

The relationship between the crime of smuggling migrants and the offenses set forth in Rome Statute



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Introduction

Before talking about the relationship between the crime of smuggling migrants with those crimes stipulated in Rome Statute, it is fine to recall some basic definitions related to the concept of migration first and to the crime of smuggling migrants.

First: Definition of migrant:

There is no universally accepted definition of the term "migrant", but this term covers all cases in which an individual decides to migrate freely without the intervention of an external coercive factor. ⁽¹⁾

The International Organization for Migration (IOM) adopts the

definition that defines migration as the movement of a person or a group of people between countries or within the same country between two places on its territory. ⁽²⁾

Second: Definition of smuggling migrants:

Smuggling migrants may be defined as the arrangement of an illegal entry of a person into a State Party of which that person is not a national or a permanent resident, in order to obtain, directly or indirectly, a financial or other material benefit. ⁽³⁾

The role of the judiciary in coping the phenomenon of smuggling migrants:

Countries, especially receiving countries, are making great efforts to counter the flows of migrants. However, this phenomenon is continuing to grow and increase. Failure to face the phenomenon may be due to the challenges that are facing the States. ⁽⁴⁾ Those challenges that can be hastily summed up as the most important here:

1. Lack of mutual trust between states and excessive adherence to the concept of sovereignty.
2. Diversity of legal systems.
3. Lack or weakness of channels of direct communication between competent bodies in different countries.
4. Different priorities for countries.
5. Cultural and linguistic challenges.

In addition to these challenges, there are others that are facing international cooperation to confront the phenomenon of smuggling migrants, this struggle still lacks the most important tool which is judiciary. It is difficult to say that there is an effective judicial control against migrant smuggling gangs.

This judicial deficit appears both in terms of national and international jurisdiction:

As for the national judiciary:

National judiciary in origin states and in transit or passage states appear to deficit and ineffective. This deficit has been aggravated by the transboundary nature of smuggling migrants crime and the rejection of judicial systems to cooperate with each other for various reasons, for example adherence to an old classical concept of sovereignty, Apart from, the Non-activation of real training systems for judges. So the result to all of this was this deficit in fighting this crime.

As for the international judiciary:

International criminal law defines two types of courts (special courts and permanent courts)

In the case of special courts, 5 courts are established on the occasion of a certain specific crime that has occurred and ended. Consequently, this type of courts is not related to recurring or repeated crimes, such as the crime of smuggling migrants, which necessitates the exclusion of this type of court from our research.⁽⁵⁾

The permanent criminal courts has only one example which is the International Criminal Court, whose jurisdiction and function was regulated by the Rome Statute. This Court 's narrow substantive jurisdiction prevents it adjudicating many crimes that falls outside the scope of the four trial forms enshrined in its Statute, namely article 5 : The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole and the Court shall have jurisdiction under this Statute to consider the following offenses:

- a. Genocide.
- B. Crimes against humanity.
- C. War Crimes.
- D. Crime of aggression.

Elements of smuggling migrants crime:

The physical component of the crime of smuggling migrants is the criminal behavior taking three forms, smuggling of migrants or facilitating the smuggling of migrants, or allowing a person to remain in a country unlawfully

The crime of smuggling migrants, like any other crime, has two grounds physical and moral.

The physical component of this crime is the criminal behavior taking three forms, smuggling of migrants or facilitating the smuggling of migrants, or allowing a person to remain in a country unlawfully.⁽⁶⁾

The moral element is the criminal intent, since the crime of smuggling of migrants is a deliberate crime that does not occur by fault or error.⁽⁸⁾

Noting that according to Article 6 of the Protocol against the Smuggling of Migrants, the crime of smuggling migrants requires a specific criminal intent and not merely general criminal intent. The specific intent is the offender's will to obtain financial or other material benefit.⁽⁷⁾

Does the International Criminal Court have jurisdiction over the offense of smuggling migrants:

As we have noted, Rome Statute has defined four exclusive crimes, namely, war crimes, crimes against humanity, genocide and the crime of aggression.

Thus, the competence of this court in considering the offense of smuggling migrants is subject to the inclusion of this crime as one of the four crimes mentioned above.

The closest models among the four to the crime of smuggling migrants are the crimes against humanity , so we will focus in our research on following the elements, conditions and details of these crimes compared to the crime of smuggling migrants to show the compatibility and dif-

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Rome Statute of
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ference between the two models.

Jurisprudence defines crimes against humanity as crimes committed by individuals of a state against other members of their state or non-state systematically and within a plan of discrimination in order to deliberately harm the other party. However, Rome Statute itself adopted a clear definition of the crime against humanity, According to article 7 of Rome Statute, the conduct that constitutes a crime against humanity if it contains one of the acts enumerated in that article (as a first condition) and the act is committed in the context of a widespread or systematic attack directed against any civilian population and being aware of the attack (as a second condition).

In accordance with article 7, paragraph 1 (k), one of the forms of conduct of a crime against humanity is "other inhumane acts of a similar nature intentionally causing severe suffering or serious injury to body or to mental or physical health".

By analyzing this text, it can be noted that it allows for introducing many acts within its scope, including smuggling migrants.

However, what may make it difficult is the second requirement in article , that the act is committed as part of a widespread or an organizational systematic attack directed against a civilian population or in furtherance of a State

that should include being aware of the attack.

There is no doubt that the linguistic definition of the word "attack" prevents introducing the crime of smuggling migrants as one of the crimes meant in this text, because in reality, migrants are the ones who go to smugglers and ask to be accepted and even pay in return for that, which raises the right to ask where is the attack in such a crime?

This problem, however, seems to be only linguistic because Rome statute itself defines "attack" more broadly and in a way that a smuggling operation of migrants can be considered as an attack in a legal sense – which is what important to us here – even if is not linguistically accurate.

To prove what I just said, paragraph 2 (a) defined the attack as a behavioral approach involving the repeated commission of acts referred to in paragraph (1) against any civilian population pursuant to in furtherance of a of a State or organizational policy to commit such an attack.

To illustrate what I want to say, smuggling migrants is

- 1) Involves multiple commission
- 2) an inhuman act that intentionally causes severe suffering or injury to physical or mental health and ,
- 3) is based on and in application of a specialized smuggling organization policy, so we shall, in this case, have a clear situation where all terms and conditions apply, that enable the ICC to intervene in these cases mentioned according to article 7 of the Rome Statute.

Does referral to the International Criminal Court allow the Security Council to have jurisdiction over the offense of smuggling migrants regardless of whether requirements of article 7 apply or not?

In the preceding lines, we attempted to examine the compatibility of the offense of smuggling migrants with that of Rome Sta-

tute. Here we shall try to find another way of examining the extent of the International Criminal Court's jurisdiction in considering the offense of smuggling migrants

Here we have an essential question: What if the Security Council refers to the International Criminal Court a case that does not fall within its jurisdiction?

First, article 13 of Rome Statute states that "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

The previous text provides that referral to the ICC is either at the request of the Member State or the Prosecutor of the International Criminal Court or by the Security Council. Based on Chapter 7 of the Charter of the United Nations.

Let's return to our question,

Undoubtedly, if the Prosecutor of the Court refers or a State Party requests from the Court to consider an incident that is not within its jurisdiction, the Court shall decide not to exercise its jurisdiction, on the basis of its substantive competence, which is restricted in accordance with the above article 7.

If the referral was made by the Security Council and the Court was informed that the assignment referred to it by the Council was not within its jurisdiction, the most likely would happen that the Court would decide not to exercise its jurisdiction.



The International Criminal Court. credit : internet

However, some jurisprudence here goes to adopt another doctrine. In that point of view, if the referral was from the Security Council, the Court would not have authority to decide its jurisdiction. They argued that when the Security Council referred the matter to the Court, it did not act on the basis of Rome Statute but on the basis of the Charter of the United Nations. Since the Charter gave the Security Council the highest authority in maintaining international peace and security, it is no longer possible to rely on a convention to impede such powers the Council have. According to Article 103 of the Charter of the United Nations, In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail

Therefore, the International Criminal Court cannot decide its jurisdiction according to Rome statute if it conflicts with the charter of the United Nations.⁽⁹⁾

Conclusion:

Facing the crime of smuggling migrants cannot be effectively carried out by national judiciary alone, and that international judicial mechanisms can be more effective in confronting it.

Also, international legal philosophy can adopt an explicit obligation for international judicial institutions to clearly adopt International criminal jurisdiction to consider and adjudicate this crime, it is necessary to reinterpret texts so as to allow the international judiciary to take up the task of coping with this phenomenon as much as possible. And of course without prejudice to proper legal interpretation of texts, especially in accordance with the doctrine of potential will of legislator.

Margins

1 / Abu Ghanem, Mohammed Mahmoud Musaed, the organized crime of smuggling illegal migrates. With an applied study on the Republic of Yemen, p 14

2 / Abu Ghanem, op. Cit., P. 13

3 / paragraph 3 (a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

4 / Abu Ghanem, op. Cit.

5 / for example the tribunal for the assassination of former Lebanese Prime Minister Rafik Hariri.

6 / Abdel-Azim, Amr Mossad, Criminal and security guidance for illegal immigration crimes, p.151-156

7 / Abdel-Azim, Amr Mossad, p.159-160

8 / Almadhagy Wael, Types of referral to the International Criminal Court, p. 109

For more details on the relationship between the Security Council and the International Criminal Court, see Yubi Abdullah, "The Relationship between the Security Council and the International Criminal Court."

References

First: Books, Letters and Articles:

1 - Abu Ghanem Mohammed Mahmoud Assistant, the organized crime of smuggling illegal migrates with an applied study on the Republic of Yemen, Dar Al Nahda Alarabya, 2014

2 – Almadhagy Wael, Types of referral to the International Criminal Court, an article of University of Andalusia for Science and Technology, without T.

3 - Abdel-Azim Amr Mossad, Criminal and Security Confrontation of Illegal Migration Crimes, Dar al-Nahda al-Arabiya, 2016, without i.

4- Yubi Abu Abdullah, The Relationship between the Security Council and the International Criminal Court, PhD Thesis, Faculty of Law, University of Oran, 2011-2012

Second: Documents:

1. The Charter of the United Nations

2. Rome Statute

3. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime