



Distinguishing between Human Trafficking and People Smuggling

10 April 2003

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Tackling human traffickers: call for action against those who smuggle people

Crime gangs target human traffic; gangs are smuggling illegal immigrants

Trafficking; A human tragedy; the numbers of those seeking asylum or wanting to enter the EU illegally is increasing

Human smuggling eclipses drugs trade: human trafficking replaces the drug trade as the world's largest illegal business

These headlines are just some of the numerous reports that have appeared recently in newspapers around the world. The world is seeing a massive growth in media reports on trafficking, people smuggling, illegal migration, and of course asylum-seeking. But there is not a great deal of common understanding of these terms, in fact they are often used synonymously. Since these all different phenomena, synonymous usage is far from accurate.

And importantly the differences between the phenomena have a profound impact on the way both perpetrators and victims are viewed and treated. It is critical to differentiate between the concepts, in order to better distinguish between who is a victim of trafficking, and who is an asylum-seeker, and who is an illegal migrant. Indeed, it is our responsibility to ensure terms are used correctly, to know what we are talking about, and to better understand why we should aim for such clarity.

Legal Definitions

People smuggling and trafficking in human beings are now distinct, internationally-agreed criminal offences and have been defined by the international community through the UN as part of the effort to combat them.

Trafficking of human beings is defined as:

“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.”

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The smuggling of people is defined 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.”

Protocol against the Smuggling of Migrants by Land, Sea and Air

The terms “asylum seekers” and “illegal migrants” often appear in the same context as people smuggling and human trafficking and are increasingly used interchangeably. Therefore, an understanding of these terms is also important.

We are at pains to point out that unlike people smuggling and human trafficking, seeking asylum is not a criminal act. An asylum seeker is a person who meets the UN criteria for consideration of refugee status, and has begun the process of being accepted as such by the host country in order to obtain the protections and rights to which refugees are entitled.

A “refugee” is defined as a person who:

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country...”

The 1951 Convention relating to the Status of Refugees

An immigrant is most simply defined as someone who moves to another country and becomes resident. There are various legal channels of migration, for example obtaining various visas or residency permits. However, the term is frequently used in the context of illegal immigration, that is, someone who enters a country other than that of which they are a citizen, and yet has not taken the proper legal channels to become a permanent or temporary resident and is therefore not able to obtain any of the benefits to which an immigrant may otherwise be entitled. An illegal immigrant also by definition normally has no lawful excuse for remaining in that jurisdiction, and is liable for deportation. Possibly also they are liable to be charged with criminal offences that relate to their illegal entry and/or stay.

The term “illegal migrant” is used to cover all of those who are in a country illegally and, commonly is used with clear prejudice. Illegal migrants are often viewed less-than-generously by resident populations, and may include people who are subject of the various migration-related phenomena of which we speak. Some may be victims of trafficking, some may be smuggled, some may have falsely arranged to enter the country, or some may have overstayed or breached the conditions of their visa.

The two most confused terms are human trafficking and people smuggling. It is important as these terms to be more commonly used, that they are used with clarity so as not to confuse these two very different phenomena. The key differences are detailed as follows:

Identity of the Victim

In human trafficking there is an identifiable human victim; a person subjected to exploitation of a kind that goes beyond what other illegal migrants might experience. For example, an illegal migrant may be paid lower wages than a resident worker, while a victim of human trafficking is likely to be paid no wages at all for their labour. A key point is that this exploitation is part of the process of trafficking and does not come from outside sources. Various aspects of what constitutes a victim of human trafficking are explored below. It is enough here to note that there is a clear identifiable individual in human trafficking cases who can be termed a victim within the terms of the internationally agreed definition. The essence is that in trafficking, there is a clear human victim – it is a crime against the person.

In people smuggling there is no victim in the traditional sense beyond the State which immigration laws have been broken. In people smuggling, generally, a smuggler is paid a sum or promised a sum of money by the person wanting to move from one country to another. This smuggler provides a service by facilitating the smuggling. The person being moved is a client of the smuggler. There are a range of situations where for example a smuggler takes advantage of those being moved and extorts them for more money, or fails to deliver the service in a safe manner, but at the end of the day it is an illegal but essentially commercial relationship between the smuggler and the intending immigrant. In people smuggling there is only a State victim – it is a crime against public order.

A Question of Consent

The question of consent in trafficking is a tricky one at times. Essentially though, not all trafficking is done without consent. However all trafficking is undertaken without valid consent. A trafficked person will often consent to the movement, after all this is what they need to do to get to the place of employment promised. However, it is after this movement that consent is nullified if they end up being exploited. It is important that the intention was not to be exploited, but to move somewhere else for work. No-one can consent to being enslaved or exploited in slave-like conditions. If someone ends up in a trafficked exploitative situation, then their initial consent is nullified by the deception (the ‘improper means’ expressed in the Trafficking Protocol). In short, the intending migrant is not complicit.

Almost without exception, people smuggling occurs with complete consent. This consent is often conditional, that the intending migrant will consent to the facilitation of the smuggler within the scope of the activity. So for example in agreeing to be smuggled

across a border, the intending migrant consents to acts that are consistent with getting them across the border. In short, the intending migrant is complicit.

The Purpose of Movement

Both human trafficking and people smuggling involve movements of people. However, a key distinction between the two distinct crime types is the purpose of the movement. As with any criminal act, intent is a key element. Especially for law enforcement purposes it is important to be able to distinguish between intentions of those parties to a crime.

For human traffickers, the purpose of moving people is the intended exploitation at destination. The intent *ab initio* on the part of the trafficker is to exploit the person and gain profit or advantage from their exploitation. This is an exploitative purpose.

For people smugglers, the purpose of moving people is in furtherance of a contract with a migrant, to steal them across a national border. The intent *ab initio* is not to control the migrant, nor to extort or exploit, but to move the person. This is a facilitative purpose.

The Destination

We may also distinguish between trafficking and smuggling by differentiating between the intended destinations.

Human trafficking can be international, i.e. occur across national borders or it can be domestic, for example rural to urban, north to south etc. Further, as we have pointed out the reason for the trafficking is for exploitation. It does not suit this purpose for a trafficked person to be left to their own devices once they have been moved. The trafficker must control the victim to the point of exploitation, for example, the actual brothel, mine, or factory. The destination in trafficking cases is the actual site of exploitation.

People smuggling can only occur internationally. The sole purpose is the illegal entry of an intending migrant into a State in which that person has no lawful right of abode. It is further the case in people smuggling that often the task of the smuggler is simply the crossing of the border, for example, the landing on the coast of Australia. It is then up to the intending migrant to find their way to their eventual destination. The destination in smuggling cases is more simply just the would-be migrants' intended State of residence.

Recruitment and procurement

In human trafficking a "recruiter" is generally the person who makes initial contact with the victim. This is the first-level trafficker. It is the job of this first-level trafficker to find people who fit a profile in demand, for example cute or injured children for begging, or pretty young girls for brothels. The first-level trafficker will often initiate contact with these people, with the intention of deceiving or coercing them to move for the purpose of

exploitation. Victims of trafficking frequently consent to the initial movement, however this consent is later nullified by the victim's exploitation.

The people smuggler often is an existing operator, and may in fact have little need to 'recruit'. They may 'advertise' their services, or tout for business, but this is far from the trafficker having to identify and lure victims. Quite often the smuggler will await those seeking to move to come to him, and they will gladly pay for his services. The Chinese 'snakehead' is such a person – their business reputation is often built on successful movements and intending migrants being safely ensconced in their destination remitting funds to family and friends in China. The snakeheads become known locally and often have little need to deceive people to move, in fact it may undermine their business to deceive clients. A smuggler will often be sought to provide a border-crossing service, in a much more business-like arrangement.

The Customer Relationship

The 'customer relationship' differs markedly from trafficking to smuggling. In human trafficking, the customer relationship exists between the recruiter sourcing the right type of individual for someone who wishes to exploit someone, for example a brothel owner or a plantation owner. In this 'transaction', the victim then takes on the role of a commodity, something to be brought and sold. The customer relationship exists between the traffickers and the eventual exploiters, and the victim is not a party to this relationship.

In people smuggling the customer relationship is very different. Here, it is the services of the smuggler that are being sought and bought. The smuggler's job is to secrete someone across a border, and the individual wishing to cross that border will pay for this. For all intents and purposes this intending migrant then becomes a customer of the smuggler. The customer relationship is between the smuggler and the intending migrant - person being moved is a party to this relationship.

Victim or Customer?

At first glance the trafficker's victim and the smuggler's customer may present as one and the same; they both may seek to move from their place of origin to another destination in the hope of securing employment and consequently a better future for themselves and their families. This is often as deep an analysis is made of illegal migrants at point of detection – why so many trafficked victims end up being treated as illegal migrants and confused for smuggled people. Investigations must go into much more depth to distinguish between the two.

The customer of the people smuggler may be moving to escape persecution in some form and may be intending to claim asylum on reaching his/her destination. Or they may simply be an economic migrant, seeking employment or a better life elsewhere. As a rule, the smuggler is simply providing a paid service and cares little about the identity or

characteristics of the person being smuggled. In smuggling, the identity of the customer is often not relevant to the purpose of the movement.

However, the victim of human trafficking possesses some key attributes which make him/her attractive to the trafficker according to the intended industry for which they are being recruited. For women and girls, this may range from simply being female, to having good looks or exotic features, to having quick fingers able to operate a sewing machine. For men, physical strength or simply age are often key factors. In both cases the victim is likely to have some vulnerability that will make him/her easy to entrap with visions of exciting city life and job opportunities. In trafficking, the identity of the victim is often directly relevant to the purpose of the movement.

Knowledge and Control

In human trafficking, the traffickers possess knowledge of the means and process of the movement. The trafficker also has quite absolute dominion over the victim. The individual, once being lured into going with the traffickers for example, have no decision-making power. The victim can neither negotiate the destination, the means, the process, the conditions or the timings. They also cannot negotiate what job they will do there. Importantly though a victim will often not know that they have no control until it is far too late. It is also the case that the trafficked victim is considered to be, and importantly related to as, being owned by the trafficker. It is characteristic of trafficking that a victim loses complete control over what eventuates.

In people smuggling, the customer has both knowledge and control over the situation. The destination will be a place largely decided by him/her and having reached a bargain with the smuggler the individual is then free to pull out at any time (although we note they are unlikely to receive a refund!). Dramatically unlike trafficking, the migrating individual generally exercises control over their situation upon arrival; where the individual goes and what opportunities he finds are often up to him. Important to remember that it is not the intention of the genuine people smuggler to exercise dominion over the intending migrant. The only time the individual may place total control in the hands of the smuggler is during the actual process of border crossing. Additionally, control is also lost often when something goes dramatically wrong in the process, for example upon detection or upon disaster such as sinking of the boat. As a general rule, it is a characteristic of people smuggling that the smuggled person retains control over what eventuates.

The Profit

The source of profit in these acts is a significant point for differentiation. It should be remembered that both phenomena are crimes, and both involve the illegal making of money. It could be said in fact that both phenomena revolve around the making of money, and so it is noteworthy that the way of making money in each cases differs markedly.

Human traffickers make profits at several points along the trafficking chain. The first level and subsequent traffickers may make money directly from the sale of the victims. This sale is either to a higher level trafficker, or to a site for exploitation such as a brothel or factory.

With trafficking it is critical to note that the most profit is generated from the continuing exploitation of the victim. The profit realised through this continuing exploitation is the *raison d'être* for the trafficking in the first instance, and reaps both the most significant and the longest lasting returns for the trafficker. For example fees paid by brothel customers are kept by brothel owners, and very rarely passed on to the victims. Further, medical treatment, such as abortions or surgeries, are costs often borne by the victim in the form of an increased debt. Factory owners do not pay human trafficking victims and again medical treatment is usually added onto the victims "debt" which might translate into more working hours, rather than actually being paid for by the owner.

The smuggler's profit is derived from the retail payments made by the customer for being transported across the borders. The amount of profit made is decided by the smuggler in negotiation with the intending migrant. The smuggler, in setting a price, will take into account transportation costs, bribery costs, the cost of forged documents and of course their profit margin.

The Role of Violence

These two very different crime types are again distinguished on this point; one is a violent crime, the other is a migration offence. For human traffickers violence is very much a part of the trafficking process as victims need to be subdued and forced into compliance. Thereafter, continuing violence becomes necessary to ensure continued compliance and to keep the victim controlled. This very serious violence, including deprivation of liberty, marks trafficking as one of the world's most serious crimes and human rights violations.

People smugglers have little if any need to use violence. They have already made their profit from being paid to facilitate the movement. Except perhaps where the intending migrant defaults on the debt or payment, there is no need for a smuggler to harm his 'cargo'. People smuggling is not classed a violent crime, and does not involve deprivation of liberty.

The Arrival

Trafficking and smuggling can also be distinguished by what occurs upon arrival in the destination country or area. Upon arrival at destination, the victim of a human trafficker will be sold or put to work in the industry she/he was brought to service. She will continue to be owned by someone in a controlling position and will be dominated by that person. At destination, the victim cannot control where they go or what they do – their behaviour and actions severely restricted by the traffickers. Further, trafficked victims will be deprived their liberty and often confined to the site of exploitation. Their travel

documents, if they were needed, are almost always held by the traffickers. Upon arrival at destination, a trafficked victim is captive.

By significant contrast, the person who buys the services of the people smuggler is free upon arrival at the destination to do and go where he/she pleases. The smuggler may try to provide additional services for the immigrant, for example, a safe house, work etc, but after payment of the transportation costs the immigrant is generally under no obligation to the smuggler. The migrant may use further services of the smuggler, and would pay for those services, but may already have his own contacts helping him to secure housing and work. Some smuggled individuals may choose to claim asylum on arrival, although many just disappear into the population of the new host country. Upon arrival at destination, a smuggled migrant is generally free to choose their next course, constrained perhaps only by their illegal status.

Perceptions of the Illegal Immigrant

Once in the country without the correct documentation both the victim of human trafficking and the smuggled person become illegal immigrants. Despite this umbrella term, there are nevertheless significant differences in the way that they are perceived and treated.

Smuggled illegal immigrants are unlikely to receive a sympathetic response from either the police or immigration officials, unless they claim asylum in which case there are specific procedures which need to be followed and according to the country, they may be housed in a detention center or housed in the community and allowed to work. Smuggled immigrants are understood to be in breach of migration laws and can expect to be deported once their status has been determined. In the press and media, smuggled migrants may receive little or no sympathy. Smuggled migrants are rarely welcome in any country.

As mentioned earlier, due to incomplete understanding of the nature of trafficking, most trafficking victims will at point of detection present as illegal migrants, and will mostly be assumed by authorities to be smuggled. Trafficked victims are from this point often treated exactly as a smuggled migrant – as an illegal entrant to be detained and deported once their status is confirmed.

The UN Trafficking Protocol deals with the criminal justice responses to trafficking. In addition, it sets out numerous recommendations for the treatment of victims. It is clear that on the international agenda, States are obligated to not treat trafficking victims as smuggled migrants. It is abundantly clear that States and enforcement authorities must take whatever means necessary to ensure that trafficked victims are not treated simply as illegal migrants, should not be detained and deported but treated as victims of crime. This is very often not the case due to the erroneous presumption of their guilt as illegal migrants.

Few countries have implemented the internationally agreed recommendations and therefore the treatment that trafficking victims receive varies widely from state to state. There is however evidence of a growing awareness that a victim of human trafficking should not be treated as if she were an illegal immigrant, but instead as an individual who has had a terrible experience. The translation of this perception into national policy varies. Countries including the US, UK, and Belgium have taken the lead in shoring up their mechanisms to more properly respond to trafficking victims. In the US, for example victims may be granted temporary right of abode, while in Belgium a victim is granted a “reflection period” to decide if she/her wishes to take action against the traffickers. These improved attitudes and mechanisms stand in contrast to many States where victims are seldom believed to be victims of anything and are detained in prison-like circumstances and detained without sufficient depth of investigation to determine their trafficked or smuggled status.

The two phenomena of human trafficking and people smuggling are starkly different in their nature. The differences start even from the internationally agreed definitions of these crimes, but patently the differences do not stop at just the legal. The two are crime types, and it is critical for particularly those responsible for detecting cases, and for those enforcing the relevant laws, where they exist, to be able to distinguish between the two.

You can see how easily at point of detection a smuggled migrant and a trafficked victims can be mistaken. It is clearly insufficient to presume all detected illegal migrants are smuggled and not trafficked. It is also clearly outrageous to treat a victim of a crime as you would treat a criminal offender. Detention and deportation are not warranted for a victim of trafficking. Much more detailed and sensitive investigation should be conducted in order to better distinguish a victim from an offender. It is better to err on the side of caution and treat all illegal migrants as potential trafficked victims until investigations prove otherwise. To err on the side of a guilty presumption is not only a deprivation of natural justice, but if it is a trafficked victim we have discovered then we may be continuing the victimisation of someone who has already suffered too much.

Smuggled immigrants should be given our fullest sympathy in terms of their home situation and our understanding as to why they desire to leave their homes. Nevertheless, an offence has been committed and all complicit perpetrators, including those smuggled, should not expect to be excused the repercussions of their actions.

Where illegal migrants are found to be victims of trafficking, then international convention now provides clear minimum standards and guidelines as to the what kind of measures should be introduced and how authorities should proceed in such cases. If law enforcement authorities breach these conditions, they should be made aware that they breach international consensus and, in some jurisdictions, an international covenant acceded to by that State.

A significant step towards empowering immigration and police officers to detect and detain traffickers and smugglers is to start with a very clear and practical understanding

of the differences between the two crimes. Only with this starting point will we see that victims and smuggled immigrants are each treated appropriately, and the people who profit from the vulnerability of others can be dealt with accordingly. The UN Office on Drugs and Crime strongly recommends that the major differences between these crimes be dealt with in enforcement and detection training programmes, and at least a basic awareness of the nature of these newly defined crimes be promulgated to all enforcement officers.
