

Trafficking in Persons or Alien Smuggling?

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Two kinds of criminal activity involve the illegal movement of persons across international borders—trafficking in persons and migrant smuggling. Trafficking in persons and migrant smuggling are similar, but international agreements and national laws do make distinctions between them. The Protection Project, a research organization focused on trafficking issues, provides this analysis of those distinctions.

Smuggling of aliens or "illegal migrant smuggling" is defined by the U.N. 2000 Protocol Against Smuggling of Migrants by Land, Sea and Air, supplementing the U.N. Convention Against Transnational Organized Crime, to mean "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a state, party of which the person is not a national or permanent resident" (Article 3 (a)).

Unlike trafficking in persons, which may occur internationally as well as internally or domestically, alien smuggling is always of a transnational nature, since it requires crossing a national border, and as such it involves an "illegal entry" of a person into a country of which such a person does not have legal status. Illegal entry, in this context, means "crossing borders without complying with the necessary requirements for legal entry into the receiving state" (Article 3 (b)).

For instance, in Bosnia, police arrested 37 criminals from Iran and Turkey who allegedly smuggled some 900 illegal immigrants into countries of the European Union. In the U.S., federal officials discovered in August 2002 a huge child-smuggling ring, smuggling hundreds of children from Guatemala, El Salvador, and Honduras through Mexico to Los Angeles. In 2000, U.S. officials discovered another ring that smuggled aliens from China through the Caribbean countries including Jamaica, the Dominican Republic, and Haiti, to the United States.

The Protocol recognizes as criminal offenses "when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit, (a) "the smuggling of migrants; (b) when committed for the purpose of enabling the

smuggling of migrants (i) producing a fraudulent travel or identity document; (ii) procuring, providing, or possessing such a document; (c) enabling a person who is not a national or a permanent resident to remain in the state concerned without complying with the necessary requirements for legally remaining in the state by the means mentioned in subparagraph (b) of this paragraph or any other illegal means" (Article 6).

These criminal offenses are considered crimes against the state, while trafficking in persons is a crime against the individual. Moreover, in cases of alien smuggling, the smuggled alien, consenting to be smuggled, is treated as a criminal, whereas a trafficked person is considered a victim of the crime of trafficking since the trafficked person is typically subject to the "threat or use of force or other forms of coercion, of abduction, or fraud and deception, of the abuse of power, or of a position of vulnerability..."(Article 3(a) of the Trafficking in Persons Protocol), and as such, the person's consent is either lacking altogether or defective. In either case it becomes "irrelevant."

Consequently, while governments should adopt protective measures to protect trafficked persons, including granting such persons a residency status, in cases of alien smuggling, the smuggled person becomes subject to deportation. Therefore, unlike the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which mandates states parties consider granting victims of trafficking temporary or permanent status, the Smuggling of Migrants Protocol calls upon states parties to "facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and

who is its national, or who has the right of permanent residence in its territory at the time of return" (Article 18(1)).

Nonetheless, the smuggled person is entitled to be treated with dignity until such person is deported. The Protocol mandates that parties preserve and protect the rights of a smuggled alien, including "the right to life and the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment" (Article 16(1)). The smuggled aliens should also be afforded "appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol" (Article 16(2)), in addition to the "appropriate assistance to migrants whose lives or safety are endangered" by such reason (Article 16(3)). In the case of their detention, the Protocol mandates that each state party must "comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provision concerning notification to and communication with consular officers" (Article 16(5)).

The Protection Project is a legal-human rights research institute based at the Johns Hopkins University School of Advanced International Studies in Washington, D.C. The project documents and disseminates information about the scope of the problem of trafficking in persons, especially women and children, with a focus on national and international laws, case law, and implications of trafficking on U.S. and international foreign policy.

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