

2018

Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps

Yehuda Goor

Recommended Citation

Yehuda Goor, *Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps*, 36 BERKELEY J. INT'L LAW. (2018).

Link to publisher version (DOI)

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps

Yehuda Goor*

ABSTRACT

Over the past decade, tens of thousands of refugees and asylum seekers have entered Israel through the Sinai Peninsula. While en route to Israel, thousands of them were kidnapped and traded as commodities within organized-crime networks. These networks shared one main purpose: holding victims hostage in “camps” and torturing them until a friend or family member paid a ransom for their release. This practice of kidnapping refugees and asylum seekers (“Ransom Kidnapping”) has also taken hold in other parts of the world and is becoming increasingly common. Looking at the experiences of Eritrean and Sudanese asylum seekers in Sinai torture camps as a case study, this Article explores the nexus between Ransom Kidnapping and the legal framework surrounding human trafficking. Despite deep similarities, most legal systems and international actors do not consider Ransom Kidnapping to be a form of human trafficking. Instead, they consider Ransom Kidnapping a species of human smuggling. This classification adversely affects the rights and entitlements of survivors. For instance, in Israel, only a small fraction of those who survived the Sinai torture camps have been recognized as victims of human trafficking. Those recognized as victims of human trafficking were granted a visa and exemption from detention, free legal aid, and a room at a designated shelter. Meanwhile, those not recognized as victims of human trafficking experienced detention and were denied suitable treatment. Almost 20 years after the signing of the United Nations’ Trafficking Protocol and the U.S. Trafficking Victims Protection Act of 2000 (TVPA), and in

DOI: <https://dx.doi.org/10.15779/Z383R0PT20>

* Dechert LLP New York, Associate; Harvard Law School, LL.M. ‘16; Tel Aviv University, LL.B. ‘14. The views expressed in this Article are mine and not those of the firm. Earlier versions of this Article were submitted to Professor Janet E. Halley as part of the Critical Theory in Legal Scholarship Seminar at Harvard Law School. I am very grateful to Professor Halley for her invaluable guidance and constructive comments on this Article. Many thanks to Elena Chachko, Matan Goldblatt, Aeyal Gross, Alon Harel, Ayelet Hochman, Steven Levy, Siobhan Namazi, Maayan Niezna, Gregory Reith, Hila Shamir, Humzah Soofi, and Gillian Teo for helpful comments and conversations. I also thank the editors of the Berkeley Journal of International Law for their excellent work. Mistakes are all mine.

light of the rise of Ransom Kidnapping and other forms of exploitation, the legal framework surrounding human trafficking must be revisited. This Article suggests a critical outlook on these mechanisms and examines how they respond to current realities on the ground.

INTRODUCTION 112

I. RANSOM KIDNAPPING AND TORTURE IN THE SINAI 118

 A. *Reasons for Departure and Transportation Routes: Between Voluntary and Forced Migration* 120

 B. *Treatment After Entering Israel* 127

II. HUMAN TRAFFICKING - DEFINITIONS AND LIMITATIONS 134

 A. *The United Nations' Trafficking Protocol's Definition* 135

 B. *The U.S. Trafficking Victims Protection Act's Definition* 138

III. THE SMUGGLING/TRAFFICKING DISTINCTION 142

 A. *Defining Smuggling in the Shadow of Trafficking: Is Classification Important?* 143

 B. *New Cracks in the Smuggling/Trafficking Distinction* 146

IV. LAW IN ACTION: TRAFFICKING CLASSIFICATION IN ISRAELI DETENTION REVIEW TRIBUNALS AND APPEALS TRIBUNALS 150

 A. *Detention Review Tribunals, Appeals Tribunals, and the Border Control Officer: Background and Scope of Mandate* 151

 B. *Law in Action: Trafficking Classification Issues at the Tribunals* 155

V. RETHINKING TRAFFICKING THROUGH THE SINAI CASE STUDY AND EVALUATING A POTENTIAL REFORM: RANSOM TRAFFICKING? ... 159

CONCLUSION 164

INTRODUCTION

Over the past decade, tens of thousands of refugees and asylum seekers have entered Israel through the Sinai Peninsula.¹ In 2010, human rights organizations began reporting that an increasing number of them carried clear signs of torture, often also showing signs of severe sexual abuse.² It did not take long before these

1. See POPULATION, IMMIGRATION AND BORDERS AUTH., FOREIGNERS IN ISRAEL – 2017 2ND QUARTER 4 tbl. A.2 (2017), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreign_workers_stats_q2_2017_1.pdf [hereinafter FOREIGNERS IN ISRAEL – 2017 2ND QUARTER] (translation on file with the author).

2. PHYSICIANS FOR HUMAN RIGHTS—ISRAEL, HOSTAGES, TORTURE, AND RAPE IN THE SINAI DESERT: A PHR-ISRAEL UPDATE ABOUT RECENTLY ARRIVING ASYLUM SEEKERS (2010); MIRJAM VAN REISEN ET AL., HUMAN TRAFFICKING IN THE SINAI: REFUGEES BETWEEN LIFE AND DEATH 17–19 (2012),

organizations made a startling discovery: thousands of refugees and asylum seekers, most of whom were Eritreans trying to flee grave human rights violations in their country, were being kidnapped and traded as commodities among organized-crime networks.³ These networks operated in Sudan and the Sinai area of Egypt, using the exact same routes that Eritreans used to escape into Israel.⁴ The networks, which consisted mainly of individuals from the Bedouin Rashaida tribe, shared one main purpose: holding victims hostage in “camps,”⁵ often raping and torturing them, until a friend or family member, who is often already in Israel, pays the ransom. Consistently, the victims’ suffering was used as leverage to obtain the ransom.⁶ This Article aims to expose and understand the nexus between this increasingly common practice (“Ransom Kidnapping”) and the human-trafficking framework, a nascent issue which is currently full of contradictions and uncertainty.⁷

Despite the similarities in both the practice and the degree of destructive impact on victims, government authorities and international actors generally do

<http://hotproject.com/userfiles/PDF's%20news/2012ReportHumanTraffickingintheSinaiFinalWeb.pdf> [hereinafter REFUGEES BETWEEN LIFE AND DEATH]. While sexual abuse has often been reported by both men and women, the effects on the victims carried a clear gendered character as many of the women have required abortions due to forced pregnancies. See PHYSICIANS FOR HUMAN RIGHTS—ISRAEL, HOSTAGES, TORTURE, AND RAPE IN THE DESERT: FINDINGS FROM 284 ASYLUM SEEKERS ABOUT ATROCITIES IN THE SINAI 3 (2011), <http://www.phr.org.il/uploaded/Phr-israel-Sinai-Report-English-23.2.2011.pdf>.

3. See, e.g., REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 16–17, 30–34.

4. In this Article, I address these groups as “kidnappers” to avoid presupposing that this practice should be labeled as “trafficking” or “smuggling” under international law. According to a significant portion of human trafficking scholarship, they should be labeled “smugglers.” For a detailed discussion, see *infra* Part III.

5. In this Article, due to the unique characteristics of the described practice and the actors involved, I will use the terms “victim” and “survivor” interchangeably, while acknowledging the reductive potential of such terms and the risk to “easily reinforce the unrepresentative stereotypes and simplified distinctions between aggressors and victims.” See David Nelken, *Transnational Legal Processes and the (Re)construction of the ‘Social’: The Case of Human Trafficking*, in EXPLORING THE ‘SOCIO’ OF SOCIO-LEGAL STUDIES 137, 147 (Dermot Feenan ed., 2013).

6. See REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 48–49. However, it should be noted that there are also many “genuine” smuggling networks operating in the region, that is, networks operated by the Rashaida and others that do not abuse those they smuggle. Refugees consent to be transferred by these organizations. See Rachel Humphris, *Refugees and the Rashaida: Human Smuggling and Trafficking from Eritrea to Sudan and Egypt* 9 (U.N. Refugee Agency, Research Paper No. 254, 2013), <http://www.unhcr.org/51407fc69.pdf>. For a discussion on the significance of “good” smuggling networks, see *infra* Part V.

7. See, e.g., Mogos O Brhane, *Trafficking in Persons for Ransom and the Need to Expand the Interpretation of Article 3 of the UN Trafficking Protocol*, 4 ANTI-TRAFFICKING REV. 120 (2015) (arguing that kidnapping for ransom is in fact human trafficking). This piece further argues for the expansion of the “exploitation” element of human trafficking to include situations of Ransom Kidnapping. For the different elements of the definition, see *infra* Part II.A. See also Mirjam Van Reisen & Conny Rijken, *Sinai Trafficking: Origin and Definition of a New Form of Human Trafficking*, 3 SOC. INCLUSION 113 (2015) (suggesting different interpretive paths to define kidnapping for ransom in the Sinai as trafficking by qualifying these practices as slavery, forced labor or services, and debt bondage); cf. Laurie Lijnders & Sara Robinson, *From the Horn of Africa to the Middle East: Human Trafficking of Eritrean Asylum Seekers Across Borders*, 2 ANTI-TRAFFICKING REV. 137, 141–45 (2013).

not recognize Ransom Kidnapping as human trafficking.⁸ Rather, these authorities⁹ and international actors consider Ransom Kidnapping a species of human smuggling.¹⁰ This classification adversely affects the victims' rights and entitlements.

For instance, in Israel, only a small number of survivors from the Sinai torture camps were recognized as human trafficking victims.¹¹ These victims were granted a visa and exemption from detention, as well as offered free legal aid, room at a designated shelter, and appropriate treatment. Meanwhile, those not fortunate enough to be recognized as human trafficking victims experienced detention and were denied suitable treatment.¹²

Victims of both Ransom Kidnapping and "traditional" trafficking are undisputedly exploited. Additionally, both sets of victims experience heavy emotional and physical hardship. Nevertheless, states tend to recognize victims as "trafficked" persons only when they have been exploited for their labor. Specifically, states generally recognize sex workers or forced laborers in local markets as being trafficked.¹³ But the exploitation and hardship that derives from

8. See, e.g., Angela Walker, Oral Statement to the 35th Session of the UN Human Rights Council from Lawyers' Rights Watch Canada (June 9, 2017), <http://www.lrwc.org/ws/wp-content/uploads/2017/06/Item-3-ID-Trafficking-Statement-35th-9-June-2017.FINAL-AMENDED2.pdf> (calling on the United Nations to classify kidnapping for ransom as human trafficking, noting that "[t]he US and Canada do not appear to recognize kidnapping for ransom as trafficking," and giving concrete examples). This is also the official position of the United States with respect to the interpretation of the TVPA. See *infra* note 164.

9. The state authorities involved are mostly agencies in charge of executing the government's policy in connection with human trafficking. In the United States, for example, these authorities include federal agencies such as the U.S. Immigration and Customs Enforcement (ICE) and the Human Smuggling and Trafficking Center that operates within it (both operate under the Department of Homeland Security). In addition, the Department of State designs global trafficking-related policy in its annual Trafficking in Persons (TIP) reports. For further discussion, see *infra* text accompanying note 151.

10. As discussed in further detail below, the most salient distinction between the legal perception of human trafficking and that of human smuggling is free will. While human trafficking is generally defined by coercion and exploitation, human smuggling is perceived as the voluntary illegal transportation of migrants across borders with the paid assistance of others. Therefore, while trafficking victims are entitled to rights and protections, "smuggled" individuals are often criminalized and are not entitled to rights and protections. See Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 478 (2003) ("In contrast with the Trafficking Protocol, the [Smuggling Protocol] refers to smuggled people not as 'victims' but rather as 'objects' of smuggling, or 'migrants.'"). For a detailed account of the definitions of human trafficking and human smuggling, see *infra* Parts II and III.A. respectively. On the meaning of being defined and "trafficked" versus "smuggled," see *infra* Part III.A.

11. See *infra* note 116.

12. See HOTLINE FOR REFUGEES AND MIGRANTS, ANNUAL REPORT 2013, at 25–27 (2014), http://hotline.org.il/wp-content/uploads/english_interactive.pdf [hereinafter HOTLINE REPORT]; Hila Shamir, *Antitrafficking in Israel: Nationalism, Borders, and Markets*, in GOVERNANCE FEMINISM: AN INTRODUCTION 21–24 (Janet Halley et al. eds., 2018) [hereinafter Shamir, *Nationalism, Borders, and Markets*].

13. For a similar argument in a different context, see Dina F. Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Procedural and Legal Failures Fulfill the Promise of the Trafficking*

being urinated on or gang raped, or having your nails ripped off and your flesh burned for profit, are often deemed insufficient for individuals to be considered “trafficked.”¹⁴ Instead, these individuals are considered to have been smuggled. However, given that the legal definition of human smuggling assumes that “smuggled” persons act on their free will and are not coerced by “smugglers,” the label of “smuggled” rather than “trafficked” implies that their experiences were somehow voluntary.¹⁵ This, in turn, dictates the legal remedy granted or deprived.¹⁶

Using the Sinai torture camps as a case study, this Article critiques the ill-fitted legal regimes that surround Ransom Kidnapping and the limited protections provided to victims. More specifically, it reveals a legal reaction that is completely opposite to the declared (even if arguably not genuine) purpose of the anti-trafficking regime—a legal reaction that does not support victims, but instead detains and treats them like criminals, thereby contributing to the deterioration of the victims’ mental and physical condition.

Ransom Kidnapping, or incidents very much like it, are increasingly being reported not only in the Sinai, but also in other parts of the world such as Thailand, Mexico, Burma, and Malaysia.¹⁷ As migration patterns change drastically and new systematic forms of exploitation and abuse emerge, it is imperative to understand and remedy the flaws in the existing legal regimes.

The Article focuses on two arenas: the local and the global. The local focus is on the Sinai survivors, who arrived in Israel as part of a greater wave of refugees

Victims Protection Act, 21 GEO. IMMIGR. L.J. 337, 372 (2007) (“If Ahn’s T-visa should not unambiguously have been granted, then this is the clearest example that the law has become distorted and that a victim of human trafficking can only be recognized as a victim when she is found chained to a bed in a brothel.”)

14. See, e.g., AMNESTY INT’L, EGYPT/SUDAN: REFUGEES AND ASYLUM SEEKERS FACE BRUTAL TREATMENT, KIDNAPPING FOR RANSOM AND HUMAN TRAFFICKING 12 (2013), <https://www.amnestyusa.org/wp-content/uploads/2017/04/afr040012013en.pdf> [hereinafter EGYPT/SUDAN REFUGEES FACE BRUTAL TREATMENT, KIDNAPPING FOR RANSOM AND HUMAN TRAFFICKING]; REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 47–49.

15. Abramson, *supra* note 10, at 5.

16. On the meaning of being defined and “trafficked” versus “smuggled,” see *infra* Part III.A.

17. See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 24, 198 (2009) [hereinafter 2009 TIP REPORT], <http://www.state.gov/documents/organization/123357.pdf>; Brhane, *supra* note 7, at 121–22; Jonathan Head, *Sold for Ransom: On the Trail of Thailand’s Human Traffickers*, BBC NEWS (May 22, 2015), <http://www.bbc.com/news/world-asia-32835811>; *Migrant Kidnappings by Criminal Organizations ‘Systematic’ in Mexico*, INSIGHT CRIME (May 11, 2012), <http://www.insightcrime.org/news-analysis/migrant-kidnappings-by-criminal-organizations-systematic-in-mexico>; Praveen Menon & Andrew Marshal, *Malaysian Police Reveal Grim Secrets of Jungle Trafficking Camps*, REUTERS (May 27, 2015), <http://www.reuters.com/article/2015/05/27/us-asia-migrants-idUSKBN0OB09E20150527>; Sarah Stillman, *Where are the Children?*, NEW YORKER (Apr. 27, 2015), <http://www.newyorker.com/magazine/2015/04/27/where-are-the-children>; Ryn Jirenuwat & Russell Goldman, *Dozens Found Guilty in Thailand in Human-Trafficking Case*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/world/asia/thailand-human-trafficking-case.html> (“[m]any victims were found buried in a mass grave near a secret jungle camp in which they had been imprisoned, tortured and held for ransom. . . they were imprisoned and made to call their families and beg for ransoms of around \$3,000. Some said they had been raped”).

from Eritrea and Sudan. Indeed, the influx of Eritrean and Sudanese refugees and asylum seekers into Israel practically stopped in 2012 when Israel built a wall along its Southern border. But before that point, about 60,000 asylum seekers entered the country. As of June 2017, according to official records, 35,363 Eritrean and Sudanese nationals lived in Israel.¹⁸ About 4,000 of them are survivors of the Sinai torture camps.¹⁹ Currently, Eritrean and Sudanese nationals, including the Sinai survivors, cannot be deported back to their countries of origin and are not expected to be deported in the foreseeable future.²⁰ This reality emphasizes the urgency of questions involving the legal rights of these communities as it forces victims into a legal limbo. The Article will address these questions by examining the treatment received by the victims of Sinai Ransom Kidnapping under the controlling legal regimes, as well as the alternatives to those regimes. Specifically, the Article will challenge the exclusion of such individuals from the human trafficking framework by confronting theory with practice and rethinking the former's defensibility.

The other focus will be the on the international arena, where a worldwide refugee crisis is unfolding. Europe and other regions have been grappling with a flood of refugees,²¹ and refugee law has been criticized for its inability to provide adequate solutions.²² At a time when refugee law mechanisms are heavily burdened and human trafficking is thriving, these related regimes require scrutiny and repeated assessment.²³ In this context, the Article encapsulates the confusion

18. See FOREIGNERS IN ISRAEL – 2017 2ND QUARTER, *supra* note 1.

19. See *infra* notes 43 & 116. Per a recent report issued by the State Department, the torture practice in the Sinai continued to some extent even after the building of the wall. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 38 (2017) [hereinafter 2017 TIP REPORT], <https://www.state.gov/documents/organization/271339.pdf> (“Israeli NGOs report that Bedouin groups in the Sinai resumed abuse—including trafficking crimes—against asylum seekers on a limited scale in 2015”).

20. The individuals who are already in Israel cannot be deported back to Eritrea or Sudan due to the principle of *non-refoulement* (Eritreans) or as a matter of government policy derived from the absence of diplomatic relations between the two states (Sudanese). For a detailed discussion, see *infra* Part I.B.

21. See U.N. REFUGEE AGENCY, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, at 2-3 (June 19, 2017), <http://www.unhcr.org/en-us/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html> (presenting general data regarding displacement internationally); PETER TINTI & TUESDAY REITANO, MIGRANT, REFUGEE, SMUGGLER, SAVIOR 4 (2017) (stating that the current migration wave is “the biggest mass migration Europe has seen since the Second World War in what has come to be known as the ‘migrant crisis’”).

22. See, e.g., Elizabeth Collett, *The Asylum Crisis in Europe: Designed Dysfunction*, MIGRATION POL'Y INST. (Sept. 2015), <https://www.migrationpolicy.org/news/asylum-crisis-europe-designed-dysfunction> (“Much of the chaos and distress being seen in Southeast Europe, as Greece, Hungary, and other countries on the Western Balkans route are grappling with massive inflows of asylum seekers is caused by confusion about who exactly is in need of protection, who should be responsible for protection, and a lack of on-the-ground capacity to respond. The problem is conceptual, political, and practical . . . This challenge is, in essence, a product of a deep mismatch between the human imperatives impelling so many to undertake often dangerous journeys and an interlocking set of EU systems and policies unequal to this extraordinary phenomenon”);

23. See Kinsey A. Dinan, *Globalization and National Sovereignty: from Migration to Trafficking*, in TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS 58, 75

and uncertainty among scholars and international organizations with respect to defining human trafficking and classifying situations as such. Without proper reasoning or attention, many situations are labeled as human trafficking, even though these situations would not be considered human trafficking under current international law.²⁴ Moreover, in the trafficking discourse there is a semantic slippery slope, and an irresponsible or unexplained use of definitions. These issues, too, will be addressed in the Article.

The attempt to understand and refine the legal framework surrounding Ransom Kidnapping is situated within the broader discursive space of the rich human trafficking scholarship and the emerging norms of the past two decades. During these years, academics produced extensive scholarship on human trafficking.²⁵ At the same time, significant legal developments and deep changes in trafficking patterns occurred, some of which bore troubling implications that have been critiqued by scholars.²⁶ Accordingly, after presenting an overview of Ransom Kidnapping in Sinai and the survivors' fates in Israel in further detail in Part I, Part II will examine the current definitions and limitations of the concept of human trafficking as established in the two legal mechanisms that constitute the core of the international anti-trafficking efforts: (1) the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (Trafficking Protocol)²⁷ and (2) the U.S. Trafficking Victims Protection Act of 2000 (TVPA).²⁸ While both instruments are significant, this

(Sally Cameron & Edward Newman eds., 2008) (“[t]rafficking networks flourish where migratory pressures are strong, legal migration opportunities are limited and existing migration networks are insufficient to overcome immigration barriers without assistance and provide protection for new migrants in destination countries”).

24. See, e.g., Jorgen Carling, *Why ‘trafficking’ is in the news for the wrong reasons*, JORGENCARLING.ORG (July 30, 2015), <https://jorgencarling.wordpress.com/2015/07/30/why-trafficking-is-in-the-news-for-the-wrong-reasons> (criticizing the overuse of trafficking terminology and stressing that “[w]hen any unauthorized transportation of people across borders is labelled ‘trafficking’ we lose the ability to pinpoint and prevent truly exploitative crimes”).

25. For a partial list, see THE UNIVERSITY OF TEXAS AT ARLINGTON LIBRARIES BIBLIOGRAPHY SERIES, HUMAN TRAFFICKING & MODERN SLAVERY BIBLIOGRAPHY (2016), <https://libraries.uta.edu/dillard/subfiles/SlaveryHumanTraffickingBib.htm>.

26. See, e.g., Janet Halley, *After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family*, 31 PACE L. REV. 887, 919–20 (2011) [hereinafter Halley, *After Gender*]; Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 388–90 (2006) [hereinafter Halley et al., *From the International to the Local*]; Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 102–04 (2012) [hereinafter Shamir, *A Labor Paradigm*]; see generally Aziza Ahmed & Meena Seshu, “We have the right not to be ‘rescued’ . . .”: *When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers*, 1 ANTI-TRAFFICKING REV. 149 (2012).

27. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Trafficking Protocol].

28. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 18 U.S.C. & 22 U.S.C.), amended by Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified at 18 U.S.C. § 1595 & 22 U.S.C. § 7109(a) (2006)), Trafficking Victims Protection

Article puts special emphasis on the application and interpretation of the TVPA. Although domestic and not international *per se*, this instrument has a significant influence on states' behavior in the struggle against human trafficking.²⁹ It certainly does for Israel, which is a paramount actor in the Sinai case study.³⁰ Part III will then discuss the definition of "human smuggling" against the backdrop of "human trafficking," and consider whether this classification is important. Further, Part III will address emerging cracks in the already-fragile trafficking/smuggling distinction in the context of Ransom Kidnapping. Part IV will switch from a global to a local lens by examining trafficking-classification decisions of the Israeli Detention Review Tribunals and the Appeals Tribunals. Among other things, these tribunals are in charge of granting individuals exemption from detention on the grounds that they are victims of human trafficking. Finally, Part V will try to rethink the Sinai case study through the prism of the foregoing discussion. This part will also examine the desirability and feasibility of classifying Ransom Trafficking as a new, untraditional type of human trafficking.

I.

RANSOM KIDNAPPING AND TORTURE IN THE SINAI

Since 2007, tens of thousands of Eritrean and Sudanese asylum seekers have crossed the border from Egypt to Israel, fleeing grave human rights violations in their countries of origin.³¹ Until Israel built a wall along its Southern border in 2012, some 64,498 "infiltrators," as they are labeled by Israel's statutes, entered the country illegally.³² Over 90 percent of them entered from the Sinai.³³ According to the most recent official report, 38,540 "infiltrators" live in Israel

Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified in scattered sections of 18 U.S.C., 22 U.S.C. & 42 U.S.C.), and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 8 U.S.C., 18 U.S.C. & 22 U.S.C.) [hereinafter the TVPA].

29. Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does the Law Deter Crime?*, 2 LOY. U. CHI. INT'L L. REV. 193, 210 (2005) ("There is no doubt that the TVPA in general, and the Department of State TIP Reports in particular, have had a positive effect on many foreign governments").

30. Daphna Hacker, *Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law*, 28 HARV. HUM. RTS. J. 11, 26–31 (2015).

31. On the human rights condition in Eritrea and Sudan, see *infra* Part I.A.

32. The Prevention of Infiltration Act, which was amended over the past few years to address African asylum seekers, was originally enacted as "an emergency law designed to tackle the entrance of terrorists into Israel during the early 1950s." Margit Cohn, *When, and Where, Does History Begin: Collective Memory, Selective Amnesia, and the Treatment of Asylum Seekers in Israel*, 2017 U. ILL. L. REV. 563, 588, 592 (2017) (arguing that the title "infiltrators" (Fedayeen) "marginalizes, if not obliterates, any reference to persecution and refugeedom").

33. POPULATION, IMMIGRATION AND BORDERS AUTH., FOREIGNERS IN ISRAEL – 2013 SUMMARY 3 tbl. A.1 (2014) (on file with author) [hereinafter FOREIGNERS IN ISRAEL – 2013]. The wall practically stopped the influx of asylum seekers: in 2013, only 43 asylum seekers entered Israel from the Sinai, compared to 10,400 in 2012 and 17,300 in 2011. See *id.*

today, 92 percent of them Eritrean and Sudanese nationals.³⁴ Thousands of the asylum seekers arrived in Israel only after being held captive and tortured in designated camps in the Sinai.³⁵ They were released only after a ransom was paid on their behalf.³⁶

The majority of abductions were committed by (1) members of the Bedouin Rashaida tribe who operate in Sudan, where many refugee camps are occupied by Eritreans and Sudanese and (2) Bedouins in the Sinai Peninsula, where Egyptian law enforcement is absent.³⁷ The ransoms charged were often worth tens of thousands of dollars (typically amounting to lifetime savings), paid by friends and family members who had already managed to get into Israel.³⁸

Friends and family members were contacted via cell phone, and what followed were horrific negotiations.³⁹ Family and friends were made to listen to the victims being tortured in order to motivate payment, which was then forwarded to the abductors' bank accounts in Cairo.⁴⁰ While official data on the number of ransom kidnappings is unavailable, NGOs estimate that in the years of 2009-2013 a minimum of 25,000-30,000 individuals were kidnapped and tortured in the Sinai.⁴¹ NGOs also estimate that a quarter of them perished after being

34. See FOREIGNERS IN ISRAEL – 2017 2ND QUARTER, *supra* note 1, at 4 tbl. A.1. According to this report, the population of “infiltrators” that currently resides in Israel is comprised of 7,869 Sudanese nationals (20%), 27,494 Eritreans (72%), 2,680 from other African countries (7%), and 497 from other countries around the world (1%). See *id.* at 5 tbl. A.2.

35. See generally Refugees Between Life and Death, *supra* note 2, at 1–3. According to this source, aside from Eritrean and Sudanese nationals, a smaller number of Ethiopian nationals were kidnapped as well. See *id.* at 25.

36. *Id.*

37. See, e.g., Eliav Liebllich, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations under International Law*, 32 B.U. INT'L L.J. 355, 393 n.170 (2014) (“[t]he recent ousting of President Morsi has led to rising chaos in Sinai, in which Bedouin tribes, Islamists, and smugglers exercise control over large swaths of land. Whether this situation will give rise to an armed conflict depends, to a large extent, on the reaction of these elements to current attempts by the government to retain control”); see also Matt Bradley & Tamer El-Ghobashy, *Egypt's Coup Sparks Rising Chaos in Sinai*, WALL STREET J. (July 21, 2013), <http://www.wsj.com/articles/SB10001424127887324144304578619931690114670>.

38. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 111 n. 60; HUMAN RIGHTS WATCH, “I WANTED TO LIE DOWN AND DIE”: TRAFFICKING AND TORTURE OF ERITREANS IN SUDAN AND EGYPT 1, 31 (2014) [hereinafter LIE DOWN AND DIE], https://www.hrw.org/sites/default/files/reports/egypt0214_ForUpload_1.pdf (“In hundreds of cases documented by refugee organizations and the UN, traffickers abused victims while forcing them to telephone relatives who pay the ransom after hearing the victims’ screams”).

39. *Id.*

40. *Id.* (“[w]henver I called my relatives to ask them to pay, they burnt me with a hot iron rod so I would scream on the phone. We could not protect the women in our room: they just took them out, raped them, and brought them back. They hardly let us sleep and I thought I was going to die but in the end a group of us managed to escape”); DAPHNA HACKER & ORNA COHEN, RESEARCH REPORT: THE SHELTERS IN ISRAEL FOR SURVIVORS OF HUMAN TRAFFICKING, 66–68 (2012), <http://www2.tau.ac.il/InternetFiles/news/UserFiles/The%20Shelters%20ino2Osrail.pdf>. A documentary film was made on these interactions, and included recordings of the phone calls and the begging of the ones held captive. See THE SOUND OF TORTURE (Trabelsi Productions, 2013).

41. See AID ORGANIZATION FOR REFUGEES AND ASYLUM SEEKERS IN ISRAEL, “WE ARE ALSO

kidnapped.⁴² About 4,000 of the survivors live in Israel as of 2017.⁴³ The following section will describe in further detail Ransom Kidnapping, the motivations behind it, and the participating actors.

A. Reasons for Departure and Transportation Routes: Between Voluntary and Forced Migration

This section sets the background and describes the practice of Ransom Kidnapping in a chronological order: the human rights condition in Eritrea and Sudan, respectively, the process of departing from these countries and what such departure entails for individuals, and the different actors who play a role in their journeys.

The vast majority of the victims of Ransom Kidnapping in the Sinai are Eritrean nationals who fled severe human rights violations in their country.⁴⁴ These include: “extrajudicial killing, enforced disappearance and incommunicado detention, arbitrary arrest and detention, torture, inhumane prison conditions, indefinite national [military] service, and lack of freedom of expression and opinion, assembly, association, religious belief and movement.”⁴⁵ In 2016, Ms.

HUMAN BEINGS”: SURVIVORS OF THE TORTURE CAMPS IN SINAI 6 (2014) [http://assaf.org.il/en/sites/default/files/ASSAF%20-%20we%20are%20also%20human%20beings%20\(english%20pdf\).pdf](http://assaf.org.il/en/sites/default/files/ASSAF%20-%20we%20are%20also%20human%20beings%20(english%20pdf).pdf). [hereinafter WE ARE ALSO HUMAN BEINGS]. Due to the urgency of the situation, in March 2014 twenty-four states addressed the United Nations Human Rights Council to demand action against the human rights violations in the Sinai. They further called for states to treat survivors humanely and to provide them with various services and refrain from detaining them. *See* 25th Session of the United Nations Human Rights Council, Statement by H.E. Mr. Hanns H. Schumacher, Permanent Representative of the Federal Republic of Germany (Mar. 13, 2014), <https://www.hrw.org/news/2014/03/13/statement-he-mr-hanns-h-schumacher-permanent-representative-federal-republic-germany>. In two different resolutions, the European Parliament referred to the situation in the Sinai as one of human trafficking. *See* European Parliament Resolution of 15 March 2012 on Human Trafficking in the Sinai, in Particular the Case of Salomon W. (2012/2569(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-92>; and European Parliament Resolution of 13 March 2014 on Human Trafficking in the Sinai (2014/2630(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0255>.

42. *See* WE ARE ALSO HUMAN BEINGS, *supra* note 41, at 6.

43. This is the common estimation of human rights organizations. *See* Sigal Rozen, “*I Never Told What Happened to Me in Sinai*”: *On the Difficulties of Identifying Survivors of the Torture Camps and the Conduct of the Immigration Authority toward Them*, 7 HAGIRA 112 (2017) [Heb.]. One NGO estimated that about 7,000 survivors lived in Israel as of 2016. *See* INTERNATIONAL REHABILITATION COUNCIL FOR TORTURE VICTIMS & ASSAF, ISRAEL BRIEFING TO THE COMMITTEE AGAINST TORTURE, 57TH SESSION, MAY 2016, at 6–7 (Mar. 2016), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ISR/INT_CAT_NGO_ISR_23472_E.pdf.

44. Press Release, Egypt, Sudan: Kidnap and Trafficking of Refugees and Asylum-Seekers Must Be Stopped, Amnesty International (Apr. 3, 2013), <https://www.amnesty.org/en/press-releases/2013/04/egypt-sudan-kidnap-and-trafficking-refugees-and-asylum-seekers-must-be-stop/> (“The vast majority of victims are Eritrean”).

45. Special Rapporteur on the Situation of Human Rights in Eritrea, Rep. on the Situation of Human Rights in Eritrea, Human Rights Council, U.N. Doc. A/HRC/23/53 1 (May 28, 2013) (by

Sheila Keetharuth, the Special Rapporteur on the Situation of Human Rights in Eritrea, addressed the United Nations Human Rights Council and expressed her deep concern about the increasing and ongoing human rights violations, and the lack of legal protections in the country.⁴⁶ Among other observations, the Special Rapporteur stated that “[t]he human rights violations in Eritrea are widespread and few would be able to say that they or family members have not been affected or don’t know people who have been affected.”⁴⁷

As mentioned above, the main reasons for fleeing Eritrea are linked to fear of indefinite forced military conscription, arbitrary arrest, detention, and torture. Moreover, one report indicated that since early 2015, Eritrean authorities have evicted individuals from their homes en masse, and “bulldozed scores of houses, directly affecting hundreds of households.”⁴⁸ In many cases, these demolished homes took decades to build and required the investment of life savings.⁴⁹ This practice thus made an adequate standard of living unreachable for those affected.⁵⁰

Another motivation for leaving Eritrea is simply the desire to seek better educational opportunities, gain relative economic stability, and generally pursue a better future. As one refugee stated, “[i]n Eritrea there is no hope for a future, there is nothing to dream of or think of, so you have to leave the country to reach your goals.”⁵¹ This account is reminiscent of the narrative generally associated with movement from the undeveloped parts of the global South into the developed world—a narrative of “voluntary” or “economic” migration by “gold-digging” foreigners.⁵² When put in the context of the harsh reality of life in Eritrea and Sudan, adopting such a narrative seems cynical at best.⁵³ Yet this narrative pollutes the discourse and the decision-making process in Israel and elsewhere.⁵⁴

Sheila B. Keetharuth) [hereinafter Special Rapporteur on Eritrea 2013]; see also U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, ERITREA 2013 HUMAN RIGHTS REPORT (2014), <http://www.state.gov/documents/organization/220321.pdf>.

46. Statement by Ms. Sheila B. Keetharuth, Special Rapporteur on the Situation of Human Rights in Eritrea, Statement at the 31st Session, Human Rights Council (Mar. 14, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17224&LangID=E>.

47. *Id.*

48. Sheila B. Keetharuth, Special Rapporteur on the Situation of Human Rights in Eritrea, Report on the Situation of Human Rights in Eritrea, Human Rights Council, 9–11, U.N. Doc. A/HRC/29/41 (June 19, 2015).

49. *Id.* at 14.

50. *Id.* at 13–15.

51. See Special Rapporteur on the Situation of Human Rights in Eritrea, *supra* note 46.

52. On such narratives, see generally Olivia Taylor, *Constructing the ‘Economic Migrant’ Narrative During the Refugee Crisis: The Neoliberal State of Exception and Political-Economic ‘Bare Life’*, 6 OXFORD MONITOR OF FORCED MIGRATION 6 (2017).

53. See Tricia R. Hepner, An Open Letter to Israel: Eritreans are NOT Economic Refugees (June 12, 2012), <http://assaf.org.il/en/sites/default/files/Eritreans%20are%20NOT%20Economic%20Refugees%20June%202012.pdf> (Amnesty’s specialist on Eritrea urging Israel “not be manipulated by the propaganda of a dying dictatorship” by cooperating with Eritrea’s strategy of labeling its fleeing refugees as economic migrants).

54. Former Israeli Minister of Interior, Eli Yishai, revealed the impact of this false image on

Looking beyond the significant data on human rights violations and the lack of security in Eritrea at large, the hardship in Eritrea and reasons for leaving the country are also evident in the first-hand stories of Eritrean refugees.⁵⁵ Many of these refugees are Sinai survivors who shared their experiences after arriving in Israel.⁵⁶

The act of leaving Eritrea itself involves serious risks. Under Eritrean law, citizens who want to leave the country must obtain special permits, which the authorities issue very scarcely and selectively.⁵⁷ Enforcement bodies are ordered to “shoot to kill” those trying to leave without suitable permits, and their remaining relatives in Eritrea are often punished and harassed by the government as means of deterrence.⁵⁸ This sort of environment and the “no exit” legal-political policy contributes to the rampant human rights abuses throughout transportation routes and to the proliferation of human smuggling and trafficking. In such a reality, trafficking and smuggling networks are inevitably created. Unfortunately, those involved in the networks—including corrupt government officials—grow powerful.⁵⁹

policy decisions when he was quoted saying—while Israel was refraining from reviewing asylum applications— that “[t]hese are not refugees, these are economic migrants who want to come to Israel for work.” Ben Hartman, *Yishai: “Every African ‘Infiltrator’ will Return Home,”* JERUSALEM POST (Aug. 12, 2011), <http://www.jpost.com/National-News/Yishai-Every-African-infiltrator-will-return-home>. Subsequently, Yishai, who was the senior government official in charge of the asylum system at the time, was quoted as saying that Israel should “lock [African asylum seekers] up and make their lives miserable.” See generally HUMAN RIGHTS WATCH, “MAKE THEIR LIVES MISERABLE”: ISRAEL’S COERCION OF ERITREAN AND SUDANESE ASYLUM SEEKERS TO LEAVE ISRAEL (2014), <https://www.hrw.org/report/2014/09/09/make-their-lives-miserable/israels-coercion-eritrean-and-sudanese-asylum-seekers>.

55. See, e.g., Mogos O. Brhane, *Understanding Why Eritreans Go to Europe*, 51 FORCED MIGRATION REV. 34 (2016); HUMAN RIGHTS WATCH, WORLD REPORT 2015: ERITREA (2015), <https://www.hrw.org/world-report/2015/country-chapters/eritrea#1e6c45>; AMNESTY INT’L, JUST DESERTERS: WHY INDEFINITE NATIONAL SERVICE IN ERITREA HAS CREATED A GENERATION OF REFUGEES (2015), <https://www.amnesty.org/en/documents/afr64/2930/2015/en/>; Dan Connell, *Escaping Eritrea: Why They Flee and What They Face*, MIDDLE E. RES. & INFO. PROJECT (Sept. 12, 2012), http://www.merip.org/mer/mer264/escapingeritrea?ip_login_no_cache=e8e0528d1e4d3ddcc1a288bf570720c; Matina Stevis & Joe Parkinson, *Thousands flee isolated Eritrea to escape life of conscription and poverty*, WALL STREET J. (Feb. 2, 2016), <http://www.wsj.com/articles/eritreans-flee-conscription-and-poverty-adding-to-the-migrant-crisis-in-europe-1445391364>; *Why They Leave*, ECONOMIST (Oct. 12, 2013), <http://www.economist.com/news/middle-east-and-africa/21587844-eritreans-are-taking-seas-because-worsening-conditions-home-why-they>.

56. *Id.*

57. See LIE DOWN AND DIE, *supra* note 38, at 16; see also Special Rapporteur on Eritrea 2013, *supra* note 45.

58. *Id.*

59. Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Eritrea, Human Rights Council, U.N. Doc. S/2013/440 35-37 (July 25, 2013). See also LIE DOWN AND DIE, *supra* note 38, at 16. A related argument was made in the context of the current reality in Europe, in a lecture given at Harvard Law School in March 2016, see Ryszard Piotrowicz, *The European Migration Crisis: Career Opportunities for People Traffickers* (2016).

The other, smaller group of victims originates from Sudan.⁶⁰ Like Eritrea, Sudan faces enormous human rights challenges. These challenges are caused by, among other things, ongoing inter-tribal and intra-tribal clashes, and violent conflicts between government forces and armed rebel groups.⁶¹ The violence perpetuated by all sides of the conflict has claimed numerous lives and resulted in the displacement of millions of people.⁶² In fact, the United Nations estimated that since the outbreak of the armed conflict between the Sudanese Government and rebel groups in 2003, about 300,000 people have been killed.⁶³ Some of them died as a direct result of the violence; others died due to conflict-related diseases, starvation, or dehydration.⁶⁴ Numerous communities and villages were destroyed and displaced, and sexual violence against women and girls became widespread.⁶⁵

Moreover, the government's military operations in "conflict-affected" provinces (namely, Darfur, Southern Kordofan, and the Blue Nile)⁶⁶ contribute to vast displacement and abuses of human rights. For example, government security forces, who are supposed to protect women and girls, are often the perpetrators of severe sexual violence.⁶⁷

60. See *Foreigners in Israel – 2017 2nd Quarter*, *supra* note 1, Table A.1. According to this report, the population of "infiltrators" that currently resides in Israel is comprised of 7,869 Sudanese nationals (20%), 27,494 Eritreans (72%), 2,680 from other African countries (7%), and 497 from other countries around the world (1%). *Id.* Table A.2.

61. Report of the Independent Expert on the Situation of Human Rights in the Sudan, Human Rights Council, 7–13, U.N. Doc. A/HRC/24/31 (Sept. 18, 2013).

62. See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2015: SUDAN (2015), <https://www.hrw.org/world-report/2015/country-chapters/sudan>; ASYLUM RESEARCH CONSULTANCY, SUDAN COI QUERY RESPONSE (Apr. 11, 2014), <http://www.refworld.org/pdfid/538ec3c24.pdf>; United Nations Human Rights – Office of the High Commissioner, Sudan: UN expert urges protection of unarmed civilians after new escalation of violence in Darfur (Feb. 5, 2016), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17015&LangID=E>.

63. See generally U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, SUDAN: DARFUR PROFILE (2015), http://reliefweb.int/sites/reliefweb.int/files/resources/Darfur_Profile_May_2015_A3.pdf; HUMAN RIGHTS WATCH, "MEN WITH NO MERCY": RAPID SUPPORT FORCES ATTACKS AGAINST CIVILIANS IN DARFUR, SUDAN (2015), <https://www.hrw.org/report/2015/09/09/men-no-mercy/rapid-support-forces-attacks-against-civilians-darfur-sudan>.

64. *Id.*

65. *Id.*

66. See generally, ENOUGH PROJECT, LIFE UNDER SIEGE – SOUTH KORDOFAN NEEDS ASSESSMENT (2014), <https://reliefweb.int/sites/reliefweb.int/files/resources/LifeUnderSiege-Report-EnoughForum-Nov2014.pdf>.

67. Report of the Independent Expert on the Situation of Human Rights in the Sudan, Human Rights Council, 10, U.N. Doc. A/HRC/30/60 (Aug. 24, 2015) ("Most victims of sexual violence are displaced women and girls attacked while engaged in livelihood activities outside their camp. In some cases, victims are attacked while in the supposed safety of their shelters inside the camp or while fleeing for safety during attacks on their villages. The pattern that has emerged from these attacks suggests that, in most cases, perpetrators cannot be identified; in other cases, attacks were allegedly perpetrated by government security forces, signatory and non-signatory armed factions and sometimes by individuals not part of any organized group or government entity").

In this reality, social, cultural, and economic rights are far out of reach and high rates of poverty are reported.⁶⁸ Beyond the danger to life and threats to personal security, other basic human rights are also constantly violated in Sudan, specifically: rights of a political nature, such as the right to freedom of expression and opinion, freedom of the press, freedom of religion, and freedom of association and assembly.⁶⁹

In sum, the reality that causes Sinai victims to flee their countries, in Eritrea or Sudan, includes genuine and immediate danger to their lives and personal security, sexual dangers, violation of basic rights, violent restriction of political freedom, and widespread poverty and displacement.

The journeys and destinations of those leaving Eritrea and Sudan vary significantly, and are often hard to predict due to various constraints and circumstances that change along the way. Many are kidnapped or smuggled from refugee camps. Some change their plans when an opportunity presents itself or when they are physically or otherwise unable to go on. Others fall victim to abuse and exploitation by both government officials and networks of organized crime (categories which often intersect).⁷⁰ However, the journeys generally include moving south to different parts of sub-Saharan Africa, north-west towards Libya (often as part of a longer journey to Europe), or north to Israel, through south Egypt and the Sinai.⁷¹

Given the lack of security and human rights violations in the countries of origin, departure often starts voluntarily and transforms into forced migration en route.⁷² That is, journeys that start with the assistance of paid smugglers or by

68. *Id.* at 10–11.

69. *Id.* at 6.

70. INT'L ORGANIZATION FOR MIGRATION, FATAL JOURNEYS: TRACKING LIVES LOST DURING MIGRATION 117–23 (2014), https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf [hereinafter FATAL JOURNEYS]; LIE DOWN AND DIE, *supra* note 38, at 16–30; REGIONAL MIXED MIGRATION SECRETARIAT, MIGRANT SMUGGLING IN THE HORN OF AFRICA & YEMEN: THE SOCIAL ECONOMY AND PROTECTION RISKS 25–32 (2013), http://www.regionalmms.org/fileadmin/content/rmms_publications/Migrant_Smuggling_in_the_Horn_of_Africa_and_Yemen_report.pdf.

71. KAREN JACOBSEN ET AL., RANSOM, COLLABORATORS, CORRUPTION: SINAI TRAFFICKING AND TRANSNATIONAL NETWORKS—A CASE STUDY OF THE ERITREAN MIGRATION SYSTEM FROM ERITREA TO ISRAEL 5–7 (2013), <http://fic.tufts.edu/assets/Ransom-Collaborate-Corrupt-8-12.pdf>. See also REGIONAL MIXED MIGRATION SECRETARIAT, GOING WEST: CONTEMPORARY MIXED MIGRATION TRENDS FROM THE HORN OF AFRICA TO LIBYA & EUROPE (2014), http://www.regionalmms.org/fileadmin/content/rmms_publications/Going_West_migration_trends_Libya_Europe_final.pdf.

72. On such transformations, see Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1150 (2003). See also ANDREAS SCHLOENHARDT, MIGRANT SMUGGLING: ILLEGAL MIGRATION AND ORGANISED CRIME IN AUSTRALIA AND THE ASIA PACIFIC REGION 17–19 (2003) (“smugglers . . . frequently [lure] migrants with . . . false information about transit and immigration systems and the dangers involved in the illegal methods of transportation It is arguable that migrant smuggling ceases to be voluntary if the illegal journey involves the deprivation of personal freedom, food and water, confiscation of property, passports and other identity documents,

travelling independently, transform under such circumstances into involuntary incidents of kidnapping and holding in captivity for ransom.⁷³

The shift from voluntary to forced journeys is both an evolution of specific journeys, as well as of the smuggling/trafficking/kidnappings networks themselves, which often change in nature over time. As one activist described it with respect to ransom kidnappings in the Sinai, “[a]t first the traffickers were more human . . . [t]hen slowly they started the torture, the rape. They started selling organs. They saw it was a good income.”⁷⁴ Accordingly, some of the victims who ended up in Israel did not even plan to arrive there when commencing their journey, but were forced into it after being kidnapped and held for ransom.⁷⁵ This feature of Ransom Kidnapping, namely, the lack of control one has over their whereabouts, seems similar to “traditional,” clearly coerced human trafficking.⁷⁶

The transformation of voluntary journeys into forced ones leads to the key component of the Sinai Ransom Kidnapping practice: abduction. A large number of the reported abductions were committed by members of the Rashaida Tribe, who operate in Sudan—where many refugee camps are occupied by Eritreans and Sudanese—and in the Sinai.⁷⁷ After the victims were kidnapped, they were sold—

or instances of threat and violence”).

73. *Id.* Many scholars and international organizations, including the International Organization for Migration (IOM), have referred to this transformation as human smuggling that becomes trafficking. Scholars and international organizations use the concepts of “trafficking” and “smuggling” interchangeably, often without proper attention to the content and components of each of these concepts under international law. This might be misleading to victims and practitioners. According to the IOM, “A markedly violent form of trafficking – in cases where the dominant trend is for human smuggling to turn into trafficking – has developed in recent years in Egypt and Sudan. Here, smugglers, traffickers and local officials work together to prey on Eritrean migrants leaving their country through Egypt, Ethiopia and Sudan, and increasingly through Libya to Egypt. Migrants are deceived and kidnapped on their journeys, or even snatched from refugee camps (in eastern Sudan and northern Ethiopia) and sometimes from the streets of Cairo. They are held for ransom by violent criminals who sell them up a chain that normally takes them into the Sinai desert. Migrants are frequently held in compounds of houses for weeks or months while their captors torture them until friends or relatives, mainly in the diaspora, pay high ransoms.” FATAL JOURNEYS, *supra* note 70, at 121–22. See Niina Meriläinen & Marita Vos, *Public Discourse on Human Trafficking in International Issue Arenas*, 5 SOCIETIES 14 (2015) for an argument regarding the context in which human rights organizations discuss human trafficking, as well as the way they frame the definitions of human trafficking in their presentations. This tension will be addressed in Parts II and III of the Article. On the use and application of these definitions, as well as on their accuracy and challenges when confronted with the changing reality on the ground, see *infra* Part III.

74. Eric Reidy, “At First The Traffickers Were More Human. Then Slowly They Started The Torture”, GHOST BOAT (Nov. 4, 2015) (quoting activist Dr. Alganesh Fisseha), <https://medium.com/ghostboat/at-first-the-traffickers-were-more-human-then-slowly-they-started-the-torture-2da698e1d846#qwuwaf7nt>.

75. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 28.

76. On the inherent coercive nature of human trafficking under international law, see *infra* Part II.

77. TINTI & REITANO, *supra* note 21, at 260; LIE DOWN AND DIE, *supra* note 38, at 17–28; Humphris, *supra* note 6, at 9–11; see also U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, 343–44 (2013),

<https://www.state.gov/documents/organization/210741.pdf> [hereinafter 2013 TIP REPORT] (“Sudanese and Eritrean nationals are brutalized by smugglers from the Rashaida tribe in the Sinai,

sometimes several times—to Bedouins in the Sinai Peninsula, or transferred to other Tribe members.⁷⁸ After victims were transferred to the Sinai, in many cases, the kidnapers held them in designated houses or “camps” until a friend or family member paid a ransom on their behalf. In cases where ransom was not paid, victims were often killed.⁷⁹

While holding victims in captivity, kidnapers severely tortured and raped prisoners in order to increase the urgency of ransom payments.⁸⁰ Commonly reported practices involved: “rape of women, including having plastic piping inserted into their anuses and vaginas; burning of women’s genitalia and breasts; stripping women naked and whipping their buttocks; rape of men with plastic piping; beating with a metal rod or sticks; whipping with rubber whips or plastic cables; dripping molten plastic or rubber onto skin; burning with cigarettes or cigarette lighters; hanging from ceilings to the point of deforming arms; giving electric shocks; beating the soles of feet; forced standing for long periods, sometimes days; threatening to kill them, remove their organs, or cut off fingers; burning with a hot iron rod or boiling water; sleep deprivation; and putting water

including by being whipped, beaten, deprived of food, raped, chained together, and forced to do domestic or manual labor at smugglers’ homes; some of these individuals were not willing migrants but were abducted from Sudan-based refugee camps or at border crossings. . . . The [Sudanese] government did not report investigating or prosecuting public officials allegedly complicit in human trafficking, despite reports that Sudanese police sold Eritreans to the Rashaida along the border with Eritrea”).

78. *Id.*; LIE DOWN AND DIE, *supra* note 38, at 27–28.

79. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 31–37; LIE DOWN AND DIE, *supra* note 38, at 24–26. Human Rights Watch managed to interview a 17-year-old kidnapper in the town of Arish in the Sinai (referred to as a “trafficker” by the Organization), who sheds some light on the way the practice actually works on the ground: “I buy Eritreans from other Bedouin near my village for about \$10,000 each. So far I have bought about 100. I keep them in a small hut about 20 kilometers from where I live and I pay two men to stand guard. I torture them so their relatives pay me to let them go. When I started a year ago, I asked for \$20,000 per person. Like everyone else I have increased the price This year I made about \$200,000 profit. The longest I held someone was seven months and the shortest was one month. The last group was four Eritreans and I tortured all of them. I got them to call their relatives and to ask them to pay \$33,000 each. Sometimes I tortured them while they were on the phone so the relatives could hear them scream. I did to them what I do to everyone. I beat their legs and feet, and sometimes their stomachs and chest, with a wooden stick. I hang them upside down, sometimes for an hour. Three of them died because I beat them too hard. I released the one that paid. About two out of every 10 people I torture pay what I ask. Some pay less and I release them. Others die of the torture. Sometimes when the wounds get bad and I want them to torture them more, I treat their wounds with bandages and alcohol. I beat women but not children and I have not raped anyone . . . I’m not interested in speaking to anyone who wants me to stop doing this. The government doesn’t care so I don’t mind talking to you. The police won’t do anything to stop us because they know that if they come to our villages we will shoot . . . I first started doing this because I had no money but saw others making lots of money this way. I know about 35 others who sell or torture Eritreans in Sinai. There are 15 just near my house, living close to each other. We are from different tribes. Some just buy them and sell them on to others, and some of us torture them to get even more money.” LIE DOWN AND DIE, *supra* note 38, at 11.

80. For the different “steps” of abduction and torture for ransom gathered in multiple interviews with survivors, *see* REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 40. For a detailed overview of the practices, *see id.* at 25–65; JACOBSEN ET AL., *supra* note 71, at 5–12; Humphris, *supra* note 6, at 14–19; LIE DOWN AND DIE, *supra* note 38, at 31–49; U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 157–58 (2013), <http://www.state.gov/documents/organization/210739.pdf>.

on wounds and beating the wounds.”⁸¹ Moreover, survivors reported a number of other cruel methods of humiliation and abuse, such as urinating on hostages and ripping off nails.⁸² Kidnappers often raped prisoners (predominantly though not exclusively women)⁸³ on a daily basis, and forced pregnancies were often reported.⁸⁴

In some cases, if ransom was paid, the kidnappers released the victims who were sometimes kidnapped again if they were unable to reach a safe place.⁸⁵ Some perished after they were released as a result of injuries sustained from severe torture.⁸⁶ Some, who either escaped or were released after a ransom was paid on their behalf, managed to cross the border into Israel illegally.⁸⁷ Others reached Cairo or Ethiopia.⁸⁸ The following section focuses on those who reached Israel and on Israel’s general treatment of refugees, asylum seekers, and noncitizens.

B. Treatment After Entering Israel

Upon entering Israel, Ransom Kidnapping victims are subjected to the local policies dealing with asylum seekers and refugees, who are labeled as “infiltrators” under domestic law, and often experience detention.⁸⁹ Since 2007,

81. LIE DOWN AND DIE, *supra* note 38, at 31–32. The U.S. Department of State has reported that “Sudanese and Eritrean nationals are brutalized by smugglers from the Rashaida tribe in the Sinai, including by being whipped, beaten, deprived of food, raped, chained together, and forced to do domestic or manual labor at smugglers’ homes.” 2013 TIP REPORT, *supra* note 77, at 343.

82. EGYPT/SUDAN REFUGEES FACE BRUTAL TREATMENT, KIDNAPING FOR RANSOM AND HUMAN TRAFFICKING, *supra* note 14.

83. See, e.g., Lijnders & Robinson, *supra* note 7, at 140.

84. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 4.

85. See, e.g., Mark Anderson, *Inside Eritrea’s Exodus*, AFRICA REP. (Sept. 26, 2016) (“Natnael Hail . . . paid smugglers \$400 to take him into Sudan, where he was kidnapped and sold to nomads in the Sinai Desert. Gangs in the Sinai Desert prey on migrants. They have been found to kidnap and then torture them until their families pay a ransom. Natnael escaped and went to a refugee camp in northern Ethiopia . . . He was kidnapped again and was forced to pay \$3,500 to be freed in Tripoli”).

86. LIE DOWN AND DIE, *supra* note 38, at 35.

87. REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2, at 69–72.

88. See *id.* at 69–71 (on escapes); *id.* at 6 (on destinations); see also EGYPT/SUDAN REFUGEES FACE BRUTAL TREATMENT, KIDNAPING FOR RANSOM AND HUMAN TRAFFICKING *supra* note 14, at 15.

89. See Prevention of Infiltration Act, 5704-1954, SH No. 160 (Isr.). One commentator indicated that Israel was making notable efforts to abolish the Ransom Kidnapping practice in the Sinai, although the nature of these efforts remained unclear. See Ayelet Levin, *The Reporting Cycle to The United Nations Human Rights Treaty Bodies: Creating a Dialogue Between the State and Civil Society – The Israeli Case Study*, 48 GEO. WASH. INT’L L. REV. 315, 344 (2016) (“There was a forum headed by the Anti-Trafficking Coordinator aimed at information exchange concerning the ongoing battle against the phenomenon of victims of the Sinai Camps, that is, persons who entered Israel illegally through the Egyptian border crossed through the Sinai Peninsula, and in some cases, while on Egyptian ground, such individuals were held in camps where they suffered heinous crimes and grave abuse at the hands of their captors, for the purpose of obtaining ransom from their family members living in Israel or abroad. Members from the Ministries of Health, Justice, Israel Prison Service, and the Police, as well as NGO representatives and UNHCR, all participated in this forum. The Author of this Article was present at some of the meetings as part of her work, and notes that it

Israel has been faced with the mass migration of asylum seekers (including victims of Ransom Kidnapping) fleeing from Eritrea and Sudan.⁹⁰ Until a wall was built in 2012, some 60,000 asylum seekers from Eritrea and Sudan crossed the border from the Sinai.⁹¹ The wall reduced the numbers dramatically, and since 2013 relatively few asylum seekers managed to get into Israel from the Sinai.⁹² Reacting to this influx, the Israeli government enacted controversial laws for dealing with asylum seekers.⁹³

The government's controversial policy towards asylum seekers was challenged three distinct times before the Supreme Court of Israel.⁹⁴ Variations of the policy suggested detaining asylum seekers indefinitely, denying them social benefits, denying them permission to work in Israel, refusing to review asylum applications, and deporting asylum seekers to dangerous "third countries" such as Uganda and Rwanda without adequate safeguards.⁹⁵ In each of the three rounds, the Supreme Court deemed parts of the legislation unconstitutional.⁹⁶

Throughout the entire process of judicial review, all parties agreed that many of the asylum seekers subjected to the contested policy had been tortured in the

was a welcome surprise to witness the good working relations among NGOs and the state, and their mutual respect and cooperation"). A petition seeking to exempt the victims of the Sinai torture camps from detention in an "open" facility was filed on January 2016, and is currently pending before the Supreme Court. *See* H CJ 718/17 Hotline for Refugees and Migrants v. CEO of the Department of Justice et al. (Isr.) [hereinafter H CJ 718/17]. For information on the facility, see *infra* note 98.

90. Although Israel built a wall along its border with Egypt in 2012, Ransom Kidnapping did not stop but merely narrowed in scope, often driving victims to other destinations, mainly through Libya, as activists describe. *See, e.g.,* Reidy, *supra* note 74; 2017 TIP REPORT, *supra* note 19; HOTLINE REPORT, *supra* note 12, at 25. Clearly, this does not change the situation of, and the legal regimes applicable to, the many victims who are already in Israel and cannot be deported back to Eritrea or Sudan due to the principle of *non-refoulement* (Eritreans) or as a matter of government policy derived from the absence of diplomatic relations with Israel (Sudanese). *See infra* notes 111–113.

91. POPULATION, IMMIGRATION AND BORDERS AUTHORITY, FOREIGNERS IN ISRAEL – 2012 SUMMARY, at 4 tbl. A.3 (2013) (on file with author); for a thorough account of the Israel-Egypt wall in the larger context of "walls as an immigration control strategy" see Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1, 34–39 (2016).

92. FOREIGNERS IN ISRAEL – 2017 2ND QUARTER, *supra* note 1, at 4 tbl. A.1 (presenting data that in the entire period of 2013– June 2017 only a few dozen "infiltrators" entered Israel illegally, compared to nearly 60,000 Eritreans and Sudanese who entered Israel in the years of 2007–2012); *see also* FOREIGNERS IN ISRAEL – 2013, *supra* note 33, at 3 tbl. A.1; POPULATION, IMMIGRATION AND BORDERS AUTHORITY, FOREIGNERS IN ISRAEL – 2014 SUMMARY 3 tbl. A.1 (2015) (on file with author); POPULATION, IMMIGRATION AND BORDERS AUTH., FOREIGNERS IN ISRAEL – 2015 3RD QUARTER 4 tbl. A.2 (2015), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/oct2015.pdf.

93. *See generally* Yonatan Berman & Reuven Ziegler, *The Union of Securitization and Demography: Immigration Detention in Israel*, in IMMIGRATION DETENTION: THE MIGRATION OF A POLICY AND ITS HUMAN IMPACT 154 (Amy Nethery & Stephanie J. Silverman eds., 2015).

94. Yehuda Goor, Gilad Zohari & Naama Omri, *Editors' Note: Parliament and the Law*, 37 TEL AVIV U. L. REV. 507, 507 (2016).

95. *See generally* Cohn, *supra* note 32, at 586–92.

96. H CJ 7146/12 Adam et al. v. The Knesset et al. [2013] (Isr.); H CJ 7385/13 Eitan et al. v. The Government of Israel et al. [2014] (Isr.) [hereinafter H CJ 7385/13]; H CJ 8665/14 Desete et al. v. The Knesset et al. [2015] (Isr.).

Sinai prior to their arrival. Justice Amit, for example, directly addressed the practice of Ransom Kidnapping described in this Article.⁹⁷ Currently, after the Supreme Court's third (and most recent) opinion of August 2015, asylum seekers are subject to three months of detention in a jail-like facility upon arrival, and, for adult men, up to one year in an "open" residence facility.⁹⁸ As determined by the Supreme Court, this residence facility is not effectively open due to its distant location in the desert and the fact that detainees are not allowed to work outside the facility.⁹⁹ Because detainees cannot seek employment in Israel, they cannot afford to travel outside the facility.¹⁰⁰ As a result, the detainees almost never leave even though they can technically move freely during the day (but they are more restricted at night).¹⁰¹

It is important to note that the detention warrants issued to asylum seekers are subject to judicial review in designated Detention Review Tribunals and Appeals Tribunals. These institutions, which review individual warrants, will be addressed in Part IV.A.¹⁰² These tribunals review cases brought by detainees who seek to challenge the detention warrants issued to them before or after they have been detained.

After being released from the detention facilities, asylum seekers are left on their own without adequate assistance in obtaining employment, appropriate healthcare, or housing.¹⁰³ Employment is formally forbidden, and although violations are often overlooked, many individuals are subsequently left with limited abilities to afford a living.¹⁰⁴ This lack of enforcement is a double-edged sword, since it leaves asylum seekers highly exposed to labor market exploitation,

97. H CJ 7385/13, at 131–32 (“Some compassion should be found for all those thousands who were severely tortured in the Sinai Peninsula and who came to us battered in body and soul. Many among them did not even plan to arrive in Israel, but were kidnapped by smugglers and held captive in the Sinai Peninsula for ransom, while being subjected to hideous torture.”) (author’s translation).

98. See SAM KUTTNER & SIGAL ROZEN, HOTLINE FOR REFUGEES AND MIGRANTS, IMMIGRATION DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, at 13–31 (2016), <https://il.boell.org/sites/default/files/detention-monitoring-2015-eng.pdf>, [hereinafter DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015] for details on the different facilities, including daily routines, food, and living conditions. For a broad comparative account of global detention policies, see LIORA LAZARUS & EIRIK BJORGE, OXFORD PRO BONO PUBLICO, REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE A COURT (2014), <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/05/2014.6-Arbitrary-Detention-Project.pdf>.

99. See H CJ 7385/13, *supra* note 96, at 76 (discussing the difficulties with this “open” facility); Berman & Ziegler, *supra* note 93. It should be noted that women and minors are currently exempt from detention in the “open” facility. See also *infra* Part IV (providing a further discussion on detention and coerced residency policies and procedures).

100. See H CJ 7385/13, *supra* note 96, at 76.

101. See *id.*; see also *Refugee Law and Policy: Israel*, LIBR. CONGRESS, <https://www.loc.gov/law/help/refugee-law/israel.php> (providing a general overview of the current legal arrangements).

102. See *infra* Part IV.

103. See Reuven Ziegler, *No Asylum for ‘Infiltrators’: The Legal Predicament of Eritrean and Sudanese Nationals in Israel*, 29 IMMIGR., ASYLUM & NAT'LITY L. 172 (2015).

104. *Id.*, at 183–84.

deprives them of labor law protections, and narrows their already-scarce employment opportunities because employers are presumably reluctant to engage in illegal hiring.¹⁰⁵ Asylum seekers' obvious reluctance to engage in any contact with state authorities creates a black market for employment with no effective regulation, which this highly vulnerable population is forced into. Additionally, a recent amendment to the Foreign Workers Act requires "infiltrators" to deposit twenty percent of their monthly salary into a special fund. Workers can recover these wages only upon leaving Israel, and the fund is designed to "encourage" them to leave.¹⁰⁶

Cases involving Ransom Kidnapping intensify these problems and cause new ones. As stated in the 2014 TIP Report, "Eritrean and Sudanese migrants and asylum seekers. . .are highly vulnerable to forced labor. . .in Israel, due to their lack of formal work status and pressure to repay their family and friends for the large debts owed for the ransoms paid to free them from criminal groups in Egypt's northern Sinai."¹⁰⁷

Israel's performance in connection with international standards of refugee law adds a crucial legal-political dimension. Under its current policy, Israel generally does not provide status to asylum seekers, despite the fact that it is unable to deport them.¹⁰⁸ It typically does not review asylum applications and in many cases simply ignores them, even though Eritreans and Sudanese are globally considered to have strong refugee claims that are recognized in many parts of the world.¹⁰⁹ Even when Israeli authorities do review asylum applications, recognition rates are very low. As of 2015, only forty-five out of 17,778 (0.25 percent) asylum applications have succeeded.¹¹⁰ Further, Israel cannot practically deport asylum seekers from Eritrea and Sudan back to their countries of origin. In

105. *Id.* (The "government announced its intention to penalise employers for employing 'infiltrators'").

106. Foreign Workers Act, 5751-1991, §§ 1(k), 1(k1), SH No. Amendment No. 18, 2017 (Isr.), art. 1(k), 1(k1). The Amendment also requires the employer to deposit an amount equal to 16 percent of the salary. *See id.* A petition challenging this Amendment on various constitutional grounds is now pending before the Supreme Court. *See* HCJ 2293/17 *Gersagher v. The Knesset*.

107. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 215 (2014), <http://www.state.gov/documents/organization/226846.pdf>; *see infra* Part II.B, for a discussion on the TIP Reports system. However, this TIP report also indicated that asylum seekers in Israel are highly exposed to sex trafficking, an observation made with no evidence. *cf.* Hacker, *supra* note 30, at 84 ("there is no reliable source that this author is aware of that provides evidence of sex trafficking of Eritrean and Sudanese migrants and asylum seekers in Israel if one does not perceive prostitution as sex trafficking").

108. *See infra* text accompanying notes 111–113.

109. U.N. HIGH COMM'R FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 2012, at 26 (2013), <http://www.unhcr.org/52a7213b9.html> (pointing out high global rates of recognition for Eritreans (81.9%) and Sudanese (68.2%) refugees).

110. Ziegler, *supra* note 103, at 181; *see also* Tally Kritzman-Amir, "Otherness" as the Underlying principle in Israel's Asylum Regime, 42 ISR. L. REV. 603 (2009); Hadas Yaron et al., "Infiltrators" or Refugees? An Analysis of Israel's Policy Towards African Asylum-Seekers, 51 INT'L MIGRATION 144 (2013) (outlining an argument offering a "genealogical approach" to these policies).

the case of Eritreans, the principle of *non-refoulement* applies. Article Thirty-Three of the 1951 Refugee Convention orders that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹¹¹

By all accounts, Eritrean nationals easily fit into this category.¹¹² Israel does not deport Sudanese nationals as a matter of policy, due to the absence of diplomatic relations between Israel and Sudan.¹¹³ The Israeli government has made several off-the-record attempts to bring asylum seekers to “voluntarily” depart to “third countries,” such as Uganda and Rwanda. These attempts resulted in tragedies. According to the Hotline for Refugees and Migrants, an Israeli NGO that represents Sinai survivors, some asylum seekers were held captive upon arrival, while others were either deported from the third country back to their country of origin (where they face persecution), robbed, or arrested because they did not have suitable documentation.¹¹⁴

The described policies provide a first layer of regulation that applies to all asylum seekers who entered Israel, including victims of Ransom Kidnapping. In some cases, laws that govern human trafficking come into play and create a second layer. When an individual gains official recognition as a trafficking victim, that person is exempt from detention.¹¹⁵ NGOs estimate that about 4,000 victims of the Sinai torture camps lived in Israel as of 2017, and that only about 10 percent of them have been recognized as trafficking victims by the authorities.¹¹⁶ As of

111. Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954). See Tally Kritzman-Amir & Thomas Spijkerboer, *On the Morality and Legality of Borders: Border Policies and Asylum Seekers*, 26 HARV. HUM. RTS. J. 1, 10–14 (2013) for a discussion on this principle generally.

112. The Israeli government openly applies “temporary” *non-refoulement* protection to Eritrean nationals. See, e.g., H CJ 7385/13, *supra* note 96, at 22–23.

113. H CJ 7385/13, *supra* note 96, at 23.

114. See, e.g., SIGAL ROZEN, HOTLINE FOR REFUGEES AND MIGRANTS, DEPORTED TO THE UNKNOWN – MONITORING REPORT 10–12 (2015), <http://hotline.org.il/wp-content/uploads/2015/12/Deported-To-The-Unkown.pdf>. In August 2017, the Supreme Court held that there are no legal flaws in Israel’s practice of deporting asylum seekers to a third country because the Court was not convinced that such deportation is unsafe and because all the applicable procedural requirements were satisfied. That said, since Israel’s agreements with third countries provide that deportation must be “voluntary,” the Supreme Court held that Israel cannot detain asylum seekers in order to “encourage” them to leave “voluntarily.” See APA 8101/15 Zegete v. Minister of the Interior [2017] (Isr.). It could be inferred from this holding that if Israel amends such agreements as to allow involuntary deportations to a third country, detention for the purpose of coercing departure will presumably be found legal.

115. See Office of the Nat’l Anti-Trafficking Coordinator, *Procedure for Granting Status for Victims of Slavery and Trafficking for Slavery and Forced Labor, Population Administration Procedure No. 6.3.0008*, MINISTRY OF THE INTERIOR (ISR.) (June 15, 2010), <http://www.justice.gov.il/Units/Trafficking/IsraelFight/Activity/Pages/guidelines.aspx>.

116. This is the estimation of the Hotline for Refugees and Migrants, see *supra* note 43. In its

2010, only eight of the Sinai survivors (five women and three men) were treated in a designated trafficking shelter. However, even those eight languished in jail-like detention facilities for several months, before being identified as victims.¹¹⁷ Further, Israel often presents these “two layers” (of trafficking and refugee law assistance) as mutually exclusive alternatives. The government demands that victims choose whether they wish to file an application for asylum or be considered for trafficking related benefits.¹¹⁸

Low trafficking recognition rates can also be attributed to complex bureaucratic requirements, a need for legal counseling, and a general lack of resources. The individuals recognized as trafficking victims are entitled to rehabilitative care and various (though still limited) benefits, including exemption from detention and free legal aid.¹¹⁹ The others, mostly men, who are the majority of victims, receive no psychological or material assistance, and are ordinarily detained for long periods of time. Absent recognition as a trafficking victim, no adjustments or forms of relief are granted, and victims are subject to the general policy of scarce rights and entitlements described above. This usually also means detention.¹²⁰

Clearly, if the Sinai survivors were granted the treatment they are entitled to under international law as refugees, this discussion of Ransom Kidnapping would have been less significant in their context. Adequate protection of victims’ rights as refugees could have perhaps rendered this whole exercise unnecessary, as a mere legal classification project without any real world implications.¹²¹ This, however, is not the case. As the Supreme Court of Israel held, the government’s

petition mentioned above seeking to exempt the victims of the Sinai torture camps from detention in an “open” facility, the Hotline submitted that “a few hundred” Sinai survivors were recognized as trafficking victims, *see* HCJ 718/17, *supra* note 89. ASSAF, an aid organization for refugees and asylum seekers in Israel, estimated that about 7,000 survivors lived in Israel as of 2016, from which only 250 were recognized as trafficking victims. *See* INT’L REHAB. COUNCIL FOR TORTURE VICTIMS & ASSAF, ISRAEL BRIEFING TO THE COMMITTEE AGAINST TORTURE, 57TH SESSION, MAY 2016, at 6–7 (2016), <http://assaf.org.il/en/sites/default/files/Israel%27s%205th%20periodic%20report%20-%20ASSAF%20and%20IRCT.pdf>.

117. HACKER & COHEN, *supra* note 40, at 67.

118. *See id.* This policy does not coincide with international standards, according to which protection provided to trafficking victims is additional to that provided to them as asylum seekers. *See generally* EUROPEAN MIGRATION NETWORK, IDENTIFICATION OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS IN INTERNATIONAL PROTECTION AND FORCED RETURN PROCEDURES 5 (2014), http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_synthesis_identification_victims_trafficking_final_13march2014.pdf.

119. However, reports show that even upon recognition benefits are often delayed or denied. *See* WE ARE ALSO HUMAN BEINGS, *supra* note 41, at 6, 16–18; HOTLINE REPORT, *supra* note 12, at 25; on the benefits see also *infra* Parts III.A, IV.A.

120. HOTLINE REPORT, *supra* note 12, at 25.

121. *See generally* ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 144–209 (2010) [hereinafter GALLAGHER, TRAFFICKING] (describing the still crucial interactions between trafficking and other international law regimes such as refugee law, migrant work, and slavery, which exceed the scope of this article).

policy is inconsistent with both internal constitutional standards and international legal obligations.¹²²

In sharp contrast to this disregard of domestic and international duties, Israel has exhibited outstanding compliance with international trafficking norms and adhered to obligations set forth by the United Nations and the United States, as the next sections will show. In such a reality—where refugee law is weak and trafficking law is an alleged success—questions arise with respect to the latter’s scope and the resulting value of its success. That is, if policymakers praise Israeli trafficking law, it is necessary to examine what the framework excludes, at what cost, and whether it is defensible. The following sections will engage in an analysis aimed at answering these difficult questions.

In sum, after managing to break free from the torture camps and arrive in Israel, many of the Sinai victims are subjected to detention, and are not given suitable treatment or assistance, because they were not labeled as victims of trafficking. Although many of them have strong refugee claims, Israel generally does not review asylum applications while simultaneously refraining from deportation. This reality creates a legal limbo, in which asylum seekers cannot obtain a stable legal status, despite the fact that they are there to stay.

Instead, asylum seekers, including the Sinai victims, are subject to the general policy, despite enduring experiences such as being traded as commodities among groups of organized crime for ransom, torture, and rape. To date, no international legal regime is designed to address their particular challenges. At the same time, the framework of human trafficking has been widely successful (though widely criticized)¹²³ in assisting individuals who were coercively moved across borders and exploited by criminals. Like victims of human trafficking, the Sinai victims were moved from place to place without effective control of their whereabouts, and were exploited for profit. In both situations, there is money to be made from cross-border control over the victims.

However, as explained in the following sections, the trafficking framework is unique. It has explicit boundaries and, as is well known, it was generally formed to deal with “trafficking” for sex work and forced labor. Despite this feature, the framework is still open textured, meaning it was intentionally designed in a way that allows new, emerging forms of exploitation to be included.¹²⁴ The open texture allows for new and unpredicted problems and emerging global practices to be addressed and potentially included. Ransom Kidnapping—at least in its Sinai version— is a new form of commodification of individuals across borders that has been increasingly practiced on a global scale.¹²⁵ Given those characteristics, the most suitable legal framework currently available to address the problem of Ransom Kidnapping appears to be that of human trafficking. Under such circumstances, the phenomena of Ransom Kidnapping must be

122. *See supra* note 96.

123. *See, e.g., supra* note 26.

124. *See, e.g., infra* note 144.

125. *See supra* note 17 (noting other places where Ransom Kidnapping is reported).

carefully examined against the human trafficking framework. Such examination is also necessary because of the significant misuse of the “trafficking” definition in connection with various situations (Sinai included), without reasoning or attention to the legal implications and the definition under international law. This misuse creates confusion and uncertainty for academics, practitioners, and judges.¹²⁶

Should the Sinai victims be recognized as trafficking victims, and hence be “rescued” from the general policy of detention and lack of basic rights which ordinarily applies to most asylum seekers? Can a framework that was carefully crafted to address sex work and, to a lesser extent, forced labor, be applied to this ostensibly unrelated problem? The following sections are dedicated to these questions.

II.

HUMAN TRAFFICKING - DEFINITIONS AND LIMITATIONS

Despite its universal-sounding title, human trafficking is extremely limited. In fact, this legal framework is almost exclusively used for the prevention of coerced and deceptive movement of persons, especially women and girls, for sex work and forced labor. The framework’s strict boundaries are dictated by concrete definitions, manifested by two central legal instruments that were established almost two decades ago, namely: the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (Trafficking Protocol);¹²⁷ and the United States Trafficking Victims Protection Act of 2000 (TVPA).¹²⁸ These instruments were conceived as part of an international effort to fight the exploitation of individuals for the purpose of sex work or forced labor. Though these instruments provided innovative definitions of trafficking in international law, they were not the first to use the term in an international context. In fact, this term was used in a series of treaties starting as early as 1904, initially in the context of what was referred to as “white slavery,” or, in other words, the transportation of women and girls for prostitution.¹²⁹ Although the current version of trafficking—rooted in the late

126. See, e.g., Carling, *supra* note 24; *infra* text accompanying notes 267 and 268.

127. Trafficking Protocol, *supra* note 27.

128. TVPA, *supra* note 28. As noted, although the TVPA is a domestic norm and is not international *per se* (and therefore analytically distinct from the Trafficking Protocol), as this Article shows, this instrument has the most significant influence on state behavior in the struggle against human trafficking.

129. Shamir, *A Labor Paradigm*, *supra* note 26, at 84–85; International Agreement for the Suppression of the White Slave Traffic, 1 L.N.T.S. 83 (entered into force July 18, 1905), as amended by

The UN General Assembly on Dec. 3, 1948, 30 UNTS 23; Later treaties include: International Convention for the Suppression of the White Slave Traffic, 3 LNTS 278 (entered into force Aug. 8, 1912), as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, 30 UNTS 23 (Dec. 3, 1948); International Convention for the Suppression of the Traffic

1980s—is defined more broadly, it seems that these early twentieth-century roots are partly responsible for the still sex-centric regimes manifested in the 2000 definitions, as well as in practice. Examining the boundaries of the existing legal framework is crucial for accurately assessing Ransom Kidnapping against it. The following sections will try to do so by contextually addressing the two central definitions of trafficking.

A. *The United Nations' Trafficking Protocol's Definition*

The current version of trafficking began crystallizing in the late twentieth-century within the broader context of the United Nation's "political will" to fight transnational crime.¹³⁰ This process resulted in the Convention Against Transnational Organized Crime,¹³¹ which is supplemented by three protocols opened for signature in Palermo, namely: the Trafficking Protocol,¹³² the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol),¹³³ and the Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.¹³⁴ The drafting process took place in Vienna and involved a wide debate encompassing multiple actors and interests (e.g. feminists and feminist organizations advocating for focus on prostitution on the one hand and representatives of the "developed world" seeking to advance border control on the other).¹³⁵ The result was the Trafficking Protocol, with the definition of trafficking set forth in Article 3 (emphasis added):

in Women and Children, 9 LNTS 415 (entered into force June 15, 1922), as amended by The UN General Assembly on Oct. 20, 1947, 53 UNTS 13; International Convention for the Suppression of the Traffic in Women of Full Age, 150 L.N.T.S. 431, (entered into force Aug. 24, 1934), as amended by The UN General Assembly on Oct. 20, 1947, 53 UNTS 13; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271, (entered into force July 25, 1951); *see generally* GALLAGHER, *TRAFFICKING*, *supra* note 121, at 13–16; *see also* Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 361–66 (2006), for an historic overview in the context of domestic legislation developments.

130. LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 241 (2003); Shamir, *A Labor Paradigm*, *supra* note 26, at 85.

131. G.A. Res. 55/255, annex, Convention Against Transnational Organized Crime (May 31, 2001); *see also* GALLAGHER, *TRAFFICKING*, *supra* note 121, at 69–70.

132. Trafficking Protocol, *supra* note 27.

133. G.A. Res. 55/25, annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air (Nov. 15, 2000) [hereinafter the Smuggling Protocol].

134. G.A. Res. 55/255, annex, Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (May 31, 2001) [hereinafter the Firearms Protocol].

135. *See* Halley, *After Gender*, *supra* note 26, at 905–08 for the various actors who were involved in the crafting of the Trafficking Protocol's definition, including the central role of "structuralist sexual-subordination feminists"; *see also* GALLAGHER, *TRAFFICKING*, *supra* note 121, at 16–29.

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. *Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;* (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article. . .¹³⁶

This definition is considered relatively broad.¹³⁷ For a trafficking claim to be successfully established, the following three elements must be present: *action*, *means*, and *purpose*. In the context of the current discussion, attention should be given mainly to the third component, *purpose*.¹³⁸ Although Article 3(b) deems consent by a trafficking victim irrelevant, one of the major distinctions between trafficking and smuggling is the migrant’s free will.¹³⁹ If she travels “voluntarily” her conduct will often be criminalized as a “smuggled” person and assistance will not be granted.¹⁴⁰ While Ransom Kidnapping clearly satisfies the *means*

136. Trafficking Protocol, *supra* note 27, art. 3.

137. Shamir, *Nationalism, Borders, and Markets*, *supra* note 12, at 4 (“This broad definition is considered one of the Protocol’s most significant achievements in that it is gender neutral and extends beyond sex trafficking to include various types of labor market exploitation”).

138. See GALLAGHER, TRAFFICKING, *supra* note 121, at 29–33 (discussing the *action* and *means* elements); see also James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking”*, 49 VA. J. INT’L L. 1, 48–51 (2008) [hereinafter Hathaway, *Human Rights Quagmire*] (critiquing the *means* element as focusing merely on the “transactional dimension” while neglecting other forms of exploitation and slavery); cf. Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 814–18 (2009) [hereinafter Gallagher, *A Response*] (“[I]t is difficult to identify a ‘contemporary form of slavery’ that would not fall within [the definition’s] generous parameters.”). The second component, *means*, will be addressed when trafficking and smuggling are compared in Part III, *infra*.

139. Trafficking Protocol, *supra* note 27, art. 3(b).

140. See, e.g., Abdelnaser Aijehani, *Legal Definition of the Smuggling of Migrants in Light of the Provisions of the Migrant Smuggling Protocol*, 79 J. CRIM. L. 122, 130–31 (2015); Ryszard Piotrowicz & Jillyanne Redpath-Cross, *Human Trafficking and Smuggling*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 234, 246–47 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross eds., 2012). This will-based dichotomy has been heavily critiqued. See, e.g., JESSICA ELLIOTT, THE ROLE OF CONSENT IN HUMAN TRAFFICKING 143 (2015) (“These examples may represent how one perceives ‘pure’ cases of smuggling or trafficking, but in reality cases are rarely this simple.”); TOM OBOKATA, TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH 21–22 (2006) (“[T]he definition of smuggling means that those smuggled are willing participants in illegal migration and this may provide a justification for States to apply strict enforcement measures such as arrest, detention and deportation against them.”); Ahmed & Seshu, *supra* note 26; see Julie Kaye & Bethany Hastie, *The Canadian Criminal Code Offence of Trafficking in Persons: Challenges from the Field and within the Law*, 3 SOC. INCLUSION 88, 88 (2015), for “mirror” arguments regarding trafficking, criticizing the refusal to

component in the Trafficking Protocol's definition, it should be noted that arguments were made for further expansion of the coercion element's scope beyond physical and psychological domination to include, for example, economic pressures, terrorism, and armed conflicts.¹⁴¹ But even if interpreted more narrowly, the coerced holding of an individual until ransom is paid on their behalf, let alone when torture and rape are involved, clearly satisfies the *means* element.

Indeed, the elements of *action* and *means* of trafficking do not pose a significant challenge to Ransom Kidnapping to be considered "trafficking" under the Trafficking Protocol's definition. However, things become murky in connection with the third element, *exploitation*. This element is traditionally perceived in the literature as the fundamental distinction that separates smuggling from trafficking.¹⁴² Significantly, *exploitation* is the factor distinguishing the two definitions despite its open texture and the fact that it is not defined under the Trafficking Protocol itself. Instead, the definition provides that "exploitation shall include" certain types of behaviors "at a minimum."¹⁴³ This language makes clear that other types of exploitation may exist beyond that minimum. Gallagher explains that "[t]he open definition ('at a minimum') was included to ensure that unnamed or new forms of exploitation would not be excluded by implication."¹⁴⁴ Another feature derived from the exploitation component is the nature of the relationship between the trafficker and the trafficked person. This is an ongoing relationship, unlike the short-term relationship in a smuggling setting which ends as far as the law is concerned once the smuggled person has crossed the border into the destination state.¹⁴⁵

In sum, given these three elements, there is an open interpretive question regarding what constitutes trafficking under the Trafficking Protocol. The open texture of the exploitation element leaves room to advocate for a more inclusive approach and invites legal innovation in connection with the Trafficking Protocol.

recognize free will among trafficked "victims" and its problematic consequences; Abramson, *supra* note 10; see also *infra* note 179, for the legal structure of criminalization of smuggled migrants.

141. See, e.g., Linda A. Malone, *Economic Hardship as Coercion Under the Protocol on International Trafficking in Persons by Organized Crime Elements*, 25 FORDHAM INT'L L.J. 54 (2001); OBOKATA, *supra* note 140, at 25.

142. GALLAGHER, TRAFFICKING, *supra* note 121, at 51–52; Fitzpatrick, *supra* note 72, at 1149–51; An attempt was made to advocate for the interpretation of *exploitation* in the Trafficking Protocol to apply to cases of kidnapping for ransom. See Brhane, *supra* note 7; see also *infra* Part III (discussing human smuggling).

143. Trafficking Protocol, *supra* note 27, art. 3(a); see Susan Marks, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 281 (Susan Marks ed., 2008) ("[S]imply grasping exploitation can itself be hard. This is especially the case in our time, when what is at question is often . . . less a matter of face-to-face relations than of long and complex chains of interactions."); see also *id.* at 293–95, for a discussion on exploitation in the human trafficking framework specifically.

144. GALLAGHER, TRAFFICKING, *supra* note 121, at n.90.

145. See Trafficking Protocol, *supra* note 27, art. 3(a) (naming forms of exploitation as "sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"). Interestingly though, the Trafficking Protocol also includes "removal of organs" in its definition of exploitation, which is typically characterized with an expiration-date interaction as well.

But it seems that the attempt to ensure inclusion of unnamed forms of exploitation, by using a non-exhaustive list of exploitation forms in Article 3 of the Trafficking Protocol, did not push the legal framework of trafficking far beyond sex work and forced labor. The decision to include or exclude different forms of exploitation from the definition remained, to a large extent, a matter of policy and ad hoc determination. Therefore, the Protocol does not necessarily guarantee protection to victims of unnamed forms of exploitation.¹⁴⁶ But in the context of the current discussion, this conclusion also means that there is a legal possibility to apply the Protocol's definition to Ransom Kidnapping.

B. *The U.S. Trafficking Victims Protection Act's Definition*

After discussing the definition of trafficking under the United Nation's Trafficking Protocol in the prior section, this section now turns to another definition of trafficking under a domestic U.S. legal mechanism. Two months before the Trafficking Protocol was adopted, in October 2000, President Clinton signed the United States Trafficking Victims Protection Act of 2000 (TVPA).¹⁴⁷ As with the Trafficking Protocol that followed, the TVPA was enacted as part of an ongoing global effort to abolish human trafficking and was formed to supervise states and incentivize them to actively pursue that cause. The TVPA was designed to attack human trafficking in three fronts, also known as "the three Ps": prosecuting traffickers, protecting victims, and preventing trafficking. A fourth "P," partnership, was added in 2009.¹⁴⁸ In order to measure compliance with "minimum standards for the elimination of trafficking"¹⁴⁹ and evaluate countries, the TVPA established, among other arrangements, a three-tier ranking system for states with respect to their performance in addressing trafficking within these categories.¹⁵⁰

According to the TVPA's ranking system, states that meet the statute's minimum standards will enjoy tier 1 status. Other states will be classified in either

146. See Hathaway, *supra* note 138, at 10–11; see also *infra* Part III.A, for a discussion on the importance of classification.

147. TVPA, *supra* note 28, 22 U.S.C. § 7106(a); see also ALICIA W. PETERS, RESPONDING TO HUMAN TRAFFICKING: SEX, GENDER, AND CULTURE IN THE LAW 44–55 (2015) (providing an overview and legislative history); Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 60–69 (2001).

148. U.S. DEP'T OF STATE, PARTNERSHIPS, <http://www.state.gov/j/tip/4p/partner/index.htm> ("[P]artnerships augment efforts by bringing together diverse experience, amplifying messages, and leveraging resources, thereby accomplishing more together than any one entity or sector would be able to alone."); see also Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT'L L. 1355, 1404–13 (2008) (suggesting the inclusion of two additional "P's"—Participation and Provision).

149. TVPA, *supra* note 28, 22 U.S.C. § 7106(a).

150. Tier-2 also includes a secondary category of a "watch list" for "[c]ountries whose governments do not fully meet the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards." 2017 TIP REPORT, *supra* note 19, at 45. See also Hacker, *supra* note 30, at 15–17; GALLAGHER, TRAFFICKING, *supra* note 121, at 480–81 (discussing the evaluation and reporting system).

tier 2, tier 2's watch list, or tier 3, in accordance with their governments' efforts "to bring themselves into compliance" with the TVPA standards.¹⁵¹ While low-ranked states are at risk of being sanctioned,¹⁵² high-ranked states may be eligible for U.S. funds to subsidize their anti-trafficking endeavors.¹⁵³ For this purpose, the TVPA established a designated office in the State Department, responsible for producing annual Trafficking in Persons Reports ("TIP Reports") which periodically rank and assess states.¹⁵⁴

In addition, the TVPA delegates certain domestic and international anti-trafficking responsibilities to federal agencies, including the Department of Homeland Security, the Department of Justice, the Department of Labor, the Department of State (responsible for the TIP Reports), and the Department of Health and Human Services.¹⁵⁵ Although TIP reports in recent years also paid attention to "labor trafficking," the TIP reports system remains focused mainly on preventing trafficking of women and girls for sex work, resembling in that sense the early twentieth-century concept of the framework.¹⁵⁶

Since its enactment, the TVPA has been the subject of a heated academic debate, being both criticized by scholars who pointed out its shortcomings in facing human trafficking both domestically¹⁵⁷ and internationally,¹⁵⁸ as well as

151. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 45–50 (2015), <http://www.state.gov/documents/organization/245365.pdf> [hereinafter 2015 TIP REPORT] ("Tier 1: The governments of countries that fully comply with the TVPA's minimum standards for the elimination of trafficking"; "Tier 2: The governments of countries that do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards"; "Tier 3: The government of countries that do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards. . . .").

152. GALLAGHER, TRAFFICKING, *supra* note 121, at 268–69 ("[T]he United States Government will not, as a matter of policy, provide nonhumanitarian, non-trade-related assistance to any government that does not comply with its prescribed minimum standards to prevent and punish trafficking and that is not making significant efforts to bring itself into compliance.").

153. See Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Report*, 12 HUM. RTS. REV. 381 (2011); Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sections to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 449–54 (2006).

154. Halley, *After Gender*, *supra* note 26, at 907–08.

155. *Notes: Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012, 1012–13 (2013) [hereinafter *Counteracting the Bias*]; see generally U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2014 (2015), <https://www.justice.gov/ag/file/799436/download>.

156. Shamir, *A Labor Paradigm*, *supra* note 26, at 92–93. See also *supra* Part II, for further discussion on this concept.

157. See, e.g., *Counteracting the Bias*, *supra* note 155; Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143 (2011); Jennifer M. Chacón, *Misery And Myopia: Understanding The Failures Of U.S. Efforts To Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006).

158. See, e.g., Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609 (2014); Hacker, *supra* note 30; Ayla Weiss, *Ten Years of Fighting Trafficking: Critiquing the Trafficking in Persons Report through the Case of South Korea*, 13 ASIAN

praised for the significant changes and advancement it brought.¹⁵⁹ In terms of defining trafficking and setting its boundaries, the TVPA focuses on “Severe Forms of Trafficking in Persons” with two separate categories: *sex* trafficking and *labor* trafficking. The definition reads as follows:

SEVERE FORMS OF TRAFFICKING IN PERSONS.—The term “severe forms of trafficking in persons” means— (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) 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.¹⁶⁰

The TVPA’s definition of trafficking seems to make it even more about sex work than the Trafficking Protocol. As Halley shows, “[t]he TVPA segregates prostitution as a distinct type of severe trafficking and places fewer conditions on its being deemed to be severe trafficking than on labor in any other conceivable sector.”¹⁶¹ In turn, this sex-centric nature sets strict boundaries to the definition of trafficking and limits the array of incidents eligible to be considered as such. Unlike with the Trafficking Protocol’s open texture,¹⁶² there is arguably no room for an interpretive effort that examines whether Ransom Kidnapping falls within the scope of the TVPA’s definition of trafficking. Not only does the TVPA define human trafficking as merely the exploitation of an individual for the purpose of “commercial sex” or forced labor, a 2013 official Fact Sheet by the Human Smuggling and Trafficking Center,¹⁶³ which operates under the United States Immigration and Custom Enforcement (ICE), explicitly excluded Ransom Kidnapping from this definition by setting forth a concrete example:

If an individual is held hostage or held for ransom and abused—that is, someone who paid to be smuggled into another country is held captive and raped or tortured until they pay a ransom or smuggling fee—but is not exploited for labor or commercial sex, the individual is not a trafficking victim.¹⁶⁴

PAC. L. & POL’Y J. 304 (2012); Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 623–29 (2009).

159. See, e.g., Frances Bernat & Tatyana Zhilina, *Trafficking in Humans: The TIP Report*, 5 SOC. COMPASS 452, 457–58 (2011); Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does the Law Deter Crime?*, 2 LOY. U. CHI. INT’L L. REV. 193 (2005).

160. TVPA, *supra* note 29, 22 U.S.C. § 7102(9).

161. Halley, *After Gender*, *supra* note 26, at 909.

162. See *supra* note 144.

163. The Human Smuggling and Trafficking Center operates under the United States Department of Homeland Security, and was established in the Intelligence Reform and Terrorism Prevention Act of 2004. Pub. L. No. 108-458, 118 Stat. 3638 (2004).

164. HUMAN SMUGGLING AND TRAFFICKING CENTER, FACT SHEET: HUMAN TRAFFICKING VS. HUMAN SMUGGLING 4 (2013), <http://www.state.gov/documents/organization/226276.pdf> [hereinafter TRAFFICKING VS. SMUGGLING].

The Fact Sheet continues by stating that “although a smuggled person may be subjected to physical or sexual violence or held for ransom, the individual is not a trafficking victim unless he or she is compelled into forced labor or commercial sex.”¹⁶⁵ The TVPA is thus knowingly and explicitly interpreted to deny victims of Ransom Kidnapping the status of trafficking victims. This strict exclusion may be attributed to regional challenges the United States faces, namely the significant volume of kidnapping for ransom among smuggled persons in the Southern border.¹⁶⁶

Despite this current approach, just a few years earlier the United States explicitly acknowledged kidnapping for ransom as a type of human trafficking, both generally and concretely with regard to Thai traffickers and Burmese victims. In the 2009 TIP Report, under the title “Buying or Negotiating a Victim’s Freedom,” the Report reads as follows (emphasis added):

If *trafficking* victims are freed because of a payment or negotiation, the *trafficker* remains unpunished and unrepentant and is free to find new victims to perform the same service. By ‘purchasing’ a victim’s freedom, well-intentioned individuals or organizations may inadvertently provide *traffickers* with financial incentive to find new victims.¹⁶⁷

Further, the 2009 TIP Report recommends to fight Ransom Kidnapping using the TVPA rather than negotiating with traffickers.¹⁶⁸ When the official authority in charge of implementing the TVPA calls to fight a certain practice with anti-trafficking measures, the only conclusion is that this practice constitutes trafficking under TVPA standards. As the Thai/Burmese discussion in the 2009 TIP Report makes clear, this *de facto* recognition of Ransom Kidnapping as “trafficking” by the United States is with respect to victims who were not exploited in the sex or forced labor markets. And only the victims who were unable to pay the ransom were forced into these markets.¹⁶⁹ In other words, trafficking is established in the stage of kidnapping and negotiating for ransom, without exploitation through sex work or forced labor.

Moreover, in a symposium on human trafficking held in 2008, the-then Homeland Security Secretary Michael Chertoff described the process of smuggling that transforms into trafficking as a result of the demand for ransom:

165. *Id.* at 5.

166. *See, e.g.*, Jim Walters & Patricia H. Davis, *Human Trafficking, Sex Tourism, and Child Exploitation on the Southern Border*, 2 J. APPLIED RES. ON CHILD. 1, 18 (2011).

167. 2009 TIP REPORT, *supra* note 17, at 24.

168. *Id.*

169. *Id.* at 29 (“Immigration officials have sold refugees to Thai traffickers, who demand a ransom in exchange for freedom. The traffickers sell those who are unable to pay to brothels, fishing vessels, and plantations.”).

Let me be clear about this: the line between so-called voluntary migration and human trafficking is not a very bold line. It is often the case that people who begin the movement across the border in a voluntary way, because they want to come across in order to get work for themselves, quickly turn into victims when they are held for ransom, or when they are required to work off the cost of the smuggling by paying off the vast majority of their wages to the smuggling organizations. Therefore, by cracking down on illegal migration, we are actually cracking down on the kind of network activity, which actually facilitates human trafficking and victimization, as well.¹⁷⁰

In addition to pushing towards labeling situations of Ransom Kidnapping as human trafficking under the TVPA, Mr. Chertoff's statement further strengthens the critique that sees human trafficking as a matter of international criminal law, rather than human rights law, and again proves that border control is a higher priority than victim protection.¹⁷¹

However tempting, this inconsistency cannot be treated as mere semantics that do not reflect normative positions. Instead, it exposes how fragile these distinctions really are, and how easily they can be manipulated and framed in accordance with the different actors involved and the balance of power between them (admittedly, as in many other contexts). It proves that the TVPA's definition of trafficking can both tolerate and reject Ransom Kidnapping interchangeably, and how complex and multilayered the reality actually is in comparison to the binary legal ambitions to reflect it. The next part will add yet another layer, by bringing the human smuggling framework into the story and mapping its relations and tensions with the human trafficking framework set forth above.

III.

THE SMUGGLING/TRAFFICKING DISTINCTION

The Vienna meetings, where the Trafficking Protocol was crafted, also resulted in the "Smuggling Protocol."¹⁷² In part, this move was meant to bring clarity to the "confusion between the concepts of migrant smuggling and what is presently referred to as human trafficking."¹⁷³

170. Michael Chertoff, Sec'y, Dep't of Homeland Sec., Remarks at the Stop Human Trafficking Symposium (Sept. 9, 2008), <https://www.hsdl.org/?view&did=235171>.

171. See *infra* note 183.

172. See The Smuggling Protocol, *supra* note 133; The Firearms Protocol, *supra* note 134. As mentioned above, a third protocol emanated from the meetings as well.

173. ANNE T. GALLAGHER & FIONA DAVID, THE INTERNATIONAL LAW OF MIGRANT SMUGGLING 44 (2014).

A. *Defining Smuggling in the Shadow of Trafficking: Is Classification Important?*

Unlike trafficking, which is associated primarily with coercion and exploitation,¹⁷⁴ smuggling is simply defined in the Protocol as the “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”¹⁷⁵ As per this broad definition, smuggling is perceived as the voluntary illegal transportation of migrants across borders with the paid assistance of others. Exploitation and coercion are absent from this framework. This shifts the focus from the migrating person to the act of facilitating her movement.¹⁷⁶ As Gallagher and David note, “this distinction also served to remove the ‘exploitation’ element from the concept of migrant smuggling, thereby shifting the focus of the definition on the *action* of migrant smuggling rather than its *impact* on those who are smuggled.”¹⁷⁷ This difference makes classification crucial from the victim’s/migrant’s perspective.

Unlike trafficking, which is primarily considered a crime against the trafficked victim, smuggling is conceived as a crime against the state.¹⁷⁸ In cases of smuggling, both the smuggler and the smuggled person can be criminalized.¹⁷⁹

174. As noted in Part II.A., the definition of trafficking under the Protocol is “the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article.” See Trafficking Protocol, *supra* note 27, art. 3.

175. The Smuggling Protocol, *supra* note 133, art. 3(a).

176. It is important to note that the Smuggling Protocol also includes a semi-hybrid definition of smuggling, by adding smuggling in “aggravating circumstances.” Such circumstances are defined as ones “[t]hat endanger, or are likely to endanger, the lives or safety of the migrants concerned” or circumstances “[t]hat entail inhuman or degrading treatment, including for exploitation, of such migrants an instruction for state parties, urging them to adopt domestic legislation.” *Id.* at art. 6(3). Since an element of “exploitation” is included, it is unclear how, in certain cases, “aggravating circumstances” differs from trafficking. However, the existence of this type of smuggling in the Protocol does not pose a challenge to the argument made in this Article (*e.g.*, by suggesting that Ransom Kidnapping is in fact merely aggravated smuggling and not a type of trafficking), since it is a provision of *criminalization*, and thus relevant only to smugglers and bears no significance to victims. *See id.*

177. GALLAGHER & DAVID, *supra* note 173, at 31.

178. ALISON SISKIN & LIANA S. WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 31 (2009); Mattar, *supra* note 129, at 370-71.

179. In spite of Article 5 of the Smuggling Protocol, which provides that smuggled migrants will not be criminalized for being the object of the smuggling act, article 6(4) allows states to preserve and implement their domestic criminal law. States often use this path to criminalize smuggled persons. *See* The Smuggling Protocol, *supra* note 133, arts. 5, 6(4); GALLAGHER & DAVID, *supra* note 173, at 358-

Although criminalization of trafficking victims is also possible,¹⁸⁰ the conceptual and practical distinction between the coerced and exploited trafficking *victim* and the choosing, free-willing smuggled *migrant* is an important one.¹⁸¹ Despite multiple real-life similarities, it can be argued (at least according to black-letter law), that smuggling and trafficking are working in somewhat different spheres: while the former focuses on criminalizing smugglers, the latter is largely dedicated to protecting victims.¹⁸² If this difference is taken seriously, then classification carries great weight as it determines whether an individual is a criminal or the victim of a crime.

In order to understand the significance of classification, a closer examination of the scope of victim protection within the trafficking regime, beyond the law-in-books, is necessary. Chantal Thomas offers such an outlook, arguing that the Trafficking Protocol should be classified as international criminal law and not international human rights law. In her view, the Trafficking Protocol “does contain language promoting the protection of human rights of trafficking victims” with regard to reducing the suffering of victims. However, she notes, “whereas the Protocol’s language relating to criminalization and repatriation establishes mandatory obligations, the provisions relating to assistance of victims and human rights protection are aspirational.”¹⁸³ Halley generally agrees with this line of argument and sees the anti-trafficking regime as a “border-control regime that grants a few penurious protections for migrants.”¹⁸⁴ Indeed, acknowledging the trafficking regime’s shortcomings and looking beyond its declared purposes is necessary for putting the current discussion in the right context.

The scope of protection provided to victims under the trafficking regime is generally limited, especially in comparison to the broad scope of “protection” it

60; see also James C. Hathaway, *Prosecuting a Refugee for “Smuggling” Himself* (Univ. of Mich. Law Sch., Public Law And Legal Theory Research Paper No. 429, 2014), <http://www.peacepalacelibrary.nl/ebooks/files/388117087.pdf> (critiquing criminalization in the context of refugee law and access to protection and noting that “Refugee Convention Art. 31(1) proscribes the penalization of a person seeking recognition of refugee status for having engaged in ‘human smuggling’ if the relevant actions were taken by that person either individually or collectively for purposes of securing access to protection.”) [hereinafter Hathaway, *Prosecuting a Refugee for “Smuggling” Himself*].

180. See Halley, *After Gender*, *supra* note 26, at 912–14; Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 990–91 (2001) [hereinafter Gallagher, *Preliminary Analysis*].

181. GALLAGHER & DAVID, *supra* note 173, at 72; Piotrowicz & Redpath-Cross, *supra* note 140, at 247.

182. See, e.g., Erick Gjerdingen, *Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as “Exploitation” and Smuggling as “Choice” Along the Thai-Burmese Border*, 26 ARIZ. J. INT’L & COMP. L. 699, 716–17 (2009).

183. Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL’Y J. 405, 438–39 (2011); see also Halley et al., *From the International to the Local*, *supra* note 26, at 388 (discussing the “unintended consequences” of sex trafficking to the “border control agendas of states”); Dinan, *supra* note 23 (discussing the “further tightening of immigration control” and the pushing of migrants underground in Japan due to anti-trafficking measures).

184. Halley, *After Gender*, *supra* note 26, at 916.

provides to border control.¹⁸⁵ Whether intended or not, this outcome is at odds with the trafficking regime's purported aspirations and human rights language. Despite these shortcomings, classification still matters. This is especially true from the victim's point of view because there are vital advantages in being identified as a trafficked person under either the TVPA or the Trafficking Protocol. As for the TVPA specifically, one of the "P's" that sets the scale under which states are evaluated, stands for (victim) Protection. Further, one of the parameters for classifying a state within the tier system is the "serious and sustained efforts to eliminate severe forms of trafficking" demand,¹⁸⁶ which includes measuring the following:

Whether the government of the country protects victims of severe forms of trafficking in persons. . . including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims.¹⁸⁷

Therefore, states committed to the TVPA regime are urged to address sensitive issues such as problematic repatriation, inappropriate incarceration, and special training for agents. The Trafficking Protocol also addresses issues of victim protection. Compared to the minimal entitlements provided under the Smuggling Protocol, the Trafficking Protocol provides victims, whether by soft encouragement of states or by actual demands, with "special rights." Those rights include temporary or permanent permission to remain in the destination state's territory, as well as physical and psychological care and detention relief.¹⁸⁸

185. Thomas, *supra* note 183, at 438; Halley, *After Gender*, *supra* note 26, at 916; *see also* Miriam Ticktin, *Sexual Violence as the Language of Border Control: Where French Feminist and Anti-immigrant Rhetoric Meet*, 33 SIGNS 863, 866–69 (2008) ("While the law is purportedly about holding mafia and trafficking networks accountable for exploiting women, in practice this law permits increased identity checks by the police, blending easily into a policing of undocumented immigrants."); Jennifer M. Chacón, *Tensions And Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1637 (2010) [hereinafter Chacón, *Tensions and Trade-Offs*] (describing how policymakers in the United States view anti-trafficking efforts and in particular noting that "government officials frequently have mentioned antitrafficking efforts within the context of border security. Antitrafficking is generally listed as one of a number of objectives that officials hope to achieve through an increased law enforcement presence at the border."); Marina Zaloznaya & John Hagan, *Fighting Human Trafficking or Instituting Authoritarian Control? The Political Co-optation of Human Rights Protection in Belarus*, in GOVERNANCE BY INDICATORS 344, 346 (Kevin E. Davis et al. eds., 2012) (offering an argument that is critical of the "selective compliance model" of governments with human rights obligations, and their manipulation of it for achieving other goals while "international indicators may fail to accurately assess human rights protections in cases of strategic selectivity by the ranked government").

186. TVPA, *supra* note 28, 22 U.S.C. § 7106(a)(4).

187. *See id.* § 7106(b)(2); 2017 TIP REPORT, *supra* note 19, at 38.

188. GALLAGHER, TRAFFICKING, *supra* note 121, at 278–80. Despite the general priority of the Trafficking Protocol in terms of entitlements, special attention should be given to the issue of

Despite such advancements, the protections provided to trafficking victims under the current regimes are far from perfect. They are dicey because they legitimize the tightening of border control under a veil of human rights. Rather than strict mandatory obligations, the protections act as soft guidelines.¹⁸⁹ Further, even when obligations do exist, states have been reluctant to fully comply.¹⁹⁰ Still, from the victim's point of view "[t]here is. . . much to be gained from being classified as trafficked, and much to lose from being considered smuggled."¹⁹¹ Significantly, that is because "[t]he difference, in terms of rights and entitlements owed to the trafficked individual (in comparison to a smuggled person), is substantial."¹⁹²

In sum, even with the grave deficiencies in the protections provided under the current trafficking regimes, a victim will generally be better protected when identified as a trafficking victim rather than as a smuggled migrant. Classification is therefore important.¹⁹³

B. *New Cracks in the Smuggling/Trafficking Distinction*

As alluded by the TVPA's inconsistency in connection with Ransom Kidnapping,¹⁹⁴ trafficking and smuggling are in serious tension with one another. Despite an explicit law-in-books distinction, in reality the two definitions often overlap, collide, and essentially apply simultaneously. The ability to reach a clear-cut result by accurately labeling a given situation as one of trafficking or of smuggling is limited, and the decision often seems arbitrary.

Still, given the strict binary definitions separating the two frameworks, the overarching consensus among scholars that, in practice, the line between the two

criminalization and prosecution. Whereas the Smuggling Protocol specifically provides in Article 5 that smuggled persons should not be criminalized for the act of being smuggled (but *can* be prosecuted under domestic laws according to Article 6(4)), *see supra* note 179), the Trafficking Protocol is silent in this regard. Some scholars have interpreted this lacuna as providing permission for prosecution, rather than a prohibition. *See* Halley, *After Gender*, *supra* note 26, at 912; Gallagher, *Preliminary Analysis*, *supra* note 180, at 990–91 (noting that an attempt to include a provision prohibiting prosecution failed).

189. Thomas, *supra* note 183, at 438; Halley, *After Gender*, *supra* note 26, at 916; Gallagher, *Preliminary Analysis*, *supra* note 180, at 990–91.

190. GALLAGHER, *TRAFFICKING*, *supra* note 121, at 276–78.

191. Jacqueline Bhabha & Monette Zard, *Smuggled or Trafficked?*, 25 *FORCED MIGRATION REV.* 6, 7 (2006).

192. GALLAGHER, *TRAFFICKING*, *supra* note 121, at 278.

193. There is also a lot to be gained from being classified as a trafficking victim in the Sinai case study specifically, in Detention Review Tribunals and Appeals Tribunals. *See* discussion *infra* Part IV; *see also* U.S. DEP'T OF STATE, *HUMAN TRAFFICKING & MIGRANT SMUGGLING: UNDERSTANDING THE DIFFERENCE* (2017), <https://www.state.gov/documents/organization/272325.pdf> ("Human trafficking and migrant smuggling often overlap in reality, which makes it particularly important that policymakers, law enforcement, immigration officers, and civil society organizations are conscious of the differences between them. When human trafficking is confused with migrant smuggling, trafficking victims may not receive the protections, services, or legal redress to which they are entitled and may be vulnerable to being re-exploited.")

194. *See supra* Part II.B.

is often blurry and uncertain is quite surprising.¹⁹⁵ Indeed, the literature has long acknowledged the murky zone between trafficking and smuggling, avoidable only in paradigmatic cases.¹⁹⁶ The alleged open texture of the Trafficking Protocol's exploitation term, meant "to ensure that unnamed or new forms of exploitation would not be excluded by implication,"¹⁹⁷ does not suffice for successfully containing the multilayered and developing reality on the ground.

Moreover, current changes in international migration patterns seem to have deepened the cracks in the trafficking and smuggling distinction—further undermining its legitimacy, beyond a mere recognition of its blurriness. In an article, Jørgen Carling, Ann Gallagher, and Christopher Horwood address the increasing diversity in irregular migration and the changing role of the trafficking and smuggling definitions within this reality. The Article directly mentions situations similar in nature to Ransom Kidnapping as unsuitable to the existing framework (emphasis added):

Those who facilitate irregular movement have rapidly expanded and diversified their operations, with some recognising the opportunity to maximise their profits by exploiting smuggled migrants either during their journey or at their destination. *In such situations, the carefully crafted distinction between trafficking and smuggling dissolves.*¹⁹⁸

The authors continue by stressing that "[d]espite the diligent efforts of lawyers and policy-makers, it has become increasingly apparent that the legal distinction between migrant smuggling and human trafficking does not always stand in the real world."¹⁹⁹ One of the authors, Gallagher, took part in drafting the Trafficking Protocol and not once defended the legitimacy of its definitions from

195. See, e.g., DOMINIKA B. JANSSON, MODERN SLAVERY: A COMPARATIVE STUDY OF THE DEFINITION OF TRAFFICKING IN PERSONS 50–51 (2015); Gallagher, *a Response*, *supra* note 138, at 817 ("It is important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world. Unless states were prepared to invent exploitation where it did not necessarily exist—or deny it where it did—they had little option but to separate formally the (inherently exploitative) practice of trafficking from the (only incidentally exploitative) practice of migrant smuggling. As a result, states were required to disregard the reality that both trafficking and migrant smuggling are processes that are often interrelated and almost always involve shifts, flows, overlaps, and transitions."); Bhabha & Zard, *supra* note 191, at 6–8; Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, 36 DENV. J. INT'L L. & POL'Y 9, 18 (2007); Fitzpatrick, *supra* note 72, at 1153; SISKIN & WYLER, *supra* note 178, at 370–71; SCHLOENHARDT, *supra* note 72, at 17–19.

196. See *id.*

197. GALLAGHER, TRAFFICKING, *supra* note 121, at n.90.

198. Jørgen Carling, Anne T. Gallagher & Christopher Horwood, *Beyond Definitions: Global Migration and the Smuggling–Trafficking Nexus* 4 (RMMS Discussion Paper No. 2, 2015), http://regionalmms.org/fileadmin/content/rmms_publications/RMMS_discussion_paper2-Beyond_DefinitionsNov_2015.pdf [hereinafter Carling et al., *Beyond Definitions*].

199. *Id.*

critics (while recognizing the aforementioned basic tensions).²⁰⁰ Her recognition of the frequent irrelevance of the existing definitions is a telling sign.²⁰¹

Further, in another article, Gallagher suggests that exploitation—which is the key to trafficking recognition and primarily distinguishes trafficking from smuggling—should be addressed with more flexibility, using a “threshold of seriousness.” This approach is meant to overcome the “current protection gap” and include more forms of exploitation.²⁰² However, it is fair to assume that putting open-textured standards for inclusion in the hands of border-centric states will not increase protection for victims. Such fluid standards may be potentially and undetectably abused. For example, a state may falsely achieve a high score (and funds) in the TVPA’s ranking system by not labeling persons as trafficking victims in order to keep trafficking statistics low.²⁰³

The fluidity and incompatibility of the definitions to current reality, and the resulting arbitrary classifications, is illustrated by an official fact sheet of the Human Smuggling and Trafficking Center.²⁰⁴ This center operates under the Department of Homeland Security. The center provides TVPA-related guidance on the proper way to classify a case as either trafficking or smuggling.²⁰⁵ The following fact sheet titled “Case Scenarios: Trafficking or Smuggling?” describes such a case and the classification process of a Ransom Kidnapping situation (emphasis added):

QUESTION: Mario wanted to come to the United States to work in construction and send money home to his family. He paid a smuggler \$3000 to facilitate his illegal entry through the Southwest border. Mario crossed the border with a group of other illegal migrants. Once they reached the United States, the smuggler took them to a safe house and demanded an additional \$10,000 from each migrant before he would release them. The smuggler locked the migrants in a basement, deprived them of food and water, and beat them. The smuggler told Mario he would kill Mario’s family in Mexico if he did not pay the ransom. The smuggler and his friends raped the female migrants, and the smuggler threatened additional abuse if the women did not pay the \$10,000. Were the migrants smuggled or trafficked?

200. See, e.g., Gallagher, *A Response*, *supra* note 138; GALLAGHER, *TRAFFICKING*, *supra* note 121, at 52 (“While acknowledging potential problems, it is also important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world. The distinction that has been created in international law between trafficking in persons on the one hand and smuggling of migrants on the other is a clear example of such a limitation. It is nevertheless understandable and defensible.”).

201. See, e.g., Carling et al., *Beyond Definitions*, *supra* note 198, at 5 (discussing “the inability of current legal concepts and structures to capture the complexity of what is happening”).

202. Anne T. Gallagher, *Exploitation in Migration: Unacceptable but Inevitable*, 68 COLUM. J. L. & INT’L AFF. 55, 68–69 (2015) [hereinafter Gallagher, *Exploitation in Migration*].

203. Gallagher alludes to this possibility. See Gallagher, *Exploitation in Migration*, *supra* note 202, at 65 (“[A]s long as trafficked victims are not identified as such. . . states will never be called to account for failing to discharge their obligations.”).

204. *TRAFFICKING VS. SMUGGLING*, *supra* note 168 (the Human Smuggling and Trafficking Center is part of the United States Immigration and Custom Enforcement (ICE), operating under the United States Department of Homeland Security).

205. *Id.*

ANSWER: The migrants were smuggled. The abuse and deprivation they suffered in the safe house do not constitute human trafficking, since the migrants were not forced to work or engage in commercial sex. *The women who were raped were victims of sexual assault but not trafficking, since the perpetrators did not pay to have sex with them. If the smuggler had charged his friends a fee for having sex with the women, at that point the women would have been subjected to commercial sexual exploitation and become victims of sex trafficking.*²⁰⁶

Even though anti-trafficking regimes (and particularly the TVPA) purport to focus on victims, tracing the logic behind this case scenario reveals that, at least as far as Ransom Kidnapping is concerned, the classification is completely detached from the victims' experience. The female migrants, from the previous example, were held for ransom and raped while traveling along the transportation route. However, the question of whether they will be identified as trafficking victims has nothing to do with their experiences or personal identity. The classification process focuses solely on the relationship between the "smuggler" and his friends: If the "smuggler" had charged a fee from his friends for the rapes, the women will be classified as trafficking victims and will be entitled to benefits and protections.²⁰⁷ But if they were raped "for free" they will be classified as "smuggled" individuals and receive nothing.²⁰⁸

Despite the fact that from the female victims' perspective, both scenarios are completely identical—the victims are not even likely to be aware of the difference—modes of relations between the "smuggler" and his rapist friends will dictate their rights and classification. This arbitrary and victim-detached classification method amplifies the weaknesses of the existing regime. And it fails to confront the personal experience of trafficked individuals. Evidently, this regime is neither attentive to the victims' individual needs nor seeks to provide them with suitable services and protections.²⁰⁹ This chunk of human trafficking law suggests, once again, that it is closer to international criminal law and border control than to human rights law.²¹⁰

206. TRAFFICKING VS. SMUGGLING, *supra* note 164, at 7.

207. To see the benefits coupled with being recognized as a trafficking victim one only needs to look at the way the TVPA examines whether a certain country makes "serious and sustained efforts to eliminate severe forms of trafficking in persons": "Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims." 22 U.S.C. § 7106(b)(2).

208. See Hathaway, *Prosecuting a Refugee for "Smuggling" Himself*, *supra* note 179 (noting that they could also face criminalization).

209. Liz Kelly, "You Can Find Anything You Want": A Critical Reflection on Research on Trafficking in Persons within and into Europe, 43 INT'L MIGRATION 235, 237–38 (2005); see also PETERS, *supra* note 147, at 127–28 (calling for defining trafficking "through survivor experience").

210. See Halley, *After Gender*, *supra* note 26, at 916, for a discussion on the right classification of human trafficking law; Thomas, *supra* note 183, at 438; see also Hathaway, *Human Rights*

After presenting these general classification challenges, the following part will shift from the general to the local by addressing the classification issues that the Sinai victims currently deal with on the ground.

IV.

LAW IN ACTION: TRAFFICKING CLASSIFICATION IN ISRAELI DETENTION REVIEW TRIBUNALS AND APPEALS TRIBUNALS

As the last sections have shown, classification matters. Despite the general fluidity (and often lack of attention) in the trafficking-recognition process, real-world implications are significant and should be taken seriously. After discussing the deepening theoretical cracks in the existing legal definitions, against the backdrop of the resulting conclusions and concerns, I turn to examine how classification works on the ground. That is, when the Sinai survivors are seeking detention relief from a Detention Review Tribunal or an Appeals Tribunal in Israel (the “Tribunals”), they may try to prove that their experiences in the Sinai make them victims of human trafficking as opposed to smuggling.

The definition of human trafficking under Israeli law dictates how the Tribunals may adjudicate trafficking claims.²¹¹ This definition is based on and informed by the other definitions that Israel is obliged or committed to, namely those of the TVPA and the Trafficking Protocol, as discussed above.²¹² The definition under Israeli law and the one set forth in the Trafficking Protocol are (at least theoretically) more open and can potentially cover a broader set of situations than the TVPA’s definition, which still remains the most influential one.²¹³ Under Israeli law, the crime of human trafficking is defined as follows:

“[S]elling or buying a person or carrying out another transaction in a person, whether or not for consideration” for the purpose of, or with one of the following results: (1) removing an organ from the person’s body; (2) giving birth to a child and taking the child away; (3) subjecting the person to slavery; (4) subjecting the person to forced labor; (5) instigating the person to commit an act of prostitution; (6) instigating the person to take part in an obscene publication or obscene display; (7) committing a sexual offense against the person.²¹⁴

Quagmire, *supra* note 138, at 6 (providing a general discussion on human trafficking and border control); Chacón, *Tensions And Trade-Offs*, *supra* note 185, at 1637; Ticktin, *supra* note 185, at 866–69.

211. Penal Code, 5737-1977, SH No. 864 p. 226, art. 377A (Isr.); *see generally* Hacker, *supra* note 30, at 45–46.

212. Penal Code, 5737-1977, Amendment No. 91 (Prohibition of Human Trafficking), 2006 (Isr.) (stating that the main purpose of the Amendment is to bring Israeli law into compliance with the Trafficking Protocol, and to achieve the TVPA’s “three Ps” – Prevention, Protection, and Prosecution).

213. *See, e.g.*, Hacker, *supra* note 30, at 29 (“[R]esearch findings clearly demonstrate that U.S. pressure, manifested by Israel’s placement on the lowest tier in the first TIP Report published during the team’s deliberation in July 2001, was the primary driving force that moved Israeli authorities from treating the foreign women working in the sex industry as unwanted criminal aliens to perceiving them as survivors deserving shelter.”).

214. Penal Code, 5737-1977, SH No. 864 p. 226, art. 377A (Isr.); *see generally* Hacker, *supra*

The Hotline for Refugees and Migrants, an Israeli NGO that represents asylum seekers and refugees in different proceedings, indicated that if a detainee is recognized as a trafficking victim, the Tribunals will facilitate his release on the exceptional humanitarian grounds that the legal framework provides.²¹⁵ This is added to free legal aid provided by the Ministry of Justice Legal Aid Department.²¹⁶ In cases of coerced residency, recognized trafficking victims are exempt as a matter of law.²¹⁷ Therefore, in the victims' reality, trafficking recognition becomes a resource—a good. And like any other good that this community is trying to achieve, it is scarce. Beyond examining classification from the Tribunals' crucial (and often overlooked) vantage point, this section will also try to shed more light on the fates and daily lives of the Sinai survivors, and reveal more of what their lives actually look like once they have entered Israel.

A. Detention Review Tribunals, Appeals Tribunals, and the Border Control Officer: Background and Scope of Mandate

Restrictions on liberty and movement of asylum seekers in Israel come in the form of either detention or coerced residency in an “open” facility.²¹⁸ There are

note 30, at 45–46.

215. DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 11 (“The HRM’s experience shows that in severe medical cases, in cases when the detainee was a trafficking or a torture survivor, or if detention has caused a minor to remain without a guardian, the Administrative Review Tribunal facilitated the release of the detainee under reasonable conditions.”); this comports with the position of the Supreme Court, *see* ARA 1689/13 Woldo v. The Minister of Interior, ¶ 7 [2013] (Isr.); *see also* Prevention of Infiltration Act, *supra* note 89, art. 30A, 32D (listing the humanitarian grounds for release); Entry into Israel Act, 5712-1952, Amendment No. 11, 5763-2003 (Isr.), art. 13F. However, it is important to note that such ad-hoc humanitarian relief without permanent and distinct guidelines followed by judges does not guarantee exemption in all cases. Sufficient protection to the Sinai victims can only be achieved through systematic recognition that will provide certainty for all victims, and not just in particular or paradigmatic cases.

216. This development of free legal aid to victims of human trafficking is a direct result of the TVPA and the incentives of the TIP Reports ranking system. In an account describing the legal aid services provided to victims, the Ministry of Justice stated that: “reports by the United States Department of State, submitted to Congress as part of a report on the global efforts to abolish human trafficking, commend the actions taken by the [Israeli] Legal Aid Department for the benefit of human trafficking victims. For example, in a report published in January 2007, legal aid was among the factors that contributed to the conclusion that significant progress has been made in Israel with respect to combating human trafficking, and assisted our exclusion from the watch list of states which do not take sufficient measures to abolish trafficking. In the Report published in 2008, the amendment to the Legal Aid Act, providing free legal aid to trafficking and slavery victims, was commended” (author’s translation). For this account, that includes details on the specific benefits provided to trafficking victims by the Legal Aid Department in the Ministry of Justice, *see* Ministry of Justice – Legal Aid Department, Human Trafficking, <http://www.justice.gov.il/units/SiuMishpaty/subjects1/NosimBetipulenu/Pages/HumanTrafficking.a.spx>. *See also* DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 31.

217. *See infra* note 236.

218. For details on the different facilities, including daily routines, food, and living conditions *see* DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 13–31 (*on the “open” center*: “The facility is surrounded by two tall fences and operated by the IPS, but it is not legally defined as a prison. Detainees in Holot are free to exit its gates during certain hours of the day and some of the services in the detention are not provided by the IPS but by other ministries (e.g.

three main bodies in charge of making decisions that impose restrictions on individuals: (1) the Border Control Officer (an administrative official operating under the Ministry of the Interior); (2) the Detention Review Tribunals; and (3) the Appeals Tribunals (together with the Detention Review Tribunals, the “Tribunals”). The Tribunals are generally meant to provide judicial review over the Border Control Officer’s decisions. The Prevention of Infiltration Act established the Detention Review Tribunals for “Infiltrators” as part of a mechanism meant to ensure proactive judicial review over administrative decisions issuing detention warrants to individuals.²¹⁹ The Entry into Israel Act established the Appeals Tribunals which are meant (in our context) to hear petitions by individuals challenging coerced residency warrants.²²⁰ This area of law is generally not as accessible and appealing as the Supreme Court of Israel, which is the central legal arena for “macro” refugee-related decisions.²²¹ However, crucial decisions are routinely made in the Tribunals, which exercise control over the personal liberty and wellbeing of many individuals.

The Tribunals have their own institutional structure. The judges in the Tribunals are equivalent to magistrate judges and they are appointed by a professional committee. The Tribunals’ decisions are subject to appellate review of a District Court and subsequently reviewable by the Supreme Court, if permission is granted.²²² As noted, the Tribunals have two main areas for exercising judicial review: detention warrants (Detention Review Tribunals) and coerced residency warrants (Appeals Tribunals).²²³

Ministry of Health and Ministry of Interior). Since the Court’s 2015 decision to limit detention time to 12 months, the MOI has sent out thousands of new summons to asylum-seekers in conjunction with the broadening of the criteria for detention. On December 29th of 2015, Holot reached its maximum capacity of 3,360 people for the first time since it was opened two years ago.” *See id.* at 13–14; *on one of the detention centers*: “Located in the Negev, near the Nitsana border of Egypt, Saharonim was built in 2007 to detain African asylum seekers who entered Israel through the Egyptian border. Up until June 2012, Saharonim had eight wings of tents, each wing can host up to 250 detainees (2,000 all together). In the spring of 2012, six more wings were added, with the intention to replace the old wings. Regulations allow capacity of 3,000 detainees in the entire prison. When the construction of Saharonim was started, it was exempt from most local and national regulations, as requested by the Israeli Ministry of Defense.” *See id.* at 13).

219. *Supra* note 89; however, the roots of the Detention Review Tribunals precede the Prevention of Infiltration Act in its current version. These tribunals were first established (under different conditions and authorities) in the Entry into Israel Act, *see supra* note 215, art. 13K. The rich legislative and judicial history of these tribunals exceeds the scope of this Article. *See generally* HOTLINE FOR REFUGEES AND MIGRANTS, THE DETENTION REVIEW TRIBUNALS 4–12 (Dec. 2014), <http://hotline.org.il/wp-content/uploads/Administrative-Tribunal-Report-Eng.pdf> [hereinafter HOTLINE DETENTION REVIEW TRIBUNALS REPORT].

220. Entry into Israel Act, *supra* note 215, chap. 4(1).

221. *See* H CJ 7385/13, *supra* note 96 and accompanying text.

222. Prevention of Infiltration Act, *supra* note 89, art. 30C; Entry into Israel Act, *supra* note 215, art. 13K (noting that judges are appointed for an initial period of 5 years, which can later be extended by the Minister of Justice).

223. *Supra* notes 219–220. *See also* Entry into Israel Act, *supra* note 215, chap. 4(1); *supra* note 98 and accompanying text (discussing detention practices); *supra* note 218 (discussing the different detention facilities).

Detention warrants are the stronger measure of limiting liberty. Individuals who enter Israel illegally—called “infiltrators” under domestic law—are subject to three months detention upon arrival.²²⁴ The Border Control Officer is authorized to order the release of an “infiltrator” only on specific grounds, mainly humanitarian ones.²²⁵ In addition to these narrow exceptions, the Act also establishes the Detention Review Tribunals. These tribunals are a proactive mechanism of periodical judicial review over detention warrants. A detainee must be brought before them initially within ten days of their arrest, and then at a minimum once every thirty days.²²⁶ The Detention Review Tribunals are authorized to approve, revoke, order release or alter the terms of a detention warrant.²²⁷

Another area occupied by the Tribunals relates to another policy that affects the liberty of “infiltrators”: warrants of coerced residency in a so-called “open” facility. As mentioned above, the Prevention of Infiltration Act also authorizes the Border Control Officer to issue “infiltrators” a warrant for coerced residency.²²⁸ This warrant means that they must reside in an “open” facility located in a remote location in a desert area.²²⁹ Such a warrant is issued when the Border Control Officer is convinced that there is “any kind of difficulty to deport an infiltrator to its country of origin.”²³⁰ In practice, this language applies automatically to all Eritreans and Sudanese men for the reasons previously discussed.²³¹ Although residents may technically come and go for most hours of the day, this facility is not effectively open because of its distant location, as well as the economic restriction caused by the prohibition on employment outside the facility.²³²

The role of the Tribunals here is different than the one exercised in connection with detention warrants. Since the “open” facility is not considered a prison, there is no procedure for periodic proactive judicial review on residency

224. Prevention of Infiltration Act, *supra* note 89, art. 30A(c). As noted, this maximum period of time was enacted only after several judicial decisions of the Supreme Court. The maximum period of detention in the first version of the act, which the Supreme Court struck down on September 2013, was no less than three years. See HCJ 7146/12, *supra* note 96; after the Court’s decision, a new maximum period was set on one year, but was again struck down by the Court as unconstitutional. See *id.*; the last maximum period of detention that was set (to date) is three months, and was upheld by the Court. See HCJ 8665/14, *supra* note 96. It should be stressed that this arrest, which was initially set for three years, is without trial and without any claim for a threat posed to the public or other criminal justification.

225. Prevention of Infiltration Act, *supra* note 89, art. 30A(b) (noting that the grounds are age-related (minors are generally not detained), based on recognition of a severe health or a mental health situation. An “infiltrator” may also be released if that is likely to promote deportation proceedings).

226. *Id.* art. 30E(1)(a), 30D(a)(1).

227. *Id.* art. 30D(a).

228. *Id.* art. 32D.

229. *Id.*

230. *Id.*

231. See *supra* text accompanying notes 111–113.

232. The facility was established in the Act after the Supreme Court struck down the three years’ detention policy in 2013. See HCJ 7146/12, *supra* note 96; see also Berman & Ziegler, *supra* note 93, for a discussion on this “open” facility.

warrants.²³³ Those who wish to challenge the Border Control Officer's decision must actively file a petition to the Appeals Tribunal.²³⁴ Although this difference is significant (proactive periodical review versus filing an appeal), for the purposes of this Article, there is no substantial difference and the analysis remains the same.²³⁵

After the Supreme Court struck down parts of the legislation in three distinct opinions, the latest version of the Prevention of Infiltration Act excludes several groups from coerced residency in the facility: minors, women, individuals over the age of 60, parents with minor dependents, individuals with severe health or mental health problems (only under certain conditions), and victims of human trafficking.²³⁶ That is, if the Tribunals are convinced that the petitioner is a victim of human trafficking, his residency warrant will be revoked and he will be released.²³⁷

Moreover, when a Detention Review Tribunal orders the release of a detainee from detention, the judge is obliged to issue him a coerced residency warrant if the applicable conditions are met (and not actually release him).²³⁸ One of the applicable conditions is that the detainee is not a victim of human trafficking.²³⁹ Therefore, the judge will not issue a residency warrant to a recognized victim of human trafficking. Once again, the classification of victims is pivotal.

As with the detention maximum periods, the length of coerced residency in the facility has a constitutional evolution of its own. The first version of the legislation was without a time limit, *i.e.*, indefinite coerced residency in the facility. After it was struck down by the Supreme Court, the limit was set to twenty months, which was again struck down as unconstitutional. Currently, the limit is twelve months.²⁴⁰ In light of these facts, we can now see them applied in concrete cases from the Detention Review Tribunals and the Appeals Tribunals.

233. Compare Prevention of Infiltration Act, *supra* note 89, art. 32D with *id.* art. 30D(a).

234. Entry into Israel Act, *supra* note 215, chap. 4(1) and art. 13(23).

235. The judges in the Detention Review Tribunals and in the Appeals Tribunals are appointed in the same way and are of the same status. Decisions are subject to similar appeal procedures, and are bound by similar considerations. See Entry into Israel Act, *supra* note 220. It should be noted that lawyers have reported that only 30 minutes are allotted to meetings with clients at the Appeals Tribunals. See DETENTION IN ISRAEL – YEARLY MONITORING REPORT 2015, *supra* note 98, at 32–33.

236. Prevention of Infiltration Act, *supra* note 89, art. 32D(b)(6); formally, recognition should be granted by the Israeli Police, after examination of the evidence related to the trafficking crimes committed against an individual. However, in practice the Border Control Officer and the Tribunals have a cardinal role in this framework, as the authorities in direct contact with the ones seeking protection are responsible for referring them to the Police.

237. *Id.*

238. Prevention of Infiltration Act, *supra* note 89, art. 30D(d).

239. *Id.* art. 32D(b)(6).

240. *Id.* art. 32D(a); in its opinions, the Supreme Court has also struck down other provisions of the act that relate to life in the residency facility, including the times and frequency of “reporting” in the center and punitive measures, see HCJ 7385/13, *supra* note 96.

B. Law in Action: Trafficking Classification Issues at the Tribunals

As discussed, being classified as a trafficking victim has serious implications on the rights of the Sinai survivors. Recognition as a trafficking victim is a ticket to freedom: Out of detention (for everyone) and out of coerced residency (for men, since women are already exempt).²⁴¹ The cases described and analyzed below demonstrate attempts by Sinai survivors to be recognized as trafficking victims and be released. The decisions and respective briefs are not always easy to obtain, and at times it was necessary to rely on the description of the proceedings in the Tribunals provided by the Appellate District Court.

The first case is from an Appeals Tribunal and was decided in February 2016.²⁴² Tesfom, a young Eritrean man born in 1988, entered Israel illegally through the Sinai in 2010. Due to the general policy of not deporting Eritrean nationals, he was able to remain in Israel and had filed an asylum application that the authorities have not reviewed by the time of the decision.²⁴³ The decision does not indicate if Tesfom spent time in detention or not, but according to his attorney he spent almost two months in detention upon arrival in 2010.²⁴⁴

The Border Control Officer issued Tesfom a coerced residency warrant for the “open” facility but Tesfom chose to challenge it in the Appeals Tribunal.²⁴⁵ His main argument was that the residency warrant is void and unlawful under the Prevention of Infiltration Act, since he is a victim of kidnapping and torture, which constitute human trafficking. Tesfom told the Tribunal that he was kidnapped by Bedouins in the Sinai, and held for two months for ransom.²⁴⁶ The petition describes his time in captivity in the following way:

The Petitioner was held by his armed kidnappers for two months, in hard conditions, beaten constantly, while his life was threatened and guns were pointed to his head. He was required to pay an enormous amount of \$10,000.²⁴⁷

241. Prevention of Infiltration Act, *supra* note 89, art. 32D(b)(6) (coerced residency) and art. 30A(b)(2) (indicating special humanitarian grounds for exemption from detention, as noted by the Supreme Court in ARA 1689/13 Woldo v. The Minister of Interior, *supra* note 215, ¶ 7); *see also supra* note 215 and accompanying text (the Hotline for Refugees and Migrants indicated that according to its lawyers’ experiences, if a detainee is recognized as a trafficking victim, the Tribunals will facilitate their release on the exceptional humanitarian grounds).

242. Appeal (Tel Aviv) 4595-15 Tesfom v. Minister on the Interior – Population, Immigration and Borders Authority [2016] (Isr.) [hereinafter Appeal 4595-15].

243. *See supra* note 90 (discussing the policy of not deporting Eritrean and Sudanese nationals); *see also supra* note 113 (discussing the low rates of both reviewing and granting asylum applications in Israel).

244. E-mail from Adv. Anat Kidron, Kidron Hady Cohen – Law Office, to the Author (Apr. 10, 2016) (on file with the author). *See also supra* note 224 (discussing the general detention policy of asylum seekers and its different versions).

245. Appeal 4595-15, *supra* note 242.

246. *Id.*

247. As cited in *id.* at ¶ 9.

The Appeals Tribunal rejected Tesfom's argument and reasoned that even if Tesfom's factual contentions were adopted in full, they would not constitute human trafficking.²⁴⁸ Therefore, the Tribunal held that exemption from coerced residency in the facility was not warranted. The Tribunal added in dicta that the Border Control Officer should have inquired further into Tesfom's experience in the Sinai before issuing the residency warrant.²⁴⁹ Specifically, the Tribunal stated that the Border Control Officer should have asked how long Tesfom was held there and what exactly happened to him. However, the Tribunal nonetheless found that Tesfom's experience did not constitute human trafficking and thus did not justify exemption from coerced residency under the trafficking provisions of the Act. The petition was denied.²⁵⁰

One of the arguments made in Tesfom's petition related to the Border Control Officer's allegedly flawed inquiry into Tesfom's experience in the Sinai, which the Appeals Tribunal criticized.²⁵¹ The Officer asked Tesfom directly whether he was raped by his abductors, and because he answered that he was not, his experience was not characterized as unusual or as one justifying any special consideration.²⁵² That was despite the fact that his experience included severe violence, threats of armed weapons, and captivity under difficult conditions for ransom.²⁵³ According to the Appellant brief, "the only thing that would amount to an 'unusual experience' [for the Border Control Officer] would be if the victim was raped by his abductors."²⁵⁴ This argument precisely illustrates the real-world implications of the sex-centric trafficking regime, that *a priori* places sex crimes in a higher normative level than other atrocities regardless of their severity. This structured "sex panic" has been critiqued in other broader contexts and should be questioned here as well.²⁵⁵

In another case, this time from a Detention Review Tribunal, the detainee was a woman who was also sexually abused, in addition to being held captive and tortured for ransom.²⁵⁶ The woman's name is not mentioned in either of the two decisions made by the Tribunal which are discussed below. But her "detainee

248. *Id.*; a similar ruling was made in the case of another Eritrean national who entered Israel in 2010, after being kidnapped and held in the Sinai for ransom. He challenged the residency warrant issued to him by the Border Control Officer, and the Appeals Tribunal upheld the warrant. The District Court affirmed. *See* AP (Tel Aviv) 57941-10-15 Gabriselasi v. The State of Israel [2015] (Isr.).

249. *Id.*

250. *Id.*

251. Appellant Brief in Appeal (Tel Aviv) 4595-15 Tesfom v. Minister on the Interior – Population, Immigration and Borders Authority ¶ 24 [2015] (Isr.).

252. *Id.*

253. *Id.* at ¶¶ 23–24.

254. *Id.* at ¶ 24.

255. The rich debate and critique of why sex is different exceed the scope of this Article. However, parts of this discussion—which critique the single-dimensional approach that often vilifies sex as such and ignores questions of agency—can shed light on this piece of trafficking law. *See, e.g.*, Ahmed & Seshu, *supra* note 26; Halley et al., *From the International to the Local*, *supra* note 26.

256. *See, e.g.*, REFUGEES BETWEEN LIFE AND DEATH, *supra* note 2 (discussing the intensified vulnerability of women in the Sinai).

number” showed that the decisions are linked. Although only four days separate the two decisions, they include contradictory holdings by the same judge about whether the case should be classified as trafficking. In the first decision, the Tribunal found that the woman is a trafficking victim, and described her hardship in the Sinai with detail:

After thorough examination, the Tribunal finds that the detainee’s experiences in the Sinai meet the elements of human trafficking. The detainee has been prisoned, her belongings and passport were taken from her and not returned, she was threatened by firearms, she was physically abused and beaten, she was treated like an object and she was not free to leave the camp and walk away. The detainee was constantly exploited without savior. Under these circumstances, I hold that the conditions for human trafficking are fulfilled and it will be proper to transfer the detainee to a shelter for trafficking victims.²⁵⁷

Despite the express holding that the woman was a trafficking victim, just four days later the same judge issued an opposite holding, finding that the woman was in fact not a victim of human trafficking after all:

A thorough examination of the detainee’s case shows that even if she was severely traumatized, the case does not necessarily constitute human trafficking. There is no doubt that under the circumstances of this case, even if it is not one of human trafficking, which would have granted her suitable treatment and a place at a designated shelter, she still needs special caring and support for her mental and physical condition for a transition period, as well as rehabilitation. With the absence of a suitable governmental or other institution, in her very special circumstances, I believe that it is justified to make an exception—only in this case and without creating precedent—to transfer the detainee to “Maagan” shelter, which is meant only for trafficking victims.²⁵⁸

This contradiction exposes how threatened the system is from the human trafficking framework, and how reluctant it is to expand the recognition cycle even in hard cases. And even if the result of this particular case seems good at first glance (exemption from detention and a place at a shelter were granted)²⁵⁹ there is still a pressing need for a systematic solution: as later decisions show, the woman was detained again in 2010.²⁶⁰ A case-by-case “policy” evidently does not provide a real legal answer, and is insufficient for protecting fundamental rights. The two decisions do not explain the sharp turn within only four days, while the

257. (Givon) 88145/09 (June 14, 2009) (Isr.), www.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx (detainee number 88145) (author’s translation).

258. (Givon) 88145/09 (June 18, 2009) (Isr.), www.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx (detainee number 88145) (author’s translation).

259. *Id.*

260. All the decisions approving the second detention are available at: www.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx (detainee number 88145).

Tribunal purports in both instances to have conducted a “thorough examination.” This case shows that even when the experiences in the Sinai involve women who were raped—a population traditionally protected by the trafficking regime—the system is still reluctant to define them as such. This reluctance from recognition may be attributed, among other factors, to the TVPA and the TIP Reports ranking system. As noted, assessing and incentivizing states on the basis of statistics may induce intentional under-recognition and manipulation of trafficking rates in the preliminary classification stage, which often goes unmonitored.²⁶¹

The cases described above elucidate the real-world implications of the human trafficking framework’s rigidity. Even though in many instances (including by United States officials),²⁶² victims of Sinai-like situations are defined as trafficked persons, effective remedies are not guaranteed. Despite occasional humanitarian consideration, no current legal framework applies to victims of Sinai-like situations, as the woman’s second detention proves. Both cases illustrate how victims often find themselves in detention or in other coercive facilities without suitable treatment, after being traded as commodities, held captive, and tortured for ransom.

Almost all men who survived the Sinai are detained for certain periods of time (or are detainees-to-be) and are not entitled to any special treatment under the current regime.²⁶³ The absence of a suitable framework on the one hand, and the conceptual proximity to the trafficking framework on the other, raises deep concerns about the legitimacy of current exclusion. Against the backdrop of the slowly dissolving distinction between trafficking situations and other scenarios, the existing classification mechanism seems unpersuasive and motivated mainly by political interests, and thus less and less defensible.

261. See Gallagher, *Exploitation in Migration*, *supra* note 202, at 65 (“As long as trafficked victims are not identified as such. . . states will never be called to account for failing to discharge their obligations.”).

262. See, e.g., *supra* notes 167, 170.

263. A Report published in 2012 gathered transcripts from 30 different proceedings held in Detention Review Tribunals in which Sinai survivors sought trafficking recognition in order to obtain detention relief. Of the 30 survivors, 22 were women and 8 were men, all of them of Eritrean descent. On average, they spent 140 days in captivity, and paid a ransom of \$33,660 in order to be released. 18 of the women were raped by the abductors, including one woman who asked the Tribunal to assist her with having an abortion. 12 of the survivors claimed they had no intention to reach Israel. 8 of the survivors reported that they were electrocuted, and 10 were tortured by burning plastic bags that were thrown on their bodies. At the time of publication, 6 were recognized as victims (although remained in prison since there was no open space for them in a shelter), 6 were denied recognition, and all the rest were waiting for a decision. The stories quoted in the Report tell horrors of torture and rape, after which the survivors were detained in prison-like conditions, usually for long periods of time. See HOTLINE FOR REFUGEES AND MIGRANTS, TORTURED IN THE DESERT, JAILED IN ISRAEL: DETENTION OF SLAVERY AND TORTURE SURVIVORS UNDER THE ANTI-INFILTRATION LAW JUNE-SEPTEMBER 2012, at 24–36 (2012).

V.

RETHINKING TRAFFICKING THROUGH THE SINAI CASE STUDY AND EVALUATING
A POTENTIAL REFORM: RANSOM TRAFFICKING?

Migration and transportation patterns are constantly changing, creating new forms of vulnerabilities that often fall between the cracks and are overlooked by existing legal mechanisms.²⁶⁴ Ransom Kidnapping is one of them. New global pressures, mainly the deterioration of human rights conditions in the global South and further fortification of the developed world, provide a breeding ground for opportunism and exploitation of vulnerabilities throughout transportation routes.²⁶⁵ As Dinan notes, “[t]rafficking networks flourish where migratory pressures are strong, legal migration opportunities are limited and existing migration networks are insufficient to overcome immigration barriers without assistance and provide protection for new migrants in destination countries.”²⁶⁶ As illustrated by the Sinai case study, victims of such developments often remain unprotected because of the existing legal frameworks’ limited scope. Should so-called Ransom Trafficking be recognized as a new form of human trafficking?

To date, the literature offered different labels for the situation of the Sinai victims which did not always pay sufficient attention to or give justification for the chosen classification. While some scholars and international actors view the practices in the Sinai as amounting to trafficking,²⁶⁷ others stress that this is a matter of smuggling.²⁶⁸ The absence of reasoning strengthens the impression that classification is often arbitrary and overlooked by scholars, despite its crucial significance to victims. This is also the case with policymakers’ approach to Ransom Kidnapping in general, which—as demonstrated through the application of the TVPA—varies from complete recognition to explicit rejection.²⁶⁹

The Israeli experience with the victims of the Sinai torture camps illustrates the troubling implications caused by not recognizing Ransom Kidnapping as human trafficking. Indeed, Israeli policy regarding trafficking victims is governed primarily by domestic law, which can theoretically be applied by interpretation to encompass Ransom Kidnapping victims (although it is not applied that way in practice).²⁷⁰ But evidence shows that Israel is highly attentive to the TVPA, and

264. See generally U.N. REFUGEE AGENCY, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, *supra* note 21.

265. See generally Carling et al., *Beyond Definitions*, *supra* note 198.

266. Dinan, *supra* note 23, at 73.

267. See, e.g., Carling et al., *Beyond Definitions*, *supra* note 198, at 9; Brhane, *supra* note 7; Reisen & Rijken, *supra* note 7; TINTI & REITANO, *supra* note 21, at 260.

268. See, e.g., GALLAGHER & DAVID, *supra* note 173, at 9. More recently Gallagher has referred to the situation in Sinai as one of trafficking. See Carling et al., *Beyond Definitions*, *supra* note 198.

269. Compare Sec’y Chertoff, *supra* note 170 and 2009 TIP REPORT, *supra* note 17, at 24, with TRAFFICKING VS. SMUGGLING, *supra* note 164, at 4. Another policymaker, the European Parliament, explicitly referred to the situation in Sinai as one of human trafficking. See *supra* note 41.

270. Penal Code, *supra* note 214, art. 377A; Hacker, *supra* note 30, at 45–46; see also Penal Code, 1977, Amendment No. 91 (Prohibition of Human Trafficking), 2006 (stating that the main purpose of the Amendment is to bring Israeli law into compliance with the Trafficking Protocol, and

especially mindful of its tier system. For example, a memorandum prepared by the National Anti-Trafficking Coordinator on Behalf of the Ministry of Justice justified the classification of Sinai victims as smuggled persons by the fact that they are not “considered” victims of human trafficking according to international standards.²⁷¹ This again illustrates how strongly Israel is influenced by the TVPA and its ranking system when designing its anti-trafficking policy.²⁷² Additionally, recent indications of a drawback in Israel’s success in preventing trafficking are causing ample concern among officials. Israel’s evident fear of being downgraded to tier 2 demonstrates once again how influential the TIP Reports ranking system is.²⁷³

Hacker describes Israel’s reaction to the TVPA as “over-compliance,” because Israel is protecting trafficking victims and defining them as such, even when the TVPA does not require such action. However, such ad-hoc humanitarian/strategic relief cannot substitute policy. Clearly, “over-compliance” does not guarantee protection in all cases. It particularly does not guarantee protection to victims of Ransom Kidnapping, as demonstrated by Hacker in her research,²⁷⁴ and by the cases of Tesfom and Gabriselasi mentioned above.²⁷⁵ Those cases represent the vast majority of the Sinai survivors.

Interestingly enough, the 2015 TIP Report itself illuminates how artificial the legal definitions are in the context of Ransom Kidnapping. For example, the report refers to Eritreans tortured in the Sinai for ransom as victims of human trafficking and “related abuses.”²⁷⁶ Clearly, a decisive message from the United States, in regards to Ransom Kidnapping, might have influenced Israel and other countries in similar situations to recognize the survivors as trafficking victims.

to achieve the TVPA’s “three Ps” – Prevention, Protection, and Prosecution).

271. Statement by Ms. Rachel Gershoni, National Anti-Trafficking Coordinator, on Behalf of the Ministry of Justice, *Visas for Trafficking Victims: The International Perception and its Implications* (Dec. 2014) (Isr.) (Hebrew version on file with author).

272. See Hacker, *supra* note 30, at 29 (“Research findings clearly demonstrate that U.S. pressure, manifested by Israel’s placement on the lowest tier in the first TIP Report published during the team’s deliberation in July 2001, was the primary driving force that moved Israeli authorities from treating the foreign women working in the sex industry as unwanted criminal aliens to perceiving them as survivors deserving shelter.”).

273. Lee Yaron, *Israel to Fund Efforts to Fight Rising Prostitution in Hotels*, HAARETZ (Feb. 28, 2016), <http://www.haaretz.com/israel-news/.premium-1.705819> (“The Tourism Ministry has decided to earmark funds to fight prostitution in hotels, due to the rise in the use of hotel rooms for this activity. The ministry fears that Israel may slip in the international ranking on human trafficking compiled by the U.S. State Department.”).

274. Hacker, *supra* note 30, at 44 (“[T]he case of Ayoub is an example of the limited scope of the TVPA, which does not include in its definition of ‘severe human trafficking’ instances of smuggling-related torture for ransom, or torture for no end other than incomprehensible sadism.”).

275. See *supra* Part IV.B., for a discussion of Tesfom’s case; see also *supra* note 248 for a discussion on Gabriselasi’s case.

276. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 152* (2015), <http://www.state.gov/documents/organization/245365.pdf> (“International criminal groups kidnap vulnerable Eritreans living inside and near refugee camps, particularly in Sudan, and transport them to Egypt’s Sinai Peninsula, and to a greater extent Libya, where they are subjected to human trafficking and related abuses, such as being forced to call family and friends abroad to pay ransom for release.”).

Such recognition would assist them in various ways, including free legal aid and exemption from detention.²⁷⁷

Indeed, “Ransom Trafficking” is not a traditional application of human trafficking. It is not what the framework was initially meant for. However, with loyalty to The Death of the Author (or the international lawyer),²⁷⁸ this alone should not block transformations that are necessary for responding to the emerging needs on the ground. Undoubtedly, such application will require making adjustments to better suit the unique situation of the Sinai victims, who are also refugees (although they are ordinarily not recognized as such in Israel, as described above).²⁷⁹ However, the required adjustments are within reach and do not rule out the trafficking solution. For example, the TVPA provides that states must pursue alternatives for repatriation in cases where, among other terms, a victim “would suffer extreme hardship involving unusual and severe harm upon removal.”²⁸⁰ States’ performance with respect to providing such alternatives is measured in the TIP reports.²⁸¹ Therefore, the repatriation feature—however salient in traditional applications of trafficking—does not block this channel for Sinai-like scenarios even within the general boundaries of the existing trafficking regime. Nevertheless, other, more complex, concerns arise from such an expansion.

As previously discussed, although anti-trafficking efforts are conveyed in human rights language, they strengthen border control.²⁸² This is an optimal situation for governments, as they can gain international credit (and TVPA funds) for combating trafficking on the one hand, while keeping vulnerable groups out and pushing them back to poor economies on the other. Moreover, many of these individuals, once inside the territory, would have been entitled to various benefits and protections according to international law. Keeping them out thus saves destination states the obligation to assist and protect them. Increased enforcement in turn deters “good” smugglers and may either prevent them from collaborating with vulnerable persons or promote the creation of less safe and more costly underground networks and markets.²⁸³

277. Shamir, *Nationalism, Borders, and Markets*, *supra* note 12, at 21–24; HOTLINE REPORT, *supra* note 12, at 25–27. *See supra* notes 115, 215 & 239 for a survey of the various benefits attached to recognition as a trafficking victim, including, *inter alia*, exemption from detention, exemption from coercive residency in a designated facility, free legal aid, and suitable treatment.

278. *See* ROLAND BARTHES, *IMAGE-MUSIC-TEXT* 142 (S. Heath trans., 1977).

279. Ziegler, *supra* note 103, at 181 (indicating that as of 2015, only 45 out of 17,778 (0.25%) asylum applications have been successful); *see generally* Kritzman-Amir, *supra* note 110; Yaron et al., *supra* note 110.

280. TVPA, *supra* note 28, 22 U.S.C. § 7105(e)(1).

281. *See, e.g.*, U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 92, 114, 134 (2010), <http://www.state.gov/documents/organization/142979.pdf>.

282. Thomas, *supra* note 183, at 438; Halley, *From the International to the Local*, *supra* note 26, at 916; Hathaway, *Human Rights Quagmire*, *supra* note 138, at 6; Chacón, *Tensions And Trade-Offs*, *supra* note 185, at 1637; Ticktin, *supra* note 185, at 866–69.

283. *See, e.g.*, TINTI & REITANO, *supra* note 21, at 5 (“[E]fforts by European policymakers and their allies to stem the flow of migrants into Europe are pushing smuggling networks deeper

As James Hathaway notes, “no state. . .will grant a visa to a person who wishes to travel here in a law-abiding way in order to claim refugee status.”²⁸⁴ Smugglers can serve as an essential mode of promoting human rights and are necessary for creating the platform in which refugees’ claims can be brought.²⁸⁵ In other words, expanding the recognition cycle of trafficking victims would expand the criminalization of other actors, including smugglers. This sounds like a dangerous game of background rules, since any push in favor of victims flips right back to harm other people, who are still unsafe in transportation routes and need smugglers (even “bad” ones) in order to get to safety. The result of targeting smugglers once again illustrates the border-centric nature of the existing regimes, which are used for interstate schemes to block access through transportation routes, regardless of their nature, often pushing people back to danger and atrocities.²⁸⁶

Expanding the array of cases considered trafficking, with the accompanied intensified enforcement against newly defined traffickers, can assist states in avoiding the absorption of refugees and other vulnerable groups while being credited as human rights protectors. Indeed, some commentators expressed concern about the misuse of current definitions and the implications of “vilifying smugglers” through the expansion of the definition of trafficking.²⁸⁷ Further, expanding the trafficking regime may result in other worrisome effects. One example is lowering the international cost of military action by strengthening “the legitimacy of responses that may otherwise be politically unpalatable if directed against facilitators of irregular migration, especially when many of the migrants involved are clearly desperate refugees.”²⁸⁸ Further, assuming that all of the Sinai Ransom Kidnapping victims will be granted adequate protections, to what extent does this legitimize the government’s policy with respect to all other asylum

underground and putting migrants more at risk.”).

284. James C. Hathaway, *Why Human Smuggling is Vital*, NATIONAL POST (Sept. 13, 2010), <http://news.nationalpost.com/full-comment/james-c-hathaway-why-human-smuggling-is-vital>; see also Hathaway, *Prosecuting a Refugee for “Smuggling” Himself*, *supra* note 179; GALLAGHER & DAVID, *supra* note 173, at 11–14 (discussing “politics of migrant smuggling”).

285. TINTI & REITANO, *supra* note 21, at 5, 32–33.

286. Sarah Elliott & Charlie Goodlake, *Libya’s People Trade is a Threat to International Peace and Security*, OXPOL—THE OXFORD UNIVERSITY POLITICS BLOG (Nov. 11, 2015), <http://blog.politics.ox.ac.uk/libya-shows-that-people-smuggling-is-a-threat-to-international-peace-and-security/> (“[F]or those who lack documentation and face increasingly tight border controls, people smugglers, despite their criminality, are often the only means to reaching safety.”).

287. Carling, *supra* note 24 (“Cracking down on smuggling is the easiest option for being assertive. But what if the smugglers are basically providing refugees with access to the protection they need and are entitled to? The costs and risks are high, but the vast majority of migrants receive the service that they pay for: they are brought to Europe. As a political strategy, the war on smuggling needs a rhetorical line of attack that casts smugglers as evil and cynical. If this portrayal succeeds, keeping refugees away from seeking protection can be presented as a way of shielding them from exploitation by smugglers.”). See also Aidan McQuade, *Migrant crisis: smuggling or trafficking? Politicians don’t seem to know*, THE GUARDIAN (Apr. 22, 2015), <http://www.theguardian.com/global-development/2015/apr/22/migrant-crisis-smuggling-trafficking-politicians-dont-seem-to-know>.

288. Carling et al., *Beyond Definitions*, *supra* note 198, at 5.

seekers and refugees, who are denied their basic rights and are often held in detention for long periods of time? Will this in effect divide the group into two classes, when the deprivation of rights from one will be tolerated (internationally and domestically) due to attention to the needs of the other? How will this influence the distribution of the already insufficient resources among the group?

However, all the flaws described above are not an insurmountable barrier for Ransom Trafficking. True, a mere law-in-books inclusion of Ransom Kidnapping victims in the benefits cycle cannot guarantee positive results, and the background rules and contingencies must be taken into account. But with the enormous global crisis and influx of more than one million migrants into Europe since 2015, causing practical suspension of refugee law, it is hard to see how expanding the trafficking framework of all things will be the reason for a backlash against smugglers and the narrowing of transportation options for vulnerable groups.²⁸⁹ In other words, if smugglers are already vilified and preyed upon, and borders are closing, then Ransom Trafficking should be considered from the victims' vantage point. It can encourage recognition and grant substantial benefits to individuals whose special conditions are not being treated under any current mechanism of international law.

Indeed, this global atmosphere caused immense strengthening of border control. Under these conditions, it does not seem that a victim-centric reform of Ransom Trafficking is a reason for concern. The European Union, for instance, already declared an "EU Action Plan against Migrant Smuggling (2015-2020)." The plan will make "proposals to improve the existing EU legal framework to tackle migrant smuggling, which defines the offence of facilitation of unauthorized entry and residence, and strengthen the penal framework."²⁹⁰ Thus, border control is constantly intensified regardless of the trafficking framework, and the argument against Ransom Trafficking from that direction seems less and less persuasive.

Finally, beyond the evils of allowing states to avoid accountability, vilifying "good" smugglers, and legitimizing flawed policies, there are also significant shortcomings in maintaining the status quo. Primarily, fluid and murky definitions

289. HUMAN RIGHTS WATCH, EUROPE'S MIGRATION CRISIS (2016), <https://www.hrw.org/tag/europes-migration-crisis>.

290. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS – EU ACTION PLAN AGAINST MIGRANT SMUGGLING (2015 – 2020), at 2–3 (2015), http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/eu_action_plan_against_migrant_smuggling_en.pdf. However, it is important to note that the Commission added that it will "seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress." *See id.* at 3. Despite practical doubts about achieving such a balanced policy, stating it as a consideration is a step in the right direction. *See also* Alessandro Spena, *Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?*, in *IRREGULAR MIGRATION, TRAFFICKING AND SMUGGLING OF HUMAN BEINGS – POLICY DILEMMAS IN THE EU* 33 (Sergio Carrera & Elspeth Guild eds., 2016), http://aei.pitt.edu/72834/1/Irregular_Migration%2C_Trafficking_and_SmugglingwithCovers.pdf (critiquing this Action Plan).

of smuggling and trafficking may be and often are abused by states to serve political and strategic goals.²⁹¹ For example, the TVPA rewards states for combating human trafficking and protecting victims, but because evaluation is largely based on statistics, it may encourage underreporting and manipulation. That is, under the TVPA, cases that are not paradigmatic scenarios of “traditional” trafficking are likely to be excluded. Such a regime helps states keep trafficking statistics low, and in turn prevents them from allocating greater resources to fund victim benefits. It is questionable how valuable such a hermetic and single dimensional trafficking regime really is. When added to the severe condition of unrecognized victims as illustrated by the Sinai case study, these concerns strengthen the call for reform.

CONCLUSION

To conclude, this Article aimed to critique the international community’s narrow framing of human trafficking and its exclusion of Ransom Kidnapping. By using the Sinai torture camps as a case study, it sought to examine the feasibility and desirability of the emergence of a new form of trafficking, Ransom Trafficking, which is different from traditional applications of the framework. It suggested that there is no necessary justification for seeing exploitation solely as work-based. Rather, the Article stressed that an individual has more “exploitable” resources than those related to the sex and forced labor markets. Such resources can be exploited by kidnappers through emotional extrusion and physical and sexual torture for profit. In addition, the Article illustrated a serious degree of uncertainty and confusion surrounding the current often arbitrary conceptualization of “hard” trafficking cases, in both academia and practice.

The Article tried to provide a panoramic view of both the global and the local: on the one hand, the roots and current definitions and challenges of the trafficking and smuggling regimes and on the other, their local implications in a hard and painful case study. After this exercise, I am no longer concerned with disrupting or distorting the current regime with a call for reform. As Halley and Thomas argue, human trafficking laws are not primarily designed for victims, but rather meant to strengthen border control and result in pushing more vulnerable people back to poor economies, while drawing legitimacy from paying a small human rights tax.²⁹² Despite the good intentions underlying the framework and its undisputed achievements, this Article showed that current anti-trafficking efforts are mainly channeled to satisfy the standards dictated by the TVPA, which do not always respond to the genuine challenges of reality. Instead, these are efforts that, along with undeniable assistance to victims, always serve other greater political and regional agendas. In that sense, trafficking is a double-edged sword for victims. Adopting a victim-centric approach like Ransom Trafficking, and continuing to shape the regime while remaining attentive to the rapidly changing

291. See Gallagher, *Exploitation in Migration*, *supra* note 202.

292. Halley, *After Gender*, *supra* note 26, at 916; Thomas, *supra* note 183, at 438.

needs of vulnerable individuals does not seem like a threat. Especially considering that other international law regimes collapse when confronted with the current trends on the ground.