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Paper for the conference

'Seeking Refuge: caught between bureaucracy, lawyers and public indifference?'

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'Rescuing' refugees in an era of 'illegal migration' and security threats?

Abstract

This paper addresses the question of how to protect refugees in a political context of rising suspicion and increasing policy measures aimed at controlling and countering the presence of 'illegal immigrants'. I will in particular look at the shifts that have taken place in the understanding and framing of human smuggling and how that has affected the way refugees are perceived and treated. Human smuggling is by no means a new phenomenon; there have always been people who for all sorts of reasons were not in the position to travel via ordinary routes. However, it is only fairly recently that human smuggling has undergone a process of criminalization. Since the beginning of the 1990s human smuggling entered the penal code of different European countries. In the year 2000 a Protocol against the Smuggling of Migrants by Land, Air and Sea came into being. This Protocol was part of the UN Convention against Transnational Organised Crime what marked the beginning of framing human smuggling as a 'global criminal business' where huge amounts of profits are made. Despite the fact that the majority of refugees are smuggled into Europe and this situation is acknowledged in article 31 of the 1951 Geneva Convention, refugees who enter countries with the help from smugglers are nowadays often perceived a 'threat' and complicit in a crime. In this paper I argue that state's current static and criminal view of what human smuggling is may easily lead to the violation of article 31 of the Geneva Convention. Moreover this particular security lens has huge effects for how states (and the public) nowadays perceive asylum seekers and refugees.

Introduction: Human smugglers: from heroes to mafia types

Human smuggling is often presented as a 'new' crime that started to appear in an age of globalization and is linked to an increasing demand for migration in poorer parts of the world. Smugglers are as a result often accused for bringing in 'unwanted' migrants and human smuggling referred to as the 'dark side' or the 'underbelly' of globalization. In this paper I show that human smuggling has always existed but has undergone a process of criminalization. I also argue that it is important to take the link between restrictive migration laws and human smuggling into consideration. It is not smugglers per se who convince people to migrate, it is rather the lack of legal migration opportunities that leave migrants no other choice than to travel in this way. Moreover, very little is known on the exact scale of human smuggling. Numbers in this field are estimations and it is important to realize that the number of immigrants wanting and waiting in the developed world to come to the West is often overstated. Although some migrants do move because of the world's unequal opportunities it is more often development as opposed to underdevelopment that causes migration (Massey et al. 1998, Castles and Miller 1998).

As said before human smuggling is nothing really new. During the Second World War many Jews were helped to escape the Nazi regime (see for example Fittko 2000). And during the Cold War many refugees were smuggled across the Iron Curtain. These smugglers were often considered heroes by the refugees as well as by the general public. Today these smugglers are even celebrated in Hollywood movies like Schindler's list, because they helped refugees escape criminal regimes. The emphasis today no longer is on the criminal *regimes* smugglers helped people to escape from, but rather on the *criminals* themselves who break the law and sneak across well protected borders. Immigration processes have become more fragmented since the beginning of the nineties than they were during the relatively transparent guest worker and colonial migration era (Böcker et al. 1998, Brubaker 1994). The numbers of 'spontaneous' asylum applications (those who are not explicitly invited by a government, but make an appeal to international treaties once they arrive) started to increase and many asylum seekers today are arriving from countries with which no links existed before. This unpredictability is causing difficulties for the 'management' of migration. 'Disruptive movements of people' (Ghosh 2000: 221) created a new suspicion with which migration was handled with in 1990s and 2000s. The fact that

large numbers of these 'spontaneous' asylum seekers were brought to Europe by smugglers who were assumed to be linked up with organised crime hit right at the heart of national sovereignty.

In the media it is foremost the large scale smuggling operations with dramatic end results that, for obvious reasons, are given a lot of attention. In Europe it was clearly the Dover case that brought human smuggling onto the political agenda and started to link human smuggling to organised crime (van Liempt 2004). On one of the hottest days of the summer of 2000 (June 18) customs officials of the British port town Dover detected the dead bodies of fifty-eight Chinese nationals in the back of a lorry. The Chinese migrants, except for two survivors, had suffocated in a sealed container filled with tomatoes. At the top of the hierarchy of this smuggling organisation sat a Chinese lady called Sister P. who is believed to have smuggled more than 200.000 men and women into the EU (The Observer, 6 July 2003). According to the police it was a combination of violence and intimidation what made Sister P. sweep all her rivals aside and made her corner the people-smuggling market between Holland and Britain soon after arriving in Rotterdam in 1997. Sister P's earnings are unknown but estimates suggest that she earned at least £15 million from her criminal activities (The Observer, 6 July 2003). Stories like the Dover case colour our imagination of who human smugglers are and justify tough actions taken against them. Who would be against 'fighting' merciless criminals who charge exorbitant prices and who do not care about their clients? The UN Protocol on Human Smuggling that came into force in 2000 is linked to the UN Convention against Transnational Organised Crime what is indicative of the new direction that is chosen to understand human smuggling.

Many smuggling operations however run relatively smoothly and are more similar to what has been called in the literature a 'package' migration service out of a sending region (Kyle & Dale, 2001), a 'transnational service-industry' (Bilger et al., 2006) or 'service-type of smuggling' (van Liempt & Doomernik, 2006). These types of smuggling operations are the result of an agreement between migrants and smugglers and do usually not end up on the covers of newspapers but are the result of a wider perspective on human smuggling that includes smugglers' as well as smuggled migrants' perspectives and is empirically grounded.

In this paper I will first of all describe the process of criminalization that has taken place with regard to human smuggling in the last fifteen years. Then I will point out some of the gaps between state's perspective on human smuggling and migrants' lived experiences. And lastly I will look into the possible effects of framing human smuggling as organised crime for migrants involved. I will argue that it is important to keep paying attention to article 31 of the Geneva Convention: no penalties should be put on refugees' unlawful entrees even though that seems an outcry in the desert in the current political climate. Sciortino already pointed out in 2003 that illegal migration is considered state's number one 'problem' (Sciortino 2003), nothing has really changed since he wrote that.

The criminalization of human smuggling in law
The shift that has taken place in how human smuggling is framed is not only a matter of shifts in discourse and public opinion it is also a shift in law. Human smuggling became part of many European countries' penal systems after a provision in the Schengen Agreement harmonised smuggling penalties at the European level in 1993[1].

In the Netherlands human smuggling entered the penal code in December 1993. Article 197a states:

> A person who, for motives of pecuniary gain, assists another person in gaining entry to the Netherlands or in remaining in the Netherlands or in gaining entry to or in remaining in any state whose obligation it is to exercise border control also on behalf of the Netherlands, or who, for motives of pecuniary gain, supplies that person with the opportunity, means or information for that purpose, where he knows or has serious reason to suspect that that person's gaining entry or remaining is unlawful, is liable to a term of imprisonment of no more than four years or a fine of the fifth category.

In 1996 the minimum penalty for human smuggling was raised from one to four years. For an act that is committed by someone in a professional capacity the maximum penalty has been raised to six years of imprisonment and/or dismissal from

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[1] Before smuggling entered the penal code smugglers were often convicted under fraud related articles.

office. If someone makes a profession of smuggling or does it in some organised way the maximum penalty is doubled to eight years of imprisonment. In the year 2000, immediately after the Dover case, the French Presidency of the European Council quickly drew up a legislative proposal for a 'Framework Decision on Strengthening the Penal Framework for Preventing the Facilitation of Unauthorized Entry and Residence'. Penalties for illegal entry have increased tremendously in the 1990s, not only in Europe but also in the United States (Cornelius et al. 1994). Increasing punishment widens up the possibilities for the police to detect smugglers. However it also increases the risk that people who help other people out of humanitarian reasons are convicted for smuggling.

Regardless of the increasing punishments in practice it remains very difficult to prove that a profit has been made on the act of smuggling. Smuggling is often a complicit crime and migrants are rarely willing to testify against their smugglers. It is often difficult for the police to find witnesses ready to testify against their smuggler (Slobbe & Kuipers, 1999, Beyer et. al 2004: 118-123). Augustin even found in the context of trafficking that 'rescue' raids by police and NGOs often fail because arrested workers refuse to denounce anyone (Augustin, 2005: 35). The reading of this behaviour by the police is that it is a logic result of threat posed by smugglers/traffickers and fear for reprisals, but interviews with smuggled migrants reveal that many of them see their smuggler as someone who saved their lives by offering help and as a person who in the future may offer help to a friend or family member in need. As such they don't really have anything to denounce. Smugglers are not always considered criminals who deserve to be punished. They may very well be seen as people who 'rescued their lives', as 'helpers' or as a 'necessary alternative' in a climate with many restrictions on mobility (van Liempt, 2007).

Human smuggling for profit and for non-profit
When the increase of smuggling penalties was discussed at the European level it became clear that European states internally had very different views on what constitutes 'humanitarian' grounds for the smuggling of asylum seekers. The definition of 'help' in the Council Directive did not specify doing so for 'financial gain', meaning that anyone 'helping' migrants to cross a border could fall under the classification of human smuggling, regardless of their motivations. Not everybody

agreed with this and as a result a humanitarian clause was adopted that says that member states shall not be obliged to impose such penalties if they are not in keeping with national legislation (ECRE, 2001). Member states may decide not to sanction individuals acting for humanitarian reasons, though they may also decide to do so if they wish. This EU decision made it easier for the Dutch government to remove the profit-making element from the smuggling definition. Initially, pecuniary gain was included in the Dutch definition of smuggling in order to prevent those who help people exit a country for humanitarian reasons from falling within the definition of human smuggling, but since 2005 the profit making element is removed. With the widening up of the smuggling definition and the focus on combating organised crime less differentiation is nowadays made between different types of smugglers.

However, the human smuggling market is a complex market for highly differentiated services such as guiding and/or transporting someone across a land or sea border, providing forged documents, offering shelter, bribing officials. As a result of this heterogeneity of the market many different people are involved in the smuggling 'industry' (see also Bilger, et al. 2006, Icduygu & Toktas, 2002, van Liempt, 2004, 2007). Human smuggling can be organised in many different ways depending on the distance that must be covered and the structural conditions that constrain people from moving in other ways. Contrary to what we might expect from the image of human smuggling that is portrayed in the media most studies in this field actually show that there is little 'organised crime'[2] involved in human smuggling (Neske 2006, Schloenhardt 2003, Soudijn 2006, Staring et al. 2005). Soudijn (2006) even shows that in Chinese human smuggling, which is supposed to be the most violent of all types of human smuggling, very few cases of highly organised structures are known and little violence is used. What becomes clear of all these studies is that there is no such thing as the prototypical smuggler.

Different types of illegality and what is socially acceptable
While terms such as 'legal' versus 'illegal' are easily used to categorise people they are in fact far from self-evident. Rather than representing a binary opposition the

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[2] Opinions are divided on the exact definition of 'organised crime' but there is great consensus in the literature that organized crime refers to a conspiratorial enterprise pursuing profit or power through provision of illegal goods and/or services, involving systematic use of force or threat of force. (see for example Winslow and Zhang, 2007: 430)

categories refer to a wide variety of positions migrants can take up in the course of a migration trajectory. When human smuggling is discussed the focus is clearly put on the violation of the law at the moment of border crossing. This is what distinguishes smuggling from trafficking. However it is analytically not correct to only look at the border crossing if we want to understand the 'illegality' of a migration process. First of all 'illegal' migration comes in many shapes and sizes. Most academic typologies of 'illegal migration' are framed around three main criteria: entry, residence and employment that can combine in many ways and produce many forms and degrees of irregularity[3] (Tapinos 2000: 18, van der Leun 2003: 19). Secondly 'illegality' in itself is not static. It is a dynamic process that differs over space and through time. Somebody may be legal at a certain point in time in one country, but become illegal just over one day, for example when a visa is overstayed or a regularisation program is put in place. Also, what used to be legal may be illegal nowadays and what is illegal in one country may be legal in another country. As such it is important to take into consideration that the violation of the law at one point does not necessarily mean that people are not entitled to state protection at another point.

Discussions about legal versus illegal would benefit from a wider perspective that goes beyond legal rules and includes normative notions. Abraham & Van Schendel (2005) differentiate between the formally legal: (il)legality and the socially acceptable: (il)licitness. They argue that certain illegal practices may well be considered acceptable. Knowledge of the context in which decisions are made to contact a smuggler is for example vital for a wider understanding of the phenomenon of human smuggling. Some migrants come from countries from which it simply is impossible to get travel documents, like for example from Somalia where no passports were issued at the time most people fled. In many countries from where people need smugglers visas are hard to get. Neumayer (2005) states that it is not passports as such, but rather the visa restrictions imposed on passport holders from certain countries that are one of the most important devices by which nation-states control entry into their territories. People from refugee producing countries almost always need visa to enter the West. Moreover asylum seekers may need smugglers

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[3] The term irregular migration is often used instead of illegal migration because it is less normative and refers to a wider range of border crossing that may occur without standard authority (Jordan & Duvell, 2002).

because they are in a situation that does not allow them to make themselves public, let alone go to an embassy and ask for a visa, because they are being looked for. Empirical research with smuggled migrants also shows that even when migrants have the legal right to migrate somewhere they may need a smuggler to get *out* of their country (van Liempt 2007: 101). Drawing on this reality assisting migrants across border can be seen as a legitimate thing to do and human smuggling a response to humanitarian needs (see also Coutin, 1993, Morrison & Crosland, 2001).

Without underestimating the seriousness of the possible threat smugglers are posing to states and to migrants as well it is important to interrogate the meaning of 'crime'. Is it really criminal to help people cross borders when they don't have the authority to do so but still need protection? If we think beyond state-defined categories of who and what is defined criminal or non-criminal, a different picture emerges. Moreover the term 'illegal migrants' itself has been criticized by many authors as well (for an overview see Koser 2005). Migrants can never be illegal themselves, only their activities can be regarded as such. But the illegal exit, entry and residence of migrants are often associated with other illegal activities (Jandl, 2007). The underlying assumption is that one illegal activity will lead to the other. This is not necessarily the case, besides, not all illegal migrants are always unauthorized.

Human smuggling: a legal violation of the law for refugees?
A good example of how blurred the category of illegal migration can be is the fact that asylum seekers who have migrated in 'illegal' ways may still be entitled to legal refugee status later on in the migration process. This particular situation is recognised in the law, more precisely in article 31 of the 51 Geneva Convention that argues that in some cases it may be legal to enter a country in an illegal way.

Article 31: Refugees unlawfully in the country of refuge

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present

themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The dominant and blurry framework of 'illegal migration' within which asylum movements are discussed nowadays often results in stigmatization of those who came through 'illegal' channels. Sometimes it may even result in denial of access to protection to those in need. In order to make this claim it is important to look more in detail to concrete effects of framing human smuggling predominantly as an (organised) crime. Does this affect asylum seekers' legal proceedings and as such does it affect the level of protection offered to refugees?

What does the focus on violation of the law mean for refugee protection?
As said before having entered the country with the help from smugglers can not be used against refugees, as this would violate article 31 of the Geneva Convention. Also it would have massive consequences as the majority of asylum seekers in Europe enter with the help from human smugglers. Efionayi-Mäder et al. (2001) conclude that almost all their respondents in a study amongst asylum seekers claimed to have used the services of a smuggler to enter Switzerland for at least one stage in their migration process. Research in the Netherlands also shows that asylum seekers are often smuggled (van Liempt, 2007) and that they are more frequently smuggled than traditional immigrant groups (Engbersen, Staring et al. 2002). Having violated the law may have an indirect impact on refugees' access to protection. Below I will point out some of the possible effects.

1. Culture of disbelief may result in denial to protection system
Asylum seekers are registered and interviewed upon arrival. In the first 'screening' interview questions are usually asked about identity, nationality and travel route.

When accounts are incoherent and/or the credibility of the story is doubted in this first stage interview it may affect the outcome of the overall procedure. During the second interview the applicant' reasons for applying asylum are discussed. In the first interview a lot of attention put on the modes of travel, the routes taken, and the prices migrants pay to smugglers. Asylum seekers are usually well informed of the fact that their story to immigration officers will be used in deciding the eligibility for their asylum. Hence, these stories determine their future, and news goes around of what should be revealed versus what should be concealed. As a result the information in asylum databases is relatively weak being compiled of standard stories with few details. Moreover smugglers sometimes inform migrants not to give too much information on how they travelled in order to avoid possible apprehension. Unreliable or contradictory travel accounts during the asylum request however may increase suspicion on immigration officers' side and may result in a general suspicion towards their case. When parts of the story are doubted more proof is needed to convince the immigration officers of the genuineness of the *whole* story. Asylum seekers nowadays often have to proof they are *not lying* rather than collect evidence that supports their case and the concept of blame is used more widely to deter asylum seekers (Khatrani 2009).

2. Lack of identification may result in detention/deportation
A related issue is the problem of identification. The majority of asylum seekers who arrive 'spontaneously' do not have the right documents. Travelling with a human smuggler often involves travelling on forged documents and sometimes the smuggler asks the documents back so he (or she) can recycle them. When asylum seekers cannot identify themselves upon arrival the general credibility of their story is doubted. From then on no gaps, contradictions, vague statements are allowed and the story needs to have a 'positive persuasiveness' (Doornbos 2004: 83). This means that in most cases the burden of proof is on asylum seekers' side. If all asylum seekers who cannot identify themselves properly upon arrival are suspected from the start this means almost *all* asylum seekers are treated with suspicion. It is important though to make a difference between those who cannot identify themselves because they lack proof of identity and those who deliberately try to hide their identity and therefore obstruct asylum applications. In previous years detention was only used as an emergency measure, but slowly detention has become a central element of European-

wide immigration law (Schuster, 2005). As a result asylum seekers without the right documents increasingly run the risk of being detained. This increasing use of detention is often justified as a means to correctly identify persons to speed up the process of forced repatriation (Broeders & Engbersen 2007: 1602). Asylum seekers without the right documents thus run the risk of being incarcerated and even deported when they cannot identify themselves.

3. Smuggled migrants run the risk of being convicted as smugglers
The specific situation of smuggling as a complicit crime and the state being considered the victim of human smuggling rather than smuggled migrants may also easily result in migrants and smugglers getting mixed up. It sometimes happens that smuggled migrants are being accused for smuggling even when they were the ones who were smuggled. In Bulgaria for example quite a number of asylum seekers are deported under suspicion of being a smuggler even before they had the chance to apply for asylum themselves (personal communication with Bulgarian attorney, 12 December 2008). This enforces the fact that in an era dominated by fear and suspicion smuggled migrants are easier considered 'criminals' and therefore denied access to the protection system.

Migrants are increasingly prosecuted and sentenced to prison for immigration violations such as entry without inspection. As such migrants are nowadays prosecuted for things that were not criminal in the past. The increasing focus on 'reliable' travel accounts and 'proper' travel documents and the possible risk for migrants of being identified as a smuggler may result in denial of access to protection, detention or even deportation. This situation may in the end be a reason for asylum seekers to circumvent the asylum system all together and go even deeper underground immediately upon arrival. But very little is known about this.

The wider effects of treating smuggling as organised crime
State's interest in fighting against organised crime is obviously something very legitimate and rarely questioned. However, if migrants' perspective is taken into account and a less legal but more sociological perspective is put on human smuggling the fight against smugglers may simultaneously mean that migrants also have less access to the services of smugglers what in its turn means less access to protection. In

contrast to the general image portrayed, smugglers can provide gateways to protection for migrants. A quite paradoxical consequence of restricting mobility is that smugglers are not leaving the scene. On the contrary, efforts to combat human smuggling may even increase the demand for smugglers. Cornelius et al. (1994) note that the gap between the aim for total control and its actual results – more 'illegal migration' – adds pressure to adopt even more restrictive policies. The effect of this is that more restrictions posed on the receiving end might push more migrants into the hands of smugglers.

There is also a noticeable shift in the routes smugglers take as a result of increasing measures taken by governments to fight against human smuggling. While trying to enter via what smugglers believe are the continent's least controlled borders many people are presently dying at the borders of Europe. The increase in personal dangers involved in smuggling are the result of riskier routes that are indirectly the result of better controlled borders. Better controller borders also mean that it has become more difficult for smugglers to do their job. This has in its turn resulted in smuggling prices going up and migrants being forced to invest high amounts of money. Travelling with smugglers has thus become more costly as a result of increased controls. And as a result of that not all asylum seekers/refugees are in the position to pay for (the whole) journey anymore (see also Van Hear, 2004). As such another consequence of restrictive migration laws is a pre-selection of who can afford it to migrate. Those who have the means to buy their way across borders do not necessarily have the most urgent reasons to flee (see also Morrison 1998, Doomernik 2004). This raises serious ethical concerns that cannot be solved by simply shutting the door for those who managed to collect the smuggling fee.

Conclusion

Since the beginning of the 1990s increasing numbers of asylum seekers started to come to Europe 'spontaneously'. Their travel accounts often involved a violation of the law in order to find the protection offered by the Geneva Convention. Circumventing border controls in order to find protection somewhere else is not a new practice and article 31 of the 1951 Geneva Convention even recognises the fact that refugees may need to travel in 'illegal' ways to find protection. However states' interpretation of this situation has become more restrictive recently. A lot of attention

is nowadays put on the 'illegality' of asylum seekers and refugees' journeys and the possible threat this is posing. A process of criminalization has taken place and concern with migration is linked to a much stronger concern with crime in general. This particular shift in attention has created a more general climate of mistrust and fear what may affect people's access to the asylum procedure and the way they are treated within the procedure.

When it comes to asylum seekers it must be acknowledged that all refugees are initially asylum seekers. To protect refugees, asylum seekers must be treated on the assumption that they might be refugees until their status is determined. In the current climate of fear where security seems to be the dominant factor states often fail to give prior consideration to refugee protection. When security concerns raise suspicion regarding the validity of asylum claims, the desire to close borders and limit legal access may overrule the promise of protection. The general use of the term 'illegal migration' and the easy links that are made between migration and crime justify states restrictive migration measures and blame the person who violates the law. I have argued that the concept of 'illegal migration' is often used in an analytically incorrect and static way whereas it includes a variety of types of movements as well as statuses that may conflict with migration laws in sending, transit as well as receiving countries. In a single process of migration a migrant may move between legality and illegality.

Moreover it is very problematic when concepts such as 'illegal immigrants' are used as an identity rather than a temporary condition as if 'illegal migrants' are no persons. Looking more closely to how 'illegality' is produced and including normative notions sheds another light on the issue. Rather than being an objective phenomenon or a clear cut category human smuggling is defined and redefined through societal processes. In the past human smugglers were often considered heroes who are celebrated upon even today. Next to a historical perspective it is also important to include migrants' take on it rather than emphasizing states' perspective. Human smugglers offer alternative migration routes in a political climate where much mobility is restricted. As such smugglers can make it possible for migrants to find protection somewhere and escape horror and poverty. Smugglers are for that reason often labelled as 'helpers' rather than criminals by those who use their services.

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