Emerging from the shadows or pushed into the dark?
The relation between the combat against trafficking in human beings and migration control

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Abstract

Human trafficking implies exploitation often by coercion; human smuggling is usually associated with voluntary law-breaking activities, a dichotomy of which the consequences the present article addresses from an interdisciplinary angle. Based on an (international) legal analysis we first point out that attempts to combat labour exploitation (trafficking) and irregular entry, stay and employment (smuggling) of migrants have been seriously intensified recently and that both approaches have developed relatively separately. Secondly, we show how different the position of irregular migrants is in these two domains. Whereas a victim of human trafficking can appeal for legal protection, a smuggled irregular migrant (worker) overall has little rights because of the formal absence of the exploitation element, and is most likely to be expelled and criminalised. Thirdly, we have conducted a crucial empirical test to investigate whether this dichotomy on paper is also visible in practice. Our empirical analysis based on the Netherlands’ criminal investigations data derived from human smuggling cases demonstrates that many elements of exploitation can also be found in these files, which have not been recognized and labelled as such. This does not only point to differential treatment of potential victims of exploitation among irregular migrants, but also suggests that how irregular migrants are seen and treated depends very much on how they enter the system.

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1. Introduction

Trafficking in human beings (THB) or exploitation has become more visible over the last decades. Informal segments of advanced economies host many migrant workers without a working permit or residence status, who accept substandard work (Ambrosini, 2012; Sassen, 2000). They have either migrated on their own account, or with the help of smugglers. Without suggesting that all illegal labour mounts up to exploitation, it is safe to say that there is a continuum ranging from substandard labour to severe exploitation (Bruckert and Parent, 2002; Dowling et al., 2007; Skrivankova, 2010), or modern slavery (Bales, 1999). Labour exploitation or exploitation outside the sex industry, on which the present article focuses, has steadily crept up on the attention scale of the public and law enforcement. With labour exploitation we refer to excesses of substandard labour which comprise three core elements of THB that are based on international agreements: the act of recruitment, movement or harbouring of a person; by means of threat or use of force, deception, abduction or coercion; for the purpose of placement into exploitation situations. These elements have to occur in combination, not isolation. Crucial for THB is the lack of choice to move to other options and the element of exploitation (Skrivankova, 2010). We focus specifically on irregular migrants outside the sex industry, a category of potential victims of exploitation which has so far received significantly less scholarly attention than victims within the sex industry. Most academics agree that there is no objective and clear line demarking the beginning and the end of exploitation. There has to be a combination of indications which in itself do not directly have to point to exploitation or dependency (Dowling et al., 2007; Skrivankova, 2010). Therefore, THB can easily be confused with and related to illegal migration and human smuggling. A smuggled individual ‘voluntarily’ travels illegally to the destination country (i.e. has taken the initiative or has given consent to travel). Once the migrant enters the destination country, s/he is free to go (Van Liempt, 2007). In practice a grey area exists between human smuggling and THB, and the latter can easily follow from the former given the vulnerable and dependent position of a smuggled migrant (Van der Leun and Staring, 2014). Moreover, the present article will explore the assumption that whether migrants are seen as smuggled individuals or (also) as potential victims of THB (cf. Gallagher, 2014; Loftus, 2011) depends partially on how they are detected: through a punitive or protective policy approach. If this is indeed the case, we expect to find indications of exploitation (that probably would have deserved a view form the protective approach) in the files of smuggling cases that we studied (that have ended up under the punitive approach).

Attempts to combat THB involve international, European and national approaches which have been intensified over the years. A number of legal and policy instruments are put in place and agencies have been established at all levels. The ‘victims’ involved (although this term is problematic, as will be explained later) are often migrants without formal residence rights or working permits, as employers can tap into a migrant worker's lack of stable status and fear for detection, which makes irregular migrants vulnerable to exploitation (ILO, 2012).

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2These migrants may work alongside with nationals who often work off the books in the same sectors, but their position is different (Kloosterman et al., 1998). We use both ‘illegal workers’ and ‘irregular migrants’. For a thorough discussion of terms see Schrover et al. (2008).

3UN General Assembly (2001), Article 3 Palermo Protocol.

4As our focus in this article lies on migrants from third countries that have irregularly entered, stayed and/or worked in the EU, we limit ourselves to migrants from outside the EU solely (e.g. external immigration). We do not include intra-EU immigration.
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