

ISSN 2072-3334
Development Compilation
Volume 10. Number 02. March 2014

AMBIGUITIES AND CONFUSIONS IN MIGRATION-TRAFFICKING NEXUS: A CHALLENGE FOR DEVELOPMENT

Asma Ali Khan*

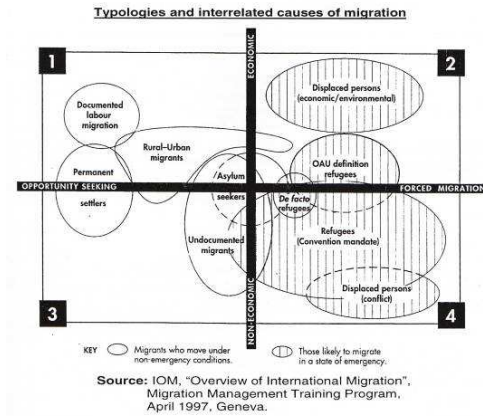
Abstract : This paper is an attempt to indicate link between migration and trafficking within the complex continuum of 'population movement'. It also attempts to establish the relations between 'smuggling in migrants' and 'trafficking in persons' to bring in further conceptual clarity. It tries to argue that clear cut differentiation between migrations, smuggling, trafficking is extremely difficult and attempts to separate them for development of interventions which may be counter-productive at the end. The paper concludes that the best possible option is to take comprehensive and integrated interventions for management of migration and trafficking.

Keywords: Migration, Trafficking, Development, Ambiguities, Challenge.

Introduction

Migration (human) is the movement of people from one place in the world to another for the purpose of taking up permanent or semi permanent residence, usually across a political boundary. Migration dynamics have undergone fundamental transformation in the 21st century adding new multi-faceted dimensions, complexities and challenges. Migration no longer only mean 'shifting of population' from one place to another across political or geographical frontiers. The age-old migratory nature of human beings which helped conquering the planet has substantially been reshaped by formation of nation-states, extreme poverty, economic imbalances, and environmental degradation and security challenges. Today migration is not determined by simple human nature or desire, rather it is an outcome of a set of inter-related historical, geographical, economic, sociological and political factors. These factors, forces and processes create a complex migration picture.

* Lecturer, Department of Law, Prime University, Mirpur-1, Dhaka.



Noticeably, the migration picture developed in mid-90s did not contain trafficking in persons as a part of migration phenomenon. It does not mean that trafficking did not exist then. It was perhaps, because of lack of understanding and knowledge of intricacies of trafficking and migration that led to the absence of recognition as a migration 'gone wrong' event. The gaps or limitations in understanding pose a critical challenge for states and international communities to address trafficking in persons effectively.¹

Trafficking in persons is the 'dark side' of migration, which places people in a 'harm' situation. It is a form of modern day slavery. It is a coercive and violent form of movement which must be prevented contrary to safe migration which should be promoted as a right and which could be beneficial for all. The trafficking process thrives on individual's vulnerability and it has three core elements, namely movement, deception or coercion and 'harm' situation of exploitation or slavery like practice. The tension between the economically rationalized integrative forces when encourage migration and the restrictive immigration policies which discourages such movement have also been redefining the development discourse.

Conceptual Ambiguities, Limitations and Confusions about Trafficking in Persons and Migrants

Migration is, simply movement from one place to another. It can be assisted or independent movement. It can be international or within a country. It can be by land, sea or air. It is everything from tourism to moving somewhere for work. "Expats" are also migrants. It can be motivated by a dream of a better life, and it can be something, someone is made to do against his or her will. Migration can be for survival and for pleasure. It can be easy or very difficult. A migrant's aims might be met, or s/he may face hurdles and unexpected outcomes. Migrants can be old or young, any gender, any race, any

nationality. Migration is very much determined by economic and trade as well as by political relations. Globalization fosters conditions that push people to migrate in search of work opportunities. However, new security discourses have made that movement more dangerous and complex, particularly following increased counter-terrorism efforts.²

Trafficking starts out as recruitment or movement, and ends with exploitation. The Human Trafficking Protocol in the 2000 UN Convention on Transnational Organized Crime includes the definition of Trafficking that is now widely used as an international standard.

The Trafficking definition has three parts:

- Actions
The recruitment, transportation, or receipt of persons;
- Means
Threat or use of force, coercion or deception; and
- Purpose

Exploitation (e.g. sexual exploitation, forced labour, slavery, or removal of organs).

Under each country's legislation, being labeled a certain category has implications for rights protection and exercise (i.e. whether a person is deported, thinks they need to hide from authorities, can access assistance and justice, or can live and work freely, to name just a few). These categories not only matter legally but also socially. Often trafficking carries the stigma of sex work. Refugees similarly often face discrimination by people who believe they are "economic migrants" cheating the State's system. Equally, governments and wider society label migrants in terms of their legal status. Migrants also label themselves, many preferring "Mother", "Congolese", "Hindu", or simply "Woman" – terms that they feel describe their whole selves better.

Migrant

Someone who leaves her/his community or country of origin to live, and possibly work and/or marry in another place. "Migrant" is a term that covers many special categories of migrants, including refugees, smuggled, trafficked and undocumented persons. Each of these special categories has a few elements that make it distinct from the others (see "YES" marks in table below).

Refugee

A person who has been, or fears being, persecuted in her/his country and is forced to leave.

Environmental or climate refugees are those who flee from natural disasters. Similar to refugees who are Internally Displaced Persons, who have been forced to move but have not left their country of origin.

Smuggled Person

Someone who travels voluntarily but illegally to another country with the assistance of a third party, whom he or she pays.

Trafficked Person

A person, who is coerced, deceived or forced to move within her/his country or to another country for the purpose of exploitation.

Undocumented Migrant

A person who does not have legal immigration status in a transit or destination country (or even in a different region of her/his own country). A person can enter a country without legal status, or can enter with status and lose it later. (We prefer using the term "undocumented migrant" to the term "illegal migrant". Illegal is a description for something a person does, rather than for the person his/herself.)

Table 1: Differences and Overlaps in Definitions

	Third party involved	Move to another country	Without legal status	Exploitation at End	Move because of some kind of Force
Migrant	Possible	Possible	Possible	Possible	Possible
Refugee	Possible	Yes	Possible	Possible	Yes
Smuggled Person	Yes	Yes	Yes	Possible	Possible
Trafficked person	Yes	Possible	Possible	Yes	Yes
Undocumented migrant	Possible	Possible	Yes	Possible	Possible

Source: GAATW (Ed.). *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*. Bangkok: (2007). GAATW,

Trafficking, refugee situations, undocumented migration and smuggling are smaller parts of the larger migration picture. In the table above the "YES" marks show criteria that must be met for each term. It could be possible for a person to have a YES in every column. If that happened, the person would have travelled with a third party to another country, not have legal status, be exploited and would have been forced to move. This person could potentially be a migrant, a refugee (if there was a certain kind of force), a smuggled person (if payment was given), a trafficked person (if there was a certain kind of force) and an undocumented person all at the same time. Categories may, thus, get very blurry, and it may be hard to tease out one label for every person who moves from their home. Further complicating trafficking and migration categories is the fact that in some contexts many migrant workers experience coercion (often in terms of abuse of authority) and exploitation in their work. For example, an overwhelming majority of workers from Nepal who migrate to Malaysia, the Gulf and India, work under exploitative working conditions. United Nations Development Fund for Women (UNIFEM) has stated that, in the case of women migrant workers from Nepal, exploitation is even more rampant, as very few protections are in place. Recruitment agencies routinely deceive migrant workers as well. With such a large problem, the "trafficking" category becomes somewhat redundant, and

loses its value in terms of providing a few specific individuals with special protections.³

Migration and trafficking are two distinct but inter-related phenomena. Migration is a broad general concept and trafficking is only a sub-set or category of the broader concept. Migration is the movement of people from one place to another (in case of international migration one country to another) in order to take up an employment or establish residence, or to seek refugee from persecution. It applies to various types of movements guided by diverse causes. International migration (i.e. migration across borders) in particular is a complex and multidimensional phenomenon. The dynamics of international migration is often explained or measured in relations to (either alone or in combination) citizenship, residence, time or duration of stay, purpose of stay or place of birth etc. Trafficking in persons is a subset of migration. It is the movement (either internally or internationally) of a person under situation of deceit, force, threat, debt, bondage etc. involving exploitation and violation of human rights of the person. Trafficking in persons generically includes smuggling plus abusive exploitation and human rights violations. Studies suggest that a person by placing himself/herself in the hands of traffickers loses control of his/her fate and freedom and ends up in a harm situation.

On the other hand, the term migrant could be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of "personal convenience" and without intervention of an extent external compelling factor. It is clear from the definition that migrant does not refer to refugees, exiles, or other forced or persons forced or compelled to leave their home. According to Article 2(3a) of the International Convention on the Protection of the Rights of All Migrant Worker and Members of their families, 1990, "a "Migrant worker" is a person who is to be engaged, is engaged or has been engaged, in a remunerated activity, in a state of which, he or she is not a national". The definition includes undocumented workers who would also, under the convention, be entitled to certain rights.

It is difficult to differentiate between migration and trafficking, as the demarcation between the two phenomenon is often apparent and a question of perception. An attempt to draw a clear line between the two concepts is described as working in a "terminological minefield". Sometimes attempts, though wrongly, are made to distinguish migration as labor issue and trafficking as a human rights issue. Again, any generalization in identifying the difference between the two concepts can be misleading because both the concepts are overlapping, contextual and time bound. In simple terms, the difference could be as follows:

.*Trafficked person is deceived or forced (actual or threat) to move. Whereas, Migrant (even domestic worker) is not usually deceived or forced

to leave his/ her place of residence. But, sometimes it could be difficult to draw a line between the two concepts, as there are gray areas in between blurring the clear distinction.

- Trafficking is a development-retarding phenomenon, whereas Migration is an integral component of economic development.
- Trafficking is viewed as an anti-social and morally degrading heinous event. But, migration is widely considered as a process that enhances social progress in both the origin and destination countries and it could be an empowering process. Exploitation, profit and illegality are all central to the idea of trafficking in persons. This is certainly not in the migration process.

Human Rights Based Ways to Link Migration and Trafficking

We know that when migrant's rights are not protected, when women's rights are not protected, and when workers' rights are not protected, abuses increase in workplaces and as people migrate. If safe routes are closed off, unsafe ones become the only options. If legal workplaces, and ones with good working conditions, are not accessible, people will have to work illegally or under bad conditions.⁴

A human rights approach to connecting migration and trafficking looks like the following:

If there are more safe migration channels and jobs with good conditions, people will migrate with fewer chances of exploitation, and they will be more likely to get jobs with good conditions. It is less likely their human rights will be violated. Indeed, if their rights are protected, people can access a remedy to problems. States and NGOs can do much to protect people from violations and to ensure access to remedies when people want and need them.

When considering whether measures by governments or civil society are human rights based, we can consider the following rights available to all migrants, as well as those specific to trafficked persons. Human rights that should be maintained in all migration situations, including trafficking, are many and include the following:

- The right to life- State is required to provide rescue services to people whose lives are endangered (UNTOC Smuggling Protocol, 2000, Art. 16).
- Freedom to leave a country, including one's own (ICCPR 1966, Art. 12, MWC Art. 8)
- Freedom from arbitrary arrest or detention (ICCPR1, 1966 Art. 9, CERD Art. 5, MWC Art. 16) and procedural protections in case of detention (ICCPR Art. 9)
- Non-refoulement, i.e. Persons are not to be returned if there is a chance of torture (UNCAT Art. 3, ICCPR Art. 6&7).

- The right to seek asylum (Convention Relating to the Status of Refugees, 1951)
- The right to join and form trade unions (ICESCR, Art. 8, MWC Art.26)
- The right to health, which includes a right to emergency care regardless of status (Universal Declaration of Human Rights Art. 25. ICESCR Art 12, MWC Art. 28).

People who meet the criteria for trafficked persons also have these rights in the UNTOC Human Trafficking Protocol, 2000 (Art. 6):

- The right to privacy and protection of identity
- The right to physical and psychological health
- The rights to work, to education, to housing and to compensation
- The right to judicial and administrative processes.

Among these, economic, social and cultural (ESC) rights are just as important as political and civil rights. ESC rights, such as the right to work or to a livelihood, are positive rights or rights to something, rather than negative rights or freedoms from a violation, meaning that origin and destination governments are responsible for actively making sure some rights are given or met.⁵

Distinguishing Between Trafficking in Persons and Smuggling of Migrants

In order to better understand migration-trafficking nexus, we need to address linkages between the concepts of trafficking and smuggling. The Palermo Protocol, 2000 clearly draws a distinction between trafficking and smuggling. According to the Protocol on Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (popularly known as Palermo protocol), "trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, either by the threat or use of abduction, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, with the aim of submitting them to any form of exploitation.[...]"

On the other hand, according to the Protocol against the Smuggling of Migrants by Land, Air and Sea, 2000 (other part of Palermo protocol) "Smuggling of migrants shall mean the procurement of the illegal entry into or illegal residence of a person in (a) (any) State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit."

Trafficking and Smuggling: Similarities and Differences



Image source: International Organization for Migration (IOM)

Elements of Migrant Smuggling

Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000 hereinafter referred to as the "Migrants Protocol" establishes that the offence is comprised of the following elements:

- procuring the illegal entry of another person
- _ Into another State
- _ For the purpose of financial or material gain

Article 6 requires, among other things, the criminalization of the offence of migrant smuggling.

Key Differences between Trafficking in Persons and Migrant Smuggling

The consequences of mistakenly treating a trafficking victim as a smuggled migrant can be very severe for the victim. In practice, it may be difficult to distinguish between a situation of trafficking and a situation of smuggling for many reasons:

- _ Smuggled migrants may become victims of trafficking
- _ Traffickers may also act as smugglers and use the same routes for both trafficking and smuggling.
- _ Conditions for smuggled persons may be so bad that it is difficult to believe they consented to it

However, there are key differences between trafficking in persons and smuggling of migrants.

Consent

- _ Smuggled migrants usually consent to being smuggled
- _ Trafficking victims have not consented or their consent is rendered meaningless by actions of the traffickers

Transnationality

- _ Smuggling involves illegal border crossing and entry into another country
- _ Trafficking does not necessarily involve crossing a border and where it does the legality or illegality of the border crossing is irrelevant

Exploitation

- _ The relationship between the smuggler and the migrant is a commercial transition is usually ends after the border crossing
- _ The relationship between traffickers and their victims involves ongoing exploitation of the victims to generate profit for the traffickers

Another Indicator is the Source of the Offender's Profit

- _ Smugglers generate profit from fees to move people
- _ Traffickers acquire additional profits through the exploitation of victims

Table 2: Key differences between Trafficking in persons and Migrant smuggling

	Trafficking in persons(adult)	Trafficking in persons(children)	Migrant smuggling
Victim's age	Over 18	Below 18	Irrelevant
Mental element	Intention	Intention	Intention
Material element	Act Means Exploitative purpose	Act Exploitative purpose	Act procurement of an illegal entry Purpose; for financial or other material benefit
Consent of the trafficked or smuggled person	Irrelevant once the means are established	Irrelevant: means do not need to be established	The smuggled person consents to the smuggling
Trans nationality	Not required	Not required	Required
Involvement of an organized criminal group	Not required	Not required	Not required

Source: GAATW. Beyond Borders: Exploring Links between Trafficking and Labour. GAATW Working Paper Series. Bangkok: 2010. GAATW

Implications of Migration-Trafficking Ambiguities on Policy-Programs to Address Trafficking in Persons

Over-emphasizing trafficking in persons within the general debate on a migratory process and "mixing" it with legal migration could be counterproductive in addressing trafficking. It may also make safe migration difficult especially for the people of developing countries. Some of the destination countries sometimes use trafficking and smuggling as excuses to develop more restrictive approaches towards migration. They argue that "trafficking in migrants" is a criminal act and needs strict crime prevention strategies to tackle it. The issue of migrants human rights with that of human rights of trafficked or smuggled persons are often "mixed" up creating difficulties for management of migration. Efforts to limit trafficking should not limit freedom of movement of people. Migration must remain a basic option as a source of livelihood for many families and communities. It also provides

opportunities for developing countries to enhance socio-economic development, among other, through receiving remittances and skill transfer. The UN High Commissioner for Human Rights has recommended that anti-trafficking measures should not adversely affect the common rights and dignity of persons, in particular the rights of migrants, internally displaced persons, refugees, and asylum-seekers. It further recommended protection of the rights of all persons to move freely and ensure that anti-trafficking measures do not infringe upon that right.⁶

International Organization for Migration (IOM) provides comprehensive responses to migration challenges including trafficking in persons. IOM's prime objectives in facilitating the management of all forms of migration, including labor migration, are:

- To promote humane and orderly migration and combat irregular migration, including smuggling and trafficking
- To foster economic and social development of countries of origin, transit and destination and
- To better link diasporas with the socio-economic development of origin country, and
- To uphold the human dignity and well-being of migrants.

IOM approaches trafficking problems from a broader framework of migration. It takes a comprehensive and integrated strategy in addressing trafficking problem. It's counter-trafficking interventions take both the "movement" and the "outcome" of trafficking episode as integral component process. IOM's strategy to counter people trafficking covers activities aiming at combating and ultimately preventing such criminal activities, on the one hand, and the protection of and assistance to victims, on the other. The different components of the strategy include:

- * Mass information campaigns;
- * Capacity building/technical cooperation (especially anti-trafficking legislation and training of government officials);
- * Assistance, protection and voluntary return and reintegration of victims;
- * Prevention of and assistance regarding sexually transmitted infections and reproductive health;
- * Development of transnational cooperation network among authorities, NGOs and intergovernmental organizations;
- * Research and forum activities

Currently, IOM is implementing counter-trafficking projects in 60 countries including Bangladesh. In Bangladesh, it is implementing projects with the Government to enhance capacity of law enforcement agencies to prevent trafficking in women and children and build capacity of local level elected

representatives for combating trafficking. IOM is also coordinating a thematic exercise to bring conceptual clarity in understanding trafficking paradigm.

Conclusion

The traditional theoretical understanding can no longer comprehend the complexities of trafficking in persons. It cannot analyze and resolve the ambiguities and uncertainties concerning migration and trafficking. It warrants new theoretical framework for providing a clear picture and analytical understanding on the issue. There is a general consensus that trafficking should be analyzed in its totally ('process' as well as 'outcome') and that policies addressing trafficking should have provisions for safe migration as well.

It is also recognized that counter-trafficking interventions are not always gender responsive. Moreover, they often lack a rights-based sustainable development orientation. This hampers efficacy of the interventions and disempowers the survivors. The core of a meaningful counter-trafficking strategy should be based on the principle that women's rights are human rights. The counter-trafficking interventions should be gender sensitive and rights based. It should ensure their fundamental human entitlements in order to expand their choices promote their well-being and empower them in an equitable and suitable manner.

There is a need for an integrated and multi-sectoral program to address trafficking in persons as an integral component of development. The irregular migration including trafficking could perhaps be curbed by progressively 'regulating' the flow of migrants. The process will require not only adoption of a migration, but also a reorientation of basic strategies and rationale for migration management. The new migration-trafficking regime should be consistent with global development trends and priorities. The international development partners should similarly 'rethink' the significance of migration on the socio-economic development process both in origin and destination countries especially its potential role in addressing global inequalities. Increasingly, migration is conceived as a 'development force' as well as an 'equalizing force' which could soften the impact of adverse consequences of globalization process on the developing countries. The development partners should look beyond traditional boundaries of 'security', 'criminality', 'sovereignty' or 'immigration' in formulating a creative counter trafficking policy and strategy.⁷

Governments of origin, transit and destination countries should therefore use law and policy to: strengthen the power migrating people have in relation to agents and employers; increase their knowledge about the migration process; and to improve socio-economic circumstances in origin and destination countries.

Below are several things governments and civil society organizations can do at the intersection of migration and trafficking to make progressive and effective policy.⁸

To Origin, Transit and Destination Country Governments

- Create more opportunities for legal migration.
- Ensure migration and anti-trafficking policies are consistent.
- Avoid restrictive migration measures as an overall solution to stop trafficking.
- Create more job opportunities and livelihoods in countries of origin.

Anti-trafficking measures are strongest when governments and civil society work in partnership and are based on evidence. Both government and civil society must also consider that the trafficked or migrant labels may carry social stigma or legal implications, i.e. both must be aware of the impact of categorizing individuals.

To Governments and Civil Society

- Avoid protectionism of women in anti-trafficking and migration policy design and implementation.
- Take positive steps to eliminate discrimination against migrant women and work to eliminate all forms of discrimination of women in migration measures.
- Assess the value of the trafficking category for trafficked persons in each context.

Notes & References:

- ¹ Martin, Susan F. "Forced Migration and the evolving humanitarian regime", UNHCR working Paper No.20, Geneva, July 2000.
- ² Skeldon, Ronald, "Trafficking: A perspective from Asia" in Reginald Appleyard and John Salt edited, "Perspectives on Trafficking of Migrants", 2000, IOM, Geneva.
- ³ Massy, S., Douglas et al. "Theories of International Migration: A Review and Appraisal" in Population and Development Review 19, No.3, September 1993
- ⁴ Ahmed, Syed Refaat, "Forlorn Migrants: An International Legal Regime for undocumented Migrant Workers, 1999, UPL, Dhaka.
- ⁵ Agustin, L, "The ease of righteous causes: What to feel about undocumented migration". London Progressive Journal, July, 2009
- ⁶ Cham, Martin, G. *The Feminization of International Migration. International Migration Programme*: ILO. 2006, Retrieved from <http://www.ilo.org/public/english/dialogue/actrav/publ/129/7.pdf>.
- ⁷ Parizot, C. "Tightening closure, securing disorder: Israeli closure policies and informal border economy during the second Intifada (2000-2006)" Refugee Watch, 2008.
- ⁸ Pollock, J. "Illegal Burmese migrants: Caught between hiding or becoming legal". The Nation. Nov 21, 2009.