection and family unification NGO, International Social Service (ISS), is currently drafting a set of internationally agreed principles on the protection of the rights of the child in the context of surrogacy that can be used to guide policy and legislation.⁴³ Thus, we see that the absence of a comprehensive legal framework on cross-border CGS allows scope for countries to look to alternate legal tools, such as anti-trafficking laws, in order to police surrogacy.

Briefly, it is important to note that beyond domestic laws allowing or disallowing CGS as seen above, domestic family and citizenship law frameworks will determine critical issues of filiation and nationality. As nationality can be derived through one's parents, as well as place of birth, filiation is important, and the two matters are often related. Conflicts of national law on the attribution of these matters (e.g. legal parenthood is commonly attributed to the woman who gives birth and her partner; conversely, some countries—notably, Ukraine—attribute parenthood to the intended parents from birth) has led to instances where children have been rendered 'parentless' or 'stateless' or both, in contravention of Articles 7 and 8 of the CRC.⁴⁴ Furthermore, this exposes both the intended parents and surrogates, for either party might be in a position where they are caring for a child to whom they are legally unrelated, to investigation for child trafficking.⁴⁵ Thus, aligning the law on filiation and citizenship for cross-border CGS is important in the context of trafficking. In Israel, for instance, a genetic link between the child

⁴² *Ibid.*; H Baker, 'Preliminary Report on International Surrogacy Arrangements', (Prel. Doc. No 10), Hague Conference on Private International Law (HCCH), March 2012.

⁴³ ISS website, retrieved 14 July 2020, <https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy>; C Baglietto, N Cantwell and M Dambach (eds.), *Responding to Illegal Adoptions: A professional handbook*, International Social Service, Geneva, 2016, chapter 6.

⁴⁴ S Mohapatra, 'Stateless Babies & Adoption Scams: A bioethical analysis of international commercial surrogacy', *Berkeley J. Int'l L.*, vol. 30, issue 1, 2012, pp. 412-450, <https://doi.org/10.15779/z380q00>; CP Kindregan and D White, 'International Fertility Tourism: The potential for stateless children in cross-border commercial surrogacy arrangements', *Suffolk Transnat'l Rev.*, vol. 36, issue 3, 2013, pp. 527-628; M Yehezkel, 'From Baby M to Baby M (anji): Regulating international surrogacy agreements', *JL & Pol'y*, vol. 24, issue 1, 2015, pp. 41-93; A Margaria, 'Parenthood and Cross-Border Surrogacy: What is "new"? The ECtHR's First Advisory Opinion', *Medical Law Review*, vol. 28, no. 2, 2020, pp. 412-425, <https://doi.org/10.1093/medlaw/fwz042>; M Iliadou, 'Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v Italy*', *Medical Law Review*, vol. 27, issue 1, 2019, pp. 144-154, <https://doi.org/10.1093/medlaw/fwy002>; Ergas.

⁴⁵ Mohapatra, 'Stateless Babies'.

and at least one of the commissioning parents is required in order to rule out possible child trafficking.⁴⁶ Arguably, even in jurisdictions where this approach is not enshrined in law, demonstrating filiation can help mitigate suspicion of trafficking.⁴⁷

Human Trafficking in the Context of Surrogacy: International law and policy

Undoubtedly, human trafficking laws have a place within the network of laws governing international CGS to prevent and apprehend instances where surrogacy is used as means of trafficking in persons. Anti-trafficking laws have typically targeted ‘modern slavery’ and sexual exploitation.⁴⁸ As new medical technologies have advanced, trafficking laws have expanded to target new forms of trafficking, namely, trafficking people for organs and tissue, including human egg-cells.⁴⁹ CGS itself is not targeted in the international anti-trafficking law books, however human trafficking laws can nonetheless be used to police reproductive tourism in a number of ways. It is clear that women can be trafficked for the purpose of serving as surrogates or for the purpose of harvesting their egg-cells.⁵⁰ That is to say, the legal elements of the crime of human trafficking can be met vis-à-vis surrogates as victims (see below). I am not suggesting that compensated surrogates *are* by virtue of their participation in CGS victims of human trafficking (which is a discussion worthy of a separate paper); rather, the set of actions involved in CGS could potentially be both construed as trafficking, and evidenced to be so.⁵¹ Indeed, the absence of any meaningful legal distinction between the constituent elements of trafficking and CGS is, in that context,

⁴⁶ Shalev *et al.*

⁴⁷ See analyses of the La Roch case in: Mohapatra, ‘Stateless Babies’, p. 420 and the Shigeta case in Mohapatra, ‘Adopting an International Convention’, p. 6.

⁴⁸ T Truong, ‘Human Trafficking, Globalization, and Transnational Feminist Responses’, in R Baksh-Soodeen and W Harcourt (eds.), *The Oxford Handbook of Transnational Feminist Movements*, Oxford University Press, Oxford, 2015, p. 295.

⁴⁹ C Shalev, ‘Limiting Commodification: International law and its challenges’, in J Rainhorn and S El Boudamoussi (eds.), *New Cannibal Markets: Globalization and commodification of the human body*, MSH, Paris, 2015, pp. 363-382.

⁵⁰ *Ibid.*; Truong; J Kostenzer, ‘Human Trafficking and Exploitation for the Purpose of Reproduction’, in B Gebrewold, J Kostenzer and A Müller (eds.), *Human Trafficking and Exploitation: Lessons from Europe*, Taylor & Francis, London and New York, 2017, ch. 5; K Neorytu, ‘Assisted Reproduction Crime Network in Greece Highlights Need for Monitoring Surrogacy’, *BioNews*, 21 October 2019, retrieved 14 July 2020, https://www.bionews.org.uk/page_145701.

⁵¹ A Parker; Gupta.

profoundly problematic as it obfuscates the line between legitimate practices and criminal behaviour.⁵²

Might children born via surrogacy and then transferred to the commissioning parents also be potential victims of human trafficking according to the law? The example of Cambodia elaborated on in the introduction demonstrates how a shift in policy can transfer the status of victim from the surrogate to the child, and of trafficker/wrong-doer from the intermediary/commissioner to the surrogate herself. I contend that this is not consistent with internationally agreed definitions and constructions of trafficking in persons. Trafficking can occur in the domestic or international context; given that the emphasis of this paper is cross-border CGS where the child born will be taken home from the surrogacy host country, I focus on the relevant international laws. Applying the law, I show that although child trafficking *might* occur in the context of CGS, this would be exceptional, and that CGS is not in itself child trafficking.

The UN Trafficking Protocol is the primary international law instrument governing human trafficking.⁵³ Following Article 3(a), in order for something to be considered trafficking in persons, three distinct elements must be met:

- i) the *act* (recruitment, transport, transfer, harbouring, receipt of persons)
- ii) the *means* (threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim)
- iii) the *purpose* (for the purpose of exploitation, which includes, at a minimum, exploitation of the prostitution of others, sexual exploitation, forced labour or services, slavery or similar practices, servitude, and the removal of organs).

Furthermore, Article 3(b) states that any consent derived via the means set out in subsection (a) ‘shall be irrelevant’, and that consent is in any event irrelevant if the person trafficked is a child (3(c)). Notably, surrogacy is not specifically mentioned in Article 3, nor elsewhere in the Protocol, nor the relevant *travaux préparatoires*. It is mentioned as a potential form of exploitation in the Model Law drafted by the UN Office on Drugs and Crime to assist countries in implementing the Convention and Protocols⁵⁴—but no further guidance is offered on how and

⁵² Shalev *et al.*; Shalev.

⁵³ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000.

⁵⁴ United Nations Office on Drugs and Crime, *Model Law Against Trafficking in Persons*, Vienna, 2009, https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf.

when CGS might meet the elements of trafficking.

Nonetheless, Article 3(a) is not a closed or exhaustive definition—the purpose element only sets out the minimum requirements. Certainly, some writers have argued that CGS itself meets all three elements when the surrogate is considered the victim of trafficking.⁵⁵ What of the child as a victim of trafficking in CGS arrangements? Applying the criteria set out in Article 3(a) yields the following:

- i) the *act*—transferring the child(ren) from the surrogate to the commissioning parents, intermediaries may be involved in the transport, harbouring, and receipt of the children
- ii) the *means*—following Article 3(b), this element is not required to be met. That said, payments/benefits to the surrogate as the ‘person in control’ of the child, physically and/or legally in her capacity as the automatic legal mother (bearing in mind the conflict of laws viz. parentage alluded to above in the section on ‘practice and law’), or to the intermediaries in cases where the child(ren) are in intermediary care before being collected by the commissioning parents, could nonetheless constitute means.
- iii) the *purpose*—no exploitative purpose.

Children brought about via commercial surrogacy overwhelmingly go to loving, caring homes.⁵⁶ These children are joyously welcomed by their intended parents and their arrival is celebrated with hope for a happy and fulfilling family life—just as any other parent welcomes their newborn. There is no expectation of subsequent exploitation, in the same way that there is no expectation of subsequent exploitation when parents whose genetic, gestational and intentional parenthood coincide (i.e. the prevailing hetero-normative family ‘ideal’) take their children home from a hospital maternity ward. Thus, unless there is evidence to the contrary, the purpose for which children born through surrogacy are transferred is not an exploitative one, and therefore trafficking is not established.

The CRC potentially offers a far wider definition of child trafficking. Article 35 states that: ‘State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of, or traffic in children *for any purpose or in any form.*’ [my emphasis]

Taken at face value, under this approach exploitation need not be demonstrated as the purpose of trafficking, and nor is the method of trafficking limited, that is to say, it could encompass CGS arrangements. However, although the wording of Article 35 offers more flexibility to establish trafficking practices,

⁵⁵ A Parker; Gupta. Although see for counter-arguments: Pande, ‘Wombs in Labour’; Panitch; B Parry, ‘Surrogate Labour: Exceptional for whom?’, *Economy and Society*, vol. 47, no. 2, 2018, pp. 214-233, <https://doi.org/10.1080/03085147.2018.1487180>.

⁵⁶ See intended parents’ accounts in: Grytsenko.

the implementation guide cuts back significantly on that flexibility. Readers are redirected to Article 3(a) of the Trafficking Protocol for a definition of human trafficking—which is at odds with Article 35. The former includes an unequivocal requirement for demonstrating the exploitative purpose; the latter does not. Neither the CRC nor the accompanying implementation guide mentions surrogacy, although intercountry adoption is specifically addressed. The guide does state that Article 35 serves as a safety net ‘to ensure that children are safe from being abducted or procured for these [CRC Articles 21, 32, 33, 34, 36] purposes or for any other purpose.’ (p. 531) It is far from clear that CGS in itself would fall foul of article 35 on trafficking grounds. CGS may, however, be construed as sale of children, a separate offence under Article 2(a) of the Optional Protocol.

The Optional Protocol does not specifically mention surrogacy, however, the sale of children under Article 2 was specifically considered by the UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio (hereafter the ‘Special Rapporteur’), in a thematic report presented to the UN Human Rights Council.⁵⁷ In fact, this report is directed at preventing the sale *and trafficking* of children in the context of surrogacy, with both ‘sale’ and ‘trafficking’ repeatedly emphasised together throughout the report (paragraphs 34, 36, 37). Given this, it is disappointing that the law on trafficking in children is not at all explored, or at least distinguished and set aside in the report, nor discussed during the interactive dialogue,⁵⁸ nor the follow-up report.⁵⁹ Trafficking is listed in the report as an abusive practice in surrogacy (paragraphs 29-33), but no evidence of child trafficking as per Article 3 of the Trafficking Protocol is put forward. The example of the Baby 101 surrogacy ring cited appears to have been a case of trafficking in women—not children—for the purposes of exploitative surrogacy practices.⁶⁰

⁵⁷ UN Human Rights Council, *Report of Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material A/HRC/37/60*, 15 January 2018 (‘SR Report 2018’), <https://undocs.org/en/A/HRC/37/60>.

⁵⁸ *Ibid.*; OHCHR, ‘Human Rights Council Discusses the Right to Privacy, and Commercial Surrogacy in the Context of the Sale of Children’, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22768&LangID=E>.

⁵⁹ UN Human Rights Council, *Report of Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and other Child Sexual Abuse Material A/74/162*, 15 July 2019, <https://undocs.org/en/A/74/162>.

⁶⁰ Anon, ‘Thai Police Free 14 Women From Illegal Baby-Breeding Farm in Bangkok’, *Huffington Post*, 24 February 2011, retrieved 14 July 2020, https://www.huffpost.com/entry/vietnamese-women-freed-fr_n_827595.

On the other hand, the law on the sale of children is considered in depth (paragraphs 41-51) and the report concludes that commercial, and in some cases altruistic, surrogacy usually does meet the elements of the sale of children under the Optional Protocol—and that most CGS arrangements are therefore in contravention of international law. Briefly, for the sale of children is not focus of this paper, the elements of sale under Article 2 are: i) remuneration or any other consideration (payment), ii) the transfer of the child, and iii) the exchange, i.e. payment *for* transfer. Article 3 (Optional Protocol) sets out the minimum acts and activities for which the sale of children is prohibited: sexual exploitation, transfer of organs for profit, and forced labour. On this analysis the child is viewed as a commodity.⁶¹ However, whether the payment in gestational surrogacy is payment for the child itself, or the surrogate's gestational service, and whether intending parents can in fact buy a child that is or was always 'theirs' (through intention, genetics or both)⁶² or indeed *at all* (for CGS arrangements do not presuppose that parents have ownership rights over children)⁶³ is a matter of contention. This ultimately depends on how surrogacy is conceptualised and organised—as work, commerce, or altruism.⁶⁴

There is considerable scholarly debate over whether Article 35 (CRC) and Articles 2 and 3 (Optional Protocol) extend to CGS at all. Some scholars⁶⁵ maintain that interpreting these Articles according to the ordinary meaning of the terms used clearly results in CGS amounting to the sale of children—this appears to be the approach adopted by the Special Rapporteur.⁶⁶ However,

⁶¹ DM Smolin, 'Surrogacy as the Sale of Children: Applying lessons learned from adoption to the regulation of the surrogacy industry's global marketing of children', *Pepp. L. Rev.*, vol. 43, issue 2, 2015, pp. 265-341, <https://digitalcommons.pepperdine.edu/plr/vol43/iss2/2>.

⁶² JKM Hanna, 'Revisiting Child- Based Objections to Commercial Surrogacy', *Bioethics*, vol. 24, no. 7, 2010, pp. 341-347, <https://doi.org/10.1111/j.1467-8519.2010.01829.x>.

⁶³ Arneson.

⁶⁴ M Cottier, 'Understanding the Impact of Different Concepts of Surrogate Mother for the Regulation of International Surrogacy Arrangements', *Voelkerrechtsblog*, 22 July 2016, <https://voelkerrechtsblog.org/understanding-the-impact-of-different-concepts-of-surrogate-mother-for-the-regulation-of-international-surrogacy-arrangements>.

⁶⁵ J Tobin, 'To Prohibit or Permit: What is the (human) rights response to the practice of international commercial surrogacy?', *Int'l & Comp. L.Q.*, vol. 63, issue 2, 2014, pp. 317-352, <https://doi.org/10.1017/S0020589314000049>.

⁶⁶ SR Report 2018, paragraphs 41-51.

others⁶⁷ argue that the treaties must be interpreted in light of their object and purpose—‘to prevent harm to children, to protect children’s rights and to promote their best interests’⁶⁸—and that it is not obvious how CGS contravenes these aims, given the intention of all surrogacy arrangements is to bring much-wanted children into families that are ready to care for them as their own.⁶⁹ Furthermore, although it is not excluded, this intended outcome does not sit logically alongside the (minimum) prohibited purposes of sale listed in Article 3 (Optional Protocol), all of which are clearly degrading and exploitative.⁷⁰ Johnson goes further, arguing that following a complete and contextualised reading of both treaties, CGS in fact advances rather than contradicts the goals of the CRC set out in the Preamble—to allow children to ‘grow up in a family environment, in an atmosphere of happiness, love and understanding’⁷¹—and that there is no evidence to date that surrogacy detracts from this objective.⁷² This argument applies equally to any attempt to bring CGS under the broad definition of trafficking in Article 35 (CRC).

CGS has been intuitively linked to trafficking in children. It is not difficult to see how: surrogacy as a transaction has been criticised as manifesting the commodification of children (and women), and commodification in turn is associated with exploitation—the very thing that anti-trafficking laws seek to prevent. However, the fact that commercial surrogacy can—*but not necessarily does*—involve exploitation, does not mean that it is therefore an act of child trafficking. Even if the process of surrogacy is deemed to commodify the child, it does not follow that such commodification was carried out for the purpose of exploitation under Article 3(c) (Trafficking Protocol). And, as demonstrated above, the CGS process itself does not meet the third element of trafficking in persons. This is not to undermine the very serious issues of both commodification of children (and women) and the exploitation of vulnerabilities of each party: the surrogate’s need to alleviate her economic position, the intending parents’ inability to form a family without ART, the child’s right to a family (i.e. parents) and citizenship, etc. These issues are of critical importance, but they are outside

⁶⁷ L. Johnson, ‘Commercial Surrogacy Is the Sale of Children? An argument that commercial surrogacy does not violate international treaties’, *Wash. Int’l L. J.*, vol. 28, no. 3, 2019, pp. 701-726; P. Gerber and K. O’Byrne, ‘Souls in the House of Tomorrow: The rights of children born via surrogacy,’ in P. Gerber and K. O’Byrne (eds.), *Surrogacy, Law and Human Rights*, Routledge, Abington, 2016, pp. 81 -112

⁶⁸ Gerber and O’Byrne, p. 97.

⁶⁹ *Ibid.*

⁷⁰ Johnson; Gerber and O’Byrne.

⁷¹ CRC Preamble.

⁷² Johnson, p. 712.

the remit of anti-trafficking law, which refers to a specific set of actions and intentions. In an area that is emotionally sensitive, ethically controversial, and inconsistently regulated, accuracy and clarity is crucial when considering the applicability of human trafficking charges. Safeguarding against issues of commodification and exploitation in this wider sense requires the development of rigorous, comprehensive, and targeted international laws and legal bodies to effectively regulate cross-border surrogacy, and consider more closely the interaction between the private, public, and potential criminal law dimensions of assisted reproduction.

Finally, it is interesting to note that this exact confusion between ‘sale of children’ and ‘trafficking in children’ is an issue that also pervades intercountry adoption.⁷³ Indeed, intercountry adoption has often been compared to cross-border CGS as a field sharing some similar characteristics.⁷⁴ The HCCH’s Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption⁷⁵ is the main international law document regulating cross-border adoption, seeking to ensure that ‘adoptions take place in the best interests of the child’ (Article 1a) and ‘to prevent the abduction, the sale of, or traffic in children’ (Article 1b). It has often been held up as model for a future cross-border surrogacy convention.⁷⁶ As with CGS, it is difficult to establish the ‘purpose for exploitation’ element necessary to determine trafficking in the context of intercountry adoption—a fact conceded by those who would prefer to police the practice through anti-trafficking law.⁷⁷ The difficulty in establishing trafficking under Article 3(a) has led some to propose removing the ‘purpose of exploitation’ criteria, on the grounds that not all people who are trafficked are necessarily subsequently exploited, and vice versa.⁷⁸

⁷³ N Cantwell, ‘Editorial’, *ISS Monthly Review*, no. 11-12, 2005, p. 1; Mohapatra, ‘Adopting an International Convention’; DM Smolin, ‘Intercountry Adoption as Child Trafficking’, *Val. UL Rev.*, vol. 39, no. 2, 2004, pp. 281-325.

⁷⁴ Mohapatra, ‘Adopting an International Convention’; Smolin, ‘Intercountry Adoption’; R Scherman *et al.*, ‘Global Commercial Surrogacy and International Adoption: Parallels and differences’, *Adoption & Fostering*, vol. 40, no. 1, 2016, pp. 20-35, <https://doi.org/10.1177/0308575915626376>.

⁷⁵ Hague Conference on Private International Law (HCCH), *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

⁷⁶ Mohapatra, ‘Adopting an International Convention’; Trimmings and Beaumont, ‘International Surrogacy Arrangements’.

⁷⁷ DM Smolin, ‘Child Laundering as Exploitation: Applying anti-trafficking norms to intercountry adoption under the coming Hague regime’, *Vt. L. Rev.*, vol. 32, 2007, pp. 113-168; Smolin, ‘Intercountry Adoption’.

⁷⁸ T Obokata, *Trafficking of Human Beings From a Human Rights Perspective: Towards a more holistic approach*, vol. 89, Martinus Nijhoff Publishers, Leiden, 2006.

To date there are no proven cases of surrogacy for the purpose of subsequent exploitation. That is not to say it will not happen: There are two known cases of children being born through surrogacy to an intended parent (in both cases the father) who was subsequently found to be a convicted child sex offender.⁷⁹ In neither case were trafficking charges raised, and both home country authorities have concluded, following investigation, that it is in the best interests of the child to remain with the intended parent despite his convictions, that there is no evidence of harm, and that the risk of harm is low (monitoring is ongoing). In both cases, a background check would have revealed the intended father's criminal record and could have prevented the surrogacy from proceeding on grounds of suspected trafficking—for in both cases surrogacy for the purpose of subsequent exploitation was and remains a real danger. Two points emerge: firstly, that child trafficking in the context of surrogacy, albeit rare, is a real risk that must be taken seriously. Manipulating the language of child trafficking to lobby against CGS wholesale obfuscates these risks and frustrates the development of regulatory safeguards to actively prevent trafficking. Child trafficking is a devastating and serious criminal matter that must be properly understood and discussed with rigour and accuracy, rather than headline-grabbing rhetoric.⁸⁰ Secondly, these cases simultaneously highlight the alarming lack of oversight, and the corollary urgent need for international cooperation and robust regulation to prevent and detect harms, including human trafficking. A blanket ban cannot achieve this.⁸¹ As seen in Cambodia, banning commercial surrogacy simply drove the practice underground, where there is no oversight to ensure legal, ethical, and medical care standards are being met, no dispute resolution procedures, and no mechanisms for accountability.

Conclusion

In this paper I have sought to place anti-trafficking laws within the network of laws that impact international surrogacy. In doing so, I have shown that the language and lens of human trafficking has been used and misused to police CGS. 'Trafficking in children' has been conflated and confused with the 'sale of children' at the expense of properly considering the applicability of international

⁷⁹ J Overdorf, 'Israeli Sex Offender Taps India's Booming Surrogacy Trade for Baby Girl', *The World*, 10 June 2013, <https://www.pri.org/stories/2013-06-10/israeli-sex-offender-taps-indias-booming-surrogacy-trade-baby-girl>; M Safi, 'Baby Gammy's Twin Can Stay With Australian Couple Despite Father's Child Sex Offences', *The Guardian*, 14 April 2016, <https://www.theguardian.com/lifeandstyle/2016/apr/14/baby-gammys-twin-sister-stays-with-western-australian-couple-court-orders>.

⁸⁰ J Millbank, 'Gammygate II: Surrogacy law must not be based on the latest tabloid story', *BioNews*, 27 April 2015, https://www.bionews.org.uk/page_95013.

⁸¹ Bromfield and Rotabi, p. 131.

anti-trafficking laws. Focussing on that, I have demonstrated that CGS itself does not meet the elements of the crime of trafficking in children in accordance with international law, and nor is it clear that CGS falls within the ambit of the sale of children offence. Yet, states and institutions have inaccurately and misleadingly used the weight and/or rhetoric of child trafficking laws to discourage cross-border CGS—i.e. reproductive tourism—wholesale. This is problematic for two reasons.

Firstly, it is a misuse of the law on child trafficking; in an area already fraught with ambiguity, manoeuvring anti-trafficking laws to achieve outcomes beyond those which they are designed to target adds significantly to the legal uncertainty faced by already vulnerable parties. When there is no evidence indicating or suggesting subsequent exploitation (of the child, in this case), anti-trafficking laws do not apply. The sweeping use of anti-trafficking laws to target CGS is rather an attempt to assert a particular ethical position vis-à-vis CGS—in short, to stop it. Sovereign states are of course free to legislate nationally as they wish; however, the reality is there is both a demand for ART, and people and places willing to provide these services. Reproductive tourism for CGS needs to be addressed with due care and thought, rather than ignored, outsourced, or indirectly banned through anti-trafficking laws. And even countries who specifically ban surrogacy practices must confront how to handle reproductive tourists returning home.⁸²

Secondly, the consequences of employing anti-trafficking laws in the context of CGS must be examined. For the Spanish families trapped in Ukraine, it was the child—left legally stateless and parentless for weeks to months—who was most affected. Likewise, in Cambodia, children born via CGS have been separated from their intended, and perhaps genetic, parents and placed in the care of a surrogate who a) did not intend to expand her family, and b) far from alleviating her economic position, will now be under even more financial strain to provide for a larger family. In both instances the intended parents are indirectly punished (the threat of/actual loss of their child), and in the latter, surrogates were directly targeted. It is difficult to see how these outcomes are defensible or desirable for any of the stakeholders, including the states. And yet, commercial surrogacy continues; Spanish families are travelling to Ukraine⁸³ and CGS operates underground in Cambodia.⁸⁴

⁸² Mohapatra, 'Adopting an International Convention'; S Bassan, 'Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions', *Mich. J. Int'l L.*, vol. 37, issue 2, 2015, pp. 299-349.

⁸³ Grytsenko.

⁸⁴ M Cook, 'More Surrogate Mothers Jailed in Cambodia', *Bioedge*, 28 July 2019, <https://www.bioedge.org/bioethics/more-surrogate-mothers-jailed-in-cambodia/13151>.

Surrogacy is about building families. To view CGS simply through the framework of trafficking or the sale of children is to miss the point that distinguishes this practice. A surrogate child is planned as a welcome addition to the intended parents' family. Here, the intention is to build a family; in trafficking, the intention is to exploit a child. Whilst existing laws on human rights and trafficking could provide a scaffold for the regulation of cross-border CGS, ultimately, the unique ethical and practical issues raised by this practice require targeted, detailed laws that respond on point to the vulnerabilities of each party to prevent exploitative practices manifesting and to promote safe practices that protect the interests of all parties. Such an undertaking, however, goes far beyond the purpose and function of human trafficking laws.

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Short Articles

The Perfect Victim: ‘Young girls’, domestic trafficking, and anti-prostitution politics in Canada

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‘We can save the girl next door and we can save young women all across Ontario if we get this done now.’

Todd Smith (Progressive Conservative Party), 17 April 2017, p. 3604.

The current human trafficking preoccupation in Canada centres in large part on the domestic sexual exploitation of girls and young women, frequently referred to as ‘children’ regardless of their age. This represents a significant change from previous understandings of trafficking, for example in the 1990s and early 2000s, when attention in the political sphere was almost exclusively focused on the transnational migration of exotic dancers from Eastern Europe. Over the past decade, this new perspective has coincided with a modified political landscape for Canadian sex work law and policy. In 2013, the country’s Supreme Court ruled in *Bedford v Canada* that key prostitution laws were unconstitutional, validating long-standing claims by sex workers and allies about the harmfulness of the anti-sex work provisions in the Criminal Code.

Although the Conservative majority government criminalised the purchase of sexual services and related activities in 2014, the Supreme Court ruling the previous year, along with the increasingly visible Canadian sex worker rights movement and the upsurge in research and publications created by and with sex working communities, made it less and less feasible for politicians and others to continue claiming that all adult sex workers were exploited victims. It is our contention that this changed socio-legal context is, at least partially, driving the current focus on people under the age of 18 who engage in commercial sexual exchange. They represent a new victim in both law and public perception, one

who has no voice and whose subjectivity can be fully erased or appropriated.¹ However, while attention has ostensibly shifted to young people, the criminal justice interventions that have emerged in response negatively impact both young people and adult sex workers.

The perfect youth victim, who has been evoked in both federal and provincial policy as well as public debates, thus serves to legitimise the development of new or modified legislation that imposes greater restrictions on women's bodily autonomy, freedom of movement, and income generating activities in a context where anti-sex work laws have been found to be harmful. In this short article, we explore a recent example where this perfect victim was conjured up to influence policy in Ontario, the country's most populous province, with girls and young women spoken *for* in ways that demonstrate clearly the misrepresentations and erasures of the experiences of both minors and adults. We analyse debates in the Legislative Assembly of Ontario among Members of Provincial Parliament (MPPs) on two virtually identical trafficking bills, with the name of the first, the *Saving the Girl Next Door Act* (2016), clearly capturing the stance we are critiquing here. It failed to pass before the legislature was prorogued but was reintroduced as the *Anti-Human Trafficking Act* (2017) and implemented shortly afterwards.

While the legislation was purportedly intended to address the trafficking of any individual, the concerns articulated by MPPs across party lines were overwhelmingly about child sexual exploitation and 'young girls.' MPPs frequently expressed concern about 13- and 14-year-olds,² but cited the dangers to those as young as 11 and as old as early 20s. These arguments drew on widely circulated yet debunked claims that the average age of entry into sex work (and hence trafficking) is 13 or 14,³ while also demonstrating how easily the category of youth can be expanded into adulthood. In these instances, young girls are represented as vulnerable innocents with an absence of sexual knowledge; they are naïve and easily manipulated by exploitative men and boyfriends:

Here's a typical story: A girl is online. She starts to form a relationship with a man who, it turns out, is methodically grooming her. Young, vulnerable and often lacking in self-esteem, she becomes convinced she's the

¹ Global Network of Sex Work Projects (NSWP), 'Policy Brief: Young sex workers', NSWP, 2016, <https://www.nswp.org/resource/policy-brief-young-sex-workers>.

² See, for example, statements by Laurie Scott (Progressive Conservative Party), 5 April 2017, p. 3425; Wayne Gates (New Democratic Party), 5 April 2017, p. 3434.

³ See J Lowman, 'Crown Expert-Witness Testimony in *Bedford v. Canada: Evidence-based argument or victim-paradigm hyperbole?*', in E van der Meulen, EM Durisin, and V Love (eds.), *Selling Sex: Experience, advocacy, and research on sex work in Canada*, UBC Press, Vancouver, 2013, pp. 230-250.

centre of his world. Gifts follow, money, the promise of being loved and looked after.

- Indira Naidoo-Harris (Liberal Party), 21 March 2017, p. 2940

Our little girls are on the Internet having conversations with cute boys, and then they meet them. The second time they meet them, they might smoke a joint and have to work it off, and get trafficked for the weekend to a weekend hotel party...

- Jennifer K. French (New Democratic Party), 21 March 2017, p. 2947

Such narratives appear to reproduce the deeply engrained stereotype of the ‘pimp,’⁴ but here he becomes a novel ‘boyfriend-pimp.’ Indeed, it is girls’ sexual interest in boys that makes them vulnerable.⁵

Family and community are represented by MPPs across the political spectrum as the most appropriate and safest places for girls and young women. As such, the protective cover of the family is a bulwark against exploiters and predators, with home perceived as a haven from harm:

Young women, girls and vulnerable workers are being recruited and moved away from their homes and communities. They are being threatened, isolated and controlled, and often form a desperate trauma bond with their traffickers.

- Indira Naidoo-Harris (Liberal Party), 17 May 2017, p. 4511

On any given night, 30 to 40 families [are] looking on backpage.com for their daughters who are being trafficked throughout the province.

- Laurie Scott (Progressive Conservative Party), 5 April 2017, p. 3443

⁴ See K Gillies and C Bruckert, ‘Pimps, Partners, and Procurers: Criminalizing street-based sex workers’ relationships with partners and third parties’, in EM Durisin, E van der Meulen, and C Bruckert (eds.), *Red Light Labour: Sex work regulation, agency, and resistance*, UBC Press, Vancouver, 2018, pp. 82-93; N Mensah, ‘The Representation of the “Pimp”: A barrier to understanding the work of third parties in the adult Canadian sex industry’, in C Bruckert and C Parent (eds.), *Getting Past the Pimp: Management in the sex industry*, University of Toronto Press, Toronto, 2018, pp. 19-35; E van der Meulen, ‘Illegal Lives, Loves, and Work: How the criminalization of procuring affects sex workers in Canada’, *Wagadu: A Journal of Transnational Women’s and Gender Studies*, vol. 8, 2010, pp. 217-240.

⁵ See S Angelides, *The Fear of Child Sexuality: Young people, sex, and agency*, The University of Chicago Press, Chicago, 2019.

Omitting the reality that girls and young women often leave their families because of abuse and turn to sex work to earn money,⁶ such ‘family as saviour’ discourses reinforce the very institutional norms and hierarchies that cause so much harm to begin with. In limiting trafficking to abusive acts committed by boys and men in the context of sex work, the harms girls face from the child welfare system, in the family, and from police and other authorities are ignored and erased.

The way that age is rendered nebulous by Ontario MPPs is key to expanding the scope of potential legislative interventions. While the overarching concern is evidently about girls under 18, it is not uncommon for politicians to conflate them with women over 18 as well:

So let's talk about those people at risk of being trafficked: 70% of trafficking involves sexual exploitation, and that targets our youth, young women, girls and boys, typically aged 14 to 22.

- Indira Naidoo-Harris (Liberal Party), 21 March 2017, p. 2939

As emphasized earlier, most of the victims of trafficking in Ontario and in London are young women: 93% are female, and almost half are between the ages of 18 and 24.

- Peggy Sattler (New Democratic Party), 5 April 2017, p. 3440

As these quotes illustrate, outrage toward child abuse is linked to adult sex work and then used to problematise women’s activities such that, through a rhetoric of protecting the ‘girl next door’, anti-prostitution perspectives become hegemonic common sense.

One impact of the focus on children and youths is that adult women engaging in sex work tend to be infantilised and presented as lacking awareness or agency, a familiar anti-prostitution argument:

[The police officer] told us that a 25-year-old woman who had no idea she was in North Bay – she had no idea what town she was in – was indeed involved deeply in the sex and drug trade.

- Victor Fedeli (Progressive Conservative Party), 5 April 2017, p. 3426

⁶ Global Network of Sex Work Projects. See also: J Musto, *Control and Protect: Collaboration, carceral protection, and domestic sex trafficking in the United States*, University of California Press, Oakland, 2016; C Showden and J Musto, *Youth Who Trade Sex in the U.S.: Intersectionality, agency, vulnerability*, Temple University Press, Philadelphia, 2018.

Rather than discussing the structural factors that give shape to women's experiences, comments such as these risk positioning them as child-like or hapless dupes in need of the paternalistic state for protection, a stand-in for the patriarchal family that supposedly keeps girls safe. Despite the fact that many adult sex workers regularly contribute to discussions around sex work and trafficking, policy debates like the one explored here frequently give women and girls rights only as victims, not as agentic subjects. They also do not acknowledge the harms that accrue when police and the state are relied upon for social or gender justice.

Girls under 18 are entirely denied a voice in these debates. Instead, they are represented by policymakers who tend to neglect the profound victimisation experienced within institutions designed to help them. She is the perfect victim—voiceless, vulnerable, and easily manipulated. Her subjectivity is appropriated in the name of trafficking, and legislative changes are justified in the name of protecting her innocence. Anti-trafficking efforts thereby become proxies for anti-prostitution policies that have been clearly shown to harm adult sex workers, and potentially youths as well.⁷ Indeed, the shift to child sexual exploitation in Canadian policy debates legitimises the ongoing criminalisation of sex work and undermines sex worker's demands for social, economic, and legal justice.

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⁷ J Iman *et al.*, *Girls Do What They Have To Do To Survive: Illuminating methods used by girls in the sex trade and street economy to fight back and heal*, Young Women's Empowerment Project (YWEP), Chicago, 2009, <https://ywepchicago.files.wordpress.com/2011/06/how-the-reproductive-justice-movement-can-support-youth-in-the-sex-trade.pdf>.

Online Child Sexual Exploitation in the Philippines: Moving beyond the current discourse and approach

Melinda Gill

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Online Child Sexual Exploitation in the Philippines

Online child sexual exploitation (OCSE) is a growing, global issue. OCSE refers to situations where a child 'takes part in a sexual activity in exchange for something (... or ... the promise of such), from a third party, the perpetrator, or by the child him/herself' and where the sexually exploitative images and materials at some stage involve the online environment, whether being 'produced, bought, sold, possessed, distributed, or transmitted'.¹ OCSE is highly interconnected with other forms of child sexual exploitation, including sexual exploitation that occurs whilst the victim is online or the grooming of children online for either online or offline sexual exploitation.²

The Philippines is often referred to as a 'hot spot' for OCSE. Since the first convictions involving OCSE in 2011,³ the number of reported cases has been rising each year, with more than 800,000 tips of possible OCSE from the Philippines in 2019.⁴ During the COVID-19 pandemic, tips are reported to have

¹ S Greijer and J Doek, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, ECPAT International with ECPAT Luxembourg, Bangkok, 2013, pp. 24-28, https://www.ecpat.org/wp-content/uploads/2016/12/Terminology-guidelines_ENG.pdf.

² *Ibid.*

³ Terre Des Hommes Netherlands, *Fullscreen on View: An exploratory study on the background and psychosocial consequences of webcam child sex tourism in the Philippines*, TDH, 2013, p. 5, <https://cdn.icmec.org/wp-content/uploads/2020/07/Exploratory-Study-Webcam-CSE-in-Philippines-Terre-des-Hommes-2013.pdf>.

⁴ National Center for Missing and Exploited Children (NCMEC), *CyberTipline*, 2019, retrieved 24 November 2020, <https://www.missingkids.org/gethelpnow/cybertipline>.

increased by 264 per cent.⁵ Widespread access to low-cost internet and mobile devices together with high levels of English proficiency and an established commercial sex industry are the most immediate explanations for the prevalence of OCSE in the country.⁶

Whilst the relevant stakeholders concur that more action is needed to tackle the issue, there is disagreement regarding how the problem is represented and addressed. High profile awareness and online safety campaigns portray OCSE as being perpetrated against young children by adults, usually within the same household.⁷ However, existing research and the experience of many community-based practitioners suggest that self-generated sexual content/material by children is more common and becoming normalised in many communities with friends and young relatives ‘coaching’ their peers in how to produce sellable images and access paying customers via anonymous payment systems without an adult ‘facilitator’.⁸ Research suggests a range of motivations for children to engage in this behaviour, including to meet their families’ financial needs; to

⁵ B Pulta, ‘Online Child Exploitation Reports in PH Surge Amid Covid-19: DOJ’, *Philippine News Agency*, 25 May 2020, retrieved 21 November 2020, <https://www.pna.gov.ph/articles/1103852>.

⁶ UNICEF, *A Systematic Literature Review of the Drivers of Violence Affecting Children: the Philippines*, 2016, p. 6, <https://www.unicef.org/philippines/media/501/file/National%20Baseline%20Study%20on%20Violence%20Against%20Children%20in%20the%20Philippines:%20Systematic%20literature%20review%20of%20drivers%20of%20violence%20affecting%20children%20.pdf>; see also WeProtect Global Alliance, *Global Threat Assessment 2018: Working together to end the sexual exploitation of children online*, 2018, pp. 5-9 and 14, <https://www.weprotect.org/wp-content/uploads/Global-Threat-Assessment-2018-EN.pdf>.

⁷ M Abad, ‘PH Government, Private Sector Launch Joint Campaign Against Online Child Sexual Abuse’, *Rappler*, 22 October 2019, <https://www.rappler.com/moveph/saferkidsph-campaign-against-online-child-sexual-abuse>; No Author, ‘New Campaign SaferKidsPH to Raise Awareness on Online Sexual Exploitation of Children’, UNICEF, 22 October 2019, <https://www.unicef.org/philippines/press-releases/new-campaign-saferkidsph-raise-awareness-online-sexual-exploitation-children>.

⁸ Plan International, *Children and the Sex Trade in the Digital Age: A study on the commercial sexual exploitation of children in Metro Manila*, The Girls Advocacy Alliance, 2018, p. 29, <https://plan-international.org/publications/children-and-sex-trade-digital-age>; Internet Watch Foundation, *Trends in Online Child Sexual Exploitation: Examining the distribution of captures of live-streamed child sexual abuse*, IWF, Cambridge, 2018, p. 11, <https://www.iwf.org.uk/sites/default/files/inline-files/Distribution%20of%20Captures%20of%20Live-streamed%20Child%20Sexual%20Abuse%20FINAL.pdf>; National Center for Missing and Exploitation Children (NCMEC), *The Online Enticement of Children: An in-depth analysis of CyberTipline reports*, 2017, retrieved 24 November 2020, <https://www.missingkids.org/content/dam/missingkids/pdfs/ncmec-analysis/Online%20Enticement%20Pre-Travel.pdf>; Terre Des Hommes Netherlands, p. 23.

have their own money to purchase clothes, gadgets, or drugs and alcohol; or in the hope of forming relationships with foreign men online.⁹

The sole study on the impact of OCSE in the Philippines suggests higher levels of post-traumatic stress, lower self-esteem, severe educational delays, and an increased risk of entering prostitution among victims.¹⁰ However, the long-term effects of OCSE, whether facilitated by an adult or involving self-generated material, on the mental, physical, sexual, and social wellbeing of children is unknown and research is greatly needed to address this gap.

The primary interventions against OCSE in the Philippines are to identify and prosecute perpetrators and conduct OCSE awareness campaigns and education about online safety. These are important. However, professionals living in communities where OCSE is common observe that law enforcement activities are not a deterrent,¹¹ and may actually be detrimental and traumatising for children.¹² Similarly, research has shown that advanced law enforcement activities have little preventive effect on all forms of exploitation.¹³

The Way Forward

In my opinion as a health professional with ten years of experience working in the Philippines, OCSE should be regarded as a sexual and reproductive health (SRH) outcome. As with other SRH outcomes, it does not occur in a void but is influenced by a ‘complex web of interrelated factors that operate at different levels.’¹⁴ Social determinants such as poverty, family breakdown and dysfunction, poor parenting and supervision of children are pervasive in the

⁹ Terre Des Hommes Netherlands, pp. 17-23; UNICEF, p. 63; Plan International, p. 62.

¹⁰ Terre Des Hommes Netherlands, p. 48.

¹¹ Renewsiya Foundation and Consuello Zobel Alger Foundation, *A Healthy Me: Understanding and enhancing the impact of a health and wellbeing program for Filipina adolescents*, April 2020, p. 46, <http://www.renewsiya.org/wp-content/uploads/2020/11/A-Healthy-Me-Research-Report-November-2020.pdf>.

¹² Plan International, p. 61.

¹³ L Kiss and C Zimmerman, ‘Human Trafficking and Labor Exploitation: Toward identifying, implementing, and evaluating effective responses’, *PLoS Medicine*, vol. 16, no. 1, 2019, <https://doi.org/10.1371/journal.pmed.1002740>.

¹⁴ V Chandra-Mouli, C Lane and S Wong, ‘What Does Not Work in Adolescent Sexual and Reproductive Health: A review of evidence on interventions commonly accepted as best practices’, *Global Health: Science and Practice*, issue 3, 2015, pp. 333–340, <https://doi.org/10.9745/GHSP-D-15-00126>.

Philippines.¹⁵ Furthermore, rapidly changing patterns of sexual activity, existing sociocultural norms, and a lack of evidence-based programmes, among other issues, result in other poor SRH outcomes such as teenage pregnancies, HIV/AIDS and sexually transmitted infections, and sexualised violence against children.¹⁶

As is also true with interventions that are effective at reducing human trafficking, strategies to address OCSE and other SRH outcomes must be founded on a deep understanding of the underlying causal pathways and contextual factors for specific populations.¹⁷ Given the known determinants of OCSE, this must include long-term interventions at the household and community level which address poverty, enhance educational and employment opportunities, provide access to comprehensive SRH education for both girls and boys and their parents, and strengthen the family unit.

Whilst national legislation in theory supports this approach, multiple factors such as fragmentation of services, lack of sustained funding, and poor cooperation at the local government level limit programme reach and implementation.¹⁸ Progress is also disrupted by incongruous government policies and laws, including those that require a guardian's consent for children and youths under 18 years to access SRH services, but hold that children as young 12 can provide sexual consent and

¹⁵ UNICEF p. 6; J Melgar, *et al.*, 'Assessment of Country Policies Affecting Reproductive Health for Adolescents in the Philippines', *Reproductive Health*, vol. 15, no. 205, 2018, <https://doi.org/10.1186/s12978-018-0638-9>; S Q Arguilla and J M Habitan, *How Filipino Adolescents Communicate With Their Parents, and Vice Versa, Topics About Sexual Behavior and Reproductive Health*, Undergraduate Thesis, College of Mass Communication, University of the Philippines Diliman, Quezon City, April 2014, retrieved 5 March 2021, <http://iskwiki.upd.edu.ph/flipbook/viewer/?fb=2010-53196-HOW-FILI#page-1>; MP N Marquez, M Kabamalan, and E P Laguna, *Ten Years of Traditional Contraceptive Method Use in the Philippines: Continuity and change*, DHS Working Papers No. 130, ICF, Rockville, July 2017.

¹⁶ Philippine Statistics Authority (PSA) and ICF International, *Philippines National Demographic and Health Survey 2013*, 2014, p. 61, <https://dhsprogram.com/pubs/pdf/fr294/fr294.pdf>; Department of Health and Epidemiology Bureau of the Philippines, *HIV/AIDS & ART Registry of the Philippines, August 2019*, 2020, https://www.aidsdatahub.org/sites/default/files/publication/EB_HARP_August_AIDSreg2019.pdf; E G Vista, 'Updates on Sexually Transmitted Infections in the Philippines', *Journal of the Philippine Dermatological Society*, vol. 27, no. 1, 2018, pp. 8-10; Council for the Welfare of Children (CWC) and UNICEF, *National Baseline Study on Violence Against Children in the Philippines*, 2016, p. 6, <https://www.unicef.org/philippines/reports/national-baseline-study-violence-against-children-philippines>.

¹⁷ Kiss and Zimmerman; Chandra-Mouli, Lane and Wong.

¹⁸ Plan International, pp. 61-62.

be held criminally liable at the age of 15.¹⁹

A large body of evidence confirms that comprehensive SRH education can have a significant impact on SRH outcomes.²⁰ Nascent research also suggests that this impact can be extended to related issues and, thus, experts recommend the inclusion of topics such as internet sexuality and gender-based violence.²¹ However, to be effective, SRH programmes must be holistic and intensive, using activity-based and learner-centred educational methodologies. They should be sustained across multiple developmental stages and implemented at the community level, with adequate attention given to the quality and fidelity of the programme.²² Whilst Philippine law and national government policies overtly provide a strong mandate for comprehensive SRH education, current SRH programmes are typically of limited scope and reach and use lecture-style, facilitator-directed educational methodologies. Thus, they are unlikely to be effective.

Children are considered social agents, although it is recognised that how this is conceptualised depends on an individual's or societies' moral and political constructions of childhood.²³ However, it is clear that their agency comprises a mix of vulnerability and resilience, reflected in their complex and nuanced reasons for involvement in online sexual exploitation.²⁴ Given these recognised vulnerabilities, the potential power imbalances encountered online, and the potential long-term impact of OCSE, they are entitled to special protection online.²⁵ This must involve directly reaching children with evidence-based

¹⁹ A J Rabe, *Raising the Alarm: A policy brief on increasing the age of statutory rape*, Consuelo Zobel Alger Foundation, August 2020, p. 7.

²⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), *International Technical Guidance on Sexuality Education: An evidence-informed approach*, UNESCO, Paris, 2018, pp. 13-17, retrieved 13 March 2020, <https://unesdoc.unesco.org/ark:/48223/pf0000260770/PDF/260770eng.pdf.multi>.

²¹ *Ibid.*, pp. 17-20; P Montgomery and W Knerr, *Review of the Evidence on Sexuality Education: Report to inform the update of the UNESCO international technical guidance on sexuality education*, UNESCO, Paris, 2018, p. 17, <https://unesdoc.unesco.org/ark:/48223/pf0000264649>.

²² UNESCO; Chandra-Mouli, Lane and Wong.

²³ L Bordonaro, 'Agency Does Not Mean Freedom. Cape Verdean street children and the politics of children's agency', *Children's Geographies*, vol. 10, issue 4, pp. 413-426, <https://doi.org/10.1080/14733285.2012.726068>.

²⁴ *Ibid.*; N Mai, 'Tampering with the Sex of "Angels": Migrant male minors and young adults selling sex in the EU', *Journal of Ethnic and Migration Studies*, vol. 38, issue 8, 2011, pp. 1237-1252, <https://doi.org/10.1080/1369183X.2011.590927>; Greijer and Doek, p. 25.

²⁵ Greijer and Doek, p. 11.

programmes and services which understand and acknowledge the different lenses which children have, including regarding their internet sexuality.²⁶ Failure to do so denies their rights to comprehensive SRH education which imparts the skills they need to avoid or minimise risks and maximise their wellbeing in both the online and offline worlds. Children must have access to a range of economic and educational opportunities and social services in order to be protected and protect themselves from sexual and economic exploitation and anything that might ‘interfere with their education, or be harmful to their health and physical, mental, spiritual, moral, or social development’.²⁷ Given the rising numbers of reported OCSE cases, the time to start implementing these interventions is now.

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²⁶ Plan International, p. 10.

²⁷ United Nations General Assembly, *Convention on the Rights of the Child*, 1989.

ANTI-TRAFFICKING REVIEW

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