

INTERNATIONAL LEGAL RESPONSES ON PEOPLE SMUGGLING

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Abstract: People smuggling is a threat to maritime security. Indeed, this issue has become one of the main concerns of the international community, as people smuggling not only affects countries of origin and destination, but also transit states. According to the British Home Office, around 30 million people are smuggled every year all over the world. Moreover, a vast amount of money is received by people smugglers in return for their services. The perilous nature of people smuggling operations means that people's lives are often threatened, thus making people smuggling one of the main threats to maritime security in the region. Therefore, the issue is worthy of particular attention, and further measures should be implemented in order to solve the problem.

Keywords: legal response, human smuggling, migrants, maritime security

Introduction

People smuggling constitutes an offence under international law. The offence is committed when people attempt to unlawfully enter another state's territory via sea, land or air. Indeed, these people are often assisted by professional smugglers who know the best drop-off points in the destination state. The smuggling process also takes into consideration patrols by border control officials. Successful smuggling thus involves being able to evade detection by these officials¹. In this way, eradicating people smuggling activities - whether by land, sea or air - becomes a border control issue². For the purpose of this article, however, people smuggling by sea will form the main focus of the discussion.

People Smuggling involves a vast number of countries, as well as numerous routes which have continued to grow over time³. Technological advancements, such as the advent of complex navigational equipment, have also helped people smugglers refine their activities and escape detection.

It is believed that the number of illegal migrants via land, sea and air are around 30-40 million out of approximately 191 million migrants worldwide. This figure accounts for 15-20% of the world's total immigration⁴. Meanwhile, the Global Commission on International Migration has acknowledged that the number of illegal migrants is estimated to be 2.4 to 4 million people annually⁵. With respect to migration by sea, the UN Secretary General has reported that in 2006 there were an unprecedented number of migrants who used maritime routes to unlawfully enter the territory of other states⁶. Indeed, it has been reported that between 2001 and 2007 there were more than 1,200 incidents involving more than 61,400 migrants⁷. However, these statistics do not represent the actual number of illegal migrants, as the reported figures only take into account those illegal migrants that were apprehended by authorities. Hence, the actual number of illegal migrants worldwide is likely to be much higher⁸. In light of these statistics, it is

¹Patricia Mallia, *Migrant Smuggling by Sea: Combating a current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers, 2010), p.7

²Ibid, P.7

³Ibid, P.8

⁴Ibid, P.8

⁵Ibid, P.8

⁶UNGA, 'Oceans and the Law of the Sea: Report of the Secretary-General' (2008)

⁷Mallia, above n 1, P.9

⁸Ibid, P.8

hardly surprising that people smuggling has caused disruption to the international legal framework governing, as well as to the national immigration policies of states⁹.

There are several causes of people smuggling. Some people undertake the journey to flee volatile political situations in their home country, while others are simply seeking a better place to live. However, poverty has always been one of the main reasons people choose to 'migrate' to another country. Their intention is to make a better life for themselves by seeking employment opportunities in their destination country¹⁰. Another factor that causes many people to migrate is discrimination. In some parts of the world, people face discrimination on the basis of their race or gender, and therefore are not afforded the same employment opportunities as the general population¹¹. Furthermore, there are countries where inequalities exist with regard to the treatment of women. In these places, women are marginalised in economic, social and political circles and do not receive the same rights enjoyed by men. Humanitarian crises have also played a role in the rise of people smuggling¹². In some states, people face abuse on the basis of their race, religion and/or political membership, thus causing them to voluntarily 'migrate' to other countries.

However, the notion of resettling in another country to enjoy a better quality of life does not always eventuate. During the smuggling process, many people are treated inhumanely, with some even being subjected to torture. In some circumstances, 'immigrants' have even died during the course of their voyage. In 2001 for example, 356 people died when an overcrowded ship commissioned by people smugglers sank off the coast of Indonesia¹³. Furthermore, terrorist groups harness people smuggling activities, using them as a way to clandestinely enter another state's territory¹⁴.

States have taken measures to combat people smuggling at the national, regional and multilateral level. At the multilateral level, people smuggling is considered an offence pursuant to the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol) which is attached to the United Nations Convention on Transnational Organized Crime (CATOC). CATOC defines an "organized criminal group" as:

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit¹⁵.

At the regional level, the Bali Process has been one of the most important forums in addressing the issue of people smuggling. Indeed, it led to the creation of an Ad Hoc Group to implement the Bali Process Regional Cooperating Framework (RCF). Established on 30 March 2011, the RCF aims to establish practical arrangements for members to respond to the irregular movement of people through "consistent processing of asylum claims, durable solutions for refugees, the sustainable return of those not owed protection and [the] targeting of people smuggling enterprises".

Process of Smuggling

People smugglers charge exorbitant fees to transfer would-be migrants to another state¹⁶. Indeed, those seeking to be 'resettled' often require their relatives to shoulder all or part of the financial burden. It is often the case that these relatives do not have the required funds, and must thus take out a loan to pay the fee demanded by the people smugglers. However, instead of going to established banks, they invariably choose questionable lending institutions that ask fewer questions regarding the reason for the loan. However, these lenders almost always charge a higher rate of interest than the official banks. Thus, in many cases, the borrower ends up losing their home or what little land they have in order to pay the debt.

⁹Ibid, P.8

¹⁰UNHR, 'Report of the Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography: Mission to Morocco, E/CN.4/2001/78/Add.1' (2001) <<http://www.ohchr.org/en/issues/children/pages/childrenindex.aspx>> para.21.

¹¹Tom Obokata, 'Smuggling of Human beings from a human rights perspective: Obligations of non-State and State actors under International Human Rights law' (2005) 17(2) *International Journal of Refugee Law*, p.399

¹²Ibid. p.399

¹³UNHR, 'Report of the Special Rapporteur on Migrants' (2002) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/108/38/PDF/G0210838.pdf?OpenElement>>, para 32.

¹⁴Mallia, above n 1, p.7

¹⁵Ibid, p.9

¹⁶Obokata, above n 11, p. 400

During their voyage to the destination country, illegal migrants are exposed to several risks. Indeed, people smugglers have little regard for the proper treatment of the people they are transporting. For example, it is common for illegal migrants to be carried in overcrowded containers for extended periods of time. As the result, they suffer sickness and are prone to dehydration, malnutrition as well as exhaustion. Furthermore, there have been instances where people have been tortured or treated inhumanly during their voyage. Indeed, incidents of sexual assault and other forms of violence are relatively common, and serve to earn more money for the people smugglers. What is more tragic is that there have been cases where illegal migrants have lost their lives before reaching the destination country. As mentioned earlier, 356 people lost their lives in 2001 when their overcrowded boat sank off the coast of Indonesia. Unfortunately, this is not an isolated case. In other parts of the world, such as in the UK, the US, Ireland and Libya, there have been reports of various accidents during the people smuggling voyage, as well as incidents of illegal migrants being treated inhumanely by people smugglers¹⁷.

Consequences of Smuggling

If we look carefully at the definition of people smuggling articulated in Smuggling Protocol, it is clear that the offence is completed when those smuggled reach their destination state¹⁸. However, they may still be treated with violence in their new home. As mentioned earlier, many illegal migrants must borrow money in order to finance their voyage, and are thus willing to accept any job they are offered when they reach their destination country, even if the salary and/or working conditions are less than decent. Indeed, the vulnerability experienced by many of these illegal migrants has the potential to lead to forced labour or even slavery. In these circumstances, people smuggling may even be viewed as human trafficking. One illustration of this is where smuggled people are made to work in the agricultural sector. On a day-to-day basis they may be in direct contact with dangerous chemicals which have the potential to affect their health. However, due to their illegal status, and for fear of being prosecuted, they hesitate to see a doctor and thus remain in their unhealthy state. Another consequence of people smuggling is the inhumane treatment to women. Many reports have shown that women who migrate illegally are much more likely to be sexually and psychologically abused. Furthermore, some people who are smuggled become 'trapped' when they arrive in new their homeland. Indeed, people smugglers have been known to seize the passports and other documents of the people they have transported in order to gain control over them, and as a result the illegal migrants are prevented from moving freely in their destination state¹⁹.

Smuggled people also face racism and other forms of discrimination. Indeed, people tend to be racist towards new arrivals as the term "illegal migrants" has a negative connotation in many communities²⁰. Furthermore, they are often marginalised due to their poor state of health and lack of knowledge of the local customs and language used in the destination state. These inequalities persist because smuggled people are less likely to report discriminatory conduct to authorities precisely due to their status as 'illegal migrants'.

Some of the concerns surrounding the treatment of smuggled people derive from law enforcement authorities themselves. There are instances where illegal migrants have been shot by law enforcement officers before entering the destination state. Such action has resulted in illegal migrants sustaining severe injuries and, at times, even death. In other cases, authorities have acted unlawfully by asking for money or sexual favours from illegal migrants in exchange for their freedom. If they fail or refuse to cooperate, they risk spending a longer period of time in detention. What makes this situation worse is the poor condition of the detention centres. They are often unhygienic and ill equipped to provide adequate medical assistance. Furthermore, while in detention, illegal migrants are often denied basic rights such as consular assistance, legal advice and access to interpreters. Although not every smuggled person suffers these consequences, they invariably find themselves in highly vulnerable situations and are thus prone to exploitation²¹.

¹⁷Ibid, p.400

¹⁸Ibid, p.401

¹⁹Tiffany St Claire King, 'The Modern Slave Trade ' (2002) 8 *UC Davis Journal of International Law and Policy* , p.309

²⁰Obokata, above n 11, p.402

²¹Ibid, p.402

The Dangers of People Smuggling

Many states which are affected by people smuggling, whether as a state of origin, transit or destination, are highly concerned about the issue²². As mentioned earlier, the British Home Office has stated that approximately thirty million people are smuggled annually. This activity generates a huge amount of money - approximately 12-40 million pounds every year. Furthermore, the money obtained by people smugglers is often spent on other illegal activities, such as the trafficking of drugs and the illicit arms trade. However, more worrying is the fact that some illegal migrants later become involved in criminal activities, such as theft, the drugs trade and prostitution, in order to repay their debt to the people smugglers²³. In this way, people smuggling can be seen as a modern form of slavery. However, not all illegal migrants find themselves in this situation, with many enjoying a better quality of life and a decent living environment in their new homeland²⁴.

People Smuggling VS Trafficking in Persons

In order to gain a better understanding of people smuggling, scholars have sought to differentiate it from human trafficking. Today, there is an international legal framework which regulates human trafficking and people smuggling. With regard to human trafficking, the Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children (Trafficking Protocol) has been adopted by members of the United Nations. In the case of people smuggling, as mentioned earlier the United Nations has adopted the Smuggling Protocol. Both of these protocols are attached to the CATOC, which is also known as the Palermo Convention. These protocols have helped states, scholars, international organisations and other parties define and differentiate people smuggling from human trafficking. Furthermore, these legally binding instruments assist member states to punish perpetrators engaged in the trafficking and smuggling of people.

The process of entering a state can take place with or without documentation. Undocumented entry involves migrants entering a state (other than their country of origin) without proper documentation as required by the visited state²⁵. If the entry process is assisted (i.e., from people in the state of origin), then this act could be considered people smuggling and/or trafficking in persons. The distinctions between the two offences are clearly articulated in the Trafficking and Smuggling Protocols²⁶. The Smuggling Protocol defines "smuggling" in Article 3(a) 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.

Hence, it is quite clear that people smuggling involves three elements: (i) there must be a physical movement of a person; (ii) the activity must be conducted across international borders; and (iii) the activity must be conducted in exchange for payment or some type of material benefit. Furthermore, the main focus of the crime is on the assistance provided by people smugglers to facilitate the unlawful entry of a person into the other state. Therefore, the "subsequent treatment of the migrant is not a constitutive element of the crime"²⁷.

On the other hand, trafficking in persons is a more complex crime. It involves not only illegal migration, but also other acts such as the use of force, coercion, fraudulent conduct and the exploitation of people²⁸. The Trafficking Protocol has defined "trafficking in persons" in Article 3(a) 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 service, slavery or practices similar to slavery, servitude or the removal of organs.

²²C. Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective' (2003) 14 *International Journal of Refugee Law* 5621, p.578

²³Ibid, p.579

²⁴Ibid, p.580

²⁵Mallia, above n 1, p.10

²⁶Ibid, p.10

²⁷Ibid, p.10

²⁸Ibid, p.10

From the above definition, it is clear that trafficking in persons is different from people smuggling in several respects. Firstly, people smuggling is voluntary in nature – that is, the act is carried out with the consent of those being smuggled. On the other hand, trafficking is not voluntary and involves coercion and deception²⁹. Secondly, the act of people smuggling ends when the migrants reach their destination, whereas trafficking entails the continuous exploitation of people even after they have reached their place of destination³⁰. Thirdly, people smuggling requires international movements, while trafficking can be carried out either within a single state or between different states³¹. Fourth, in terms of entering a state, people smuggling is always illegal, and thus those smuggled are categorised as illegal migrants. Conversely, in a trafficking scenario, the trafficked people may enter a state legally or illegally³².

The distinctions that exist between the two offences do not preclude them from overlapping. Indeed, there have been cases where both smuggling and trafficking has occurred. This arises where people intending to be smuggled into another state end up being trafficked. In essence, the migrants are tricked on their way to the destination state and are treated inhumanely.³³ Moreover, the migrants are charged a huge amount of money in order to be transported illegally to the other state. As a result, they are exposed to exploitation, thus making them the victims of human trafficking. The overlaps between people smuggling and trafficking in persons create problems for authorities with respect to law enforcement and prosecuting offenders³⁴.

Policy Implication

There are different legislative as well as law enforcement approaches to people smuggling and human trafficking³⁵. Indeed, in the context of trafficking, it has been proposed that the apparent and continuous exploitation of people (in the form coercion and deception), requires states to provide assistance and protection to such people, even though they may have breached national immigration policies. On the other hand, people smuggling involves people who voluntarily depart their home state knowing they will violate the immigration laws of the destination state. Many states consider such conduct to be reprehensible, and therefore believe that the full force of the law (including arrest, repatriation, detention or deportation) should be brought to bear upon them³⁶.

Notwithstanding the above argument, the differences between trafficking and smuggling have changed the general understanding of exploitation and abuse. It is clear from the smuggling and trafficking protocols that preferential treatment is given to those who have been trafficked over those who have been smuggled. According to the Trafficking Protocol, states are obliged to provide protection to victims of trafficking. Such protection extends to “[providing] assistance in criminal investigations and proceedings, [the provision] of accommodation, physical and psychological assistance, employment and educational opportunities, and [the issue of a] temporary or permanent residence permit”³⁷. In contrast, the Smuggling Protocol does not protect those smuggled as extensively as the Trafficking Protocol protects trafficked people.

Even though there are some protective measures embedded in the Smuggling Protocol, such as the right to life and the prevention of torture, the protection afforded to smuggled people remains limited³⁸. The protocol supports the right of a state to prosecute people involved in people smuggling, especially because the act breaches the domestic

²⁹Patrick Twomey, 'Europe's Other Market: Trafficking in People' (2000) 2(1) *European Journal of Migration and Law* 1, p.7

³⁰Obokata, above n 11, p.397

³¹Mallia, above n 1, p.10

³²Obokata, above n 11, p.397

³³Mallia, above n 1, p.11

³⁴Ibid, p.11

³⁵Kelly E Hyland, 'Protecting human victims of trafficking: An American framework' (2001) 16 *Berkeley Women's Law Journal* 29, p.34

³⁶Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23(4) *Human Rights Quarterly* 975, p.1000

³⁷Obokata, above n 11, p.397

³⁸Ibid, p.398

immigration laws of states. Furthermore, such action is affirmed by other international instruments, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the European Convention on Human Rights 1950 (ECHR), the American Convention on Human Rights 1969 (ACHR), as well as the African Charter of Human and People's Rights 1981 (African Charter). Although these international instruments may also be enforced in relation to trafficked people, they mainly apply to illegal migrants because such people are likely to have breached several provisions under the various instruments³⁹.

Conclusion

People smuggling is a significant problem at both the regional and international level. Indeed, the gravity of the issue has been recognised by states, and solutions to address the problem have been proposed and implemented. However, as people smuggling is a transnational organised crime, it is difficult to combat, with offenders routinely crossing state boundaries to escape prosecution⁴⁰. For this reason, law enforcement agencies and related authorities must work together to disrupt smuggling networks⁴¹.

Even though many states have ratified the Smuggling Protocol at the international level, implementation of the protocol at the national level has not always been forthcoming. There are several reasons for this, including a lack of legislation, inadequate policies and planning, as well as limited international cooperation⁴².

The Conference of the Parties to the United Nations Convention against Transnational Organized Crime, which was held in 2008, encouraged states to ratify the Palermo Convention as well as its protocols⁴³. Indeed, it was reported at the conference that numerous states did not have the capacity to formulate legislation against people smuggling. Nonetheless, it was also reported that many states had successfully criminalised smuggling activities at the national level. Those states that had not drafted domestic legislation incorporating the relevant international instruments cited limited capability and a lack of expertise as the main factors for the legislative gap⁴⁴. Hence, it is important to develop capacity building in the form of training sessions and other measures so that this problem can be overcome. Indeed, it is critical to have legislation at the national level that accords with international instruments in order to quash people smuggling syndicates, and more importantly, to support the political will of states that have ratified the Palermo Convention and its protocols.

Another problem militating against the implementation of the convention and its associated protocols is the inadequacy of state policies and planning⁴⁵. Only a few states have a specific policy addressing the issue of people smuggling, and as a result, it is difficult to establish interagency cooperation to respond to smuggling activities. Furthermore, law enforcement efforts at the state level are often limited to border control,⁴⁶ but this is inadequate to deal with the problem. To be responsive to developments in people smuggling activities, states must engage in advanced planning and have a range of different policies in place. Furthermore, this planning should produce "collaborative, multi-agency, long-term and coordinated strategies"⁴⁷. Such planning, however, must take into account several factors, such as the assessment of the smuggling activities and the capability of states to respond to the problem. In addition, authorities must develop cooperative and collaborative approaches at the regional and international level in order to implement the required strategies⁴⁸.

Limited international cooperation is another factor that has hampered the implementation of the Smuggling Protocol⁴⁹. It is almost impossible to combat people smuggling by unilateral initiatives which ignore the importance of cooperative ties with other states. Indeed, in order to track the movement of people smugglers and their human

³⁹Ibid, p.398

⁴⁰UNODC, *International Framework for Action: To Implement the Smuggling of Migrants Protocol* (United Nations, 2011)118, p.7.

⁴¹Ibid, p.7.

⁴²Ibid, p. 7.

⁴³Ibid, p.9.

⁴⁴Ibid, p.9.

⁴⁵Ibid, p.9.

⁴⁶Ibid, p.9.

⁴⁷Ibid, p.10.

⁴⁸Ibid, p.10.

⁴⁹Ibid, p.11.

cargo, and to create coordinated operational activities between states, bilateral as well as international cooperation is needed⁵⁰. People smuggling is a highly organised operation, involving numerous criminal networks across multiple regions and states. Therefore, a collaborative and transnational approach between states is required to comprehensively address the problem. However, such an approach is not without its difficulties. Given the disparate social and cultural sensitivities of states in the region, it is important to overcome “geographical, political, ideological and linguistic” barriers in order to address people smuggling activities⁵¹.

Recommendations

In conducting their activities, people smugglers take advantage of states with inadequate legal frameworks and weak law enforcement capabilities⁵². Indeed, developing states are often used as transit areas, providing people smuggling and their customers with a ‘safe haven’ until such time as formal arrangements are in place for their departure to the destination state. Moreover smuggling operations conducted by sea threaten the lives of legitimate users of the ocean. In responding to this concern, the UN General Assembly passed Resolution 64/71, which in principle urges states and relevant stakeholders to cooperate and combat people smuggling⁵³. Furthermore, the resolution encourages states to cooperate at the international level, particularly with respect to the Palermo Convention and the Smuggling Protocol.

The framework for cooperation is outlined in Articles 7 to 9 of the Smuggling Protocol. In combating people smuggling by sea, states are encouraged to cooperate in accordance with international law to the fullest extent possible, as stipulated in Article 7. In accordance with the first paragraph of Article 8, where a state party has reasonable grounds to suspect that a vessel may be engaged in people smuggling, it may request assistance from other state parties to prevent the smuggling process. Moreover, the second paragraph of Article 8 allows a state party to give permission to other state parties to board, search and take other appropriate measures in respect of a vessel flying its flag where the vessel is allegedly being used for migrant smuggling purposes⁵⁴.

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⁵⁰Ibid, p.11.

⁵¹Ibid, p.11.

⁵²Joseph H Douglas and Andreas Schloenhardt, *Combating Migrant Smuggling with Regional Diplomacy: An Examination of the Bali Process* (Migrant Smuggling Working Group: The University of Queensland, 2012), p.50.

⁵³Ibid, p.50.

⁵⁴Ibid, p.50.

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