

# Beyond Definitions

## Global migration and the smuggling–trafficking nexus

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**Abstract:** *This discussion paper explores the rise of mixed, irregular migration with particular focus on the role of smuggling and trafficking in both facilitating that movement and influencing its impact. It explains the current migration context followed by a discussion and analysis of the smuggling–trafficking nexus. Emerging characteristics of irregular migration suggest that changing realities are challenging the limits of existing terminology and understanding around these activities. Current legal concepts and structures are struggling—and sometimes completely unable—to capture the complexity of what is happening. Migrants are facing increased risks in terms of greater vulnerability and less protection, not least through a shrinking of the asylum space. Understanding migrant smuggling and human trafficking as part of a wider phenomenon within classic economic dynamics of supply and demand is critical to developing migration policy that is not diverted by misuse of terminology and that maintains an appropriate focus on the rights of migrants and corresponding obligations of States. An understanding of how and why smuggling and trafficking occur also lays bare the costs to the modern liberal State of waging ‘war’ against an enemy that can only ever be defeated through the continuous deployment of massive force and denial of basic rights. The paper brings together the insights of three experts who have worked as practitioners and researchers on mixed migration, smuggling and trafficking within diverse geographical and disciplinary perspectives.*

## The Context: Global Irregular Migration

‘Mixed migration’ is a relatively new term used to describe a long-standing reality: that people of different status and motivations will often migrate in similar directions, using the same migration infrastructure. Maritime movement across the Mediterranean has long been a case in point. Migrants with divergent histories and experience travel side by side, facing very different outcomes in the European immigration system. Some have been compelled to move because of persecution and will seek asylum, others move for economic reasons; some do not know that their movement is a carefully choreographed step in their eventual exploitation. <sup>2</sup>

The involvement of those who can facilitate migration has existed for as long as borders have obstructed free movement. What is new is the indispensable role now played by facilitators in current migration movements. In today’s more restrictive world, migrants depend heavily on smugglers to negotiate the myriad physical and legal borders that mark their journey. Smuggling is now the norm, not the exception, in large migration flows. The grouping and movement of large numbers of migrants of different status and vulnerability under the control of smugglers places migrants at significant risk of exploitation and presents unprecedented challenges to States seeking to exercise control over their borders.

Global irregular migration, whether maritime or land-based, is attracting unprecedented interest amongst politicians, policy makers, international organisations and the general public. Media attention is at an all-time high. In an increasingly fractured and polemical debate, concerns revolve around multiple, and sometimes contradictory, issues including migrant fatalities, vulnerabilities, criminality, rising numbers, changing migration policies and the global asylum regime. Of particular interest and censure is the role of smuggling—and in some cases trafficking—in contemporary migration.

<sup>1</sup> For author biographies, see p. 18.

<sup>2</sup> We use ‘migrants’ inclusively to describe all people who migrate, including those who may also be labelled asylum seekers or refugees. (See Carling, J. (2015). ‘Refugees are Also Migrants. And All Migrants Matter’. University of Oxford Border Criminologies Blog. Retrieved from: <http://bordercriminologies.law.ox.ac.uk/refugees-are-also-migrants/>.)

### Complex causalities

Factors that influence a person's, or a family's, decision to migrate are complex and flows often reflect a confluence of trends. These include demographic shifts (such as the rapid rise of youth unemployment and underemployment in developing countries); endemic poverty; natural disasters (at least some of which appear to have been caused or exacerbated by climate change and environmental degradation); increased inequality and perceptions of inequality between countries and regions; widespread situations of protracted political violence; poor governance and oppressive regimes; and chaotic, rapidly shifting migration and asylum policy in destination countries.

Modern mobility is also empowered and inspired by unprecedented levels of connectivity. Individuals and communities in previously isolated societies are exposed to life elsewhere through personal contacts, social media and broadcast media. It is critical not to underestimate the force of aspirations and desires of many young people trapped in what they experience as politically restrictive and socioeconomically stagnant backwaters. Surveys suggest that even in relatively stable developing and middle-income countries, the desire to migrate is very high.<sup>3</sup> Migration tends to foster more migration through the development of a 'culture of migration' in communities of origin as well as diasporas in preferred destinations that can help facilitate new migration and support a soft landing.<sup>4</sup> But aspirations to leave are generally rising much more quickly than the opportunities for doing so. The current era is not only the 'age of migration', as Castles, Miller and de Haas call it,<sup>5</sup> but also the 'age of involuntary immobility',<sup>6</sup> a period in which unprecedented numbers of people prefer to live elsewhere, but lack the capacity to move on their own. This conflict, between motivation and capacity, is what underlies the demand for the services of those who can bridge that gap and facilitate movement.

### Record levels of internal and external displacement

Conflict and persecution are key factors compelling people to move—factors that underlie the rapid, apparently inexorable growth in displacement. Current figures are higher than any seen since the end of the Second World War.<sup>7</sup> By the end of 2014, the United Nations High Commission for Refugees (UNHCR) identified 19.5 million refugees worldwide, claiming that 42,500 people were forcibly displaced every day during that year. At least 1.66 million people submitted applications for asylum in 2014 - again, the highest level ever recorded. Respectively, the Russian Federation, Germany and the US were the top three countries where asylum was requested.<sup>8</sup>

Internal displacement, often overlooked in contemporary discussion of 'the migration crisis', has also reached unprecedented levels with the global total now standing at more than 38 million people, many of whom can be expected to try and leave the country in which they are displaced. In 2014, countries producing the largest waves of conflict-related internal displacement included the Syrian Arab Republic, Iraq, the Democratic Republic of Congo, the Central African Republic, South Sudan, Afghanistan and Colombia. The Internal Displacement Monitoring Centre (IDMC) is recording higher levels of displacement than ever before, increasing year by year.<sup>9</sup>

Many so-called durable solutions offered by international organisations and migrant rights advocates are unfeasible and / or politically untenable: even if vastly expanded beyond present levels, resettlement placements will never match the number of refugees in need; local integration is complex, beset with practical difficulties and often not acceptable to host or migrant as a long-term solution; safe return is an impossibility in the context of most protracted conflicts. Prospects for those who have been (or who fear being) displaced for a protracted period of time are typically bleak. It is therefore unsurprising that many migrants choose to move: away from their fragile, dangerous communities or out of camps and towards locations where there is a real chance for security, permanent settlement and economic opportunity.

3 Carling, J. (2013). *EUMAGINE survey: 'Imagining Europe from the Outside': Who wants to go to Europe? Results from a large-scale survey on migration aspirations*, PRIO Policy Brief, 4. Oslo: PRIO.

4 ILO. (2011). *Trafficking in persons overseas for labour purposes: The case of Ethiopian domestic workers*. Addis Ababa: International Labour Organization; Hernandez-Carretero M. & Carling J. (2012). "Beyond "Kamikaze Migrants"; Risk Taking in West African Boat Migration to Europe". *Human Organization*, Vol. No. 4.

5 Castles, Miller & De Haas. (2013). *The Age of Migration*. Guilford Press.

6 Carling, J. (2002). "Migration in the age of involuntary immobility: Theoretical reflections and Cape Verdean experience". *Journal of Ethnic and Migration Studies*, 28(1):5-42.

7 UNHCR. (2015). *The sea route to Europe: The Mediterranean passage in the age of refugees*. p.19

8 "Facts and Figures on Refugees". Retrieved from: <http://www.unhcr.org/about-us/key-facts-and-figures.html>; UNHCR. (2015). *World at War: UNHCR Global Trends – Forced Displacement in 2014*. Retrieved from: <http://unhcr.org/556725e69.html>

9 IDMC. (2015). *Global Overview 2015*. Retrieved from: <http://www.internal-displacement.org/publications/2015/global-overview-2015-people-internally-displaced-by-conflict-and-violence>

# 1.

## Migrant smuggling: the new normal in irregular migration

For the millions of people who want or are forced to move, international migration has become increasingly expensive and hazardous. This is not surprising, as contemporary migration regimes deliberately aim to restrict the ability of individuals to secure legal access to preferred destinations. That forces migrants, including refugees who are compelled and have a legal right to seek asylum, into the arms of those who are able to help them circumvent ever-increasing controls.

Migrant smuggling—the business of moving people across borders for profit—is reported to be one of the fastest growing and most lucrative forms of organized criminal activity. Smugglers crowd their human cargo into shipping containers and on to boats and trucks. As discussed further below, many arrive safely and consider the investment well spent, but migrant smuggling can be a dirty business. Criminality and excessive profiteering routinely places migrants' lives and wellbeing at serious risk. Each year, thousands of smuggled migrants drown trying to reach Europe across the Mediterranean, cast adrift on unseaworthy vessels once they had paid for their passage. Similar stories of dire circumstances are told of those trying to enter Australia from transit points in Indonesia, and into the United States across its vast and hostile southern border.

Attempts to estimate the number of migrants smuggled each year are stymied by the absence of reliable data. It is reasonable to presume that most of those seeking to enter another country that is actively trying to keep migrants out have been required to use the services of smugglers at one or more points in their journey. That presumption is based on our imperfect but improving understanding of how irregular migration actually works in practice. As migrants see it, the solutions to their compelled movement, whether these are economic or related to protection or a mixture of both, rarely lie within that person's immediate geographical region. Neighboring countries are too often in crisis themselves. The likelihood of securing long-term refuge and establishing a new life, even in the most hospitable neighboring countries, is minimal. Improved odds may be sought through long distance travel to more far-flung destinations, which is difficult to organize without the help of others. For example, it seems to be near-impossible for an undocumented migrant to make the trip across the Mediterranean from North Africa to Southern Europe without the help of a paid intermediary. Accordingly, it is likely that most, if not all of the 276,000 irregular border crossings in that region during 2014<sup>10</sup> involved smuggling. Similarly, while asylum seekers from Iran or Afghanistan may be able to get to Indonesia or Malaysia on their own, the final leg of their journey by sea to Australia will always require costly third-party assistance. Many individuals still seek to travel through Mexico to the United States border independently, but the combination of tightened border controls and monopolization of major routes by criminal groups is making independent travel much more difficult and dangerous. For Rohingya trapped in a remote corner of Myanmar, paying a smuggler to board a vessel is the only available option for escape.

For asylum seekers, reliance on migrant smugglers is especially acute and comes at a particularly heavy price. The rules of international refugee law are complex but in essence, they provide everyone with the right to seek and enjoy asylum from persecution. Those same rules prevent States that have signed up to them (just about all the major western countries of destination as well as many others) from returning a person with a valid claim for asylum back to a situation where they face persecution. But asylum seekers must be outside their country in order to make a claim for protection. As noted previously, countries that are easy for asylum seekers to reach are often unable or unwilling to provide them with the protection and support they need. For example, in 2014, of 14.4 million refugees globally, only 105,200 were assigned places through UNHCR official resettlement processes—representing a derisory 0.73 per cent chance of resettlement for registered refugees.<sup>11</sup> For refugees currently in camps and other protracted situations, such figures offer little cause for hope. By contrast, the likelihood of obtaining protection in a safe third country dramatically increases for those who are able to make their way to or even near their preferred destination. For Syrian asylum seekers, for instance, recognition of asylum claims is virtually guaranteed when they present themselves in most European countries.

Strengthening border controls is detrimental to asylum seekers because it closes off the opportunity for such persons to reach a country in which they can realistically claim and receive protection. As such, a major theme of this paper is that restrictions on entry to preferred countries of asylum have become more onerous and appear increasingly directed toward thwarting the arrival of those who may claim asylum.<sup>12</sup> This development has had the effect of pushing individuals who want or need to cross international borders into the hands of smugglers. That necessary decision—to engage the services of persons who are widely reviled as criminals—shapes the migrant's experience; public perception of his or her situation; and often, even the level of protection that he or she may eventually be offered.

<sup>10</sup> European Commission. (2015). "Questions and Answers: Smuggling of Migrants in Europe and the EU response," MEMO/15/3261. Retrieved from: [http://europa.eu/rapid/press-release\\_MEMO-15-3261\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-3261_en.htm).

<sup>11</sup> UNHCR. (2015). *World at War: UNHCR Global Trends – Forced Displacement in 2014*. Retrieved from: <http://unhcr.org/556725e69.html>

<sup>12</sup> Gallagher, A.T. (2009). "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway," *Virginia Journal of International Law*, 49(4): 841.

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## The criminalisation of smuggling and the trafficking–smuggling nexus

Many of the factors outlined above have converged to place migrant smuggling and human trafficking at the forefront of debate around irregular migration and increasingly, to shape responses to such migration. Changes in the reasons people seek to leave home; the pressures on them to do so; the nature of their journeys; and the response of preferred destinations to real and anticipated movements have all conspired to create a reality in which the involvement of paid facilitators is the only way most irregular migrants—persecuted or not—will ever be able to move. Those who facilitate irregular movement have rapidly expanded and diversified their operations, with some recognising the opportunity to maximise their profits by exploiting smuggled migrants either during their journey or at their destination. In such situations, the carefully crafted distinction between trafficking and smuggling dissolves.

### The international legal regime

The distinction between trafficking and smuggling has been an important, though recent, clarification for governments, particularly those that consider they have the most to lose through illegally facilitated migration. Until December 2000, when States agreed to the establishment of an international legal regime around trafficking and migrant smuggling, the terms had been used interchangeably, along with “migrant trafficking” and other variants. At the centre of that new regime was a set of definitions that affirmed, for the first time, the elements that comprise the conduct to be criminalized under the label of “human trafficking” and ‘migrant smuggling’ and, critically, the distinctions between them.

The term ‘migrant smuggling’ (or in the uniquely Australian vernacular ‘people smuggling’) refers to the unauthorized movement of individuals across national borders for the financial or other benefit of the smuggler.<sup>13</sup> This definition, which was agreed in the context of establishing a uniform criminal offence, deliberately excludes those who are helping to move people purely for humanitarian reasons. However, it remains sufficiently broad to apply to a wide range of facilitators of irregular migration including recruiters, organizers, transporters and providers of fraudulent travel and identity documents. Crucially, the identity of the smuggled migrant is not relevant: the cross-border movement of refugees is still considered ‘smuggling’ when it involves a financial or other reward.

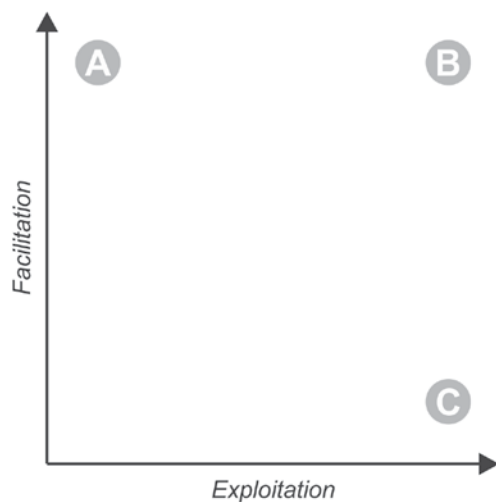


Figure 1: Migrants’ potential interactions with others while they are being smuggled.

Human trafficking can be distinguished from migrant smuggling on a number of grounds but the most important is purpose: migrant smuggling seeks to facilitate a person’s illegal movement for profit; trafficking seeks their exploitation. In a classic migrant smuggling situation, the relationship between the smuggled migrant and his or her facilitator ends when the journey is completed. In cases of human trafficking, both profit and purpose are directly tied to the exploitation of the migrant.

### Limits to legal distinctions

Despite the diligent efforts of lawyers and policy-makers, it has become increasingly apparent that the legal distinction between migrant smuggling and human trafficking does not always stand in the real world. Most obviously, many migrants who end up in a situation of trafficking are first smuggled across national borders. But much more relevant to this paper is the fact that smugglers are increasingly taking on the role of trafficker: using their clients for extortion, compelling them into situations of sexual enslavement; selling them for forced labor. Even when they have paid for their journey, migrants can remain in debt to those who funded their trip, making them highly vulnerable to exploitation in the country of destination.

The dissolution of this neat distinction between trafficking and migrant smuggling has important practical ramifications. Under the international legal regime outlined above and most national laws, smuggled migrants, even those subject to hardship and abuse, are not considered to be victims of crime or human rights violations. They have no right to support and assistance; they have no right to seek remedies for the harms committed against them; they have no right to protection from further harm. In an increasing number of States, smuggled migrants are themselves criminalized. This stands in stark contrast to persons identified as having been trafficked who, under national and international laws are entitled, at least in theory, to a raft of rights related to protection, assistance, compensation, protection from criminalization, safe return, reintegration and non-criminalization of status offences, such as illegal entry or illegal work.<sup>14</sup>

<sup>13</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507 (15 November 2000), art. 2.  
<sup>14</sup> See Gallagher, A.T. (2010). *The International Law of Human Trafficking*. Cambridge University Press.

States have used the slippage between migrant smuggling and trafficking in persons in very different ways. First and foremost, as predicted at the time the two respective treaties were drafted, most States have sought to evade the additional obligations imposed upon them with respect to trafficked persons by avoiding such identification in relation to migrants who have been smuggled—even when signs of trafficking are present or easily discoverable.<sup>15</sup> While precise information is impossible to obtain, it is very likely that few if any of the hundreds of thousands of smuggled migrants who have entered Europe in the most recent wave have been screened for trafficking. Even when highly credible allegations of trafficking of smuggled migrants are made, this rarely translates into the application of a different and higher standard of treatment. For example, while many smuggled Rohingya refugees from Myanmar have been subjected to trafficking-related exploitation, countries of destination including Malaysia and Thailand have studiously avoided taking these persons into their well-structured and well-financed trafficking victims assistance programs.

### Conflation of smuggling and trafficking

It should also be noted that front line governments have also done the opposite—conflating trafficking and smuggling when it is in their interests to do so. As the head of Anti-Slavery noted in connection with European reaction to the 2015 refugee crisis:

*The conflation of smuggling and trafficking conveniently obfuscates the issue and buys political breathing space. It is a classic public relations move by those faced with evidence of their complicity in human rights abuses—or in this case, arguably, a preventable atrocity. When faced with such horror, it is easier to make grand statements blaming migrant deaths on evil traffickers than to seek the causes and identify proper responses.*<sup>16</sup>

There is also something else at work, as illustrated by responses to the same crisis. Identifying a situation as one of trafficking strengthens the legitimacy of responses that may otherwise be politically unpalatable if directed against facilitators of irregular migration, especially when many of the migrants involved are clearly desperate refugees. European States have sought to use the language of ‘trafficking’ and ‘slave traders’ to justify military action against smugglers and their vessels.<sup>17</sup>

Cynical *realpolitik* is one explanation for this conflation of concepts and misuse of language but part of the problem lies in the inability of current legal concepts and structures to capture the complexity of what is happening. In addition to those who are trafficked, many smuggled migrants, irrespective of the reasons for their initial flight, experience significant harm. For all smuggled migrants, the clandestine nature of their journey; the sometimes unscrupulous and corrupt conduct of their facilitators and collaborators; and, most critically, the extent to which some States will go to prevent their departure, transit or arrival, all operate to create or exacerbate serious risks to personal security and wellbeing. In such cases, the maintenance of a rigid distinction between those who are treated as commodities, exploited and harmed incidentally, and those who are deliberately subjected to exploitation and harm begins to look increasingly unrealistic and unfair.

### The facilitation–exploitation dynamic

Migrant smuggling requires an array of services that facilitate the circumvention of migration regulations and border controls. As noted above, the definition of smuggling casts a very wide net: the act of producing or providing fraudulent documentation; issuing a visa on false grounds; arranging or conducting the transportation of a person across a border that he or she is not entitled to cross, in exchange for any payment or benefit, all qualify as migrant smuggling crimes. The profile of smugglers reflects the broad scope of the crime. Major organizers are occasionally identified but this is rare. Smugglers typically operate within a loose network of small, decentralised groups that, in some cases, also facilitate cross-border movement of drugs and weapons. Their work is facilitated, in turn, by local opportunists who may be involved in myriad tasks, from recruitment at the point of origin to conducting a single leg of a longer journey.

Research with migrants suggests that experiences and relationships with smugglers vary considerably.<sup>18</sup> When smuggling involves the transportation of migrants across the sea or remote land areas, migrants’ vulnerabilities increase significantly. In some cases, delayed payment incentivises smugglers to ensure migrants’ well-being and safe arrival. Additionally, where there is a steady flow of migrants from the same community, continuation of business depends on smugglers’ reputation. But with the circuitous, ever changing, routes that many migrants are now compelled to follow, such straightforward transactional relationships are giving way to more complex situations in which migrants are required to establish relationships and make deals with a series of unrelated and uncoordinated smugglers at various points in their journey. In such situations, advance payment, with all the attendant risks, becomes the norm rather than the exception.

<sup>15</sup> *Ibid.*

<sup>16</sup> McQuade, A. (2015). “Migrant crisis: Smuggling or trafficking? Politicians don’t seem to know”. *The Guardian*. Retrieved from : <http://www.theguardian.com/global-development/2015/apr/22/migrant-crisis-smuggling-trafficking-politicians-dont-seem-to-know>

<sup>17</sup> See for example: Traynor, I. (2015). “EU draws up plans for military attacks on targets in Libya to stop migrant boats”. *The Guardian*. Retrieved from: <http://www.theguardian.com/world/2015/may/10/eu-considers-military-attacks-on-targets-in-libya-to-stop-migrant-boats>; O’Connell Davidson, J. (2015). “Mediterranean migrants are not slaves – do not pervert history to justify military action”. *The Guardian*. Retrieved from: <http://www.theguardian.com/commentisfree/2015/may/17/mediterranean-migrants-slaves-history-military-action-eu-leaders-libya>; and Carling, J. (2015). “Why trafficking is in the news for the wrong reasons”. Retrieved from: <https://jorgencarling.wordpress.com/2015/07/30/why-trafficking-is-in-the-news-for-the-wrong-reasons/>

<sup>18</sup> See for example van Liempt, I. & Sersli, S. (2013). “State Responses and Migrant Experiences with Human Smuggling: A Reality Check.” *Antipode*, 45(4):1029-1046.



Long and fragmented journeys increase the vulnerability of migrants to exploitation and abuse from a wide range of individuals. The situation of being smuggled increases migrants' vulnerability to harm, not only from smugglers but from a range of others. Government officials and opportunistic criminals sometimes prey on migrants through extortion, robbery, and sexual abuse.

**Figure 1** displays a simple framework for considering the different actors that smuggled migrants engage with during their journey. Each interaction combines a certain degree of *facilitation* and *exploitation*. Facilitation occurs when migrants are helped to proceed on their journey, assisted across legal, bureaucratic or geographical obstacles. Exploitation takes place when migrants are deprived of their resources or physical integrity for someone else's gain through violence, coercion, or deceit.

As smuggling always entails facilitation, smugglers will always be found in the upper half of the quadrant. However, the smuggling may or may not also be exploitative. **Point A** represents a smuggler who offers to take the migrant to her desired destination for a fixed price, and delivers that service as agreed. **Point B** is a smuggler who offers the same deal and takes the migrant to the agreed destination, but sexually assaults her and steals her belongings—or holds her for purposes of extorting additional money from her family before completing the agreed journey. The smuggler in this case facilitates but also exploits. **Point C** represents actors who take advantage of the smuggling context to exploit migrants, but do not facilitate their journey. An increasingly common example is the kidnapping of migrants for ransom. Eritreans being smuggled through Egypt as well as Latin Americans transiting through Mexico have been victims of such crimes on a significant scale. In some cases, those who are engaged in facilitating the journey (the smugglers) are involved, directly or indirectly; in other cases, the exploiters are completely detached from the smuggling activity.

As the figure illustrates, there are varying degrees to which facilitation and exploitation can be combined. The area between points A and B invites discussion about the exploitative elements of smuggling. Outright robbery, extortion or physical abuse are not the only forms. Exploitation occurs when migrants are transported for gain and the smugglers do not use their resources to ensure safe passage. It also occurs when smugglers abandon migrants on the way, before the agreed destination is safely reached. Such interactions would be situated somewhere in the middle of both axes of figure 1: there is an element of facilitation since the migrants have been taken further on the journey, but also an element of exploitation because of the deceit involved and the consequent harm. There can be many points on the continuum between **points B** and **C** as well. A smuggled migrant may, for example, be temporarily detained by his or her facilitator in order to extort additional payments before the journey can be completed. The types of interactions associated with **point C** present a serious threat to the safety and wellbeing of migrants, but in policy debates, are usually overshadowed by concerns about smuggling. With a focus on protecting migrants, it is essential to acknowledge that the *smuggling context* creates vulnerabilities, but that the dangers do not always come from the smugglers.

# 3.

## Risk / cost–benefit analysis: The migrant’s perspective

What most perplexes many observers in destination countries relates to decision-making processes at work in a situation of migrant smuggling—particularly when it involves long, complex and hazardous journeys. What compels migrants to risk their lives and those of their families? What compels them to place their future—and often considerable financial resources—in the hands of criminals? While some important research is now being done on the motivations of migrants to use the services of smugglers, and the complex decision-making processes involved,<sup>19</sup> our understanding remains uneven and incomplete. However, much of the narrative around smuggling is conducted on the basis of the assumption that migrants must be unaware of the dangers they face when embarking on their facilitated migration.

### Vulnerabilities faced by the smuggled

In this age of heightened communication, it is highly unlikely that migrants are oblivious to the risks and potential hazards associated with smuggling, including the risk of trafficking-related exploitation. Those who choose to assume these risks are not indulging a sudden whim but are taking a carefully considered—and often well-researched—gamble which they have assessed to have a high chance of success.<sup>20</sup> While they may have distorted views of their preferred destination and exaggerated expectations of life elsewhere, would-be migrants generally make rational information-based decisions. Often their family, community and external relations or kinfolk (in the diaspora) are involved in planning, financing and execution. Some studies show that the level of awareness about specific hardships and abuse they can expect to face, including the risk of death, is well known and accepted by migrants who engage smugglers.<sup>21</sup> Many may nevertheless find the scale of hardship, cost and abuse far higher, and their tolerance for it lower than they expected.

While the policy and media focus is often on the final stage of the journey—the crossing of the US–Mexican border (mainly Central Americans); the Mediterranean (Sub-Saharan Africans and Syrians); the Red Sea (Ethiopians and Somalis); Australian waters, Malaysia and Indonesia (Afghans, Iranians, Rohingyas and Bangladeshis)—much of the violence and vulnerability is experienced at earlier points in the journey, in deserts, mountains and towns through which migrants are taken. Well-documented examples include the kidnapping and extortion of Eritrean migrants on their way through Sudan and Egypt,<sup>22</sup> and the exploitation of northbound Central American migrants by Mexican drug cartels.<sup>23</sup> Recent initiatives seeking to count migrant fatalities reveal high numbers, but openly caution the likelihood of undercounting the true extent of migrant deaths.<sup>24</sup> Other studies document the fact that most migrants directly experience or witness high levels of abuse throughout their journey.<sup>25</sup> A critical aspect to the vulnerability of migrants on the move is official collusion and corruption that allows smugglers and traffickers to operate with little risk of apprehension or sanction. The economy surrounding irregular migration (and trafficking) is a dynamic and lucrative one<sup>26</sup> and, when combined with a seemingly ceaseless flow of migrants, is arguably the major driver making irregular migration so dangerous. Rather than protecting migrants, government officials have frequently been found to be protecting criminal gangs and other profiteers, thereby ensuring their virtual impunity.<sup>27</sup>

### Most journeys end well

Attention to the large-scale loss of life is important and justified, but also comes with a very real danger of misunderstanding how migrants make decisions and how they assess risk. Contrary to distorted public discourse around irregular migration and smuggling that emphasises death, exploitation, stranded destitution, refused entry and deportation, the truth is that most of those who attempt irregular migration ultimately make it. Despite great hardship and substantial risks and despite journeys that may take months or years to complete, a far larger proportion eventually succeed than fail. Migrants know the odds, and take a carefully calibrated gamble when they weigh up the risks against the likely benefits that may include, in addition to personal security and prosperity, the chance of family reunification and the opportunity to help extended networks back home. This story of the silent mass of successful irregular migrants is yet to be written. When that happens, there can be little doubt that the role of smugglers in enabling migrants to arrive at or near their chosen destination will figure prominently. Moreover, the place of border controls in the migrants’ calculation of cost and benefit is likely to also be illuminated: from the migrants’ perspective, those hoping to deter them need to succeed every time, while the individual migrant needs only to succeed once.

Available information appears to confirm that migrants’ assessment of risk is highly accurate. For example, in relation to Mediterranean Sea crossings, the odds of success are heavily in favour of migrants. In 2014 in the Mediterranean, fatalities were approximately 1.6 per cent of those recorded as arriving in Europe by sea. The death rate reached unprecedented levels in early 2015, but still remained well below 5 per cent. These percentages translate into thousands

19 See for example Williams, A.M. & Baláz, V. (2015). *Migration, Risk and Uncertainty*.

20 Hernández-Carretero, M. and Carling, J. (2012). ‘Beyond “kamikaze migrants”: Risk taking in West African boat migration to Europe.’ *Human Organization*, 71(4):407–416. See also Williams and Baláz, above.

21 RMMS. (2014). *Blinded by Hope: Knowledge, Attitudes and Practices of Ethiopian migrants*. Nairobi: Regional Mixed Migration Secretariat.

22 Reisen, van, M., Estefanos, M., & Rijken, C. (2012). *Human Trafficking in the Sinai: Refugees between Life and Death*. Brussels: Tilburg University/EEPA.

23 Diaz, E. (2009). “Mexico cartels kidnap, kill migrants headed to U.S.” *Reuters*. Retrieved from: <http://www.reuters.com/article/2009/09/22/us-mexico-drugs-idUSTRE58L3B420090922>; Burnett, J. (2011). “Migrants Say They’re Unwilling Mules For Cartels”. *NPR*.

24 IOM. (2014). *Fatal Journeys*.

25 RMMS. (2014). *Blinded by Hope: Knowledge, Attitudes and Practices of Ethiopian migrants*. Nairobi: Regional Mixed Migration Secretariat; RMMS. (2013). *Migrant Smuggling in the Horn of Africa & Yemen: the political economy and protection risks*. Nairobi: Regional Mixed Migration Secretariat.

26 UNODC. (2011). *Smuggling of Migrants A Global Review and Annotated Bibliography of Recent Publications 2011*. Vienna: UNODC.

of deaths—a large-scale loss of life that is alarming and unacceptable. The risk of dying must nevertheless be understood as low from the migrants' perspective in comparison with expected benefits. By the time they face this final crossing, most are far from home and have spent months in transit. The situation they left, and the one they have endured on the way, is often one of open-ended danger and uncertainty. The crossing holds the high probability—if not the promise—of a safe and relatively positive outcome. Those who have fled armed conflict or repressive regimes and who make it to Europe have a very real chance of being granted asylum. And even among those who are denied the right to stay in Europe as recognised refugees, many are not returned: only 39 per cent in 2014 were denied the right to stay.<sup>28</sup> The Red Sea and Gulf of Aden, another hot spot of maritime migration where many migrants and refugees have died, provides an additional example. In crossing to Yemen during 2014 and early 2015, the risk of dying was 0.2 per cent (296 deaths of 120,000 crossings made by Ethiopians and Somalis), but the dividends of reaching Saudi Arabia (the destination for most) are considerable: menial jobs are paid at levels unimaginable in Ethiopia or Somalia.<sup>29</sup>

### Deterrence and dissuasion

While European countries have developed and implemented a raft of measures to reduce new arrivals, they still provide a fair chance of settlement for those who manage to reach European territory. By contrast, the approach in some other countries of preferred destination, including Australia and Canada, is based firmly on deterrence. In Australia for example, the legal and policy framework is explicitly designed to 'stop the boats', to discourage irregular maritime migrants by increasing the costs and risks of 'unauthorised' arrivals by sea. During 2013 and 2014, rigorous enforcement of this policy appeared to have the intended effect, with almost no irregular maritime migrants reaching Australia and any prospect of settlement in Australia summarily withheld from all those who arrived in this way, irrespective of any other considerations, including refugee status. There can be little doubt that the "push-down pop-up effect" so familiar in other areas such as international illicit drug control is at work here; while this approach may effectively address Australian concerns, it does nothing to alter the number of irregular migrants on the move, rather funnelling them into alternative routes and destinations—again with smugglers and traffickers' involvement.<sup>30</sup> The policy has also drawn widespread criticism because of reportedly inhumane and degrading conditions in offshore processing centres and systematic government efforts to conceal information about policy implementation.<sup>31</sup>

Europe has not implemented deterrence in such forms or on such a scale. However, individual European States have certainly sought to influence migrants' (including asylum seekers') cost-benefit calculation by presenting a range of unattractive obstacles. For example, in late 2015, and perhaps borrowing from Australia's notorious videos of disappointment, drowning and an uncompromising no-settlement policy for all boat arrivals,<sup>32</sup> Danish authorities placed advertisements in four Lebanese newspapers with information about cuts in welfare and family reunification provisions, intended to make Syrian refugees reassess the benefits of settling in Denmark.<sup>33</sup>

<sup>28</sup> See EU Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos letter to EU 1st June 2015. Retrieved from: <http://www.statewatch.org/news/2015/jun/eu-AVRAMOPOULOS-migration-letter-to-eu-ministers.pdf>

<sup>29</sup> Regional Mixed Migration Secretariat data as compiled in monthly reports based on IOM and UNHCR statistics from the region.

<sup>30</sup> In the last two years, the number of Afghan asylum seekers/irregular migrants coming into Europe has risen. Examining the data from Australia and Europe could be interpreted as indicating the rise in Europe is in direct proportion to the reduction in Afghans trying for Australia compared to previous years. Eurostat and Frontex reports track annual changes in Afghan asylum claims in Europe. (e.g. [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics))

<sup>31</sup> Human Rights Law Center. (2015). "UN finds Australia's treatment of asylum seekers violates the Convention against Torture", Retrieved from: <http://hrlc.org.au/un-finds-australias-treatment-of-asylum-seekers-violates-the-convention-against-torture/>; Farrell, P. (2015). "Asylum seeker transfers to Nauru and Manus should stop, say refugee groups". *The Guardian*. 24 April 2015.

<sup>31</sup> Human Rights Law Center. (2015). "UN finds Australia's treatment of asylum seekers violates the Convention against Torture", Retrieved from: <http://hrlc.org.au/un-finds-australias-treatment-of-asylum-seekers-violates-the-convention-against-torture/>; Farrell, P. (2015). "Asylum seeker transfers to Nauru and Manus should stop, say refugee groups". *The Guardian*. 24 April 2015.

<sup>32</sup> See: <https://www.youtube.com/user/notopeoplesmuggling>

<sup>33</sup> Al Jazeera and DPA. (2015). "Denmark advert in Lebanon newspapers warns off refugees". *Al Jazeera*. Retrieved from: <http://www.aljazeera.com/news/2015/09/denmark-advert-lebanon-newspapers-warns-refugees-150907225146384.html>



# 4.

## Approaches to smuggling

Unsurprisingly, approaches to smuggling of migrants differ substantially between countries and regions as the impact of smuggling on States varies widely. States' asymmetrical interests and levels of concern are reflected in highly divergent responses.

### Strategic demonization

Political leaders in preferred destination States are under immense pressure to act in the face of migration crises. The urgency comes from humanitarian impulses within the community, from a strong sense of unequal burdens (particularly felt by front line States), and from perceived threats to public order, national unity and sovereignty. An intensified fight against smuggling is frequently presented as the best course of action against the broader and more ephemeral spectre of irregular migration.

When migration crises are linked to the smuggling of refugees, targeting smugglers serves several strategic purposes. First, a successful fight against smuggling, by closing off a vital means of escape and arrival for asylum seekers, would restore the balance of appearing to guard the principles of the Refugee Convention while in fact offering protection to relatively few refugees. If smugglers were eradicated, prospective refugees would remain under threat of persecution or have to seek protection elsewhere, and the visible part of the crisis would fade away.

Second, by focusing on smugglers as the cause of suffering and loss of life, leaders engage in politically valuable 'virtue signalling': recasting themselves as protectors of refugees in opposition to cynical and evil villains. In Europe, since at least the 1990s, large sectors of civil society have been critical of migration control policy and leaders have widely been perceived as hawkish rather than compassionate in migration issues. Such an image can be useful at times but becomes a burden when refugees visibly drown by the thousands on Europe's doorstep. With a focus on fighting smugglers, however, European leaders are able to project an image that is simultaneously assertive and caring. The fight against smuggling is accompanied by rhetoric that depicts migrant smugglers as inherently evil. In this way, smugglers become legitimate targets, even when their basic function is to offer refugees a possibility to seek the protection to which they are entitled.

There are other significant effects of the demonization of smugglers and smuggling. For example, the criminalization and prosecution of smuggling exercises a strong selection effect on the smuggling business model. When smuggling is treated as a serious crime, the risks are elevated and the profile of those involved inevitably shifts. This is particularly the case in Europe, North America and Australia where, despite low detection rates, smuggling carries a growing risk of detection, arrest and harsh sanctions.<sup>34</sup> Small-scale and part-time operators have been crowded out by organizations and individuals who are prepared to play for higher stakes. Another response has been to cut the journey short—to abandon migrants at sea, sending them towards the shore or into the arms of potential rescuers on their own.

### A battle weakly fought

Migrant smugglers appear to operate with great success. Many migration containment measures—such as the recent erection of border fences between European countries—effectively increase the demand for smuggling by making irregular migration more dependent on specialized knowledge, equipment, and infrastructure. The strong demand for smuggling services clearly outstrips prevention and prosecution efforts, with the effect that smuggling services are plentiful and profitable. As previously noted, smuggling is also very often a win-win for those involved. Smugglers make money and their clients reach their chosen destinations, or at least are delivered close enough to enable them to take the final steps on their own.

Despite the creation of a global legal regime around migrant smuggling—one that has the in-principle involvement of almost all States,<sup>35</sup> smugglers continue to operate with near-total impunity, often assisted by complicit state officials who share their profits and facilitate movement and exploitation. This is the case across the world, despite greatly increased detection and prosecution efforts on the part of those States who perceive the threats most strongly and who are consequently most committed to protecting their borders from smugglers.

The fight against *trafficking* has also been fought weakly and unevenly. Despite widespread acknowledgment of the scale of the problem, very few victims are officially identified and a much smaller number of traffickers are ever brought to justice.<sup>36</sup> While most countries now benefit from strong anti-trafficking laws, it is difficult to locate prosecutions for trafficking-related exploitation amongst irregular migrants and refugees—even when their exploitation is egregious and public, as in the cases of trafficked Rohingya and migrant victims of extortion in the Sinai. The most important and influential compliance mechanism around trafficking, the annual US State Department *Trafficking in Persons Report*, rarely gives sustained attention to these forms of trafficking and this particular class of victim.

<sup>34</sup> In Europe for example, there were almost 1,000 prosecutions for migrant smuggling offences in 2014. Frontex. (2015). *Annual Risk Analysis 2014*. Warsaw: Frontex.

<sup>35</sup> As at October 2015, the Smuggling Protocol had been ratified by 141 States and the Trafficking Protocol by 167 States. (see further: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en))

<sup>36</sup> U.S. Department of State. (2015). *Trafficking in Persons Report 2015*, pp. 55-60.

### Rising costs, rising risks

Smuggling is the new normal in irregular migration - the only avenue available for the vast majority of individuals who wish or are being forced to move and who do not have the opportunity to do so legally. The nature of the crime means that systematic interdiction is simply beyond current criminal justice capacities, including capacities of States to cooperate transnationally. As the industry consolidates, professionalises and becomes more profitable, its ability to suborn national state officials will increase, and not just in developing regions.<sup>37</sup> Extensive anti-smuggling efforts are making it difficult, if not impossible, to operate successfully without factoring in costs of official complicity. As with any successful business, these costs are passed onto clients and therefore do not diminish the profits of those involved. Experience teaches us well that tougher approaches to irregular migration will inevitably operate to increase reliance on smugglers, leading to a rise in real costs, risks, fees and smuggler profits.

Heavy-handed prosecution of smugglers is often justified with reference to the need to protect migrants. But the threat of prosecution also affects smugglers' modus operandi in ways that make migrants more vulnerable. For instance, smuggled migrants are sometimes tasked with navigation or other responsibilities on a sea journey, in return for a discounted smuggling fee. Such practices not only exacerbate risks for everyone on board, but also turn smuggled migrants into facilitators who are themselves subject to prosecution. The use of ghost ships—decrepit cargo ships full of up to 1,000 migrants abandoned by smugglers at sea—provides another contemporary example of interdiction efforts exacerbating risks.<sup>38</sup>

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- <sup>37</sup> In June 2015 a Newsweek edition focused on Mafia involvement in reception centres in Italy. Perry, A. & Agius, C. (2015). "Migrants and the New Mediterranean Mafia". *Newsweek*. Retrieved from: <http://www.newsweek.com/2015/06/19/migrants-and-new-mediterranean-mafia-341468.html> ; more generally – UNODC. (2013). *UNODC Issue Paper: Corruption and the smuggling of migrants*. Vienna: UNODC. Retrieved from: [http://www.unodc.org/documents/human-trafficking/2013/The\\_Role\\_Of\\_Corruption\\_in\\_the\\_Smuggling\\_of\\_Migrants\\_Issue\\_Paper\\_UNODC\\_2013.pdf](http://www.unodc.org/documents/human-trafficking/2013/The_Role_Of_Corruption_in_the_Smuggling_of_Migrants_Issue_Paper_UNODC_2013.pdf)
- <sup>38</sup> AFP/Reuters. (2015). "Italy's second 'ghost ship' rescue prompts EU pledge to fight smugglers," *ABC News*. Retrieved from: <http://www.abc.net.au/news/2015-01-04/italys-second-ghostship-rescue-prompts-eu-pledge/5999122>.

# 5.

## Asylum under unprecedented threat

Almost 90 per cent of the world's refugees are currently hosted by countries in developing regions. Less hospitable neighbours and others further afield show little inclination to do more than pay the costs of refugee camps. However, recent, dramatic increases in the number of asylum seekers and refugees trying to access wealthy countries that are seen to offer greater chances of security and prosperity has pushed the issues of asylum and irregular migration to the top of the political agenda in North America, Europe and Australia. Questions are now reasonably being raised about current, egregious inequalities—not just between different regions of the world but also within Europe where front line States and several others are assuming a disproportionate share of the 'burden' of asylum.<sup>39</sup>

The long-standing principle that persons with a well-founded fear of persecution should be able to seek asylum in a safe country has always been implemented unevenly and sometimes disrespected altogether. But contemporary threats to its standing are of a new and different kind.

### Escalating anti-asylum sentiment

The global refugee regime is facing serious and multiple threats. Hostility towards asylum seekers is increasing. Many, including political leaders, are challenging the underlying principles of that regime. Such hostility can only be fully understood in the context of domestic politics, but it is also shaped by the ways in which immigration and asylum-seeker arrivals are experienced and managed.

As border controls tighten, smuggler-organized entry into Europe becomes more daring and confrontational. This fuels a change in public sentiment and refugees and asylum seekers may soon become as unwelcome as other irregular migrants. The nature of smuggling sometimes results in asylum seekers being represented as evasive or deceptive, representations that strain popular support for granting their protection. The rapid and apparently uncontrolled growth in the number of persons seeking protection may further fuel political and community opposition. Certainly, parallel to the rising numbers, anti-migrant politics and political movements are on the ascendancy in most wealthy countries of destination for asylum seekers.

### Barriers to accessing protection

In its operation, the global asylum regime seeks to strike a delicate balance between, on the one hand, guarding the principles of the Refugee Convention, and on the other, making it extremely difficult for those seeking protection to avail themselves of those principles. This strategy works in favour of wealthy countries of destination. In-principle adherence to the Refugee Convention preserves an important aspect of national identity and keeps influential political constituents and civil society groups on side while heavily restricted access keeps numbers very low—especially when considered against the number of people worldwide who have a well-founded fear of persecution. Of course, efforts to block opportunities to seek protection come at a high cost: the more successful this well-established de facto policy, the more the asylum system is hollowed out. Smugglers are upsetting the carefully calibrated balance: enforcing consistency between the principles of refugee protection and its provision to those in need.

### A single smuggled, unregulated flow

A further source of pressure lies in the mixed nature of unauthorized migration flows. The confluence of many different streams of migrants into one smuggled and unregulated flow challenges the refugee and asylum regime in developed regions. Particularly in Europe, irregular migrants, with asylum seekers and refugees amongst them, are not only paying smugglers and travelling together, but are being exploited together, and defying barriers, authorities and international borders together. It is widely known that many economic migrants fabricate stories or alter identities in order to increase their chance of being accepted as refugees, thereby devaluing the currency of the testimony of the genuinely persecuted. Further, many of those whose claims to asylum are rejected manage to stay without authorisation—61 per cent in 2014.<sup>40</sup>

Mixed migration flows are sometimes represented in a crude contrast between 'genuine refugees' and 'economic migrants'. The actual mix, however, defies such a simple distinction. Many people are fleeing serious insecurity but may nevertheless fail to meet the conditions for asylum. For instance, refugee status was given to fewer than half of Iraqis who sought asylum in Europe in 2014, and only to a quarter of Somalis and Afghans, despite the widely generalised risks to personal security that the entire population in these countries is exposed to. Many were allowed to remain on other grounds, but in each case, a third had their applications rejected and were expected to return to societies in turmoil.

While the term 'economic migrants' carries with it an air of opportunism, many of those who are subsumed under this label are motivated not by greed or a desire to so-called free-ride, but by fundamental human desires such as being able to raise a family. The high cost of smuggling should not be used to infer that migrants were well-off to start with: there is too much evidence of debt-financed migration, with smugglers fees being borrowed or pooled from a large number of relatives.

<sup>39</sup> See UNHCR. (2015). *The sea route to Europe: The Mediterranean passage in the age of refugees*.

<sup>40</sup> See EU Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos letter to EU 1st June 2015. Retrieved from: <http://www.statewatch.org/news/2015/jun/eu-AVRAMOPOULOS-migration-letter-to-eu-ministers.pdf>

## Towards the future

A wide range of factors has conspired to push millions of the world's poor, displaced, persecuted and oppressed out of their countries and towards parts of the world that offer a real chance for a better life. Rather than cutting off such opportunities, repressive migration policies have helped create and sustain a robust market for paid facilitators who are able to circumvent all but the most draconian border controls. Calls to address so-called 'root causes' that do not base themselves firmly on these unpalatable realities are doomed to irrelevance and failure.

Dithering amongst policy makers is inexcusable but on some level, also understandable. The scale and sophistication of irregular migration is growing and it is impossible to predict with certainty how this will play out in the years ahead. That unpredictability is, understandably, giving many governments pause for thought as they seek to avoid being locked into policies and approaches that may prove disastrously costly into the future.

Western democracies are in another, more existential bind. The modern, liberal, democratic state is singularly unprepared for the task of stopping facilitated irregular migration—at least not in the long term. As the United States has already learned, and as Europe is coming to appreciate, ending large-scale unwanted migration in the face of strong counter-forces can only be effectively achieved through the continuous deployment of massive force and violation of individual rights on a scale that grossly offends liberal values.<sup>41</sup>

This paper accepts that there is no 'expert' solution to the current global migration crisis. Any positive change—any progress towards a more coherent response—will necessarily be incremental and based on greater awareness of motivations, patterns and processes. A more sophisticated and informed understanding of those who facilitate irregular migration, the smugglers and the traffickers, is an essential and much overdue step in the right direction.

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<sup>41</sup> See further Gallagher, A.T. (2015). "Exploitation in Migration: Unacceptable but Inevitable", *Journal of International Affairs*, 68 (2).



### The Regional Mixed Migration Secretariat (RMMS).

Formed in 2011 and based in Nairobi, the overall objective of the RMMS is to support agencies, institutions and fora in the Horn of Africa and Yemen sub-region to improve the management of protection and assistance to people in mixed migration flows in the Horn of Africa and across the Gulf of Aden and Red Sea in Yemen. The co-founders and Steering Committee members for the RMMS include UNHCR, IOM, Danish Refugee Council (DRC), INTERSOS and the Yemen Mixed Migration Task Force. The RMMS is therefore a regional hub aiming to provide support and coordination, analysis and research, information, data management and advocacy. It acts as an independent agency, hosted by the DRC, to stimulate forward thinking and policy development in relation to mixed migration. Its overarching focus and emphasis is on human rights, protection and assistance.

RMMS is located at: The DRC Regional Office for the Horn of Africa and Yemen, Lower Kabete Road (Ngecha Junction), P.O.Box 14762, 00800, Westlands, Nairobi, Kenya., Office: +254 20 418 0403/4/5, [info@regionalmms.org](mailto:info@regionalmms.org)