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Decriminalising 'Humanitarian Smuggling'

Boats carrying refugees and migrants arrive on the shores of Lesbos, Greece. Credit: UNHCR/Achilleas Zavallis

Key points

- Efforts to combat human smuggling and suppress humanitarian acts are in service of a larger agenda of securitising and deterring irregular migration.
- Both the UN Smuggling Protocol and the EU Facilitation Directive risk suppressing genuinely humanitarian acts of assistance.
- The EU Facilitation Directive is a tacit expansion of the UN Smuggling Protocol, giving states discretion to criminalise a broad range of acts of assistance to irregular migrants.
- Bringing the EU Facilitation Directive in line with the UN Smuggling Protocol is not sufficient to decriminalise humanitarian acts of assistance.
- The wrongful harms inflicted by smugglers may be more appropriately punished under existing criminal offences rather than through smuggling prohibitions.

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Summary

This brief summarises the legal and policy findings from the Refugee Studies Centre Working Paper, **The 'humanitarian smuggling' of refugees: criminal offence or moral obligation?** It outlines the concept of 'humanitarian smuggling', and then critiques smuggling prohibitions at the international and the EU levels. It argues that these prohibitions are overbroad and vague, failing to meet basic requirements of the rule of law. Moreover, they criminalise acts that fall outside the law's stated purpose, acts that are often ethically defensible. Finally, the brief analyses existing proposals to improve the framework governing smuggling and provides additional recommendations to decriminalise 'humanitarian smugglers'.

The context

In the current 'refugee crisis', the European Union (EU) and its Member States are employing all possible tactics to stop irregular migration[1] – from targeting organised smuggling groups who often deliberately endanger migrants and refugees, to suppressing humanitarian actors and private individuals who attempt to remove refugees from harm. While the European Commission (EC) recognises that the introduction of legal pathways to the EU would also reduce irregular migration, it remains focused on combatting human smuggling and all humanitarian actions that might be construed as such.

The EC was scheduled to release a proposal by the end of 2016 to 'improve the existing EU legal framework to tackle migrant smuggling' and has rhetorically acknowledged the need to '[avoid] risks of criminalisation of those who provide humanitarian assistance to migrants in distress' (European Commission 2015: 3). As such, it has been reviewing the Council Directive that defines the facilitation of unauthorised entry, transit and residence – the EU Facilitation Directive (European Council 2002). This legislation governs human smuggling in addition to other acts facilitating the transit and residence of irregular migrants.

The concept of 'humanitarian smuggling'

The term human smuggling typically conjures up images of those individuals whose actions are largely responsible for over 5,000 dead or missing migrants in the Mediterranean in 2016 (IOM 2016). Such human smugglers are accurately described as 'travel agents of death', as articulated by the Director General of the International Organisation for Migration, William Lacey Swing (Inskeep and Montagne 2015).

Yet, some human smugglers, as the RSC's Cathryn Costello argues, are more appropriately described as 'travel agents'. **The term 'humanitarian smuggling' refers to acts facilitating irregular entry that are morally permissible and that should fall outside the scope of punishable offences under smuggling prohibitions.**

For example, in October 2015 Rob Lawrie, a 49-year-old British man, was moved by the pleas of a desperate father and attempted to smuggle a four-year-old Afghan girl from the abhorrent conditions of the 'Calais Jungle' to the home of her relatives in the UK. Lawrie was apprehended by the French authorities, charged with human smuggling, and faced up to five years in prison. While ultimately cleared of the charge due to the humanitarian nature of his act, the threat of criminalisation and trial led to immense regret over his compassionate act and to attempted suicide (Wilsher 2016).

A second example is the case of Salam Aldeen, co-founder of a volunteer rescue organisation operating off the coast of Greece, who in January 2016 was arrested on charges of human smuggling. Since co-founding Team Humanity in September 2015, Aldeen had responded to distress calls from approximately 200 boats with a total of approximately 10,000 refugees on board, seeking to uphold the duty to rescue at sea. Aldeen is now unable to leave Greece, is required to check in weekly with the Greek authorities, and faces up to ten years in prison (The Observatory 2016).

'Humanitarian smuggling', and the risks involved with engaging in morally blameless, praiseworthy or even morally obligatory acts, is not new. It has a long distinguished history, from the smuggling of slaves via the Underground Railroad in the United States, to the rescue of Danish Jews during World War II, to the rescue by Cap Anamur, an Italian humanitarian organisation, of migrants in distress at sea in 2004.

'Humanitarian smuggling' encompasses a spectrum of morally complex acts, ranging from the morally blameless, like removing a young refugee from potentially dangerous conditions, to the morally imperative, like rescuing thousands in immediate peril at sea.

Legal deficiencies

In anticipation of the release of the EC's report on the EU Facilitation Directive, recent analyses of the directive have suggested that, at a minimum, it should be revised to more closely resemble the 2000 United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol). The authors of a 2016 report commissioned by the European Parliament (EP) argue that the Directive suffers from an 'implementation gap' in several areas, including the threshold of what constitutes an act of smuggling and the possibility of a humanitarian defence (Carrera et al. 2016: 10).

Refugees and migrants arrive in Catania, Sicily, after being rescued at sea. Credit: UNHCR/Iosto Ibba

However, over and above this 'implementation gap', the Facilitation Directive is more appropriately described as a *tacit expansion* of the already misguided UN Smuggling Protocol. **Recommendations to amend the Facilitation Directive must not only take into account the Directive's deficiencies, but also the Smuggling Protocol's shortcomings.**

UN Smuggling Protocol

The UN Smuggling Protocol establishes the threshold for what constitutes criminal smuggling based upon the element of gain. Gain is defined as obtaining, 'directly or indirectly, a financial or other material benefit' (United Nations 2000: 2, Article 3). The gain threshold acts as a for-profit/humanitarian binary intended to exclude those who provide humanitarian assistance to migrants from the provisions of the protocol.

This gain threshold was:

> *included in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties* (UNODC 2006: 469).

Actions for gain and those for humanitarian reasons are thus portrayed as mutually exclusive. **This for-profit/humanitarian binary is problematic, however, as it rests on the premise that acts for gain cannot be humanitarian.** An organisation could conceivably act based on 'humanitarian reason' but also be compensated for doing so. If Aldeen, for example, earned a fair salary rather than acting as a volunteer, his actions might be interpreted as simultaneously humanitarian and for gain.

In theory, the gain threshold should be reinforced by the Smuggling Protocol's focus on transnational organised crime. The Scope of Application outlined in Article 4 states that the Protocol is limited to offences that are 'transnational in nature and involve an organised criminal group' (United Nations 2000: 3). Yet, the inclusion of the 'transnational' and 'organised crime' elements are optional in the Protocol's transposition into national law. The 'Legislative Guide for the implementation of the Smuggling Protocol' states that '[i]n the case of smuggling of migrants, domestic offences should apply even where transnationality and the involvement of organised criminal groups does not exist or cannot be proved' (UNODC 2004: 333).

The Smuggling Protocol thus not only rests on a problematic humanitarian/for-profit binary, but the discretion given to states in transposing the Protocol into national legislation permits the creation of laws that risk criminalising individuals who are not part of transnational organised criminal groups.

EU Facilitation Directive

The EU Facilitation Directive can be understood as a tacit expansion of the UN Smuggling Protocol. It sanctions a wide range of acts of assistance to irregular migrants, including not only the facilitation of irregular entry, but also of irregular transit and residence. As it pertains to the facilitation of entry and transit, the Directive stipulates that Member States:

> *shall adopt appropriate sanctions on: any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens* (European Council 2002: 17, Article 1.1a).

Unlike the Smuggling Protocol, the Facilitation Directive does not include a gain threshold for the facilitation of irregular entry, nor does it purport to target transnational organised crime.

The Facilitation Directive does, however, include an optional safeguard for those whose assistance of entry or transit is humanitarian in nature: '[a]ny Member State may decide not to impose sanctions…where the aim of the behaviour is to provide humanitarian assistance to the person concerned' (European Council 2002: 17). This safeguard, known as the 'humanitarian clause', provides Member States with the possibility to exempt those like Lawrie and Aldeen from criminalisation.

Most Member States have transposed the Directive expansively, permitting the criminalisation of a broad range of individuals facilitating irregular entry. According to a report by the Fundamental Rights Agency, **in 2014 the optional 'humanitarian clause' had been explicitly transposed at the national level in only eight Member States**. The range of the exemptions includes prohibiting the punishment of assistance to family members in Austria, to preventing sanctions against those who act on behalf of a volunteer organisation dedicated to assisting asylum seekers in the UK and Ireland, to not punishing assistance arising out of unforeseen circumstances, like emergency or rescue, in Lithuania (FRA 2014: 10).

While a humanitarian exemption could theoretically resolve the deficiency of the for-profit/humanitarian binary established in the UN Smuggling Protocol, **the optional nature of the exemption ultimately permits the criminalisation of an overbroad spectrum of activity at the national level regardless of the element of gain**.

The UN Smuggling Protocol and the EU Facilitation Directive take distinct approaches to target smuggling. Yet, the fact that they risk criminalising humanitarian acts of assistance at the national level, albeit to different degrees and through different means, is evidence of the fact that both prohibitions are in service of the same goal – to deter irregular migration.

Recommendations

Given the deficiencies in both the UN Smuggling Protocol and the EU Facilitation Directive to offer safeguards for those who provide humanitarian assistance to irregular migrants, how should the EU Facilitation Directive be revised? The first three recommendations below examine existing proposals. The final two consider additional possibilities in light of case law and the shortcomings in existing recommendations. These recommendations are not necessarily mutually exclusive.

1) Mandatory exemption as defence against prosecution

A common recommendation to prevent the criminalisation of 'humanitarian smugglers' is to make the humanitarian exemption in the EU Facilitation Directive mandatory (FRA 2014). A mandatory exemption, if properly drafted, would allow for those who engage in humanitarian acts of smuggling to have a successful defence against prosecution.

But, even if a humanitarian exemption ensured a successful defence, it is ultimately insufficient. The process of being charged with smuggling and threatened with prosecution is punishment itself for the individuals involved, acting as *de facto* criminalisation. In Lawrie's case, for example, the threat of prosecution led to attempted suicide. Moreover, **the threat of prosecution reaches far beyond the accused and can have a tremendous deterrent effect on future humanitarian acts** (Carrera et al. 2016).

The border between Austria and Hungary. Credit: UNHCR/Gordon Welters

2) Exemption as a bar to prosecution

Given the shortcomings of a humanitarian exemption as a defence, the EP-commissioned report concludes that the exemption should be a bar to prosecution. The report suggests that a bar would 'ensure that no investigation is opened and no prosecution is pursued against private individuals and civil society organisations assisting migrants for humanitarian reasons' (Carrera et al. 2016: 64).

A bar to prosecution would theoretically protect all individuals who provide humanitarian assistance from having any case brought against them. If properly drafted, all those providing humanitarian assistance would have a protected status. In practice, however, **a bar to prosecution is only effective where it is possible to clearly define the category protected by the status**. While it would be possible for this category to include family members of refugees or individuals working for humanitarian organisations, it would be more challenging to protect such a broad category as 'private individuals'.

Moreover, even if the group with protected status was clearly and unambiguously defined, there is no guarantee that it would operate effectively. Article 31 of the 1951 Convention Relating to the Status of Refugees commits not to punish presumptive refugees, yet in reality asylum seekers are still prosecuted for illegal entry in many states (Hathaway 2008).

3) Threshold of excessive gain

The EP-commissioned report proposed that in addition to a humanitarian exemption as a bar to prosecution, the Facilitation Directive should amend the definition of facilitation of irregular entry and transit to incorporate a financial gain element in line with the Smuggling Protocol. The report states that this gain element, 'should be qualified to encompass only "unjust enrichment" or "unjust profit"', notably limiting this qualification to 'bona fide shopkeepers, landlords and businesses' (Carrera et al. 2016: 64). There is no question that if the Facilitation Directive were revised to incorporate a mandatory humanitarian exemption, in addition to adding the financial threshold, this element of gain should apply narrowly to excessive gain.

The excessive/standard gain distinction is not without legal precedent. In September 2015, the Austrian Supreme Court ruled that licensed taxi drivers who assisted refugees to cross the border from Hungary to Austria could not be convicted of human smuggling if the fare did not surmount typical standard fees for the journey (Schloenhardt 2016; *11Os125/15i*). Although only applying to licensed taxi drivers, this rightly nuances the for-profit/humanitarian binary. Such cases involving individuals charging standard fares for transport across borders, however, may conceivably fall under other legal prohibitions, such as civil carrier sanctions.

4) A more narrowly drafted smuggling offence

The above recommendations would undoubtedly narrow the gap between what is and what ought to be criminalised. **A more comprehensive solution would be a far narrower definition of blameworthy smuggling**. This definition should provide maximum certainty that those fulfilling a humanitarian duty to rescue, or even engaging in a morally blameless act of smuggling, are not simply exempt from criminal prosecution, but have no possibility of being construed as blameworthy smugglers warranting criminalisation.

A properly defined offence of smuggling in accordance with widely accepted principles of legality should take into account both the wrongfulness and the harm associated with the act. The wrongfulness is tied to the physical act of facilitating the irregular crossing of a border. While this act may not be considered morally wrong, it is wrong insofar as it violates the sovereignty of the territory of the state being transgressed. The harm has to do with the mental intent and manner in which the border crossing is carried out, without proper regard for the safety of the person transported. Such harms would fall on a hierarchy of blameworthiness, from negligent to reckless to deliberate harm.

The November 2015 Supreme Court of Canada (SCC) case, *R v. Appulonappa*, sets a legal precedent for a narrower smuggling prohibition. The SCC ruled that Canada's law criminalising smuggling, S. 117 of the Immigration and Refugee Protection Act, exceeded its legislative intent to criminalise organised crime. S. 117 is not dissimilar to the Facilitation Directive, theoretically sanctioning any individual whose actions facilitate irregular entry. The SCC ruled that S. 117 should be 'read down…as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members)' (*R v. Appulonappa* 2015: para. 86). Amendments to S. 117 may serve as a model for a more narrowly drafted prohibition.

5) Other existing legal prohibitions

The previous four recommendations work to narrow existing smuggling prohibitions. Yet, without the attempt to transgress a national border, the typical acts of 'bad smugglers' would likely fall under a pre-existing section of criminal law with clearly defined gradations of offences. From exploitation to operating an unlicensed or unseaworthy vessel to reckless endangerment to murder, **the acts of blameworthy smugglers are often criminalised under existing criminal laws**. If our concern is genuinely to target the 'travel agents of death', then existing criminal laws may provide a fairer and more calibrated response.

Conclusion

The barrier to these recommendations lies with the fact that what the law's purpose *ought* to be and what the law's purpose *is* are often in opposition to one another. If the EU's apparent emphasis on combatting smuggling were indeed aimed at combatting smugglers who endanger refugees and migrants, then smuggling networks would be repressed and blameworthy smugglers brought to justice. **Yet, smugglers – both those who are 'travel agents of death' and those who are simply 'travel agents' – are Europe's scapegoat in the 'refugee crisis'**. Targeting human and humanitarian smugglers is Europe's Band-Aid solution to a problem that can only be adequately addressed through safe and legal pathways for refugees to reach Europe.

Endnote

[1] The term 'irregular migration' typically refers to the cross-border flow of individuals who enter a state without that state's legal permission to do so.

Further reading

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