

Human Trafficking and Human Smuggling: The Distinction and Legal Implications

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Abstract

The disturbing trend in transnational organized crime, human smuggling and human trafficking to be specific, calls for global cooperation in addressing them. However, it is germane for stakeholders to understand the difference between the two crimes so that one will not be mistaken for the other at the point of detection. This will easily enable governments and law makers evolve effective legislation that will curb the crimes. The paper considered the provisions of international instruments in relation to the distinction between the two terms and concluded that the two terms are indeed different even though some jurists have differing opinions. In view of the distinction that exists, the paper concluded that there is need for municipal legislation to be developed by States accordingly in order to enhance effectiveness in enforcement by relevant agencies.

Keywords

Human Smuggling, Human Trafficking, Transnational Organised Crime

1. Introduction

Human trafficking and human smuggling have gained the attention of the global community in recent times. They are two of the fastest growing transnational criminal activities and are thought to be the most lucrative form of organized crime after the drug trade (Shelley, 2014). Trafficked victims and smuggled persons are treated like illegal goods sold for illicit gains. It is pertinent to note that sometimes human smuggling and human trafficking are used interchangeably but they do not have the same meaning. Consequently, it is crucial for the two terms to be distinguished. The UN has, however, resolved this problem by defining these terms in its instruments adopted against various forms of transnational organized crime: *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2001* (Trafficking Protocol) and *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air 2000* (Smuggling Protocol).

This was adopted by the UN General Assembly on 15th November, 2000. The Protocols are supplements to the [United Nations Convention against Transnational Organized Crime 2000](#). Prior to the emergence of these Protocols, many scholars had argued that there was no difference. Even now that the Protocols have clearly defined these two activities, some still do not agree that there is a difference between the two concepts.

The widespread nature of these two activities prompted the adoption of the Trafficking Protocol and Smuggling Protocol. For the first time in international law, these protocols provide the definitions for human trafficking and human smuggling. This has made it easier for stakeholders to distinguish between the two, unlike how it was previously where one term was substituted for the other as if there were no distinctions ([Obokata, 2005](#); [Dagin, 2005](#); [Ekwuru, 2000](#)). However, the two Protocols reveal that human trafficking and human smuggling are not the same.

1.1. Human Trafficking

Trafficking of persons is an illegal business being operated, particularly in several poor and politically unstable countries. Such persons (men, women and children) are enticed by these criminal gangs with the assurance of higher wages, better living conditions and opportunities to attend school in their destination countries. Unknown to them, they are merely commodities required to generate income for the gangs' clandestine activities. Article 3 of the Trafficking Protocol defines human trafficking 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 giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.

Although, the UN Trafficking Protocol mentions certain types of exploitation, they are not comprehensive. One common factor in human trafficking is the use of violence, intimidation and force in order to subdue the trafficked person for sexual exploitation or involuntary labour. Once under their control, the traffickers inflict extreme physical and mental abuse on them. The traffickers exploit them for their own financial gain. Report has it that human trafficking has reached epidemic proportions ([UNODC, 2006](#)). No country is immune. UNICEF has records showing that over 200,000 children have become slaves in West and Central Africa as a result of this act ([Fagbohunge, 2003](#)). However, most States have inculcated the Trafficking Protocol in their domestic laws. In other words, most countries have anti-trafficking laws.

1.2. Human Smuggling

Although much migration research has focused on trafficking, little has been done on smuggling. There are more migration activities occurring from developing to developed countries while very little migration is directed towards developing countries ([Vayrynen, 2002](#)). Human smuggling is an aspect of illegal immigration. Human smuggling is a criminal activity in which persons illegally transport others across international borders ([Salvation Army, 2005](#); [Kralis, 2006](#)). The smuggling of persons may occur with an economic interest in organizing such a crime. The smuggling of persons may occur with or without their consent; however, most of the times such people—who rarely have any opportunity to migrate by legal means—voluntarily look for smugglers who could take them across international borders. This crime is such an entrenched one that even mafias are said to be involved ([Laccino, 2015](#)). Laccino stated that mafias become a sort of “employment agency” for migrants and that once they reach Italy, they are offered lousy salaries and inhumane accommodations. If they want to travel to other European countries, the mafia—upon payment—organizes their journey. According to article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), 2000 smuggling of migrants shall mean “...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 permanent resident”

From the above definition, human smuggling involves a situation where a person who is not a national of a country pays a fee to another who is to assist him in gaining entry into another country without the required immigration documents. The reason for this migration is mostly due to people searching for better living conditions. There are few others who are compelled to enter into another country in this illegal manner because they are fleeing the persecution of oppressive governments in their countries (asylum seekers). There are yet others who engage the services of this smugglers in a bid to escape from their war torn countries as we are presently wit-

nessing in Europe. Vayrynen opines that human smugglers take advantage of countries with light penalties for the offence of illegal immigration to perpetuate their trade (Vayrynen, 2002). Most smuggled migrants are men. Countries in Asia, African and South American countries are most commonly cited as countries of origin while the European countries, United States of America and Asia are cited as destination countries (Kangaspunta, 2003). A few African countries are also cited as destination countries. For instance, the economic prosperity of South Africa and Botswana continues to attract unauthorized migrants to these countries; this problem is replicated in Cote d'Ivoire but not necessarily for the same reason (Zlonik, 2003).

Although human smuggling is only beginning to attract the attention of governments in Africa, protocols against smuggling and trafficking have been ratified by only few African countries (UN Status of Ratification, 2015). Though this is a start, we must state that it is not encouraging considering the fact that there are 56 countries on the African continent. Probably most of them are not interested in ratifying this protocol because African countries are not major countries of destination as a result of their poor economic situations. However, the fact remains that most African countries are transit as well as source countries. It is reported that smuggling is increasingly affecting countries in Northern Africa and South Africa. They are used as countries of transit for citizens of countries in sub-Saharan Africa and Asia who wish to gain access to Europe (Sarrica, 2005). The issue of human smuggling is continuing to raise alarm bells for governments worldwide because as much as they want to keep tabs on people entering their country, they know that with so much clandestine movements occurring, this is virtually impossible.

This article acknowledges that human trafficking and human smuggling are definitely different concepts even though both concepts crossover and overlap (Buckland, 2009). It further establishes that it is only in making these distinctions that adequate legal action can be taken to curb the increase in these acts and necessary legislation can be enacted in harmony with the UN protocols, particularly that these distinctions have a profound impact on the effectiveness of enforcement of such legislation by the relevant agencies—Police, border guards, prosecutors, NGOs and others.

2. Distinctions between Human Trafficking and Human Smuggling

Although smuggling and trafficking share similarities, from the definitions given by the UN protocol on smuggling and trafficking, there are important distinctions that can be seen. According to the United Nations Office on Drugs and Crime, in some countries, the crimes are clearly distinguished by the legislator but not in law enforcement practice (Iselin & Adams, 2003). Consequently, one finds that smuggled migrants and trafficked persons are mistaken at the point of detection. The fact that concerned actors are unable to determine the differences in the two activities has also led to some countries treating both cases the same in their official statistics. These make it imperative for us to examine the distinctions between them. A detailed work on this has been done by the United Nations Office on Drugs and Crime (Iselin & Adams, 2003). Therefore much of the content in this part of the article will be extracted from that work in order to enable us examine the legal implications of the distinctions subsequently. The distinctions are as follows:

2.1. Identity of the Parties

In human trafficking, the person trafficked is regarded as a victim while in human smuggling the country of destination, which had its immigration laws broken, is the victim. In human smuggling, a person who promises to assist is paid money or is promised a sum of money by the person wanting to migrate. The smuggler is the facilitator of the movement while the person he is moving is his client or customer. Presently, European countries are witnessing a mass migration of people who are fleeing the war crisis in the Middle East and who are seeking asylum in those countries. It is smugglers that assist them to make this journey for a price. However, most migrants are economic migrants who are in search of jobs and better living conditions. The distinction in the types of migrants is important as it will determine whether a migrant should be regarded as a criminal or not. In human trafficking, the customer is the recruiter who seeks out the person to be trafficked for the eventual exploiter (Iselin & Adams, 2003). The trafficked person is not a customer in this case.

Again, in human trafficking, the identity of the trafficked person is important for the purpose of movement. Consequently he or she needs to possess certain qualities depending on the purpose the trafficker intends to achieve. For example, if the trafficked person is being recruited for sexual purposes or for forced labour, the trafficker will search for individuals that possess qualities that fit either of the purposes. This is not the case in

human smuggling as anybody can be smuggled, no special attributes are required (Iselin & Adams, 2003).

2.2. Consent

In human trafficking, consent of the trafficked person is usually not legitimately obtained. It would seem that consent was validly obtained when the trafficked person and the trafficker set out on their journey to the destination country for the promised job and better living conditions. However, the consent is eventually negated if the trafficked person ends up being exploited and kept in slave-like conditions on arrival at the destination country. In human smuggling, the smuggled person usually gives his consent wholly to the smuggler. In any event, smuggling can hardly occur if the smuggled person does not engage the services of a smuggler. In doing this, the consent of the smuggled person cannot be questioned (Iselin & Adams, 2003; UNODC, 2006).

2.3. Intention of the Trafficker and Smuggler

The intention of the smuggler and the trafficker for engaging in their different activities are obviously different and it is important to distinguish them especially for the purposes of law enforcement. In trafficking, the intention is to exploit the trafficked person and earn money from their exploitation. So the intention is exploitative. For smugglers, the intention is to secrete a migrant illegally into another country, not to exploit or control the migrant. This intention is facilitative (Iselin & Adams, 2003; Emerole, 2002).

2.4. The Destination

Human trafficking can occur at domestic or international levels. The destination in human trafficking is the venue of the exploitation and it can occur domestically or internationally. The destination in human smuggling varies; many times the smuggler is expected to just move the person across the border from where the migrant is to find his way to his destination. At other times the smuggler transports the migrant beyond the border to countries closest to the migrant's destination (Iselin & Adams, 2003).

In addition, upon arrival at the destination and depending on the purpose of movement, the trafficked person will immediately be dispatched to fulfil that purpose e.g. the person may be sold or sent to work. The person however, remains under the control of the trafficker. This control is further established when the trafficker withholds the trafficked person's travel documents (where needed). In human smuggling, the smuggled person is free upon arrival at the destination and does not owe the smuggler any obligation provided he has paid the transportation charges to the smuggler (Iselin & Adams, 2003; Fagbohunge, 2001).

2.5. The Role of Violence

Human Trafficking involves violence because most times, the trafficked persons have to be forced to comply with the orders of the traffickers. Iselin and Adam stated that human trafficking is "one of the world's most serious crimes and human rights violation" (Iselin & Adams, 2003). Human smuggling on the other hand, has no need of violence. Since it is in the form of a contract, as long as the smuggler and the smuggled person have fulfilled their obligation to each other, no violence need be involved. Violence will be introduced only where the smuggled person fails to make the agreed payment. Summarizing the distinctions, Iselin and Adams, put it aptly when they said that human trafficking is a violent crime while human smuggling is a migration offence (Iselin & Adams, 2003).

2.6. Status of the Trafficked and Smuggled Persons

The way the trafficked person and the smuggled person are perceived differ, though the entry of both of them into a country without valid travel documents make them illegal immigrants. Trafficked persons are regarded as victims while smuggled persons are regarded as criminals (even though we will see later that the international laws are reluctant to label them so). Being victims, authorities are more sympathetic with the plight of the trafficked person. For smuggled persons, the law enforcement agents are harsher and stricter unless the migrant is an asylum seeker. A smuggled person is normally in breach of the migrations laws and he is deported the moment that is detected (Sarrica, 2005). According to Buckland, "sometimes, due to incomplete understanding of the nature of trafficking, most trafficking victims will at the point of detection present as illegal migrants, and

will mostly be assumed by authorities to be smuggled” (Buckland, 2009). When this happens, trafficked persons are treated like smuggled migrants and they are also deported on determination of their status.

From the above, human trafficking and human smuggling have marked differences. Consequently, it is necessary for law enforcement agents to distinguish between the two so that all confusion will be eliminated at the point of detection. However, it should be noted that the foregoing distinctions may not always exist in all cases because human smuggling can easily develop into trafficking and vice versa (UNODC, 2010).

3. The Legal Implication of the Distinction

Legal implication is defined as “consequences of being involved in something as determined by law” (Wilcox, 2015). The basic legal implication of the definition and distinctions determines the way the trafficked and smuggled persons are treated. The trafficker and the smuggler are liable to be prosecuted under the national laws of each country. The distinctions will also enable law enforcement agents to enforce the relevant laws. The **Trafficking and Smuggling Protocols** are the sole international laws that address human trafficking and human smuggling from all perspectives even though there are a number of other instruments dealing with the exploitation of humans. These Protocols which came into force in 2003 and 2004 respectively and have enabled the international community to address these twin evils, are the focus of this section of the paper. Countries that have ratified these protocols are expected to develop municipal statutes in line with their provisions. We shall examine a few of the implications of the distinctions.

3.1. Liability of the Trafficked and Smuggled Person Under the Protocols

The Trafficking Protocol: The Declaration of the Parties to the Trafficking Protocol is that the co-operation of all countries of origin, transit and destination is required if human trafficking will be successfully addressed. Such co-operation involves State Parties putting in place adequate penalties to punish and deter traffickers. The measures should particularly provide for the protection of the victim’s human rights. Two documents further provides standards on how trafficked persons should be treated. These are the Human Rights Standards for the Treatment of Trafficking Persons and the Principles and Guidelines on Human Rights and Human Trafficking which emphasize the status of those trafficked as that of victims and not criminals. The treatment of trafficked persons as victims is necessary because such treatment infracts their right to life, liberty, and freedom from slavery in all its ramifications. It pervades, corrupts and destroys the fabric of societies around the globe.

For a trafficked person to be regarded as a victim, all the person is required to prove is that he or she was given no other choice but to do the trafficker’s bidding even if no direct force or threat was applied (King, 2015). Furthermore, since the trafficker can use the trafficked person’s consent as a defence, article 3 (b) of the Protocol is to the effect that such consent will be disregarded once it is obvious that the person had no choice but to consent. The intention of this provision in Article 3 of the Trafficking Protocol is to provide trafficked persons with some protection and prevent them from being charged as criminals or accomplices. The Protocol apparently took this position because generally, no reasonable adult will consent to be exploited if he or she knew that the promises of better living conditions are all false. As for children, their position of vulnerability implies that they have no capacity to give consent. This is based on the Protocol’s position on “abuse of a position of vulnerability” (APOV). This provision has brought about a change in the treatment of trafficked persons unlike what the situation was prior to the adoption of the Protocol. Trafficked persons did not usually attract the sympathy of authorities once they confessed they were involved in trafficking, rather they were immediately deported to their own countries. Regarding consent this way is also relevant for the purpose of ensuring that traffickers are prevented from avoiding liability by pleading the victim’s consent as a defence (UNODC, 2014). It should be noted however that for the above position to be applicable, the trafficker must have taken undue advantage of “an existing or created vulnerability in order to secure an act intended to result in exploitation” (UNODC, 2012).

The Smuggling Protocol: A combination of Articles 5 and 6 of the Smuggling protocol requires that States should not hold smuggled persons liable for a crime even though States have a right to prosecute those who violate their country’s immigration laws. However, Article 3 provides that States are obligated to criminalize the offence of the procurement and use of illegal travel or identity documents for the purpose aiding the entry of illegal migrants into their territories. It is clear that the Smuggling Protocol does not intend to regard migration as a crime and smugglers who facilitate the entry or residence of migrants for humanitarian and non-profit reasons (for example, religious groups, NGOs or family members) as criminals. It regards as criminals, only those who

smuggle persons for financial gains (UNODC, 2013). Scholars who support this position have argued that regarding smuggled persons as criminals will inevitably encourage their further exploitation by smugglers and their accomplices in the destination countries. They argue further that the status of a criminal will force such smuggled persons to join criminal organizations (Sarrica, 2005). Some even argued that the same protection afforded trafficked victims should be extended to smuggled migrants as well since their motive for migrating is for economic and humanitarian reasons (Vayrynen, 2002).

We hold a different opinion to a certain degree. No doubt, migrants who left their countries for the reasons mentioned deserve our sympathy, but that should not obviate the fact that they have committed an offence and the law should take its course. At least, this is the position in Criminal law with respect to perpetrators of crime and their accomplices. In our opinion, giving smuggled persons the same protection trafficked persons enjoy, will encourage this clandestine activity rather than prevent it. However, we align ourselves with the protocol to the extent of its provisions which protect smuggled migrants from torture and emphasise their right to life. This just follows the principle in criminal law which retains the basic rights of an offender and encourages the application of humane treatment to him for as long as his trial lasts (Grant, 2005). In addition, we submit that only those who seek the assistance of smugglers in order to escape war situations or oppressive governments in their countries and those who assist them for no profit should be exempted from the criminal status.

3.2. Assistance from States

The Trafficking Protocol: The trafficking protocol in article 6(2) provides that State Parties should ensure that their domestic legal or administrative system contains measures that provide trafficked persons information on relevant court and administrative proceedings and to render assistance during criminal proceedings against the traffickers. Article 6(3) further requires States to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons. It also tasks the Parties to seek the cooperation of non-governmental organisations and other civil societies in resettling the trafficked person. Article 6(6) provides that Parties are to ensure that their domestic legal system contains measures that offer trafficked persons the possibility of obtaining compensation for damage suffered. Article 7(1) requires states to adopt “legislative or other appropriate measures that will permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”. From the foregoing provisions, it is clear that the Protocol offers the trafficked person a lot of assistance. This buttresses the position of the Protocol on the status of the trafficked person.

The smuggling protocol: The preamble and Article 16 of the Protocol note the need to treat smuggled persons humanely and protect their human rights. The provisions also require their protection against violence that may be inflicted upon them by reason of being smuggled persons (Grant, 2005). The implication is that a smuggled migrant will be expelled and deported by the destination country once he is caught. However, some are of the opinion that if this anti-smuggling measures are successful, asylum will not be obtainable any longer. We do not foresee that the success of the measures will pose a problem because it is relatively easy to determine migrants who are fleeing from their country for reasons other than economic if the position we canvassed earlier is adopted. For instance, those migrating as a result of war crisis or political issues can be identified without much ado because the situations in their countries will be common knowledge. All that is required of States is to implement their immigration processes in such a way that these latter category of people, whom we refer to as genuine refugees or asylum seekers, can be identified.

3.3. Penalty

A combination of the United Nations Convention against Transnational Organised Crime and its Protocols is to the effect that State Parties are to adopt legislative and other measures as may be necessary to establish human trafficking and human smuggling as criminal offences in their domestic legislation. Consequently, State Parties provide for penalties for these two crimes differently. In a country like UK, on conviction for human trafficking and human smuggling generally, the trafficker is subject to imprisonment for up to 14 years. Sometimes a fine is included, depending on the element of the offence and at other times an offender will be subjected to just a fine or both (Immigration Act, 1971). In Nigeria, the anti-trafficking law provides for penalty ranging from 5 yrs imprisonment and a fine of not less than ₦1,000,000 (s.14, Trafficking in Persons (Prohibition) Enforcement and Administrative Act, 2015). This is a reviewed penalty. Prior to this time, penalty for trafficking in Nigeria

ranged from 10 years imprisonment without an option of fine to life imprisonment. However, there is no provision for human smuggling in Nigeria yet. In a country like USA, the penalty ranges from 10 yrs imprisonment and or fines to life imprisonment or death penalty per smuggled person. Interestingly, in line with our view enunciated in the foregoing, Germany is one country that provides penalties for both the smuggler and the smuggled person (Heckmann et al., 2000).

Some have argued that employing harsher anti-migration strategies do not stop trafficking and smuggling. People will not stop to migrate if they see this as their only option. Moreover, considering the money involved there are bound to be people ready to “help” (Pehrsson, 2001). While this assertion may contain some truth as evidenced in the mass migration to Europe of those fleeing war zones which we earlier alluded to in this paper, it does not portray the accurate effect stiffer penalties will engender. We believe that stiffer penalties have a strong deterrent effect and employing them will reduce these acts drastically.

4. Conclusions

It is obvious from this discourse that human trafficking and human smuggling differ in various ways even though they can overlap at times. Understanding the distinctions between the two criminal activities is imperative if law enforcement agents will be effective in detecting traffickers and smugglers. This is the only way to ensure that the right treatment is given to all individuals involved in both activities.

One challenge facing legislation, as a tool for combating human trafficking and human smuggling is that posed by the sheer magnitude of the problem and its multi-faceted dimensions. This is now worsened by the war crisis and internal armed conflicts occurring globally which is bound to encourage these two crimes as people will keep fleeing such areas for safer countries. Another challenge is the fact that there are no reliable statistics from States on the magnitude of the problem and there is scarcity of information particularly from many of the African countries (Makkai, 2003). While accurate statistics on the extent and magnitude of these crimes in every African country might be difficult to obtain, there can be little doubt that they are on the increase on the continent. It is hoped that the countries that are yet to ratify this Protocol will do so soon so as to enable them to fight this act and those who are parties should ensure that they strictly enforce the provisions of their domestic legislation. We also recommend that the smuggling protocol be amended to adopt the view put forward in this discourse on liability of smuggled persons.

However, as observed by the UNODC, law enforcement measures alone cannot prevent trafficking of persons and smuggling of migrants, a holistic approach is required. There is need for a stakeholder cooperation that will include civil society groups, state instructions and international organisations.

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