

Transnational Traffic - Child Migrants and The Trafficking and Smuggling Protocols of the Convention on Transnational Organized Crime

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INTRODUCTION

In less than a decade, the issue of irregular migration has moved from a side-show within the general discussion of globalization and international migration policy to center stage (1). And one set of migrants- largely invisible previously- have increasingly attracted public attention and concern: children, who embark or are caught up in transnational migration alone (2). The extraordinary saga of Elian Gonzalez's journey and subsequent custody battle represents a high water mark of this public preoccupation with lone child migrants. The case of twins Belinda and Kimberley, adopted over the internet and snatched by a British couple after they had already lived with their American adoptive parents for 2 months is another (3). But, as the numbers of separated (or unaccompanied) child migrants rise every year, growing attention is paid to other more common situations - transnational child trafficking, child refugees separated from their families, indentured child labourers, smuggled children.

Like adults, separated children become irregular migrants for varied and numerous reasons, spanning a vast spectrum of situations and actors (4). The spectrum stretches from cases of undisputed coercion (kidnapped trafficked victims) to situations which are clearly voluntary (children leaving home in search of opportunity) with many complex variants of these variables; it includes situations which are clearly abusive, situations which are unquestionably motivated by the child's best interests and a myriad others which do not fit easily into one or other of those categories. It includes cases where the outcome of the migration is planned and predicted and cases where the nature of the migration changes radically after the journey is started; it spans situations where immediate return of the child home is the preferred option to situations where permanent exile is the only viable outcome. It covers cases of legal immigration, cases of illegal immigration and cases which change from one status to the other. Every year at least 5000 children in these situations are "apprehended" and detained by the U.S. immigration authorities.

Within the overall preoccupation over this new set of transnational "problems", three distinct images of irregular child migration recur. One image shows lone child refugees fleeing persecution, war, endemic violence or other civil upheavals; children alone arriving in distant airports or railway stations, groups of orphans or separated children crossing borders by foot, from Rwanda, Chechnya, Bosnia, Kosovo, Somalia, Liberia. Out of the 11 million children who UNHCR estimates are refugees, about a quarter of a million are separated from their families; for example over 50,000 Rwandan children found themselves alone after fleeing the genocide (5). In this scenario, children's irregular migration is a survival strategy, in some ways identical to that of adults, a strategy to reduce the risk of death or torture, with exile the only option. What is distinctive about child refugees is their enhanced vulnerability, and the fact that in general (6) refugee law and policy have failed to account for the specificities of children as lone asylum seekers or refugees. The traditional image of children as familial objects of protective concern clashes with the more recent approach to children as rights bearing agents. Thus children whose refugee claims are based on their political activism or targeting by a hostile regime encounter particular hurdles, which reflect an adult standard for defining activism and persecution (7). (Who would be afraid of or bother to persecute a child?)

A second image shows child victims of human trafficking - human commodities removed from their home by force or fraud, controlled by criminal transnational networks fuelling an ever growing multi million dollar transnational business. Here the images are of Ukrainian girls enslaved in Dutch brothels, of Nepali school girls captured for the Bombay sex market, of Bangladeshi 4 year old boys kidnapped to become camel jockeys in Gulf states, of Filipino children servicing wealthy western sex tourists in Bangkok, of South Asian girls shipped to far flung destinations as house maids. Estimates of the scale of the problem vary wildly, and no disaggregated figures for children are available (8); the United Nations estimate that 4 million persons, the majority women and children, are trafficked every year, the US government estimate that at least 50,000 women and children are trafficked annually into the US. According to UN Secretary General Kofi Annan, trafficking in children is one of THE human rights issues of our time. In this context, lone child migration is an exploitation strategy, a central component of the trade in humans, which transports commodities to the most profitable site of exploitation. The trade capitalizes on pull factors such as the opportunity for huge profits and sexual greed, and push factors such as the destitution and vulnerability of disenfranchised communities, as well as pervasive gender and age-based power disparities. Because of their immaturity and dependence, children are particularly at risk of exploitation.

Finally a third image shows smuggled child "illegal immigrants" - irregular but "voluntary" child migrants who manage to evade immigration control, and to cross borders, for social, economic or family reasons. The images here are of Hungarian Roma adolescents or Indian boys hidden in the back of European lorries, of Albanian teenagers trying to cross the channel from Calais to Dover, of young Chinese adolescents trapped inside containers in the holds of ships, of African 16 year old stowaways in the under carriage of planes . For these children "unaccompanied minor" becomes a new globalization-era status, a peculiar diasporic identity which constitutes them as members of a community of other lone child migrants with whom they are detained or housed by the receiving state: a diaspora based not on a common point of origin, but a common genesis for dispersal. In this frame, migration is a self-advancement strategy for the children or the families of children from poor or developing countries, who seek to access education, employment or other opportunities relying on sophisticated, professional services to evade immigration control, thus posing a challenge to state border controls.

The three different human scenarios set out above are embedded in contrasting legal and policy frameworks; they reflect quite differing historical legacies. In the first situation, the forced child migrants - refugees, displaced persons, asylum seekers - are objects of humanitarian concern and internationally recognized responsibility. The historical reference point for their form of upheaval and their claim to international protection is Europe before, during and after World War Two, most specifically the Holocaust. International law, in the form of the 1951 Convention on the Status of Refugees, and subsequent elaborations, articulates the responsibility of host states to offer protection and to refrain from carrying out expulsion to the home country. The policy framework is one of humanitarian protection and international responsibility. No particular legal standards are elaborated for children, though a fair amount of attention has been devoted to child-specific procedural protections.

The second situation is quite different. Here the forced child migrants - indentured labourers, sex slaves, domestic servants, babies sold for adoption, servicers of child pornography or child prostitution networks - are objects of security concern by immigration officials, vice squads and law enforcements agents. The historical reference point is eighteenth and nineteenth century slavery, including the so-called "white slave traffic" encompassing the export of European women into brothels in various colonial

empires. International law dates back to the 1904 International Agreement for the Suppression of the White Slave Trade, the first of several anti-trafficking measures (9). Specific concern over the involvement of children has a long history - it was first addressed in the 1924 Declaration on the Rights of the Child (10), the precursor to the UN Convention on the Rights of the Child. The object of intervention here is criminalization and abolition, with trafficking for labour or sexual exploitation viewed as a modern transformation of the slave trade, and trafficked children viewed as particularly vulnerable victims in need of protection.

Distinguished from both these groups of forced migrants, are the third category - voluntary child migrants who, whether as a result of their own choice or their parents' decisions, embark on migration alone for a plethora of different reasons. Like adults the child migrants navigate increasingly burdensome immigration controls by using the services of commercial smugglers to gain access to the receiving state. As irregular migrants, they are vulnerable to removal or deportation, though in many states less so than adults. In some jurisdictions they face long term detention pending a decision on their status and a prolonged limbo of illegality or uncertainty. The framework applied here is one of state exercise of sovereignty through migration control, with restrictionist concerns clearly privileged over protectionist obligations; this approach dates back to national immigration control policies developed in the late nineteenth and early twentieth century through Alien Control Acts (11), designed to regulate the entry of particular categories of migrant and exclude unwanted groups. Sharp global disparities in standards of living, political freedoms and economic opportunities combined with a globalized world system with inexpensive transportation and transnational communication, have rendered migration policy a key pressure point for the confrontation between privilege and dispossession; increasingly this multifaceted migration business encompasses lone children as well as adults and families.

This tripartite strategic approach impinges, in inconsistent and sometimes contradictory ways, on the policies of all states with substantial child immigration. Protective concerns about separated children, mandated inter alia by the widely ratified Convention on the Rights of the Child, clash with restrictive policies directed at controlling migration. States have developed increasingly interventionist approaches in dealing with separated child migrants as their numbers have escalated and as familial arrangements for children's future in the host states are challenged or ignored. But intra state policies are not sufficient. Migration by definition implicates multiple states and, collectively through international collaboration at the UN, states have become increasingly concerned with the transnational aspects relating to current migration phenomena. Thus the tripartite strategic approach has recently been crystallized in the first international treaty initiative directly addressing contemporary irregular migration issues, the United Nations Convention against Transnational Organized Crime (hereafter the TOC Convention) (12). For the first time, the treaty provides an internationally agreed definition of trafficking in persons, including a specific definition of trafficking in children, and an agreed definition of smuggling of migrants. Each definition is included in a separate protocol, which also sets out procedures for criminalizing the agents responsible for organizing both practices. Both protocols, though with very different emphasis, make specific reference to the special needs of child migrants. The TOC Convention will provide a central framework for states parties efforts to develop and coordinate their policies in respect of irregular child migrants.

The UN Convention against Transnational Organized Crime

The prime purpose of the Convention is to encourage states to adopt consistent, effective and better coordinated measures against transnational crime, and to provide mechanisms

for facilitating cross border collaboration and investigation with a view to its eradication.

Responding to the urgency felt in the international community about transnational crime, as a central aspect of current globalization, work on the convention proceeded speedily, moving from the initial General Assembly resolution establishing a working committee (13) to signature of the completed convention in just two years, with over two hundred meetings and extensive member state participation taking place in that time (14). The Convention establishes four specific crimes to tackle money laundering, corruption, participation in international criminal groups and obstruction of justice. It also includes three (15) protocols two of which, on trafficking in persons, and smuggling of persons, were also completed and presented for signature at the treaty signing conference in Palermo in December 2000.

The starting point for the TOC Convention is the acknowledgement that the opportunities and benefits afforded by globalization have been exploited more efficiently by private than public sector operators, and in this context by criminal networks and strategists rather than by state law enforcement agencies. So new forms of transnational state collaboration are called for to counter, indeed to catch up with this "darker side of globalization" (16).

This law enforcement and eradication agenda is the context which frames the two protocols addressing human migration. It is the first time international law has addressed questions of trafficking or smuggling of persons, and the first time that an agreed definition of these migration practices has been elaborated. The absence of such agreed definitions, particularly the lack of a common definition of trafficking in persons, was widely blamed as a central cause for the lack of international success in past efforts to curtail the problem and to afford adequate protections to trafficked and smuggled persons, a particularly serious failing as reports of serious human rights violations, including deaths, of trafficked and smuggled persons continue to increase (17). Differing and inconsistent definitions between supposedly cooperating states and lack of strong enforcement capabilities have contributed to a situation where trafficked persons are much more likely to face state sanctions than their captors or exploiters. This is the situation the protocol sets out to address.

The Protocol's Definition of Trafficking

The Protocol's definition of trafficking adopted, after much discussion and controversy, is revealing. According to Article 3:

(a) "Trafficking in persons" shall mean 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.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

The definition is gender neutral. It consists of four central elements, the first two of which derive from the protocol being part of the TOC Convention: the establishment of

transnationality; the involvement of an organized criminal group; the use of coercion, and the presence or goal of exploitation. Each of these elements is broadly inclusive. Thus the transnationality requirement (18) is met not only when offences occur in more than one country, as where a person is transported across a state border, or recruited in one state and harboured or "received" in another; the requirement is also met where the offence is executed in a different country from the one in which it is planned or directed ; or where the criminal organization, though not necessarily any individual agent, operates transnationally; or finally where the offence has a substantial effect outside the state where it takes place. This definition therefore does not require the physical transportation of a trafficked person across a state border; rather it requires the impact of the offence to include a transnational dimension. It thus covers the situation where a network enslaving rural girls for enforced prostitution in cities within the same country is masterminded outside the country, or where profits from the exploitation are transferred to members of the criminal group in another country, or possibly where the exploitation possibilities, say in having a domestically run child prostitution group, attract sizeable numbers of clients from another country. Clearly this broad conception of transnationality has implications for law enforcement and protection obligations which may apply extraterritorially. Some states already criminalize consumers of child prostitution when they return to their home countries after sex holidays abroad; traffickers might now receive the same treatment.

"Organized criminal group" is defined as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit" (19). Thus it is not just large or quasi permanent mafia like organizations that are envisaged; nor is a rigid hierarchy or elaborate group structure required for a trafficking network to count as an organized criminal group (20). Given what is known about the variety, informality and flexibility of trafficking networks such limitations would have dramatically narrowed the protocol's scope. Thus it is known that many children are trafficked by networks with informal nodes operating in the children's villages of origin, exploiting neighbourly or family trust to gain access to the child. On the other hand individuals who act alone to ensnare victims for their own benefit or who on a one off basis sell a relative are excluded by this definition. The definition also establishes that the criminal group can have a broad range of goals, beyond purely financial gain; thus sexual gratification rather than profit may be the predominant motivation (21). The third element, the requirement of some form of coercion, is central to the definition of trafficking, and it is what distinguishes it most sharply from other forms of commercial irregular migration, particularly smuggling. Here again the Protocol adopts a broad and inclusive approach. The definition makes it clear that physical force is not a requirement, but that fraud, deceit or bribery can count as coercion, when they arise in the context of a grossly unequal relationship in terms of power or freedom to choose. Thus the classic case where a vulnerable person is lured into being trafficked by false promises of future employment is covered, as is the situation where a child or female relative is handed over in return for a bribe or other inducement. As the definition explicitly states, consent is irrelevant where coercion has taken place. This is not a tautology. It represents a welcome recognition of the limitations in a simple consent/coercion dichotomy, given relationships of radical power and resource inequality, and provides a way out of the impass generated by the bifurcated debate about whether all forms of prostitution are inherently coercive . This insertion of a gender perspective in the approach to trafficking brings substantive rather than just formal considerations into the process of deciding what constitutes a coercive relationship.

In relation to what should count as "exploitation", the protocol adopts a deliberately abstentionist position on the vexed debate about whether recruitment and transportation

of an adult for consensual prostitution constitutes ipso facto exploitation. Thus in the definition, exploitation includes "the exploitation of the prostitution of others" but not prostitution simpliciter; it is left to individual states to decide how to define "other forms of sexual exploitation" (22). Some argue that prostitution is necessarily exploitative, and insofar as it represents a seemingly non-coerced choice of work, does so only because of insurmountable pressures of poverty and or powerlessness (the analogy is sometimes made with victims of domestic violence who decide to return to the abusive home for lack of options, but can hardly be said to choose continued sexual abuse). Others argue that prostitution can constitute a valid work choice, and that protective intervention is only required if the prostitution is in some way forced.

The definition of Trafficking in Children

How does the protocol deal with children? Whilst there continues to be debate about the boundaries of forced adult prostitution, there is no dispute that prostitution of children is always, by definition, coercive and to be proscribed (23). Though the category "child" is clearly a problematic construction in relation to sexual activity and consent, this proscription of prostitution applies across the board, for 4 year olds as much as for 17 year olds. Thus the fact that a 17 year old young woman consents or chooses to be a prostitute, on the basis of a voluntary assessment that this is an advantageous course of action, is irrelevant. Whereas much of the debate and the data collection on trafficking treat "womenandchildren" as one group - one word in effect - here is a clear difference in the approach to and treatment of women and children. Several commentators urged upon the TOC drafting committee that this difference be reflected in the protocol's definition of trafficking (24) and indeed the final text does contain a separate subparagraph on child trafficking:

"The recruitment, transportation, transfer, harbouring or receipt 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 out in subparagraph (a) [coercion, fraud deception etc.] of this article" (25).

Coercion or duress is not therefore a necessary component of trafficking in children. The definition covers situations where children are taken away for sexual or labour exploitation, whether or not they have consented to this. Parental consent is ofcourse also irrelevant as a defence to a trafficking charge. The definition leaves open the question of what forms of labour will count as exploitation, this being a matter for domestic regulation. Unlike the universal acceptance that prostitution of children is always unlawful, the use of all forms of child labour is not similarly proscribed.

An important and open question raised by the definition is whether exploitation that is foreseeable but not directly planned as part of the transport of a child makes the transportation a case of trafficking. In many cases children are non coercively transported as irregular migrants in return for a very high fee to pay for the smuggling operation; the transporters are aware that the fee will be paid by the children being subjected to exploitative labour conditions once they reach the migration destination, a form of bonded labour. Thousands of separated children arrive in this way in the US every year. Typically the work that the children engage in to repay the smuggling fee is neither forced, in the sense that the employer imprisons or unduly coerces the child, nor does it fall within the categories of child labour prohibited by the ILO. Rather the work is exploitative because of the labour conditions, the level of pay, the length of hours, and the absence of protective terms and conditions. The situation is well illustrated by excerpts from an interview with a 17 year old chinese girl who was smuggled into the United States from China by so-called "snakeheads" and now lives in New York:

"The latest trend is for people in [my] village [in Fujian province] to borrow money from their neighbours or relatives at a very high rate in order to send their kids away. Even an uncle would charge interest to his nephew or niece.... My family has to pay interest to relatives. That is why I have to work very hard, and the money I make is only enough to pay the interest. If I delay working until I go to school and college, I will owe so much money that it will be almost impossible to pay it off... I work about 70 hours a week for a restaurant..." (26).

Though the transportation could not be said to be "for the purpose of exploitation", since the children typically do not work for the transporter but for quite independent employers, knowledge that this form of exploitative labour will be available is an essential part of the transaction since without it there would be no assurance of repayment. The question therefore is whether the transporter's reliance on the child's future exploitation, to repay the smuggling fee, is sufficient to bring the case within the trafficking definition (27). As we will see this is not just an academic question. If the case is one of trafficking the child is in a quite different legal position than she is in if considered a case of smuggling.

The second protocol to the TOC deals with smuggling. The primary object of this protocol is to criminalize migrant smuggling and facilitate international cooperation to suppress it. The 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" (28).

Activities undertaken in order to smuggle migrants, such as producing or obtaining false or forged documents, are also criminalized (29). Such smuggling falls within the protocol if it is transnational in nature and involves an organised criminal group (30). These two requirements are identical to those which apply to the definition of trafficking in persons, considered earlier. However, unlike the definition of trafficking, the definition of smuggling requires an international border crossing. The crime is therefore dependent on restrictive immigration control policies for its existence - if migrants seeking to cross borders could do so freely or had adequate legal channels open to them, the crime would disappear. Conversely however, if migrants have a lawful claim to enter a receiving state (eg because they are asylum seekers) but can, because of restrictive immigration controls, only exercise that claim using illegal means to gain entry, then their entry falls within the definition.

Two other differences between the trafficking and smuggling definitions are noteworthy. First migrant smuggling does not require any evidence of coercion; the fact that the migrant enters into the smuggling arrangement voluntarily is no defence to a charge against the smuggler. Second, there is no requirement of exploitation - the financial or material benefit derived from the migrant smuggling falls within the definition even if it is non extortionate (31), a fair reflection of the market value of the illegal service provided (however determined). Thus, whether the smuggling group charge \$500, \$50,000, (or possibly consensual sex as a material benefit) for the assisted illegal migration does not alter the requirement that the conduct be criminalized. However some "material benefit" must be derived by the smugglers to bring their behaviour within the protocol. Purely humanitarian or familial efforts to assist with illegal border crossing would not be criminalized (32). Whether well-intentioned groups ferrying refugees including children across borders in return for a fee would be covered by the exception remains to be seen (33).

Like the trafficking protocol, the smuggling protocol provides that the smuggled migrants themselves shall not be criminalized (34) by virtue of their assisted irregular entry. This is an important provision given the progressive criminalization of irregular migration, and the escalating use of imprisonment, summary removal and other deterrent measures against irregular migrants rather than their exploiters. Of course a more effective way of reducing the incidence of smuggling would be to explore expanding legal channels for migration, in response to labour shortages or demographic changes for example, or to introduce easier access to asylum procedures for applicants from prima facie persecuting states. In recent months some highly restrictive states have started exploring labour migration options for white collar workers for these reasons, but transnational efforts to put labour mobility on a par with that of capital, goods or services are still far off. Instead the Protocol requires states to strengthen border controls, and to require commercial transportation carriers to check the validity of travel documents (35), measures which are likely to increase rather than decrease the volume of migrant smuggling.

Whether or not a case falls within the provisions of the trafficking or smuggling protocol is significant not just from the law enforcement perspective, trafficking being by far the more serious criminal offence. It is also significant from the protection perspective, since the provisions for victim support differ radically as between the two categories of irregular migrant. Both protocols adopt the position that the irregular migrants themselves, whether victims of trafficking or smuggling, should not be criminalized; however, beyond this baseline, the approach to the two sets of migrants differs sharply. Trafficking victims are eligible for a broad array of carefully particularised measures, whereas smuggled migrants are accorded a far lower level of protection. The protection provisions of the trafficking protocol are extensive and detailed, and in general reflect the vigorous pressure from human and migrants rights organizations that trafficked persons needs be seriously considered and addressed (36). This is an important achievement, and a significant departure from prevailing state practice which has tended to neglect effective law enforcement against traffickers and ignore the protection needs of trafficked persons. Most trafficking victims are extremely vulnerable for a variety of reasons; they are vulnerable to reprisals from the traffickers or pimps under whose control they have been, they are traumatised by their experiences, they are isolated, they may be in poor health, they are likely to be indigent and homeless, and they lack a legal immigration status. In addition to these difficulties, most trafficking victims face considerable reentry hardships if returned to their country of origin: shame, disapproval, vulnerability to re-trafficking, health related risks, unemployment and poverty are all part of the picture. For children there is the added vulnerability that comes with their dependent status: separation from family or other potential support structures; ignorance about sources of help; potential dangers both in the receiving state and in the home state from the exploitative networks that led to trafficking; dangers of re-victimization including re-insertion in the trafficking situation. And yet, to date, deportation and even incarceration have been the prevailing state responses to trafficked persons. Stays of deportation and other protective measures have tended to be offered as a quid pro quo for trafficking victims' agreement to testify in court proceeding against their abusers, and have lasted only for the duration of such proceedings (37). This pressure to act as a witness has placed some victims in further danger and contributed added psychological stress to a charged situation. Reflecting sustained NGO concern about these practices, the protocol requires (38) states to protect the privacy and identity of trafficking victims involved in court proceedings. States are also required to "endeavour to provide" physical protection for trafficking victims against retaliation or further abuse from their oppressors, and to ensure that legal remedies to obtain compensation for the harm suffered through trafficking are available and made easily accessible to potential beneficiaries. The

protocol therefore accords states a new set of law enforcement duties on behalf of victims, over and above the law enforcement obligations related to conviction of traffickers simpliciter.

The protection provisions of the protocol go considerably further than these legal remedies. They encourage states to consider a panoply of protection measures for trafficking victims unrelated to their role as potential witnesses or claimants against traffickers. Unlike the legal provisions, these measures are not mandatory but rather optional - they are simply encouraged (39)- a reflection of the fact that for many states the very fact of providing services rather than sanctions for trafficked persons represents a significant policy shift. The protection measures include the provision of support for physical and psychological recovery, but they go further; acknowledging the extreme social vulnerability of trafficking victims, the protocol calls on states to consider assistance for "social recovery", so that trafficking victims can be re-integrated into non stigmatized positions. States are thus invited to offer all trafficking victims appropriate housing, and employment, educational and training opportunities - a new approach, which marks an important shift from the victimization/rescue approach to a rights based concern with economic and social needs. States are explicitly required to take into account children's needs; this obligation to provide for their care could be a useful tool in curtailing current punitive policies (40) and institutionalizing the appointment of guardians, access to quality legal advocacy, adequate social provision.

One area where the protection provisions are quite inadequate relates to the critically important question of security of residence for trafficking victims. The protocol does not require states to grant any lawful immigration status to trafficking victims. It is regrettable that a legislative measure, which proclaims as one of its principal goals the protection of trafficked victims, fails to impose a stronger obligation on states to depart from the widespread practices of speedy deportation and removal of trafficking victims and really accord them substantive protection. For child trafficking victims this is a particularly serious protection limitation, since states have tended to deal with child victims of trafficking by lengthy and often inconclusive proceedings, which prolong the child's limbo of uncertainty rather than establishing permanent and enduring care arrangements.

By contrast with the trafficking protocol, the smuggling protocol contains no child-specific definition or protection provisions. This is not surprising given the different preoccupations underling the genesis of the two protocols. Nearly all the child specific concerns were formulated in terms of concerns about trafficking in women and children, particularly the issue of sexual trafficking (41). The smuggling protocol, by contrast, developed from European concerns about the threat to border controls posed by assisted and increasingly sophisticated methods of illegal migration. Human rights violations inflicted on smuggled migrants during the course of their journey or as a result of border control policy are only a subsidiary concern. Only one out of the protocol's 25 articles addresses questions of migrant protection. And yet there is an abundance of evidence that children form a substantial and possibly growing part of the pool of irregular migrants outside the trafficking context, both as consensual "illegally smuggled" migrants and humanitarian migrants, and that they face serious human rights violations and have acute protection needs.

The protection clause in the smuggling protocol requires states to provide basic human rights protections for smuggled migrants, including protecting their right to life and to freedom from torture; these obligations are not new but rather are already binding on states though established international human rights treaties. Absent from these provisions is any recognition of the broader panoply of civil, political, economic, social

and cultural rights to which trafficking victims or migrant workers are entitled. Nor does the clause refer specifically to the rights of refugees or asylum seekers, despite clear evidence that many smuggled migrants fall into these categories.

The requirement that states take special account of the needs of women and children is likewise underspecified. On the one hand it suggests some recognition of the special vulnerability of these groups of smuggled migrants; on the other hand the generality of the clause is unlikely to yield any appreciable benefit to these groups. Thus there is no reference to treaties or guidelines which detail women or children's rights in relation to migration. Given many smuggled children's acute protection needs, in terms of guardianship and legal representation, care arrangements, psychological and physical health and protection from detention, intimidation and exploitation, this is a very serious limitation in the smuggling protocol.

It follows that, from a child centered point of view, the division between the two protocols is problematic. First, there is the difficulty of distinguishing a trafficked child from a smuggled child. Unaccompanied children are particularly vulnerable to exploitation and abuse living as lone migrants, yet these circumstances may not have been foreseeable at the time of the migration or immediately after; family pressures are often the genesis of smuggling of separated children; in many cases child testimony will not be available to assist with this distinction. Second, the large difference in protection provisions between the two protocols means that many smuggled children, including refugees and asylum seekers, will not be eligible for enhanced protections that may be available to their trafficked peers.

In conclusion I would like to highlight certain aspects of this important Vienna process which give rise to concern, particularly from the perspective of irregular child migrants, and their so far largely unmet need for protection. First, by attaching the anti-trafficking and anti-smuggling measures to the criminalization of transnational crime, the Convention continues the growing trend to address pressing questions of global migration through a law enforcement rather than a rights based framework. Immigration and crime control concerns about irregular cross border movement are the prime preoccupations, which then, as a secondary and subordinate corollary, lead to concern for victims of abusive irregular migration practices. This inevitably effects the resources and political will marshalled for the protection of migrants' fundamental human rights, despite their peculiar vulnerability. Smuggled children in particular will lose out from this prioritization.

Second the TOC Convention, for the first time, establishes as an agreed fact grounding international law, the tripartite division of irregular migration into trafficked migration, smuggled migration and humanitarian migration. A positive aspect of the process of definitional clarification is that it will not only enable states to harmonize and improve their law enforcement interventions. This might also interfere with domestic pressures to escalate penalties across the board for all migration related offences, requiring states to distinguish the egregious slavery-like practices from commercial facilitation of border crossing (42). But, though these categories do correspond with some commonly encountered clear-cut migration situations, they pose problems for migrants who fall into more than one of the migration category either simultaneously or at different times during their migration. No procedures for deciding which category applies are set out. For children this division is particularly problematic because the considerably enhanced protections for trafficked persons are not available to those who are not so identified. Definitional boundaries may be used by states to exclude from protection or even penalize some highly vulnerable migrants.

A third significant consequence of the TOC Convention for the development of policy on irregular migration is the clear distinction drawn between criminal and victim - the commercial trafficker/smuggler on the one hand, and the migrant on the other. The Convention makes it clear that migrants themselves, whether transported by traffickers or smugglers, are not to be criminalized (43). As Pino Arlacchi, the UN official directing the Convention drafting process said at the opening plenary conference: "The protocols [to the Convention] will bring about a change in the way we see and treat those working as child labourers or prostitutes. No longer will they be viewed as accomplices. Now we will know them for what they are - victims of a new form of slavery. They must not be criminalised. Instead, they need help and protection" (44). This welcome development contrasts markedly with the increasing criminalization of migrants themselves in many transit and destination states. Unaccompanied minors arriving in the US, for example, are routinely detained - some in very harsh and punitive conditions. It is common for children as young as 10 or 12 to be shackled, handcuffed and kept for indefinite periods stretching from months to years, in juvenile correctional facilities, even where they have not been charged with any criminal wrongdoing. So the emphasis on not criminalizing the "victim" may be beneficial in its impact on current state practice.

However, the dichotomy criminal/victim is not without problems in the smuggling context. Whilst some commercial travel facilitators are engaged in manifestly abusive and exploitative criminal behaviour, others are exploiting the increasing difficulty of lawful border crossing for asylum-seekers, to perform a much sought after, if costly, service. Perhaps a useful analogy is to the behaviour of expensive back street abortioners in a situation where abortion is illegal. So far there is no evidence that escalation of criminal sanctions reduces the abusive behaviour (infact so far the evidence appears to go the other way, with ever increasing numbers of persons trafficked despite growing law enforcement attention to the phenomenon (45)). But there is little doubt that increased migration transaction costs are passed on to the migrants themselves: the more complex, risky and expensive the mechanisms required to evade immigration control, the more costly the service. As a result smuggling fees are more likely to lead to post-entry bonded labour repayment arrangements.

Moreover privileging the protection obligations to migrant witnesses able to testify against their traffickers to secure convictions (46), over obligations to other migrants, is dangerous. It pressurizes vulnerable migrants to cooperate with law enforcers at the risk of placing themselves and their families, typically beyond the jurisdiction of the law enforcers, at greater risk; it reduces the protective concerns of law enforcers towards victims who are not in a position to be witnesses (47); and it provides law enforcers with a justification to deny protection and or legal immigration status to those who are unable or unwilling to testify. The following excerpt from an interview with a smuggled 16 year old child illustrates some of these dangers:

"... I came with 3 people plus a snakehead. We travelled through Cambodia, Thailand, and New Zealand on our way to the United States. The whole journey took around 27 days. I took a plane from New Zealand to L.A. In L.A. the INS [US Immigration and Naturalization Service] threatened me, and told me that I had to testify against the snakehead [the smuggler] or I would be locked up for 20 years. They also told me that the snakehead would go to jail for 20 years. The INS said if I didn't want to be a witness, I would have to pay. As a witness, I would receive better treatment. I said "I'm just a kid. I don't know anything." But the officer said "Sixteen is old enough to go to jail in this country". I got scared, so I signed the form, There was a translator who translated the form, but they never gave me a copy" (48).

Increasing and more effective criminalization is the prime policy agenda emerging from

the Convention, with qualified victim protection a second goal; despite acknowledgement of the importance of underlying or "root causes" of the migration problems, no serious consideration is given to new collaborative or imaginative mechanisms for addressing or impinging on these underlying precipitating causes. As a result the policy proposals generated do not address many of the factors impinging on and encouraging the migrations, nor do correspond with the most pressing needs of the implicated migrants, particularly those of lone migrant children. For many of them, trafficking and smuggling are last ditch survival mechanisms, products of the dirth of more acceptable life choices. They are part of a broader set of interacations between the extremes of wealth generation and privilege preservation on the one hand, and the progressive immiseration, disintegration of communities and gendered tyranny on the other. They are a direct product a global situation where, unlike capital, services, goods or ideas, the flow of people is legally restricted. Moving people thus becomes a scarce commodity, a profitable business, more so than moving goods -even illegal goods such as drugs. This is particularly so where illegality produces greater labour exploitability. Hence the demand for illegal migrant labour, including child labour, and, as a result, for smuggling or trafficking services.

Greater labour mobility, enhanced rights protections and reduced power disparities should be the goals of any public policy that seriously seeks to reduce trafficking and smuggling in persons. This is not however the current international approach. The TOC Protocols, by addressing the phenomena of trafficking and smuggling primarily through increased criminalization, are likely to exacerbate the human rights violations facing victims of exploitative irregular migration, and, by raising the transaction costs of irregular migration, to prolong the period of indenture of the pool of disenfranchised labourers, which includes a growing proportion of children. It remains to be seen whether the new victim protection measures, dependent as they are on state discretion, and divorced from clear migration or labour rights protections, will be effective in moving states to stem the tide of criminalization and discrimination against migrants in general and lone alien children in particular.

NOTES

1) B. Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (1998: Martinus Nijhoff); R. Cohen, "Illegal migration rises sharply in the European Union", *New York Times*, December 25, 2000; International Organization of Migration (IOM), *Migrant Trafficking in Europe: A Review of Migrant trafficking and Human Smuggling in Europe with case studies from Hungary, Poland and Ukraine* (2000) [hereafter IOM, Migrant Traffiking]; J. Morrison, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?* (UNHCR, July 2000), [hereafter Morrison, Trafficking and Smuggling].

2) This increasing attention corresponds to a more general preoccupation with the position and status of children in society, see E. Verhellen, "Changes in the Images of the Child" in ed. Michael Freeman and Philip Veerman, *The Ideologies of Children's Rights* (1992: Martinus Nijhoff, Dordrecht) 79.

3) Jan Disley, "Twins bought over the Internet -- it's all so immoral", *The Mirror*, January 17, 2001.

4) J. Bhabha and W. Young, "Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines", 11 (1) *Int. J. Refugee L.* [hereafter Bhabha and

young, Not Adult in Miniature] 85-86.

5) P. Stromberg, "Going home... But to an uncertain fate" , *Refugees* 19-21 (UNHCR Winter 1997).

6) Bhabha and Young, Not Adults in Miniature, 84-125.

7) J. Bhabha, "Inconsistent State Intervention and Separated Child Asylum Seekers" , forthcoming, *European Journal of Migration and Law*.

8) IOM, Trafficking, 29-38.

9) Several anti-trafficking measures were eventually consolidated in the 1949 *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*. This treaty focuses on the criminalization of trafficking for prostitution and the eradication of prostitution with some, albeit weak and unenforced protection concerns for victims. Because of its abolitionist stance towards prostitution and its paternalistic approach to 'victims,' in the period of 50 years it has been adopted by only 69 states. For a critique of the Convention as it applies to the protection of trafficked persons see *Report of the Special Rapporteur on violence against women, its causes and consequences, M. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission of Human Rights resolution 1997/44E/CN.4/2000/68* [hereafter Coomaraswamy, Report on trafficking] para 21-26.

10) Prohibition of child exploitation was subsequently reiterated in the 1959 Declaration on the Rights of the Child; the prohibition on child exploitation and child trafficking were developed further in the 1989 Convention on the Rights of the Child. See G. Van Beuren, *The International Law on the Rights of the Child* (1995: Martinus Nijhoff, Dordrecht) 262-292.

11) Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (1990: Weidenfeld, London) 92-142; Aleinikoff, Martin, Motomura, *Immigration and Citizenship: Process and Policy* (1998: West, St. Paul) 151-242.

12) *UN Convention against Transnational Organized Crimes and Protocols thereto*, A/55/383.

13) Resolution Adopted by the General Assembly, January 20, 1999 [A/RES/53/111]

14) TOC Ad Hoc Committee Report.

15) The text of the third draft protocol against illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, was not completed in time for signature at the December conference. Para 120, Report of the Ad Hoc Committee, November 2, 2000.

16) Senator Sam Brownback, Debate on Senate bill on sex trafficking, Gerald F. Seib, "The Dark Side of New World", May 17, 2000, Dow Jones News. See also Communique of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, Moscow, 19-20 October 1999, Morrison, Trafficking and Smuggling, quoted in note 6.

17) These include the deaths of 50 south asian migrants in a freighter off the coast of Turkey in January 2001, the deaths of 58 Chinese migrants asphyxiated to death in a truck at Dover in the UK, the deaths of at least 1,000 migrants per year attempting to enter Europe, the imprisonment and brutalization of thousands of trafficked persons every year, see B. Ghosh, "Europe on the Move", *Wall Street Journal Europe*, Jan 5, 2001; R. Coomaraswamy, *Report on Trafficking in women, women's migration and violence against women* E/CN.4/2000/68; IOM, *Trafficking and Smuggling*, ch.11, 98-111.

18) Art.3, TOC.

19) Art.2, TOC.

20) See *Interpretative notes for the official records (travaux preparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* A/55/383/Add.1, [hereafter *Travaux preparatoires*] para 4.

21) "The *travaux preparatoires* should indicate that the words "in order to obtain, directly or indirectly, a financial or other material benefit" should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paidophile rings or cost-sharing among ring members". *Travaux preparatoires* para 3.

22) *Travaux Preparatoires* para 64. see also note 31 to Revised Trafficking Protocol Draft 6: 'The words 'at a minimum' will allow States Parties to go beyond the offences listed in this definition in criminalizing. It is also intended to make it possible for the Protocol to cover future forms of exploitation (i.e. forms of exploitation that are not yet known). [hereafter Revised Trafficking Protocol Draft 6]. A/AC.254/4/Add.3/Rev.6.

23) Convention on the Rights of the Child, art. 34; Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Art 1, A/RES/54/263.

24) Human Rights Caucus Priority Concerns 5; HCHR Note, para 5.

25) Trafficking Protocol art 3(c).

26) Interviews conducted by author's research assistant Celeste Froelich in New York during August 2000. On file with the author.

27) According to a recent (and as far as I know unique) Canadian decision, such circumstances can amount to trafficking; indeed in that case, where several chinese teenagers were smuggled into Canada, inducted into exploitative labour to repay smuggling debts, the court found that they qualified for refugee status on the basis that trafficking was a form of persecution. *Li v Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 2037.

28) Smuggling Protocol Art.3(a).

29) Smuggling Protocol Art.6(b),(c).

30) Smuggling Protocol Art.4.

31) However if the migrant smuggling involves exploitation or other inhuman treatment,

or if it endangers the life or safety of the migrant, this will constitute an aggravating circumstance to the offence, Art .6(3).

32) "... the reference to "a financial or other material benefit" as an element of the offences ... was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations". *Travaux* para 92.

33) For examples of such behaviour see Morrison, *Trafficking and Smuggling*, 55 and ftns 143,144.

34) *Smuggling Protocol* Art.5

35) *Smuggling Protocol* Art 11(1), 11(3).

36) See HCHR Note; Human Rights Caucus Recommendations and commentary; European Parliament Report on the Communication from the Commission to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation, A4-0372/97, Rapporteur Mrs, S.A. Waddington, (hereafter EP Waddington Report) para 10; European Parliament Report on the communication from the Commission to the Council and the European Parliament "for further actions in the fight against trafficking in women" A5-0127/2000, Rapporteur Patsy Sorenson (hereafter EP Sorenson Report) para 9.

37) In Italy and Belgium, victims lodging a complaint against a trafficker receive a residence permit only until the end of the trial, see EP Sorenson Report, 18.

38) Though the requirement to protect is mandatory ("each State Party shall protect"), states have discretion to determine the cases where the requirement applies ("In appropriate cases and to the extent possible under its domestic law"), Art. 6, *Trafficking Protocol*. This discretion undermines the mandatory nature of the protection requirement and could allow states to persist with court practices which expose trafficking victims acting as witnesses to reprisals and risks of re-trafficking. The full article reads: "In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential".

39) *Trafficking Protocol* Art 6 (3): "Each State Party shall consider implementing measures"...

40) "Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care". *Trafficking Protocol* Art 6(4). Earlier drafts of this clause had weaker protections for children, and included a troubling limitation: "States parties shall ensure that their legislative frameworks contain measures that permit providing ... appropriate housing, education and care for children *in government custody*", *Trafficking Protocol* Rev.5 Art 4 (2)(c), suggesting acceptance of the practice prevalent in some states of detaining trafficked children.

41) An exception is the recommendation set out in HCHR Note para 19, " ... that the Migrant Protocol should include an explicit acknowledgement of the fact that children

have special rights under international law; that child victims of smuggling have special needs and are entitled to special protection, and that, in dealing with child victims of smuggling, the best interests of the child are to be at all times paramount." See also Report of SR on Sale of Children, paras 50-52.

42) See for example *French Initiative for a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence* (Document 10676) European Union: French Presidency Proposals, December 2000 and see critical response by Immigration Law Practitioners Association, *ILPA European Update 2000*, p.12, para 48.

43) Art. 2(b) and Art. 14 (2) *Trafficking Protocol*, Art.5, *Smuggling Protocol*.

44) Pino Arlacchi, *Statement to the Opening Session of the Plenary* December 12, 2000.

45) Europe's restrictive policies have resulted in greatly increased illegal immigration, now estimated at between 300,000 and 500,000 entrants a year; in the US, despite a doubling of border enforcement personnel and a tripling to \$4.3 billion of the INS budget in the last seven years, the number of illegal immigrants is estimated to be growing at the rate of 300,000 a year. B. Ghosh, *Wall Street Journal Europe* January 5, 2001.

46) Protection of victims participating in legal proceedings is the first protection mentioned in the Protection of Victims section of the Trafficking Protocol - Art.6(1): "... each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential".

47) As the High Commissioner for Human Rights commented in relation to an early draft of the Smuggling Protocol: "...victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by investigating and prosecuting agencies to act as witnesses in criminal proceedings". Informal Note, Para 21.

48) Excerpt from one of 10 interviews conducted by author's research assistant Celeste Froelich in New York during the summer of 2000, with children detained by the INS on entry to the US, and subsequently released into the custody of relatives. Interview notes on file with the author.