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Whatever Happened to the Migrant Smuggling Protocol?



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Whatever Happened to the Migrant Smuggling Protocol?

Anne Gallagher

Executive summary

In December 2000, the international community adopted a new legal framework to address transnational organised crime. Two treaties, one dealing with trafficking in persons and the other with migrant smuggling, were part of the package. The Trafficking Protocol has proved to be a game-changer – shaping international, regional and national legal and policy responses in profound ways. But the Migrant Smuggling Protocol has been much less influential, with State practice reflecting a strong desire to develop tailored responses to migrant smuggling unfettered by international legal rules that are not perceived to reflect and advance national interests. This paper uses evidence from a recent UNODC study into implementation of the international legal definition of migrant smuggling to expose the extent of the drift away from the Protocol and explore why States have responded in this way. It concludes by (i) considering the deeper implications of this rejection for global migration policy and practice; (ii) proposing several concrete measures that must be taken to reaffirm commitment to the Protocol, most particularly its agreed definition of migrant smuggling and its rejection of the criminalization of smuggled migrants.

I. Background and context

‘Smuggling of migrants’ is a new concept in international law and policy. Prior to the adoption of an international legal definition less than two decades ago, the term was used informally, often interchangeably with ‘migrant trafficking’ to refer to a range of conduct related to the facilitation of unauthorized entry into a country and sometimes also unlawful stay.

States have long criminalised certain aspects of illegally facilitated migration but the push for international legal regulation only began in the early 1990s: initiated and led by wealthy destination countries of western and central Europe, North America, and elsewhere that had experienced a significant increase in the number of “unauthorized arrivals”, apparently facilitated by criminal groups that were organized and sophisticated enough to exploit legislative, policy and law enforcement weaknesses.¹

Deficiencies in international law were seen as particularly acute and detrimental: there was no agreed definition of smuggling of migrants, no obligation of criminalization, and no obligation to extradite or prosecute perpetrators, resulting in a “legal lacuna under international law [that] is increasingly perceived as an obstacle to the efforts of the international community to cope in an efficient manner with the phenomenon of smuggling of illegal migrants for criminal purposes”.² The default position: a purely national approach to sanctioning those who facilitated such migration, supplemented by *ad hoc* and largely ineffective bilateral cooperation – was seen to be playing directly into the hands of smugglers.

1 See “Measures to Combat Alien Smuggling: Report of the Secretary-General,” UN Doc. A/49/350, 30 Aug. 1994.

2 “Letter dated 16 September, 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General,” UN Doc. A/52/357, 17 Sept. 1997, at paras. 2–3 (transmitting a draft of the proposed convention).

Interest in developing an international regulatory framework around migrant smuggling gained momentum throughout the 1990s, finally coalescing around the UN Crime Commission's work against transnational organized crime. After initially agreeing to develop a treaty on "trafficking of migrants", the Crime Commission eventually decided that two instruments were necessary: one dealing with facilitated illegal movement of migrants and the other dealing essentially with the movement of individuals into exploitation. The *Protocol against the Smuggling of Migrants by Land, Sea and Air* (Migrant Smuggling Protocol) and the *Protocol against Trafficking in Persons, especially Women and Children* (Trafficking Protocol) were both adopted in late 2000 along with their parent instrument, the *United Nations Convention against Transnational Organized Crime* (Organized Crime Convention).

The Trafficking Protocol proved to be a game-changer, triggering unprecedented levels of action at the national, regional and international levels. Ratification was extremely rapid, allowing it to enter into force less than three years after adoption. And States very quickly began to incorporate its core provisions into national law. Today, "trafficking"- generally defined in accordance with the Protocol - is now criminalized in just about every country.³ Most national anti-trafficking legislation includes comprehensive provisions on victim protection and support – often going well beyond the lowest-common-denominator obligations set out in the Protocol. This trend has been sharpened by a raft of international and regional legal and policy instruments that affirm the central tenets of the Protocol while expanding its rather meagre human rights provisions.⁴ A vigorous, diverse and well-resourced anti-trafficking 'industry' ensured that responses to trafficking are under close scrutiny - and that the pressure on States to align their legislative and policy response with international standards is constant and intense.

While it has attracted substantial ratification (146 States Parties compared to 172 States Parties to the Trafficking Protocol as at 16 October 2017) the Response to the Migrant Smuggling Protocol could not have been more different. For example, apart from some desultory legal and policy development within Europe, the Migrant Smuggling Protocol has provided neither a trigger – nor a template, for further normative development. Certainly, there is no anti-smuggling 'industry'; no well-funded organizations focused on scrutinizing responses and holding States to account. That is especially significant because, in implementing their legislative and regulatory responses, States have moved substantially away from the core tenets of the Protocol. The following sections detail just two of the many examples of the Protocol's lack of influence. The first relates to the widespread failure to accept the international legal definition of migrant smuggling; the second concerns the trend towards criminalization of smuggled migrants and marginalization of their rights. In its concluding section the paper briefly considers the deeper implications of this rejection for global migration policy and practice.

2. Counter-trend: An expanded concept of migrant smuggling

Under the definition set out in the Protocol, migrant smuggling will occur if the offender engaged in the act (procuring illegal entry of a person who is not a national or permanent resident), and did so intentionally for the purpose of obtaining a financial or other material benefit. States Parties to the Protocol are required to criminalize migrant smuggling and smuggling-related production and possession of fraudulent travel or identity documents. They are also required to criminalize enabling illegal stay when this is committed intentionally and in order to obtain a financial or other material benefit.

The inclusion of "intention to obtain a financial or other material benefit" as an element of the crime of migrant smuggling was explicitly intended to narrow its scope by excluding the activities of those who facilitate migration for humanitarian or family reunification reasons. In the official records of their proceedings, drafters affirmed that: "It was not the intention of the Protocol to criminalize the activities of family members or

3 In 2003 only 33 countries had enacted specific legislation criminalizing trafficking on the basis of the Protocol's definition. By August 2016 that number had risen to 158. UNODC *Global Report on Trafficking in Persons* (2016), p. 48.

4 For a detailed overview of the international legal framework see Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010).

support groups such as religious or non-governmental organizations”,⁵ and that: “the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers”.⁶

A 2016 study by UNODC, led by the present author, sought to examine the extent to which States had incorporated the Protocol’s definition of migrant smuggling into their national law, with specific reference to the ‘financial or other material benefit’ element.⁷ The study examined national legislation and case law and interviewed 122 practitioners from a sample of 13 States.⁸

The results of the survey are unsettling. Of the States surveyed, none had incorporated the Protocol’s definition, unchanged, into their domestic law. Only two of the 13 (both countries of origin) included financial benefit as an element of the offence of facilitated entry. This means that 85% of surveyed States have retained legislative capacity to prosecute facilitated entry that is not motivated by financial reward.⁹ And nine of the 13 (70%) have retained the capacity to prosecute the act of facilitating the stay of a person who has been smuggled and / or who is otherwise irregularly present in the country. These deviations from the international legal definition were typically defended as necessary to ensure that States retained the flexibility to respond to *all* situations of facilitated illegal entry and stay. Practitioners interviewed for the study pointed to the heavy evidentiary burden that would result from the inclusion of the financial element in smuggling offences.

Countries participating in the study were carefully selected to ensure geographical balance; a balance of civil, common and mixed law systems; and a range of migrant smuggling experiences. It is therefore possible to safely extrapolate the results and conclude that most States Parties to the Migrant Smuggling Protocol have effectively dismantled one of the central tenets of the international legal framework: expanding the definition of migrant smuggling – and thereby the obligations of criminalization and cooperation – well beyond that intended by the drafters.

3. Counter-trend: Criminalization and marginalization of smuggled migrants’ rights

The Smuggling Protocol requires States to criminalize smuggling and related conduct as defined in that instrument; to strengthen their borders against smugglers; and to cooperate in preventing and combating smuggling. However, these obligations are tempered by a number of caveats and limitations that are too often forgotten. Article 5, for example, prohibits States Parties from prosecuting smuggled migrants themselves for having been smuggled. In the words of the Protocol’s drafters: “[smuggled] migrants [are] victims and should therefore not be criminalized”.¹⁰

Protection of the rights of migrants is identified as one of the three purposes of the Protocol. And States Parties are explicitly required to take all appropriate measures, consistent with their obligations under international law, to preserve and protect the rights of smuggled migrants including the right to life; the right not to be subject to torture or other cruel, inhuman, or degrading treatment or punishment; and the right to consular access. They are further required to afford migrants protection against smuggling-related violence and appropriate assistance if their lives and safety are endangered through the smuggling process.

The Protocol also includes a very specific savings clause to the effect that none of its provisions can impact on existing rights and obligations including those related to human rights, international humanitarian law and refugee law. The savings clause was hard-won and its significance and impact should not be trivialized.

5 Interpretative notes, UN Doc. A /55/383/Add.1, 3 November 2000, para. 88.

6 United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Sales No. E.05.V.2 (2004) p. 333, para. 19.

7 United Nations Office on Drugs and Crime, *The Concept of “Financial or other Material Benefit” in the Smuggling of Migrants Protocol: Issue Paper* (UNODC, 2017).

8 Australia, Canada, Germany, Greece, Indonesia, Italy, Malaysia, Mexico, Morocco, Sri Lanka, Tunisia, the United Kingdom and the United States of America.

9 Note that the legislation of an additional three surveyed States does provide at least partial protection from punishment (not prosecution) for humanitarian motivated facilitate entry.

10 United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2006), p. 483.

While a collision of norms (for example between the right of States to control their borders and the obligation of *non-refoulement*) may still occur, the correct outcome has been clearly articulated: any State Party that acts against the letter or spirit of international law, including international refugee law, in implementing its obligations under the Migrant Smuggling Protocol is in violation of one of its central provisions.

It is not possible, within the confines of the present paper, to provide even a cursory assessment of international, regional and State practice against these standards. But there is abundant and compelling evidence of States Parties distancing themselves from the Protocol's goal of protecting smuggled migrants and ensuring their basic human rights. For example, almost all EU Member States have legislated to establish irregular entry and stay as offences, often punishable with custodial sentences.¹¹ In Australia and elsewhere, laws, policies and practices effectively punish migrants for the fact of having been smuggled – and humanitarian actors assisting recognised refugees to access protection have been prosecuted for smuggling.¹² Very few States would be able to defend their actions against migrant smuggling as conforming to the letter and spirit of the Protocol with regard to smuggled persons rights under that instrument including their right to consular access; to assistance; and to protection from inhuman or degrading treatment.

4. Implications for global migration policy and practice

The impetus behind the Migrant Smuggling Protocol is not difficult to fathom. For States that felt themselves especially affected, a focus on the facilitators of migration as a way of dealing with irregular migration made strong political sense. As subsequent experience has shown, criminalization of irregular migrants themselves is always an option. But this approach can be problematic for liberal democracies – especially given the reality that many asylum seekers, including those with genuine claims to refugee status, use the services of smugglers in their often-desperate search for protection. Criminalization of the facilitation of such migration can be seen and sold quite differently: less an attack on individual migrants than on those who are profiting from their vulnerability and desperation. And, by emphasizing the connection with transnational organized crime, States are more easily able to characterize migrant smuggling as a threat to public order and national security. This in turn helps to both explain and justify measures that might otherwise appear extreme, such as externalization of border controls and militarization of migration management.

The separation of migrant smuggling from trafficking in persons has been critical in shaping public perception of migrant smuggling as a crime against the State, and of smuggled migrants being complicit in their own misfortune and thereby not 'victims' deserving of protection and support. While the new international rules around migrant smuggling acknowledge the possibility of harm and the need to preserve the human rights of migrants, that has done little to dispel those entrenched perceptions. As a result, those protections that should, in theory, be available to smuggled migrants are rarely acknowledged or applied.

The very different fates of the migrant smuggling and trafficking protocols reflect a multitude of factors. Despite the complicated politics with which it has also been associated, trafficking is relatively straightforward for States. The ethics of human exploitation for private profit are not ambiguous or contested. Without compromising their core interests, all States can promise to support and protect victims; all can commit to addressing the root causes that make individuals and groups vulnerable to trafficking. An in-principle victim-centered and rights-based response has been further encouraged by abundant funding for anti-trafficking interventions; vigorous civil society involvement; and the existence of multiple external compliance mechanisms – not least the annual U.S. *Trafficking in Persons* report that evaluates the response of every country. None of these factors has been at play in relation to the Migrant Smuggling Protocol. The result is unsettling if unsurprising: a perceptible shaping of the Protocol and expectations around its implementation to meet the evolving policy preferences of States. This situation threatens the fragile international legal

11 European Union Agency for Fundamental Rights: *Criminalization of Migrants in an Irregular Situation and of Person Engaging with Them* (2014).

12 See Andreas Schloenhardt, "Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice Under Article 5 of the Protocol Against the Smuggling of Migrants by Land, Sea, and Air", *International Journal of Refugee Law*, 25 1: 39-64, (2013).

framework around this issue and consolidates the inexorable erosion of the rights and protections that the framework delivers to smuggled migrants.

5. Smuggling and the global compact for migration

Since the adoption of the Protocol in 2000, migrant smuggling has evolved from a fringe criminal activity into the 'new normal' in international migration: the means of movement for many migrants, including most asylum seekers.¹³ The Global Compact for Migration must address migrant smuggling openly and honestly. At a minimum, States and others negotiating this instrument have a clear responsibility to confront the drift away from commitments made in 2000 and agree to correct them.

In relation to the definition: corruption of the international legal definition of migrant smuggling threatens the integrity of the carefully constructed legal framework around migrant smuggling and undermines efforts to secure a common understanding of the problem and of what is required to address it. States and involved international organizations should clearly *affirm the internationally recognized definition of migrant smuggling: the intentional facilitation of irregular entry for financial or other material benefit.*

In relation to the criminalization of smuggled migrants: the international community must make clear, through the Global Compact for Migration that *international rules around migration and migrant smuggling do not provide any legal basis for the de jure or de facto criminalization of persons who have been smuggled.* Actions against migrant smuggling must be assessed against the international legal commitments that States have freely entered into. These commitments extend to those provisions of the Migrant Smuggling Protocol that affirm the preeminence of existing rights and obligations including those related to human rights, international humanitarian law and refugee law.

¹³ See further J. Carling, A. Gallagher and C. Horwood, 'Beyond Definitions: Global Migration and the Smuggling-Trafficking Nexus' http://www.regionalmms.org/images/DiscussionPapers/Beyond_Definitions.pdf



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