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UNHCR's Position against Smuggling**

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# **Criminalising and Victimising the Migrant: Reflections on the UN Protocol and UNHCR's Position against Smuggling**

By Zeynep Kasli

## **Abstract**

This paper discusses the ways in which the UN Protocol against Smuggling and its reception by UNHCR reinforce a certain image of the 'smuggled migrant' that emerges simultaneously as a 'victim' of smuggling and a 'threat' to the states' authority over border crossings. The paper further claims that such seemingly contradictory images in fact complement one another and provide the legal and institutional basis to 'manage' migration by securitising it.

The strengthening of border controls and measures to deter people's entry into Western states has pushed migrants to search for other ways to enter and rely more on 'smuggling rings'. Due to stricter border measures, smuggling routes have become more dangerous for those who have to rely on them (Hagen et al 2011, W2eu 2011). Concomitant to an increasing number of 'smuggling victims,' like the act of trafficking, people smuggling is also a matter of humanitarian concern for organisations such as UNHCR (UNHCR Refugees Daily 2009). This paper discusses the ways in which the UN Protocol against Smuggling and its reception by UNHCR reinforce a certain image of the 'smuggled migrant' that emerges simultaneously as a 'victim' of smuggling and a 'threat' to the states' authority over border crossings. The paper further claims that such seemingly contradictory images in fact complement one another and provide the legal and institutional basis to 'manage' migration by securitising it.

Many scholars have pointed to the fact that the securitisation of migration and new instruments of border management target migrants as a 'risk' and impede humanitarian assistance for 'migrants in need' by, for example, erasing the categorical distinction between 'asylum seekers' and 'others' (Leonard 2010; Morrison and Crosland 2001; Noll 2003; Schuster 2005; van Munster 2009). Despite recognising the difficulties of categorising people as smuggled migrants/trafficked persons/refugees due to the increasing complexity of the economic and social reasons to move across borders, previous studies have generally not given due consideration to what functions such categories serve. By claiming that 'the concept of labelling reveals and contests the subjectivity and arbitrariness by which labels are made, and the way in which everyday bureaucratic processes transform identities' (Zetter 2007: 180), Zetter stresses how institutional practices transform the 'refugee' label by developing new instruments, such as the overseas application processes or third country readmissions. Similarly, Zetter also mentions, the 'asylum seeker' label functions 'to manage...and to decline refugee claims' made on the basis of the Geneva Convention (2007: 182). While acknowledging the role bureaucratic interests and practices play in labelling and the role labelling plays in managing migration, the analysis of the 'smuggled migrant' label in this paper is limited to the rhetoric of international actors and their possible effects on the process of label (trans)formation.

Through the adoption of the UN Protocol against Smuggling of Migrants by Land, Sea and Air (supplementing the UN Convention against Transnational Organised Crime), human smuggling, as well as trafficking, has been accepted as a 'transnational organised crime' in the international

political field (UN 2000).<sup>52</sup> UNHCR Summary Position on the UN Protocol against Smuggling and Trafficking states that during the Ad-Hoc Committee sessions for the Protocol, ‘UNHCR emphasized the need to reconcile measures to combat the *smuggling of migrants* and the *trafficking of persons* with existing obligations under international refugee law’ (UNHCR 2011, emphasis added). UNHCR declares its appreciation for the ‘protection of smuggled migrants’ and for not punishing migrants ‘for the mere fact of having been smuggled or at penalising organisations which assist such persons for purely *humanitarian reasons*’ (emphasis added). However, by underlining ‘humanitarian reasons’ as the only just cause for being exempt from punishment, UNHCR makes it clear that the distinction between *persons* who are trafficked and *migrants* who are smuggled can be reconciled if and only if they ‘deserve’ protection for being ‘victims’ in the hands of smugglers. For that matter, it can be said that the framing of migrant smuggling has increasingly resembled what Aradau (2004) calls the ‘politics of pity’ and the ‘politics of risk’ that are simultaneously used in trafficking cases. Just as the ways in which security and humanitarian discourses were simultaneously utilised to prevent the ‘re-trafficking’ of previously trafficked women for the sex industry (Aradau 2004), the criminalisation of smuggling has also aimed at preventing the *re-smuggling* of previously smuggled migrants unless they are migrating for immediate ‘humanitarian reasons’. Although UN Protocol positions ‘smuggled migrants’ closer to victims of trafficking and guarantees them temporary protection under international law from potential abuses of ‘smuggling rings’ and UNHCR reaffirms the necessity to provide such protection, both UN Protocol and UNHCR take for granted the limits of UNHCR’s mandate, that is protecting refugees as they are defined by the 1951 Refugee Convention and the 1967 Protocol.

Within this paradigm, ‘smuggled migrants’ remain in a precarious position not only because they are outside UNHCR’s protection mandate but also because, contrary to UNHCR’s claims, the Smuggling Protocol’s priority lies in protecting states against smugglers more so than in protecting migrants against the act of smuggling, which is defined in Article 6 entitled Criminalisation. For instance, Article 11 (5) on Border Measures includes the right to take ‘measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons’ and Article 11(6) emphasises the ‘strengthening cooperation among border control agencies, by *inter alia*, establishing and maintaining direct channels of communication.’ Just as the former reinforces state sovereignty at the expense of the free movement of people, the latter encourages the securitisation of migration through the patrol and strengthening of borders. In other words, Article 11 provides the legal basis for intergovernmental cooperation and for that matter, the formation of external border agencies such as FRONTEX<sup>53</sup> in the European context. Similarly, Article 18 on Return of Smuggled Migrants considers states’ concerns for managing cross-border movement more so than the concerns of individuals who are smuggled into a country which otherwise does not authorize them to cross its borders and stay. As in Aradau’s (2004) emphasis on the simultaneous use of ‘politics of pity’ and ‘politics of risk’ in the case of trafficked women, Article 18 shows that the Protocol anticipates return as the ultimate measure to ‘protect’ migrants against the act of smuggling. Indeed, contrary to the Protocol’s initial definition of those individuals as ‘victims’ of smuggling, Article 18(8) legitimises the criminalisation of migration and individuals ‘who have been the object of [smuggling]

<sup>52</sup> It was adopted on 15 November 2000 and entered into force on 28 January 2004. Yet there is no updated information in the website of UNHCR regarding the status of the ratification of either the Smuggling Protocol or the Convention.

<sup>53</sup> FRONTEX is a Warsaw-based intelligence driven EU agency that was formed in 2004, with the ultimate aim of improving information coordination and dissemination efforts in the field of border security. As a public clearing house, it integrates several centres (the Air Borders Centre in Rome, the Centre for Land Borders in Berlin, Maritime Borders Centres on Madrid and Piraeus, COLPOFOR and the Risk Analysis Centre in Helsinki).

conduct' by stating that 'this article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs' the return of smuggled migrants. For that matter, Article 18 provides the legal basis also for readmission agreements signed by EU member states with neighboring countries that are transit points for people to reach and cross EU borders. Therefore, by pushing them outside the borders of host states, the Protocol first victimises and then criminalises the migrants as well as the smugglers.

In his study on securitisation of EU immigration policy, Van Munster argues 'for what may seem as a managerial question of abject populations is in the end also a question of who is allowed access to the social fabric of society and how society should be structured' (2009: 123). Since the legal distinctions between migrants/asylum seekers/refugees have so far depended on the discretion of states, rather than the needs of individuals, for Van Munster (2009), challenging this current trend of securitising migration would be possible only through a political shift away from the discourse of 'migrant rights' (as a distinct category) to the 'right to have rights' as equal subjects.<sup>54</sup> Indeed, one might assume that the following statement by UN High Commissioner for Refugees Antonio Guterres in 2007 emerges as a sign of such a proposal for challenging states' discretionary power:

In exactly a week from now, we will be celebrating International Migrants Day. Let us use that day, and let us use this Dialogue, to reaffirm the need to *respect the rights of all those people* who have left their own country, *irrespective of their legal status or their motivation for moving*. In making that remark, I am not seeking an expansion of my Office's mandate... I do believe, however, in the universality and indivisibility of human rights. By creating a global environment in which *migrant rights* are respected, we will also be creating an environment in which UNHCR can more effectively exercise its mandate for refugee protection and solutions.<sup>55</sup> (emphasis added)

Guterres' rhetoric differs from what Van Munster suggests, as Guterres still clearly labels migrants as a distinct category of individuals with distinct rights. Yet by stating that 'Irregular migration can only be curtailed if people who want to move can aspire to do so in a safe and legal manner' (Guterres in Crisp 2008: 4), Guterres at least makes a more inclusionary statement compared to the previously discussed UNHCR Summary Position in 2000 which considered the protection of migrants only on 'humanitarian grounds' while at the same time criminalised them for crossing borders illegally.

Furthermore, the same year as Guterres' statement, UNHCR released the 10-Point Plan of Action.<sup>56</sup> As Crisp confirms, this plan did provide 'a framework for states and other stakeholders to address the phenomenon of mixed movements in a principled manner' (footnote 4 in Crisp 2008). Nevertheless, the language of the headings and details of each point reaffirms UNCHR's stance regarding the necessity to expand and deepen surveillance at entry points. In other words, like the UNHCR Summary Position on Smuggling Protocol, the 10-Point Plan also serves the

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<sup>54</sup> Van Munster borrows Arendt's notion of 'a right to have rights' which she introduced in her 1949 essay 'The Rights of Man: What are they?' and her 1951 book *The Origins of Totalitarianism*.

<sup>55</sup> In December 2007, UN High Commissioner for Refugees Antonio Guterres's opening statement for the two-day meeting in Geneva that was titled a 'Dialogue on Protection Challenges' (cited in Crisp 2008).

<sup>56</sup> This plan is composed of: 1. Cooperation among key partners. 2. Data collection and analysis. 3. Protection-sensitive entry systems. 4. Reception arrangements. 5. Mechanisms for profiling and referral. 6. Differentiated processes and procedures. 7. Solutions for refugees. 8. Addressing secondary movements. 9. Return arrangements for non-refugees and alternative migration options. 10. Information strategy (UNHCR 2007).

securitisation of migration and criminalisation of individuals who are unable to prove their 'victimhood' within the existing humanitarian framework. Thus it reinforces UNHCR's distinction between 'deserving' and 'undeserving' migrants on the basis of its predetermined notion of 'humanitarian grounds'. Although at first glance this plan might seem contradictory to Guterres' 2007 statement, which stresses the 'universality and indivisibility of human rights', the plan and Guterres' rhetoric, in fact, mutually reinforce one another. While both underline the limits of UNHCR's mandate as well as the need to respect *migrant rights*, the already existing categories of migrants and refugees are taken for granted and the possibility of revising these distinctions and labels on the basis of the newly emerging 'protection needs' is absent (Zetter 2007).

Though no detailed information is available about the ongoing processes of implementation, the coming into force of this UN Protocol also seems as an important factor that paved the way for the agreement between FRONTEX and UNHCR in 2008, namely the 'working arrangements establishing a framework for cooperation agreement with FRONTEX' (FRONTEX 2008). For instance, UNHCR has urged FRONTEX 'to ensure that asylum in Europe is not being threatened in the drive for tighter policing of the continent's external borders' (UNHCR 2010). Despite calling attention to the problems faced by asylum seekers at EU borders, UNHCR, as an international humanitarian agency, underlines the fact that their main concern is not *migrants* per se but *asylum seekers* who have to resort to 'people smuggling rings' in order to cut through increasing border controls around Europe (UNHCR 2010). Therefore, by seeking measures which are 'protection-sensitive' yet at the same time drawing boundaries of protection for 'asylum seekers' at the expense of 'migrants', UNHCR forms and transforms the image of the 'smuggled migrant' as a 'deserving' individual on the basis of the Smuggling Protocol that provides the legal ground for temporary protection for merely 'humanitarian reasons'. In other words, the UN Protocol as well as UNHCR's position seem to reinforce the securitisation of migration and institutionalise the criminalisation of smuggling in international law. Yet they also served to create a certain image of the 'smuggled migrant' that is paradoxically labelled both as a 'threat' who challenges state sovereignty through 'unauthorised' border crossing and as a 'victim' of the act of smuggling that UN Convention defines as a 'transnational organised crime'.

In sum, neither the UN Protocol nor UNCHR's interpretation of it problematise the fact that smuggled migrants/trafficked persons/refugees/asylum seekers are labelled as distinct groups, whose distinct legal rights are subject to states' discretionary power. While defining smuggling as organised crime, the critical articles of the Protocol and UNCHR's interpretation of this Protocol, as discussed in this paper, protect states against smuggled migrants whom they treat not only as 'victims' of the crime but also as 'threats' to states' territorial sovereignty. Finally, the simultaneous use of these images shows that unless 1) international law protects people's 'right to have rights' rather than the right to temporary protection for individuals who prove their victimhood based on 'humanitarian reasons', and 2) state borders are accessible for all those who have left their home country, as Guterres also once underlined, irrespective of their motivation for moving, the fight against smuggling in the international as well as national level will remain as yet another means to perpetuate the securitisation of migration.

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