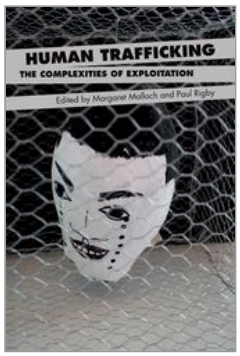

Human Trafficking: The Complexities of Exploitation
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Criminalising Victims of Human Trafficking: State Responses and Punitive Practices

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[–] Abstract and Keywords

International responses to trafficking in humans include a presumption against the prosecution of victims who commit crimes as a direct result of their victimisation. However, there is increasing international evidence that victims of trafficking continue to be detained or imprisoned in state institutions following ‘liberation’ from traffickers. This chapter examines the social, political and economic depiction of ‘deserving’ and ‘undeserving’ victims and the political basis for the criminalisation of certain victims of human trafficking. The broader questions that this raises in terms of appropriate responses to victims of human trafficking, and the limitations of effective survivor care, are considered.

Keywords: Criminalisation, Non-prosecution, Criminal justice responses, Detention

Introduction

Despite the existence of national and international legislation (see earlier chapters), underpinned by practice guidelines and commitments, victims and survivors of human trafficking continue to be subject to prosecution and punishment by nation states that either fail to identify, recognise or acknowledge their status as victims of exploitation. Many individuals appear to be detained as 'illegal migrants' rather than treated as victims (or survivors) of crime. As with all areas of human trafficking, the extent to which this occurs is impossible to determine. However, despite a clear gap in evidence, there is a growing awareness of this problem. Indeed, it has been suggested that there are more victims of human trafficking detained in Scottish prisons than convicted traffickers (House of Lords 2014); while RACE in Europe (2013: 16) highlight significant concerns that while prosecution and conviction rates for trafficking crimes in the United Kingdom remain low, 'there is a deep concern that those trafficked are instead being punished for the crimes that their traffickers force them to commit' (see also All Party Parliamentary Group 2015). This would appear to be reflected elsewhere; despite international legislation and guidance to the contrary, victims of trafficking continue to be detained across the globe in prisons and immigration detention centres (for example, Amnesty International 2008; Human Rights Watch 2010; US Department of State 2010; CUNY School of Law 2014). This chapter considers why measures aimed at protecting victims of human trafficking from criminalisation and detention by host nation states do not appear to be operating effectively. It **(p.176)** highlights the importance of locating these troubling circumstances within a broader context which links experiences of exploitation and trafficking with asylum-seeking, immigration and broader processes of criminalisation.

Background

Legal directives (for example, EU Directive 2011/36) are intended to prevent the 'punishment' of trafficking victims by criminal justice systems in the countries to which they have been trafficked. Although actual numbers are unknown, evidence continues to highlight circumstances where individuals who are almost certainly victims of trafficking have been imprisoned in the United Kingdom and internationally or held in immigration detention centres (Hales and Gelsthorpe 2012; Anti-Trafficking Monitoring Group (ATMG) 2013; All Party Parliamentary Group 2015). This is ostensibly due to the difficulties in identifying victims during initial investigations, but it also highlights the ways in which legislation creates dualisms (for example, 'guilty'/'innocent', 'deserving'/'undeserving') which can contribute to processes and experiences of imprisonment. In 2010, for example, the ATMG identified flaws in victim identification by the National Referral Mechanism (NRM) and stated that victims of trafficking continued to be routinely prosecuted for offences committed under duress (ATMG 2010). The Group of Experts on Action against Trafficking in Human Beings (GRETA) (2012) also noted cases of arrest, prosecution and conviction in relation to migration and non-migration offences experienced by victims of human trafficking in the United Kingdom. Two key factors appear to underpin processes of criminalisation which relate specifically to victims of trafficking: first, irregular migration: the routes by which victims of human trafficking enter a country, and, in many cases, their movement into the country (clandestine or irregular entry) may constitute a criminal offence (such as unauthorised entry and/or use of forged documents). Where status as a victim of trafficking is not identified or acknowledged, individuals may not have access to relevant support services and, indeed, the trauma they have already experienced may be significantly exacerbated by the experience of detention, imposed if they are deemed likely to abscond or while awaiting forcible removal.

Secondly, individuals may be prosecuted for ‘survival’ offences; crimes committed in order to survive should they escape from their exploiters or as a direct result of the exploitation itself (that is, in circumstances where they are forced to break the law by their exploiter). RACE in Europe (2013: 1) estimate that 16 per cent of the potential **(p.177)** victims of trafficking identified by the UK Human Trafficking Centre (UKHTC) in 2012 (362 of 2,255) had been trafficked for the purposes of criminal exploitation, including benefit fraud. Indeed, the international category of labour exploitation includes criminal exploitation such as theft, shoplifting, drugs production, selling counterfeit DVDs, smuggling cigarettes, forced begging and benefit fraud.

Information obtained from all police forces across the United Kingdom under a Freedom of Information request identified that since January 2011, 1,405 individuals had been arrested for offences relating to the cultivation of cannabis; 63 per cent of those arrested were Vietnamese, 13 per cent of whom were children (RACE in Europe 2013: 4). The available figures indicate that child victims of trafficking have been arrested and convicted of cannabis cultivation supporting claims by GRETA (2012), who also highlighted concerns that potential victims of human trafficking had been detained. This reflects the emphasis that the criminal justice system places on identifying and responding to ‘criminality’. Many victims fall foul of the law as their status is criminalised (that is, where they have been initially categorised as irregular migrants); and any further acts that contravene the law will result in the consolidation of this criminal status, despite protocols against smuggling and trafficking that state that intercepted asylum seekers and refugees should not be liable to prosecution.[1] However, the contextualisation of these protocols as criminal justice responses first and foremost inevitably dilutes the intended focus on ‘victims’.

Not only does this process of criminalisation limit the access of victims to support services, it is also likely to have a detrimental impact on the individuals’ physical and mental health and compounds the difficulties they are likely to experience in disclosing their circumstances to authorities. Those individuals who are intercepted may also be subject to removal; of note given that the majority of victims are believed to be trafficked by people they know in their country of origin.

Stephen-Smith (2008), in collaboration with the POPPY Project, found evidence that women who had been trafficked had been detained in custody in England and Wales. The United Nations (UN) rules for the treatment of women prisoners and non-custodial measures for women (2010, rule 66) encourages states to ratify international protocols and ‘provide maximum protection to victims of trafficking in order to avoid secondary victimization of many foreign-national women’ (United Nations 2010). However, the emphasis given to preventing irregular migration has remained a priority. For example, the Prison Reform Trust examined the circumstances **(p.178)** of foreign national women in prison in England and Wales in 2012, noting that the dominant offences among this group related to deception and fraud, generally in relation to immigration status and related paperwork.[2] Other dominant charges were theft and employment in illegal activities, such as cannabis production and selling fake or counterfeit goods. While such charges are not, in themselves, indicative of victimisation as the result of trafficking, they are the type of offences that are often associated with it. It has also been noted (Prison Reform Trust 2012) that legal representatives may not give sufficient attention to identifying exploitation or duress. In addition to the punishments meted out by the courts, this may also impact on future applications for asylum or residency.

Hales and Gelsthorpe (2012) gathered information on the numbers of migrant women processed through the criminal justice and immigration systems in England and Wales and, within this context, considered the extent of compliance with the European Convention on Trafficking and the Convention on Human Rights in cases where victims of trafficking, smuggling and 'work under duress' were detained in custody. Examination of data from the prison service (where accessible) and FPWP/Hibiscus (an organisation working with foreign women in custody) indicated high numbers of foreign nationals charged with offences such as deception and fraud (in relation to immigration status) and related offences of using false documentation to access work or benefits, entry or exit to the United Kingdom through customs (accounting for 41 per cent of the case-load of FPWP/Hibiscus; and 26 per cent of all foreign prisoners). The researchers identified forty-three women[3] in the prison and immigration holding estates as potential victims of trafficking, and fifteen who appeared to have been smuggled into the United Kingdom and/or made to work under duress[4]; two of whom were formally assessed as children while held in adult prisons. The two key offence groups related to use of false identity documentation (accounting for twenty primary charges) and production of cannabis (accounting for fourteen primary charges).[5]

Only eleven women (from forty-three identified as victims of trafficking by researchers) were processed through the NRM. Even where referrals resulted in a positive decision and non-prosecution, victims spent an average of four months in custody. For most of these women, there was no formal recognition of victim status, access to appropriate support or temporary protection from removal other than the option of making an asylum application. Thirty-one women had applied for asylum, and of the fourteen outcomes that researchers were aware of, two (where age assessments had confirmed that the detainees were children) had been given leave to remain for five **(p.179)** years, while twelve applications had been refused, including six which had gone through the appeal process. It appeared that the status of 'illegal migrant' was predominant in the response to women in terms of immigration case management.

Hales and Gelsthorpe (2012) set out some contributory factors as to why researchers were able to identify key indicators of trafficking victim status which had not been identified by professionals within the criminal justice system. They noted: the failure of arresting officers to facilitate or respond appropriately to disclosures of victimisation or to understand the obstacles to free and full disclosure due to ongoing threats to the arrestee; 'inconsistent and limited' access to legal representatives; impact of imprisonment; inability of the woman to understand the process or language difficulties which compounded trauma already experienced; lack of appropriate knowledge or response by potential first responders; reluctance to go through the NRM process; and narrow interpretation of the European Convention.

Hales and Gelsthorpe (2012: 60) state: 'In a number of cases it is inconceivable that the physical and psychological indicators used to identify victims of trafficking, which were so apparent when interviewing women in the context of this research, were not evident at the point of arrest.' They go on to say: 'One can only conclude that these women were processed in the normal manner because the police were focusing on the individual as an offender and did not see it appropriate to act as a "first response authorised agency" and report the case to UKHTC'.[6] This chimes with the views of women interviewed by the UK Border Agency in prison, who also indicated that they felt they were being assessed as 'offenders' (Prison Reform Trust 2012). Similarly, Stephen-Smith (2008: 13) noted: 'Criminal justice issues, for example, women entering the country by deceptive means (irrespective of the fact that such an act was likely to have been under duress),

were seen as overriding factors, thereby neglecting the paramount status of victims' human rights.'

Significantly, too, the police did not appear to attempt to investigate allegations of victimisation made by arrestees. In Hales' and Gelthorpe's study, victim disclosures had resulted in only one full police investigation relating to perpetrators and two attempts to obtain further information. Indeed, one woman who had not been charged with any criminal offences, spent six months in Yarl's Wood and nine weeks in prison on an immigration hold, before being granted bail following input from the Poppy Project which provided further information to the woman's legal representative requesting reassessment of her status as a victim of trafficking (Hales and Gelsthorpe 2012).

(p.180) Both Stephen-Smith (2008) and Hales and Gelsthorpe (2012) found that even in cases where there was evidence to suggest that women were victims of trafficking, and where this information had been made known to the authorities, detention was still authorised. Both studies illustrate that women trafficked into the United Kingdom are routinely held in immigration detention centres and prisons, despite international guidelines that oppose this. Such concerns have been reinforced in Scotland by the Equality and Human Rights Commission Scotland (2013) and across the United Kingdom by the ATMG (2010, 2013), RACE in Europe (2013) and the All Party Parliamentary Group (2015).

Criminal justice responses and the non-prosecution of victims

In addition to international law, which specifies that victims of trafficking should not be prosecuted, individual nation states have introduced their own guidance and are developing legislation on an ongoing basis. For example, the Modern Slavery Act (England and Wales) 2015, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, Human Trafficking and Exploitation (Scotland) Act recently progressed through the Scottish Parliament. Guidance has also been developed by the Association of Chief Police Officers (ACPO 2010a), *ACPO Lead's on Child Protection and Cannabis Cultivation on Children and Young People Recovered in Cannabis Farms*, which formally recognised the involvement of victims of trafficking in commercial cannabis production, noting that systems of production may be controlled by organised criminals with wider connections. An update by ACPO (2010b) noted that violence may be used to ensure the compliance of workers.

While much attention has been given to the identification of victims and the importance of police practices, the role of prosecutors has been acknowledged as a crucial factor in ensuring that the non-prosecution of trafficking victims is upheld. The Crown Prosecution Service (England and Wales) (CPS) (CPS 2011),[7] the Crown Office and Procurator Fiscal Service (COPFS) (Scotland) (COPFS 2010), and Public Prosecution Service (Northern Ireland) (PPS 2013) have all produced guidance to prosecutors aimed at informing them of legislation and outlining practice in relation to human trafficking.[8] While much of this guidance is focused upon the prosecution of traffickers and on outlining the various forms that trafficking violations may take, it also highlights circumstances where victims of **(p.181)** trafficking may face prosecution. The importance of ensuring that further enquiries are undertaken in circumstances where it comes to the attention of the prosecutor that the accused may be a victim of trafficking is noted. Where the accused is considered to be a 'credible' trafficked victim, the importance of considering the 'public interest' and whether or not it is best served by prosecution is highlighted. Factors such as the seriousness of the offence, whether the offence was committed as a direct consequence of being

trafficked, and the extent to which coercion was used are all to be taken into account when considering whether or not the 'public interest' will be served by prosecution. The PPS for Northern Ireland notes that:

> The PPS cannot offer blanket immunity from prosecution for trafficked victims who may commit criminal offences … The Convention does not provide for immunity from prosecution for trafficked victims but it does require that careful consideration must be given as to whether the *public interest* requires prosecution in such cases.
>
> (PPS 2013: 20; emphasis added)

In Scotland, despite similar guidance aimed at ensuring such 'careful consideration' in the cases of trafficking victims, legal respondents have continued to express concerns that potential victims of human trafficking are prosecuted for crimes they had been compelled to commit; that the guidance was not always applied in practice, and that key practitioners (social work practitioners outwith Glasgow, duty solicitors, the procurator fiscal service and even judges) had limited awareness of the guidance (see Malloch, Warden and Hamilton-Smith 2011). This can mean that victims of trafficking are not identified in court, a situation also noted in England and Wales. As the CPS guidance states:

> a prosecutor can only take these steps if they have information from the police or other sources that a suspect might be a victim of trafficking and is only relevant where the criminality is as a direct consequence of the trafficking situation. There must also be the consideration of the extent to which the victim was compelled to undertake the unlawful activity.
>
> (CPS 2011: 30)

Evidence that an offence was committed while the individual was in a coerced situation should imply the importance of stopping the prosecution–in the 'public interest'. The 'public interest', an ambiguous concept, seems to be something of a 'get out' clause for prosecutors, notwithstanding that in Western jurisdictions all prosecutions **(p.182)** should be considered in relation to the public interest with criminal sanction as a last resort.

There is currently no system in place to review the process of avoiding the punishment of victims for involvement in criminal activities that they have been compelled to commit as a direct consequence of being subject to trafficking. The CPS is, however, working with criminal justice partners and UKHTC to identify a 'practical mechanism' to monitor the effectiveness of existing arrangements (OSCE 2012: app. 1). However, recent cuts to the CPS budget may well have an impact on the resources available to identify and address the needs of individuals who have been trafficked.

The Modern Slavery Act (2015) introduced a defence for victims where the victim has been compelled to commit a crime 'as a direct result of their slavery or trafficking experience', although safeguards include non-application to certain serious offences (for example, sexual or violent offences); the individual seeking to use the defence must be a victim of the trafficking or slavery offences; and must have been 'compelled to commit the offence as a direct result of their trafficking/slavery situation, and a reasonable person in the same situation would have no

realistic alternative but to commit the offence' (Secretary of State for the Home Department 2014: 17).

Similar emphasis is given in Scotland where the Lord Advocate will, under the recent Human Trafficking and Exploitation (Scotland) Act, have a duty to publish instructions about the prosecution of '"credible" trafficking victims who have committed offences' (Justice Committee 2015: 18). Although this would not compromise the independence of the Lord Advocate, they would specify the circumstances where there should be a 'strong presumption' against prosecution of a victim of trafficking. However, concerns have been expressed about the extent to which the responsibility is placed on the victim to demonstrate that they are a credible victim of human trafficking.

Theorising processes of criminalisation

Despite serious concerns expressed across governments and criminal justice agencies about the potential criminalisation and ongoing punishment of individuals who are victims of human trafficking, it is necessary to consider why, given the existence of legislation and guidance, victims of trafficking continue to be held in prisons and detention centres as a direct result of offences related to their trafficking status. As the Commissioner for Human Rights (2010: 38) has noted: 'the recognition of these commitments **(p.183)** does not appear to influence, in practice, the approach towards criminalisation'.

In 2013, the Convener of the European and External Relations Committee of the Scottish Parliament wrote to the Cabinet Secretary for Justice on behalf of a group of organisations involved in supporting victims of human trafficking, expressing concerns about compliance with EU Directive 2011/36/EU. Responding to specific concerns noted in the letter which related to the criminalisation and detention of potential victims of human trafficking, the Lord Advocate (the Right Honourable Frank Mulholland QC) outlined the existing COPFS guidance to prosecutors. He highlighted the role of this guidance in ensuring that appropriate consideration was given to potential victims of human trafficking and stressed the commitment of COPFS to do this. He also outlined the challenges, noting:

> It is important to remember that identifying *genuine* victims of trafficking is a complex task which must be carried out with diligence and care to ensure that those making *false* claims to have been the victim of human trafficking in an attempt to avoid prosecution are also identified (mail correspondence, 21 January 2013; emphases added).

This response illustrates a dichotomy that sits at the heart of legislative practice and features throughout criminology and 'victimology': how can the 'genuine' and 'deserving' victim be distinguished from the 'fraudulent' or 'undeserving'?–a conundrum that continues to result in the imprisonment and detention of victims of trafficking, where the 'condition of victim' is granted by others (Ruggiero 2010: 187). Treated as 'judicial goods', these individuals are 'requested to entrust their inviolability to external agencies which are normally structured to reproduce principles of dependency and delegation …' (*ibid*.: 187).

Concerns surrounding 'genuine' victims of trafficking can be located within a broader context wherein the 'genuine' and 'false' must be distinguished and responses directed as appropriate. This has particular significance for the depiction of the 'trafficking victim'; a concept that O'Connell Davidson (2010: 244) argues has, particularly in relation to the 'trafficked sex slave' 'been worked to most effect in the service of extremely conservative moral agendas on prostitution, gender and sexuality and in support of more restrictive immigration policies and tighter border controls'. This stereotypical victim and the complex reality of actual individual experience can cause significant challenges at the level of identification and recovery. For example, the Equality and Human Rights Commission Scotland (2013: 43) noted that: 'Views clearly differ between the police and **(p.184)** prosecuting authorities, and agencies supporting victims on whether those coerced into illegal activities are being criminalised.'

This distinction between 'genuine' and thus by implication 'not genuine' victims has long characterised state responses to asylum seekers and migrants internationally. As Hudson (2012: 19) notes: 'The border, the detention centre, the interrogation room, the shanty town street, the contested territory, are sites of inequality, where one party can give or withhold justice and security and the other can have no certainty of receiving either.' For non-citizens, procedural protections in criminal law are not evident in immigration procedures where the boundaries

between civil and criminal law are porous, while distinctions between ‘insiders’ and ‘outsiders’ are emphasised (Stumpf 2010). Referring to an earlier work (2006), Stumpf (2010: 59) outlines three intersections between immigration and criminal law:

> (1) The substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.

Here, even the use of language evidences the extent of the challenge facing criminal justice agencies. For example, the Council of Europe Parliamentary Assembly highlighted the importance of language, urging nation states to refer to ‘undocumented migrants’ or ‘migrants without papers’, yet all EU institutions and Member State governments continue to refer to ‘illegal immigrants’ and ‘illegal immigration’ in policy and practice, thereby emphasising migration as a criminal justice issue. This allows for the ‘deployment of coercive enforcement techniques’ (Commissioner for Human Rights 2010: 35; see also Lee 2004) and contributes to what Wacquant (1999) has referred to as the ‘hypercriminalisation’ of immigrants. Additionally, border controls, which were previously governed by nation states, are increasingly overseen by transnational organisations.

Criminalisation of immigration and asylum

Despite the liberal tenet of the law, policies and practices aimed at securing international borders have resulted in a response where people seeking asylum and/or fleeing international strife have met with a punitive response. The depiction of asylum seekers, for example, in the media and often reinforced by policy, often appears to differentiate refugees and asylum seekers into overly simplistic categories **(p.185)** of 'deserving' or 'undeserving' of the status and benefits that accrue to those judged as 'genuinely' seeking sanctuary. Thus, there is a separation of citizens and non-citizens through the use of criminal law and administrative language, which results in non-citizens being increasingly subject to measures such as detention without charge, trial or conviction for status offences, and the criminalisation of those who engage with non-citizens (such as transport companies and employers) (Commissioner for Human Rights 2010). Anderson and Andrijasevic (2008) argue that state responses to migration 'effectively construct groups of non-citizens who can be treated as unequal with impunity' (see also Brown 2014). Bosworth and Guild (2008: 714) argue that this has an important effect: the 'criminalisation of migration reshapes the referents for security–British citizens'. This process of social construction also applies to the representation of victims of trafficking. Haynes (2007: 346), for example, challenges the law and order emphasis as perpetuating myths that:

> most trafficking victims are rescued by law enforcement officials; that they are rescued from actively and visibly abusive environments; that only those who are rescued are really victims and those who escape or are arrested or detained are not; that if a person is not visibly a victim, she is probably a criminal; and that someone who has broken the law cannot also be a victim of trafficking.

Calls to identify and recover victims of human trafficking are based on an acknowledgement of their exploitation and victimisation. Similarly, however, despite the recognition that asylum seekers are 'victimised' by circumstances of persecution, torture and, potentially, death, the dominant rhetoric across the United Kingdom has been influenced by the 'risk' and 'danger' that large numbers of undocumented migrants may pose to the stability of UK society (Sales 2002; Malloch and Stanley 2005) and across Europe and the United States (Welch and Schuster 2005). Following an original policy of dispersal, the Home Office White Paper, *Fairer, Faster and Firmer* (1998), signalled an emphasis on increasing the use of detention, and resources swiftly moved to the development of induction centres, accommodation centres and removal (formerly detention) centres, staffed and managed by private companies such as UK Detention Centres, Premier Prison Service and Group 4 (now G4S). Although not intended to hold asylum seekers, but those detained before removal, their use was frequently extended to hold individuals with ongoing claims. Conditions within immigration detention centres have consistently been criticised; despite limited access to counselling and support services, interpreters and legal advisers, **(p.186)** individuals were increasingly required to 'prove' their victimisation (Malloch and Stanley 2005; Commissioner for Human Rights 2010; HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration 2012; HM Chief Inspector of Prisons 2013; All Party Parliamentary Group 2015). This inextricably linked asylum claiming in the United Kingdom to a system aimed at discouraging 'bogus' claims of asylum and also reflected Bauman's (1998: 69) depiction of the 'global hierarchy of mobility' where freedom of movement is an entitlement of the dominant, while the dominated are subject to the 'strictest possible constraints'. This is borne out by the United Nations Development Programme (UNDP 2009), which indicated that people in the poorest countries remain the least mobile.

Across Europe and the United States, increasing proportions of prison populations consist of prisoners detained for migration offences. In the United States, a number of what were previously ‘civil offences’ have become felonies, and in Europe a number of new types of offence have been created relating specifically to migration. In the United Kingdom, between 1997 and 2007, the then Labour Government introduced nine pieces of legislation concerning immigration, asylum and terrorism (Bosworth and Guild 2008). These changes, on an international scale, are indicative of new strategies of criminal justice control over migration. Legislative changes have been characterised by the increased depiction of migrants, asylum seekers and refugees as ‘suspect communities’ where the distinction between citizen and non-citizen is emphasised (see Commissioner for Human Rights 2010). Those outside the protections afforded citizens become targets for surveillance and intervention. The expansion of punishment via the criminal justice system is accompanied by the expansion of detention restrictions into the community and the creation of ‘quasi-penal spaces’. This process operates against the enactment of international conventions, legislation and constitutions, and particularly mitigates protections for victims that depend on the use of discretionary power or discernment. The emphasis is increasingly on the criminalisation of status rather than conduct.

At the same time, these developing processes of criminalisation create a lucrative business for prison and detention industries and other businesses geared towards regulation and control (Amnesty International 2009). Similarly, the increase in forced removals continues to be a profitable business for private companies. Ruggiero (1997, 2000) notes the overlap between legitimate and illegitimate networks in the business of cross-border movement, which involve, for example, transport entrepreneurs, airline employees and public officials (see also OSCE 2014).

(p.187) Guidelines developed by the UN High Commissioner for Human Rights (2002) consider the detention of human trafficking victims to be ‘inappropriate and, implicitly, illegal’, with states encouraged to ensure that custody or detention is not used for individuals believed to have been trafficked. Yet the existing ambiguities between the ‘public interest’ and legal protection remain highly problematic within this wider context where these antagonistic processes operate, reflected within the law itself in terms of ‘justice’ and ‘regulation’. The existence of rights in law, yet their discretionary application in practice reinforces the observation by Arendt (1968) that the loss of national rights equals the loss of human rights. Those ‘stateless persons’ are no longer viewed as citizens of any sovereign state and therefore are ‘out of legality altogether’ with, she argues, greater attention paid to the ‘status of the persecuted’ than to the deeds of the persecutors.

For Grewcock (2007: 186), ‘criminalisation by the state is integral to legitimising criminal activity by the state’. Grewcock discusses the pre-emptive process of ‘externalisation’ where nation states attempt to prevent the entry of ‘illicit workers’ into areas where there might be considerable demand for their services or against forced migrants and refugees ‘into areas where they might gain access to the human rights machinery that was developed explicitly to protect them’ (2007: 180).

Similarly, Maggie Lee (2014) draws attention to the ways in which related ideologies influence the ‘gendered discipline and protective custody’ of trafficking victims in Asia. In particular, she notes: ‘What seems missing in the existing scholarship on immigration detention is the way in which detention has expanded and mutated for a particular category of unauthorized migrants, that is, trafficking victims within a diverse range of semi-carceral institutions’ (2014: 207). She

argues that the basis of ‘protective custody’, particularly for women and girls, is indicative of ‘a hitherto under-researched gendered disciplinary regime and carceral processes for unauthorized migrants’ (2014: 207), and is significantly problematic for victims of trafficking who have been ‘rescued’ and subsequently detained in residential facilities. According to Gallagher and Pearson (2010), there is limited or cursory international legislation governing the use of such facilities and ‘residents’ have minimal legal protection despite the fact that their detention may be involuntary and indefinite; often justified by claims of rehabilitation or ongoing trafficking prosecutions. Furthermore, as Lee (2014) notes, gendered responses under the guise of prevention and protection from trafficking, have resulted in increased moves towards the regulation and control of women and increased scrutiny of their cross-border movements.

Many European countries prioritise the monitoring and regulation **(p.188)** of ‘illegal immigration’ over the identification and recovery of victims of human trafficking; similarly, victims are often seen as instrumental to the prosecution of traffickers rather than prioritised in terms of their human rights. In the United States, without law enforcement certification, victims of human trafficking are likely to be viewed as criminals and be deported (Haynes 2007: 350). Significant discretion is given to officials who may be reluctant to see victims who have not been ‘rescued’ as ‘certifiable’ (Segrave *et al*. 2009; Hoyle *et al*. 2011). It may also be difficult for victims experiencing significant trauma to cooperate with law enforcement agencies. Segrave *et al*. (2009) discuss provisions for women victims of trafficking for commercial sexual exploitation focusing on Australia, Thailand and Serbia. While detailing responses and provisions across the three countries they also note the distinction between short-term assistance for ‘victims’ and longer-term assistance for ‘witnesses’ linked to victim cooperation with prosecutions.

Conclusion

International obligations are clear that there should be provision for non-prosecution of individuals who commit offences as a direct result of their exploitation. The current detention of an unknown number of potential victims of trafficking in prisons across the United Kingdom and internationally requires consideration, and highlights the importance of implementing appropriate and effective identification processes throughout the criminal justice system (see, for example, Hales and Gelsthorpe 2012). Issues of through-care and support on release are also important.

The ongoing distinction that is drawn between ‘deserving’ and ‘undeserving’ victims of crime is exemplified by the treatment and response to irregular migrants. Caught up in this response are, inevitably, those seeking asylum and the victims of human trafficking and exploitation. While protection may be afforded in international law and state guidelines and directives, inevitably, the attention to combating irregular (‘illegal’) migration results in all foreign nationals being viewed through a lens of criminality. Across the United Kingdom and Europe, migrant detainees make up an increasing proportion of detained populations; and this is evident globally. While, on the one hand, attention is given to trafficking of humans as a scourge on society, the lens through which individuals are viewed is inextricably linked to migration and criminalisation. Depictions of the ‘exceptional circumstances’ of trafficking are relevant, however these images are often juxtaposed against ‘ordinary’ economic **(p.189)** migrants despite the fact that identified circumstances of victimisation are often related more to high debts and abusive working conditions than kidnapping and imprisonment (Chapkis 2003). This renders legislation in place to protect victims of trafficking as limited; the greater authority is directed towards responding to perceived ‘criminality’ and ‘illegality’. Underpinning this lies the ‘discourse of depoliticization’, the presentation of trafficking as a phenomenon that is distinct

from the exploitation and injustices that characterise the experiences of many migrants (O'Connell Davidson 2010: 245), and that constructs political judgements about what becomes 'appropriate' versus 'inappropriate' exploitation.

Nevertheless, the existence of measures that set out intentions towards non-criminalisation, and the existence of many government reports and inquiries at national and international levels appear to suggest a partial acknowledgement that there is a problem in securing and enforcing the rights of victims of trafficking and preventing criminalisation, punishment and detention. However, the continued problems with this approach is that it maintains the focus on limited practical recommendations, such as enforcement of existing legislation, training opportunities for those who administer the system, improved data collection and, on occasion, recommendations for wider resources. There is rarely suggested change outside this framework and, as Cohen (2001: 114) notes, this translates violations of human rights 'into the legalistic, diplomatic, UN-speak … language of "human rights violations" pass[ing] ownership of the problem into the professional and bureaucratic cartel'. The framing of the process of criminalisation is reinforced where crime is framed as a 'migration-related' issue, making it easier to imply the existence of 'genuine' and, subsequently, 'false' victims where the 'public interest' in the current climate is characterised by a concern that the 'guilty' will go unpunished, which appears to supersede concerns to ensure the protection and enforcement of rights.

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Notes:

(1.) And there have been a number of cases where the rescue of refugees and asylum seekers has itself been criminalised (see, for example, at: http://www.statewatch.or/news/2007/sep/07italy-tunisia-fishermen.htm, on the trial of seven Tunisian fishermen prosecuted in Sicily following the rescue of forty-four migrants in international waters south of the Pelagian islands), as well as increasing sanctions (criminal sanctions and sanctions that carry criminal law consequences) for businesses that employ foreign nationals who do not have right of residence. While presented as 'anti-trafficking' measures they clearly have significant consequences.

(2.) With an average sentence of eight months for false documents and twelve months in the case of conviction for deception.

(3.) From 103 migrant women who had been detained or arrested on charges that were potentially linked with entry to, or exit from, the United Kingdom or work under the control of others.

(4.) Using the indicators outlined in the European Convention and listed in the Trafficking Toolkit.

(5.) Seven women were charged with entry into fake marriages (two of whom were trafficked and paid to enter into these marriages to obtain British nationality after escaping from their traffickers; two were undocumented migrants; three were EU nationals, recruited and paid to provide fake marriages for non-EU nationals for financial gain).

(6.) UKBA is the competent authority with responsibility for establishing 'conclusive grounds' decisions on all non-EU women held in the prison or immigration estate, rather than UKHTC. The UKBA Criminal Casework Directorate (UKBA CCD) and prisons work together, with UKBA CCD holding surgeries in women's prisons and all prisons being obliged to pass information on prisoners with unconfirmed UK nationality (Prison Reform Trust 2012).

(7.) First published in 2007.

(8.) In the case of *R* v. *O* [2008] EWCA Crim 2835, a young woman received an eight-month custodial sentence after pleading guilty to possessing a false identity card with the intention of using it as her own. The case was overturned on appeal on the grounds that the young woman, legally a minor, was the victim of trafficking for the purpose of sexual exploitation. Although this had been indicated at the original court appearance, the disclosure had not resulted in further inquiries, nor had steps been take to confirm her age, resulting in her treatment as an adult. In the appeal judgment, Lord Justice Laws stated:

> We hope that such a shameful set of circumstances never occurs again. Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking,

> especially a young client. Where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made, indeed statute so required. All this is obvious … We hope that this case serves as a lesson to drive these messages home.
>
> (*R* v. *O* [2008] EWCA Crim 2835, para. 26)