In Search of an Effective Legal Protection for Fishermen Recruited Overseas Aboard Taiwanese Fishing Fleets: Criminalization and Beyond

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INTRODUCTION

Strong words condemning alleged practices of human trafficking and contemporary forms of slavery are storming the notorious island of distant-water fisheries. Following an engendered division of labour in industrialised societies, while the domestic workers represent the majority of cases involving slavery-alike abuses, those male workforces who draw mostly the attention for their suffering are employed on board of distant-water fishing fleets. Cases of human trafficking for forced labour on Taiwan-flagged fishing vessels in international waters have consecutively been denounced by the U.S. Department of State's Trafficking in Persons Reports[1] (2013, pp. 353-354; 2014, p. 368; 2015, pp. 111, 272, 307 & 326-327; 2016, pp. 169, 203, 339 & 359-360; 2017, pp. 170, 362 & 382-384; 2018, pp. 187, 228, 387 & 407-409). Based on relevant reports published between 2016 and 2017 (Green Peace, 2016; Lee *et al*., 2017), global and local NGOs also started to point at the whole industry, calling for public awareness of the "sweatshop seafood".[2] Taiwan's distant-water fisheries are now under multiple criticisms for its previously unknown ways of operation. These reports or journalist investigations state that the failure of the Taiwanese government, in spite of certain efforts, to adopt effective measures of prevention, protection and prosecution had contributed to a transnational networking of trafficking foreign fishermen recruited overseas (hereafter "FFROs").

Be it isolated in the international community, Taiwan is not completely out of the international human rights protection scheme against human trafficking. Along with five "core" international human rights treaties domesticated step by step since 2009[3], the Human Trafficking Prevention

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[1] Previous annual reports focused mainly on the situation of female domestic workers in Taiwan (2012, pp. 333-335).

[2] The term also echos the idea of "Seafood from Slaves" used by the American press (Yi-shan Chen 2016). See among others, Green Peace Taiwan (2018).

[3] Without a chance to access to these treaties, Taiwan has opted for their domestication through a series of "implementation acts" for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (2009), the Convention on the Elimination of All Forms of Discrimination Against Women (2011), the Convention on the Rights of the Child (2014), the Convention on the

Act (hereafter "Anti-Trafficking Act") also joined in 2009 to strengthen the Criminal Code and the 2006 Executive Yuan Action Plan on Human Trafficking Prevention. At the normative level, Taiwan seems to have met the international standard in combatting human trafficking for exploitation.[4] Moreover, a yellow card issued by the European Union based on its Regulation 1005/2008 to prevent, deter and eliminate illegal, unreported and unregulated fishing (hereafter "IUU fishing") has efficiently pushed the Taiwanese authorities to review legislative and regulatory norms on distant-water fisheries. This 2016 reform particularity aimed at ameliorating the working conditions of FFRO aboard Taiwan-flagged fishing vessels. Nevertheless, the recent waves of NGOs protests hit the international headlines on the Web again (Morris, 2018; Maritime Executive, 2018; Fletcher, 2018 & Undercurrent News, 2018), still questioning the effectivity of these normative reforms and demanding tougher actions against trafficking and human rights abuses in the distant-water fisheries.

What went wrong with the Taiwanese norms to prevent the FFROs from being abused in the distant-water fisheries? If the norms, which have seemingly upgraded both the deterrence of criminal justice and the labour standard on the Taiwan-flagged fishing vessels, are unable to bring up expected changes, there could be a structural problem behind the scene. I argue in this paper that the current approach of fiercer criminal punishment and administrative regulations cannot pull the whole industry back on track. By contrast, without a reasonable adjustment of the migration policy, the current norms in Taiwan are actually tempting every actor in this particular industry into a race to the bottom, or more precisely, to the edge of illegality. The gap between the distant-water fishery reality and the state of prohibition of human trafficking can be enlarged into a grey zone by the policy incoherence of Taiwan on recruitment of economic migrants. If Taiwan is to fulfil its positive obligations to prevent the FFROs from becoming victims of modern slavery, it must review its current immigration policy and assist the civil society to establish cross-border cooperation network.

This study explores the situation through the lens of international human rights standards on human trafficking, while using interviews to examine the problems encountered by the governmental agencies, FFROs (represented by trade unions), employers (represented by fishing associations) and brokers. In other words, by confronting the industrial realities to the

Rights of Persons with Disabilities (2014). See Weng & Hsu (2017).

[4] The Human Rights Committee (examples for typical use of terms: 2018a, §3[c]; 2018b, §33[a]; 2018c, §3[c]; 2017a, §§3[k], 25-26), has been consistent in encouraging State Parties to ICCPR to adopt and enforce anti-trafficking legislation and action plan, as well as to establish an institution to coordinate the actions and strategies.

national norms implementing human rights standards, I try to explain why the existing normative scheme is far from realising a satisfactory prevention.

I. ON POSITIVE OBLIGATIONS TO PREVENT HUMAN TRAFFICKING FOR EXPLOITATION

Traditionally in international law, the notion of human trafficking, considered under a social pathology approach (Doezema, 1999, p. 28; Chaumont, 2009, p. 21), was not associated to the 1926 Convention to Suppress the Slave Trade and Slavery and its 1956 Supplementary Convention neither international human rights treaties. The slavery ban referred to those customary practices identified through different experiences of colonized territories (Gutteridge, 1957, pp. 463-5) and later strongly linked to racism within the United Nations (Allain, 2013, pp. 149-152). After a long period of studies and struggles for a modern definition of slavery-alike practices[5] narrowly hooked on trafficking in "persons" (not limited to women and children for exploitation of prostitution anymore), the ground-breaking judgments in international criminal law [6] and the comprehensive report from a UN working group (Weissbrodt & Anti-Slavery International, 2002) finally came to renew, with a rights-based approach, the definition of slavery in international law and start to regroup the practices of human trafficking under the prohibition of slavery[7].

In the field of international law, in comparison with an abundant literature that explored or analysed the conceptual development of modern slavery and human trafficking (Bales & Robbins, 2001; Decaux, 2009; Gallagher, 2010; Bales, 2012; Allain, 2013; Clesse et al., 2014), there is a limited number of studies that took a closer look into the obligations to prevent trafficking.[8] For this section, I will try to delimit the State obligations of prevention by

[5] Starting from 1970s, the contemporary forms of slavery has been discussed within the framework of the then Sub-Commission on Prevention of Discrimination and Protection of Minorities, without significant impact and conclusions till 1990s (ECOSOC, 1974a; 1974b; Miers, 2000, p. 719; Allain, 2013, p. 154; Gallagher, 2010, p. 62).

[6] ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, case no. IT-96-23-T & IT-96-23/1-T, Trial Ch. judgment of 22 February 2001, §§540-542; *Prosecutor v. Kunarac, Kovač and Vuković*, case no. IT-96-23 & IT-96-23/1-A, Appeals Ch. judgment of 12 June 2002, §§117, 120-121.

[7] For Obokata (2005, pp. 450-1) and Munro (2008, pp. 248-51), human traffickers are those who handed the victims to the authors of exploitation; there arises the question of participation in a crime of enslavement.

[8] Chuang (2006a) addressed the international legal response to the socio-economic factors of migration and trafficking and found the existing strategies insufficient with States resisting to face the general socio-economic problems. This paper is based on a similar approach to her study. Chuang (2006b) has also evaluated the U.S. strategies to combat trafficking through unilateral sanctions. Ekberg (2004) examined the Swedish successful strategy to reduce market demands by applying tougher punishment on buyers. Gallagher (2010, pp. 236-248, 278-283) discussed State obligations and due diligence priciple.

searching the international human rights jurisprudence (A), which should find its theoretical support in relevant studies (B).

A. Obligations to Prevent under International Human Rights Norms

It seems unnecessary to join the debate about whether the prohibition of human trafficking or/and contemporary forms of slavery has reached the status of *jus cogens* or obligations *erga omnes* held by the conventional slavery ban (Scarpa, 2008, pp. 78-81; Allain, 2009, p. 456; Kirchner & Fesse, 2015). The idea of an international "*ordre public*" (Decaux, 2009, pp. 44-45) is sufficient to illustrate the fundamental aspect of international collective efforts to stop the practices. Taiwan is a destination for trafficked human beings and a State witnessing victims of modern slavery, it cannot, regardless its international legal status, stay away from the global combat. Under the rule of law in Taiwan, there is no room for derogation of article 8 of the International Covenant on Civil and Political Rights (ICCPR), and its own Anti-Trafficking Act should be effectively implemented. The question goes to what are the exact obligations that Taiwan has to combat these forbidden practices.

Taiwan, not a State Party to the ICCPR, holds its own periodic national report examination by international independent experts following the 2009 domestication. However, the past concluding observations (International Review Committee, 2013; 2017) are both mute on Article 8 of ICCPR or any related issues. Even if the FFROs have drawn their attention, the alleged abuses were discussed under Article 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (International Review Committee, 2017, §§33-34). By contrast, Article 3 of the 2009 Covenants Implementation Act requires that the application of the Covenants' clauses should refer to the "interpretations of the Human Rights Committee". Within the Taiwanese legal system, this "reference clause", if not forcibly binding[9], serves at least a chance to dialogue with the international jurisprudence (Weng, 2017, pp. 1166-1167).

Stoyanova (2017, pp. 400-408) analysed the concluding observations issued by the Human Rights Committee from 2014 to 2016, general comments and views adopted under Article 5(4) of the Optional Protocol. Her research found that the Committee did address human trafficking under Article 8 of ICCPR. Although the Committee resists to apply any modernised definition

[9] Even some Taiwan NGOs argue that the clause makes the Committee's "interpretation" binding in national legal system, rarely any State Party to the UN core human rights treaties recognise the binding force of the treaty bodies' observations or views. The Supreme Court of Spain just created the first exception, regarding the legally binding character of a view adopted by the CEDAW Committee on an individual communication (Casla, 2018).

on slavery or servitude to name relevant practices of abuse[10], the notions of human trafficking and, often consequently, forced labour cover mostly the issues tackled under Article 8 today.[11] On the other hand, the search for an operational definition system of the notions under Article 8 was in vain.[12] Additionally, in the Committee's most recent concluding observations, State Parties' obligations to prevent remains vague terms. One can hardly find, as usual, any concept development concerning the obligation to prevent human trafficking or forced labour, except for repeated emphasis on the identification of victims and criminal procedures (investigation, prosecution and punishment, as well as training of magistrates and civil servants).

If the criminalisation should not be the only way to stop human trafficking, it nevertheless remains a top concern of the Human Rights Committee under Article 8 of ICCPR in the absence of other concrete recommendation on preventive measures. Article 4 of the European Convention on Human Rights (ECHR) was once similarly few developed until 2005. In its milestone judgment of 2005, *Siliadin v. France*[13], the European Court of Human Rights condemned France for its failure to adopt enforceable criminal punishment for authors of "servitude". The major problem there was the insufficiency of a civil remedy to the exploitation of a teenaged Togolese girl working irregularly as domestic worker. *Siliadin* might be a disappointing judgment for scholars advocating a modern definition of slavery that goes beyond de jure ownership (Nicholson, 2010, pp. 710-711; McGeehan, 2011, p. 444; Allain & Hickey, 2012, pp. 921-923). The Strasbourg Court assumed an approach significantly different from that of the International Criminal Tribunal for the former Yugoslavia[14], leaving the slavery in its classic definition. By contrast, the Court did develop a modern definition of servitude by comparing it to the feudal serfdom under Article 1(b) of the 1956 Supplementary Convention.[15]

The Strasbourg Court went further to incorporate the human trafficking ban and developed a more general scope of positive obligations under Article 4 of ECHR in its *Rantsev v. Cyprus*

[10] With a single exception in its remarks on the "foreign-chartered vessels operating in New Zealand waters", the Committee was concerned by the "economic exploitation and forced labour" under a subtitle of "trafficking in persons, and other slavery-like practices" (Stoyanova, 2017, p. 403). I examined the Committee's concluding observations from 2017 on and found the same pattern, with only two more exceptions. The Committee also commented the Romanian efforts on combatting human trafficking under a subtitle "elimination of slavery and servitude", without connecting these concepts (Human Rights Committee, 2017b, §§37-38). It also used the term of "contemporary forms of slavery" together with "forced labour and trafficking in persons" in the Honduran case (Human Rights Committee, 2017c, §§36-37).
[11] See, inter alia, Human Rights Committee (2018a, §§46-47; 2018b, §§32-33; 2018d, §§35-36; 2018e, §§25-26; 2017d, §§28-29).
[12] See also Pormeister (2014, pp. 133-134).
[13] Eur. Court HR, *Siliadin v. France*, no. 73316/01, 26 October 2005.
[14] See §§ ICTY Appeals Chamber *Kunarac* judgment at §120.
[15] *Ibid*. §123.

and Russia (Allain, 2010; Pati, 2011; Piotrowicz, 2012, pp. 196-197). The case was brought up by the father of a young Russian lady trafficked cross-border to work as cabaret "artist" in Cyprus and allegedly killed by traffickers. The Court confirmed by supporting the idea of "the modern form of the old worldwide slave trade": *"[T]rafficking in human beings, by supporting that, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment […]. It implies close surveillance of the activities of victims, whose movements are often circumscribed […]. It involves the use of violence and threats against victims, who live and work under poor conditions.*"[16]

In so far as the obligations of prevention are concerned, the Strasbourg Court's observations in *Rantsev* can be divided into two phases: general measures and case-specific action. The Court first affirmed that, "*in addition to criminal law measures to punish traffickers*", States are to "*put in place adequate measures regulating businesses often used as a cover for human trafficking*". It went even further request the State Parties to take into considerations of anything that might encourage, facilitate or tolerate trafficking in their national immigration rules.[17] Consequently, the Court found a violation of Article 4 of ECHR in regard to the negative effects of the Cypriot immigration policy. Firstly, under the Cyprus immigration rules, employers should report to the authorities when an artiste quits her employment. It somehow encouraged the employers to "*track down missing artistes or in some other way to take personal responsibility for the conduct of artistes*." Secondly, the Court found it particularly inacceptable that the artistic agents and cabaret owners had each side to deposit a bank letter guarantee, together with a separate bond to cover any plausible future costs associated with" their recruited artistes (immigration relief, support or repatriation). So was condemned the Cyprus failure in reviewing this "artist visa" regime, despite of various reports revealing a facilitated trafficking in women under these circumstances.[18] In addition, the Court also addressed the preventive measures on Russian side concerning the general risk of trafficking and was contented by the warning issued by the Russian authorities to their citizens.[19]

[16] Eur. Court HR, *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, §282. Once again regrettable for advocators of a modernised slavery definition (Pormeister, 2014, p. 134), the Court resisted to identity whether the treatment to the victim of human trafficking should constitute slavery, servitude or forced and compulsory labour. It only confirmed that "*trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention*."
[17] *Ibid*. §284.
[18] *Ibid*. §§290-293.
[19] *Ibid*. §§304-306.

The second phase of obligations of prevention came from a more conventional approach[20], checking if the State had taken "operational preventive measures". By underling the positive obligations of Cyprus to enable State agents to identify potential victims, it questioned whether the police have adequately responded where there were sufficient indicators of "real and immediate risk" of trafficking or exploitation.[21] Whilst it is State Parties' margin of appreciation to find the best balance between their immigration policy and engagement in combatting human trafficking (Murphy, 2013, p. 624), there is a tougher obligation on any "real and immediate risk" that could, without creating disproportionate burden on the authorities, trigger necessary and prompt reaction by State agents (Piotrowicz, 2012, pp. 198). Most significantly, immigration policy is now recognised as a plausible generator of precariousness (Mantouvalou, 2012, p. 154) where there is a risk to bind the destiny of migrant workers to the hands of their employers. Similar question on immigration policy has also been invoked by the Human Rights Committee (2017d, §29[c]), which asked Italy to "release labour inspectors from the responsibility of enforcing immigration law".

In its judgment on the exploitation of irregular migrant workers under armed surveillance in a strawberry farm, *Chowdury and Others v. Greece*[22], the Strasbourg Court, by reaffirming the principles set up in *Rantsev*, explained that "exploitation through work also constitutes an aspect of human trafficking".[23] A similar dilemma of irregular migrant workers around the world was noted by the Court: if they quit the job, they would be arrested and deported, with no hope to be finally paid.[24] In addition, their prior consent to work could not exclude the fact of forced labour.[25] Finally, the Court reiterated the distinction between servitude and forced labour lied in the victim's observations on whether the situation could be unlikely to change.[26] Immigration policy did not directly show their weight in this case. Notwithstanding, the victims were all recruited within Greece, and the Court found the authorities, with only some "sporadic reaction", failed to take any operational measure to prevent human trafficking.[27] This could suggest that, as the Greek Ombudsman's report had stated[28], the government failed to put the out-of-balance relations between employers and employees under control.

[20] Which refers to the famous Osman test. See, for instance, Palmer (2006, p. 450) and Xenos (2007, pp. 239-240)
[21] *Ibid*. §296.
[22] Eur. Court HR., *Chowdury and Others v. Greece*, no. 21884/15, 30 March 2017.
[23] *Ibid*. §93.
[24] *Ibid*. §95
[25] *Ibid*. §96.
[26] *Ibid*. §99.
[27] *Ibid*. §§110-115.
[28] Cited in *ibid*. §§48-52.

B. Criminalisation of Trafficking as Prevention in Socio-Economic Context

The jurisprudence of international human rights law does not provide an abundant and detailed guidance on the obligations to prevent human trafficking and/or modern slavery. Questions on normative infrastructure and criminalisation of trafficking for exploitation rank high on priority. The criminalisation of human trafficking is not unnecessary. In Chuang's (2006a, p. 156) critical review of the States' resistance to address socio-economic context of human trafficking, the effectivity of tougher criminal norms was not problematic. So as Wheaton, Schauer and Galli (2010, pp. 131-132) claimed in their economist analysis. To augment risks of criminal punishment is to increase the costs for traffickers (supply side of the market), while informed and "awaken" customers' boycott and law enforcement help to decrease the demands of trafficked victims. Frantantuono (2007, p. 149) put an essential reminder in his book review: "The rationale for illicit activity is mainly economic in nature." Human trafficking for exploitation, unfortunately, is a rational behaviour. To sum up, enforcement of criminal justice, with due diligence, can lead to higher costs and lower profits and consequently shrink the market.

Yet the controversy lies upon the end of the criminalisation, as well as the curious criminal law distinction between smuggling and trafficking. The long-standing discourse of transnational crime[29] of human trafficking, originated from the myth of "White Slave Trade", still needs to be revisited. As Chaumont (2009) found among the historical archives and evidences, there had not been such a transnationally organised crime or "social evil". The myth was collectively fabricated in favour of a "crusade" for social purity. Nowadays in the United States, Chacón (2010, pp. 1628-1636) went through the published official records and media coverage to illustrate the myth of noncitizen criminals of trafficking that distracted the focus from the real market demand. In Europe, the modern notion of trafficking "in persons" became criminalised, regardless whether for exploitation of prostitution, with the idea to punish those who assisted irregular border-crossing (Doomernik, 2012, p. 77). Especially, the European migration controls began with domestic labour protection and moved later, upon large flows of asylum seekers hitting the borders, toward question of security (*Ibid.*, p. 82). To some extent, this modernised concept of human trafficking can be seen as a by-product of immigration restrictions (*Ibid.*; Chacón, 2010, p. 1611).

[29] The crime of human trafficking had been discussed within the former Social Commission of the UN Economic and Social Council, and neither former Human Rights Commission or Commission on the Status of Women could access to the field of issues (Weng, 2008, pp. 60-62).

Without a modernised slavery ban and the protection of victims' rights, the criminalisation of human trafficking can be no more than another tool to strengthen immigration control and home security. The above-mentioned US trafficking reports send a message of a just war declared on the evil, accompanied by a strong victimisation of migrant workers. There arises the debate on the distinction between human smuggling and trafficking. Krieg (2009, p. 789) examined the EU strategies and found the thought behind them: "the distinction between trafficking in persons and human smuggling is one between the innocent victim (of human trafficking) and the guilty migrant (of human smuggling)." This victimisation of migrant workers has successfully alerted the public about vicious practices in the global economy, yet the context as a whole seems much more complex. Behind this problematic discourse, hides a fundamental shortcoming in the international anti-trafficking norms – with presumption of certain groups of human beings as vulnerable, these instruments seem reluctant to question why they are vulnerable and why they travel with their known vulnerability (Todres, 2011, pp. 57-61).

Furthermore, when evoking human traffickers and their transnational networks today, multinational criminal organisation would first come up to the scene. It unfortunately leaves those "ordinary business" and even individuals in the backstage. Shelly (2007, pp. 120-121) and Pati (2012, pp. 141-145) both mentioned about traffickers sizing from an individual – sometimes as close as partner or parent to the victims – to family business and large multinational organisations, including terrorist groups or guerrilla movements. To this list can be added those cases where smugglers become victims of trafficking. As the above-mentioned *Siliadin* judgement has shown, the victim arrived in France with someone entrusted by her family and later exploited by the same person and then the other "employers". The Strasbourg Court did not address the crime of human trafficking, since the controversial French legislation and judgment concerned her "employers" and not her "trafficker".

According to the National Immigration Agency (Ministry of the Interior), an absolute majority of irregular foreign residents entered Taiwan with due authorisation[30] (tourist visa or working permit; NIA, 2018). The "trafficking" part, from recruitment, transportation, transfer, to harbouring or receipt of persons,[31] has been all regular and legal in these cases. The illegality happens next: they became irregular migrant workers, often assisted by their relatives, friends or just someone they knew simply through mobile phone connections. Irregular and out of

[30] While confronting the NIA (2016; 2018) statistics on the situation of missing FFROs and the numbers of missing migrant workers in general, it is clear that the number of missing FFROs significantly low.
[31] Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

labour protection system, the risk of exploitation started there (TIWA, 2018). Another notable group of cases implies those "regularly recruited" migrant workers, where the brokers (human resources agencies which recruit migrant workers) or the employers abuse the victims (*Ibid*.). A same picture can be seen in the Strasbourg case of *Chowdury*, where the irregular migrant workers were all recruited within the borders.

The Taiwan International Workers' Association (TIWA, 2018), as the first migrant workers' trade union in Taiwan, did not hesitate to indicate that migrant workers' behaviours are also based on the same economic rationale as their brokers and employers. They travel for a better economic status for their family, and – despite of their often limited education and knowledge – they have their own networks of information. Instead of running the risk of heading abroad with a plausible criminal organisation, they know very well that the "ordinary business" such as licenced local brokers should be a better choice (*Ibid*.; Broker A, 2018). The problem happens following this regular way of recruitment: frauds and false papers, degrading working conditions, confiscation of passports or limited freedom of movements.

In light of the observations outlined above, I submit that it is essential to reconsider the crime of human trafficking under the concept of modern slavery, and not the contrary. It is the latter that is connected to the general socio-economic contexts in different cases. This is particularly true when the policy priority is given to immigration control. Meanwhile, if the criminalisation strategy as well as the due diligence requirement to enforce criminal justice still matter, they cannot sustain in a long run a meaningful combat against trafficking for exploitation (Chuang, 2006a, p. 156). The Strasbourg Court's *Rantsev* judgment picked up at least one slice of the whole bread, pointing at the Cypriot immigration control that reinforced the dominant position of traffickers *vis-à-vis* the potential victims. It explains perfectly why using rights-based approach to deal with the dark sides of global economic migration is so important. States are often reluctant to work seriously on what Bales (2007, p. 19) suggested as global strategies to combat trafficking and exploitation of human beings, such as eradication of poverty and corruption, environmental protection and peace building. By contrast, under international human rights norms, at least for States of rule of law, there are positive obligations to prevent human trafficking for exploitation and all forms of modern slavery-like practices.

The criminalisation approach led by the UN and the Palermo Protocol against human trafficking can only touch upon every kind of real problems when concrete human rights violations are

being considered.[32] Under the criminalisation approach of immigration control, the necessary categorisation of migrants not only exclude some victims of exploitation from access to justice but also allow the public authorities to keep closing their eyes on their unreasonable social policies (van den Anker, 2012). It is not to support any stronger wording of victimisation but to put forward the States' positive obligations to prevent trafficking for exploitation, including a coherent approach on immigration control. The Strasbourg Court's concerns shown in *Rantsev* already highlighted the paradox between national norms. States' omission, often due to the priority to enforce immigration policy, to adopt coherent legal measures can lead to violations of fundamental human rights. During an annual workshop on human trafficking in Taiwan, Patrick Taran, as president of Global Migration Policy Association, also outlined the negative effects of migration restriction on trafficking for exploitation.[33] At the centre of the contemporary trafficking challenge, it is the exploitation and not the migration that should ask for more international collective efforts to prevent.

II. FAILURE OF TAIWAN TO ADOPT COHERENT NORMS

Suspicious cases of forced labour, debt bondage, deprivation of liberty in person, as well as degrading treatments are mostly identified practices on Taiwan-flagged fishing vessels working in international waters (U.S. Department of State, 2013, p. 353; 2014, p. 368; 2015, p. 326; 2016, p. 359; 2017, p. 382; 2018, p. 407; Green Peace Taiwan, 2016, pp. 18-25; Lee et al., 2017, pp. 43-52). The criminalisation approach has been underlined both in the U.S. trafficking reports and NGOs' statements, often paired with a call for national treatment of labour (Hung, 2018). It seems simple some questions: a better training of magistrates to end up impunity and an equal standard of working conditions for everyone. Nevertheless, the resistance remains strong, from both employers and brokers who insist on their innocence regarding human trafficking (Employer A, 2018; Employer B, 2018; Broker A, 2018; Broker B, 2018). The polarisation of different positions has made the above-mentioned 2016 reform on distant-water fisheries a political compromise, with no one satisfied with the new rules.

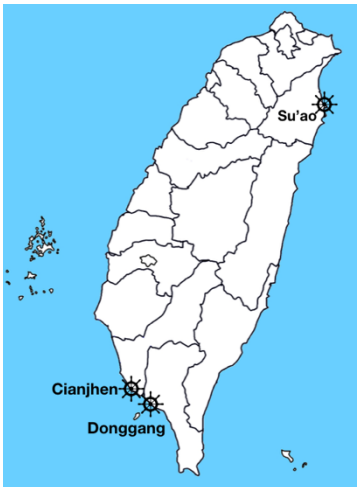
Is this simply another story of "greedy capitalists exploiting innocent workers" or merely some individual cases to be treated as exceptions?[34] Bales (2012, p. 4) told us that *"[p]eople get rich*

[32] See also criticisms from Hathaway (2008, pp. 54-57).
[33] In a keynote speech entitled "Immigration, Housing Safely and Harmoniously – The Drafting of Global Compact for Safe, Orderly and Regular Migration in UN and the Effects on Combating HT", 2018 International Workshop on Strategies for Combating Human Trafficking, Taipei, 25 July 2018, Taiwan.
[34] It is an observation made by the executive director of the Taiwan International Workers' Association (TIWA) to criticise the inaction of public authorities regarding institutions of migrant workers in Taiwan (Legal Aid

by using slaves. And when they've finished with their slaves, they just throw these people away. This is the new slavery[…]" The FFROs, perfectly disposable with their fixed term contract out of Taiwanese labour protection scheme, are they only one of the many examples of modern slavery? In this section, by contrasting opinions of different actors, including trade unions, employers (represented by fisher associations), brokers and responsible government agencies, I will first briefly illustrate the status of FFROs under current national norms (A), before I can explore the structural context behind their working conditions (B).

A. Potential Smugglers or High Risk Victims of Trafficking?

Taiwanese fishermen quit massively the Taiwan-flagged distant-water fishing vessels. In some extreme cases, "there is no more Taiwanese on board, including the captain, the chief officer and the chief engineer, those you thought to be the last Taiwanese guys on board. A vessel may depart from Taiwan with several qualified and licenced Taiwanese fishermen aboard who would hand the vessel to an all-FFROs team once on the high seas." (Broker A, 2018) The FFRO regime started from the 1990s – at the peak of the distant-water fishery development – when illegal overseas recruitments became the solution to reduce the costs that had augmented with the international pressures on Taiwan concerning its overdeveloped and unregulated distant-water fisheries (Haward & Bergin 2000, 42; Chang et al., 2010, p. 543; Huang & Chuang, 2010, p. 74; Lin et al., 2011, pp. 67-68). The regime began with "vessels operating upon oversea fishing bases", to legalise their recruitment of Chinese fishermen (Chuang & Lee, 2000, p. 105). Today, rising demands for environmental and ocean species protection as well as the integration of Taiwan into the regional fisheries management organisations (RFMOs) has an even greater impact on the once notorious industry linked to IUU (Chen, 2012, p. 352).



Taiwan, listed by the Food and Agriculture Organization (FAO) as one of the twenty-five major marine capture producer countries (FAO, 2018, p. 9), has considerably moderateded its capture production in recent years. It owns three bases for distant-water fisheries. Cianjhen (前鎮)[35] is the largest, counting about 80% of the distant-water fishermen household of Taiwan, while the

Foundation, 2016, p. 189).

[35] Cianjhen should represent two fishing harbours, Cianjhen and Siaogang (小港). When Cianjhen harbour

second large one, Donggang (東港)[36] has a registration at around 14% (FA-COA, 2017, tb2). Su'ao (蘇澳)[37] is the only one at the Pacific side. An offshore fishery base with very few registered distant-water fishermen households (*Ibid.*), it nevertheless hosts about 60-70 traditional longline fishing vessels working on high seas (Employer A, 2018; Employer B, 2018).[38]

It matters to distinguish these fishing bases, since their hosted vessels do not work and recruit in the same way. Donggang and Su'ao are the home and the only base of their Taiwan-flagged distant-water fishing vessels, overwhelmingly longline tuna-fishing ones (Employer B, 2018; Broker B, 2018). Cianjhen is the only giant in this industry, hosting vessels of longline tuna-fishing (including ultra-low refrigerators), squid jigging, squid/saury fishing[39], and gigantesque "American purse seiners" for tuna (FA-COA, 2018; Broker B, 2018). Concerning the working methods, those known cases of alleged forced labour or trafficking for exploitation can be compared to what the brokers call "breach of contract" circumstances, happening the most often on squid jiggers and longline vessels, for reasons of the non-stop working hours at the fishing grounds (Broker B, 2018). As for the recruiting channel, for Donggang and Su'ao, all FFROs embark their vessel via the Taoyuan International Airport to launch their round-trips, three to six months for each, between the home base and fishing grounds during normally three or two years. Only at Cianjhen can be found the FFROs physically recruited overseas, i.e., who embark the vessel from an overseas base (Employer A, 2018; Broker A, 2018; FA-COA, 2018).

Increasing costs related to operations (fuel, equipment, fishing quota, IUU watch…) push the employers to go on seeking cheap and docile[40] manpower overseas. According to the Taiwan Fisheries Agency of the Council of Agriculture (FA-COA, table 1), there are in total 17615 registered FFROs working on the Taiwan-flagged distant-water fishing vessels at the end of 2017. With less and less Vietnamese and a decreasing proportion of Filipinos, about 60% of the FFROs are Indonesians. The number of Filipinos outstands only in tuna fishing, and it is plausibly because of the higher skill demanded by tuna purse seiners. Why Indonesians? The

becomes to crowded, some of the vessels would docked in Siaogang (CGA, 2018).

[36] The number should also extend to Liuqiu (Lamay) islet which situates against Donggang (See also Table 1).

[37] Precisely the Nanfang'ao (南方澳) fishing harbour.

[38] These now distant-water fishing verssels worked originally offshore. Due to shortage of tunas in their traditional fishing grounds, they have been obliged to set off for high seas to survive (Employer B, 2018).

[39] Every year between May and July, some of the squid jiggers come back to Cianjhen and changed the equipment to the saury stick-held dip net before they set off for the Northwestern Pacific Ocean (Broker B, 2018; CGA, 2018).

[40] Some Taiwanese brokers even tried to recruit in Africa but finally found Asian fishermen "easier" to work together (Broker A, 2018).

answers from different employers and brokers all point to the same concerns. First of all, these are cheaper manpower, who normally have zero fishing experience back in their inland Indonesian villages. Second of all, as employers A and B (2018) both observed, these Indonesians are less likely to "jump down the vessels", a colloquial term for "quit and disappear". "There have been cases where the newcomers (FFROs), upon landing at the Taoyuan Airport, ran away from the brokers who tried to pick them up." The interviewed brokers confirmed by adding: "for the distant-water fishery, the most important thing is sailing for catching in time, with a sufficient number of fishermen ready to go aboard. We have to be careful." (Broker A, 2018; Broker B, 2018)

Table 1: Registered FFROs aboard Taiwan-flagged fishing vessels in 2017

Fishermen Associations	**FFORs / Nationality**			
	Indonesia	**Philippines**	**Viet Nam**	**Others**
Taiwan Tuna Association	1 612	2 757	428	819
Taiwan Squid Fishery Association	2 741	1 355	353	211
Taiwan Tuna Purse Seiners Association	140	305	138	48
Kaohsiung Fishing Boats Association	4	3	2	0
Kaohsiung Fishermen Association	278	97	23	3
Donggang Fishermen Association	2 965	309	85	13
Liuqiu (Lamay) Fishermen Association	2 309	112	1	8
Linbian Fishermen Association	39	4	3	0
Su'ao Fishermen Association	430	9	4	1
Keelung Fishing Boats Association	6	0	0	0
Sub-total	10 524	4 951	1 037	1 103
Total	17 615			

Source: FA-COA, 2018.

A certain number of undocumented migrant workers seemed to have used this FFROs recruiting process to enter Taiwan, probably because the cost at the labours' side is much lower than any of the recruiting procedures under the Employment Service Act (TIWA, 2018; NIA, 2018; Broker A, 2018). "No more Vietnamese FFROs, enough of risks. In certain cases, they planned the escape before their arrival."[41] (Employer A, 2018) Under Article 8 of the 2017 Regulations on the authorisation and administration of the overseas recruitment of non-citizen crew members (hereafter "FFRO Regulations")[42], a guarantee deposit at around 50,000 USD or more[43] is required by the FA-COA to a Taiwan-based broker. It is destined to clear off the broker's unfulfilled duties related to salaries, insurance, medical care, transport or compensation of damages (Article 17[1] of FFRO Regulations), as a response to increasing

[41] However, Table 2 shows that the proportion of the Vietnamese FFROs who went missing does not appear higher than those of other nationalities (NIA, 2016; 2018).
[42] Promulgated by the COA Decree on fishery no. 1061332225 of 20 January 2017.
[43] A broker recruiting less than one hundred FFROs should deposit 50,000 USD, and the deposit sum augments following the number of recruited crew members.

disputes on forced labour, debt bondage or other abuses. Besides, Taiwan-based brokers also need to advance some procedural expenses in place of the employers[44] or sometimes as a favour to their Indonesian partners[45] (Broker A, 2018; Broker B, 2018; Employer A, 2018). They cannot help complaining about all the surveillance duties imposed by the FFRO Regulations, especially under its Article 15. In cases of FFROs' implication in criminality, illness or disabilities, death, accidents or other emergencies, the brokers are in charge of FFROs' return.

Table 2: Registered and Reported Missing FFROs in the Past Five Years

	Indonesians		**Filipinos**		**Vietnamese**		**Other Nationalities**	
	Registered	Missing	Registered	Missing	Registered	Missing	Registered	Missing
2017	10 524	601	4 951	27	1 037	57	1 103	-
2016	9 785	709	4 768	15	1 271	62	466	-
2015	9 066	508	4 970	30	1 666	35	296	0
2014	7 041	276	3 448	18	1 527	51	266	0
2013	7 039	302	3 430	12	1 750	64	350	1

Source: NIA, 2016; 2018; FA-COA, 2018.

In particular, when a FFRO went missing, the brokers and the employers are all held responsible (Articles 15[6] & 28[8]). What really matters to them is not the duty to assist the National Immigration Agency (NIA) to find the "run-away" crew members but the employers' recruiting quota would consequently be reduced under Article 32(1) of the Recruitment Regulations (Broker A, 2018; Broker B, 2018; Employer A, 2018; Employer B, 2018). On the other hand, the quota restriction appears to have successfully released the Taiwan-based brokers from being tempted by foreign human smugglers/traffickers. With a "commission" of around 330 USD by head, the Taiwan-based brokers only need to help the smugglers to enter Taiwan with a valid paper (NIA, 2018). Smugglers as "missing" FFROs, only need a smartphone to knock out the door to the local labour market (NIA, 2018; TIWA, 2018). During the docking/transit stay in Taiwan, it is sufficient for illegal brokers to win the trust of one of the crew members, "then he would bring up his buddies with you" (NIA, 2018).

As counter-measures for risk prevention, some brokers or employers choose to step on the edge of legality. Without an explicit confirmation of the presumed choice of "strategy", neither Broker A (2018) nor Broker B (2018) disapproved it. Nevertheless, they seem to have found some solutions to avoid sanctions under the Human Trafficking Prevention Act. "Their passports are kept by the customs broker during the transit period, for maximum fourteen days,

[44] As a matter of market competition, brokers render better services this way to their clients (employers) in exchange of their trust and loyalty (Broker A, 2018).
[45] These procedural expenses are to be debited from the service charge paid by the FFROs to their Indonesian broker (Broker A, 2018; Employer A, 2018).

to facilitate necessary procedures in Taiwan. They can move around freely with their transit permission; the police only need to verify that piece of paper. It has nothing to do with confiscation." (Broker A, 2018) In other cases, some employers ask the migrant workers to sign up a paper asking their employer to "keep their passport in safety" (TIWA, 2018). In regard to the menaces, threats or curses on non-payment of salaries, the employers or brokers often use these "tricks" to deter any attempt to escape or to revolt (YFTU, 2018). "Almost all FFROs believe that they work illegally in Taiwan! When they return home, they keep telling this to the future FFROs." This label of illegality works, "so they (FFROs) will not try to escape and will be afraid of the police." (YFTU, 2018)

Moreover, an alleged case of private deprivation of liberty in person has been officially denounced by a recent Ombudsperson report (Wang, 2018), about the lodging conditions of a temporary shelter on land during the refurbishment and replenishment of their vessel.[46] Broker A (2018) revealed a serious concern of the employers: "These men are out of record in Taiwan, and they can be tempted by drug dealers or even mafia…; We are held responsible for their behaviours here, anyone implicated in crimes or disruptions of public order can cost us [employers and brokers] a fortune." Taiwan authorities of home security watch very closely on the FFROs and has set up special action plan (NIA, 2018). Therefore, do FFROs form a identified group of suspicious smugglers/criminals or potential victims of trafficking? The NIA officers claimed that they deal carefully with this paradox: "We will first try to identify why they ran away (from their employers). It should the same for the police, in cases of disturbances or other incidents, to make sure that we do not leave a potential victim back to the hands of his trafficker which could be the broker or the employer." (NIA, 2018)

B. Alleged Debt Bondage and Forced Labour?

The FFROs recruiting process constitutes the most controversial part of the whole regime. The first question lies upon the cost of international mobility and who should pay for it. An FFRO goes through three brokers before his papers reach the employer. The first one is called "bullhead" (牛頭), another colloquial term for "sponsor" (Lee et al., 2017, p. 41), mostly someone more or less known by the villagers, who often had experienced the overseas fishing business (Broker A, 2018). These sponsors introduced the candidates to the brokers based in the port city, who will later take care of the paper works, including applications for passports, crew certificate, medical certificate, etc.. The Taiwan-based brokers are responsible to the

[46] Normally the FFROs stay on their vessel during the docking/transit period.

employers, where their revenues come from. They recruit via their foreign partner brokers and report the due files to the FA-CAO (Broker A, 2018; Broker B, 2018; Employer A, 2018).[47] The FFROs normally pay a service fee and a guarantee deposit (1000 USD or more) to the port city broker of their country, while the "bullhead" earn their commissions from these local brokers (YFTU, 2018; TIWA, 2018). Broker A (2018) explained that a legally acting Taiwan-based broker would "never earn a penny" from the FFROs. Instead, in order to attract more partners to supply the manpower in need, Taiwan-based brokers would pay them a commission fee by head (Lee et al., 2017, pp. 43-44; Broker A, 2018).

The problem arises from the service fee and guarantee deposit on FFROs' charge, for it is often an amount over their financial capacity. Some of them seek mortgages with their land or house, but not with a certificated bank. This happened mostly in Indonesia, not in Philippines or Viet Nam where the domestic norms prohibit practices of usury (Broker A, 2018; Broker B, 2018). "The bullhead knows where you live, if you escape, it will be your family that suffers." (TIWA, 2018) Nevertheless, due to the well-known low salary offered by Taiwan-flagged fishing vessels, the brokers are more and more confronted with "men with nothing to lose" (Broker B, 2018). Taiwan-based brokers once played the role of training and selection of fishermen overseas (TIWA, 2018), to make sure that "they can endure the tedious working mode on board". (Broker B, 2018). Now still eager to recruit sufficient workforce, they are sometimes obliged to recruit a FFRO without guarantee deposit nor service fee payment in advance. "I try my best to reject this kind of workers, because they can escape at any time without losing anything!" (Broker B, 2018) Gaining control over the FFROs means so much both to the brokers and employers. On the opposite side, once the FFROs on mortgage breach the contract and lose the job, for reasons of health, maladaptation, faults (often linked to inexperience), the financial situation of the whole family is in crisis (YFTU, 2018; TIWA, 2018).

The FFRO regime, even after the 2016 reform, still maintains its main character – disposable manpower without future. Yet the future can be elsewhere. Employer A (2018) invoked a curious role of Taiwan distant-water fisheries: "Many of my ex-employees then went on working for EU vessels with my reference letters. Our men are skilled and disciplined." In this sense, Taiwan-flagged fishing vessels serve as a training base, while the skilled workers would not stay. Before the 2016 reform, the minimum salary was 300 USD per month (against 450

[47] The reporting process starts from the employers' affiliated fishermen associations who report to the fishery affaires office at the local government level, and finally the files will reach the FA-COA that will verify the legality of the papers. None of these intermediate institutions are authorised to check the files (FA-COA, 2018; Employer A, 2018).

USD today), "but it is already much better than what they (FFROs) can earn in their home village; these are men without any experience. Besides, we distribute monthly bonus pay[48] (小功) so often!" (employer B, 2018) However, with this 450 USD per month, the FFROs have a whole family to feed and a heavy loan to pay off. Their contract has often two different versions, one for the public authorities of both sides, another between them and the brokers (Lee et al, 2017, p. 46; YFTU, 2018). Even if a FFRO is aware of this fraud, he might not denounce it. Broker B (2018) explained the trap: "Including their crew certificate and medical records, every paper can be faked. Some Indonesian brokers do this to accelerate the recruitment."

None payment, delayed payment or disproportional deduction of the due salaries constitute another highly controversial issue, which is often seen as a practice of exploitation. The 2016 reform entails a prohibition to withhold any due salary for loan payment or service charges.[49] Additionally, the salary should be paid in full amount directly to the FFROs.[50] However, both brokers and employers found these obligations hard to fulfil. Especially in the case of a "household vessel", namely a fishing business based on a family scale, the employer is often the captain himself, travelling with his FFROs in the international waters. The monthly payment of salary is confined to the Taiwan-based broker, who wires the money to their foreign partner. A Jakata-based broker then distributes to the family the amount after deductions of diverse charges, often including loan reimbursement (Broker A, 2018). The FFROs still touch directly a small proportion of their salary at the end of a journey, since it is useless for them to hold cash on board (Employer B, 2018). In so far as the delayed payment is concerned, Broker A (2018) simply stated that it is a customary practice, employers are used to pay when they see the cash rolling in after a fishing operation.

An alliance of NGOs in Taiwan keeps calling for the abolishment of the FFRO regime, which is arguably a legalised mechanism of trafficking. Nevertheless, socialist specialised in fisheries, Dr. Liu-Huang (2017) is preoccupied by a structural injustice: "The large-scale companies now turn their vessels to flag of convenience (FOC) ones and go on recruiting overseas. But the household vessels at the front line facing the decline of distant-water fisheries, will have to withdraw from the market." The employers managing household vessels struggled predominantly against the replacement of FFRO regime by the regime under the Employment Service Act: "We work in the international waters, and these workers do not work in Taiwan.

[48] This practice comes from the tradition, where the salary level was low and employers encouraged their fishermen to work hard by distribution of bonus (employer B, 2018; broker A, 2018).
[49] Article 13(2)(4) of the FFROs Regulations.
[50] Article 28(4) of the FFROs Regulations.

If they think that our vessels are Taiwanese territories, then where are the police and coast guards when we are in danger?" (Employer B, 2018) It reflects the common anxiety within these households, when the industry seems to be forced to shrink in a hostile climate both at the national and international levels. After all, there are real difficulties for the distant-water fisheries to adapt to the conditions set up by the Labour Standards Act. The Coast Guard Administration (CGA, 2018) seemed to understand the maladaptation: "Not all the vessels come home at a yearly base. Some of them travels all the time overseas."

For instance, the traditional longline fishing vessels (for tuna) based in Donggang and Su'ao are mostly small fleets around 20 tons, operating at a household base and travelling with twelve to fifteen men aboard[51] (Broker B, 2018; Employer B, 2018). It takes about one month to arrive at the fishing ground, during which the fishermen maintain some daily routines and basic training exercises. The tough part of the job comes once the targeted tunas are found. It can last more than ten hours of non-stop operation for the branch-line setting (Broker A, 2018; Employer B, 2018). With this type of small team on board, it is often hard to ensure daily rests or twelve hour shifts (Broker B, 2018; Employer B, 2018). On the squid vessels, when squids come up with the automatic jigging machines, it also implies long hours of non-stop pre-treatment (Broker B, 2018). "It is about hard labour (on board), young Taiwanese generation can no longer stand it and would rather stay on lands." (Employer A, 2018; Broker A, 2018) Broker B (2018) indicated that "Donggang sees a higer proportion of missing FFROs[52], and there is a reason!" Restrictions related to fishing quota and fishing grounds managements hit hard on the employers, and the accumulative costs and loss will now transfer to the employees.

There remains the alleged violence or physical "punishments". FA-COA (2018) now sends their special envoys to the overseas fishing bases in cooperation with those port countries. FA-COA also maintains some data exchange cooperation with principle port countries, so that a special commissioner can travel there for random on-board checks. Apart from FA-COA, the vessels are within the reach of Taiwan authorities when they are home. It is the CGA checking unit that can first spot the FFROs at the harbour. A NIA officer will come to the harbour and join the CGA routine checks respectively upon the entry and the departure. Two CGA officers, one to hold the crew members for NIA check, another to execute the environment check (CGA,

[51] Generally twelve in the case of Dung'gang (Broker B, 2018) and fifty in the case of Su'ao (Employer B, 2018).

[52] The NIA 2016 report reveals the same observations: in 2015 for instance, 393 FFROs reported missing in Donggang against 153 in Cianjhen (p. 24), while the number of crew members passing by Cianjhen doubles the one of Donggang (FA-COA, 2018).

2018). The CGA can identify some of the visible injuries, but the FFROs are normally wrapped in jackets (a necessity in a refrigeration environment). Basic inquiry will be held on-site, with simple questions as "what happened?" by pointing on the injury. With their more than ten years of experiences, they only play a passive assistant role in calling ambulance in before the vessel arrives. A vessel with injured or sick crew member broadcasts to the Fishery Radio Station of the FA-COA, which informs the CGA about necessary steps to take (CGA, 2018).

"Without the expertise, we can hardly tell if it is about bullying, physical punishment, occasional fights or accidents during fishing operations." So confessed the CGA. "Basically, upon docking, everyone seems happy, finally some good rest on land." A very limited number of officers at mission there in a CGA checking unit, and they are neither specially trained for verification of labour standards nor for identification of abused victims. The NIA officer comes only to the harbour make sure that the embarking FFROs are all on their registry, while the FA-COA officers mainly to check the fishing products. Who should be held responsible to identify the alleged victims at the harbour? None of the authorities has the necessary number of experts to coordinate with each other. Even with a training programme for sensibility, are there sufficient officers to take care of the several thousands of FFROs at Cianjhen during the squid jiggers yearly return?

CONCLUDING REMARKS

(To be continued at the conference. I am not yet pretty satisfied with my conclusion…)

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