POLICY PAPER

Strategies to tackle the root causes of human trafficking in the Horn of Africa: Complementing anti-trafficking laws with freedom of movement

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Introduction

Trafficking in human beings constitutes a serious challenge in the Horn of Africa (HoA). The transnational, organised exploitation of tens of thousands of persons, and attendant abuses, have inflicted immense pain and suffering on its immediate victims, families and friends.[1] Trafficking is also a governance issue. Its persistence indicates a failure of states to discharge their duty to protect individuals within their jurisdiction from abuse. This situation is widely acknowledged, although

strategies differ on how best to tackle trafficking in the region.

The Intergovernmental Authority on Development (IGAD) has adopted several policies and measures to combat trafficking, including in the context of the IGAD Regional Migration Policy Framework (2012),[2] and the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (2006).[3] It has also engaged in regional cooperation efforts, such as the African Union Horn of

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1. SAHAN and IGAD, Human Trafficking and Smuggling on the Horn of Africa-Central Mediterranean Route, February 2016. UNHCR, Smuggling and Trafficking from the East and Horn of Africa, Progress Report, 2015, 2: "Precise numbers are unknown. Estimates indicate that 25,000-30,000 people were victims of trafficking in the region between 2009-2013." Available at www.icvanetwork.org/system/files/versions/5.%20UNHCR-Smuggling_and_Trafficking-Progress_Report.pdf accessed 25 October 2017

2. See http://migration.igad.int/wp-content/uploads/2017/02/Regional-Migration-Policy-Framework1.pdf Accessed 8 October 2017.

3. See https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/ouagadougou_action_plan_to_combat_trafficking_en_1.pdf and www.igadhost.com/igad/index.php/2012-09-15-21-12-34/1256-a-campaign-against-human-trafficking Accessed 8 October 2017

Africa Initiative against human trafficking and smuggling of migrants.[4]

Legislative measures are an integral component of these policies. This is reflected in the IGAD policy framework, which includes "strengthen[ing] national policy, structures and laws in order to establish a co-ordinated and integrated approach at national level by incorporating pertinent international instruments".[5] Several States in the region have become parties to the Palermo Protocol[6] and adopted specific anti-trafficking legislation, including Uganda (2009)[7] and Kenya (2010),[8] and, more recently, in the context of the intense regional and international focus on trafficking in the region, Sudan (2014),[9] Ethiopia (2015)[10] and Djibouti (2016).[11] Eritrea, Somalia and South Sudan have yet to adopt specific anti-trafficking legislation.

This policy paper argues that the substance of relevant national laws and their practical application contain a number of shortcomings and challenges.[12] This argument is based on extensive empirical research with Eritreans on the move, in which 67 qualitative interviews were conducted in Ethiopia, Sudan and Europe (for the full findings of the research, available from 7 November 2017, see "Tackling the root causes of human trafficking and smuggling from Eritrea: The need for an empirically grounded EU policy on mixed migration in the Horn of Africa.")

This paper outlines key findings from the research. It then presents a number of shortcomings in law and policy within the region, before making specific policy recommendations.

Summary of the findings

Eritreans leave their countries to flee forced conscription, political repression and the lack of economic prospects. As the majority of Eritreans are unable to leave their country legally most rely on smugglers to ensure that they successfully evade border controls in their efforts to reach safety. Their irregular entry into neighbouring countries, and their often-precarious status, has made individual migrants and refugees vulnerable to trafficking, particularly in refugee camps. Smuggling and trafficking in human beings has developed into a transnational business operated by criminal networks, whose members often come from disadvantaged backgrounds.

The responses of state institutions in the region to these realities vary significantly, not only between countries but also within each of the states in the region. While some institutions and officials offer protection and assistance to people on the move, and respect human rights, other state institutions are predatory and carry different degrees of responsibility for the abuses that refugees and migrants suffer from. In other words, while states and their capacity to

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4. See IGAD and IOM, "Human Trafficking and Smuggling of Migrants in the Context of Mixed Migration Flows: State of play in the IGAD region", Background Paper, Sixth IGAD Regional Consultative Process in Migration (IGAD RCP) October 2015, 13 and 14.

5. Ibid., 23.

6. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000. Available at www.osce.org/odihr/19223?download=true accessed 25 October 2017

7. The Prevention of Trafficking in Persons Act, 2009. Available at www.ulii.org/ug/legislation/act/2009/7/Prevention%20of%20Trafficking%20in%20Persons%20Act%2C%202009.docx accessed 25 October 2017

8. Counter-Trafficking in Persons Act, No. 8 of 2010. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf accessed 25 October 2017

9. Combating of Human Trafficking Act, 2014. Available at www.ilo.org/dyn/natlex/docs/MONOGRAPH/99189/118286/F148132047/SDN99189%20Eng.pdf accessed 25 October 2017

10. Proclamation no.909/2015, Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation. Available at www.ilo.org/dyn/natlex/docs/ELECTRONIC/101059/126622/F-402220324/ETH101059.pdf accessed 25 October 2017

11. Act No. 133/AN/16/7ème, 2016, Combating Trafficking in Persons and Illicit Smuggling of Migrants; earlier, Act No.210/AN/07/5ème L, 2007, Combating Trafficking in Human Beings. Available at www.ilo.org/dyn/natlex/docs/ELECTRONIC/101766/122772/F253643777/DJI-101766.pdf accessed 25 October 2017

12. The review of legislation has been undertaken with reference to the Palermo Protocol and relevant international human rights standards, taking into consideration findings of UN human rights treaty bodies and the country entries in the United States Department of State, Trafficking in Persons Report over the last five years.

operate are undeniably part of the solution to the situation of refugees and migrants in the HoA, the findings also make it clear that they are often also the cause of it.

Most Eritreans who decide to migrate have a clear knowledge of the fact that they are taking a huge risk to their own safety, but are usually only vaguely aware of the specifics of that risk, and how to avoid it. Family links play an important role in the context of decision-making: most people get their information from family and friends, rather than from state institutions, NGOs or the media. Whether inside Eritrea or outside it, ultimately people look to those who they most trust for information.

Thus, decisions to cross borders irregularly and take extreme risks are often taken when alternative options are perceived to be equally bad, or potentially worse. What policy makers view as an ill-informed decision is often calculated risk-taking. Many of those who migrate irregularly do so not because they are unaware of legal migration procedures or because these are over-bureaucratic, but because it is clear to them that the legal routes are so limited for people in their situation that they cannot rely on them as viable solutions.

Those interviewed distinguished between smugglers as service providers who are helping people flee a repressive state, and traffickers who are a source of exploitation and abuse. However, the line between smugglers as "humanitarians" and the abuses associated with trafficking is painfully thin. People are acutely aware of this and attempt to mitigate the risk by using smugglers or routes that are perceived to be more reliable and safe. As a result, people's descriptions of their journeys pointed to a pattern in which their journeys become increasingly dangerous, often as the original linkage between the migrants and the original smuggler got weaker.

Many of those who move from the region to Europe do so as a result of failures in refugee policies in first countries of asylum, policies that have left millions

of people living for years and sometimes decades in protracted situations of exile. These failures hinge primarily around the emphasis on encampment for those in exile and failures around access to work and durable solutions. Combined, these policy failures have created a semi-permanent state of emergency, jeopardising quality of life and bringing the humanitarian system to breaking point.[13]

Shortcomings in law and policy

The experiences of Eritreans, particularly in relation to human smuggling and trafficking, take place in a policy and legal environment that has a series of shortcomings adversely impacting the adequacy and effectiveness of responses. First, legislation does not fully conform to the Palermo Protocol, including in some instances concerning the very definition of trafficking; and contains provisions that raise concerns over their compatibility with human rights standards (imposition of the death penalty for numerous trafficking offences, lowering of the burden of proof etc.). Several laws provide for limited victim protection, granting no, or short, reflection periods (the time a trafficking victim is permitted to legally stay in a country after being rescued) and inadequate protection against *refoulement* (being returned to a country where a person may face persecution or human rights violations).

Second, the application of anti-trafficking laws, in combination with other legislation, frequently results in trafficking victims being treated as irregular migrants.[14] This frustrates victim protection, and has resulted in deportations, particularly to Eritrea, and concerns over *refoulement*. Further challenges include the limited number of prosecutions *per se* and especially cases involving officials, despite allegations of complicity. Victim protection has been non-existent or inadequate due to a combination of limited resources, capacity,

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13. For an extensive critique of the impact of these policy failures, see Lucy Hovil, *Refugees, Conflict and the Search for Belonging*. Palgrave, 2016, 155 – 191.

14. This is a common theme in most countries in the Horn of Africa. See, for example, country entries in the United States

Department of State, Trafficking in Persons Report, 2017. Available at www.state.gov/j/tip/rls/tiprpt/2017/ Accessed 19 October 2017.

expertise and priority setting.[15] The implementation of laws also raises broader rule of law and human rights concerns, including the use of paramilitary and security services as border enforcement agencies. In addition, the application of legislation has not been transparent, making it difficult to assess the compatibility of measures taken with good practice, and their effectiveness.

The strategic component of adopting legislation is important to develop an adequate legal framework in states across the region. However, there is limited evidence that the focus on a legal and a predominantly repressive approach has been effective in combating trafficking. Notwithstanding the few successful prosecutions and reported incidents in which victims of trafficking were rescued in countries in the region, their limited impact has failed to instil trust in the authorities. Victims of trafficking are therefore still inclined to evade the authorities and have limited interest in cooperating in any prosecution efforts.

The repressive approach also fails to address the root causes of trafficking. Persons who cross borders in the region, including victims of trafficking, do so because they flee persecution, human rights violations and conflict in their home countries, or seek to better their lives elsewhere, or both. The lack of regular migration channels typically drives persons, particularly from Eritrea, into the hands of smugglers. This factor, in conjunction with the involvement of corrupt or otherwise complicit border officials, encampment, lack of freedom of movement and insecure status in neighbouring countries renders persons who cross borders extremely vulnerable to abuse. These realities create an environment conducive to trafficking. These dangers are known to people living in precarious circumstances who therefore often seek to move further away and leave the region altogether. Such decisions risk enhancing their vulnerability to trafficking; they typically need the help of smugglers and resources to finance onward journeys, which often creates a desperate situation that traffickers are apt to exploit.

This evidence ties in with findings that highlight the limits of a predominantly repressive approach.[16] It calls for a broader focus on prevention that tackles the root causes of trafficking. This includes creating conditions that respect the rights, status and economic prospects of people within countries, and that reduce vulnerability to trafficking in the region. The proposed IGAD protocol on free movement of persons has the potential, if it indeed effectively ensures free movement, to constitute a major step to reduce such vulnerability.[17] It would obviate the need for nationals of member states to have recourse to smugglers, reduce encampment, and provide freedom of movement within countries. Legal status, the right to work and adequate protection of rights are critical, as they greatly reduce the need for illegal employment and therefore risk of exploitation. They also enhance the prospects of gaining a living in countries across the region, which reduce incentives for onward journeys.

Nonetheless, it is clear that a protocol on free movement of persons will not in and of itself end onward movement beyond the region, particularly as long as governance challenges, including armed conflict, human rights violations and weak and uneven economic development, persist. Other actors within the region and beyond, including the European Union and the African Union, therefore have an important role to play. Measures to be taken in this regard include supporting regional integration as well as providing channels of migration and access to safety for those in need of protection.

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15. Ibid.
16. See further Anti-Trafficking Review No 6(2016) Special Issue- Prosecuting Human Trafficking. Available at http://gaatw.org/ATR/AntiTraffickingReview_issue6.pdf accessed 25 October 2017

17. IGAD Launches Negotiations on Protocol on Free Movement of Persons, 3 July 2017. Available at https://igad.int/divisions/economic-cooperation-and-social-development/2016-05-24-03-16-37/1588-igad-launches-negotiations-on-protocol-on-free-movement-of-persons Accessed 18 October 2017.

Recommendations

To IGAD member states:

Considering the empirical findings based on interviews with Eritreans, and with a view to enhancing refugee protection in the region and reducing the demand for smuggling, IGAD member states should:

- Refrain from deporting refugees back to their countries of origin, which commonly constitutes a violation of the principle of non-*refoulement*. States should also ensure refugees are not prosecuted or punished for their irregular entry into the country in contravention of the 1951 Refugee Convention relating to the Status of Refugees (Art. 31). Refugees have the right to cross borders in search of protection and this movement should not be criminalised.

- Allow refugees to move freely and choose their place of residence. Settlement in refugee camps should be on a voluntary basis. A restriction on the freedom of movement and choice of residence of refugees which is lawful has to meet the requirements of both the 1951 Refugee Convention relating to the Status of Refugees (Art. 26) and the International Covenant on Civil and Political Rights (Art. 12).

- Develop policies and programmes that will improve refugees' access to livelihoods and will facilitate refugees' access to labour markets, both in camps and in urban areas.

- Undertake reforms that strengthen the rule of law and human rights protection of anyone within a state's jurisdiction, in line with recommendations made by UN human rights treaty bodies, African regional human rights bodies and the UN Human Rights Council's Universal Periodic Review.

- Create a database that provides accurate information on cases concerning trafficking, smuggling, refugee status, and immigration generally, using internationally/regionally agreed upon concepts.

Considering experiences in respect of the formulation and application of anti-trafficking legislation in the region to date, IGAD member states should:

- Adopt specific anti-trafficking legislation where no such legislation is in place (Eritrea, Somalia, South Sudan). Where anti-trafficking legislation has been enacted, ensure it is in accordance with the Palermo Protocol and international human rights standards.

- Ensure that coherent legal frameworks are in place, which adequately distinguish between trafficking victims and irregular migrants, and provide effective protection to victims of trafficking. Such protection includes adequate reflection and recovery periods that allow victims of trafficking to stay in the country concerned (of no less than 90 days, see UNODC Model Law against Trafficking in Persons) and explicit provisions granting effective protection against *refoulement*.

- Provide sufficient resources to build facilities, train personnel and render services to victims of trafficking, including a gender and children component.

- Strengthen the focus on the complicity of official personnel in trafficking operations, and ensure that any such involvement is dealt with effectively and as prescribed by law.

To IGAD:

Considering the factors that persons crossing borders and victims of trafficking have raised as pivotal in respect of their decision-making and vulnerability to abuse, IGAD should take the following measures to combat human trafficking and smuggling effectively:

- Expedite efforts to adopt a Protocol on Free Movement of Persons in the region, which provides for free movement of nationals of member states and ensures that refugees enjoy the greatest possible freedom of movement, at a minimum as guaranteed in regional and international instruments.

- Take measures to make free movement of persons effective upon the coming into force of the Protocol, including by undertaking legislative reforms and strengthening access to justice for anyone wishing to exercise or exercising their freedom of movement.

- Invite individuals, community representatives and civil society organisations from the relevant communities in the region to meetings and consultations, and provide them with the opportunity to make presentations on their situation and on extant and planned migration policies and their implementation.

- Call on non-IGAD member states, particularly in Europe and in the Middle East, to provide adequate protection to migrants and refugees from the Horn of Africa who reach their borders or are otherwise within their jurisdiction. Work in cooperation with these states to facilitate legal mobility between them and IGAD member states.

The International Refugee Rights Initiative (IRRI) was founded in 2004 to inform and improve responses to the cycles of violence and displacement. IRRI has developed a holistic approach to the protection of human rights before, during, and in the aftermath of displacement, by identifying the violations that cause displacement and exile; protecting the rights of those who are displaced; and ensuring the solutions to their displacement are durable, rights respecting, safe and timely.

www.refugee-rights.org

The Strategic Initiative for Women in the Horn of Africa (SIHA) is a network of civil society organisations from Sudan, South Sudan, Somalia, Somaliland, Ethiopia, Eritrea, Djibouti, Uganda, and the coastal area of Kenya. Established in 1995 by a coalition of women's rights activists with the aim of strengthening the capacities of women's rights organisations and addressing women's subordination and violence against women and girls in the Horn of Africa, SIHA is now comprised of close to 75 members.

www.sihanet.org

The Centre for Human Rights Law, SOAS, University of London, provides a forum for scholarship and collaborative approaches on human rights law in practice. It has hosted a number of events, made submissions and provided expert testimony on human rights in Sudan and policies on mixed migration in the Horn of Africa, with a particular focus on the Khartoum Process.

www.soas.ac.uk/human-rights-law