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Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006

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INTRODUCTION

This fact sheet will explain the differences between human smuggling and human trafficking. Because these are complex crimes, it is not always readily apparent when a "human smuggling" case crosses into the realm of a "human trafficking" crime. Understanding the basic principals outlined in this fact sheet will assist the reader in identifying the subtle differences between each of these crimes. For this discussion, the terms "human trafficking" and "trafficking in persons" refer strictly to "severe forms of trafficking" as defined in 22 USC 7101¹.

As in any other area involving complex crimes, it is important to gather and examine as many relevant facts as possible, compare the fact pattern against relevant statutes, and when necessary, seek expert legal advice in making determinations.

BACKGROUND

Trafficking in persons and human smuggling are some of the fastest growing areas of international criminal activity, according to the United Nations. It often involves a number of different crimes, spanning several countries, and involving an increasing number of victims. Trafficking in persons (TIP) can be compared to a modern day form of slavery. It involves the exploitation of people through force, coercion, threat, and deception and includes human rights abuses such as debt bondage, deprivation of liberty, and lack of control over freedom and labor. Trafficking can be for purposes of sexual exploitation or labor exploitation.

According to U.S. Government estimates, 600,000 to 800,000 victims are trafficked globally each year and 14,500 to 17,500 are trafficked into the United States. Women and children comprise the largest group of victims. Trafficking victims are often physically and emotionally abused. Although TIP is often an international crime that involves the crossing of borders, it is important to note that TIP victims can be trafficked within their own countries and communities. Traffickers can move victims between locations within the same country and often sell them to other trafficking organizations.

While there are significant differences between TIP and human smuggling, the underlying issues that give rise to these illegal activities are often similar. Generally, extreme poverty, lack of economic opportunities, civil unrest, and political uncertainty, are factors that all contribute to an environment that encourages human smuggling and trafficking in persons.

Although there are similarities in the conditions that give rise to TIP and human smuggling, there are distinct differences in the expectations and treatment of persons being smuggled and the victims of human trafficking. Additionally, there are significant statutory differences between TIP and human smuggling.

Human Smuggling

Human smuggling is the facilitation, transportation, attempted transportation or illegal entry of a person(s) across an international border, in violation of one or more countries laws, either clandestinely or through deception, such as the use of fraudulent documents. Often, human smuggling is conducted in order to obtain a financial or other material benefit for the smuggler, although financial gain or material benefit are not necessarily elements of the crime. For instance, sometimes people engage in smuggling to reunite their families. Human smuggling is generally with the consent of the person(s) being smuggled, who often pay large sums of money. The vast majority of people who are assisted in illegally entering the United States are smuggled, rather than trafficked.

Smuggled persons may become victims of other crimes. In addition to being subjected to unsafe conditions on the smuggling journeys, smuggled aliens may be subjected to physical and sexual violence. Frequently, at the end of the journey, smuggled aliens are held hostage until their debt is paid off by family members or others. It is also possible that a person being smuggled may at any point become a trafficking victim.

The Immigration and Nationalization Act, Section 274(a)(1), (2), provides for criminal penalties under Title 8, United States Code, Section 1324, for acts or attempts to bring unauthorized aliens to or into the United States, transport them within the U.S., harbor unlawful aliens, encourage entry of illegal aliens, or conspire to commit these violations, knowingly or in reckless disregard of illegal status.

Trafficking in Persons

On October 28, 2000, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"). The VTVPA is a comprehensive statute that addresses the recurring and significant problem of trafficking of persons for the purpose of committing commercial sex acts, or to subject them to involuntary

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servitude, peonage, debt bondage, or slavery. It also is designed to increase the protection available to victims of trafficking and other types of violent crimes. It is an attempt to address these issues on a national and international level, and affects many government and non-government agencies and organizations.

Unlike smuggling, which is often a criminal commercial transaction between two willing parties who go their separate ways once their business is complete, trafficking specifically targets the trafficked person as an object of criminal exploitation. The purpose from the beginning of the trafficking enterprise is to profit from the exploitation of the victim. It follows that fraud, force or coercion all plays a major role in trafficking.

It may be difficult to make a determination between smuggling and trafficking in the initial phase. Trafficking often includes an element of smuggling, specifically, the illegal crossing of a border. In some cases the victim may believe they are being smuggled, but are really being trafficked, as they are unaware of their fate. For example, there have been cases where women trafficked for sexual exploitation may have knowingly agreed to work in the sex industry and believed that they would have decent conditions and be paid a decent wage. What they did not realize is that the traffickers would take most or all of their income keep them in bondage and subject them to physical force or sexual violence. Or, the victims may have believed they were being smuggled into the United States where they would be given a job as a nanny or model, later realizing that the so-called smugglers deceived them and that they would be forced to work in the sex industry.

Conversely, persons being smuggled may sometimes willingly enter into "contracts" with the smugglers to work off a smuggling debt. Unless the aliens' labor or services are enforced through the forms of coercion set forth in the trafficking statutes, such deferred repayment does not make these people trafficking victims. However, a work-based debt can be an "indicator" of trafficking, and such a situation could trigger further examination to determine whether the aliens are victims of trafficking or extortion.

According to the "Trafficking Victims Protection Act of 2000," severe forms of trafficking in persons always includes the recruitment, harboring, transportation, provision, or obtaining of a person for one of the three following purposes:

1. Labor or services, through the use of *force, fraud or coercion*, AND resulting in involuntary servitude, peonage, debt bondage, or slavery; OR
2. Commercial sex act, through the use of *force, fraud or coercion*; OR
3. If the person is under 18 years of age, any commercial sex act, whether or not force, fraud or coercion is involved.

Human trafficking does not require the crossing of an international border - it does not even require the transportation of victims from one locale to another. Victims of severe forms of trafficking are not all illegal aliens; they may, in fact, be U.S. citizens, legal residents, or visitors. Victims do not have to be women or children - they may also be adult males.

While trafficking victims are often found in sweatshops, domestic work, restaurant work, agricultural labor, prostitution and sex entertainment, they may be found anywhere in the U.S. doing almost anything profitable to their handlers. Victims may not even recognize that they have been victimized, or may be forced into protecting their exploiters, so self-proclamation of their status is not required.

The "Trafficking Victims Protection Act of 2000" also provides tools to combat trafficking in persons both worldwide and domestically. The Act recognizes the need to protect the victims while gaining their cooperation by providing a safe haven. Section 107(c)(3) reads: "Authority to Permit Continued Presence in the United States.--Federal law enforcement officials may permit an alien individual's continued presence in the United States, if after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible, and such officials in investigating and prosecuting traffickers shall protect the safety of trafficking victims, including taking measures to protect trafficked persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates."

DIFFERENCES BETWEEN HUMAN TRAFFICKING AND SMUGGLING²

TRAFFICKING	SMUGGLING
Must Contain an Element of Force, Fraud, or Coercion (actual, perceived or implied), unless under 18 years of age involved in commercial sex acts.	The person being smuggled is generally cooperating.
Forced Labor and/or Exploitation.	There is no actual or implied coercion.
Persons trafficked are victims.	Persons smuggled are complicit in the smuggling crime; they are not necessarily victims of the crime of smuggling (though they may become victims depending on the circumstances in which they were smuggled)
Enslaved, subjected to limited movement or isolation, or had documents confiscated.	Persons are free to leave, change jobs, etc.
Need not involve the actual movement of the victim.	Facilitates the illegal entry of person(s) from one country into another.
No requirement to cross an international border.	Smuggling always crosses an international border.

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Person must be involved in labor/services or commercial sex acts, i.e., must be "working".	Person must only be in country or attempting entry illegally.
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In some cases it may be difficult to quickly ascertain whether a case is one of human smuggling or trafficking. As will be illustrated in the scenarios below, the distinction between smuggling and trafficking are often very subtle, **but key components that will always distinguish trafficking from smuggling are the elements of fraud, force, or coercion. However, under U.S. law, if the person is under 18 and induced to perform a commercial sex act, then it is considered trafficking, regardless of whether or not fraud, force, or coercion is involved.**

CASE EXAMPLES AND SCENARIOS

Case Example One

Sonia was invited to come to the United States by family friends, and told that she could work for them as a housekeeper, and they would pay her \$100.00 a week. Sonia was provided with fraudulent documents and departed for the United States with her new employer. She knew that this was illegal, but she needed the money, and was willing to take the risk.

Was Sonia smuggled or trafficked?

Sonia was smuggled in the United States. She left willingly with full knowledge that she was entering the United States illegally.

Upon arriving in the United States, Sonia was kept in isolation, she was given a place to sleep in the basement and told not to speak to anyone or she would be turned over to the Immigration Service. Sonia was never paid for her work and felt that she had no one to turn to for help.

Was Sonia smuggled or trafficked?

At this point Sonia was restricted from leaving the house, threatened with deportation if she attempted to talk to anyone, and forced into involuntary servitude. Sonia is a victim of trafficking.

Case Example Two

A recruiting agency in India was looking for welders to work at a company in the United States for \$10.00 an hour. The agency charged each prospective worker a non-refundable \$2,500.00 application fee. Enroute to the United States the workers were given contracts to sign. The contracts obligated the workers to work for the next six months for less than \$3.00 per hour. They were told to sign the contracts or they would be sent back home. The workers felt that they could not back out because they had invested all their savings, and were already on their way to the United States. Once they arrived, they were confined to the factory grounds and the owner of the company kept their passports.

Were the workers smuggled or trafficked? The workers were victims of severe forms of trafficking in persons.

The workers were transported for the purposes of labor through the use of fraud and coercion, which resulted in the workers being subjected to involuntary servitude. Confiscation of the workers' passports by the employer also caused the workers to believe that they were forced to stay with the company.

Case Example Three

Local law enforcement authorities executed a search warrant at a brothel and arrested three 17-year-old girls for prostitution. The Department of Family Services notified Immigration and Customs Enforcement concerning the illegal immigration status of the three juveniles. Immigration and Customs Enforcement Agents interviewed the three juveniles and learned that they were smuggled into the United States.

Were the girls smuggled or trafficked? The girls were trafficked into the United States. All three girls were juveniles and were performing commercial sex acts. Since the girls were under 18 years of age, they would be considered victims of severe forms of trafficking, regardless of whether or not they have consented to participate or paid to be brought illegally into the U.S.

Case Example Four

A husband and wife in the United States convince their relatives in India to allow their daughters to travel to the United States to receive an education. The husband and wife are the aunt and uncle to the girls, and have promised the girls' parents that they would provide housing and support for the girls. In order for the girls to receive a student visa, their aunt and uncle enrolled the girls in school. The girls are granted student visas and allowed to enter the U.S to receive an education.

Once the girls arrive in the U.S. their aunt and uncle immediately tell them that they won't be attending school. The aunt and uncle never intended to have the girls attend school and only enrolled them for the purpose of fraudulently obtaining the entry visas. At this point, the girls have unwittingly been smuggled into the U.S. through the use of visa fraud.

During the next several weeks the girls are locked in a basement and continually told that if they try to leave they would be arrested for their involvement in the visa fraud. Eventually their uncle takes the girls to local motels where they are made to clean rooms and provide janitorial services. The girls are never paid for their work, all their identification has been taken away, and they are continually reminded that they could be arrested for their involvement in visa fraud. Because the girls are being held against their will through coercion and intimidation, and are being forced to work for no pay, they are now victims of trafficking.

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¹ Severe forms of trafficking in persons means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

² The "Trafficking vs. Smuggling" chart on this page does not provide a precise legal distinction of the differences between smuggling and trafficking. The chart is designed to illustrate general fact scenarios that are often seen in smuggling or trafficking incidents. Fact scenarios are often complex; in such cases expert legal advice should be sought.