Of Human Bondage: Combating Human Trafficking and People Smuggling

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Introduction

This is a summary of an event held by the International Law Programme at Chatham House, in association with Doughty Street Chambers, on the topic of combating human trafficking and people smuggling. The meeting was held in the format of a conversation, with attendees encouraged to contribute to the discussion between speakers.

The meeting was not held under the Chatham House Rule.

Human trafficking and people smuggling: current legal frameworks

The discussion began with an introduction to the distinction between trafficking and smuggling as contained in the two Palermo protocols appended to the Convention against Transnational Organized Crime in 2000. Human trafficking is defined as ‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’. The intention of the trafficker is to exploit the person upon their recruitment, harbouring, or at the end of the journey, whether that is within the country or across international boundaries. Trafficking is for the purposes of exploitation, but the exploitation does not actually have to take place. Exploitation includes ‘the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’. Where children are involved, none of those means such as threats, the use of force, coercion, or deception need to be proven to establish human trafficking. Exploitation with the intention of forcing a person into criminal activity enables the hand of the trafficker to be protected by the hand of the victim committing the crime. Both trafficking and smuggling are low-detection, high-profit crimes.

Smuggling, on the other hand, is defined as ‘the procurement in order to obtain either directly or indirectly a financial or material benefit from the illegal entry of a person into a state of which the person is not a national or a permanent resident’. The intention of the protocol on smuggling was to cover the movement of a person across an international boundary, which is generally the point at which human smuggling ceases. The person may then be released from the contract, as payment has been made to achieve the goal of their transportation to another country.

One speaker made the observation that those involved in smuggling drugs and weapons may also be involved in the smuggling of humans. Furthermore, smugglers of human beings may often also be their traffickers once they have crossed the border. The core reasons underlying a person’s willingness to

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1 This meeting summary was prepared by Jack Kenny.
3 Article 3, Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime 2000. Also see The Council of Europe Convention on Action against Trafficking in Human Beings: entered into force in the UK on 1 April 2009; the same day the NRM began operation (the ECAT), Article 4; and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA (Trafficking Directive), Article 2.
4 Article 3 Trafficking Directive.
5 Article 3 (c) Trafficking Directive.
engage with somebody who promises them a good job, or to gain entry into a country where they think they might have a better future, are poverty, inequality, and an initially vulnerable position. Thus, in some cases traffickers are able to identify the kind of people they may be able to exploit later on.

**Domestic trafficking and smuggling frameworks in the UK**

Traditionally, trafficking and smuggling have been treated separately. In England, for example, the Immigration Act 1971 criminalized the facilitation of illegal entry into the UK. If someone smuggles a person into the UK, they are guilty under the Act of that criminal offence. Human trafficking laws in the UK have been incremental. The Sexual Offences Act 2003 criminalized trafficking into the UK for sexual exploitation. In 2004, the Asylum and Immigration (Treatment of Claimants etc.) Act criminalized trafficking into the UK for any form of exploitation, covering other kinds of exploitation. The UK had never had a free-standing forced labour/slavery criminal offence after the abolition of the international slave trade, and this was remedied in 2009, through the involvement of Anti-Slavery International, by Section 71 of the Coroners and Justice Act. The criminal laws on trafficking for sexual exploitation and forced labour had deficits in that they had not criminalized trafficking either within the UK or out of the UK unless the person had first been trafficked internationally into the UK; this was remedied by the Protection of Freedoms Act 2012, and all the offences have now been incorporated into one piece of UK legislation, namely the Modern Slavery Act 2015. Overall, the development of the framework of trafficking and slavery-related criminal legislation has not been straightforward, requiring the bringing of cases by expert barristers and solicitors, and advocacy by various NGOs and other bodies, culminating in the 2015 Act.

In recent tragic events in the Mediterranean and other oceans across the world, those responsible are commonly labelled as traffickers, but this is wrong: it is not possible to ascertain whether the people who were arranging those journeys intended to exploit people; only that the people are in the process of being smuggled. Sometimes politicians deliberately misuse the trafficking rhetoric to describe what is a clearly a smuggling situation as a means of justifying an argument that they should not interfere to save vulnerable people on the basis that it would ‘only encourage the traffickers’ to continue to take such serious risks with human lives.

Traffickers intentionally ensnare vulnerable people and entrap their victims into a position that makes it very difficult for the victims to escape. This could be a result of psychological coercion, debt bondage, family obligations, etc. There is therefore a special term in the trafficking definition which explains that trafficking includes a trafficker’s abuse of a victim’s position of vulnerability, and there is also a special term specifically addressing the irrelevance of consent: if a victim consents to their trafficking, that consent is rendered irrelevant where any such means have been used because that consent was never freely given.

With regard to exploitation, it was noted by a speaker that it is easier to prosecute cases where there has been tangible exploitation, whereas it is more difficult to prosecute trafficking cases where the traffickers are apprehended before the victims are exploited. In order to lead to successful prosecutions, law enforcement must carefully consider this point to establish intention.

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7 Article 3(a) includes that one of the means is ‘abuse of a position of vulnerability’ (APOV). The United Nations Office on Drugs and Crime (UNODC) has provided recent legal guidance on APOV in an Issue Paper and Guidance Note on APOV of 2012.

8 See Art 3 (b) UN Trafficking Protocol, known as the Palermo Protocol. UNODC issued legal guidance on the role of consent in trafficking cases in its Issue Paper on Consent of 2014.
Forced labour and slavery

One speaker highlighted an excessive focus by the government on criminal justice in relation to the Modern Slavery Act – in particular the targeting of heads of criminal organizations – and a refusal to address any other aspects of the political economy where there may be enforced labour or slavery.

There are a number of international definitions of slavery, stemming from 1926, which include treating a person as property. The Forced Labour Convention, adopted in 1930, provided a better working definition – including little or no pay for services for which someone has not offered themselves voluntarily. This definition is more functional than the original 1926 definition, which proved problematic to operationalize legally because it is difficult to prove that someone was treating a person as property. The scope of the 1930 Convention provided indicators that facilitated differentiation of whether a situation amounted to forced labour or merely consisted of labour exploitation.

Law, policy, and customs can facilitate forced labour and slavery. South Asia is fundamentally dependent on slavery across the subcontinent, and the lack of capacity of the courts there renders ineffective many of the laws promising protection from various forms of slavery. Elites in the political establishments of countries refuse to confront other elites who benefit from forced labour in a different part of the political economy.

The situation is not as extreme within the UK, but the same sorts of problems do exist. There are risks of forced labour within sectors of the economy that use casual and informal labour. The Gangmasters Licensing Authority does not look beyond agriculture and food into other sectors in which there is considerable risk of forced labour, such as construction, catering, and domestic work. In relation to domestic work in the UK, under current policy the government ties visas of overseas domestic workers to their employers (although this policy is currently under review). This can serve in effect as a licence granted to those employers for trafficking and domestic servitude in the UK; this is despite the fact that the government asserts its wish to be a leading force in combating forced labour and slavery across the world.

Criminal justice and obstacles in prosecution

One of the main obstacles in prosecution is victim identification when the victim first comes into contact with authorities. Failure to identify a victim of trafficking often results in that person not having access to their rights. Where there are sufficient indications of trafficking present on first contact with authorities so as to raise a credible suspicion of trafficking, an investigative duty should be triggered by the state that may be capable of leading to a successful prosecution. If these steps in the process of identification and investigation leading towards a successful prosecution are not effective, then they form key obstacles. All those who come into contact with possible victims of trafficking – including frontline officials, police, lawyers and judges – must have knowledge of their responsibilities in identifying such victims.

The EU Directive on trafficking and the European Convention on Action against Trafficking in Human Beings clearly state that there must be proper and adequate training of officials and cooperation between law-enforcement agencies of states. Insufficient training of front-line staff of the UK Home Office

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or police officers results in a failure to detect standardized indicators of trafficking. Investigative bodies do not begin to ask the right questions to spot those indicators of trafficking, such as: if a person has control over their own passport; if someone else has arranged travel on their behalf; or if that person is receiving no wages in payment for labour.

In *Rantsev v. Cyprus and Russia* the European Court of Human Rights held that there was a breach of Article 4 of the European Convention on Human Rights through multiple failures that began with not asking the right questions to detect indicators of trafficking. Those indicators would have led the Cypriot police to identify Ms Oxana Rantseva as a victim; to investigate the circumstances of her trafficking; and potentially to a successful prosecution. The Court held that there had been multiple breaches of the duties owed to protect potential victims of trafficking in breach of Article 4; and in this case the Cypriot police simply ascertained Ms Rantseva’s immigration status, contacted the victim’s abusive employers to pick that person up from the police station, and only hours later she had died in suspicious circumstances.

A lack of training has resulted in a striking level of ignorance. There is also a problem with resources, but it is difficult to determine exactly what the problems are in practice. Phil Brewer has suggested there is a culture of disbelief that may create further obstacles to effective identification and investigations. Furthermore, the role operated by UK Visas and Immigration under the Home Office in asylum and immigration decision-making is in conflict with the duty as Competent Authority in identifying victims of trafficking. There is a separate Competent Authority, the UK Human Trafficking Centre responsible for identifying EEA/British/Irish nationals. However, the statistics on victim identification demonstrate that identification rates for third-country national victims subject to immigration control are significantly lower than recognition rates for EU citizen victims and secondly British/Irish nationals.

Funding is required for effective international cooperation. Between 2007 to and 2008 co-operation for a Joint Investigation Team (JIT) between the UK and Romania funded by the European Commission, known as Operation Golf, was extremely successful in securing multiple criminal convictions both in the UK and in Romania, targeting traffickers responsible for volume thefts by Roma children. In Romania some important criminal convictions took place because there is a specific offence of being a member of an organized criminal network, so the kingpins of the operation could be caught and sentenced more appropriately under that legislation. In other instances where funding for JITs stopped, investigations ground to an immediate halt.

One participant mentioned the excessive reliance on computerization of law enforcement. For example, traffickers are targeted only if they are ‘in the system’. Ideally, each country should keep its own records accurately reflecting the victims they have encountered, even if only as a matter of intelligence rather than for a specific prosecution in court. Methods of operating, routes through which trafficked victims are taken, and the identification of key players who take extensive measures to avoid detection are valuable sources of intelligence. There is currently no parity between any countries in the world in terms of reporting human trafficking statistics.

In order to increase prosecution, there needs to be a very clear link between support agencies and the police. It was asserted that in the majority of the cases, victims were identified through the support and

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14 *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010.
15 Head of the Metropolitan Police’s human trafficking and kidnap unit.
16 The Anti-Trafficking Monitoring Group Report *Hidden in plain sight Three years on: updated analysis of UK measures to protect trafficked persons*, October 2013 reported ‘Dramatic differences in the number of positive NRM decisions granted by the two Competent Authorities (CAs) exist. In 2012, over 80% of EU/EEA national referred to the system received positive trafficking identification decisions. In comparison, less than 20% of third country nationals referred received positive identification’ (p.8).
encouragement of groups other than the police. That focus is not included in the Modern Slavery Act, where an opportunity to increase prosecution rates has been missed. The UNODC training manual for the police outlines the need for sensitive interviewing techniques dealing with consent, particularly when victims often consider themselves to be in a better position than their initially vulnerable situation.

A speaker recalled the case of R v O involving a young Nigerian girl aged 16 who used a false document to get out of the UK. She had been trafficked into the UK; she was brutalized and sexually exploited; and then escaped and managed to obtain a false identity card to flee to France and escape her trafficker. She was arrested for using a false document and then prosecuted. The most her criminal defence barrister did for her was to plead mitigation on the grounds that she was running away from a man who had brutalized her, sexually exploited her and raped her, and that she should therefore receive a lower sentence. The Judge accepted that mitigation and gave her a reduced sentence of eight months in prison. The case was allowed on appeal, when her conviction was quashed for a breach of the child’s fair trial rights under Article 6 of the European Convention on Human Rights. It was the first case where combined issues of human trafficking, the operation of the UK’s criminal law and recognition of trafficked victims’ rights were scrutinized by UK courts. However, victims are still not being adequately protected by the law.

**Detrimental government immigration priorities**

This government is unlikely to change its immigration priorities. The current priority of the UK and other European governments on immigration is causing victims to go unidentified and then be removed as illegal migrants.

Several frameworks recognize and warn against the state treating victims of trafficking as illegal migrants. The EU Trafficking Directive and the Council of Europe Trafficking Convention provide such warnings and are predicated on an effective identification mechanism. However, these frameworks are not implemented in practice. In the UK the National Referral Mechanism for the identification of trafficking victims was reviewed, and a report published in 2014 recommended changes in the future. The recommendations of the Joint Committee on the Modern Slavery Bill had been to take the role of victim identification out of the hands of the Home Office. It remains to be seen how these recommendations by Jeremy Oppenheim will be adopted in practice, and what role the Home Office would still play in victim identification.

The EU has a stringent immigration policy, and the desire of the EU in terms of its immigration and asylum policy is to keep illegal migrants out, which in turn can mean that in the EU victims are treated as illegal migrants and not properly protected. The EU’s opening of internal borders and the closure of external borders, and the policing of those borders externally, has directly increased traffickers’ use of underground or unknown illegal routes to get into richer states of the EU. Both domestic and international cooperation is important.

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88 [2008] EWCA Crim 2835.


21 Director, Safeguarding, Home Office, Safeguarding Unit, Modern Slavery Unit and Public Protection Unit.
Xenophobic immigration debates have coloured the government’s attitude towards combating trafficking over the last 5–10 years, and is now polluting conversation in terms of how the crisis in the Mediterranean should be managed. One speaker argued that EU citizens have far greater chances of being identified as victims of trafficking if presented to the authorities than victims from outside the EU.

**People smuggling**

To effectively tackle people smuggling requires a multifaceted approach, including improving existing mechanisms for identification, and safe labour and employment schemes. Multifaceted and multi-agency responses as envisaged by the Trafficking Directive and Council of Europe Convention are not translating into practice. The EU mission EUNAVFOR Med has already been implemented, aiming to stop and target ships. The proposed UN Security Council resolutions to bomb the boats are not proceeding because Libya will not give its consent.

Interception and search and rescue operations must comply with human rights obligations. *Hirsi and Italy* concerned Somali and Eritrean migrants, likely to be refugees, travelling from Libya, who were intercepted at sea by Italian authorities and sent back to Libya. The European Court of Human Rights held that returning the migrants to Libya without even giving them an opportunity to express their wish to claim asylum exposed them to risk of ill treatment and amounted to collective expulsion. The Italian coastguard was held in breach of Articles 3 and 13 of the European Convention on Human Rights. This led to the establishment by Italy of its Mare Nostrum operation. The EU operation must be carried out in full compliance with the 1951 Refugee Convention, the international law of the sea, international humanitarian law and the European Convention on Human Rights. A report of the Parliamentary Assembly of the Council of Europe, *Lives Lost*, recommended that member states must act in full compliance with international law to protect vulnerable people on the boats heading for Europe.

**The role of businesses and transparency in excluding forced labour from supply chains**

It is only because businesses from the Ethical Trading Initiative approached the government and demanded the inclusion of the requirement for transparency in the supply chain that it is in existence within the Modern Slavery Act. The government is much more willing to regulate business if business makes the request for regulation.

One of the main reasons why businesses from the Ethical Trading Initiative wanted transparency in supply chains within the Act was because conducting businesses ethically risks being undercut by businesses that are not; there is self-interest in ensuring there is a level playing field to compel those businesses that are not interested in ethical trading to take it seriously.

One speaker mentioned that ethical auditing has done nothing to protect vulnerable workers or change the systems within which they are exploited. No sanctions face businesses for using forced labour: their goods are not excluded from EU markets; and no business executive will ever be held criminally liable for knowing that forced labour is used in their supply chain. A speaker raised some loopholes in the Act: if there is a wholly owned overseas subsidiary, the parent business in the UK does not have to report on

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22 See recommendations of Shelley, Louise (2014), Human Smuggling and Trafficking into Europe: A Comparative Perspective, Migration Policy Institute.

23 *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012.

those activities\textsuperscript{25} and slavery within the Act is not an extraterritorial criminal offence. The extent to which the government is prepared to hold businesses to account even when they are asking to be held to account is very limited.

Within the Act, there is now the requirement to report on supply chains; the question remains, however, of exactly how the reporting is going to work in practice. It is reasonable and acceptable under the Act to declare that there are no concerns about forced labour in their supply chain without actively investigating. Nonetheless, there is hope through contact with lawyers and businesses that a much higher standard of reporting will be adopted. Businesses should begin by undertaking a risk assessment of the supply chain. Usually, a minority of points within a supply chain are cause for concern about forced labour. The first step would be to highlight those problematic points. For example, in sourcing seafood through any export-orientated sector such as Indonesia there is a considerable risk of forced labour in the supply chain in the light of the circumstances of migrant workers in the region.

Moreover, the transparency supply chain reporting requirement is to be subject to a financial threshold based on turnover, above which all companies must produce human trafficking statements. That threshold is yet to be announced by the government, and there is concern that the government may set it so high that the system is ineffective.

The purpose of auditing is to provide businesses with some kind of a defence when confronted with discovery of forced labour in their supply chains. From a financial point of view, auditing generally is not an approach that will identify a problem within a business because it focuses on whether the systems against financial fraud and other malfeasance within the business are strong. When transferred across into ethical auditing, the model is not going to identify cases of abuse. It is also highly corruptible, and there is evidence demonstrating widespread unethical auditing. For example, there have been numerous instances in Bangladesh over the past few years of fires in factories that had often been ethically audited before they burnt down with workers locked inside them.

In order to identify risks in the supply chain effectively, there needs to be proactive investigation; attempts should be made at reform through changes in managerial practice, changes in the management of the supply chains, or through working with NGOs on the ground in order to try and remove the causes of the problem. The failures in law, policy, and custom that are increasing these risks must also be identified. The UN Guiding Principles on Business and Human Rights\textsuperscript{26} state that businesses have the responsibility to respect the human rights of workers and that governments have the responsibility to protect these rights. It is difficult for a business to respect the rights of workers in a supply chain if governments are not doing that job.

If businesses make a serious and substantial effort in reporting, this should facilitate a deeper understanding of the complexity of the political economy on both national and international levels, and the beginnings of a proper dialogue and discussion about how best to reform that political economy to one that excludes forced labour and slavery as opposed to one that currently facilitates it where large numbers of businesses and some significant countries try and use them to their competitive advantage.
