

Trafficking v. Smuggling; Coercion v. Consent: Conceptual Problems with the Transnational Anti-Trafficking Regime

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Abstract – *This essay will seek to explain the differences between human smuggling and human trafficking as set out in international law and their respective regimes. It will examine the two Protocols relating to Trafficking and Smuggling, focusing on the differences in the two categories of movement concerned. The essay will then highlight some of the concerns regarding the enhanced penalisation of migration. It will also show that a core element separating smuggling and trafficking is that of ‘consent v coercion’. I will demonstrate how these terms are an unhelpful way to categorize the two phenomena. Throughout I will talk about the effects the two Protocols and the current anti-trafficking/anti-smuggling regimes have on border security, not least of all on refugees, and in conclusion analyse a human rights approach to trafficking.*

Keywords: human trafficking, migrant smuggling, consent, coercion, exploitation, border security

1. Introduction

Human trafficking is a complex phenomenon. No-one can deny that human trafficking damages people’s lives greatly, and the practices associated with it violate some of the most basic human rights. Yet “much mystery still remains about the genuine extent and nature of the practice, and much controversy still surrounds the question of how national and international responses should best be formulated to address the problem”.¹ The current anti-trafficking regime is fraught with problems in its conceptualisation and its quantification of what is ‘trafficking’. What constitutes trafficking is a much heated discussion that suffers from a great deal of moral panic, ‘othering’ and victimization. The movement element of trafficking, as well

¹ G Wylie, P McRedmond, ‘Human Trafficking in Europe’ in G Wylie, P McRedmond (eds) *Human Trafficking in Europe, Character, Causes and Consequences* (Palgrave Macmillan 2010), 1.

as the exploitations associated with trafficking (slavery, forced labour, etc), and the definitions of these elements have far reaching political, social, and philosophical implications. One of the most important elements at the root base of human trafficking is the notion of ‘coercion’ (the ‘means’ element of trafficking as laid out in the relevant Protocol). The notion of coercion is central to how the ‘victims’ of trafficking are separated from those who are smuggled (i.e. those who ‘consent’). What counts as coercion (whether social, economic, cultural, gender, etc factors count?) is problematic, as is the notion of consent, something which is not only found in the movement element but also in the forms of exploitation associated with trafficking. The most debated of these forms of exploitation is in regards to the sex industry and whether *all* sex work is exploitation and therefore cannot be consented to. As the Office of the High Commissioner of Human Rights (OHCHR) notes, the line between smuggling and human trafficking is blurry and one practice can quickly transform into the other.

Linked to all these issues is the impact the anti-trafficking regime has on increased border security and the knock-on effect this has on migration, not least of all on refugees. Principally, this impact manifests itself as an augmented emphasis on stopping illegal migrants getting into the country by increased identification of migrants routes, by penalisation of commercial transport carrying illegal immigrants and not performing visa checks, by tightening borders, etc. This paper looks at the various conceptual problems in the current anti-trafficking regime, and argues that trafficking should be seen as an element of exploitation, rather than exploitation as an element of trafficking as is currently the case. This alternative approach could more adequately deal with the coercion/consent issues and greater definitional problems as the emphasis would be more on the forms of exploitation and less on the forms of movement.

2. Migration v. Smuggling

With the division of smuggling and trafficking into two Protocols,² it seems a clear line was drawn at the international level between the two activities. Obokata states that smuggling “can be summarized as an act of facilitating illegal immigration”.³ The OHCHR says that trafficking is always exploitative, always contains fraud or coercion, and encompasses both illegal and legal migration. Smuggling on the other hand is not *necessarily* exploitative, coercion is not a

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Annex II, art. 3(a), Dec. 12, 2000, G.A. Res. 55/25, U.N. Doc. A/55/383 (2000); Protocol against the Smuggling of Migrants by Land, Sea and Air, Annex III, pmb., art. 4, Dec. 12, 2000, G.A. res. 55/25, U.N. Doc. A/55/383 (2000).

³ T Obokata, *Trafficking of Human Beings from a Human Rights Perspective, Towards a Holistic Approach* (Martinus Nijhoff 2006), 21.

necessary element, and the migration is always illegal.⁴ Gallagher contends that smuggling, as compared to trafficking, is “only incidentally exploitative”.⁵ Smuggling requires the (illegal) crossing of an international border, while trafficking can occur within a state.⁶ Hathaway disagrees on the second point and claims the Trafficking Protocol only focuses on transnational dealings, and that no duty arises from the Protocol to tackle intra-state dealings of exploitation.⁷ Gallagher disagrees, contending that Article 5 of the Protocol obligates States to criminalize trafficking domestically.⁸ Because each of the elements of trafficking must be domestically sanctioned, it’s unlikely for anyone who has exploited someone not to have committed one of the sanctioned elements (i.e. harbouring someone).⁹ The Council of Europe’s Convention on Action against Trafficking in Human Beings, perhaps aware of this problem, makes specific mention of this issue stating that trafficking can be carried out within a state and that criminal gangs need not be involved for it to be considered trafficking.¹⁰

Yet in terms of the people concerned in these two Protocols (victims, migrants, etc), in reality the line between the smuggling and trafficking is often not so clear-cut. Holmes states that “the clear conceptual distinction that exists between people smuggling and human trafficking is not always sustainable in practice”, and that “people smuggling readily mutates into human trafficking”.¹¹ The OHCHR asserts that “[t]he distinction between trafficking and migrant smuggling is a legal one and may be difficult to establish or maintain in practice”, because “trafficking and migrant smuggling are *processes* - often interrelated and almost always involving shifts, flows, overlaps and transitions”.¹² A person can be smuggled one day, and trafficked the next.¹³ Gallagher finds it useful to think of both smuggling and trafficking as “processes that are often interrelated and almost always involve shifts, flows, overlaps, and transitions”.¹⁴

⁴ United Nations OHCHR, Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking, November 2010, HR/PUB/10/2, 34.

⁵ A Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, Virginia Journal of International Law 49.4 (2009) 817.

⁶ OHCHR Commentary (n 4) 34

⁷ J C Hathaway, ‘The human rights quagmire of “human trafficking”’, Virginia Journal of International Law 49 (2008), 10-11.

⁸ Gallagher (n 5), 812

⁹ Gallagher (n 5), 814

¹⁰ Council of Europe, Convention on Action against Trafficking in Human Beings, Article 2

¹¹ L Holmes, ‘The issue of human trafficking’, in L Holmes (ed), *Trafficking and Human Rights, European and Asia-Pacific Perspectives* (Edward Elgar 2010) 3,4.

¹² OHCHR Commentary (n 4), 34-5.

¹³ OHCHR Commentary (n 4), 35.

¹⁴ Gallagher (n 5), 817.

Hathaway argues against the ‘processes’ approach put forward by Gallagher and the OHCHR. He claims that trafficking and smuggling rarely connect and that human smuggling is generally “consensual and relatively benign”.¹⁵ Thus, of the effects of smuggling on the person, he states that “[i]t is often too simplistic to assume that all, or even most, smuggling is rights diminishing”.¹⁶

3. *Trafficking Protocol v. Smuggling Protocol*

A look at the two Protocols shows that the drafters saw many key similarities between the two forms of migration. Much of the outline and details of the two Protocols are the same, yet the parts which differ are telling. The Trafficking Protocol talks of ‘repatriation of victims of trafficking’¹⁷ while the Smuggling Protocol talks of ‘return of smuggled persons’.¹⁸ The Trafficking Protocol speaks of preferred ‘voluntary’ repatriation¹⁹ while the other just stipulates return in an ‘orderly manner’.²⁰ The Trafficking Protocol speaks of ‘prevention of trafficking’,²¹ while the Smuggling Protocol talks of ‘measures against’ smuggling.²²

Yet, several articles in the treaties are almost identical, and generally deal with preventative measures and information exchange between State Parties.²³ Article 11 deals with sanctioning and penalizing commercial carriers for allowing smuggling/trafficking. This shows the anti-migration focus of the Protocols. Articles 12 and 13, about securing documents, are identical. The ‘saving clauses’ (Article 14 for Trafficking, Article 19 for Smuggling Protocol) are also largely the same.

Hathaway states that the treaties have the same goal, namely tighter borders.²⁴ When we see the common articles about sharing information on routes used (weak points of entry), on penalizing commercial craft, etc, it seems his point has some merit. It also demonstrates how in international law, if not the definitions, that some of the responses to deal with the allegedly separate phenomenon of smuggling and trafficking are the same. Yet when it comes

¹⁵ Hathaway (n 7), 5.

¹⁶ Hathaway (n7), 35.

¹⁷ Trafficking Protocol, Article 8.

¹⁸ Smuggling Protocol, Article 18.

¹⁹ Trafficking Protocol, Article 8 (2).

²⁰ Smuggling Protocol, Article 18 (5).

²¹ Trafficking Protocol, Article 9.

²² Smuggling Protocol, Article 8.

²³ Trafficking Protocol, Article 10; Smuggling Protocol, Article 10.

²⁴ Hathaway (n 7), 30-1.

to protection offered to those affected ('victims' of trafficking, 'objects' of smuggling), the troubling concept of coercion v consent serves to split the response each group receives.

4. *Border Security*

One of the pitfalls of the Protocols, in their seeking to better prevent trafficking and smuggling, are several provisions that lead to the intensification of States borders. This is problematic, as it is already the case that, "[i]n human rights terms, there can be no doubt that current migration regimes reinforce discrimination and inequality and contribute to global suffering".²⁵ The increased border controls called for in the two Protocols "may in practice exacerbate the risk of human rights abuse by creating the conditions within which simple smuggling is transformed into trafficking".²⁶ Heightened border security leads to an increase in the number who use the services of smugglers, the amount this service costs and the danger involved.²⁷ Obokata agrees that restrictive borders, in the context of illegal migration of East Europeans to the West after the fall of the Berlin Wall, "has compelled people to use the services provided by traffickers".²⁸ Hathaway claims that the trafficking agenda has allowed states to tighten their borders and in a sense criminalize those who are smuggled, under the cloak of human rights/anti-trafficking. With the implementation of the Protocols, "agreement was achieved to establish a transnational duty to criminalize any compensated effort to move unauthorized persons across a border".²⁹

"Whether by design or simply happy coincidence"³⁰ the Protocols have a negative effect on refugee's ability to seek asylum. With recommended measures such as commercial carriers to be sanctioned for carrying the undocumented, and passports being more heavily scrutinized, the methods used by refugees to escape persecution are being diminished.³¹ As refugees often have to rely on (expensive) smugglers and traffickers, poorer refugees are worse off. The UN notes that irregular migrants and asylum seekers are among "those most likely to be trafficked".³²

²⁵ Gallagher (n 5), 833-4.

²⁶ Hathaway (n 7), 6.

²⁷ Hathaway (n 7), 32-4.

²⁸ Obokata (n 3), 2.

²⁹ Hathaway (n 7), 26.

³⁰ Hathaway (n 7), 41.

³¹ Hathaway (n 7), 36-41.

³² OHCHR Commentary (n 4), 85.

It is a State's legal right to control its borders and turn away illegal migrants.³³ As international lawyers this is the framework we are dealt, and if we are to be realistic we must work within it. Yet this may show the limits of international law in this case – it can play a part, but cannot be the whole solution, in seeking to end trafficking and deal in a pragmatic and realistic way with smuggling. .

Despite all these restrictive measures that a State can carry out, and the tightened borders due to the Protocols, States' actions still have limits. Article 19(1) of the Trafficking Protocol reminds states of their obligations under international law, not least in terms of refugee law, and states acting against 'the letter or spirit' of this Article are therefore in violation of their obligations.³⁴ It is our task and that of the international community to hold states to account when they deviate from this letter and spirit.³⁵

5. *Coercion v. Consent*

The crux of what separates trafficking and smuggling – and thus shapes how a state deals with a certain case – is the notion of consent as opposed to that of coercion. It is what defines those trafficked as 'victims' and those smuggled as 'accomplices'. Fitzgerald states that "[t]he distinction between trafficking and smuggling essentially turns itself upon the presence or absence of the elements of deception, coercion, or abuse of power in the relationship between the perpetrator(s) and the migrant".³⁶ The concept of being able to 'consent' to exploitation dominated a significant amount of the negotiations of the Trafficking Protocol. It was in particular reference to sex work, but the same principles can be applied to other areas of exploitation. Many authors and authorities claim that it is not possible to consent to exploitation. Indeed the Protocol itself, in Article 3 (b), states that any consent given was invalidated by fraud, coercion or deception. Gallagher goes so far as to assert that international law states that one cannot consent to being exploited, stating that:

“[i]nternational human rights law has long recognized that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away. The issue came before the drafters of both the Supplementary Convention and the

³³ Gallagher (n 5), 838-40.

³⁴ Gallagher (n 5), 840.

³⁵ *Ibid.*

³⁶ J Fitzgerald, 'Trafficking and a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking', *Mich. J. Int'l. J.* 24 (2002) 1149.

ICCPR in the context of proposals to add the qualification ‘involuntary’ to the term ‘servitude’. The proposal was rejected in both instances on the grounds that ‘it should not be possible for any person to contract himself into bondage’.³⁷

The European Court of Human Rights, in *Van der Musselle v Belgium*, ruled that “consent of the person concerned was not enough to rule out forced labour” and that “the validity of consent has to be evaluated in the circumstances of the case”.³⁸ The *travaux préparatoires* of the Trafficking Protocol notes that the ‘means’ element “precludes the consent of the victim”.³⁹ The European Commission on Human Rights, in *De Wilde, Ooms and Versyp v Belgium*, stated that “personal liberty is an inalienable right which a person cannot voluntarily abandon”, meaning that no consent is possible.⁴⁰

Yet for other authors, especially with regards to sex work, the issue is not so clear cut. Doezema discusses the “complex and varied experiences of migrant sex workers”⁴¹, and she cites studies on sex work from all corners of the globe, which “indicate that women seeking to migrate are not so easily ‘duped’ or ‘deceived’, and are often aware that most jobs on offer are in the sex industry”⁴². Despite knowing the work involved, many women still agree to it. This is reflected in an International Organization for Migration (IOM) study which showed that some Eastern European women knew they were going to work as prostitutes, and yet still consented.⁴³

Still, the ‘coercion v consent’ paradigm risks painting “those smuggled as willing participants”.⁴⁴ The definition of smuggling means they were not coerced or exploited and so “this may provide a justification for states to apply strict enforcement measures such as arrest, detention and deportation against them”.⁴⁵

Other authors, keeping in line with the fluidity argument – that those smuggled can become those trafficked – state that consent *can* be given, yet this can be taken back or annulled due to coercion. This is not an uncommon situation. Obokata, while stating that coercion “in

³⁷ Gallagher (n 5) footnote 95, 811-2.

³⁸ Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, para 90.

³⁹ Gallagher, *The International Law of Human Trafficking* (CUP 2010), footnote 62, 27.

⁴⁰ Gallagher (n 39) footnote 68, 28.

⁴¹ J Doezema, ‘Now You See Her, Now You Don’t: Sex Workers at the UN Trafficking Protocol Negotiation’, *Social and Legal Studies* 14 (2005) 67.

⁴² Doezema (n 41), 66.

⁴³ Obokata (n 3), 26.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 21.

the definition under the Trafficking Protocol makes it clear that people cannot be trafficked voluntarily”,⁴⁶ nonetheless acknowledges the complexity of the term.⁴⁷ Part of this complexity is that there is no clear line where consent ends and where coercion begins⁴⁸: much like trafficking itself, it can be a process. Allain speaks of a ‘continuum of coercion’ and how it “forces a person to decide between disagreeable alternatives – for instance, between working for less than minimum wage or not working at all”.⁴⁹ In situations such as these the person is extremely vulnerable and often “has no real or acceptable alternative but to submit to the abuse involved”.⁵⁰ People have different levels of awareness of what trafficking involves,⁵¹ yet even when someone consents to poor working conditions this “does not mean that they consent to be subjected to abuse of all kinds”.⁵² A useful approach to take is that consent “does not alter the offenders’ criminal liability”.⁵³ Equally, Gallagher argues for the necessity in cases of consent to focus on the intentions of the trafficker.⁵⁴

Further still, some authors seek to expand the notion of coercion, so that when some people appear to be consenting, they are really coerced. Obokata lists economic issues, war, and other ‘casual factors’, and thus finds that while “traffickers may not be directly responsible for triggering the causes of trafficking, they do take advantage and profit from them”.⁵⁵ Abramson argues for the:

“establishment of a minimum threshold of exploitation...[which] could have refined the definition of trafficking so as to provide a singular defining characteristic of trafficking in persons. In fact, the Trafficking Protocol takes this route in its application to children: children are explicitly held to be trafficked if they are under eighteen and are recruited, transported, held, or received for exploitation, regardless of the methods used to recruit, transport, hold, or receive them.”⁵⁶

⁴⁶ *Ibid*, 25.

⁴⁷ *Ibid*.

⁴⁸ Explanatory Report (n 38) para 97.

⁴⁹ J Allain, ‘Trafficking and Human Exploitation in International Law with Special Reference to Women and Children in Africa’, in B Lawrence and R Roberts (eds) *Trafficking in Slavery’s Wake* (Ohio University Press 2012), 152.

⁵⁰ EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings: Art 2(2)

⁵¹ Explanatory Report (n 38), para 97.

⁵² *Ibid*.

⁵³ Explanatory Report (n 38), para 226.

⁵⁴ Gallagher (n 39). 18.

⁵⁵ Obokata (n 3). 25

⁵⁶ K Abramson, Note, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT’L L. J. 477.

Might this route for children be applied to all victims of trafficking? This approach would shift the focus to the exploration and abuse of human rights, and consent would be irrelevant. In this way migrants under the Smuggling Protocol would also be covered.

6. *Human Rights Approach to Trafficking*

While it is true that the Trafficking Protocol, the main document to deal with human trafficking, is rooted in criminal law, several authors have argued convincingly for a human rights approach to understanding and combating trafficking. They feel such an approach would avoid many of the pitfalls of the current regime, and can ‘fill in the gaps’ where the regime fails (for instance in terms of redress for the victims).⁵⁷ Due to the relevant provisions in the Convention of the Rights of the Child (UNCRC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), together with the Council of Europe’s Trafficking Convention, it can be argued that there now exists a “general consensus among states” that trafficking is a human rights violation.⁵⁸ A human rights approach “seeks to both identify and redress *the discriminatory practices and unjust distributions of power that underlie trafficking*, that maintain impunity for traffickers, and that deny justice to victims of trafficking.”⁵⁹ Forms of trafficking can be understood as a form of sex-based discrimination and as violence against women,⁶⁰ as well as amounting to torture in certain cases.⁶¹ Further, all the forms of the end goal of trafficking – exploitation (slavery, etc) – are human rights offences under international law and often in national legislation.⁶² This is one of the benefits of the modern international anti-trafficking legal regime, the Trafficking Protocol and European Trafficking Convention; they bring various forms of exploitation under one umbrella and in so doing add greater emphasis and urgency.⁶³

Importantly for the above discussion, a human rights based approach would side-step the concerns about consent and coercion. Everyone’s rights must be respected, whether

⁵⁷ Gallagher (n 5), 791.

⁵⁸ OHCHR Commentary (n 4), 38-9.

⁵⁹ *Ibid*, 49 emphasis added.

⁶⁰ *Ibid*, 39-43.

⁶¹ *Ibid* footnote 32, 37.

⁶² *Ibid*, 3.

⁶³ J Allain, ‘The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: ‘Slavery-Like Practice’, *Cahiers de la recherche en droits fondamentaux*, Vol. 10, 2012, 39.

‘victim’ (trafficking) or ‘accomplice’ (smuggling),⁶⁴ citizen or undocumented. A human rights approach, rather than turning migrants into victims, would serve to protect and empower migrants when and if they become victims. With regards to socio-economic reasons for why trafficking occurs in the first place, such an approach could better get at the root causes.⁶⁵ “While the definition of trafficking under the Trafficking Protocol entails some conceptual difficulties, it seems reasonable to state that its scope is wide enough to accommodate different viewpoints, and therefore offers useful guidance to understand and respond to the practice.”⁶⁶

⁶⁴ Obokata (n 3), 36.

⁶⁵ OHCHR Commentary (n 4), 3.

⁶⁶ Obokata (n 3), 37.