

Human Trafficking and Smuggling in the Migration Context: Challenges and Lessons

This policy brief focuses on irregular migration and the risks attached to being smuggled to another country, as well as the dangers of being trafficked. Smuggling and trafficking of people are regularly confused and, while they have some features in common, there are significant differences.

Definitions

“Smuggling of migrants” is defined in Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000) 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 country of which the person is not a national or a permanent resident. Accordingly, it always entails the crossing of an international border. The person being smuggled consents to take part. People smuggling could take place for altruistic reasons, but the number of such cases is very small. People smuggling is highly profitable.

“Trafficking in human beings” (THB) is a serious crime to which the victim cannot legally consent. Defined in Article 3(a) of the Protocol to Prevent, Suppress and Punish

Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000), it contains three elements:

- the act,
- the means and
- the purpose.

The crime of trafficking includes any one or more of the following acts: recruitment, transportation, transfer, harbouring or receipt of persons. Thus, THB is a process, involving potentially several actors. A person needs to perform only one of these acts to be a trafficker. The moment someone – such as a recruitment agent – recruits a person, ostensibly for normal work, while knowing that the person is to be exploited, that person becomes a trafficker. Actual exploitation does not have to take place.

The possible means used are, for example, the threat or use of force or other forms of coercion, abduction, fraud, and/or the abuse of power or of a position of vulnerability.

Although the purpose of trafficking is exploitation, the person does not have to be actually exploited for the offence to be committed. It is enough that the act (for instance, of recruitment) is done for that purpose. Exploitation includes sexual and labour exploitation, as well as forced begging, forced criminality and the removal of human organs for transplantation.

Whereas smuggling is always international, people can be trafficked across borders or within one country. Once people have been trafficked transnationally, they may be further trafficked within the destination country.

Smuggling and Trafficking of Human Beings

Due to the difficulty for people from the source countries (mostly in Africa, Asia and the Middle East) to migrate to Europe through lawful means, they seek assistance to do so from people smugglers, paying them to organise and facilitate their journey to Europe, either across the Mediterranean Sea or overland through the Middle East and Turkey.

People smuggling is a criminal offence but it is important to keep in mind that, according to the law, the offenders are the smugglers, not the migrants who, in accordance with Article 5 of the Smuggling Protocol, are not to be prosecuted for having been smuggled. However, they may sometimes still be subject to prosecution for irregular entry into a country. Once they arrive at a European country, typically Greece or Italy, they may spend substantial periods of time in refugee camps waiting for their cases to be processed.

According to a recent report by the UNHCR¹ a significant danger for those being smuggled is that, while they may believe that they are only being smuggled and will therefore become free agents when they reach Europe (albeit with no rights of employment, residence, social assistance or health care), they are in reality being trafficked, or else traffickers take control over them whilst they are in transit or while they are in refugee camps awaiting the processing of their cases. This can happen through force or deception where, for instance, the smuggled person is promised a job in the destination country but ends up in a trafficking situation.

The risks to migrants being smuggled include kidnap, sexual and physical violence, and death by drowning if they are at sea. If they end up being trafficked, they may be kept under the control of their exploiters for lengthy periods of time. The smugglers and traffickers know that these people are vulnerable and desperate, often alone and with no support network. Some are held hostage and forced to call their families to urge them to pay a ransom for their release. Unaccompanied minors, who may have embarked upon their journey alone or who have become separated from their family members, are at particularly high risk of exploitation.

The exploitation to which trafficked people are subjected can amount to grave criminal offences. This raises serious challenges for European States, which have significant protection and assistance obligations towards trafficked persons under EU law and human rights law. For example, the Council of Europe Convention on Action against Trafficking in Human Beings (2005) and the EU anti-Trafficking Directive (2011) each require States to take steps to ensure the safety of trafficked persons, including through practical support and assistance to address their needs, which may be complex and significant, as they may have

been subjected to physical, sexual and psychological violence. Moreover, States may be obliged to permit persons who have been trafficked from another country to remain on their territory if their return would place them at real risk of a serious violation of their human rights, such as the risk of torture or inhuman or degrading treatment, or the risk of being re-trafficked, which would violate Articles 3 and 4 respectively of the European Convention on Human Rights (1950). All European States except Russia are bound by the Council of Europe Convention, and they are all monitored for their compliance with the Convention. Failure to comply is reported, and States will come under pressure to modify their policies if they cannot justify them.

The effective protection of trafficked persons, as well as those at risk of being trafficked, depends upon them being identified as such, and not merely as irregular migrants. Failing such identification, they will not receive the protection, assistance and benefits to which they are entitled and which they may badly need; and there is a risk that they may be returned to face danger in their home country. Consequently, States should have in place comprehensive training programmes for relevant professionals, such as border guards, asylum adjudicators, medical professionals and labour inspectors, to enable them to identify those at risk of being exploited.

The Human Rights Dimension

States have significant human rights obligations towards trafficked people. Indeed, THB is often described as a violation of human rights. The Council of Europe Convention on Action against Trafficking in Human Beings, states exactly that in its Preamble. This is persuasive rhetoric but risks failing to highlight exactly where the human rights violation takes place if a person is trafficked.

In addition to obligations of support, assistance and protection, human rights are also violated when a country returns a trafficked or smuggled person to their home country, if there is a real risk that they will be re-trafficked or face some other serious threat in their home country, such as armed conflict. That threat places a duty of international protection upon the destination State, that is, a duty to allow the individual to remain in its territory at least until the State can establish that it is safe for the person to return. The UNHCR has published guidelines to explain how such persons may be entitled to asylum². That duty goes further: smuggled or trafficked people will need shelter and food; some may have significant medical problems; children need to be educated. The failure to provide at least a minimum level of social security may, in certain circumstances, amount to inhuman and degrading treatment³. The provision of these essentials may consume considerable resources, which may give rise to political tensions.

Human trafficking, in the absence of state involvement, is therefore not a human rights violation but a crime. However, there is a human rights *dimension* to THB. This arises when the State fails in its duty of prevention, protection and assistance. States need to be fully aware of their obligations of protection and assistance; and they must be willing to honour them.

The collective expulsion of foreigners is prohibited under Article 4 of Protocol 4 of the European Convention on Human Rights. This means that entire groups of people cannot be lawfully expelled or removed simply based upon their nationality, ethnicity or some other characteristic that they share. Accordingly, States have a duty to examine each case on its own merits. Each human being will require individual consideration of his or her circumstances. This is time-consuming and costly. The State has

a legitimate interest in knowing who is on its territory; and at the same time a duty not to expose such persons to the risk of serious harm by removing them from the territory.

Smuggled migrants may have no identity documents⁴. These may have been lost, stolen or destroyed. They may fear the authorities of the destination country, particularly if their previous encounters with authority in their home country have been negative. They may therefore be reluctant to communicate truthfully with those whose job it is to process their case or even to assist them. This adds to the cost to the destination country of conducting an individual assessment for each migrant.

Non-Punishment

People who have been smuggled are not to be penalised for having entered into an agreement to be smuggled. This recognises that their situation may have seemed so desperate that they felt they had no alternative but to take this course of action.

Similarly, it is widely accepted that trafficked people should not be penalised for offences they have been forced to commit in the course, or as a consequence, of having been trafficked. This is because trafficked people are under the control of their traffickers and as such are not able to make a choice. Such offences could include immigration offences, such as entering a country irregularly, or criminal offences, such as petty theft⁵.

In such situations it is crucial that trafficked persons can be identified as such; otherwise there is a real risk that they will be treated simply as suspected offenders and prosecuted.

Policy recommendations

Training

In order for States to be able to comply with their duties to identify, assist and protect those who have been smuggled or trafficked, relevant officials need to receive appropriate training. Identification of smuggled people may not generally be a major challenge as they are often highly visible, particularly if they arrive by sea. Identification of trafficked persons, as well as those at risk of being trafficked, is more difficult. Such persons will not necessarily self-identify. Furthermore, they may be present amongst larger groups who have been smuggled. Personnel who should be trained to spot indicators of human trafficking include police officers, border officials, personnel of camps where irregular migrants are held, personnel of NGOs (in particular where the State has delegated protection and assistance functions to them), medical personnel and social workers.

Assistance and Protection

States must be fully aware of their protection and assistance obligations towards smuggled and trafficked persons on their territory. These include obligations of immediate assistance, including shelter, accommodation and sustenance, as well as longer-term obligations, including education for children, safe repatriation or international protection. They may need assistance and treatment because of physical, sexual and psychological abuse to which they have been subjected.

Minors

Minors, especially if unaccompanied, are particularly vulnerable to exploitation and abuse. States should have in place facilities and personnel competent to provide the support and care such persons require.

Notes

1 *Desperate Journeys January 2017-March 2018*, especially at 13; this is confirmed by a more detailed report published by the International Organization for Migration in 2017, EL Galos, L Bartolini, H Cook and N Grant, *Migrant Vulnerability to Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes*.

2 Guidelines on international protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, 7 April 2006, HCR/GIP/06/07

3 *D V United Kingdom*, European Court of Human Rights, Application 30240/96, 2 May 1997; see further Ana Gomez Heredero, *Social Security as a Human Right. The Protection Offered by the European Convention on Human Rights* (2007), pp40-44

4 European Commission, *EMN Synthesis Report for the EMN Focussed Study 2017. Challenges and Practices for Establishing the Identity of Third Country Nationals in Migration Procedures* (2017), pp17-18

5 UNICEF UK, *Victim, Not Criminal. Trafficked Children and the Non-Punishment Principle in the UK* (2017); OSCE/Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013)

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