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Trafficking, Smuggling, and Human Rights

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In recent years, the smuggling of human beings across international borders has grown rapidly. A small-scale cross border activity affecting a handful of countries has become a multimillion-dollar activity that is global in scope.

Information about human smuggling — the numbers of people smuggled, the conditions that they endure in transit and their treatment on arrival — is patchy at best. It is currently estimated that some 800,000 people are smuggled across borders every year.

These figures mask the complex and various experiences of the men, women, and children caught up in such processes. Those who are smuggled include political refugees, those fleeing conflict and violence of various kinds, and economic migrants in search of a better life.

This is by nature a secretive, illicit activity, and one that is increasingly controlled by transnational organized crime syndicates. What little we do hear, however, gives ample cause for human rights concerns — numerous press articles describe cases of migrants drowning in unsafe vessels or suffocating to death in overcrowded truck compartments and ships, or being victimized for revealing information about smuggling gangs.

Many of those who do reach their destination find themselves locked in cycles of violence, exploitation, and abuse. These violations tend to go unreported because the victims fear arrest and deportation on one hand, and retribution by smuggling gangs on the other.

The spread of human smuggling needs to be understood in the context of globalization and migration. Since 1965, the number of international migrants has doubled to some 175 million persons at the turn of the millennium. Prospects of a better life abroad, poverty, economic marginalization, political and social unrest, and conflict are all incentives to move.

In an increasingly interconnected world, movement is easier. As push and pull factors encourage increasing numbers of people to migrate, these individuals in turn collide with the many legal obstacles to entry that industrialized countries have put in place.

However, opportunities to immigrate legally are severely limited. Migrants, including asylum seekers, have increasingly resorted to illegal entry and unauthorized stays, and ever-larger numbers use the services of smugglers to evade the system, compounding

their vulnerability to exploitation and ill treatment.

Human Rights and the Definitions of Smuggling and Trafficking

Despite the plethora of human rights concerns associated with human smuggling, it is in fact the law enforcement imperative — the war against terrorism, narcotics, and irregular migration — that have moved this issue up the international policy agenda.

In 2000, states drafted two new protocols to the UN Convention on Transnational Organized Crime (UN TOC) dealing with trafficking and smuggling respectively. The Trafficking and Smuggling Protocols, more commonly known as the Palermo Protocols, came into force on December 23, 2003 and January 28, 2004 respectively.

The Palermo Protocols are framed around a central dichotomy between coerced and consensual irregular migrants. Whereas people who are trafficked are assumed not to have given their consent and are considered to be "victims or "survivors," people who are smuggled are considered to have willingly engaged in a criminal enterprise.

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There is also a gender dimension to these distinctions: whereas those who are smuggled are mostly assumed to be men, victims of trafficking are associated with the traditional targets of protective concern — women and children.

Trafficking

The UN TOC Convention brought to a close decades of frustrating and inward-looking debate about the distinction between human trafficking and human smuggling. Trafficking is defined as:

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

This definition of coercion is expansive, reflecting perhaps the concerted input and

interest of the human rights and feminist lobbies in the drafting of this protocol (an interest that was less evident in the Smuggling Protocol).

Coercion is not simply brute physical force, or even mental domination, but includes "the abuse of a position of vulnerability." This can potentially encompass a very broad range of situations, since poverty, hunger, illness, lack of education, and displacement could all constitute a position of vulnerability. Whether a particular arrangement constitutes "abuse" may be as much a question of assessing the market or "going" rate for pricing a particular migration service as of characterizing a personal interaction.

Second, the trafficking definition requires exploitation, but exploitation itself is undefined. However, the trafficking definition does include exploitative actions, such as prostitution of others, as well as a range of non-sexual labor relationships that are "practices similar to slavery" such as indentured or bonded labor, child labor, or oppressive forms of labor. It is agnostic on whether prostitution itself constitutes exploitation, reflecting the deeply polarized views within UN Member States on the topic.

In sum, the protocol's critical ingredients for trafficking in persons are the presence of exploitation and the fact of coercion. Cross-border transport of the trafficked person is not required, provided the offense is "transnational in nature" as defined in the UN TOC (Article 4).

Smuggling

In contrast, the term "smuggling", following general practice, refers to consensual transactions where the transporter and the transportee agree to circumvent immigration control for mutually advantageous reasons. The Smuggling Protocol defines "smuggling of migrants" 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" (Article 3).

The two critical ingredients of this definition are illegal border crossing by the smuggled person and receipt of a material benefit by the smuggler.

Comparing the Protocols

The protocols share several key features. Both require state parties to criminalize the relevant conduct of traffickers or smugglers, to establish and implement domestic law enforcement mechanisms, and to cooperate with other states to strengthen international prevention and punishment of these activities. Both stipulate that the migrants themselves should not be subject to criminal prosecution because of their illegal entry.

An interesting innovation is that both protocols require states parties to concretely address the root causes of vulnerability to trafficking and smuggling (see for example (Article 9(4) of the Trafficking Protocol and Article 15(3) of the Smuggling Protocol).

Finally, neither protocol explicitly requires states to implement any particular immigration benefits for victims, to regularize or expand lawful access to their territory, or to address the chronic mismatch between supply and demand by increasing supply.

However, the two protocols do differ in several key respects, particularly in the protections they afford migrants. The Trafficking Protocol addresses the need for protection of trafficked persons in some detail and provides for a broad range of protective measures.

Though the requirements are couched in optional rather than mandatory language — "each state shall consider implementing... in appropriate cases..." and "...shall endeavor to provide" — they establish a useful framework for intervention to enhance human rights protections for trafficked persons.

Article 6(3) in particular requires states to consider "implementing measures to provide for the physical, psychological, and social recovery of victims of trafficking in persons." This includes cooperation with NGOs; provision of housing, counselling, medical psychological, and material assistance; and employment and training opportunities.

It even requires states to consider adopting legislation to enable trafficking victims to remain in their country "temporarily, or permanently, in appropriate cases" according to Article 7. If domestically enacted, adequately funded and energetically enforced, these measures would constitute significant benefits for trafficked persons.

The Smuggling Protocol, by contrast, contains rather minimal reference to the protection needs of smuggled persons. The preamble to the protocol does set out "the need to provide migrants with humane treatment and full protection of their rights," and expresses concern that "the smuggling of migrants can endanger the lives or security of the migrants involved."

This, combined with the prohibition on criminalization of migrants, articulates an important and useful international commitment to a basic level of protection. This is significant given the pervasive use of de facto punitive measures against smuggled migrants.

The Smuggling Protocol also requires states to "ensure the safety and humane treatment of the persons on board" vessels that are searched (Article 9); and to implement their preexisting, absolute obligations under international law, to protect the right to life and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment (Article 16(1)).

States parties are also required to embark on a range of prevention measures (Article 15), including strengthening domestic information programs to increase public awareness of the dangers facing smuggled migrants and collaborating with other states to prevent migrant recruitment by criminal gangs.

But there are no provisions regarding medical, psychological, or social recovery, which include help with housing, employment, and job training. States also are not obligated to collaborate with NGOs, or to provide temporary legal residency as in the Trafficking Protocol. Nor are the inclusive rights to non-discriminatory treatment derived from relevant international law included in the convention.

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Moreover, even the requirement to afford at-risk smuggled migrants protection is very heavily qualified: states should "take *appropriate* measures to afford migrants *appropriate* protection" against violence from smugglers and where their lives are endangered. But "appropriate" to whom and what? This clause undercuts the more robust protections afforded by the recently ratified 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ([see related article](#)).

At the same time, the protocol explicitly endorses the possibility that states can detain smuggled migrants provided they are afforded the requisite consular access, and it requires states to remove smuggled migrants back to their home countries expeditiously.

Thus, in terms of protections, migrants are better off being classified as trafficked than smuggled. However, the distinction in practice may obscure more than it illuminates.

The Consent/Coercion Seesaw

First of all, the distinction between trafficking and smuggling is difficult to implement in practice. Rarely are there "pure" cases of one or the other. Children kidnapped without their parents' consent and migrant workers lied to from the outset are at one end of the spectrum, while the opposite end includes completely transparent cross border transportation agreements where a fee is mutually agreed on and the relationship between transporter and transported ends once the border is crossed.

The vast variety of migration strategies and circumstances defies easy categorization. At the point of departure and at multiple stages of the journey, it may well be unclear which category of irregular migration is at issue — trafficking or smuggling.

And the most accurate classification may change over time. The available evidence suggests that most transported undocumented migrants consent in some way to an initial proposition to travel, but that, en route or on arrival in the destination country, circumstances frequently change.

At what point should the decision about how to characterize the conduct be made? States tend to favor the point of departure as an indication of the migrant's "true intentions." Rights advocates favor the time of arrival or stay as an indication of the migrant's needs. Yet, the state's perspective usually wins because it is very difficult for someone who was a sex worker prior to departure to ever claim successfully that she was trafficked, even when subjected to severe human rights violations.

Second, the distinction depends on a flawed conception of human agency. It presupposes a hard and fast divide between two motivational states — consent and coercion. At first sight this is plausible. States and rights advocates want to distinguish agreements people enter into voluntarily from those they enter into as a result of coercion, because the latter are not real agreements and should not bind the coerced person.

But the distinction between coercion and consent is complex. How should coercion be characterized? Does someone with a gun to their head consent to hand over their money when

robbed? Most would say no. But does someone who sells his kidneys because his children are starving consent?

Translated into the migration context, do persecution, destitution, and heartache from prolonged family separation constitute "guns" to the head? Are refugees "choosing" to avail themselves of the services of travel professionals to get false travel documents, cross unguarded borders, or create fictive identities — or are they "coerced"?

The trafficking protocol defines coercion to include not only force (e.g., kidnapping) but also "the abuse of power or of a position of vulnerability." The latter, however, is not defined, and it remains to be seen whether states and courts will interpret it as including extreme poverty. If they do, many cases currently considered instances of human smuggling will be brought under the Trafficking Protocol. If they do not, then the political point of expanding the concept of coercion beyond mere physical force, fraud, or deceit could be lost.

A further complication arises in deciding how to characterise situations of "mutually advantageous exploitation," a very common circumstance for smuggled migrants. The transporter benefits from his or her profit, the transportee benefits from gaining access to an employment opportunity, even if the smuggling fee is exploitative.

Yet, many of the employment opportunities that smuggled migrants are keen to access constitute "forced labor" in international law terms—paradoxically, they are forced but chosen opportunities. Are these workers smuggled because they surely consent, or are they trafficked because the exploitative offer is actually a threat? Not accepting means they lose the opportunity to find work.

There is no question that smugglers take advantage of the migrants' desperation or vulnerability. But are all exploitative offers coercive and is coercion always exploitative? The answer is no: hawkers selling tickets to the Olympics may charge exploitative prices, but they are certainly not coercive; conversely, a parent forcing a child to travel abroad to practice a foreign language before an exam is coercive but not exploitative.

Therefore, just because the smuggler's offer is exploitative does not necessarily mean the migrant is coerced. For that to be the case, states need an independent yardstick. If the migrant has no other acceptable options, then the exploitative offer becomes coercive. For instance, if the migrant would starve, or be unable to get medicine for a child unless he or she took up the offer, then the offer would be coercive.

In these situations, the fact that the migrant consents to be smuggled (because the deal is mutually advantageous) does not alter the fact that it is coercive. The critical issue is to determine which alternatives are considered acceptable and which are not.

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The question of acceptable alternatives comes back to international norms, and to what philosopher Alan Wertheimer calls the "moral baseline." In assessing what counts as coercive and what counts as consensual, states are forced to engage in moral decisions about what types of conduct are acceptable or permissible in a society and what are not. Slavery and slavery-like work are clearly not acceptable. But what about destitution — lack of access to essential food, medicine, and shelter?

This discussion applies to the distinction between smuggling and trafficking. If the person consents to be transported knowing what the working conditions abroad will be like, then, according to UN TOC, the person is smuggled — unless the consent was obtained by force, by undue influence, or "abuse of a position of vulnerability" because the person had no morally acceptable alternatives.

But by this standard, many people who are now considered "smuggled" should fall within the category of trafficking victim, even though they have formally consented to travel and/or to engage in exploitative work in the destination state.

Conclusion

From a human rights perspective, migration is an inherently risky activity. Despite the potential rewards and benefits, switching the familiar for the new, and the status of a national for that of a non-national or alien in a world in which the state is still the prime guarantor of rights entails material, social, and psychological challenges.

These risks are heightened when combined with an irregular status. The UN TOC and its two protocols on trafficking and smuggling mark an important step forward in the battle against some of the most exploitative and dangerous situations that migrants can encounter. Although motivated primarily by law enforcement concerns, the protocols contain important protective measures, which, if implemented fully, could significantly advance the human rights of migrants.

However, it is critical that these new provisions be read against the corpus of existing human rights law and labor standards that already exist to protect the rights of migrants (**see related article**) and that policymakers strike an appropriate balance between the security interests of states and the human security entitlements of migrants.

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