

Understanding the complexity of migrant smuggling: The ‘smuggling spectrum’ as comprehensive analytical framework

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Biographical statement

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Abstract

Migrant smuggling has been conceptualised in many different ways and from many different perspectives. Over the last fifteen years, the rise of more critical studies which challenged a dominant security-oriented and policy-driven framework has been extremely important, and it also contributed to generating new understandings of the phenomenon. Acknowledging the validity of these multiple approaches, and the need for common analytical grounds, I try to offer a broadly applicable analytical framework in order to understand and compare the different empirical manifestations of smuggling and the connected policy responses. To do so, migrant smuggling is firstly unpacked, focusing on its two main components – smugglers and smuggled migrants – and identifying their characteristic elements. The latter are, in turn, brought back together and conceptualised as an area of complexity: the ‘smuggling spectrum’. This enables a flexible and comprehensive understanding of smuggling, acknowledging the existing complexity, and yet making it analytically manageable.

Introduction

The term “migrant smuggling” is used to designate both a phenomenon that exists and can be observed in practice and, at the same time, from a legal point of view, an offence provided in the corpus of national and international laws. Furthermore, the way in which this is defined in different pieces of legislation varies substantially, also in terms of its constitutive elements. It is not uncommon for national or regional frameworks (such as the EU) to depart from the most universal and vastly agreed-upon definition of the phenomenon, which is the one contained in the Protocol against the

smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling Protocol¹).

Based on this preliminary understanding, definition-related and analytical aspects of migrant smuggling acquire particular importance, in order to strengthen the comprehension of the phenomenon. Starting from here, I seek to explore migrant smuggling through a comparative analysis of existing empirical studies, moving beyond legal definitions and with a view to identifying those elements which allow for the proposition of an analytical framework. Such framework aims to outline the complexity of the phenomenon in its diverse empirical manifestations, yet without losing the validity of the general category of “migrant smuggling”.

To do so, I will firstly address the way in which the phenomenon was first conceptualised over the 1990s, when both the academic community and practitioners increasingly elaborated and accepted the concept and made a wide use of it (Gallagher and David, 2014, p. 189), and, simultaneously, the earliest legal definitions were proposed.

Secondly, moving past legal definitions, I will review and explore some of the crucial elements in existing definitions and understandings of migrant smuggling, as they emerge in relevant literature. To do so, I will unpack migrant smuggling into its two main different components, i.e. smugglers and smuggled migrants, and separately address both of them.

Lastly, I will convey and unify the intricacies of the different dimensions analysed in the unpacking process through the elaboration of an analytical tool that I call ‘smuggling spectrum’. Such tool provides the necessary elements to establish a comprehensive and broadly applicable framework which aims to understand the diverse manifestations of migrant smuggling.

The phenomenon, its conceptualisation and its multiple definitions: A state of the art

A distinctive element of the phenomenon of migrant smuggling is its complex nature in between migration and crime, which has fostered the plurality of approaches used by scholars (and policy-makers) to address it. Baird and van Liempt (2016) offer an overview of the most notable studies up to then and, in particular, of the different lenses used by scholars, from pure migration approaches to pure crime/security ones. More specifically, they distinguish between five different perspectives to look at smuggling, i.e. business, crime, networks, global political economy and human rights.

But approaches tend to vary substantially also in terms of the focus chosen, from those studies starting from an analysis of the actors involved, which often consider migration routes and smuggling patterns (such as Achilli, 2015; Collyer, 2016; Fargues and Bonfanti, 2014; Richter, 2019; Schapendonk, 2018; Shelley, 2014; Spener, 2004; Triandafyllidou, 2018; van Liempt and Doomernik, 2006; Zhang, Sanchez and Achilli, 2018), to those based on an analysis of existing legislation and policies, often from a criminal law and criminal justice perspective (see, among others, Carrera, Vosyliūtė, Smialowski, Allsopp and Sanchez, 2018b; Militello and Spena, 2019; Mitsilegas, 2019; Salt, 2000; Salt and Stein, 1997; Triandafyllidou and Maroukis, 2012) or with a focus on human rights and ethical arguments (e.g. Aloyo and Cusumano, 2018; Crépeau, 2003; Gallagher and David, 2014; Hidalgo, 2016; Müller, 2018).

In light of such complexity, the process of tracing back the origin of the concept – from the acknowledgement of the existence of the phenomenon, to its conceptualisation in multiple ways, and to the variety of legal definitions of it – is of the utmost importance.

¹ As of 23 August 2020 there are 149 states parties to the protocol (data retrieved from <https://treaties.un.org/>).

In academia, a first milestone in migrant smuggling studies is represented by a paper by John Salt and Jeremy Stein – “Migration as a Business: The Case of Trafficking”: it was published in 1997 and it offered, for the first time, a comprehensive analysis of the smuggling of migrants. Their definition points at an “international business, involving the trading and systematic movement of people as ‘commodities’ by various means and potentially involving a variety of agents, institutions and intermediaries”. Other relevant examples of important studies in these years include those of Gallagher (2002), Koser (1996 and 1997), Morrison and Crosland (2001), Salt (2000), Singer and Massey (1998) and Widgren (1994).

One can notice, from the very beginning, a deep interconnection between the developments in academia and those in the policy framework, and for this very reason the conceptual and juridical frameworks cannot be fully isolated from one another.

In this perspective it is useful to recall some of the key steps undertaken in those years leading to a comprehensive and coherent definition of the phenomenon: the International Maritime Organization Assembly in 1993, the United Nations General Assembly Resolution of 1993, the International Organization for Migration Seminar on Migration in 1994, the Expert Group of the Budapest Group and the Europol Convention (see Gallagher and David, 2014, pp. 190–191 and Salt and Stein, 1997). These examples clarify the “growing political concern” towards a phenomenon considered “to be undermining international collaborative efforts to produce ordered migration flows” (Salt and Stein, 1997, p. 467). In these years, the so-called ‘Vienna Process’ also began, spearheaded by Austria in 1997 and soon joined and supported by Italy with a view to developing a legal tool to tackle transnational organised crime and the smuggling of migrants. This process resulted in the adoption, in the year 2000, of the Smuggling Protocol – the first international agreement aiming to acknowledge and define such phenomenon and to provide specific measures to ensure the cooperation of states, which would be followed by other regional initiatives. More national legislations started criminalising this activity (in accordance with article 6(1) of the Smuggling Protocol) and a number of academic works – though limited, compared to other migration issues – were published and offered a plurality of angles upon the issue.

In a regional perspective, the case of Europe is worth mentioning. Here important steps were taken, with the provisions included in the 1990 Convention implementing the Schengen Agreement (the Schengen Convention), in the so-called 2002 ‘Facilitators Package’ (FP, the milestone of the EU anti-smuggling policy framework, composed of Directive 2002/90/EC and Framework Decision 2002/946/JHA) and with several criminal law acts passed in Member States (MSs) in those very years.

The recent nature of the concept and the fact that, from the very beginning, a sort of overlap occurred between legal and analytical definitions – with a clear prominence of the definition provided by the Smuggling Protocol (McAuliffe and Laczko, 2016, p. 4) – ended up creating a policy-driven debate.

The Smuggling Protocol definition is in fact crucial, as it provides a minimum standard of criminalisation which is recognised by the 149 states parties to the Protocol itself. Furthermore, it can be (and, in fact, it is) used as a benchmark when considering other legislations.

Article 3(a) of the Protocol defines migrant smuggling as “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 a permanent resident.”

In a comparative perspective, one element of this definition remains quite undisputed: the nature of this process as the facilitation of an undocumented migration movement. A second element is more controversial, and is related to the material benefit of the facilitator, which is not required by all legislations (see UNODC, 2017). A clear example of this is the Facilitators Package, where such a material gain is not necessary for migrant smuggling. This is a very long-standing controversial point,

which indeed leads to also take into consideration under the umbrella of smuggling activities of humanitarian assistance (especially in the absence of a mandatory exemption from criminalisation of these activities). Allsopp and Manieri (2016), Carrera, Allsopp and Vosyliūtė (2018a), Carrera et al. (2018b), Nicot and Kopp (2018), among others, exhaustively address this point.

A third element leads to the shift in focus from states to migrants: migrant consent, which is assumed, even though not explicitly stated, in this definition. This contributes to distinguishing between smuggling and some forms of trafficking in persons (TIP), where human movement is coercive (see Doomernik, 2013, p. 120). From this interpretation at least two main consequences arise: (a) the possibility for states to criminalise not only the smuggling of migrants, but also the undocumented entry of migrants into their territories (notwithstanding the exemption clause set out in article 5 of the Smuggling Protocol, see Gallagher and David, 2014, p. 401); (b) the focus on the repression of smugglers rather than on the assistance and protection of smuggled migrants. Notably, however, concerns in this respect were expressed throughout the drafting process, but a general consensus was eventually secured by the parties that “smuggled migrants are not ‘victims’ in the same way that this term can be applied to those who have been trafficked”, as they voluntarily decided to be smuggled in order to reach their destination (Gallagher 2015, pp. 196–197).

In such dimension, in the words of François Crépeau (former United Nations Special Rapporteur on the human rights of migrants), a “striking [...] difference” seems to exist between the Smuggling Protocol and the 2000 Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (the Trafficking Protocol). While in the former “refugee-receiving countries are trying to strengthen their strategy of migration containment” and “[t]he protection and the assistance of the victims was not the first objective, except where it can contribute to the main objective”, in the latter, on the contrary, there are “numerous clauses dedicated to protection issues” (Crépeau, 2003, pp. 175-176). Even though clear-cut definitions do not always correspond to reality, and evidence shows that frequent overlaps occur between smuggling and trafficking in persons, the perception of the phenomena seems still to significantly diverge.

The substantive elements of the Smuggling Protocol definition are not very different from those identified a few years earlier, in 1994, by the IOM in its first study on the topic: (a) the involvement of a smuggler; (b) his/her material gain; (c) the “illegal” (*sic*) nature of this migration movement; (d) migrant’s consent (Salt and Stein, 1997, p. 471. See also Carrera, Guild, Aliverti, Allsopp, Manieri and LeVoy, 2016, p. 22).

Similarly, these aspects can be detected, explicitly or implicitly, in most smuggling legal definitions on a global level, though taking into account the several differences on the material gain requirement – an aspect which has proven to be particularly relevant in the EU, among other cases (see Mitsilegas, 2019 and UNODC, 2017). In broad terms, the prioritisation of a security-based approach can be observed, to the detriment of a migrant (human) rights’ one. Therefore, the importance of the UN definition is crucial, not only because it is the most vastly agreed-upon on a global level, but also because states have built or amended their legislations upon this definition, though with minor differences, following the provisions of article 6 (for an up-to-date legal overview, see Militello and Spena, 2019 and Mitsilegas, 2019).

In this paper I do not seek to provide a comparative legal analysis, nor an alternative legal definition of smuggling. I rather rely on the Smuggling Protocol definition, as the most vastly agreed-upon at an international level, and on those consistent regional and national definitions. From a legal point of view, which details what constitutes smuggling and what does not – or what is criminal and what is not –, I follow the argument that smuggling takes place when there is a facilitation of an irregular movement, when this involves a material gain for the smuggler and in the presence of at least a partial or implicit migrant consent, as was explored above.

Therefore, I will not delve into the debate related to the material gain requisite (and to the humanitarian exemption), which both proved to be particularly problematic from a legal point of view (see Carrera et al., 2018a and 2018b; UNODC, 2017). In so doing, I do not intend to minimise the importance of this issue, which is in fact extremely relevant and present, the criminalisation of humanitarian actors in the Mediterranean Sea being one of the most topical examples. Yet, I intend to focus on other problematic issues connected to smuggling, its conceptualisation and understanding. I indeed maintain that, even setting this issue aside for a moment, and assuming – in line with the Smuggling Protocol definition – that facilitating the irregular crossing of a border can be considered smuggling only when this is done for profit, there are still numerous and extremely diverse possible empirical cases of smuggling. These require the elaboration of a comprehensive analytical approach which can make sense of such complexity and can facilitate the emergence of different responses.

I therefore try to go *beyond* (not *against*) legal definitions and analyses of smuggling, by understanding the diversity of smuggling events falling within the same legal definition, even in line with the most widely accepted international standards. Such an effort, besides ensuring a deeper understanding of the phenomenon, could ideally also help in the process of designing more effective, balanced and even human rights-oriented policies.

By doing so, it is also possible to move past a mere security-based approach (as suggested by Castles, 2004; Triandafyllidou, 2018 and van Liempt and Sersli, 2013 among others), which is often leading to focus exclusively on smugglers in the elaboration of policies, as in the Smuggling Protocol and the Facilitators Package (see Gallagher, 2002; Koser, 2005 and Shelley, 2014. See also, for some further critical views: Achilli, 2015; Spena, 2016; Triandafyllidou, 2018 and Zhang et al., 2018).

An abundant scholarship has followed a different approach: Alpes (2016), Betts (2010), Gallagher (2002 and 2015), Koser (2005), Kyle and Koslowski (2013), Morrison and Crosland (2001), Nadig (2002), Richter (2019), Shelley (2014), Triandafyllidou (2018), Zhang et al. (2018) offer alternative starting points, where the focus is placed on the actors involved in the process of smuggling and which, in some cases, lead to the definition of a quasi-trade-off between state security and human security of smuggled people. States often prefer the former to the latter (Koser, 2005, p. 13. See also Achilli, 2015 and Fargues, 2015).

Some scholars also observed that the flows of smuggled migrants are inversely related to the level of border openness and to legal migration opportunities (Koser, 2005, p. 15. See also Castels, 2004, p. 205; Kyle and Dale, 2013 and Spener, 2004, pp. 296–297) and even how some policies aimed at preventing migration have unwanted opposite consequences (Düvell, 2011). These approaches are particularly important when it comes to framing anti-smuggling policies within the broader migration policy field, and, in particular, its aspects connected with (tough) border control and undocumented migration. Among the restrictive policies considered in this approach, extraterritorial ones are particularly harsh (see Morrison and Crosland, 2001, p. 31 and Väyrynen, 2003). An example is provided by ‘shifting out’ policies (Lavenex, 2006), where borders are de facto moved further and the control of undocumented migration is delegated to origin or transit countries (see Strik, 2019).

Keeping the focus on the EU – a territory where smuggling has been a central element of the political debate over the last years – several studies have addressed the incomplete integration within and/or the limited effectiveness of undocumented migration and smuggling policy frameworks, as well as the different stances of MSs in this regard. It is useful to recall, among others, Achilli (2015), Carrera and Guild (2016), Collett (2015), Düvell (2011), Fargues (2015), Fargues and Bonfanti (2014), Nováky (2018), Shelley (2014), Toaldo (2015) and van Liempt (2016). More recently, a number of works have focused specifically on the smuggling dynamics in the Mediterranean Sea (Cusumano, 2019; Cusumano and Gombeer, 2018), on the connection and implication of search and rescue (SAR) activities and humanitarian assistance (Carrera et al., 2018a and Vosyliūtė and Conte, 2019), as well as on shifting out policies (Strik, 2019).

Such a vast heterogeneity of approaches to smuggling, which stresses different aspects of the phenomenon and therefore suggests different legislative responses, reinforces the usefulness of an analytical framework which can make sense of such complexity. This result can be achieved through an unpacking process of the phenomenon into its two main components – smugglers and smuggled migrants – and an analysis of their characteristics, based on an inductive approach founded on a review of empirical studies.

The supply side: who is the smuggler?

Numerous works (for a review, see McAuliffe and Laczko, 2016, p. 8) point to the multifaceted nature of smugglers and stress the unproductivity of treating them as a unified and homogenous group. On the contrary, smugglers differ from one another in their organisation, in their connections with organised and other forms of serious crime, in the routes they choose, in the means of transportation, in their relationship with smuggled migrants, etc. (McAuliffe and Laczko, 2016, p. 8 and van Liempt and Doornik, 2006). Differently to what is often thought among the general public (and in some law enforcement reports, as we shall see below), there is no such thing as an archetype of a smuggler.

In spite of this, policies (and sometimes even academic literature) do not always seem aware of that (as highlighted by Crépeau, 2003 and Zhang et al., 2018) and tend to take certain dynamics and characteristics for granted, even though they are far from being real. On the contrary, some studies, such as that of Pastore et al. (2006), the special issue of *The Annals of the American Academy of Political and Social Science* (2018), edited by Luigi Achilli, Gabriella Sanchez and Sheldon Zhang, or the several interesting contributions in the work edited by Sanchez and Achilli (2019) are particularly useful, as they are specifically aimed at critically discussing and debunking alleged myths and extremely limited understandings of smugglers' (and more generally smuggling) characteristics, with a view to providing an evidence-based framework of the issue.

The way in which smugglers are depicted, as Baird and van Liempt (2016) notice, preferring some aspects to others, also arises from the different analytical approaches that are chosen, based in turn on the existence of different models to study migrant smuggling (see above).

And so, from one extreme to another, there are works that treat smugglers primarily from a business-oriented point of view, such as the one by Salt and Stein (1997) or Europol (2016, 2017 and 2018) reports, which all tend to privilege a perspective which facilitates the emergence of the well-structured organisation and profit-driven activity of smugglers. On the other side, alternative perspectives such as those offered by Collyer (2016), Khosravi (2010) and Watson (2015) tend to highlight the humanitarian and/or political nature of smugglers. Similar conclusions could be drawn for any of the different angles used to study the characteristics of smugglers. Different analytical approaches tend to depict different types of smugglers and to make different characteristics more visible, enriching the whole knowledge of the phenomenon (insofar as one does not assume that a specific approach is the only valid one).

Exploring empirical research on smugglers is therefore a useful operation with a view to not challenging one or another approach, but rather to acknowledging such complexity and making it analytically fruitful in order to understand the phenomenon.

A critical reading of the relevant literature offers at least five different aspects that can shape the nature of smugglers, related to: (a) the dimension and internal organisation of the smuggling group; (b) the connection with other criminal activities; (c) the characteristics of the routes followed; (d) the level of coercion; (e) the very connotation of the smugglers.

Firstly, smugglers can be very different from one another depending on the dimension and the internal organisation and hierarchy of the smuggling group. Smugglers can be facilitators, such as coyotes or

passeurs, i.e. individuals or members of small organisations working on a minor scale. But smugglers can also be members of cartels, networks and organised crime gangs. Evidence supports both cases, and in fact the adherence to one of the two models (or something in-between) is not only a matter of perspective but also, of course, a matter of substantial differences that take place in reality. So, for example, the border between Mexico and the United States tended to be characterised by coyotes in the past, as the very name suggests (Guiraudon, 2008 and Spener, 2004), even though there was a radical change in the last years, also due to the sharpening of US border control policies (for a more in-depth view, see Sanchez and Zhang, 2018). And if other areas of smuggling are more often associated with criminal networks and organised crime (e.g. the Mediterranean Routes, see Bühler et al., 2016 and Toaldo, 2015), there is also evidence of smuggling taking place even with organisations led by groups of friends, or groups characterised by a very low organisational level, or even individuals temporarily dedicated to such activity (Richter, 2019). All this confirms what Salt and Stein had already noticed in their first work, and namely the very existence of a variety of organisational models (Salt and Stein, 1997, pp. 476–477. For an overview: Baird and van Liempt, 2016, pp. 407–408).

The use of different analytical perspectives can play a role in the emergence of these differences, but evidence clearly shows that, in fact, both types exist. Nevertheless, the narrative of smuggling as organised crime is particularly widespread in policy documents and in official reports of law enforcement authorities (e.g. European Commission, 2015a and 2015b and Europol, 2016, 2017 and 2018). This appears very notable as policy choices are heavily influenced by these analyses, and if only one perspective is taken into consideration, this jeopardises the effectiveness of the policies chosen, as has been critically discussed by several authors, who have pointed to the “international understanding that [migrant smuggling is] part of organized crime” (Shelley, 2014, p. 3).

Secondly, there is a variable degree of connection with the perpetration of other crimes. Such connection between the smuggling of migrants and other crimes is very widespread in law enforcement reports (see Europol 2016, 2017 and 2018, among others), whereas other evidence-based studies, come to other conclusions. Monzini (2004), for example, citing an IOM report of 2003, pointed to the absence of a connection between smugglers and other trafficking and illegal activities (on this point see also Pastore et al., 2006 and Sanchez and Zhang, 2018). On the other hand, the link with those criminal activities which are ancillary to migrant smuggling itself, such as corruption or passport and visa forgery, is clearly quite common and widespread (McAuliffe and Laczko, 2016, pp. 7–9).

Thirdly, smugglers differ depending on the type of route – the distances covered, their dangerousness and the characteristics of the borders to be crossed. Each route has its own characteristics and smugglers operate also very differently depending on that. De Bruycker, Di Bartolomeo and Fargues (2013, pp. 3–7), for example, looked at Mediterranean sea routes and highlighted their structural nature and their connection to larger routes and other forms of smuggling, coming from sub-Saharan Africa. But if some have connected maritime routes with a higher level of internal organisation, Pastore et al. (2006, p. 108) pointed out that is arguable and quite speculative, as there is no definitive evidence in that regard. Just by way of another example, in other areas we find quite different situations, such as in East Africa, where migration movements happen both in a long and in a short distance, by land, air and sea and involve a number of different types of smugglers. There are chief smugglers as well as a lot of different types of middlemen, including transporters such as taxi and bus drivers as well as brokers, facilitators, recruiters and travel agents, in organisations that can be informal and independent (Majidi and Oucho, 2016, pp. 62–63). Connecting this dimension with others, less dangerous routes tend to be associated with passeurs, whereas networks and criminal organisations tend to come into play in more dangerous and complex routes (Väyrynen, 2003, pp. 15–16. See also Andersson, 2016 and Triandafyllidou, 2018 on the ‘professionalisation’ of smuggling).

The border characteristics and the strength of border control come also into play in shaping different forms of smuggling. Areas where higher control by border guards and restrictive policies are in place seem to experience not only a higher level of organisation on the side of smugglers (Doomernik, 2013, p. 121; Guiraudon, 2008, p. 5 and McAuliffe and Laczko, 2016, p. 7. See also Brachet, 2018 and above), but also more violent smuggling processes. This could be one of the unintended consequences of restrictive migration policies highlighted by Düvell (2011). On this whole point see Triandafyllidou, (2018).

A fourth dimension which deserves attention due to its implications in terms of human rights is coercion and it is strictly related to the relationship between smugglers and smuggled migrants. For such reason, this has to do both with the characteristics of the smugglers and with those of the migrants, which will be further explored in the following paragraph (it is clearly cumbersome to adopt a clear-cut approach to the demand and the supply side, smuggling being a relational process between smugglers and smuggled migrants). It is important to highlight that evidence reveals the existence of different degrees of coercion, from a very low level – associated with ‘helpful smugglers’ – to a high level of exploitation and disregard for migrants’ lives (MEDU, 2015 and van Liempt and Doomernik, 2006). The latter is particularly relevant in those cases where the drawing of a line between smuggling and trafficking proves particularly difficult (Dimitriadi, 2016).

A fifth and last element is related to the way in which smugglers are depicted and considered. Whether a smuggler is a criminal, on one end of the continuum, or a saviour, on the other end, very much depends on the combination of the elements described above (on the twofold nature of smugglers, see Crépeau, 2003, p. 181). The existence of “altruistic smugglers”, close to the saviour profile, is acknowledged for example by McAuliffe and Laczko (2016, p. 5, including also references to other authors) or, more recently, by Schloenhardt (2019), as well as by “humanitarian smuggling²” scholars (Watson, 2015. See also Landry, 2016, with a focus on the European Union), as briefly hinted above, and represents the cornerstone of the ‘moral argument’ made by Aloyo and Cusumano (2018). This perspective privileges the aspects of a smuggler who helps those in danger or who find it difficult to escape and to reach safe places (this is particularly evident in refugee studies, cf. Crépeau, 2003; Fargues, 2015 and Morrison and Crosland, 2001). Smugglers have also been depicted positively when acting for political motives (Khosravi, 2010), whereas a complicated situation is that of smuggled migrants who might turn into smugglers themselves (this case is particularly relevant to the central Mediterranean route, see Oxfam Italia, Borderline Sicilia Onlus, Tavola Valdese, 2016).

Issues connected to the positive view of smugglers are very complex and controversial. In legislation and in the political debate, those lines that distinguish between what is humanitarian/altruistic/small scale smuggling and what is the pure criminalisation of humanitarian actors have proven to be very thin (see Carrera et al., 2018a and Cusumano and Gombeer, 2018).

On the other side, however, smugglers are depicted as evil individuals who take advantage of difficult situations and desperate needs of the would-be smuggled migrants, and making money out of that, also putting their lives further in danger (Bühler et al., 2016 and Europol, 2016).

The demand side: the agency of smuggled migrants

The agency of smuggled migrants represents most probably one of the crucial issues to address when reading the smuggling process in its complexity. It is not uncommon in the existing literature, especially when it comes to official reports issued by international organisations, governments and

² Not to be mistaken for the criminalisation of pure humanitarian actors, performing activities aimed at saving lives in situations of emergency and clearly falling outside the Smuggling Protocol definition, such as NGO ships operating in the Mediterranean Sea.

law enforcement agencies, to view migrants as just another item which can be smuggled from a place to another, denying, ignoring or otherwise minimising the proactive role that they can and actually do assume in the smuggling process (this argument can be found in Doomernik, 2013, p. 121; Schapendonk, 2018; van Liempt and Doomernik, 2006 and Watson, 2015, p. 46).

On the contrary, however, some studies, particularly those adopting a sociological or geographical qualitative perspective and making use of migrant interviews, draw a quite different picture, where migrants assume an important and active role, from the beginning of the process, i.e. the decision to make use of smuggling services and which smuggler to contact, until the end, i.e. how to proceed further through the journey and what final destination country to choose (Martínez, Slack and Martínez-Schuldt, 2018; McAuliffe and Laczko, 2016, p. 8; Schapendonk, 2018 and van Liempt and Doomernik, 2006).

A background element to all this is clearly represented by the understanding of the diversity of smuggled migrants (and would-be ones): their characteristics, the reason for moving, the motives behind the decision of using smuggling services. These are but some of the elements that mark such diversity. Connected to all this, there is also the higher or lower likelihood of being accepted (and granted some form of residence permit) in the destination country, which often dramatically decreases in the case of the so-called ‘economic migrants’ (as opposed to asylum-seekers and refugees).

Acknowledging the agency of smuggled migrants also leads to comprehending the existence of a demand side in the smuggling process. There is a request for smuggling services, essentially arising from the combination of two factors: (a) the structural nature of mobility and migration (Collyer, 2016, p. 21 among others) and (b) the progressive protection of borders on the side of national states, with the implementation of measures aimed at controlling transnational mobility (Andersson, 2016; Baird, 2013 and Triandafyllidou, 2018). This point turns central as it implies that policies aimed at countering smuggling by exclusively addressing the supply side (i.e. targeting smugglers and enhancing border controls) are unlikely to be the solution and, on the contrary, entail the risk of a counterproductive effect (Düvell, 2011). But acknowledging the agency of smuggled migrants, on the other side, poses some questions and problems with regards to at least two other issues: (a) their relationship with smugglers and the role of coercion in the smuggling process (as anticipated from the perspective of smugglers); (b) their status of ‘victims’.

When considering the agency of migrants within smuggling processes, coercion and victimisation are, in fact, the two main dimensions that contribute to shaping the different possible patterns of smuggling. From here other differences can arise, such as in terms of variable degrees of protection received in destination countries, among other things.

The relationship between smugglers and migrants can be very different, depending on the specific circumstances, as was already outlined in the previous paragraph. This has mostly to do with the degree of freedom enjoyed by migrants in the different steps of the smuggling process (from the initial choice until the completion of it) and with its perception. In other words – or from another perspective – this is connected with the degree of internal coercion in the smuggling process.

Evidence tells us of cases of extreme violence and deaths, such as in the Mediterranean Sea, as well as of cases of more peaceful and safer smuggling, such as from Mexico to the US in a certain historical period (Spener, 2004, p. 311; see also ICHRP, 2010, p. 20 and Sanchez and Zhang, 2018) and these conditions often vary throughout the same journey. As was mentioned above, this very much depends on the characteristics of the smugglers. But in this perspective, accounts of migrants and their points of view are also clearly important and those studies specifically focused on their stories confirm that they normally refer to smugglers as “agents or helpers” (Doomernik, 2013, p. 124). Going even further, Watson (2015, p. 40) suggests that “[c]riminalising smuggling, which is often the sole means of escape for those facing violence and endemic poverty, justifies numerous ‘equally injurious acts’

against vulnerable populations and those who assist them.” In this way, the criminalisation of migrant smuggling is challenged. However, even though such an approach positively brings in several elements that are ignored in state policies, it involves the hazard of being too simplistic, ignoring or minimising the actual risks that smuggling processes can have for migrants, the abuses and mistreatments that, though more limited than one could imagine, do actually exist.

Even assuming that smuggling exists because states close their borders and that the criminalisation approach is intentionally used by states to control and reduce migration flows (both analyses are to a certain extent correct, though not fully exhaustive), this does not mean that smugglers are necessarily the good ones in this story (see, among others, the section on torture and other cruel, inhuman or degrading treatment in MEDU, 2015). In this case too much depends on the specific situation and, though it seems at odds with evidence to depict smugglers exclusively as the evil members of Mafia-type organisations, in the same way it seems quite incorrect to assume the idea of the Good Samaritan at any cost (see also Aloyo and Cusumano, 2018, p. 13, on the Libyan case, for example).

Coercion can indeed be a distinctive characteristic in the relationship between smugglers and migrants, as was mentioned above. This can particularly happen in those cases in between smuggling and trafficking. The simple fact that the smuggling process begins with a voluntary choice of would-be migrants does not exclude that they could eventually suffer violence and abuses from smugglers, put their life at risk, etc.

This brings us to the second dimension, i.e. victimisation. Here the starting question is whether a smuggled migrant is a *de facto* victim, or, better yet, whether someone who deliberately decided to use some illegal services can actually be regarded as a victim (see Baird and van Liempt, 2016, p. 404). In such perspective, whereas coercion is considered internal, as being related to the actual relationship between smuggler and smuggled migrant, victimisation is mostly external, as far as it has to do with the recognition of a characteristic from relevant authorities and from society more broadly. Despite the tendency of states not to (fully) grant this status to smuggled migrants (Crépeau, 2003, pp. 175–176), the answer seems yet to be positive, considering that in some circumstances factual dynamics of smuggling could change along the course. Also, migrants could actually ignore what would eventually happen to them or could, however, be aware of that and accept the risk because this is the only option they have to escape a situation of danger and distress (UNHCR, 2000; cf. also Baird and van Liempt, 2016, p. 410).

This is particularly noticeable in the case of asylum-seekers or refugees, who sometimes have limited or no access to protection in their states of origin and need to resort to smugglers in order to escape to safety. A point that, in turn, opens a whole debate on the effectiveness of the asylum system in some countries, in particular with reference to the possibility for asylum-seekers to apply for asylum in their countries or to the lack of permanent resettlement mechanisms and humanitarian corridors.

In the victimisation of smuggled migrants, furthermore, the boundary between smuggling and trafficking becomes crucial. Smuggled migrants can turn into victims of trafficking both “en route or on arrival” (Dimitriadi, 2016, p. 64), and this, yet again, highlights the limits of a rigid separation of smuggling and trafficking, pointing, on the contrary, at the existence of a continuum with a space for overlapping (ICHRP, 2010, p. 29; see also McAuliffe and Laczko, 2016, p. 7 and Reitano, McCormack, Micallef and Shaw, 2018, with a particular focus on Libya). Applying a continuum is perhaps more complicated from a legal point of view (where strict definitions are preferred as they create pure categories and possibly more certainty) – yet this seems to better capture the very nature of these two processes.

It should be clarified, however, that even when granting the ‘victim’ status (or, at least, ‘potential victim’) to smuggled migrants, in the criminalisation of smuggling the safety and security of migrants does not seem to represent the main asset to protect. In fact, there is a certain agreement in the

literature in considering state security and border protection as the goods that are defended through such a criminal law approach whereas migrants seem to be protected only in a residual way (Crépeau, 2003, pp. 180–181; Doomernik, 2013, p. 120). Ultimately, the Smuggling Protocol – and the Trafficking Protocol – are “instruments to aid states in the fight against organized crime” rather than “human rights instruments” (Baird and van Liempt, 2016, p. 410). Yet, some pointed out that the Trafficking Protocol still contains several provisions aimed at the protection of human rights, whereas the Smuggling Protocol is a pure criminal law instrument with a repressive aim (Crépeau, 2003, p. 182; Doomernik, 2013, p. 120).

Conveying the complexity: the ‘smuggling spectrum’

Several aspects that characterise the smuggling of migrants emerged in this analysis, reinforcing the assumption that no one-size-fits-all understanding of smuggling exists and that the vast complexity that is actually observable in reality is often not fully perceived and taken into account.

An analytical approach which does not intend to deny such complexity but, rather, to make sense of it, should now make it possible to bring together all the different characteristics of the smuggling of migrants and use them to make said complexity analytically manageable. To do so, I propose an analytical framework which, based on a legal understanding of smuggling as defined in the Smuggling Protocol, provides the necessary dimensions to convey the complexity of the phenomenon as it manifests itself in practice.

The aspects considered above can then be assumed as the analytical dimensions of an area of complexity, where migrant smuggling can be seen and characterised in very different ways and where those very dimensions can be combined through, once again, an evidence- and logic-based operation.

This can be done through the proposition of a ‘smuggling spectrum’ (cf. House of Lords 2015, p. 16, McAuliffe and Laczko 2016, p. 7, and UNODC 2017, p. 65), conceived as a multi-layered continuum where the different dimensions do not appear to be randomly distributed, but rather associated with one another (see Figure 1).

On the one side, one finds loosely-coupled smuggling organisations (or even individuals) with low hierarchy, not perpetrating other crimes and definitely far from any implication in TIP. Such organisations are mainly working on non-particularly dangerous routes and borders, with a relatively low level of coercion and the absence of any victimisation of smuggled migrants, which would lead to the idea of some kind of altruistic smuggler.

On the other side, conversely, one can place those organisations that are structured and hierarchical, active also in other crime areas and particularly in trafficking in persons, where routes and border crossings are more dangerous (also in presence of stronger border control), and with a higher victimisation of migrants, and therefore smugglers are seen as criminals tout court.

Legal definitions (in our case the Smuggling Protocol one) tell us what is smuggling and what is not, what is criminal and what is not. But even just within criminal(ised) smuggling, a wide degree of difference still exists, and these analytical dimensions attempt to make sense of it.

Its intrinsic characteristics make this tool primarily useful in a research-oriented and scholarly perspective; yet, with some direct implications also in terms of policy. Firstly, it can be used to make visible the different characteristics of specific smuggling events (or routes, actors, etc.), which can be placed in some parts of the spectrum or can embrace it more broadly, showing a certain degree of complexity. Secondly, it can serve as a way to understand to what extent the complexity of the phenomenon is taken into account in the context of a certain policy framework or piece of legislation. Thirdly and lastly, it can highlight the different stances taken by different actors – be they policy-

makers or other practitioners – in addressing migrant smuggling: in other words, their understanding of the phenomenon.

These various elements can be particularly helpful in a comparative approach, by type of object of analysis (e.g. different smuggling events or different pieces of legislation) or, even more so, by combining events, policies and actors altogether. In so doing, different smuggling events, policy frameworks and actors' understandings can be placed on the smuggling spectrum, making visible the appropriateness of actors' understanding and of the connected policy options. This serves overall as a benchmark in the analysis of the interaction between the phenomenon, the actors involved in its governance and the policy outputs.

Figure 2 offers a very basic example of that, by sketching out different elements (events, policies, actors) related to migrant smuggling from West Africa to the EU on the same smuggling spectrum. In particular, it considers the case of Niger and the period 2014-2019. The figure highlights:

- a. The empirical observation of smuggling dynamics, which almost embrace the totality of the spectrum, depending also on the specific segment of the route (as observed in Bish, 2019, Brachet, 2018, Campana, 2018, Militello and Spena, 2019, Stambøl, 2019);
- b. One key piece of applicable legislation (the Facilitators' Package, as discussed by Carrera et al. 2016) and some important elements of the policy framework progressively adopted, such as the EU Action plan against migrant smuggling (European Commission, 2015b) and the EU Niger-oriented policies (Akkermann, 2018, pp. 51–52, European Commission, 2016 and 2017, HOSG of France, Germany, Italy, Spain, the High Representative/Vice President of the Union for Foreign Affairs and Security Policy, HOS of Niger and Chad and the Chairman of the Presidential Council of Libya, 2017);
- c. The stance adopted by one of the main anti-smuggling actors, and namely Europol (2017, 2018 and 2020).

Intuitively and synthetically, this basic operationalisation shows the potential use of the smuggling spectrum. In the specific case, it shows, through a comparative approach, the limited institutional understanding of migrant smuggling in West Africa-EU movements and the distance between such understanding and the empirical reality observed and reported. By doing so, it offers not only an opportunity to bring different elements into the same picture and, thus, further highlighting the existing relations between events, policies and actors; it also suggests that specific, pre-determined continua be used to understand this interaction, providing a solid instrument in order to facilitate comparative analyses.

Further empirical studies will be important in order to test and confirm the validity of the inductively generated assumptions of the spectrum, to explore new uses of it and to adjust some of its constitutive elements, if necessary.

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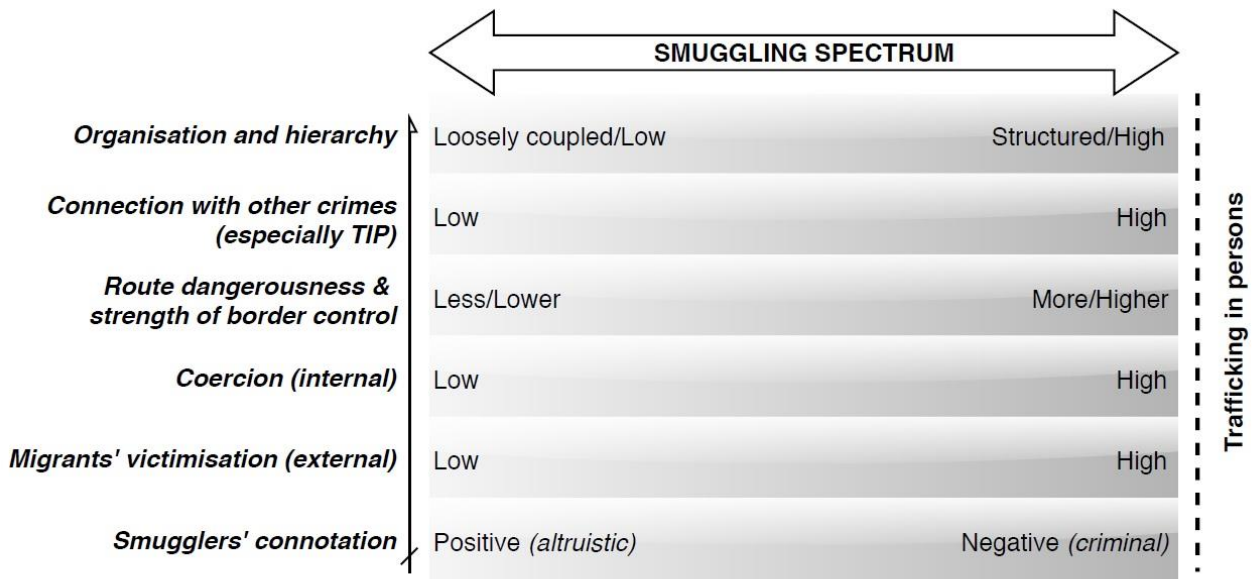
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Figure 1 – The ‘smuggling spectrum’

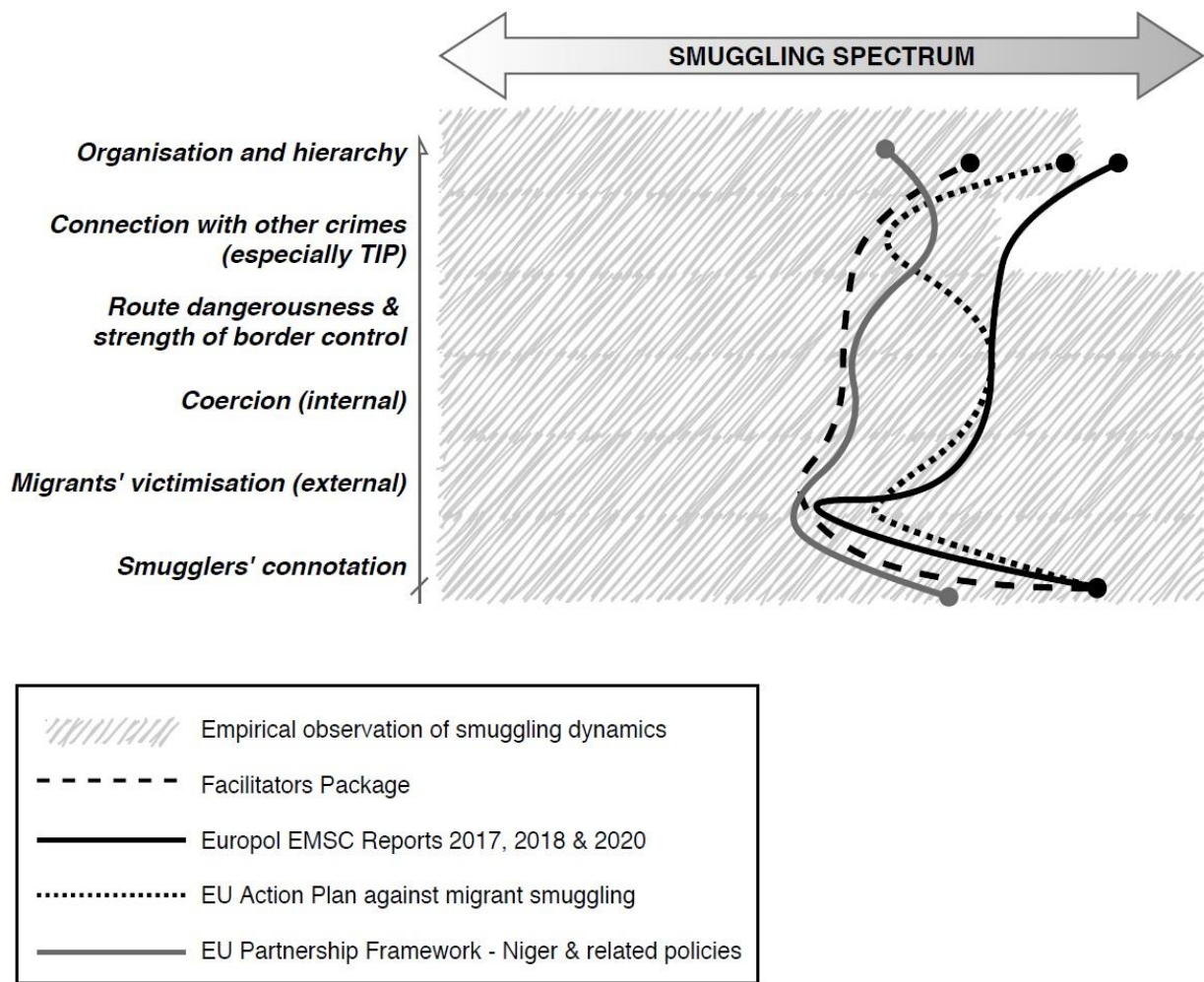


Source: Elaborated by the author

Notes: The ‘coercion’ dimension was mentioned both in the analysis of smugglers and in that of smuggled migrants, but it was not double counted. For this very reason the five dimensions of smugglers and the two of smuggled migrants give a total sum of six and not, as one would arithmetically prima facie expect, seven.

As explained throughout the text, the spectrum only applies to those activities falling within the definition of migrant smuggling under the Smuggling Protocol. Non-smuggling activities, such as the non-criminal involvement in undocumented migration (e.g. humanitarian assistance, search & rescue at sea, etc.) fall outside the spectrum.

Figure 2 – An example of the operationalisation of the ‘smuggling spectrum’



Source: Elaborated by the author

Keywords

Smuggling spectrum, Migrant smuggling, Smugglers, Migrants, Migration, Analytical framework, Continuum