DIIS POLICY BRIEF

Understanding human smuggling as a human rights issue

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Governments typically view human smuggling as an issue of law enforcement and border control. Instead, human smuggling should be viewed as a human rights issue.

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DEFINING HUMAN SMUGGLING

Human smuggling plays a central role in migration from areas affected by conflict and poverty to areas of relative safety. The terms 'smuggling' and 'trafficking' are often used synonymously in public discussions and the media. The accepted international definitions of smuggling and trafficking were not devised until the end of the 1990s. In international law, with the signing in December 2000 of the United Nations *Protocol Against the Smuggling of Migrants* and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons,* a distinction was made in order to aid authorities in managing and prosecuting individuals involved. Human smuggling and trafficking are covered under the two *Protocols to the Convention Against Transnational Organized Crime* (UNTOC), which were negotiated in Vienna under the United Nations Commission on Crime Prevention and Criminal Justice, with the UN Centre for International Crime Prevention serving as secretariat, in the 'Vienna Process'. The Smuggling Protocol was signed at a meeting convened in Palermo, Italy, as one of what were dubbed the 'Palermo Protocols'. The following definition of human smuggling is widely accepted by governments and academic communities:

> 'Smuggling of Migrants' shall mean the procurement, in order to obtain, directly or indirectly, *a financial or other material benefit, of the illegal entry*

POLICY RECOMMENDATIONS

State responses to human smuggling:

1. Improve identification of who has been victimised by violence or fraud. This should be a key priority of law enforcement when apprehending 'survival migrants' using smuggling services.
2. Improve awareness of human smuggling through training of police, lawyers, members of civil society and the public.
3. Implement and enforce legislation that can provide protection to smuggled migrants.
4. Potential migrants should be educated in countries of origin, transit, and destination to raise their awareness of the risks involved as well as in how to contact police in case they find themselves subject to violence, fraud or kidnapping.
5. Improve the number of reception areas for minors without documents.

> *of a person into a State Party* of which the person is not a national or permanent resident. (Italics added)

Human smuggling is legally differentiated from human trafficking, which is defined as:

> … the recruitment, transportation, transfer, harbouring or receipt of persons, *by means of the threat or use of force or other forms of coercion*, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, *for the purpose of exploitation*. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. (Italics added)

The majority of the Member States of the United Nations have ratified the Smuggling of Migrants Protocol (112 signatories). However, many countries do not have dedicated action plans or strategies to respond to growing numbers of 'survival migrants' using smuggling to access their territories. Multiple fields of concern have arisen in the legal and political discussion surrounding the definitions of smuggling and trafficking, including differentiating the smuggler of persons from the smuggled person, differentiating between human smuggling and human trafficking, differentiating between punishing smuggling and trafficking, and protecting persons who have been smuggled. It is the legal division between smuggling and trafficking that is at the root of these legal and political discussions. Trafficking, for example, must include three elements: movement and harbouring, deception or force, and exploitation at the destination. In trafficking as well as smuggling, these elements are not always present, with some cases involving deception or force without exploitation at the destination, and other cases involving movement that has no relation to the final exploitation. The definitions of smuggling and trafficking exclude many deceived or exploited migrants from protection or access to basic human rights.

STATE RESPONSES TO HUMAN SMUGGLING

The difficult and dangerous lengths to which individuals go to migrate have raised serious questions about the moral, legal, and normative responses of states to 'survival migrants'. Fundamental tension arises when individuals have a right to leave their country, but are denied the corresponding right to enter another. States' preoccupation with controlling and managing migration has given rise to the migration industries of management and control as well as those of human smuggling, further antagonising the debate about the treatment of migrants. Human smuggling forms only one part of the migration industry: an industry of migration management and control has also arisen which profits from the movement of people through enhanced border controls, and new technologies to monitor and track populations on the move. Northern states grant mobility rights unequally with strict visa controls, pushing up demand for smuggling from certain nationalities and not others. In general, national interests in preserving state sovereignty and security tend to prevail. States have only recently been willing to work effectively on regional co-operation to combat human smuggling or to implement their international obligations from the 1951 Refugee Convention. But how should states ethically respond to human smuggling? How can states reconcile human rights with human smuggling as a crime? To what extent is the right to asylum compromised by state reactions to smuggling? The consequences of denying permission to some, while granting it to others, raises important issues of human rights.

WHO USES HUMAN SMUGGLING AND WHY?

Migrants use smuggling in order to cross borders and to flee existential threats to their survival. The fastest growing nationalities detected for illegal border crossing in the European Union between 2011 and 2012 were Syrians, Somalis and Eritreans according to the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX). Afghans make up the largest group of apprehended migrants in the EU. Those apprehended in the EU come from regions embroiled in conflict and environmental stress, where individuals face an existential threat to their lives. Thus, migrants using smugglers are often survival migrants.

Survival migration refers to a type of migration caused by sources of external displacement such as environmental disaster, state fragility, and livelihood failure. Survival migrants use human smuggling to move from their country of origin because they face an existential threat to their basic rights (including those of basic liberty, basic security, and basic subsistence), and are unable to find a resolution to these existential threats within domestic courts or through internal migration, making cross-border international migration the only option. However, migration is often constrained because of border controls and stringent visa policies. Human smuggling networks meet the need of survival migrants to cross international borders and to avoid enhanced border controls.

MEASURES AIMED AT CONTAINING MIGRATION	MEASURES AIMED AT PROTECTING MIGRANTS
• Criminalisation of migrant smuggling • Measures against the smuggling of migrants by sea • Information exchange among law enforcement authorities about smuggling organisations • Border measures - Strengthened controls - Obligations and sanctions for carriers - Denial of entry for smugglers - Strengthened cooperation between border control agencies • Security and control of documents • Training and technical cooperation for immigration officials • Prevention measures which inform the public and migrants of risks involved • Cooperation on bilateral or multilateral agreements preventing smuggling • Return of smuggled migrants	• Protection and assistance measures - Measures to preserve and protect the rights of smuggled migrants - Measures against violence - Assistance to migrants whose lives and safety are in danger - Measures to take into account the special needs of women and children • Migrants not considered criminals because they have been smuggled; not liable to criminal prosecution for being objects of smuggling

Comparison between the measures of the Palermo protocols aimed at containing migration and those aimed at protecting migrants

A key human rights point within the area of human smuggling is the lack of protection offered to migrants who have been smuggled, particularly given that a majority of asylum seekers use human smuggling to flee political persecution. The relationship between smuggling and asylum points to the deep ambiguities in the Palermo protocols and their relation to other human rights instruments. The Palermo protocols therefore should not be seen as human rights instruments, but rather as instruments to aid states in the combatting of organised crime. Issues of sovereignty and security are the driving force behind state efforts to control migration. However, although states have rights to prevent entry, states must ensure that an individual's means of entry into a state should not adversely affect their ability to access asylum and make a claim for refugee status. Multiple analyses of the laws criminalising smuggling have demonstrated that to do so constrains the ability of individuals to access rights and gain protection if necessary.

The main protection concerns involved in the Smuggling Protocol are outlined in the table above.

Efforts to end the practice of human smuggling have not seen much success. Border controls are ineffective tools because smugglers improve clandestine techniques, divert flows through other countries, or change business tactics by entering counterfeit document markets. Enhanced surveillance activity makes it easier to detect human smugglers and migrants, but does not stem the flow. Returns (both assisted and forced) are ineffective because people can restart the journey, often at considerably more expense. Information campaigns which try to prevent migration have been ineffective because the pressures to migrate outweigh efforts to prevent it. At the level of documentation, it is difficult to detect fraudulent documents and conduct operations against document fraud. Humanitarian responses to migration, including asylum, may be pull factors for more migration, but offer protection to vulnerable people. Providing opportunities for travel and work are difficult to execute in European labour markets because they are unpopular with political constituents. The effects of decriminalising smuggling are unclear. Policy research in general has concluded that ending smuggling requires comprehensive approaches which include providing options for temporary employment, although no definitive solutions have been proposed. In other words, there are no clear-cut efforts to end human smuggling, as the practice is bound up with the international structure of the state system and the existence of border controls.

EMERGING ISSUES IN HUMAN SMUGGLING

First, interactions between smugglers and migrants are often based on threats and physical abuse. Intimidation, coercion, physical force and fraud can be used to take advantage of migrants using the services of smugglers. Violence is used during operations to assert control, to discipline the group, to enforce ad hoc rules, to coerce those who may be unwilling to cooperate with smuggler demands, or to collect payment. Abuse and rape of women has also been reported. Violence maintains group boundaries between the organisers of smuggling and the clients. The scale of violence experienced by migrants is unknown, but is thought to be increasing as unscrupulous groups enter into the business of smuggling and as states increase the conditions of entry, barring many

from gaining protection. The entrance of violent groups into the smuggling businesses in areas such as Mexico, Egypt, Israel, Turkey and the Horn of Africa are only a few examples of world regions where violence and exploitation have come to the foreground in human smuggling.

Second, knowledge about unaccompanied minors using human smuggling is relatively limited. Minors (itself a culturally specific term, often used to designate those 18 years old or younger) constitute a growing population among migrants using smugglers to reach other countries. The smuggling of minors raises serious questions concerning protection, victimisation and human rights. Minors may be more vulnerable to exploitation and forms of human trafficking. Minors travelling alone are particularly at risk. Furthermore, minors and adolescents are at risk of developing emotional problems related to past traumatic events, and the smuggling journey may magnify the risks to their emotional and physical well-being.

WAYS FORWARD

How can the debate on human smuggling be redirected from a control discourse to a human rights discourse? It is difficult to enter into the human rights debate without bringing normative and moral concerns to the fore. Receiving countries often misinterpret the intent of migrants to enter their territories, and control responses often fail to address the root causes of migration. Migrants are also wilfully violating states' laws, and take great risks to avoid detection and apprehension, often at the cost of their lives. It is often difficult for states to decide who needs protection. Defining migrants as inherently dangerous has negative consequences for those who are vulnerable and in need of protection. Human rights debates may open a space for protection by emphasising protection and inclusion over control and exclusion. For example, specific state responses to human smuggling can emphasise protection as a key priority.

Specific state responses to human smuggling can take a variety of forms. Improving the identification of those migrants who have been victimised by violence should be a key priority for law enforcement. Providing protection should take priority for those who have experienced violence at the hands of smugglers. Implementing existing rights legislation and providing protection to smuggled migrants should be a main goal of anti-smuggling operations. Improving the awareness of human smuggling is also important, and can be done through training of police, lawyers, members of civil society, and the public. National research agencies and funding bodies can assist the process through offering research grants in a bid to improve data and knowledge on the topic of smuggling. Potential migrants should be educated in countries of origin, transit, and destination to raise their awareness of the risks involved as well as how to contact police in case they have been subject to violence, fraud or kidnapping. Minors are particularly vulnerable and the number of reception areas available for minors without documents should be improved.

This policy brief is based on PhD fieldwork carried out in Turkey and Greece in 2011 and 2012 as part of Theodore Baird's PhD thesis on human smuggling from Africa to the Middle East. This brief falls under the aegis of MIMM (the Migration Industry and Markets for Migration Management), an international research network founded to explore the roles various migration industry actors play in contemporary migration flows.

FURTHER READING

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For more on survival migration, see Betts, Alexander (2010) "Survival Migration: A New Protection Framework," Global Governance, 16: 361–82.

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