

Trafficking, smuggling and human rights: tricks and treaties

by Anne Gallagher

Through the adoption of two new treaties on trafficking and migrant smuggling, states are attempting to curb the growing influence of organised criminal groups on international migration. The risk of human rights being marginalised in this process is, unfortunately, a very real one.

Each year, an unknown number of people are 'smuggled' or 'trafficked' across international borders. Smuggled migrants are moved illegally for profit: they are partners, however unequal, in a commercial transaction. All going well, their relationship with the smuggler ends at the destination country and they may even manage to survive the ordeal with only financial damage.

By contrast, the movement of trafficked persons is based on deception or coercion and is for the purpose of exploitation. The profit in trafficking comes not from the movement but from the sale of a trafficked person's sexual services or labour in the country of destination. Most smuggled migrants are men. Most trafficked persons are women and children.

In November 2000, the UN General Assembly adopted two new international treaties (protocols): one on smuggling of migrants¹, the other on trafficking in persons². The treaties are actually part of a package of legal instruments which were developed by the UN's Crime Commission to deal with the growing problem of transnational organised crime. The parent instrument of this package is the UN Convention Against Transnational Organised Crime – also adopted by the General Assembly in November 2000³. Both protocols have attracted a large number of signatures and are expected to come into force in the next few years.

They did not emerge in a vacuum. Trafficking and migrant smuggling are now high on the international agenda for a range of reasons. Humanitarian concern – especially for trafficked women and girls – is one factor. However, in many cases, and particularly on the part of the major destination countries, attempts to counter trafficking and smuggling seem to be motivated by a growing intolerance of all forms of irregular migration. The connections between trafficking, smuggling and irregular migration have made it difficult to persuade governments to place individuals and their rights at the centre of this debate.

The Trafficking Protocol

The purpose of this treaty is to prevent and combat trafficking in persons, especially women and children. Its main emphasis is on strengthening cooperation between countries. The Protocol requires States Parties to:

- criminalise trafficking and related conduct as well as impose appropriate penalties
- facilitate and accept the return of their trafficked nationals and permanent residents with due regard for their safety
- when returning trafficked persons, to ensure that this happens with due regard both for the safety of the trafficked person and the status of any relevant legal proceedings
- exchange information aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers
- provide or strengthen training for law enforcement, immigration and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims
- strengthen border controls as necessary to detect and prevent trafficking
- take legislative or other appropriate measures to prevent commercial transport being used in the trafficking process and to penalise such involvement

Trucks arriving in the UK being checked for asylum seekers, Dover, 2001.



- take steps to ensure the integrity of travel documents issued on their behalf and to prevent their fraudulent use

The protocol contains a number of victim protection measures but most of these are optional. States Parties are to undertake the following in **appropriate cases and to the extent possible under domestic law:**

- protect the privacy of trafficking victims and ensure that they are given information on legal proceedings and facilities to present their views and concerns during criminal procedures against offenders
- consider implementing a range of measures to provide for the physical and psychological recovery of victims of trafficking
- endeavour to provide for the physical safety of trafficking victims within their territory
- ensure that domestic law provides victims with the possibility of obtaining compensation
- consider adopting legislative or other measures permitting victims of trafficking to remain in their territories temporarily or permanently in appropriate cases with consideration being given to humanitarian and compassionate factors
- endeavour to establish policies, programmes and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimisation
- endeavour to undertake additional measures including information campaigns and social and economic initiatives to prevent trafficking

The Smuggling Protocol

In contrast with trafficked persons, smuggled migrants are assumed to be acting voluntarily and, therefore, in less need of protection. Accordingly, the primary emphasis of the Migrant Smuggling Protocol is on strengthened border controls – particularly in relation to smuggling by sea. For the first time in international law, States Parties are specifically authorised to intercept certain vessels suspected of carrying smuggled migrants. They are also required to:

- criminalise the smuggling of migrants as well as related offences including the production, provision and possession of fraudulent travel or identity documents
- take steps to ensure the integrity of travel documents issued on their behalf and cooperate with each other in preventing their fraudulent use
- provide or strengthen specialised training for immigration and other officials aimed at preventing, combating and eradicating migrant smuggling
- adopt appropriate legal and administrative measures to ensure the vigilance of commercial carriers such as airlines in preventing migrant smuggling, to guarantee their liability and to provide for sanctions in the event of complicity or negligence

The Protocol includes a number of provisions aimed at protecting the basic rights of smuggled migrants and preventing the worst forms of exploitation which often accompany the smuggling process. While these

are nowhere near as comprehensive as the protections contained in the Trafficking Protocol, they are nevertheless important.

When criminalising smuggling and related offences, States Parties are required to establish, as aggravating circumstances, situations which endanger the lives or safety of migrants or entail inhuman or degrading treatment, including for exploitation. Migrants themselves are not to become liable to criminal prosecution under the Protocol for the fact of having been smuggled (although this provision would not prevent a State from prosecuting a smuggled migrant for violation of national immigration laws). All appropriate measures must be taken to preserve the internationally recognised rights of smuggled migrants, in particular, the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment. Smuggled migrants must also be protected from violence and those whose life or safety has been endangered by reason of having been smuggled must be assisted.

Outstanding issues

The development and adoption of agreed definitions of trafficking and migrant smuggling is a major achievement of the two protocols. While the final definitions may not be perfect, they are close enough. Incorporation of a common understanding of trafficking and migrant smuggling into national laws and policies will enable states to cooperate and collaborate more effectively than ever before.

Trafficking in Persons is:

“... 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 purposes 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.”

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, Article 3(a).

Common definitions will also help to overcome the serious problems which now exist in relation to data collection and analysis.

However, the extent to which the two protocols actually contribute to eliminating trafficking and migrant smuggling remains uncertain. The protection provisions of both instruments are weak and, as noted above, mostly optional. Certainly, they do

identify irregular migrants as having been smuggled rather than trafficked. There is already plenty of anecdotal evidence indicating that this is already occurring. The possibility of individuals being wrongly identified was not even considered during the drafting process – despite the best efforts of a coalition of UN agencies. Nor was there any acknowledgement of the fact that someone can be a smuggled migrant one day and a traf-

for many governments, trafficking and smuggling are issues of crime and border control, not human rights

not add substantively to what is understood as the minimum core rights to which all human beings are anyway entitled. On a practical level, this deficiency is likely to undermine the law enforcement objectives of the protocols by ensuring that people caught up in trafficking and smuggling networks have little incentive to cooperate with national authorities. Without such cooperation, it is likely that traffickers and smugglers will continue to operate with impunity.

Even more importantly, the protocols contain no guidance on how trafficked persons and smuggled migrants are to be identified as belonging to either of these categories. The Canadian Refugee Council has picked up on this issue: “If authorities have no means of determining among the intercepted or arrested who is being trafficked, how do they propose to grant them the measures of protection they are committing themselves to?”¹ The regime created by the two protocols (whereby trafficked persons are accorded greater protection and therefore impose a greater financial and administrative burden on States Parties than smuggled migrants) creates a clear incentive for national authorities to

ficked person the next. These failures are serious and are likely to compromise the practical value of the protocols’ already weak protection provisions.

While most governments are unwilling to accept any limitation on their ability to repatriate or turn back smuggled migrants, the issue of repatriation of victims of trafficking is a more sensitive and controversial one. The UN High Commissioner for Human Rights has expressed the view that “safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to [provide] for safe (and to the extent possible) voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of trafficked persons. When trafficking occurs in the context of organised crime, such an endorsement presents an unacceptable safety risk to victims”.⁵ The identification of an individual as a trafficked person should, at the very least, be sufficient to ensure that immediate expulsion against the will of the victim does not occur and that necessary protection and assistance are provided. The Trafficking Protocol does not meet even this minimum standard.

The special case of refugees and asylum seekers

An increasing number of refugees are currently being transported across borders by smugglers and (less frequently) by traffickers. The consequences are usually severe. UNHCR is not alone in noting that “..an asylum seeker who resorts to a human smuggler seriously compromises his or her claim in the eyes of many States ...lead[ing] to an imputation of double criminality; not only do refugees flout national boundaries but they also consort with criminal trafficking gangs to do so”⁶.

During the protocol negotiation process, a number of international agencies (including UNHCR and the UN High Commissioner for Human Rights) recognised the danger of further limitations to the rights and opportunities of individuals to seek and enjoy asylum from persecution in other countries. They argued that: (i) illegality of entrance into, or presence on, the territory of a state should not adversely affect a person’s claim for asylum; and (ii) smuggled migrants and trafficked persons should be given full opportunity (including through the provision of adequate information) to make a claim for asylum or to present any other justification for remaining in the country of destination.

While there was resistance to insertion of such specific protections, the drafting committee for the two protocols finally agreed to include a broad savings clause in both instruments to the effect that nothing in them will affect the rights, obligations and responsibilities of states under international law, including international humanitarian law, international human rights law, and, in particular, refugee law and the principle of *non-refoulement*.

Smuggling of Migrants is:

“... 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.”

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, Article 3(a).

It remains to be seen whether the savings clause is enough to prevent the two protocols from being used to undermine the already precarious refugee protection regime. The border control provisions in both instruments are especially worrying. Border enforcement measures such as readmission treaties, carrier sanctions or the posting of Airline Liaison Officers abroad are now routinely used by governments of the major destination countries. This is despite the fact that such measures risk denying *bona fide* refugees the chance of escaping persecution. Rather than addressing this conflict, the two protocols contribute to confusion by endorsing strengthened border controls while at the same time nominally upholding the right to asylum.

Time for an honest look at trafficking and smuggling

The past few years have shown how easy it is to discuss trafficking, smuggling and the broader problem of irregular migration in a human rights vacuum. The failure of the two Protocols to include mandatory protections provides a strong indication that, for many governments, trafficking and smuggling are issues of crime and border control, not human rights. In countries of destination, people trying to move across their borders illegally are widely considered to be law-breakers, undeserving of compassion or support. Those who are tricked or coerced into moving and exploited upon arrival may be viewed more sympathetically but are nevertheless routinely prosecuted for minor offences and quickly deported.

Many governments ignore the fact that irregular migration (including trafficking and migrant smuggling) happens because of the enormous difference between the number of people who wish (or are forced) to migrate and the legal opportunities for them to do so. There is a growing body of evidence that severely restrictive immigration policies are more likely to fuel organised, irregular migration than to stop it. Tighter law enforcement controls on smuggling and trafficking push individuals and smaller, informal operators out of the market – helping to create a monopoly for the best and most sophisticated criminal networks.

International action to end organised, irregular movement also ignores the fact that traffickers and smugglers service a market in which there are both buyers and sellers. The growth in trafficking and smuggling reflects not just an increase in ‘push’ factors from countries of origin but also the strong pull of unmet labour demands – particularly in the informal sector. While cracking down on illegal migration, governments in the main destination countries have done little to address the insatiable demand for cheap labour and cheap sex which makes trafficking and smuggling so profitable in the first place. At best, this is misguided. At worst, it is actively hypocritical.

Conclusion

The world’s migration management systems are in crisis. They are failing to meet the needs of governments, business and, importantly, the migrants themselves. The growth in smuggling and trafficking is a direct consequence of the global failure to manage migration and deal with its root causes. While new international laws will never be enough, they can be important tools for change. Despite their imperfections, the new treaties on trafficking and migrant smuggling are a small step forward. For the very first time, the parameters of acceptable responses to trafficking and smuggling have been established. There is now a standard against which laws, policies and practices relating to trafficking can be judged.

Attention should now focus on ensuring that human rights are not marginalised any further. By definition, trafficked persons are victims of serious human rights violations. Smuggled migrants are often fleeing human rights violations or situations of extreme violence or poverty. The connection between human rights and abusive forms of migration such as trafficking and migrant smuggling makes it especially important that those working to promote the rights of migrants and refugees take up this issue. The human rights community in particular has a special responsibility to ensure that trafficking and smuggling are not seen only as problems of migration, problems of public order or problems of organised crime. These perspectives, are, of course,

valid and important. However, as the UN Secretary-General has noted, in developing realistic and durable solutions we must be prepared to look further – to the rights and the needs of the individuals involved.⁸

People have always moved and will continue to do so. However, it is the ‘survival migrants’, including asylum seekers, who are the most likely to be trafficked or smuggled because they are the ones who have fewest choices. Lack of human security and gross inequalities within and between countries are still the main reasons why people take dangerous migration decisions. Until genuine efforts are made to deal with the root causes of forced migration, the international community will stand no chance of developing credible, effective solutions.

Anne Gallagher is Adviser on Trafficking at the Office of the UN High Commissioner for Human Rights (OHCHR). She is also Coordinator of the Inter-governmental Organisation Contact Group on Human Trafficking and Migrant Smuggling which aims to strengthen cooperation and collaboration between international agencies working on these issues. The views expressed above are her own and not necessarily those of the OHCHR. Email: agallagher.hchr@unog.ch

See also: Anne Gallagher ‘Human Rights and the new UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis’, *Human Rights Quarterly*, Vol 23, 2001.

1. Text available from: www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf

2. Text available from: www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf

3. Text available from: www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf

4. Canadian Council for Refugees ‘Migrant Smuggling and Trafficking in Persons’, 20 February 2000, available from <http://www.web.net/~ccr/traffick.htm> (accessed Oct 2001).

5. UN Doc. A/AC.254/16, para. 20.

6. Erica Feller ‘The Convention at 50: the Way Ahead for Refugee Protection’, *Forced Migration Review*, issue 10, pp6-7.

7. *ibid*

8. UN. Doc. E/CN.4/Sub.2/2001/26, July 2001, para 25.