

Issues in Human Trafficking and Migrant Smuggling in the Context of Illegal Migration

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I. Introduction

Global rates and trends¹ in *migration* indicate that it is one of the defining issues of the 21st century and the driving force of the globalization of the world economic system. Unprecedented increases in both voluntary and forced *international migration* in the last few decades have warranted the introduction of measures at both domestic and international levels to manage such an expansion. Following the increasingly restrictive nature of the domestic immigration policies of a significant number of governments, organized crime has come to control a vibrant market of illegal channels of migration. Out of the estimated 191 million migrants worldwide,² about 15 – 20 percent are said to be “unauthorized”³ meaning that they have *illegal migration* status in receiving countries.⁴

Migrant smuggling and *human trafficking* are two of several phenomena associated with *illegal migration*. The relationship between the two tends to create confusion with regards to the migration status of the ‘article’ of either enterprise dealing with matters of *illegal migration*. More specifically, while both phenomena are different in terms of actors and *modus operandi*, they both deal with the same article of business, that is, humans “intending” or “willing” or “forced” to migrate across international borders. Additionally, since both phenomena are clandestine in nature and are products of criminal enterprise, it is difficult for to distinguish one from the other.

Therefore, the first part of the paper focuses on examining the relationship between migrant smuggling and human trafficking against the backdrop of illegal migration. The second part then examines the elements of criminal intent, consent and coercion to determine when an act of illegal migration involves smuggling or trafficking based on the definitions of migrant smuggling and human trafficking laid out in key documents of the United Nations in this area. The first part examines the concepts of illegal migration, migrant smuggling and human trafficking as well as how they interact. More specifically, this part discusses the elements of criminal intent, consent and coercion as the critical factors in an attempt to distinguish migrant smuggling from human trafficking as incidents of illegal migration. The paper concludes that though both phenomena share certain confusing characteristics, they

differ in the following respects:

- the original intention of the actors;
- the presence, absence or withdrawal of consent to migrate on the part of the migrant;
- the scope of freedom of the migrant to refuse to migrate or to repudiate an earlier “contract” to migrate and;
- the fate of the migrant upon arrival in the host country.

II. Migrant Smuggling, Human Trafficking within Illegal Migration

Migrant smuggling, *human trafficking* and *illegal migration* are different phenomena associated with international migration – defined as the movement of persons from one country to another with the intent to stay in the host country permanently or for a relatively long period of time.⁵ Väyrynen argues that the status of such migrants is either legal or illegal depending on the immigration policies and rules adopted by national governments and intergovernmental organizations.⁶ To Maas, the delineation of legal from illegal migration is “flux” ostensibly because of constant adjustments in relating immigration rules and policies as well as their application.⁷ Nevertheless, what is generally regarded as *illegal migration* encompasses both *migrant smuggling* and *human trafficking*. Conceptually, all three differ in many respects even though they share a common occurrence in movement of people across international borders. In distinguishing these phenomena, this segment of the discussion deals primarily with official definitions contained in relevant instruments of the U.N. such as the supplementary protocols⁸ attached to the Convention against Transboundary Organised Crime 2000⁹ (Palermo Convention).

Overall, *illegal migration* is a highly controversial concept. Even the UN has been accused of not recognizing the concept of illegal migration but of irregularity in migration that should not deprive the immigrants of certain basic rights.¹⁰ The said controversy notwithstanding, illegal or “irregular” migration is an omnibus term that covers a number of issues relating to inter-border movement of persons in contravention of migration restrictions imposed by both sending and receiving countries.¹¹ Crépeau and Nakache define it as the attempted

or actual presence of persons in “a destination country without proper authorization”.¹² To name an example, legal norms of the United States consider such occasions variably from illegal entry to “visa overstay”.¹³ The International Organisation for Migration define illegal migration as “the movement of a person to a new place of residence or transit using irregular or illegal means, without valid documents or by carrying forged documents.”¹⁴

Migrant smuggling constitutes a special class of *illegal migration* while *human trafficking* is a subcategory of *migrant smuggling* where the migration involved can be either legal or illegal. Simply put, *migrant smuggling* is the facilitation of illegal entry to states for profit. Article 3(a) of the Smuggling Protocol defines migrant smuggling 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.” This definition is an international consensus on the nature and character of migrant smuggling viewed from several perspectives. It implies two criminal elements including securing illegal entry for an alien and the motive for the service. In 1994 the IOM identified the characteristics of migrant smuggling (which it refers to as “migrant trafficking”) as:

- Exchange of money or other forms of payment;
- Involvement of a “facilitator” who takes care of relevant travel logistics;
- The crossing of an international border;
- Illegal entry secured by either avoiding legal ports of entry or with the use of fraudulent travel documents; and
- Voluntary movement of the migrant.¹⁵

To sum up these criteria, every smuggled migrant has an *illegal migration* status in destination country because his entry and stay has not been facilitated through the legal channels of migration. This makes *migrant smuggling* conceptually different from *human trafficking* in which some trafficked persons actually have legal migration status in receiving countries. Aiming to differ trafficking from *migrant smuggling* and *illegal migration*, Salt and Hogarth for example, maintain that “trafficking is usually considered as one of the latter, though it does not always involve *illegal migration* because entry into a country may be legal with status changing after entry.”¹⁶

Conceptually, *human trafficking* has no single precise definition that adequately captures the phenomenon. For example, after reviewing relating literature Salt and Hogarth identified over 20 definitions of trafficking.¹⁷ Salt and Stein favored a definition describing human trafficking as “an international business, involving the trading and systematic movement of people as ‘commodities’ by various means and potentially involving a variety of agents, institutions and intermediaries.”¹⁸ Laczko adds that such concept also involves “controlling and exploiting people after transporting them to

a new location, often beyond the borders of their homeland.”¹⁹ From whatever perspective or whichever terms human trafficking is defined, its features are summed up in Article 3(a) of the Trafficking Protocol as follows:

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... 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.²⁰

Thus, *human trafficking* is the illicit trade in human beings within or across national borders and it involves a wide spectrum of slavery-related activities. It is the third biggest illegal business after drugs and arms trade, fetching anything from US\$7 – US\$12 billion annually.²¹ It is rooted in chattel slavery,²² and first gained international recognition as “white slave traffic” in 1904²³ following the wide-spread recruitment and enslavement of job-seeking white European women into the international sexual services markets.²⁴ Today, human trafficking involves the trade in, and ruthless exploitation of men, women and children of all races, ages, color. Unlike *migrant smuggling*, its practice is not restricted to the illegal crossing of borders but involves both intra and inter-border activities akin to ancient chattel slavery now popularly referred to as the “new slave trade”.²⁵

In terms of the relationship and interaction, *illegal migration* involves a number of problems including a whole spectrum of transnational crimes that pose serious challenges for law enforcement and international security.²⁶ Both *migrant smuggling* and *human trafficking* are well positioned within the broader patterns of illegal migration. The act of illegal crossing of national borders is therefore a feature common to both *migrant smuggling* and *human trafficking*.

They are a consequence of desire to migrate originating from one or a combination of several factors of socio-economic and political nature. Both are also controlled by organized criminal networks that facilitate movements of migrants through illegal channels of migration (in *migrant smuggling*) and both legal and illegal channels (in *human trafficking*).²⁷ The involvement of organized crime made humans a commodity that is either trafficked or smuggled across borders, depending on levels of vulnerability or financial capability.²⁸ Although the differences between them are not clear-cut and consistent, they are still to be treated differently according to the UN definitions highlighted above.

Additionally, there is another factor differentiating *migrant smuggling* from *human trafficking*. While migrant

smuggling is perceived as a migration issue, human trafficking is regarded as a human rights issue. The Trafficking Protocol for example, recognizes trafficked persons as “victims” whose individual human rights are violated whereas the Smuggling Protocol places emphasis on the violation of States’ political interest by smugglers and their “clients” who are regarded as “willing violators of immigration laws.”²⁹ The reason is not farfetched: similarly to ancient slaves, trafficked persons are traded in manners and ways they have not approved of and against their will even when they voluntarily opted to migrate counting on aid of a “helper”. They are held against their will with visible and invisible bonds, physically and/or psychologically tortured and are denied their basic human rights and fundamental freedoms.

On the other hand, smuggled migrants freely contract with and pay smugglers to facilitate their illegal crossing of borders even though some do suffer human rights abuses in the course of while smuggled.³⁰ Within the UN system, *human trafficking* has officially been classified as a “crime against humanity” prohibited, along with other acts, under Article 7 of the Statute of the International Criminal Court.³¹

Additionally, *human trafficking* involves the use of deception, fraud, threat or use of force or other forms of coercion as well as abusing the victim’s state of vulnerability to achieve his/her consent to migration. Consequently, there is arguably any degree of voluntariness to migrate in such circumstances. Additionally, in case involving children,³² Article 3 (c) of the Trafficking Protocol rules out any accepted voluntariness even if such children were not forced to move as a result of similarly illegal means. *Migrant smuggling* on the other hand is purely contractual in nature, with the requisite *ad idem* between smugglers and client-migrants. It usually does not involve coercion or use of force except where the client-migrant is in breach of any of the terms of the contract like refusal or inability to pay debts owed.³³

Also, smugglers do not “recruit”³⁴ migrants but rather take advantage of their desperation to migrate to delude them with promises of refuge or economically greener pastures abroad if only they would pay for the service of getting there.³⁵ Illegal migrants in most cases actively seek out smugglers who offer a complete range of illegal immigration services including fake documentation, transportation, transit accommodation, guided crossings etc. They voluntarily submit themselves to be transported across borders for a fee. In a contrast, traffickers recruit people who are vulnerable as a result of their socio-economic circumstances or live in areas devastated by natural disasters, political instability or armed conflicts and countries in political transition. They lure or deceive such people into migrating with attractive offers of good jobs, marriage to foreigners, better living conditions etc. It is only later when the victims of trafficking become subjects to slavery and other similar practices.

Human trafficking involves perpetual exploitation secured

through threats of or actual violence, coercion or duress during and after transportation of the victims to unfamiliar environments. In most cases, traffickers use violently-enforced debt bondage to subject victims to working under dehumanizing conditions in shadow market sectors depending on forced labor and prostitution, domestic servitude, forced marriage, sexual entertainment, pornography, organized begging, and other criminal activities.³⁶ Such absence of choices related to work, such as where and under what conditions clearly separate the trafficked persons from those who are ‘only’ smuggled. Smuggled migrants, even as illegal aliens are usually free not only to work under conditions they choose to, although they are usually worse than for citizens or permanent residents working in the same industry. Also, the smuggled migrants usually work in the legitimate albeit less visible sectors of the economy and are free to quit the jobs at anytime.³⁷

Finally, smugglers’ motive for moving illegal migrants across borders is fundamentally different from that of traffickers. For smugglers, the motive is service in return for monetary or material profits. As a rule, smugglers rarely exploit their “clients” either in transit or at the receiving country. On the other hand, traffickers’ motive is the maximum exploitation of the person or labor of their victims at their destinations. Consequently, traffickers trample upon any human right that gets in the way of their profit and view their victims as merchandise and articles of trade.³⁸

Summing up the the main points regarding the similarities and differences between migrant smuggling and human trafficking discussed above, Ollus succinctly states:

The main difference between smuggling of migrants and trafficking in persons is that trafficking is by definition for exploitative purposes. Trafficking is thus a more long-lived criminal activity than is the smuggling of migrants. The profit of smuggling in migrants comes mainly from the organisation of entry into another country while the profit of trafficking comes from both the transportation of the person being trafficked, and from the exploitation the person is subjected to. It is this long-term exploitation that yields the largest profit. Persons being smuggled often share a mutual interest with their smugglers, i.e. they wish to enter another country. This is, however, sometimes also the case in trafficking. Although the victim of trafficking might originally have consented to the trafficking, it is the exploitative characteristics that differentiate trafficking from smuggling. Trafficking in persons is thus a crime against a person, while smuggling can be regarded as a crime against state sovereignty.³⁹

III. Criminal Intent, Consent and Coercion in Illegal Migration

Several authors and researchers have highlighted the problem of “artificial” boundaries between *migrant smuggling* and human trafficking for overlaps between the two as well as metamorphosis from smuggling to trafficking.⁴⁰ Lee for example, contends that “it is often unclear whether a person is trafficked or smuggled at the beginning of his or her journey, as deception, exploitation and human rights abuses may not be apparent until later stages.”⁴¹ This part of the discussion illustrates how the critical factors of criminal intent, consent and coercion identified in the Trafficking Protocol, if analyzed together, help to clearly differentiate *migrant smuggling* from *human trafficking*.

As earlier pointed out, it is often difficult within the context of illegal migration, to distinguish migrant smuggling from human trafficking within the context of illegal migration. It is due to the fact that at the initial stage of a migrant’s journey the migrant’s movement appears to be voluntary. Apart from obvious cases of abduction or kidnapping, smuggled migrants and trafficked persons usually start out as parties to a migration ‘contract’ whereby the furnishing of ‘consideration’ may be provided immediately or in the future.

From the onset the criminal intent of traffickers is to exploit their victims who are either persuaded by non-coercive means, and thus could be considered ‘recruits’, or forced to migrate by kidnapping or abduction. With respect to the victims who unwittingly put themselves at the mercy of traffickers, criminal intent is completely at odds with the agreement reached during recruitment. Consequently, traffickers misuse the contract with a migrant by deliberately misrepresenting material terms relating to the purpose of the migration. In most cases, they offer to pay all travel-related expenses and trick the migrants into debt bondage.

Through a subsequent use of different forms of coercion, they prevent such migrants from simply withdrawing from the contract. Smugglers, on the other hand have the criminal intent of facilitating illegal crossing of borders for their willing clients in exchange for material profits.⁴² They consequently arrange for false travel including related documents necessary for them to migrate. Then they release migrants from any further obligation subject to full payment of the agreed contract sum.

Consent as a distinguishing factor in these case relates to the free will of a migrant to be assisted in a process of migration as well as the choice to shape his personal and professional fate afterwards. The presence or absence of a migrant’s consent during the entire process of migration and its aftermath determines whether such a migrant is smuggled or trafficked. According to Salt and Hogarth, quoting from a study conducted by Meese et al, “if the free consent of the person is maintained to the end of the process, this is

smuggling; if the process involves coercion/intimidation, etc. then this is trafficking.”⁴³ Smuggled migrants generally consent and willingly cooperate with their smugglers in violating immigration laws. Occasionally they do so even despite suffering from human rights violations and abuses⁴⁴ in transit or upon arrival at destination countries.⁴⁵ Trafficked persons do not knowingly and willingly consent or cooperate with their traffickers, who have to rely on the use of force to secure the desired cooperation.

Coercion is perhaps the most visible distinguishing factor between *migrant smuggling* and *human trafficking* in illegal migration. In migrant smuggling, smugglers neither force people to migrate nor exploit them by using coercive means. Instead, the relationship between the smuggler and the smuggled can be identified as “a criminal commercial transaction between two willing parties who [part the company and] go on in their separate ways once their business is completed”. Such modus operandi applies except for the cases where such smugglers hold the migrants hostage pending their paying off, or by their families, of debts owed to the smugglers. In such situations, migrant smugglers can be just as ruthless and deadly as human traffickers. Unlike *migrant smuggling*, some traffickers simply abduct or kidnap and transport their victims to other locations for further exploitation enforced by violent coercion.⁴⁶ In cases of recruited victims, traffickers deceive them regarding the nature of jobs they were promised in destination countries. Additionally, during transit or upon arrival the traffickers force them into exploitative situations from which the victims are unable to free themselves. Such victims are completely at the mercy of their traffickers who exercise full physical, psychological, emotional and financial control over them.⁴⁷

As for voluntariness or consent to the migration, both categories of migrants in *migrant smuggling* and *human trafficking*, apart from kidnapped or abducted persons, usually consent to migrate. However, the nature of such consent makes the migrants in the former category “collaborators” and “victims” in the latter as defined under the Smuggling and Trafficking Protocols respectively.⁴⁸ According to the protocols, the smuggled migrant is just as culpable as the smuggler because both knowingly and intentionally cross international borders by illegal means. Whereas the victim of trafficking is exculpated by the invalidation of his or her consent to cross-border migration even with prior knowledge that the crossing is illegal. This is because the initial consent is acquired as a result of the traffickers’ duplicity and at times also by the introduction of the element of coercion into the transaction. Article 3(b) of the Trafficking Protocol renders irrelevant any consent obtained by any of the means stated in Article 3(a). Additionally, in the case of children their consent or otherwise is not an issue once they have been recruited for purposes of exploitation. This is based on the presumption that no one would willingly consent to being trafficked and exploited in

conditions akin to slavery⁴⁹. Also, children are deemed to be legally incapable of giving any kind of consent.⁵⁰ Finally, coercion necessarily entails absence or withdrawal of consent throughout the process of migration. Since this only occurs in cases of trafficking, smuggled migrants cannot be regarded as forced to migrate or lacking a free will to determine their fate thereafter.

IV. Conclusion

Migrant smuggling and *human trafficking* feature prominently in the *illegal migration* terrain. Both phenomena are forms of illegal migration and products of transnational organized criminal enterprise. In most cases, the same organisations engage in smuggling and trafficking and they often work together locally and across borders in order to facilitate their activities.⁵¹ Both phenomena also promise the migrants prospects of better lives in countries of destination after the transportation processes utilising weak features of immigration and border control in countries of the origin, transit and destination. However, the creation of separate protocols by the UN for both phenomena is an indication that the crimes defined therein are different in nature even when they appear to share the same characteristics. Clarifying the blurred lines between both *migrant smuggling* and *human trafficking* is the main objective of this analysis. It can be concluded, in a metaphorical way, that the waters of both hardly mix even when they appear to be running in the same course because of the elements of criminal intent, consent and coercion.

Criminal intent or *mens rea* being the mental component of any illegal act is a fundamental issue in distinguishing *migrant smuggling* from *human trafficking* in the context of *illegal migration*. As discussed earlier, the criminal intent of smugglers differ from that of traffickers. The primary purpose of smuggling is the facilitation of illegal entry into a country of destination, in return for a payment of an agreed fee, by also using the migrant's consents and cooperation. After arriving safely in the country of destination, the migrant is free to pursue his goals without any additional obligation to the smuggling network.

The purpose of trafficking on the other hand is the criminal and inhuman exploitation of the victim regardless of whatever consent the victim may have given to migration for it is obtained forcefully or fraudulently.⁵² Unlike the smuggled migrants, victims of trafficking may travel with perfectly legitimate documents which are subsequently confiscated by their traffickers upon arrival at their destinations.⁵³ Neither do they have the freedom to choose whether or not to accept the conditions they are subjected to in transit or final destination.⁵⁴ Finally, the subsequent enslavement of trafficked victims and the loss of their fundamental rights and freedoms at final destinations are what makes them thoroughly different from

the smuggled migrants.

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