



The European Union's Response to Smuggling of Syrian Asylum Seekers: the end of Human Rights?

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ABSTRACT

Although the European Union's recent focus has been on human trafficking and its human rights implications, insufficient attention has been devoted to the phenomenon of refugee smuggling, which has exacerbated by the outbreak of civil war in Syria in 2011. This study investigates the implications of the post-2010 EU anti-smuggling norms and strategies on refugee rights. It focuses on the specific case of Syrians, as they constitute the largest refugee group fleeing into Europe. Along with the available literature, data for this study was collected through a survey of 16 Syrian refugees currently residing in the EU. Firstly, the article presents the *modus operandi* pertinent to refugee smuggling networks to give an overview of the dimension of the phenomenon. Secondly, by observing the experience of Syrian refugees as they are smuggled across borders, the study highlights practices of pushbacks, inefficient border identifications, prolonged arrests, and the lack of legal means to access the EU territory. To conclude, the study advocates for initiatives to prevent Syrians from colliding with the explored harsh reality and halt smugglers from making a profit out of asylum seekers' dire conditions.

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INTRODUCTION

The international community is today witnessing what the Secretary General of the Norwegian Refugee Council has defined as the 'the largest displacement crisis in a generation' (Egeland, 2014). Syria is at the heart of this crisis, where since 2011 a civil war has been ravaging the entire country. Almost half of the population, over 10 million people, have fled their homes and taken refuge in neighbouring countries, including Turkey, Lebanon, Jordan and Iraq (Egeland, 2014; UNHCR, 2015).¹ In trying to flee from persecution, some Syrian refugees have not stopped there, but risked their lives to embark on dangerous journeys from the Middle East to Europe in hopes of building a new life in a safer place.

In the current period of crisis, while around 1 million Syrians have claimed asylum in the European Union in the last five years, an increasing number of reports of non-governmental organisations are drawing attention to the harsh restrictions experienced by Syrian refugees entering destination countries (UNHCR, 2012; UNHCR, 2016; Amnesty International, 2014). Many European states have developed practices, adopted regulations and entered international agreements that limit their obligations to asylum seekers and the legal means to access their asylum systems (Hurwitz, 2009). However, in the face of these restrictions, many genuine Syrian asylum seekers have turned to smuggling networks to unlawfully enter and reside within an EU member state, putting their lives in further danger and fuelling the profit-oriented business (European Commission, 2015).²

Consequently, the EU has introduced provisions aimed at tackling refugee smuggling.

However, these legal constructions coupled with the aforementioned legally inaccessible asylum protection have perpetuated inefficient enforcement measures, identification and control practices. This article attempts to establish to what extent these provisions undermine the refugee framework and the human rights they encompass rather than protect Syrian refugees. The circumstance of Syrian refugees, as currently the largest group of asylum seekers arrested at EU external borders, demonstrates how state action contributes to further refugees' vulnerability and plight (Egeland, 2014).

For the purpose of this article, the discussion has been structured in four main sections. Section 2 gives an overview of the *modus operandi* of smuggling rings, with a focus on those working in countries where Syrians transit to reach Europe. This section is functional for the reader to get a better understanding of how smuggling networks operate and eventually capture the complexity of the phenomenon. Section 3 builds on this by exploring the effects of the provisions on Syrian asylum seekers' human rights. It observes how the inadequacies of the legal framework add to the human rights damage while shedding light on the perpetuated mistaken distinction made between smugglers and refugees. Finally, this article uses primary data obtained from questionnaires distributed among 16 Syrian refugees in 2015, who now reside in the EU³.

A brief overview of how smugglers operate

As the data on smuggling networks, smugglers and Syrians intercepted at EU external borders is not reliable and often difficult to access, it is difficult to present a clear picture of the business. It is especially difficult to give precise numbers on smugglers involved and asylum seekers using this transnational service. Human smuggling has been widely depicted as a formal business with a hierarchical structure, where there are locally operating individuals who form small networks and work independently as part of a single chain (Bilger, Hofmann and Jandl, 2005, p.63; Di Nicola, 1999, p.1; Shelley, 2014, p.4)⁴. Due to their flexible

¹ The terms 'refugees' and 'asylum seekers' shall be defined for the purposes of the article and to avoid any misunderstandings throughout the study. An 'asylum seeker' refers to any individual who claims to be a 'refugee,' but whose claim has not been definitively evaluated. Article 1(A)(2) of the Convention Relating to the Status of Refugees (Refugee Convention) (1951) affirms that a *de facto* refugee is a person who: "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". Once these requirements are met, an asylum seeker is recognised as a refugee.

² Specifically, in 2014, **more than 276,000** migrants illicitly entered the EU representing an increase of 155% compared to 2013 statistics of 107,964 illegal border-crossings (European Commission, 2015).

³ Surveys were distributed online and participants answered 20 questions on a non-attributable and anonymous basis.

⁴ The concepts of human smuggling and trafficking are often linked. However, they describe two distinguished phenomena. Human smuggling is a profit-oriented activity where clients' illegal entry in a

structures which can adapt to changing political circumstances, Europol recognised the changes smuggling organisations had undergone by stating that 'more than 40% of criminal groups have a "network" type of structure, suggesting that criminal groups are becoming more networked than has previously been the case' (Europol, 2013, p.33). Within this system, certain factors have additionally contributed to the criminal organisations' continuing operations, which in turn keep generating a variety of costs for refugees.

As the results of the surveys confirmed, the 'interpersonal trust between the smuggler and the migrants' plays a considerable role in the provision of smuggling services (Içduygu and Toktas, 2002, p.26). Nonetheless, contrary to what Içduygu and Toktas (2002) had recently argued, more than 60% of respondents have declared that these flexible networks are mainly based on kinship and friendship affiliations, not on nationality ties (Survey on Smuggling of Syrian Asylum Seekers to Europe, 2015). Additionally, limited familiarity among smugglers along the smuggling chain seems to be another significant aspect that could determine the success of an operation (Içduygu and Toktas, 2002, p.26). Indeed, smugglers are familiar only with other facilitators from whom they receive migrants and to whom they hand them over (Survey on Smuggling of Syrian Asylum Seekers to Europe, 2015). As the chain is not strongly linked, anytime a smuggler is apprehended, 'the missing link is quickly replaced,' and, since linkages are unknown to each other, the police find it hard to get depositions (Salt, 2000, p.42; Içduygu and Toktas, 2002, p.46).

Throughout their journey, refugees endure dire situations at the hands of their smugglers. In three days on the week of May 29th 2016, at least 700 migrants drowned in three separate shipwrecks in the Mediterranean Sea (Yardley and Pianigiani, 2016). During the summer and its calmer weather, smugglers send out a high number of unseaworthy vessels loaded with mixed groups of migrants and asylum seekers to European shores (Yardley and Pianigiani, 2016). More recently, Amnesty International reported accounts of abuses, sexual violence and torture on refugees at every stage of the journey by people smugglers

(Amnesty International, 2016). The organisation collected this information in detention centres in the Italian regions of Sicily and Apulia showing how costly it has become for migrants and prospective refugees to embark on journeys to Europe (Amnesty International, 2016). Yet, as the interviewees reported, the cost is also monetary for the payments of smuggling services ranging from a few hundred to approximately \$6,000 (Survey on Smuggling of Syrian Asylum Seekers to Europe, 2015). Within the economic transaction, distance involved, destination, difficulties gaining entry, complexity of the smuggling operation and circumstances from which asylum seekers are fleeing, are all determining factors (Twomey, 2000).

Refugee smuggling and the European response

Built on the premises of the Universal Declaration of Human Rights (UDHR) (1948), the Refugee Convention (1951), its Protocol (1967) and the United Nations (UN) Smuggling and Trafficking Protocols (2000), the EU regulatory context has attempted to build a common platform of action against organised crime within which member states can operate strict domestic policies for refugees to access EU protection (Carrera and Guild, 2016, p.iii; Scarpa, 2008).⁵ However, these legal constructions, focused on prosecuting smugglers and preventing the emergence of transnational criminal activities, have been at the centre of discussions since their adoption, as scholars and human rights agencies question their effectiveness in tackling smuggling while protecting human rights (Amnesty International, 2014; Hathaway, 2009; Gromek-Broc, 2011).

On the other hand, as recent studies have shown, EU member states seem to have endangered the already fragile protection of asylum seekers and

country is facilitated, and they willingly engage in the transaction (Twomey, 2000, p.7). In human trafficking, there is an exploitative nature in facilitating border crossing (Twomey, 2000, p.7).

⁵ While the UDHR (1948) sets out for the first time fundamental human rights to be universally protected, the Refugee Convention (1951) and its Protocol (1967) are the first multilateral treaties to define in a clear and thorough way refugee rights and responsibilities as well as the obligations of States that are parties to it. Key document in the fight against human smuggling, the UN Smuggling Protocol (2000) contains measures to protect migrants and provisions aimed at preventing and eliminating smuggling services. Alongside this document, the UN Trafficking Protocol (2000) ensures the protection of trafficked victims and prosecution of traffickers. The fact that frequently smuggled individuals become victims of trafficking activities makes it fundamental to consider these two documents together when discussing human smuggling (Brolan, 2003).

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refugees by implementing practices inconsistent with human rights standards (Weinzierl and Lisson, 2007, p.10). For instance, Syrian asylum seekers, trying to cross EU's external borders, have recently been the protagonists of restrictive measures as they experienced violence and ill-degrading treatment at the hands of border police (Amnesty International, 2014). As refugees trying to enter Bulgaria told Amnesty, "they were held at the border for up to 12 hours, outdoors in the cold. Some said they were forced to lie face-down on the ground during that time" (Amnesty International, p.20). At the same time, other Syrians, whose majority are women and children according to the United Nations High Commissioner for Refugees (UNHCR), were forced back across the Hungarian wire border into Serbia (UNHCR, 2016). On the other hand, others may assert that EU member states have established a collective and comprehensive response against criminal organisations and have committed as a union to dismantle smuggling networks and protect the rights to life and freedom of any human being (Hathaway, 2009). Nevertheless, as the next subsection elaborates, current policies seem to risk not ending the smuggling phenomenon but rather obstructing victims of unabashed persecution and violence to enjoy their incontrovertible right of asylum (Morrison and Crosland, 2000).

Deterrent quagmire of anti-smuggling mechanisms

As a means to pursue the key pillar of the European community's approach of organised crime prevention, member states have adopted migration policies that encompass the imposition of visa requirements for non-EU citizens, including nationals of genuine refugee-producing countries (Gallagher, 2009; Morrison and Crosland, 2000). Sanctions and criminal liability against carriers who transport a person without a visa are then used to enforce these legal norms (Morrison and Crosland, 2000; Hathaway, 2009, p.36). These policies were introduced to halt improper documented arrivals, while inadvertently increasing the profitability of human smuggling. However, they also have the effect of limiting the regular possibilities of genuine asylum seekers to access a safe country within the

EU territory (Hathaway, 2005, p.291)⁶. Rejected at borders and with counterfeit identity documents and passports, the plight of Syrian asylum seekers continues.

By accessing an EU state's legal system, Syrians would be able to present their case for protection to state authorities and claim asylum and refugee rights (Morrison and Crosland, 2000).⁷ At the same time, qualifying for asylum under the terms of the Refugee Convention, refugees have the right to enjoy and seek asylum 'outside the country of their nationality' (UDHR 1948, art.14). However, as Syrians are nationals of a non-EU country, they are not entitled to a visa and leaving Syria for Europe with improper documentation and through illegal smuggling channels would be considered unlawful. They are not, therefore, in a position to legally apply for international protection under the Refugee Convention. The legal system seems to have trapped Syrians in their own country as it legally allows them under the UDHR (1948) to leave persecution and violence behind, but at the same time safe havens reject them.

Alongside visa requirement, EU states' emphasis on document checks, carriers' sanctions and criminal liability has led to the intensification and increasing sophistication of liaison officers' efforts to prevent the entry of unauthorised migrants (Brolan, 2003). Member states require transportation companies to communicate advanced passengers data and share their passengers' details with border guards tasked with immigration controls at border checkpoints (**Council Directive 2004/82/EC, art.3**). Information must include the number and type of travel document used, nationality, full names, date of birth, border crossing point of entry in the member states and initial point of embarkation (**Council Directive 2004/82/EC, art.3**). As these provisions strengthen cooperation among border control agencies, crossing borders for asylum seekers, like Syrians, who are without a visa, is challenging. The 2015 questionnaire, conducted for the purpose of

⁶ The policies restricting refugees' access to a country are known as *non-entrée* mechanisms (Hathaway, 2005, p.291).

⁷ As set out in article 3 of the Dublin Regulation, 'member states shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones' (**Regulation (EU) No 604/2013**). Thus, in order to lodge an asylum application in one of the EU member states, asylum seekers have to be within the territory of that state.

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this article, reports, 62% of Syrian respondents shows that when they tried to cross member states, the border police used force against them (Survey on Smuggling of Syrian Asylum Seekers to Europe, 2015). It took them a long time, most often from two to four weeks, to move from one transit country to another (Survey on Smuggling of Syrian Asylum Seekers to Europe, 2015).

In the absence of valid legal means, smugglers are sometimes the only option left for asylum seekers trying to move across borders (Obokata, 2005, p.394; Ćerimović, 2015). As a plethora of scholars, including Lord Justice Simon Brown (1999, p.3), have noted, "the combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents". Notwithstanding the potential consequences of engaging with any form of clandestine activity, many refugees admit that they still make use of smugglers "either because they have no other means of reaching safety or because they believe it will open up more viable and durable protection methods" (Brolan, 2003, p.577). In fact, while EU directives and the UN Smuggling Protocol's restrictions seem to fall short, the lack of alternative legal means to access the European community raises a threat to the right to seek asylum as set out in article 14 of the UDHR (1948) and upon which the Refugee Convention (1951) is grounded. By threatening a fundamental obligation of international law, EU directives are not only questioning the validity of the Declaration (1948) but also of the preeminent international document, the Refugee Convention (1951).

Distinguishing between victims and criminals

In the name of strengthening the fight against smuggling and post-crossing exploitation, EU states have adopted further prosecuting measures to apprehend smugglers of asylum seekers. The drafters of the Refugee Convention were aware that these legal norms by attempting to punish smugglers may have an adverse impact on refugees, who are 'rarely in a position to comply with the requirements for legal entry,' and they introduced article 31 (Refugee Convention, 1951). Under this article, governments "shall not impose penalties, on account of their illegal entry or presence, on refugees' as long as they present themselves immediately to the authorities and

explain the breach of migration control laws" (Refugee Convention, 1951, article 31). However, while article 31 "provided immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law", no real safeguard is advanced in EU decisions to prevent the punishment of acts performed for humanitarian reasons or emergencies (*R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999]; FRA, 2014, p.8). Therefore, the need of article 31 of the 1951 Refugee Convention in the current refugee crisis with no accessible legal channels seems all the more relevant.

As the questionnaire shows, a significant proportion of Syrian respondents, approximately 40%, were criminalised upon entry for the possession of fraudulent travel and/or identity documents despite the legal recognition and authorisation to rely upon professionals for smuggling services (Survey on Smuggling of Syrian Asylum Seekers to Europe, 2015). Because of the accusations, smuggled individuals in genuine need of international protection are considered 'criminals' instead of 'victims' (Krieg, 2009, p.786). Furthermore, a common procedure among member states to treat Syrian would-be refugees for their alleged infringements has been found to be the detention of asylum seekers for an undetermined period of time while their claims for asylum are pending (Zamacona, 2013). While Syrians are in detention, the local police sedate and guard them in criminal facilities, including maximum-security prisons, or adopt other disciplinarian treatments (Zamacona, 2013, p.58; McAdam, 2013, p.35). Research, based on empirical evidence and commissioned by the UNHCR, suggests that the effects on asylum seekers are devastating, especially on their psychology and physical wellbeing (Edwards, 2013, p.4). As the Jesuit Refugee Service (2011) highlights, all forms of detention, especially prolonged arrests, can have eventual negative consequences on the integration of a refugee in the host country.

As Syrians are kept in indefinite detention, they experience limited enjoyment of their freedom and rights. If they collaborate with the competent authorities to find and prosecute their smugglers, governments have to provide them with protection (**Council Directive 2004/81/EC**). However, as non-governmental organisations and scholars have

referred, the situation is quite the contrary (Hathaway, 2009; Amnesty International, 2014). Syrians have been treated as criminals, while states are legally entitled to apply inhuman proceedings against them. Even if “no set of rules, no enforcement regime, and no form of physical barrier has ever been able dependably to prevent migration in such circumstances”, as Hathaway (2009, p.32) notes, the criminalisation of victims creates one last and even more difficult obstacle to overcome. Syrians find themselves before another loophole as while they have the right to enter another country and claim asylum, states can prosecute and sanction them for committing unlawful acts.

Against this backdrop, smugglers are free and able to go back to the profitable industry and engage more asylum seekers. Smugglers are rarely apprehended for their behaviour, but instead it is asylum seekers themselves who are punished (Morrison and Crosland, 2000). Indeed there are few cases of prosecuted smugglers and reasons for their non-apprehension are still unclear, although İçduygu and Toktas (2002) highlight cases of poor investigations or corrupt border officials. In the interim, Syrians remain exposed to potential consequences in terms of apprehension by immigration or police authorities (İçduygu and Toktas, 2002, p.30).

Conclusion

Within the scope of anti-smuggling campaigns and regional and international legislation, the way EU migration control and refugee protection policies translate into reality highlights the need to ensure a functioning refugee protection system a priority. EU governments are indeed showing “a clear commitment to doing real human rights damage to [. . .] refugee protection” (Hathaway, 2009, p.56). The problems seem to lie not in formal recognition of operationalising the rules but in their implementation (Goodwin-Gill, 2011, p.456). Considering the outcomes emerged from this study, the enforcement of the treaties and directives reflects the lack of attention to refugees, who deserve specific protection regulations and operations, if not the deliberate attempt of discouraging asylum seekers from undertaking the journey to Europe (Obokata, 2005, p.394).

The current legal constructions came as a prompt response to the rising phenomenon of illegal migrations from an EU concerned about its borders and national interests (Scarpa, 2008). However, because of the lack of formal and lawful means to access the EU protection arrangements, Syrian asylum seekers have been forced to avail themselves of dangerous illegal alternatives (Morrison and Crosland, 2000). Many scholars report that these conditions intertwined with the criminalisation of smuggling, detainment practices and strengthened border controls are creating the perfect environment for smuggling relations to turn into post-crossing enslavement, trafficking and other abusive practices (Brolan, 2003; Bilger, Hofmann and Jandl, 2005; Gallagher, 2008). Furthermore, the inelasticity of the demand for smuggling services and the risks associated with them make the business extremely profitable, as smugglers can command high prices to move people across borders (Hathaway, 2009, p.32). As Hathaway (2009) states, ironically the very phenomenon that the anti-smuggling legislation in place is committed to deterring is actually what the EU is witnessing.

From the debate above we can draw the conclusion that the direction of the current anti-smuggling and migration policies risks to preclude Syrians' enjoyment of their inalienable right of asylum instead of solving the problem of human smuggling. Advocates have called for a more nuanced understanding of the complexities of human smuggling, which keeps at its centre the distinction between the aforementioned transnational criminal activity and trafficking (Weinzierl and Lisson, 2007; Salt, 2000). As states are expected to make asylum a more accessible form of protection, at the same time a comprehensive approach focused on the peculiarity of asylum seekers and refugees' condition is needed for a satisfactory implementation of the EU directives and frameworks in respect of human rights.

Finally, the right to asylum lies at the core of the EU commitment to human rights and with the introduction of regional protection policies, member states willingly took upon the responsibility to welcome and protect asylum seekers (Brolan, 2003). A question, whose answer may present a temporary conclusion to this scrutiny, is: can EU anti-smuggling initiatives be reconciled with the imperative of human rights

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protection? (Pécoud and de Guchteneire, 2007, p.6-7). Whether or not it is possible to successfully carry out regional practices without affecting the rights of potential refugees, it remains that there is a need to introduce unfamiliar but potentially more effective systems to tackle irregular migration and safeguard refugee rights within a framework of managed migration and solidarity (O'Nions, 2014, p.188). Carefully situated within a human rights paradigm rather than distant from humanitarian concerns, such actions would gradually bear fruit.

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