

Smuggled or trafficked?

by Jacqueline Bhabha and Monette Zard

The UN Convention Against Transnational Organized Crime (TNC) and its two Protocols on Trafficking and Smuggling, adopted in 2000, seek to distinguish between trafficking and smuggling. In reality these distinctions are often blurred. A more nuanced approach is needed to ensure protection for all those at risk.

In recent years the smuggling of human beings across international borders has grown rapidly from a small-scale cross-border activity affecting a handful of countries into a global multi-million dollar enterprise. Although information about human smuggling is patchy and often unreliable, current estimates suggest that some 800,000 people are smuggled across borders every year.

The spread of smuggling needs to be understood in the context of globalisation and greatly increased migration. Prospects of a better life abroad, poverty, economic marginalisation, political and social unrest and conflict are all incentives to move. Global media and transportation networks make movement easier. As push and pull factors encourage increasing numbers of people to migrate, they in turn collide with the many legal obstacles to entry that industrialised countries have put in place.

Two trends are a direct consequence of this. First, as avenues for legal migration have become increasingly restricted, the asylum system has come under pressure as one of the few options that migrants can use. Second, migrants (including asylum seekers) have increasingly resorted to the use of smugglers to facilitate their travel. This compounds their vulnerability to ill-treatment and exploitation.

How have states responded to this flourishing human smuggling industry? To date, policy-making in the migration arena has largely been driven by three different visions. The first views the migrant as a defenceless victim and has generated policies based on human rights and refugee law which seek

to ensure that protection is given to those who need it. A second view – a variant of the first – is the perception of migrants as industrious workers, making a dual contribution through their labour in the destination state and through remittances sent back home. Policies that call for amnesty, regularisation of immigration status and more generally ‘migration management’ derive largely from this perspective.

The third, arguably now dominant, perception of the migrant is one that sees him or her as a security threat to the state or even as a criminal. This has fuelled law enforcement responses – based on criminal law – which attempt to address irregular migration by strengthening border controls and criminalising the facilitators. Whilst human rights and labour rights approaches are primarily concerned with need, or with current conditions in the place of work, criminal law demands attention to motive. It is through this dominant prism that states have responded, embarking on an ambitious international programme of transnational law enforcement, negotiating and adopting with remarkable speed the UN Convention Against Transnational Organized Crime (TNC) and its two Protocols on Trafficking and Smuggling in 2000.¹

A question of choice?

The Protocols distinguish between those who are smuggled and those who are trafficked. 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 is undefined but the Protocol specifies that it includes, 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. In such cases, the consent of the victim becomes irrelevant. By contrast, ‘smuggling’ refers to consensual transactions where the smuggler and the migrant agree to circumvent immigration control for mutually advantageous reasons. The smuggling relationship technically ends with the cross-

The Protocols are framed around a central dichotomy

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

The Protocols are thus framed around a central dichotomy: between coerced and consenting illegal migrants, between victims and agents, between innocence and guilt. This dichotomy governs contemporary public policy, dividing the field into two distinct parts. One addresses the protection needs of trafficking victims who are considered to be non-consenting, innocent and deserving. The other addresses the situation of the smuggled illegals – culpable and complicit actors. The latter are considered less deserving of protection and support because of their original motive – the decision to **choose** to migrate illegally. There is also often a gender dimension to this dichotomy in that women and children are more likely to be considered as trafficked whilst men are more likely to be considered as smuggled (although this assumption

is certainly open to question).

The two Protocols thus differ in several key respects, particularly in the protections they afford migrants. Whilst the Trafficking Protocol provides for a broad range of protective measures (though couched in 'optional' language), the Smuggling Protocol contains rather minimal reference to the protection needs of smuggled persons. States are required to ensure the safety of persons that are on board vessels that are searched (art. 9) and they must respect pre-existing non-derogable obligations² under international law, such as the right to life and the right not to be subjected to torture, or to cruel, inhuman or degrading treatment. However, there are no provisions regarding medical, psychological or social recovery, or temporary legal residency, as in the Trafficking Protocol. Moreover, although there is a requirement to provide protection for at risk smuggled migrants, it is very heavily qualified: states should "take **appropriate** measures to afford migrants **appropriate** protection" against violence from smugglers and where their lives are endangered. Appropriate to whom and what? 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.³

There is thus much to be gained from being classified as trafficked, and much to lose from being considered smuggled. But is this distinction helpful or even workable in practice? There are certainly 'pure' cases of trafficking and smuggling - of children kidnapped without their parents' consent, of migrant workers defrauded from the outset or, at the other end of the spectrum, of completely transparent cross-border transportation agreements where a fee is mutually agreed and the relationship between transporter and transported ends. But the majority of migration strategies and circumstances defy easy categorisation.

First, at the point of departure and at multiple stages of the journey, it may well be unclear which category - trafficking or smuggling - is at issue. Most transported undocumented migrants appear to consent in some way to an initial proposition to travel but frequently *en route* or on arrival

in the destination country circumstances change. States tend to favour looking at consent at the point of departure as an indication of the migrant's 'true intentions'. Rights advocates favour a focus on the ongoing circumstances of the migrant in the destination state as an indication of his or her needs. When should the determination of category be made and by whom?

Second, the distinction between smuggled and trafficked migrants assumes a hard and fast divide between 'consent' and 'coercion' but the distinction between these is complex.⁴ Do persecution, destitution or prolonged family separation amount to coercion? The Trafficking Protocol defines coercion as including not only simple brute force but also "the abuse of power or of a position of vulnerability." Poverty, hunger, illness, lack of education and displacement could all in theory constitute coercive circumstances that induce a position of vulnerability. It remains to be seen, however, whether states and courts will interpret abuse of a "position of vulnerability" so broadly. 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

The bodies of Somali and Ethiopian asylum seekers, who were forced to jump off the trafficker's boat, washed ashore in Yemen.





Kay Chernush for the US State Department

This 9-year-old Indian girl was trafficked with her entire family and sold to the owner of a brick-making factory.

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'. The smuggling fee from China to the US is about \$50,000 per person, to France about \$40,000, yet there is no shortage of takers. The smuggler benefits from his or her profit, and the migrant benefits from gaining access to an employment opportunity, even if the smuggling fee is exploitative. Indeed, many of the employment opportunities that smuggled migrants are keen to access are extremely exploitative in nature. Are these workers smuggled (because they consent) or are they trafficked (because they are transported to be exploited)?

There is no question that smugglers are taking advantage of the smuggled person's desperation or vulnerability but just because the smuggler's offer is exploitative does not necessarily mean that the smuggled migrant is coerced. However, if the smuggled migrant has no other acceptable options, if he or she would starve, or be unable to get medicine for a child unless he or she took up the offer, then the exploitative offer might legitimately be considered coercive. Formal consent in these situations (because the migrant sees no other way out) does not alter the coercive nature of the

agreement. In assessing 'coercion' and 'consent', policy makers and advocates are forced to engage in moral decisions about which types of conduct are acceptable or permissible in a society and which are not. Slavery and slavery-like work are clearly not acceptable but neither is lack of access to essential food, medicine and shelter.

Fourthly, it is worth recalling that legal systems of migration are not immune from abuse and exploitation either.⁵ Workers who migrate into a country under legally sanctioned work permit schemes are often tied to their employer, even if they arrive to discover that the terms of their contract are not what they expected. Their ability to leave, however, is constrained because their immigration status is linked to their employment; leaving might also precipitate claims to repay their travel and recruitment costs. Confiscated passports, unpaid wages and other types of abuse are increasingly being documented by NGOs in these situations. Tolerated because it takes place within the formal economy, such dependency might well be considered bonded labour and thus part of a trafficking situation if it took place within the informal economy.

Conclusion

In focusing on the difficulties inherent in implementing the distinction between trafficking and

smuggling, the authors do not wish to suggest that the approach is not valid or potentially workable. Policy does need to distinguish between those who are vulnerable and those who are not, just as it needs to combine law enforcement and protection approaches. Rather, we are calling for a more nuanced approach that questions some common assumptions about who is smuggled and who is trafficked, and that situates these considerations within a broader context of human rights protection for all migrants, whether regular or irregular. Migration is itself an inherently risky business. Violence, coercion, deception and exploitation can and do occur within both the trafficking and smuggling process, within the formal and informal economy, within the legal and illegal migrant experience. And policy needs to take this into account.

Monette Zard is Research Director at the International Council on Human Rights Policy (ICHRP) www.ichrp.org and Jacqueline Bhabha is a lecturer at Harvard Law School. Emails: zard@ichrp.org and jacqueline_bhabha@ksg.harvard.edu. This article is written as part of an ongoing ICHR project on migration, human smuggling and human rights. For more information see www.ichrp.org or contact zard@ichrp.org. The original, longer version of this article can be found at: www.fmreview.org/pdf/bhabha&zard.pdf

1. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Protocol Against the Smuggling of Migrants by Land, Sea and Air, hereafter referred to as the Trafficking and the Smuggling Protocols. Convention and Protocols available at www.unodc.org/palermo/theconvention.html

2. Rights which cannot be suspended.

3. This represents a lower level of protection for the migrant than the corresponding article in the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMWF): art17(3). www.unhcr.ch/html/menu3/b/m_mwctoc.htm

4. Alan Wertheimer *Coercion*, Princeton: Princeton University Press. 1987.

5. For elaboration of these issues, see Anderson, B and O'Connell-Davidson, J, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, International Organization for Migration, www.iom.int/DOCUMENTS/PUBLICATION/EN/mrs_15_2003.pdf