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Anti-smuggling and Anti-trafficking Measures Are they compatible with the EU Charter of Fundamental Rights?

Human smuggling and human trafficking can lead to serious suffering and even death. However, could the very measures adopted to curb human smuggling and trafficking at the same time constitute violations of human rights law? A new Delmi report examines the compatibility of the EU measures against human smuggling and human trafficking with the EU Charter of Fundamental Rights.

Addressing human smuggling and human trafficking has become a priority objective for the EU Member States in their effort to decrease the number of migrants arriving in their territory. Developing strong cooperation with third countries, generally perceived as countries of origin and transit, has been considered indispensable to achieve this objective. The cooperation with third countries aims to contain the movement of migrants so that their departure to the EU is prevented. The containment and departure prevention arguably prevent the loss of migrants' lives and prevent them from becoming victims of human traffickers or of unscrupulous smugglers.

The externalization and outsourcing of migration control by the EU to third countries is not new. However, since 2016 this has been explicitly prioritized by the EU. These forms of controls are based on the idea of incentivizing third countries to restrict movement. Could this type of outsourcing of migration control be in violation of human rights law? When implementing anti-smuggling and anti-trafficking measures, aimed at preventing migrants from dying or becoming victims of trafficking, could the EU and its members be violating the human rights of those very migrants.

This study focuses on two specific rights enshrined in the EU Charter of Fundamental Rights: *the right to life* and *the right to seek asylum*. It concludes that the EU and its Member States may be failing to fulfill their positive obligations to ensure the right to life, and that the EU and its Member States may be in violation of the right to leave to seek asylum. The EU and its Member States have positive obligations to take active steps to safeguard the *right holders*’ (the migrants affected by the anti-smuggling and/or anti-trafficking measures) effective enjoyment of a fundamental right, such as the right to life.

Given the empirical doubts as to whether the current measures achieve this objective, alternative measures need to be considered. These alternatives, while ensuring the right to life, will have to also accommodate the States’ migration control interests.

Challenges when applying the EU Charter of Fundamental Rights

There are several legal challenges related to the applicability of the EU Charter of Fundamental Rights to the anti-smuggling and anti-trafficking measures undertaken by the EU and its Member States. These challenges concern among others the following factors:

- First, the individuals affected by the measures are not only located in third countries. They are also not under any form of physical or territorial control exercised by the EU and its Member States.
- Second, the measures are undertaken not only by the EU and its Member States that are bound by the EU Charter, but also by other actors, including third countries. It may be difficult to distinguish the specific roles of the different actors.

- Third, the measures are based on informal agreements with third countries, thus not constituting binding law.

The EU Charter applies to all EU institutions and bodies even when their actions have extraterritorial effect or these act outside of the confines of the EU legal framework. This means that any informal agreement with third countries can be scrutinized against the principles of the EU Charter.

The right to life

The EU and the EU Member States have positive obligations to ensure *the right to life* in the context of the anti-smuggling and anti-trafficking measures. These positive obligations cannot be so far reaching as to require neglect of the EU’s and Member States’ migration control interests. However, the EU and the Member States are at least under the positive obligation to consider alternative means that provide increased protection for migrants. The EU and the Member States are also under a positive obligation to initiate studies to assess to what extent the current anti-smuggling and anti-trafficking measures effectively ensure the right to life and to what extent any alternative measures (e.g. legal routes to entry, humanitarian visas) might be too burdensome or unreasonable.

The right to asylum

The anti-smuggling and anti-trafficking measures lead to containment of people in third countries and prevention of their departure to potential countries of asylum; for this reason, the measures interfere with *the right to asylum*. An integral part of this right is the right to leave to seek asylum. For any interference with the right to leave to seek asylum to be permissible under human rights law, it needs to meet certain requirements. First, it must be provided by law, which means that any measure that interferes with the right must have a specific legal basis.

This requirement does not seem to be met considering the informal nature of the cooperation with third states within which the anti-smuggling and anti-trafficking measures are undertaken. Solely based on the failure to meet this requirement, the measures can be declared contrary to human rights law.

Second, the measures that interfere with the right need to pursue a legitimate objective. This requirement seems to be met since the measures aim to preserve the integrity of the Member States' borders and, arguably, aim to save lives. It can, however, be questioned whether the chosen measures for achieving these objectives are appropriate or even necessary. There seems to be alternative measures that in practice might lead to the same number of people entering the EU while, at the same time, better guaranteeing the right to leave to seek asylum.

Recommendations

Better understanding of the definitions

The legal definitions of human smuggling and human trafficking are ambiguous and have been interpreted in an overly expansive way, which has led to little understanding as to the nature of the phenomenon that the EU and the EU Member States try to address. This understanding needs to be improved for any measures against human trafficking and human smuggling to be effective. An improved understanding also implies that 'human smuggling' and 'human trafficking' should not be constantly rhetorically invoked to justify migration control policies.

Reconsidering the definitions so that these reflect severe forms of harm

In light of the overly expansive way in which human trafficking and human smuggling are interpreted, a reconsideration is necessary as to the type, nature and severity

of harm and wrong that these crimes are meant to reflect. Such a reconsideration should, for example, imply questioning the inclusion of humanitarian assistance within the definitional scope of human smuggling.

Undertaking complementary measures for ensuring asylum seekers' rights

For the EU and the Member States to truly deliver on their claim that saving lives is a primary goal of the EU actions in relation to the management of the EU external borders, the measures of containing migrants in third countries will have to be complemented with other measures. These other measures can ensure safe routes for accessing the EU territory. Any alternative measures (e.g. creating safe and legal channels for existing third countries) might lead to the same number of people entering the territory of the EU Member States. There is an urgent need for further studies in this area.

Strengthening of hard law

Cooperation with third countries in the field of migration should evolve towards greater recourse to hard law, rather than soft law and informal arrangements. This will ensure that EU and the Member States' actions in this area can be tested against human rights law standards.

Undertaking empirically grounded studies

The EU and its Member States should ensure empirically grounded studies that can demonstrate that the current anti-smuggling and anti-trafficking measures are effective for achieving the claimed objectives i.e. saving lives and preventing arrivals. It is also desirable to undertake empirically grounded studies that can demonstrate whether any measures that are alternative to the ones that currently dominate would be too burdensome and unreasonable.



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