



# SMUGGLING AND TRAFFICKING: Rights and Intersections



Global Alliance Against Traffic in Women



# SMUGGLING AND TRAFFICKING

## RIGHTS AND INTERSECTIONS

GAATW WORKING PAPER SERIES 2011

Global Alliance Against Traffic in Women

# Smuggling and Trafficking: Rights and intersections

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In 2008-10 the GAATW International Secretariat carried out a programme on the 'linkages' between trafficking and other related fields. This programme emphasised that trafficking cannot be seen as isolated from the context within which it takes place. It has to be understood and addressed as part of the broader social, political and economic systems linked to migrants', women's and workers' rights. In 2010 GAATW produced a Series of four Working Papers, each of them locating trafficking within a specific context and/or exploring its linkage to one specific field, namely, Gender, Globalisation and Security, Labour, and Migration.

We have devoted our efforts in 2011 to deepen our knowledge on some of the issues that emerged in 2010. This Working Paper further explores 'smuggling', an aspect of migration often confused and certainly interlinked with trafficking. It looks at rights that people have in smuggling situations, at the intersections between smuggling and trafficking, and at storylines and language that people use to talk about smuggling.

Intended readers of this Working Paper are member organisations of GAATW, and colleague organisations that provide assistance to migrants who have had smuggling and trafficking experiences. This report is also meant to inform policymakers and other stakeholders.

**This Working Paper is a work in progress, and we are looking forward to further discussions. Please share your thoughts with us (email: [gaatw@gaatw.org](mailto:gaatw@gaatw.org)).**

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### Acronym Guide

- **GAATW** – Global Alliance Against Traffic in Women
- **IGO** – Intergovernmental organisation
- **IOM** – International Organisation for Migration
- **NGO** – Non-governmental organisation
- **NOII** – No One Is Illegal (Canadian NGO)
- **OHCHR** – United Nations Office of the High Commissioner for Human Rights
- **UNHCR** – United Nations High Commissioner for Refugees
- **UNODC** – United Nations Office on Drugs and Crime
- **UNTOC** – United Nations Convention Against Transnational Organized Crime

This paper was written primarily by Rebecca Napier-Moore, at GAATW International Secretariat. This is a Working Paper, and GAATW welcomes further comments. Please email [gaatw@gaatw.org](mailto:gaatw@gaatw.org).

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# EXECUTIVE SUMMARY

By sheer necessity, many migrants pay a broker to reach their destination. They need to get out of their country or find a way to support their families, but the widespread implementation of restrictive immigration measures prohibits many migrants from moving independently and legally. Technically, such migrants are seen by many authorities as ‘smuggled’ people. As we know from migrants and those working with them, many people in trafficking situations also classify, in government terms, as having been ‘smuggled’ (in other words, a group helped them irregularly cross a border for profit). GAATW members find that in reality the lines between these categories are oftentimes blurry, where a person’s migration story includes both smuggling and trafficking.

The Global Alliance Against Traffic in Women (GAATW) is increasingly concerned with immigration measures that criminalise migrants and badly affect trafficked people. Many of these policies are framed as ‘anti-smuggling’ measures. We chose to look at smuggling partly because the Smuggling Protocol<sup>1</sup> sits in the same UN convention as the Trafficking Protocol<sup>2</sup> and receives much less attention, especially in terms of human rights.

GAATW members also struggle with smuggling in terms of misidentification. When authorities detain migrants, they do not always screen whether they might have been trafficked, but detain them as criminals, as ‘smuggled’, or as ‘irregular’ and then deport them before they have a chance to seek or receive entitled rights. If people labelled as ‘smuggled’ are not getting their rights, it follows that some non-identified trafficked people are not either. We feel that we cannot ignore the anti-smuggling measures that are affecting the people with whom we work.

This paper examines three topics:

- Human rights that migrants have in smuggling situations,
- Intersections between smuggling and trafficking, and
- Language that different stakeholders use to talk about smuggling.

We begin by discussing rights in smuggling. Migrants have human rights no matter what situation they are in or what they are experiencing. Though located in the UN Convention Against Transnational Organised Crime and thus not primarily seen as a human rights document, the Smuggling Protocol contains several express and general human rights provisions. 117 States have signed the Protocol and therefore are obligated not only to prevent crime but also to provide and uphold migrants’ rights. Migrants in smuggling situations have the right to life; the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment; and the right to non-refoulement. States are further obligated to take ‘appropriate measures’ regarding protection from violence; assistance if a migrant’s life or safety has been endangered; consular notification and communication; and safe and humane treatment during boat interdiction. The parent convention UNTOC housing the

Smuggling Protocol also guarantees witness protection, victim protection against retaliation, access to compensation and restitution, and for a victim to have their views heard at appropriate stages of the criminal proceedings. Further, a broad savings clause<sup>3</sup> in the document obliges States not to implement the Protocol in a way that contravenes the human rights commitments they have made. If only these few express rights were realised for migrants in smuggling situations globally, their situation would be much improved. As it stands, States are implementing anti-smuggling measures without much thought to rights. Advocates should work to make States' rights obligations clear, so that States incorporate rights specifically in anti-smuggling measures.

There are many intersections in smuggling and trafficking journeys. Ensuring some rights in smuggling journeys would mean that trafficked persons' experiences are improved or that trafficking is even averted in some cases, for instance, where root causes have been addressed or torture and inhuman treatment have been prevented. In the second section of this working paper, we examine intersections between smuggling and trafficking in terms of prevention, identification, consent, victimhood and remedy. We see that consent is a part of the trafficking definition, but not part of the smuggling definition, freeing migrants from some of the criminalising implications usually applied to them in smuggling. We problematise the fact that remedies are far more accessible for trafficked people, though experiences of abuse and exploitation can be found in smuggling as well. This section also briefly examines the history of the two concepts and touches on the important linkage between smuggling and refugee movements. When smuggling is prevented through measures designed to deter all migrants, refugees' right to seek asylum is denied.

In the last section, the paper looks at language describing smuggling. Reviewing the literature, we look at how various stakeholders (migrants and facilitators, academics, governments, intergovernmental agencies, media and NGOs) talk about smuggling. The section looks at causal narratives and storylines, in which stakeholders say why smuggling happens, who is to blame for wrongs, what actions are wrong, and what needs to be done. By understanding stereotypes, storylines and solutions that different people give for smuggling, advocates can work towards changing not only the storylines but also convincing various stakeholders to work towards different solutions to the problems they see in smuggling. The conclusion and recommendation section at the end of the paper gives some of those different solutions to work towards.

### **We make the following recommendations to the human rights community:**

- Facilitate wider understanding of the human rights obligations to which States Parties to the Smuggling Protocol must adhere;
- Monitor and evaluate States Parties' smuggling measures for their human rights impact and their adherence to the rights contained within

the Smuggling Protocol and advocate necessary amendments;

- Document rights abuses against smuggled migrants, including those committed by the State, and assist those whose rights have been violated to seek remedies;
- Engage in discussions and the formulation of laws and policies on smuggling at national, regional and international levels, holding States Parties to the Smuggling Protocol to their human rights commitments;
- Where appropriate, avoid describing smuggling in a way that implies criminality of migrants. The Smuggling Protocol does not criminalise migrants;
- Ensure that humanitarian sentiment for migrants in smuggling situations does not lead to protectionist measures that try to deter migration, but to an upholding of human rights before, during and after movement;

**We make the following recommendations to States Parties** to the UN Convention Against Transnational Organised Crime including the Protocol against the Smuggling of Migrants by Land, Sea and Air, and all governments:

- Uphold the following obligations and duties elaborated in the UNTOC Smuggling Protocol:
  - To protect migrants in smuggling situations from death, torture or other cruel, inhuman or degrading treatment or punishment (Article 16, 1)
  - To protect migrants from violence (Article 16, 2)
  - To provide appropriate assistance to persons whose lives or safety are endangered in a smuggling situation (Article 16, 3)
  - To ensure safety in return, preventing refoulement (Articles 18, 5 and 19, 1)
  - To provide information on consular notification and communication (Article 16, 5)
  - To ensure the safety and humane treatment of the persons on board during boat interdiction (Article 9, 1a)
  - To take into account special needs of women and children (Article 16, 4)
  - To address root causes, strengthening socio-economic development and poverty-reduction (Article 15, 3)
  - To implement the Smuggling Protocol in a way that does not affect other rights obligations in international law (Article 19, 1), or in a way that is discriminatory to persons in smuggling situations (Article 19, 2).

- Integrate human rights into global and regional consultative processes which address migrant smuggling, such as the Bali Process;
- Train immigration officials and others such as law enforcement officers and social service providers about “the humane treatment of migrants” and to “respect their rights” as set out in the Smuggling Protocol (Article 14, 1);
- Establish appropriate identification mechanisms which enable authorities to accurately and rapidly identify trafficked persons and smuggled persons whose rights have been violated, and refer individuals to relevant social and legal assistance;
- Ensure that measures to protect migrants from violence and abuse include emergency referrals and direct assistance with medical care, shelter, food, clothing, care for dependents, crisis intervention counseling, and information about legal rights and options and legal processes. Measures should include protection during any legal proceeding from intimidation;<sup>4 5</sup>
- Ensure that any detention of migrants is not arbitrary, meaning that it must be appropriate, necessary, proportionate and justifiable;
- Ensure that all migrants at any point of their journey have access to justice;
- Take the necessary steps to address the root causes of smuggling, including:
  - Ensuring that individuals social, economic, cultural, civil and political rights are upheld at all times and that efforts to reduce poverty are made
  - Increasing affordable and accessible avenues for legal migration.

# INTRODUCTION



In recent years, facing public outcry at perceived influxes of migrants, governments have intensified bi- and multi-lateral discussions on smuggling, including its intersects with trafficking.<sup>6</sup> Increasingly, smuggling and trafficking are used interchangeably in discourse and policy.<sup>7</sup> When this happens, some governments and intergovernmental organisations say that restrictive anti-smuggling measures are also serving to protect trafficked people, who cannot be exploited if they cannot reach the destination country.

Migration deterrence of this kind creates more vulnerabilities for trafficked persons and all migrants, as migration routes become more dangerous, more expensive, and increasingly necessitate using a broker or 'smuggler', who could also turn out to be a trafficker.

Smuggling and trafficking are blurred in policy and stakeholders' language, and also in migrants' actual lived experiences, where a person can be in a smuggling situation one day and trafficked the next, or indeed could be smuggled and trafficked at the same time. For this reason, the Global Alliance Against Traffic in Women (GAATW) sees a need to address anti-smuggling measures, which are negatively impacting trafficked persons by increasing vulnerabilities in migration.

The human rights community as a whole can do more to reduce the ill-effects of anti-smuggling measures, which often see States failing in their responsibilities to protect, promote and uphold human rights. This neglect has not just permitted a weakening of rights protections gained for trafficked persons, refugees and other protected migrants, but has the effect of creating an unacceptably weak 'minimum human rights framework' for all migrants. As governments rely on policies which aim to prevent migration, spaces for refugees, trafficked persons and other migrants with special protections under the law are reduced, and increasing numbers of

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migrants (including refugees and trafficked persons) are sorted into ‘irregular’ or ‘smuggled’ categories, where they face arrest, detention and deportation.

GAATW has always positioned itself as not *only* interested in the narrow field of human trafficking, but aware that trafficking is part of broader social, economic and political processes of migration, labour, gender and globalisation. We have seen that an exclusive focus on trafficking is often coupled with sensationalism, and can miss wider factors affecting trafficked women, such as migration measures aimed at combating smuggling. While anti-trafficking specialisation is helpful in terms of specific legal or court procedures, what often happens is that a person’s identity is collapsed into being merely that of a “trafficked person”, or “smuggled person”, with stereotypes attached to each term.

In the last few years, we developed specific material<sup>8</sup> and held many discussions with GAATW member organisations and others about what it looks like to link trafficking to related fields. As smuggling and trafficking fall under the same UN Convention Against Transnational Organised Crime (UNTOC),<sup>9</sup> in addition to overlaps in policy and lived experience, the need for anti-trafficking organisations to look at smuggling is significant. At the regular UNTOC Conference of Parties, few migrants’ rights or anti-trafficking civil society organisations are present at intergovernmental discussions on smuggling. We see space and a need for civil society to engage particularly with anti-smuggling discussions on international and regional levels, where criminality and deterrence are discussed with far more frequency than rights.

A key conclusion from the GAATW Working Paper (2010) on Exploring the Links between Trafficking and Migration emphasised that exploitation against trafficked or smuggled people are not so dissimilar.<sup>10</sup> The separation of the two migration categories, established by the two separate Protocols on Trafficking and on Smuggling to the UN Convention Against Transnational Organised Crime, has meant in practice that trafficked migrants are accorded rights where smuggled migrants are not. It is frequently hard to distinguish between the victim and criminal categories in practice. In many States’ national criminal legislation and measures, trafficked persons are perceived to have no agency, whereas smuggled migrants have no claim to identify violations and victimisation.

After looking at definitions of smuggling, trafficking and other migration related categories, this working paper explores:

- 1) Human rights that migrants particularly have in smuggling situations;
- 2) Intersections between smuggling and trafficking; and
- 3) Language framing smuggling used by different actors: migrants and facilitators, academics, governments, intergovernmental organisations, media and non-government organisations.

First, it may not be obvious that migrants have rights in smuggling situations. Many people think that because States prohibit smuggling, they do not need to ensure human rights of those who have been in smuggling situations. This is not the case. The Smuggling Protocol expressly says that the document is not intended to criminalise migrants, and that those migrating through smuggling routes have the right to life, the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment, and the right to non-refoulement.<sup>11</sup> States are further obligated to take 'appropriate measures' regarding protection from violence; assistance if a migrant's life or safety has been endangered; consular notification and communication; and safe and humane treatment during boat interdiction.<sup>12</sup> The parent convention UNTOC housing the Smuggling Protocol also guarantees witness protection, victim protection against retaliation, access to compensation and restitution, and for a victim to have their views heard at appropriate stages of the criminal proceedings.<sup>13</sup> Further, a broad savings clause<sup>14</sup> obliges States not to implement the Protocol in a way that contravenes the human rights commitments they have made. This section of the paper briefly goes through these rights, as well as limitations of the Smuggling Protocol. We look at implications of victimisation which are a by-product of applying a rights framework to any group, and the paper also explore examples of what rights violations in smuggling actually look like.

The second section of the working paper examines overlaps and differences between smuggling and trafficking, asking when consent matters and questioning why some migrants who have experienced abuse receive assistance and remedies while others do not. The section also looks at examples of how anti-smuggling and anti-trafficking measures positively and negatively impact migrants in smuggling and trafficking situations.

As referred to above, anti-smuggling measures tend to heavily rely on blocking migration, which makes movement more dangerous for all migrants. They also do not leave much room for determining whether migrants are due remedies before being detained or deported.

Anti-trafficking on the other hand is frequently used as justification for reinforcing anti-smuggling measures. The logic is that if people do not enter a destination country, then they cannot be exploited (and thus trafficked) there. When policy makers talk about both smuggling and trafficking at the same time, they feel they are able to satisfy two groups of constituents – one who want restricted migration, and one who want migrants to be protected, or at least worst cases (identified as trafficking) to receive attention. This section of the working paper particularly looks at intersections in prevention, identification, consent, victimhood and remedy, also briefly touching how refugee issues interact with smuggling.

The third part of this paper is a discourse analysis to show how people talk about smuggling, by detailing a sample of different stakeholders' voices found in online sources and in journals. We look at different actors who speak specifically about

smuggling: migrants and facilitators, academics, governments, intergovernmental agencies, media and NGOs.

We have looked at English sources only, which means the sources we draw from are geographically and linguistically biased. In looking at the language of other actors, we are engaging with them as a rights-based civil society organisation, and we do not claim to be impartial in our presentation. The aim of examining how different people tell the ‘story’ of smuggling is to be better prepared to engage with smuggling as advocates for human rights. By knowing for instance what criminalising or humanitarian language looks like in relation to smuggling, and by knowing who is using that language and how, we can begin to think about how to add human rights elements to it, or to reframe it in a way that is helpful for all migrants including trafficked persons.

This working paper does not claim to be comprehensive in scope. We do not, for instance, try to review the latest information on smugglers’ modus operandi or exact numbers of smuggled people. Please see UNODC’s recent and very thorough such global review.<sup>15</sup> We do highlight details in the smuggling definition, in rights migrants are due in smuggling situations, in intersections with trafficking, and in language around smuggling.

As the Global Alliance Against Traffic in Women, we are only beginning to enter the smuggling arena and have much more listening and discussing to do before we engage with sure footing. We look forward to hearing feedback from you on what you think are strategic and helpful ways to work towards upholding rights of all migrants including those in smuggling and trafficking situations.

**DEFINITIONS:  
'SMUGGLED PERSON'?**

The Smuggling Protocol uses the term smuggled migrants, but does not define it. We are glad this term has not yet been solidified in international law, because we, like other groups, are uncomfortable labelling people ‘smuggled.’ It is a term laden with criminalising implications. Therefore, where possible we use the broad term ‘migrant’ or talk about ‘migrants in smuggling situations’. We prefer using the terms ‘broker’, ‘facilitator’ or ‘agent’ (rather than ‘smuggler’) for those people who assist with migration processes. In some places in this paper, however, we are exploring how stakeholders talk about smuggling. Therefore, for this specific purpose, we use or illustrate the terms that other people are commonly using.

While the Smuggling Protocol does not define a smuggled person per se, it does define the *event “smuggling of migrants”* as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”<sup>16</sup>

Several **elements are key to this definition of smuggling:**

- Securing the illegal entry of another person into a country (or their illegal residence or stay)
- When this is done for the purpose of financial or other benefit

This **definition does NOT have the following elements:**

- Criminalisation of migrants. (The Smuggling Protocol says migrants shall not become liable to criminal prosecution for being the ‘object’ of smuggling.)<sup>17</sup>
- Migrants’ consent. (The Smuggling Protocol does not mention consent; however, most people think that it is in the definition. Reading consent into the definition of smuggling assigns the migrant culpability in breaking immigration laws. The Protocol only assigns this culpability to people who facilitate movement for profit.)

In addition to setting out this definition of smuggling, the Smuggling Protocol also asks States to criminalise other actions: enabling illegal residence (Article 6,1,c) and activities surrounding the falsification of travel documents (Article 6,1,b).

## Migration-Related Terms

On the next page we give a few migration-related terms to help readers understand how we are using them in this working paper. Internationally agreed, full definitions are provided either in the text or in footnotes where relevant:



**Smuggling of Migrants** - “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”<sup>18</sup>

**Migrant** – someone who leaves her/his community or country of origin to live, and possibly work and/or marry in another place. “Migrant” is an overarching term that covers many categories of migrants, including refugees, trafficked and undocumented persons and migrants who are in a smuggling situation.

**Undocumented migrant** – a person who does not have legal immigration status in a transit or destination country (or even in a different region of her/his own country). A person can enter a country without legal status, or can enter with status and lose it later. (We prefer using the term “undocumented migrant” to the term “illegal migrant”. Illegal is a description of something a person does, rather than for the person his/herself.)

**Trafficked person** – a person who is coerced, deceived or forced to move within her/his country or to another country for the purpose of exploitation.<sup>19</sup>

**Refugee** – a person who has been, or fears being, persecuted in her/his country and is forced to leave.<sup>20</sup> Environmental or climate refugees are those who flee natural disasters. Similar to refugees are *Internally Displaced Persons*, who have been forced to move but have not left their country of origin.

*We, like other groups, are uncomfortable labelling people 'smuggled,' as it is a term laden with criminalizing implications. Therefore, where possible we use the broad term 'migrant' or talk about 'migrants in smuggling situations'.*

# 1. HUMAN RIGHTS IN SMUGGLING: DO THEY EXIST?

Smuggling is often talked about in terms of terrorism, security, organised crime or undocumented migration. A few actors, such as some governments, NGOs and IGOs (see Smuggling Language section), show a humanitarian sentiment, feeling sorry for people who drown on boats, but rarely does this sentiment come with commitment to the human rights that migrants have in smuggling situations.

In fact, because migrants are often labelled as criminals, it is common for many people to think they do not have or deserve rights, even though the Smuggling Protocol explicitly lays out rights they are due and further explicitly says they are not criminals for having been the object of smuggling, though the State can charge them for other offenses.<sup>21</sup>

All humans are deserving of rights. In this vein, it is important to note that ‘smugglers’ or migration facilitators also have rights.<sup>22</sup>

The Smuggling Protocol itself has both general and specific human rights protections in it, which makes it useful in advocating that signatory governments uphold *all* their commitments in the document, not only the crime control elements but also the human rights ones. And, like other human rights issues which commonly cross reference protections in international law, we can apply other areas of human rights law to migrants in smuggling situations. Though in this working paper, we are not outlining the vast array of international law that could be drawn upon, this includes States’ commitments to anti-discrimination, women’s rights, rights related to detention, etc.

On the other hand, not all people in smuggling situations have their human rights violated. It is important to respond practically to each situation. If a migrant’s rights have been violated, this should be addressed. If not, there is no need for special assistance, but all migrants must be able to exercise all human rights and this may require some special programs and attention by governments.

Migrants, like other people, can have a lot of control over their situations, working to make sure that as they move they are getting as many of their rights met as possible, rights to food, to life, to protection from violence. Many are able to control when, where, how and with whom they travel – though increasingly migration management/

migration restriction structures are making these choices more limited.

The human rights framework as it exists today is inherently victimising. Human rights violations necessarily involve having victims of those violations, and those victims, as we know from anti-trafficking, can be characterised as being passive, helpless and unable to make decisions for themselves.

***Reducing migrants to the status of 'victims' will not necessarily represent their interests or assist them in their overall goal of improving their lives or the lives of their families. Nevertheless, the conditions in which they make these choices, their treatment on the way and in the country of destination is something unacceptable to modern standards of dignity and human treatment.<sup>23</sup>***

While we do not want to victimise people by saying all have experienced violations in migration, we also know that many DO EXPERIENCE VIOLATIONS. The rationale behind emphasising human rights in smuggling situations is that there is an increasing need to respond to the violations that are happening in smuggling situations (See Box 1 for a sample of recent violations in smuggling situations). Arguably some of these are happening at least partly as a result of the mandate for States to deter and criminalise which is given in the Smuggling Protocol (For review of studies on this issue see Prevention subsection from p. 37 of this Working Paper). The Migration Advisor at the UN Office of the High Commissioner for Human Rights talks about this correlation saying:

*While we do not want to victimise people by saying all have experienced violations in migration, we also know that many do experience violations.*

*Smuggling could in some ways be characterised as an industry largely created by migration management models, particularly models that prioritise control and containment, high barriers to entry, and punitive sanctions for irregular movement. Opaque and overly onerous bureaucratic migration procedures also create the conditions and incentives for migrant to turn to facilitated movement and the services of smugglers. In this context, then, it could be argued that it is the counter-smuggling paradigm itself that could open up avenues that lead to trafficking and vulnerability to exploitation.<sup>24</sup>*

## ***Rights accorded in the Smuggling Protocol***

All migrants, regardless of their migration status have certain inalienable rights in international human rights, refugee and humanitarian law. The Smuggling Protocol not only states that none of these should be compromised in implementing anti-smuggling measures, but also explicitly preserves a handful of rights. Though the Smuggling Protocol is not primarily a human rights agreement, by signing it, State Parties agree to cooperate to prevent and punish migrant smuggling, which is defined as a crime against the state. Migrants are not seen as victims in the Protocol, but rather States are victims of the crime, because state sovereignty is violated when borders are crossed without permission. However, the Smuggling Protocol has useful human rights elements that not many stakeholders are pointing to when discussing smuggling. Indeed, when the Protocol mentions the actions that constitute aggravated smuggling (Article 6(3) endangering life and inhuman treatment), actions which are traditionally seen as human rights violations, these are listed solely as a means by which to measure out longer sentences or harsher punishment to convicted smugglers.

### **Box 1: Are Rights Actually Violated in Smuggling Situations?**

If you are used to working with trafficked persons or refugees, you are used to seeing these groups as migrants requiring special protections. Their rights have been violated in a certain way, and this sets them apart from migrants whose rights have not been violated. The migrants you are working with are due certain protections, and it may not be as obvious that other migrants are also experiencing violations - though those may not add up to qualify a person as a refugee or trafficked person.

Several of the rights explicitly preserved in the Smuggling Protocol are below, followed by accounts of those being violated in smuggling situations by both migration facilitators and law enforcement officials. Other rights besides those mentioned in the Smuggling Protocol are of course also violated in smuggling situations but not detailed here.

### **Right to Life**

A 29-year-old Kurdish Iraqi died after four months in a coma, after police beat his head against a concrete barrier when they found him hiding under a lorry ready to board a ferry for Italy at the border port of Igoumenitsa in western Greece.<sup>25</sup>

### **Right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment<sup>26</sup>**

A Somali was held by smugglers in Libya and describes electric shocks: “He handed us to another smuggler who took us to Ajdabiya, where we were held for one month and where they again held us for ransom and demanded more money. The beatings there were even more severe because we couldn’t pay the money. They took some of the boys out and beat them with clubs and electric shocks.”<sup>27</sup>

### **Protection from violence that may be inflicted on migrants because they are in smuggling situations**

We got arrested in Mwanza [Tanzania]. Police stopped us and started demanding money and hitting us with the butt of their guns before they had even arrested us. We paid them \$400.<sup>28</sup>

### **Assistance, if a migrant’s life or safety has been endangered by reason of having been smuggled**

A Nigerian having left Libya describes having a leaky boat and running out of rations which caused 3 deaths. They were not rescued after sightings: “On the fourth day we saw a helicopter. The helicopter saw us and waved. The helicopter did not drop food or water, and no boat came to rescue us. Five hours later we saw a ship. It did not come to help. It stopped and spent a few hours standing there. The boat just watched.”<sup>29</sup>

## ***Express Rights Provisions***

Smuggled migrants have certain inalienable rights, irrespective of their legal status as migrants. These rights arise from human rights and refugee law, and are specifically preserved and even re-stated in the Smuggling Protocol, as express rights provisions. States parties are required to take all appropriate measures:

- To protect migrants in smuggling situations from death, torture or other cruel, inhuman or degrading treatment or punishment (Article 16, 1)

- To protect migrants from violence (Article 16, 2)
- To provide appropriate assistance to persons whose lives or safety are endangered in a smuggling situation (Article 16, 3)
- To provide safe return, preventing refoulement (Articles 18, 5 and 19, 1)
- To provide information on consular notification and communication (Article 16, 5)
- To ensure the safety and humane treatment of the persons on board during boat interdiction (Article 9, 1a)

In applying these, States Parties have agreed to take into account the special needs of women and children (Article 16, 4) as well as address root causes, strengthening socio-economic development and poverty-reduction (Article 15, 3).

To go through these express rights systematically, **the right to life** (International Covenant on Civil and Political Rights (ICCPR) Article 6(1), restated in Smuggling Protocol Article 16,1) can be interpreted as a right that States need to *positively* provide. The Human Rights Committee has said that the right to life, as set out in the International Covenant on Civil and Political Rights, can be interpreted to include provision of emergency medical care. This provision is also included in the UNODC Model Law on Smuggling of Migrants,<sup>30</sup> and is of course in addition to government officials not directly or otherwise indirectly causing the death of migrants (See Box 1 on page 24).

The right **not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment** is set out in Article 16(1). Torture is defined in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>31</sup> but inhumane or degrading treatment is not defined. It is commonly taken to involve physical or mental suffering but may not involve all of the elements in the definition of torture.<sup>32</sup> States must take measures, including passing legislation to protect all people, regardless of immigration status and race, from these kinds of treatment.

**Non-refoulement** (Convention Relating to the Status of Refugees Article 33,1) is mentioned explicitly in the Smuggling Protocol savings clause (Article 19,1), confirming it is not permissible. Sending, transit and receiving States are obliged to take “all appropriate measures to carry out the **return in an orderly manner and with due regard for the safety and dignity** of the person” (Article 18,5). The language is unspecific about what “appropriate measures” are. One commentary notes that “for the purposes of protection, advocates should make the argument that implementation of these measures should respect the object and purpose of the treaty, which includes protection of the rights of smuggled migrants.”<sup>33</sup>



**Protection from violence** inflicted on migrants because they are in smuggling situations is in Article 16(2) of the Smuggling Protocol. See Box 1 for examples of this. Based on criminal justice and human rights standards, positive State measures should include emergency referrals and direct assistance with medical care, shelter, food, clothing, care for dependents, crisis intervention counseling, and information about legal rights and options and legal processes. It should also include protection during any legal proceeding from intimidation.<sup>34</sup>

**Assistance** to persons whose lives or safety are endangered in a smuggling situation is protected in Article 16(3), and the UNODC Model Law on Smuggling notes that the following assistance measures are key considerations: provision of physical security (for example, by law enforcement personnel); access to emergency food, shelter and medical care; access to consular services; and legal advice.<sup>35</sup>

**Access to consular officials** is in Article 16(5) of the Smuggling Protocol and can also be found in the Vienna Convention on Consular Relations, Article 36, which says that State authorities must inform a migrant that they have a right to communicate with consular officials. If the migrant chooses to take the opportunity, then consular officials should be free to communicate with nationals.

Another express provision is that **during boat interdiction**, officials are required to, “ensure the safety and humane treatment of the persons on board” (Article 9). The Smuggling Protocol was written at a time when certain States were especially concerned about boat arrivals. Article 14(1) further stipulates that States are required to train immigration officials about “the humane treatment of migrants” and to “respect their rights” as set out in the Protocol (whether on land, in the

## *Migrants in smuggling situations claiming rights, making rights real*

*A system for migrants in Afghanistan and Pakistan works like an escrow service. As a migrant, you give money to a third party, and that party releases it to the migration facilitator only if you arrive safely. This leaves you less open to exploitation because you are not indebted and there is more guarantee the facilitator will have your safety as his/her interest.*

*- drawing on Khalid Koser, 2009, ABC Fora*

air or at sea). Further, they must cooperate with international organisations, non-government organisations and civil society organisations to ensure proper training, including on “humane treatment”.<sup>36</sup>

**Special needs of women and children** in Article 16(4) relate to elements like maternal care and to Best Interest Determination for children. The Convention on the Rights of the Child, and the Committee on the Elimination of Discrimination Against Women, particularly General Recommendation 26 on Women Migrant Workers can be drawn upon here.

**Addressing root causes through development and poverty-reduction** are also key. The Smuggling Protocol provides in Article 15 (3) that States “promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.” This is calling on States to look at human rights, particularly economic and social rights, in sending countries. This can be read together with the parent UNTOC convention that calls for alleviation of social conditions that render socially marginalised groups vulnerable to organised crime (UNTOC Article 31, 5). States are thus committed to a broader approach than law enforcement and border security alone, and must promote economic and social development and poverty reduction.

## ***General Rights Obligations in the Protocol***

General rights obligations, which ask States to not exclude human rights considerations when applying the Smuggling Protocol, were hard won in the Protocol negotiations. One person involved in the process says:

***As late as March 2000, the draft of the Migrant Smuggling Protocol did not contain a savings clause, despite states agreeing on the inclusion of such a clause in the Trafficking Protocol. In its joint submission to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the Inter-Agency Group “recommended that a savings clause such as that contained in the Trafficking Protocol be inserted, with reference being made to the rights, obligations and responsibilities of States and individuals under international law, including applicable international humanitarian law and international human rights law and, in particular, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.” The proposal received support from many states and was finally taken up at the end of the drafting session.***<sup>37</sup>

The Savings Clause in Article 19(1) is broad, saying that States must give priority to make sure that carrying out responsibilities in the Smuggling Protocol does not affect other rights obligations: “Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.” As shown above, the mention of refugee rights is quite explicit here.

Article 19(2) of the Smuggling Protocol protects against discrimination, saying that the measures called for in the Protocol “shall be interpreted and applied in a way that is not discriminatory to persons [in smuggling situations]. The interpretation and application of those measures shall be consistent with internationally recognised principles of non-discrimination.” One person interpreting this provision notes: “‘Smuggled’ is not a category in traditional anti-discrimination law, unlike citizenship, so this could potentially imply a new category. More likely, non-discrimination would require that the Protocol and the border strengthening measures contained therein are not used to deny smuggled migrants equal protection of the law within the jurisdiction in which they find themselves, access to essential medical services, and the right to be expelled only in accordance with the law and with a right of appeal.”<sup>38</sup>

In addition to the Savings Clause, the Preamble and the Statement of Purpose of the Smuggling Protocol, re-emphasise commitments to human rights. In the Preamble, States Parties are “Convinced of the need to provide migrants with humane treatment and full protection of their rights”, and are, “concerned that the smuggling of migrants can endanger the lives or security

*Some will need the protection offered by specific legal regimes, such as refugee law or the protection of victims of trafficking.*

*Others will need the protection of universal legal norms that protect all persons regardless of their status.*

*- Pia Oberoi,  
Migration Advisor  
OHCHR*

of the migrants involved”. The Statement of Purpose (Article 2) says the Protocol must be achieved “while protecting the rights of smuggled migrants”.

Human rights protection is thus a basic purpose of the Protocol, to be considered beside the Protocol’s two other basic rationales, namely prevention of migrant smuggling, and promotion of inter-state cooperation.<sup>39</sup>

### ***What is NOT Included in the Smuggling Protocol***

A generous application of the Savings Clause would accord migrants in smuggling situations a great deal of rights. Through the Savings Clause, a great deal of international law is implied and can be made explicit as time goes on and advocates push for more rights protections in domestic law, regional agreements, soft law, etc. The Smuggling Protocol, however, is detailed in saying that, though migrants are not liable to criminal prosecution under the Smuggling Protocol (Article 5), the state can still take “measures against a person whose conduct constitutes an offence under its domestic law” (Article 6, 4). This means that migrants can face consequences of entering a state illegally under domestic immigration law. Commentary to the Model Law against Smuggling of Migrants says the following in explanation:

***In accordance with article 5 of the Protocol, a person cannot be charged with the crime of smuggling for having been smuggled. This does not mean that they cannot be prosecuted for having smuggled others, or for the commission of any other offences. For example, many countries have laws that criminalize conduct such as possession of fraudulent travel documents or illegal entry.<sup>40</sup>***

### ***Rights in the UNTOC Parent Convention, and in International Criminal Justice Standards***

**Witness protection** is allowed for in the UN Convention Against Transnational Organised Crime (UNTOC) Article 24. States should provide “effective protection from potential retaliation or intimidation for witnesses in criminal proceedings.” This applies to their families and people close to witnesses as well.

**Victim protection against retaliation** is in UNTOC Article 25. Though in the Smuggling Protocol it is unclear if ‘smuggled persons’ are victims, there is a principle in the Parent Convention stating that those harmed by “offences covered by this Convention” should receive assistance and protection “in particular in cases of threat of retaliation or intimidation” (Article 25, 1). The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, has an explanatory manual defining victims broadly “as persons who, individually or collectively, have suffered harm, including physical

or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of national criminal laws or of internationally recognized norms relating to human rights.”<sup>41</sup>

This same victim of the offences in UNTOC should be able to access **compensation and restitution**, and should have their **views heard at appropriate stages of the criminal proceedings** (Article 25, 2-3).

In addition, there are several codes of conduct and international standards commonly recognized at the international level that are applicable to smuggling situations.<sup>42</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, for example, states that human rights should be recognized in any form of detention.<sup>43</sup> The Code of Conduct for Law Enforcement Officers states: “In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”<sup>44</sup>

## *Conclusion*

This section has detailed human rights and protective measures that States Parties to the Smuggling Protocol are obliged to uphold. These range from protection from violence to addressing root causes, all under the principles of anti-discrimination as well as special attention to the needs of women and children. The rights and protective measures in the Smuggling Protocol are not well called upon or fought for. As we see in daily work with migrating people (see Box 1 on page 24), the rights that should be accorded to people in smuggling situations are often violated.

There is much work to be done in order to make rights in smuggling scenarios realised. As we will see in the next section, this is not only important to people traditionally categorised only as ‘smuggled’, but also to trafficked persons, who often go through the same routes and experiences as those in smuggling situations. Indeed, a person can be smuggled one day, and trafficked the next. Ensuring migrants in smuggling situations have rights is an insurance that many trafficked or potentially trafficked people will have a better chance of rights realisation while in the migration process.

## 2. SMUGGLING AND TRAFFICKING INTERSECTIONS

At a recent workshop with 30 Burmese migrant women (all of whom had used a smuggler), half of the women present said that smuggling and trafficking were not entirely different. One woman said: “We all approached and paid a smuggler to get out of Burma, and sometimes it was the case that the person would lie to us and exploit us once in Thailand. In that case, you can be both smuggled and trafficked.”<sup>45</sup>

The trafficking process can involve smuggling (being taken across a border by a person or persons who profit). The facilitator who smuggles a person across a border could then force the person into an exploitative situation (trafficking). Though it is important to recognize that not all trafficked people are smuggled and vice versa,<sup>46</sup> the overlaps certainly do challenge the seemingly clear cut distinctions that the UNTOC Protocols make between trafficking and smuggling.

Some migrants find themselves in a smuggled situation one day that turns into a trafficking situation the next, such as the case below:

*M.K., an orthodox Christian, lived in Uzbekistan. She was discriminated against in her home country. Her Muslim husband arranged for her to be smuggled to Belgium. She took her daughter with her. A Russian smuggler arranged the transport to Belgium. [He] accompanied her to the Immigration Office in order to seek asylum and gave her the necessary documents. He then left her and she never saw him again. In Brussels she met somebody who, in the end, took all her papers, social allowance and her personal belongings and forced her into prostitution. He also threatened her daughter. Over a period of six months, she was forced to receive clients in her apartment during daytime when her daughter went to school.<sup>47</sup>*

Though smuggled people can become trafficked, this is not recognized in international and most national law.<sup>48</sup> Gallagher notes:



***[A] strange legal fiction that “trafficking” and “migrant smuggling” are two completely different crimes involving helpless, virtuous victims on the one side and foolish or greedy adventurers, complicit in their own misfortune, on the other.<sup>49</sup>***

One activist says that the differences between the two seem clear for those concerned with border control and national sovereignty, but not for those working on migrant rights<sup>50</sup> or as above, for migrants themselves. While sometimes the distinction is clear (ie. a trafficked person has not been smuggled if they entered a country legally), the often unclear or overlapping categories often seem unfair to migrants because rights to assistance and protection are commonly given to people labelled as trafficked but not to those labelled as smuggled, though migrants placed in both categories may have had same or similar experiences.

There are a few exceptions, among them Belgium where both smuggled people (who have experienced ‘aggravated smuggling’, ie. violations in smuggling) and trafficked people have access to the protection and assistance systems set up for victims of trafficking.<sup>51</sup> In many countries, trafficked people are now sometimes able to enter civil proceedings for reparation. In anti-smuggling measures, however, remedies have received far less attention.<sup>52</sup> Civil society representatives, in some cases, are advocating for smuggled people to be able to claim compensation,<sup>53</sup> and there are a few attempts at setting a norm for smuggled people to be able to institute judicial proceedings for remedies.<sup>54</sup>

In this section we review challenges in the intersections between the two concepts

*While sometimes the distinction is clear (ie. a trafficked person has not been smuggled if they entered a country legally), the often unclear or overlapping categories often seem unfair to migrants because rights to assistance and protection are commonly given to people labelled as trafficked but not to those labelled as smuggled, though migrants placed in both categories may have had same or similar experiences.*

*The distinction between trafficking and migrant smuggling is a legal one and may be difficult to establish or maintain in practice. This is because trafficking and migrant smuggling are processes - often interrelated and almost always involving shifts, flows, overlaps and transitions. An individual can be smuggled one day and trafficked the next.*

*- Pia Oberoi,  
Migration Advisor  
OHCHR*

when discussing prevention, identification, consent, victimhood and remedy. A further study could look at intersections between the concepts in prosecution processes as well.

The intersections described in this part of the paper are partly ones seen through the same lens used in GAATW's 2010 Working Paper Series, *Beyond Borders*.<sup>55</sup> That Series used a human rights lens highlighting violations, while at the same time recognising migrants' agency in decisions to migrate, in movement itself, and in processes of redress. The *Beyond Borders* Series was concerned that the category of trafficking had become too narrow, with some stakeholders (ourselves included) less able to see how trafficking affected other issues, like migration, and how other issues affected trafficking. Thus in looking at intersections, we have an eye to how smuggling measures negatively impact trafficked people and how anti-trafficking measures negatively impact smuggled people.

### ***Blurring Smuggling and Trafficking***

Not only do migrants say that their smuggling experience can turn quickly and unexpectedly into a trafficking case, as in the examples above, but other actors have also lumped these two concepts together. Sometimes this is helpful for gaining rights. In other contexts, this only leads to criminalisation or stigmatisation.

Smuggling is very often talked about in the same context as trafficking, or some people use the terms interchangeably. For instance this letter from the Filipino government announcing a new anti-trafficking unit reads:



Department of Justice  
**BUREAU OF IMMIGRATION**  
 Intramuros, Manila Philippines  
 10 February 2011

Dear Sir/Madam,

In line with our government's desire to effectively implement the country's Anti-Trafficking In Persons Act of 2003 (RA 9208), the Bureau of Immigration has constituted a **Trafficking In Persons Unit (TIPU)** as an operating arm of its Intelligence Division dedicated to combat *the scourge of human trafficking/smuggling* particularly as perpetrated across national borders.<sup>56</sup>

News articles will lead with a headline that includes the word smuggling, and then use the term trafficking in the text of an article, or vice versa. NGO and IGO groups also conflate the two.<sup>57</sup> With the separation of the two concepts in the UNTOC Protocols, however, many people now distinguish them from each other as entirely separate social phenomena. Legal categories and categories that service providers and law enforcement use label people either as smuggled *or* trafficked (or belonging to another social category, like refugee).

A UK Home Office study researching 45 convicted smugglers and traffickers confirms this tendency for one category to turn into another, and indeed the line between them better reflected as a 'continuum':

*the overall market can be presented as a continuum between these two*

*GAATW members are cautious, not wanting trafficking to be equated with smuggling in a way that causes rights losses for trafficked persons, or vice versa.*

*extremes [of smuggling and trafficking], where – because of financial circumstances and because they [migrants] are buying an illegal service – many who were initially clients of smuggling operations can end up as victims of traffickers.<sup>58</sup>*

GAATW has written several times about the blurry-ness and overlaps in migrants' realities.<sup>59</sup> Many migrants may experience part of the elements of the trafficking definition but not all. Maybe they are moved and exploited but they do not think they have been coerced. They need to have experienced all three elements to be counted as trafficked. People in these situations are often called smuggled or irregular and deported. Even though someone might have experienced something that is *nearly* trafficking, the abuses against them are said to have been acceptable; and they are held culpable for breaking immigration laws.

## ***History of Smuggling-Trafficking Intersections***

During negotiations for the UN Convention Against Transnational Organized Crime (UNTOC) and its Protocols, advocates' energy was on the issue of trafficking. It remains there. During UNTOC negotiations "battles over the definition of trafficking and the related issue of prostitution served to distract NGOs from broader human rights concerns, in particular those related to the Smuggling Protocol."<sup>60</sup> Below Gallagher remembers the negotiations, from the standpoint of working with OHCHR. Rights language in the Smuggling Protocol, she says, was "hard won and incomplete," and refugee rights were a major concern (see also refugee section next).

*Our [OHCHR] position with respect to the proposed migrant smuggling treaty was slightly less assured. The prospect of a legal separation between (technically consensual, incidentally exploitative) migrant smuggling on the one hand, and (never consensual, always exploitative) trafficking on the other was generally considered to be a good thing. At the very least, it would force some conceptual clarity on a set of definitions that had been shrouded in mystery and controversy, which was to the clear disadvantage of both trafficked persons and smuggled migrants. The right of states to cooperate in lawful regulation of their borders was never seriously questioned. Our focus, therefore, remained squarely on ensuring that drafters did not endorse criminalization of smuggled migrants, and that established rights relevant to entry and return, including the right to seek and receive asylum and the prohibition on refoulement, were explicitly upheld. Although we did not walk away from what became known as the 'Vienna Process' empty handed, the end result confirmed the harsh truth that these negotiations had never*

*really been about human rights. Any victories on our side were both hard won and incomplete. The Migrant Smuggling Protocol indeed refrained from sanctioning the criminalization of smuggled migrants. It included minimum guarantees with respect to nondiscrimination, refugee rights, and a critical savings clause but, in the end, very little else.<sup>61</sup>*

Since the signing of UNTOC in 2000, GAATW and others have seen problems with the resultant stark separation between the two, and thus are seeing the need to engage with the anti-smuggling framework. But, GAATW members are cautious, not wanting trafficking to be equated with smuggling in a way that causes rights losses for trafficked persons, or vice versa.

For instance, Human Rights Watch recently wrote a letter to the Malaysian Prime Minister about the addition of anti-smuggling elements in their anti-trafficking legislation, saying that the law leads to conflation of the two which risks trafficking victims being treated as smuggled migrants and subject to deportation<sup>62</sup> - a response that is unacceptable to non-trafficked migrants as well.<sup>63</sup> Others are worried that if anti-trafficking actors move into anti-smuggling discussions and ask for rights for smuggled people, this will irritate governments, with whom advocates otherwise have a good relationship in anti-trafficking discussions. One GAATW member said: “If you move to one area, you lose in another.” On the other hand, some NGOs worry about the blur between trafficking and smuggling, as trafficking can be used as an excuse to stop people moving. NGOs on India’s borders with Bangladesh, for instance, are telling anti-trafficking actors to keep out of the border areas because they do not want to prevent people from being smuggled.<sup>64</sup>

## ***Prevention***

It is common for States and other actors, including NGOs, IGOs, academics and media, to turn to border control and other migration restrictions as the solution to prevent both smuggling and trafficking. The rationale is that both are criminal acts that would not be completed if people were not able to cross borders.<sup>65</sup> For instance, in September 2009 French authorities destroyed a migrant camp in France near the English Channel, a temporary home to migrants hoping to reach the UK. The British Home Secretary Alan Johnson said the *camp’s destruction* would not only serve to “*prevent illegal immigration, but also to stop people trafficking*”.<sup>66</sup> As a result, 287 people were detained,<sup>67</sup> and an estimated 2000 migrants spread to other sites on the French coast.<sup>68</sup>

Refugees and refugee rights advocates especially find heightened restrictions problematic as the solution to refugee flight can only be found precisely by entering another country. If refugees are mislabelled as smuggled or trafficked people who need to be kept out, they will be blocked from finding safety.

Many academics have studied the unintended effect of border controls increasing smuggling, and increasing the dependency relationship within it, thus increasing chances of trafficking. Van Liempt and Doornik show that increased crackdowns in the Netherlands did not reduce the number of irregular entries, but increased the involvement of smugglers.<sup>69</sup> Showing a stability in smuggling numbers in the 1990s, another study shows that tighter border enforcement on the US-Mexico border increased likelihood of being caught, but did not affect the number of migrants entering the US without authorisation.<sup>70</sup> Marshall and Thatun refer to “Push down-Pop up”, displacing a problem but not solving it.<sup>71</sup> Kyle and Dale talk about migration controls specifically increasing the organised crime elements of smuggling by discouraging small operations and funneling migrants through more easily monitored criminal syndicates, a win for States who can patrol with more ease.<sup>72</sup>

Some studies use econometrics to work out how increased migration controls affect migration, smuggling costs and routes. Gathman, for instance, conducted an econometric study of the border crossing histories of 2000 Mexican migrants entering the US illegally over a 12-year period, when the US border patrol budget increased six-fold and the hours agents spent patrolling tripled.<sup>73</sup> During that time, major crossing cities of San Diego and El Paso became more heavily monitored as well as fenced. More enforcement resulted in migrants substituting routes to less patrolled areas, which meant an increase in time costs, health/life costs and smugglers’ fees. She estimates that increased time and coyote costs come to an additional 110-130USD per journey, which she says is small compared to the increase in border patrol enforcement costs. Gathman notes that though crossing has become harder, only 1.25 percent of people are prosecuted, so costs of apprehension are low. This study concludes with a suggestion to give migrants more access to legal routes, by charging a fee for a temporary visa to be levied at or slightly above the same rate smugglers charge. The visa should be given to the same amount of people who ‘get through’ border. The benefit Gathman sees for governments is that enforcement efforts could decline, thereby costing less. The amount of money raised through the visa applications, she proposes, could potentially pay for the entire budget of the immigration department.<sup>74</sup>

Another study in Box 2 below tracks a border’s history, showing that tightening of the border increased migrants’ vulnerabilities and dependency on facilitators.

**Box 2: Tightened Borders Increase the Power of Agents<sup>75</sup>**

A study on the history of the border between Israel and the West Bank shows that border tightening during the second Intifada exacerbated power differentials between people across the border. Migrant workers now have to pay high amounts to cross more precarious routes. Their vulnerabilities are increased.

The case shows that clamping down on migration only pushes migrants underground into positions where they must rely more on third parties. Below is a brief history of the border:

**1967-first Intifada 1987:** The Israel-West Bank border was free to cross. Economies were integrated - with 30% of Palestinian workers working in Israel, earning 50% of all Palestinian earnings.

**1987-beginning of second Intifada 2000:** Curfews, closures and revoked entry permits were imposed to control the movement of Palestinians. Many Palestinian workers kept their jobs and “illegally” crossed the border. Employers also crossed the border to look for staff. By the end of the 1990s, 20% of Palestinian workers worked in Israel, earning 33% of all Palestinian earnings.

**2000-2006:** Increased numbers of earth mounds, checkpoints, trenches, barriers “called for increasing mediation and assistance [to] help the workers and others to cross inside Israel.”<sup>76</sup>

The closure of the border increased people’s need to cross the border more urgently as their incomes fell (the Palestine Gross Domestic Product fell 40 percent between 1999 and 2003). People could earn three times as much in Israel working illegally.

Bedouin drivers gained a monopoly on facilitating migration, and therefore began to charge high prices. This meant that people started staying longer in Israel to make payment for the trip “worth it”. “The scarcity of work and the increasingly severe controls over clandestine workers entering Israel, made the Palestinian labourers even more vulnerable in relation to their smugglers.”<sup>77</sup>

Numbers of migrants from 1996-2005/6 did not drop. Interdependencies between Palestinians and Israelis remained, they only shifted in terms of who held power over whom in migration and work processes.

*Contrary to popular belief, the Smuggling Protocol's definition does not mention consent.*

## ***Point of Identification***

It is often not possible to determine whether a situation is trafficking until the exploitation has actually occurred. For example, if people are found in a lorry, some about to suffocate to death and some having died already,<sup>78</sup> how does anyone know if they are they being smuggled or trafficked? Certainly the migration journey could be identified as smuggling and the facilitator charged with 'aggravated' smuggling.<sup>79</sup> But at the identification stage, it is unknown if the third party arranging migration intended to exploit them at the end, which would amount to trafficking.

Nonetheless, in both identification at borders and further into the migration process, one academic observes that handling trafficked persons is financially and administratively more burdensome for States than dealing with smuggled people. Therefore border authorities and immigration officials have a tendency to identify people as smuggled rather than trafficked.<sup>80</sup> There are also strong assumptions at play: "Smuggled people are often excluded from other protection determinations on the assumption that their motivations are purely economic, and their movement purely voluntary."<sup>81</sup>

While some stakeholders have a tendency to identify more people as smuggled, there is propensity for NGOs and rights based groups to identify more people as trafficked in order for them to gain rights protections or assistance. One advocate says that "migrant groups do not want to split trafficking and smuggling, because they can't claim rights as smuggled persons. They would prefer to call them trafficked persons in that case."<sup>82</sup>

It is hard to gain rights for any migrants, but possibly hardest for people in smuggling situations who do not fall in specially protected categories.

*There is much to be gained from being classified as trafficked, and much to lose from being considered smuggled.<sup>83</sup>*

## **Consent**

Many see at main divide between smuggling and trafficking as one of consent, though of course the UNTOC Protocols set out other defining characteristics as well: financial or other gain (in smuggling) vs. exploitation (in trafficking), and requirements for illegal international border crossing (in smuggling) vs. possibilities of legal national movement (in trafficking).

Consent, however, remains quite central in discussion related to distinctions between the two concepts, as it assigns the migrant culpability in breaking immigration laws.

Excepting children, the Trafficking Protocol's definition of trafficking does require force or other deceptive or coercive means to be present. Contrary to popular belief, the Smuggling Protocol's definition does not mention consent. The definition of smuggling in the UNTOC Protocol is "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or permanent resident."<sup>84</sup>

Most actors, including GAATW in past training material, say that smuggled people must have consented, some in order to highlight that trafficked people do not consent but are forced victims.<sup>85</sup>

Cases from Burma, however, show that sometimes people *do* consent to exploitation when they feel they have to in order to survive or for their family's survival. This makes the

*Not only refugees, but also trafficked persons, can both express consent and feel force in their migration decisions. They can consent initially and then find themselves exploited later; or they can consent though they may also feel forced to move out of a lack of other livelihood or safety options.*



smuggling-trafficking distinction especially hard:

*The majority of trafficking victims in Burma were not kidnapped, but rather willingly consented to accompany traffickers, only to find out later that they had been deceived... In order to [support their families] many consent to exploitative types of work. The line between trafficking and smuggling becomes increasingly blurry, as it is almost impossible to discern whether consent truly exists for those people who find themselves in dire economic situations.<sup>86</sup>*

Anti-trafficking actors know that concepts dealing with a lack of consent - coercion and force - are some of the hardest concepts to work with in judicial processes, as it is hard to find sufficient evidence as proof. Refugees and those working with refugees equally struggle with concepts of forced migration. A sub-section later in this paper will cover intersections between refugee and smuggling concepts, but it is worth touching on refugees in this discussion of consent as well.

People persecuted in their own country often can only leave if they use a smuggler. As many people from Burma, North Korea, Iraq and other restrictive countries know, not only do people need a broker to help them enter another country, but some need a broker to leave their own country, someone to 'smuggle' them out.

Van Liempt, a Dutch academic, conducted an in-depth study of people from several countries who used a smuggler in their migration to the Netherlands. She describes the situation of the Iraqi Kurds in her sample group, showing smuggling as people's only option.

*At the time [that] most of our 24 Kurdish respondents left Iraq, there was no international airport operating in the northern area because of UN sanctions against Iraq. Direct routes abroad were not available under Saddam Hussein's regime. On top of that it was very difficult for Kurds in Iraq to get a passport, let alone a visa for a country abroad. Visas were distributed by the Kurdistan Democracy Party (KDP) (in Irbil) and by the Patriotic Union of Kurdistan (PUK) (in Suleimanyia), but there were long waiting lists for these visas (Cornillie and Declercq 2003). An alternative was to go to the neighbouring countries of Turkey or Iran to apply for a visa. A darnak is a special document for Turkmen from Iraq who want to visit Turkey. Two of the people we interviewed were able to get a darnak from their smuggler. It meant they had to pretend to be Turkmen, which was difficult because they did not speak Turkish. Others tried to get a bargain, permission to stay in Iran for Iraqis, but the criteria were very strict.*

*Overall, it was very difficult to leave Iraq in a legal way. Migrants attempting to leave a country without authorization may risk fines or even prison sentences. When discussing 'illegal' migration, the fact*



*that people often need smugglers not only to enter, but also to leave a country, should not be ignored.<sup>87</sup>*

In this example there is both consent and force present. Not only for refugees, but also for trafficked persons, people can both express consent and feel force. They can consent initially and then find themselves exploited later; or they can consent though they may also feel forced to move out of a lack of other livelihood or safety options. Many people's migration stories are not clear cut in this regard.

### **Box 3: A History of the Idea of 'Consent' in Migration**

The idea of consent in migration was formed by policymakers in western countries in the 19<sup>th</sup> century, as a way to distinguish what kinds of migrants were acceptable. Knowing that this distinction emerged under politically motivated circumstances can give us freedom not to use 'consent' as a measure of 'good' or 'bad' migration.

McKeown, an American scholar, recently wrote a history of the concepts of free and forced migration. He observes that in the 19<sup>th</sup> century policy and measures directed at migration from Asia to western countries "construct[ed] concepts of] the free, self-motivated individual as the proper subject of immigration..." That construction led to today's firm distinctions between free and unfree (consenting and coerced) migrants. In the mid 1800s liberal States, wanting to safeguard freedoms for those inside a nation, needed to keep out those who would be a burden on the state. Governments were wary of people if they came without enough funds to be travelling independently, or if they were indentured or bonded by debt to ship owners. Further, migrants, who came in an 'unfree' manner, were assumed to be backwards, not knowing how to live as free individuals in a progressive democracy. If they had never been 'free' before, how could they be expected to contribute meaningfully to a free society if given the chance? Intermediaries (today's smugglers, brokers, or agents) were criminalised, while large transportation companies or others who collaborated with the government were given legitimacy to operate (a situation similar to regulated brokerage systems from Southeast Asia to the Gulf and other parts of Asia today). Governments sanctioned some agents to bring people for specific work projects to meet their infrastructure or other work needs.<sup>88</sup>

McKeown takes his reader through historical ups and downs that echo debates today, such as whether government sanctioned recruiters in the Philippines, say, are more safe, efficient and helpful than solo, independent migration, or than unregulated recruitment.

UNODC, IOM and some government, NGO and academics' reasons for

engaging in anti-smuggling efforts, as detailed later in this paper, echo this humanitarian, protective sentiment. If people are not moving 'freely' (using McKeown's term), they might be subject to exploitation or other harms. Therefore, that movement should be stopped. The only people in the 1800s, as well as now, who were able to move entirely of their own volition without anyone's help (or at least with minimal assistance), were primarily those in the upper class.

Consent is *not* part of the definition of smuggling in the Smuggling Protocol and can assign culpability or criminalisation to a migrant. Advocates can be astute in talking about smuggling so as not to play into stereotypes – If they do not have to ascribe consent to people in smuggling situations, there is no 'definitional' reason they need to. In reality, as we show here, consent can exist simultaneously with force, or as in the Burmese case, people without options can consent to exploitation. It is important to keep these nuances in mind when forming policy, writing media articles or giving a training session on migration.

## *Victimhood*

Trafficked people are legally defined as victims with rights to assistance, remedy and sometimes even entitlement to stay in the destination country, while smuggled people are more often legally defined as criminals to be arrested, detained and deported. This in turn influences the general public's attitude to smuggled or trafficked people. People think smuggling is exploitative and cruel when it ends in death, but not otherwise.<sup>89</sup> ICHRP recently wrote about the transformation to a victim (and in their words 'human') status when people are dying:

*When migrants agree to be smuggled across a border, they become a commodity, an object – a body requiring transport, not inherently different from other items like antiquities, endangered birds or stolen cars. While alive, for the purposes of the smuggling operation they are illegal things, akin to other inanimate contraband.*

*At the borderline between life and death, however, a radical transformation takes place: the thing again becomes human, acquires a soul. Paradoxically, at the point of death a smuggled life reacquires value and regains its human identity and dignity: the dying migrant is recognised once more as a person before the law. This perplexing transformation is evident throughout human smuggling. The despised "illegal" sneaking across the border or hidden in the hold of the ship becomes the vulnerable*

*and pitied irregular migrant, heroically clutched from the hand of death, or a shocking corpse eliciting cries of guilt and shame.*

*The Chinese cockle pickers who perished off the coast of England, the Ghanaian boys who froze in the undercarriage of a transcontinental airliner, the many bodies found in the Mediterranean sea and in the Indian Ocean, became human beings again at the point when they were about to cease living.<sup>90</sup>*

While trafficking is renowned for including violations of sexual exploitation, debt bondage, robbery, torture, physical abuse and even death, these can and do occur in smuggling situations as well (See Box 1 “Are Rights Actually Violated in Smuggling Situations?”). The stories of these violations in trafficking are well known and talked about in many fora. Violations in trafficking situations occur in the recruitment, migration and exploitation phases. In the Protocol definition, smuggling does not have an end purpose of exploitation. Therefore when we talk about violations in the smuggling experience, they occur in recruitment and migration phases. This is referred to often as ‘aggravated smuggling’ in national legislation, and prosecuted with heavier penalties than non-‘aggravated’ situations.

If violations in smuggling and trafficking are the same in the recruitment and migration phases, and if migrants are identified before the end of exploitation is carried through, trafficking and smuggling can be

*When people in smuggling situations are seen as victims, this can lead to a policy solution or other measures of stopping migration so that smuggled people do not risk coming into contact with dangers. Advocates highlighting ‘victimhood’, therefore, risk such policy responses of strict border control.*

*Trafficked people are affected positively and negatively by the smuggling framework - positively because they want to return home rather than go through anti-trafficking systems; negatively because they want redress that would come from being labelled as trafficked, but instead they are categorized as smuggled.*

indistinguishable from each other, as in the case of migrants suffocating in the back of a lorry.

When people in smuggling situations are seen as victims, this can lead to a policy solution or other measures of stopping migration so that smuggled people do not risk coming into contact with dangers. Advocates highlighting 'victimhood', therefore, risk such policy responses of strict border control. The anti-migrant sentiment is of course also seen in anti-trafficking prevention programmes around the world which, as well as increased border control, now also include messages to school children and adults that migrating is dangerous, and messages to women that they especially are likely end up sexually exploited and therefore should not leave their village.

The Smuggling Protocol says that smuggled people are 'objects' of the smugglers' crime, rather than victims. As discussed in the Human Rights section of this paper, the Protocol does however include language calling on States to protect smuggled people, with a human rights Savings Clause. Also as discussed earlier, applying a rights framework ascribes victimhood to those whose rights have been violated. But, people in smuggling situations are rarely given rights nor are they seen as victims, no matter the problems (ie stigmatisation, or anti-migration policy) victim status might bring.

### *Remedy*

As we have said, it is relatively much easier for trafficked people to seek remedies than smuggled persons, because they are seen as victims. They are sometimes able to go through civil proceedings for reparation. In anti-smuggling measures, however, remedies have received far less attention.<sup>91</sup>

Advocates are pushing for smuggled people to be able to claim compensation,<sup>92</sup> and there are a few attempts at setting a norm for smuggled people to

be able to institute judicial proceedings for remedies. Article 15 of the UNODC Model Law on Smuggling, for instance, says that smuggled people who have been victimized in the smuggling process should have access to the usual criminal remedies, as well as the right to institute judicial proceedings to claim compensation. Further, their immigration status or return home should not prevent them accessing the regular criminal justice system, or payment of compensation.<sup>94</sup> A 2009 European Parliament directive includes similar rights to remedy, where employers and subcontractors alike are required to pay illegally-employed third-country nationals outstanding remuneration.<sup>94</sup>

Rights to assistance and protection are also commonly given to trafficked people, at least in law, but not smuggled people. In a review of the two Protocols, one legal expert said that in the Smuggling Protocol “no entitlements [were] envisaged with respect to legal proceedings or remedies against smugglers.”<sup>95</sup> There are a few exceptions, among them Belgium where smuggled people (who have experienced aggravated smuggling) and trafficked people have access to the protection and assistance systems set up for victims of trafficking.<sup>96</sup>

During negotiations to the UNTOC protocol, the Inter-Agency Group comprised of UNCHR, OHCHR, IOM and UNICEF issued a statement saying: “While work has been done on identifying common provisions [between the two protocols], little or no discussion has taken place on the potential for conflict between them.”<sup>97</sup> In the intervening years, some of these conflicts have emerged: some in which anti-trafficking measures affect smuggled people, and vice versa. In this section we show cases where trafficked people are affected positively and negatively by the smuggling framework – positively because they want to return home rather than go through anti-trafficking systems; negatively because they want redress that would come from being labeled as trafficked, but instead they are categorised as smuggled. With time for another study we could look at how smuggled people are affected by anti-trafficking measures, both positively and negatively in terms of remedies.

Some trafficked persons weigh whether the available opportunity for redress is worth the potential social or economic consequences.<sup>98</sup> Many trafficked people especially young women who pass through Bangkok’s migrant detention center, for instance, prefer not to say they are trafficked because they would have to stay in a closed Thai shelter for two years and assist with prosecution processes. They would prefer to return home as an undocumented migrant so they can either stay at home or migrate again, not wanting to forfeit freedom of movement or an income their family depends on.<sup>99</sup>

On the other hand, rather than wanting to be treated as smuggled, or undocumented some trafficked people want to be given access to rights and redress that are due to people who have experienced trafficking. A few cases below illustrate trafficked people not compensated or given access to justice because they were labelled as smuggled. In the first case (see page 48), a woman cooperated in the legal proceedings to prosecute her trafficker and then later was told that she could not be compensated for wages or exploitation because part of her story fit the smuggling definition. She wanted the remedy due to trafficked persons:

## **Box 4: 'Trafficked' for the Purposes of Prosecution, 'Smuggled' for Compensation Assessment**

*Case from Foundation for Women*

### **Trafficked**

A. was trafficked from Thailand through Romania to the UK. She had a Thai passport with a Romanian visa for the first part of her journey and then a Malaysian passport with a UK visa, as one broker thought it would be easier to enter the UK as someone from a Commonwealth country. A. had lost her job some months before migrating and was worried that her husband would leave her if she did not find a well paid job, so sought work abroad. A. agreed with a recruiter that she would go abroad for work. The recruiter took her to see a broker who arranged her fake documents. She agreed to pay them 30,000GBP or 1.6M THB for travel, visas and fees. The broker contacted a Dutch man (Jacob) to accompany A. to the UK. They stayed in Romania for a month and then travelled to Belgium and via train to the UK. When she arrived in London, Jacob took A. to a flat where she waited for one hour, after which a brothel owner came to collect her.

Upon arrival at a flat, the brothel owner told her that if she wanted to work at a massage parlour in the UK, she must have sex with the clients. She said no. The owner made a call to the broker in Thailand who told her that if she didn't work there, he would collect the loaned money from her parents in northern Thailand. She was afraid and didn't want her parents to get in trouble or her husband to know about this, so she felt she had to work. She had 10 clients per day and could not say no to any clients or take sick leave. She believed that she could work off the debt and earn money, as she had seen other women do so.

### **Assistance with Trafficking Prosecution**

The UK police Vice Unit rescued A. in February 2009 after four months at the brothel. She stayed in the Poppy Project shelter for one month. She delivered a statement in the UK, and returned to Thailand. In June 2009, the UK requested that she return to attend a court hearing. She contacted Foundation for Women (FFW) and travelled with one FFW staff person on 19 June. She delivered her statement on 24 June with aid of a special victim support centre at the court so that she did not have to face the defendant. The police told her that when the defendant found out that the witness had come from Thailand, she changed her plea to guilty. When the trial finished, the prosecutor came to see A. thanking her and telling her that she was happy that A.

was in the UK, as it led to the guilty plea. The trafficker was imprisoned. The next day the police asked her if she would speak to the media and a researcher, which she did.

### **Not Compensated because Smuggled**

In July the UK police and head of the Vice Unit came to Thailand with the barrister who was taking care of criminal injury compensation. A. had completed a document for compensation as a victim of crime, after the court proceedings. The barrister and police went to the Romanian embassy to get A.'s visa application as a document for criminal compensation. When they saw this, however, they said it would be difficult to get criminal compensation, because a condition for it is that the person compensated should not be a part of any criminal activity. Because she had filled out the form herself, they said that this was evidence that she was involved with illegal smuggling rings, and party to the crime. She asked for her loss of earnings while working in the UK, but they said this was not possible telling her that the monetary income from working, but engaged with a criminal act (prostitution), has to be confiscated by the authorities.

In a second case below, 557 Cambodians were arrested in Thailand as smuggled, while gang leaders were arrested as traffickers. If the gang leaders were traffickers, it follows that at least some of the 557 migrants might be trafficked people due remedies.<sup>100</sup>

### **Box 5: Forced Beggars Smuggled; Gang leaders traffickers**

Between 8-10 January 2010, the Thai government arrested and deported 557 undocumented Cambodians from Bangkok. The government had received complaints of people begging in the city. The migrants were charged with illegal entry, and the gang leaders are to face human trafficking charges.<sup>101</sup> Instead of having the right to claim compensation for forced begging or to take a legal case for abuse or for trafficking, the beggars were deported. The three days time between their arrest and deportation could not have been enough time for immigration officials or NGO representatives to take 557 people's testimonies and assess whether they were trafficked. Rather than assisted as trafficked persons, the Cambodians were criminalised. Therefore, both the traffickers and the trafficked people were considered criminals.

Finally in a third case, a Chinese woman was convicted for entering the Netherlands on fraudulent documents, rather than given assistance or immediately able to seek remedy as a trafficked person.



### **Box 6: Conviction of Entering with Fraudulent Documents Takes Precedence over Trafficking**

*Case from Bonded Labour in the Netherlands, now FairWork*

In 2008 Bonded Labour in the Netherlands (BLinN), an NGO, assisted a Chinese woman who was pregnant in a migration detention centre. Though she was trafficked, she had been processed as an “illegal” due to be deported. The woman was brought to the Netherlands in 2002. She entered the country with a third party’s assistance and with false documents. She was stopped at the airport. She applied for asylum and was placed in an asylum seekers’ centre, which she left. While living undocumented, she met a man who said he would help her (it is not clear if this man had ties to the persons who had smuggled/trafficked her into the country). After staying with him for a week, he sold her to two other men. These men forced her to provide sexual services. After several months she was pregnant and managed to get away. She went to the police to press charges against the men. The police saw in their registration system that she had an unserved sentence of 60 days (convicted for entering the country with false documents), and they placed her in (penal) detention. She was assured by the police that they would visit her during her detention to take her statement against the traffickers. However, this did not happen, and the authorities had plans to keep her in immigration detention after she had finished her sentence.

BLinN met her in detention, and through their intervention, she was able to press charges. The police claimed that they had told her to contact them after her (penal) detention, and that they had not promised to visit her. However, the woman did not know their names or telephone numbers, nor did she speak English or Dutch. *The woman was denied the possibility of pressing charges against her trafficker. Her conviction of entering the Netherlands with false documents took precedence (even though this crime was possibly connected to her being trafficked/smuggled).* Dutch bureaucracy is such that she got “lost” in the system; once forgotten by the police, she was processed as just another “illegal” to be deported. The woman pressed charges against her traffickers and was released (with B9 protection<sup>102</sup>).

While we know clear cases of violations in which trafficked persons were not able to access remedies because they were labelled smuggled, far fewer opportunities exist for smuggled people to seek remedy. While assistance and compensation are rarely accessible through anti-smuggling measures specifically (though see EU and Belgian examples above), some smuggled people and migrant rights activists draw on forced labour, anti-slavery, or simply labour rights provisions to claim back pay. These address wrongs in workplaces in a destination country. Remedy for wrongs in the (smuggling) migration process are scarce, and there is potential for a further study on this, finding examples of where smuggled migrants have found redress.



## *Refugees and Trafficking*

Conceptually and practically, smuggling, of course, does not only intersect with trafficking, but with a myriad of other social, economic and political issues. We explore one of the most pertinent here.

Recent debates in Canada provide an example of the quagmire between refugee and smuggling issues. The Canadian government has delineated between acceptable refugees that they choose to resettle to Canada from camps, and unacceptable people seeking refuge not through a camp program, but through a smuggling route. The government says they have unfairly jumped the queue and argues a case for fairness:

*In total, through the private sponsorship program, Canada has welcomed more than 200,000 refugees from all over the world, over and above the number of refugees resettled through the Government-Assisted Refugees Program. All of these individuals who immigrated to Canada through our resettlement programs waited patiently in the queue for the chance to come to Canada legally. Our Government will stand up for these refugees' rights to be processed in a fair and orderly fashion, consistent with our laws and values – and not allow human smuggling operations to jump to the front of our immigration queue.<sup>103</sup>*

Opposition party Members of Parliament debated this in the House of Commons saying that refugees are fleeing war and there is no 'orderly' way for them to come. The only option to survive is to get on a boat.<sup>104</sup> Other MPs cited boats of Jewish refugees turned away by Canada in the early 20<sup>th</sup> century, saying Canada is repeating history.<sup>105</sup>

"An asylum seeker who resorts to a human smuggler seriously compromises his or her claim in the eyes of many States..."<sup>106</sup> UNHCR noted in 2001. One academic writing about the smuggling says that not taking that option can be life endangering, as for many refugees "being smuggled is a reasonable alternative to bureaucratic, time consuming, and therefore life endangering legal migration."<sup>107</sup> Yet, being both smuggled *and* a refugee undermines their position:

*Another significant effect of the involvement of smugglers in unsolicited migration and especially of asylum seekers and refugees is that this tends to undermine the efficiency, and possibly also the legitimacy, of the asylum adjudication process... [S]ome smugglers provide a "good story" as part of their service, or at any rate discourage their clients from providing a detailed account of their route into Europe. This is problematic because if an asylum seeker is really in need of protection, his/her own story should be good enough and another one may only reduce their chances of being accepted as a refugee, especially if the*

*authorities are time and again confronted with the same or similar accounts of the reasons for fleeing and vague accounts of the routes taken.*<sup>108</sup>

The Council of Europe Commissioner for Human Rights “believes that of all the areas of criminalisation of migration, the fate of asylum seekers is indeed the most problematic at the moment in Europe”.<sup>109</sup> During negotiations on UNTOC, an Inter-Agency group formed including UNHCR, OHCHR, UNICEF and IOM issuing a statement and lobbying for *non-refoulement* and for smuggled migrants to have full opportunity and information to make a claim for asylum.<sup>110</sup> The Inter-Agency group knew that because refugees often use a smuggler to get out of their country of origin, their rights would be adversely affected by the criminalisation of smuggling in the Protocol. The Ad-Hoc Committee discussing the statement and the Protocols said that full accommodation on this point was unlikely.<sup>111</sup>

Several years on, Gallagher reflects that she cannot find evidence that the Trafficking and Smuggling Protocols and subsequent international legal response have worsened things for refugees and asylum seekers, citing entrenchment of the *non-refoulement* principle in the Protocols as well as citing actors who reiterate that smuggled people should not be criminalised.<sup>112</sup> Whether things are objectively ‘worse’ or not, the clash between sovereignty and migration is here to stay. Amnesty says that the group “uphold[s] the right of nation states to maintain border integrity... however, we strongly denounce the punitive effect on refugees of the policies the Australian government has put in place to stop people smuggling.”<sup>113</sup>

Dutch government statistics show that most refugees (between 84 to 98% depending on country of origin) used a smuggler:<sup>114</sup>

**Table 1: The use of smugglers by asylum applicants in 1999, per stage**

<i>Nationality</i>	<i>Country of origin</i>	<i>During travel</i>	<i>In the Netherlands</i>	<i>Unknown</i>	<i>Total</i>
Afghanistan	69.1%	61.4%	1.6%	12.5%	98.2%
Angola	96.2%	16.0%	8.0%	3.3%	98.1%
Azerbaijan	38.8%	85.1%	6.0%	3.0%	97.5%
Iraq	82.7%	73.6%	6.5%	3.9%	97.2%
Iran	81.8%	61.6%	18.7%	4.5%	88.2%
Yugoslavia	58.7%	53.8%	8.7%	1.6%	84.3%
Sierra Leone	74.0%	30.2%	3.1%	1.6%	93.8%
Somalia	61.3%	50.4%	5.6%	2.7%	97.9%
Sudan	87.0%	27.5%	5.7%	3.2%	93.2%
Turkey	82.4%	22.0%	20.3%	7.7%	91.8%
Total	70.6%	54.1%	7.1%	5.0%	94.9%

Amnesty International notes that in some countries, like Somalia, there is no way to get legal documents. In others, like Iran and China, a person can be persecuted for trying.<sup>115</sup>

While some people argue the inevitability and necessity to use a smuggler, some people try to make the case that a certain situation *does not fit a smuggling definition*, so that they can be categorised as refugees instead. A Canadian lawyer representing a man who worked in the engine room of the *Sun Sea*, a recently arrived ship, said that the arrival of a boat... was never intended to be 'clandestine', part of the Canadian smuggling definition.<sup>116</sup> If the ship was not 'clandestine' or a smuggling ship sneaking onto shore, but rather quite obvious as a big ship docking, then the migrants were not intending to pass under the government's radar but to declare themselves as refugees needing assistance.

Refugee and smuggling issues intersect differently than trafficking and smuggling issues do. In the response measures governments typically apply, both trafficking and smuggling often receive anti-migration responses. If people do not move in the first place, or do not enter the destination country, then they cannot be trafficked or smuggled. However, States are obligated under the 1950 Refugee Convention to let refugees into their country at the very least for processing. A group of migrants stopped or deterred by anti-smuggling measures will not get the chance to seek asylum.

## Conclusion

Migrants can find themselves weaving in and out of smuggling and trafficking situations. Smuggling and trafficking intersect at many points, not to mention both falling under the UN Convention Against Transnational Organised Crime:

- *Identification* is understandably hard for law enforcement and other stakeholders, trying to assess whether a situation was one of smuggling or trafficking. Some stakeholders have an incentive to save money and time by identifying more people as smuggled.
- Much identification is based on the criterion of *consent* though this is not in the Smuggling Protocol, and some migrants find that both force and consent can be present in their journeys.
- Smuggled people are rarely seen as *victims* though smuggled and trafficked people often share experiences of same or similar violations in migration processes.
- Trafficked people are much more likely to be able to *access remedies* based on the acknowledgement of violations and victimhood in their case. This can sometimes be impeded, however, by stakeholders applying the smuggling label to trafficked people.
- *Refugees* also are commonly labelled smuggled and, like trafficked people, can be both smuggled and a refugee at the same time. Anti-smuggling efforts often block refugees' entry into another country as well as make migration routes harder, underground and potentially dangerous, exploitative and involving increased relationships of dependency on a migration facilitator or trafficker.

# 3. SMUGGLING LANGUAGE: STEREOTYPES, STORIES, AND DIFFERENT ACTORS' SOLUTIONS

Language around smuggling is far from neutral, laden with stereotypes, moral judgments and a tendency to criminalise both migrants and the people who assist their movement. In some cases representations show smuggled people controlling their lives and taking firm decisions. Often, however, depictions are of them as one in a number, or part of a faceless and invading 'mass'.

This section looks at causal narratives and storylines, in which stakeholders say why smuggling happens, who is to blame for wrongs, what actions are wrong, and what needs to be done. When we understand the storylines and assumptions stakeholders place on smuggling and migrants, advocates can begin to unravel and counter these with effective advocacy for rights. Based on a review of literature, this section looks at language and portrayals put forth by several different groups: migrants and facilitators, academics, governments, intergovernmental agencies, media, and NGOs.

## *Migrants and Facilitators*

Many migrants and smugglers describe smuggling as 'helping' someone move: "He was a friend of the family, he is not a smuggler. He just helped us, that is something you do in our culture."<sup>117</sup> Often migrants see smuggling as socially acceptable, even if not legally so.<sup>118</sup> Some migrants describe facilitators as 'professionals who offer alternatives to legal migration',<sup>119</sup> and sometimes migrants call smuggling a 'necessary evil'. An Iraqi likens smugglers to a 'shield':

*If you want to travel from countries in war you need a shield. For us, smugglers are like a shield. You only have to buy the shield. This shield however is quite expensive.<sup>120</sup>*

In one study of migrants who moved through smuggling to the Netherlands, Iraqi Kurds “called their smuggler [either] ‘qachaqchi’ or ‘muharrib’[helper]. One Iraqi woman made a clear distinction between qachaqchi and helpers. She explains:

*The word qachaqchi means ‘bad person’ – I mean, it refers to a smuggler, or something like this, but it has a strong negative connotation. Actually, it means ‘I am going to ask you for a lot of money’. The people who helped me were simple guides, no qachaqchi. My Turkish helper was really nice. He had a migration past himself. He was a real adventurous type, he did very exciting things, but I would not call him a qachaqchi. I paid money, yes, but if you go with qachaqchi you probably also have to sleep with him, as a woman, I mean. I did not have to do that.<sup>121</sup>*

As much as possible, migrants discern between helpful smugglers and those likely to exploit them and violate their rights in other ways. In the Dutch study cited above, “most of the migrants did not use the actual term ‘human smuggler.’”<sup>122</sup>

In few cases, however, migrants who become advocates proudly use the smuggling terminology, as a way to reclaim the language, neutralising its criminalising elements. For instance, No One Is Illegal (NOII) advocate Graciela Flores Mendez describes herself as “a Mexican migrant who ‘smuggled’ [her]self and lived without status in the United States near the Mexico-U.S border for the majority of [her] life.” At a public forum she describes “hir[ing] somebody to help [her and her family] across the border” in 2003 as the only way of getting back to the US where she had grown up.<sup>123</sup>

Some smugglers, though not using the smuggling terminology, defend smuggling as easing migration hardships, as making people’s dreams come true, or as helping people just like the UN does:

*I help a lot of Ethiopian and Somali brothers come into RSA [Republic of South Africa]. All I do is help them come in easier and charge them for the service. I am not doing anything illegal; I am only helping my African brothers. I send my boys into Zimbabwe and they walk the brothers through the fence. We know the soldiers and where to cross. [South African taxi driver]*

*Let’s say I help people move to their chosen destination – people who would otherwise not be able to. You could say I am like the United Nations (UN) or even like a human rights group! [Chief Somali smuggler based in RSA (Republic of South Africa)]*

*When people get together they always talk about how their sons or daughters or husbands or brothers and cousins are doing in*

***Europe and the United States. I make their dreams come true. [Major smuggler in Mandera, north-eastern Kenya, on the border with Ethiopia and Somalia]<sup>124</sup>***

Humanitarian or family elements also exist, for instance in Europe where family members will pick up someone who had been stranded in one country and drive them to another. Van Liempt observes, “Migrants often perceived this action as helping, whereas from a present-day law enforcement perspective, this would also be considered smuggling.”<sup>125</sup> Smuggled NOII advocate Mendez defends smugglers and blames the state:

***We had agency. We were not victims, and the characterization of the smuggler as a horrible person is not correct. My enemy was border patrol. The state was the one that got me into this mess.<sup>126</sup>***

She is further critical of the Canadian government [she now lives in Canada] for proposing harsher anti-smuggling legislation purportedly “for the good of the smuggling victim.” She goes on to say that “People think of some violence as ‘acceptable and necessary’ – that of the state, [building] fences that lead people to the desert. Not acceptable [forms of violence] are rapes by the smugglers.”<sup>127</sup> Stronger anti-smuggling legislation has an outward aim of helping people to not ‘put themselves’ in harm’s way, but Mendez sees that as a violation as well, leading people instead to cross borders in the desert, where even more harms threaten migrants.

A civil society group of migrants, the Malian Association of Deportees, similarly says that Europe’s restrictive policies “expose a fundamental divergence between the theoretical discourse in Europe, at one extreme, which espouses democratic values of tolerance, non-discrimination and openness, while its practices are dictated by objectives of security and exclusion.”<sup>128</sup>

As we saw in the Human Rights section of this paper above, both the state and the smuggler can be the violator of people’s rights. Two smugglers in Malawi talk about harms in the smuggling process, distancing themselves, saying they are ‘not brothers’ but in a customer relationship, and blaming others:

***There is no intentional mistreatment. Sometimes the boys we send to take the travellers across might fight with them... It is true that sometimes we smugglers fight together and the interests of the migrants in transit are forgotten, but I don’t mistreat them. [The smuggler’s main competitor] is the one who mistreats them. [Somali smuggler, one of the two largest in Malawi]***



*We offer services to the migrants. They are not my brothers. They are my customers. But sometimes they are caught in the fire [between competing smugglers]. [Tanzanian smuggler of Somali origin, based in Lilongwe, Malawi]<sup>129</sup>*

Other migration facilitators take special care and are personally invested in migrants' well-being. The below is a story from Van Liempt's study:

*Taha had a special status in the group because the smuggler knew his parents. He was the first to cross the river together with the smuggler. But before they had reached the other side, I saw the boat capsize, and Taha fell into the water. The river took him and he was gone – just like that. This image keeps coming back to me. It was horrible. The river was so cruel. I will never forget this. The smuggler completely freaked out. He wanted to go back to Turkey and kept mumbling: 'What do I tell his family? How do I explain this?' He told the group it was impossible to continue. We all went back to Istanbul. This was an expensive decision, because we went by taxi and the smuggler paid for it all.<sup>130</sup>*

Above Mendez from NOII said her family were not victims.

In a recent study interviewing smuggled people, UNODC similarly found that though migrants in smuggling situations described abuses, they did not call themselves victims: "While many current or former migrants have clearly suffered all manner of abuse during their journeys, and even those who have succeeded in entering EU may continue to live in conditions of extreme poverty, it is striking that few, if any, speak of themselves as victims. They may testify to the callousness of transporters and the brutality of police officers while continuing to regard themselves as ultimately able to determine their own fate, subject to the will of God. To readers accustomed to thinking in terms of rights, and of those whose rights are flouted as being victims, this position may seem puzzling."<sup>131</sup>

On the other hand, some groups do use victim language. Like the Malian Association of Deportees, the Alliance Against Irregular Migration (AAIM) was founded by migrants who were deported and are now working to prevent people migrating – a protectionist stance, to save others from also becoming victims. They say: "Having gone through such an ordeal ourselves we realize people in our communities still have the notion that they can still travel and live as irregular migrants and still make it..."<sup>132</sup> They use victim language to describe their rationale:

*As victims, the designers of the project also recognize that ignorance about opportunities at home, lack of knowledge about the migration process, availability of irregular means or modes*

*Researchers align themselves with or have biases towards different actors, migrants, States, or facilitators.*

*of travel (through often quack and deceitful “connection men”), ignorance of experiences of irregular immigrants abroad, and the hardships they would experience once they are deported home as well as the attendant stigma from their communities.<sup>133</sup>*

Whether migrants in smuggling situations see themselves as victims or not, many experience hardship along the way. Some blame that on facilitators, others on the sending or destination government. Some facilitators see themselves as responsible for harms, while others distance themselves. Both facilitators and migrants see smuggling as socially acceptable, if not necessary, with smugglers seen as helpers in the best of cases, and even more so in situations with humanitarian or family elements present (which if organised crime is not present, would not qualify as smuggling in the Protocol definition).

### *Academics*

For some of the same reasons that migrants, facilitators and NGOs (see section on NGOs) may not use the terms ‘smuggled person’, ‘smuggler’ or ‘smuggling’, some academics are also reticent.

Two authors of an edited volume on smuggling suggest that “[s]ome researchers may understandably wish to avoid areas of research that may link migrants with crime for fear of further stigmatising immigrant minorities, or they perceive such research to be too risky.”<sup>134</sup> In a recent journal article on smuggling and trafficking, one researcher describes avoiding the term when talking with migrants, saying that “we avoided words such



as 'smuggling' and 'trafficking' [in interviews with migrants] to try to get away from the criminal discourse that surrounds this topic."<sup>135</sup> In some of her work, she uses the term "assisted" migration instead.<sup>136</sup>

Labels notwithstanding, a majority of academics in fields ranging from economics to anthropology use journal and book spaces to describe *how smuggling works* – the modus operandi. The scope of this working paper is not to do this, but to describe how various actors, like academics, are talking about smuggling. Academic researchers debate whether smuggling is best conceived as a phenomenon involving family and social networks,<sup>137</sup> as a business,<sup>138</sup> or as primarily composed of organised crime syndicates.<sup>139</sup> In these debates, researchers align themselves with or have biases towards different actors, migrants, States, or facilitators.

For example, a family network framework can legitimise smuggling, sometimes highlighting humanitarian motives, garnering sympathy for both migrants and facilitators who are helping them. When looking at social networks, academics often show migrants in smuggling situations with agency rather than simply being objects to be transported as in the crime perspective.<sup>140</sup>

On the other hand, depiction of smuggling as a business can be faceless depicting a monetary exchange for a service, with or without emphasis on the illegality of the business. Koser notes that seeing smugglers "as business people can professionalise them and ignore the utter lack of respect that many have for the rights and dignity of their clients."<sup>141</sup>

Smuggling seen as a business also can also be associated with macro processes of globalisation and part of a process of

*Very few practitioners or scholars working in the area of migrant smuggling... appear to argue against the need for an international legal regime to deal with migrant smuggling.*

*- Anne Gallagher*

*A depiction of organized crime creates a firm picture of migrants and facilitators trespassing and violating state sovereignty. This view sees the state in a legitimate position to defend itself.*

‘migration commodification’, as Kyle and Liang say.<sup>142</sup> A depiction of organised crime creates a firm picture of migrants and facilitators trespassing and violating state sovereignty. This view sees the state in a legitimate position to defend itself. Kyle and Koslowski highlight a group of academic criminologists writing in the 1990s who look at intersections of migration and crime specifically from the perspective of impacts on States.<sup>143</sup> Since the 2000 UN Smuggling Protocol explicitly criminalised smuggling, academic papers talking about organised crime in connection with smuggling have grown in number, sometimes associated with state security and terrorism.<sup>144</sup>

In addition to the three groups of studies on smuggling as social or family networks, as businesses, or as organised crime, several academics have written on migration management, looking at how smugglers and migrants adjust to immigration measures, and how governments adjust measures in counter-response. (See Prevention section, p.37.)

Some also examine international frameworks. Noting academics’ positionality, Gallagher states that “[v]ery few practitioners or scholars working in the area of migrant smuggling... appear to argue against the need for an international legal regime to deal with migrant smuggling.”<sup>145</sup> In that vein, several academics argue *for* anti-smuggling legislation. As with anti-trafficking, once a problem has been defined, many people do not argue against it as a ‘problem’, or argue that standardised solutions such as anti-trafficking or anti-smuggling legislation should not be put into place.<sup>146</sup> By contrast, in the section above, we saw that migrants and smugglers do not necessarily see smuggling as a problem per se. Yet, taking smuggling as an agreed upon ‘problem’, Koser, an academic, talks about “a striking lack of specific laws and policies on migrant smuggling.”<sup>147</sup> Needed anti-

smuggling laws, he says, should transform smuggling “from a ‘low risk, high return’ operation for smugglers into a ‘high risk, low return’ one” by increasing the costs of smuggling.<sup>148</sup>

Others write about the need for smuggling laws as a way to protect smuggled people from abuses,<sup>149</sup> a similar argument to that of IGOs, a handful of NGOs and some governments (see other sections in this paper). Perrin, mainly an anti-trafficking author, suggests that because smuggled people face debt, prostitution, trafficking and death, governments need to crack down on smuggling particularly.<sup>150</sup> Koser suggests that smuggling laws need to be quite separate from measures to combat irregular migration, as stricter border controls to do that can perversely increase smuggling, as more people rely on brokers to cross borders. Therefore other measures, like trying to cut down forged or stolen documents, or engaging with corruption of airline and immigration officials, would increase the costs of smuggling and make it less profitable.<sup>151</sup>

Finally, some academics engage in discourse analysis around smuggling. Kyle and Dale talk about two main causal stories around smuggling, the first of which they say is a global narrative that “globalisation has created the condition for greater transnational crime”. The second they call an individual story in which “some very ruthless and greedy professionals are exploiting the weak and mostly innocent migrants who are either duped or coerced into a clandestine journey.”<sup>152</sup> There are other threads such as ‘greedy professionals are making profit from greedy, cheating migrants’ or that ‘smuggled migrants willingly risk their lives, so it’s their fault if they die’.<sup>153</sup>

Van Liempt recently wrote very specifically on gendered policy discourse, deconstructing smuggling seen as primarily of men and trafficking of women. As women are more often seen as victims, protective discourse around women’s migration can lead to protective policies restricting women’s choices. Men, on the other hand, are perceived to be more likely to take risks, act deviant, and “‘deliberately’ break the rules... run[ning] the risk of being perceived as criminals without the authorities taking into account human rights violations they may have suffered in the process, or the reasons why they needed to travel in this way.”<sup>154</sup> Men are perceived as less deserving, and women are supposedly “unaware of their own oppression” and naive. In contrast to these common understandings, she shows three stories of women who entered, what she calls “assisted” migration processes with eyes wide open, making very careful decisions with as much information as they could gather, countering a narrative she identifies as women not being able to make choices about movement.

Van Liempt also notes that the role of the state is ignored in the problems of smuggling and trafficking.

***By framing the ‘abuse’ of female migrants as the fault of ‘traffickers’, women’s agency is not only denied but the role of***

*the state is also mystified. The fact that smuggling and trafficking are also by-products of restrictive migration regimes, exploitative employment practices and inequality between poorer and richer countries is completely overlooked in this particular discourse and restrictive migration regimes are even legitimized.*<sup>155</sup>

## ***Governments***

Signing the 2000 UN Smuggling Protocol to the Convention Against Transnational Organised Crime, States agreed in Article 6 to establish legislation criminalising smuggling. Many have done so, or are doing so.

Indonesia, for instance, passed a smuggling law in early April 2011. Officials in other countries, such as Canada, are, as of November 2011, revisiting their smuggling legislation, looking to amend it with harsher penalties for smugglers and more restrictions for smuggled migrants.

States are of course not monolithic and have differing voices within them. Several political parties and Members of Parliament in Canada are opposed to harsher smuggling penalties for instance, as we shall see in the case study below.

Some national and regional legislation, like that in the EU and in many member countries, criminalises the actions of smuggling as per the Protocol, but does not always use the word 'smuggling'.<sup>156</sup>

This section of the working paper, like others, is in no way comprehensive, but looks at a sample of discussions among government officials on smuggling, where relevant focusing on those during 2011 in which governments use smuggling terminology.

Major destination governments have put anti-smuggling measures into place. Australia, for instance, has run information campaigns in countries and languages of origin, warning people of dangers, high penalties and the futility of using a smuggler to try to get to Australia.<sup>157</sup> In 2001, the Australian Navy began receiving directions from the government to tow vessels out of Australian waters.<sup>158</sup> The discourse continues for the government to save on costs and responsibilities towards migrants, encouraging creative thinking around deterrence. As justification, for example, the government recently released figures from the Attorney General's office that it costs 20,000USD to defend each person accused of migrant smuggling, suggesting the cost of the criminal activity of smuggling and of due process for smugglers is exorbitant.<sup>159</sup>

Australia has struggled for years with contradictions of deterring people at sea at the same time as meeting humanitarian obligations to preserve life under the International Convention for the Safety of Life at Sea, and meeting obligations to hear asylum

seekers under the Refugee Convention. The Australian government has been active in trying to negotiate for regional processing centres off Australian shores for migrants. In March 2011 at Bali Process meetings,<sup>160</sup> Australia promoted regional processing centres.<sup>161</sup> Ministers agreed to regional cooperation aiming to “eliminate... irregular movement facilitated by people smuggling syndicates,” wanting instead to “support opportunities for orderly migration.”

Asylum seekers under this scheme should have access to refugee assessment, not always, but “where appropriate and possible.”<sup>162</sup> The Australian High Court struck down the agreement on 31 August 2011.<sup>163</sup> Lawyers had argued asylum seekers have a legal right to go to Australia (even through a smuggling route), rather than be processed in a country that does not have adequate refugee protection legislation.

In May 2011 Association of South East Asian Nations (ASEAN) meetings,<sup>164</sup> discussing regional anti-smuggling efforts, ministers said that “Measures will be put in place to ensure smuggling victims are ‘treated humanely and provided with such essential medical and other forms of assistance’, including prompt repatriation to their countries of origin”.<sup>165</sup> This description of prompt repatriation as “assistance,” though seen here, is not common. In early May 2011, during ASEAN negotiations, Australia and Malaysia announced an agreement whereby Australia would fly 800 migrants who land in Australia to Malaysia, and in return Australia would accept 4,000 refugees from Malaysia.

Questions exist for governments and all those involved in refugee protection as to how protection works in tandem with arrangements like this and with offshore processing, especially given extraterritoriality issues.

Not only wanting arrangements for migrants after they start their journey, but also wanting to encourage non-migration, in March 2011 a group of Bali Process senior officials agreed that “[a]rrangements should seek to address root causes of irregular movement and promote population stabilisation wherever possible,”<sup>166</sup> encouraging stay in home countries. This echoes agreements trying to curb migration, between European and North and Sub-Saharan African countries, where blocking migration and readmission of returned migrants are exchanged for aid and/or trade.<sup>167</sup>

While the above discussions have crime control and migration prevention aspects in the language, others link smuggling to terrorism. The US Immigration and Customs Enforcement office’s multi-annual plan from 2010 to 2014 talks about a smuggling-terrorism nexus,<sup>168</sup> and ICE deputy assistant director James Spero says that, “While the majority of aliens smuggled into the US probably do not pose a risk to national security, the problem is terrorists could exploit these smuggling travel networks.”<sup>169</sup>

Rhetoric about stemming smuggling also is humanitarian in nature, as with Australia’s information campaign warning people of the dangers of travel. Governments express concern that people will ‘fall prey’ to smuggling. As Australian Home Minister Brendan O’Connor said: “Situations around the world mean that large numbers of displaced

*We're doing this for their own good...We want there to be a strong deterrent from taking the maritime route.*

*- Mike Carney,  
Immigration and  
Customs  
Enforcement, San  
Diego, US*

persons are looking for settlement in wealthy, developed nations like Australia and can be targeted by, and fall prey to, people-smugglers... The Australian government remains vigilant and committed to protecting Australia's borders."<sup>170</sup> His solution is to ensure people do not get hurt while moving by not letting them move. However, he does not provide a solution to the first part of his statement acknowledging that many people globally are displaced, forced to leave their homes.

Others use protective or paternalistic language when talking about prosecuting migrants. Prosecuting a woman from Mexico under the US's Safe Waters Initiative, Mike Carney, acting special agent in charge for Immigration and Customs Enforcement in San Diego, said:

*We're doing this for their own good...We want there to be a strong deterrent from taking the maritime route.*<sup>171</sup>

In the same humanitarian vein, though not speaking explicitly as a supporter of anti-smuggling programmes, former Senagalese foreign minister Cheikh Tidiane Gadio, said he wanted more legal routes to Spain to prevent people "fall[ing] prey to smugglers and traffickers."<sup>172</sup>

Some sending country governments as well as officials in destination countries, especially borderlands, are sympathetic to migrants, questioning restrictions. Then-president-elect in Mexico, Vicente Fox, outlined a vision for open borders because too many people were dying on the militarised US border.<sup>173</sup> He worked to shape US policy and remains vocal and critical of US Immigration law.<sup>174</sup> At the same time the US puts pressure on Mexico to stop migrants, using Mexico as a buffer for



stopping immigrants from Latin and South America. Mexican lawmakers recently unanimously approved domestic legislation to protect all migrants regardless of status. The legislation allows migrants access to health care, education and justice services, as well as recognizes their legal status, independent of migration status.<sup>175</sup>

In a study of 83 policymakers from Mexico, El Salvador, Nicaragua, Guatemala, Honduras, and the Dominican Republic, the top concern for them regarding migrants' negative experiences was human rights abuses in migration. Probably many sending country governments echo the former chief adviser to the Mexican foreign minister: "Our number one priority when it comes to immigration is to try to guarantee that while in the United States, all Mexicans, regardless of their migratory status, have their rights respected."<sup>176</sup> In discussions and negotiations for the UNTOC Smuggling Protocol in 2000, it was the Group of Latin American and Caribbean States that said "[T]he protocol must take into account the relevant United Nations instruments on protection of migrants in connection with correcting social and economic imbalances."<sup>177</sup>

Similarly, in a 2009 UNODC consultation of States to develop UNODC's *Model Law against the Smuggling of Migrants*, North African countries asked that in the very first article stating purpose, there be an option to prioritise smuggled migrants' rights protections. The *Model Law* was drafted accordingly.<sup>178</sup>

Not only policy makers but also implementing officials are concerned with migrants' interest. An Italian law enforcement official tells how he struggled with an order to turn a boat out of Italian waters and take it back to Libya:

***It is the most despicable order that I have ever carried out... When we took them on board of the three boats, they thanked us for saving them... My heart sank. I could not tell them that we were taking them back to the hell that they had risked their lives to get away from ... When they realized that we were taking them back to Libya, they started shouting: 'Help us, brothers!' But we could not do anything. The orders were to sail them back... We left them in the port of Tripoli, where the Libyan soldiers were waiting for them – Member of the Guardia di Finanza (customs and excise police with a military status)<sup>179</sup>***

Some government officials use economic language instead of talking about human rights to defend migration.

A group of 19 local policy makers in the US, who make up the Texas Border Coalition, say that extensive border controls are economically punitive: "US immigration policies ignore the important role immigrants play in the state and national economies and jeopardise prosperity and global competitiveness along the Texas-Mexico border."<sup>180</sup> Not justifying this economically, but on human rights grounds, destination



country Belgium gives migrants who have experienced aggravated smuggling access to the same protection systems as trafficked persons.<sup>181</sup> Conditional upon participation in the prosecution process, “Victims of trafficking and smuggling... have access to education and vocational training, financial allowance, employment and physical and mental health care.”<sup>182</sup>

A case study (below) provides an opportunity to look at some discussions of smuggling in-depth.

### **Box 7: Jumping the Queue: Canadian legislative debates and recent anti-smuggling action in Southeast Asia**

This case study describes debates for and against proposed amendments to Canadian anti-smuggling legislation. It reveals new directions in definitions of smuggling and who gets to identify smuggled people. Political attack advertisements accuse opposition parties of being weak on crime if they do not support smuggling legislation amendments, but opposition officials express concern for refugees. The case also shows a recent anti-smuggling sting operation in partnership with the Thai government from where boats to Canada sometimes originate.

The Canadian Public Safety Department describes smuggling on its website as “facilitating illegal migration, often by counselling smuggled persons to claim asylum in the country to which they are smuggled”, thereby overburdening the asylum system with false claims.<sup>183</sup> Overburdening the immigration service is a major rationale for the proposed bill C-49 *Preventing Human Smugglers from Abusing Canada’s Immigration System Act*.<sup>184</sup>

Regarding identification, under the proposed legislation, the Minister of Public Safety would be able to identify a group “*smuggling event*” if the “Minister... is of the opinion that examinations relating to identity and admissibility of the persons involved in the arrival... cannot be conducted in a timely manner,” ie. if processing will overburden the immigration service. The Minister can also designate a smuggling event if he/she “has reasonable grounds to suspect that the arrival involves organised human smuggling activity for profit, or in support of a criminal organisation, or terrorist group.”<sup>185</sup> Thus, profit, criminality and terrorism are linked.

Alongside identification issues, proposed legislative changes relate to mandatory detention, and to longer periods for regularization and family reunification.<sup>186</sup> If a person is labeled under the smuggling event

designation, under proposed Amendment 8, the person *must* be detained. Under Amendment 10, they can be detained indefinitely - until a decision is made on their refugee or other protection claim, or until the Immigration Division or Minister decides to release them.<sup>187</sup>

Debate in the Canadian House of Commons on the second reading of Bill C-49 was lively, with Opposition parties uniting against the bill, citing an abuse of refugee rights, as well as the Public Safety Minister's unchecked powers to identify smuggling and thus to detain people. One Opposition member said:

*The reality is that those individuals who are facing persecution and human rights abuses on the part of the Sri Lankan military do not have a queue to go to. They do not have an office to go to. There is no system in place to ensure they can, through a legitimate and anchored process, come to Canada. We are talking about an area where there are widespread human rights violations, disappearances, rapes, assaults and murders, and there is no system or process, no queue, waiting for them...*

*On top of that, the minister has the ability to throw any individual into jail. Rather than tackling human smugglers, the government is tackling the refugees, after coming through months on the open dangerous seas with little food and water and finally making it to our shore, and throwing them in prison.*

*That is simply not a value that most Canadians share. It is simply not a value that led to the international conventions [referring to the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] that are violated by this legislation.<sup>188</sup>*

Another minister said that existing penalties were harsh enough. He "wonder[ed] if [the penalties] actually would serve as a deterrent or if the increased cost of doing business would simply be passed along to the migrants who would have to pay even more money to smugglers."<sup>189</sup>

In response to the Liberal-led opposition, the Tories (proposing the bill) not only debated this in Parliament but also ran an attack campaign ad saying that the opposition is weak on border security and crime.

The ad's announcer says the following:

*Canada welcomes those who want to build a better future.  
But our openness doesn't extend to criminals who target  
Canadian generosity.*

*Stephen Harper [Tory] has a plan to crack down on human  
smugglers and bogus claimants who jump the queue [ie. are  
not refugees brought specifically to Canada through a camp  
resettlement system].*

*And Michael Ignatieff [Liberal] and his coalition partners – They  
oppose temporarily detaining illegal migrants.*

*They even oppose tougher sentences for human smugglers.  
Ignatieff [Liberal] and his reckless coalition – Weak on border  
security, Dangerously soft on crime.<sup>190</sup>*

Alongside this accusatory debate about crime, border security and queue fairness vs. refugee rights and international obligations, Canada continues with existing anti-smuggling measures, one of which is to work with source or transit country governments to halt smuggling before people board boats or planes to Canada.

After a few incidents of people from Sri Lanka gathering and boarding ships in Thailand bound for Canada, Canada has made a concerted effort to give Thai Police as much information and encouragement as possible, though they do not have jurisdiction to act in Thailand. In October 2010 several smugglers bound for Canada were arrested in Thailand.<sup>191</sup> Visa restrictions have increased for Sri Lankans to travel to Thailand, resulting in a 70-80% drop in visitors.<sup>192</sup>

Canada is devoting quite a lot of resources to foreign smuggling prevention, as well as a lot of Parliamentary and public discussion time to the issue of smuggling. This case study shows government officials are not in agreement about the issues. Some in Canada are concerned with the overburdening from false asylum claims and concerned with 'queue-jumpers', suggesting refugees should be admitted to Canada through selection from foreign refugee camps, rather than arriving on their own. Others in the government are concerned that some people do not have access to the queue in camps and must simply get on a boat if fleeing war. Restrictions violate rights, and the existing penalties for smugglers are strong enough.

## *Intergovernmental Organisations*

Intergovernmental organisations are established when a group of governments give them a mandate and support their operation. IGOs have differing responsibilities and relationships to those States after operationalisation.

Here we focus on a handful of UN organisations that are prominent in smuggling discussions, particularly UNODC, UNHCR and IOM.

### **UNODC**

The United Nations Office on Drugs and Crime (UNODC) has a very direct mandate to deal with smuggling as the guardian of the United Nations Convention against Transnational Organized Crime (UNTOC). Its mandate involves helping governments implement UNTOC's Protocol against the Smuggling of Migrants by Land, Sea and Air, which it calls the "Migrant Smuggling Protocol" and in one place at least calls the "Migrants Protocol,"<sup>193</sup> possibly implying a protocol *for* migrants.

UNODC emphasises that migrant protection is important. Its *Law Enforcement and Prosecution* Toolkit for instance refers to human rights at the beginning of many sections which detail investigative techniques and intelligence gathering.<sup>194</sup> UNODC calls smuggling a "deadly business" and says that "[s]muggled migrants are vulnerable to life-threatening risks and exploitation; thousands of people have suffocated in containers, perished in deserts or dehydrated at sea."<sup>195</sup> Smuggling needs to be stopped so that people do not die during the process. Thus UNODC talks about human rights of migrants in terms of preventing death and exploitation by preventing smuggling as a means of migration. See the UNODC poster

*Smuggling is a "deadly business" and "[s]muggled migrants are vulnerable to life-threatening risks and exploitation; thousands of people have suffocated in containers, perished in deserts or dehydrated at sea." - UNODC*

below prepared for the 2010 UNTOC Conference of Parties, which shows a line of lorries and reads “Getting closer to the breathing holes.’ These were my brother’s last words”.<sup>196</sup> UNODC also refers to smuggled people as potential victims of crime.<sup>197</sup>  
198

Wanting to help prevent the crime that leads to situations in which people are stuck in lorries without air, UNODC works primarily from a criminal justice approach, seeing its responsibility to assist States in technically implementing the Protocol with developing legislation and criminal justice systems.<sup>199</sup> The organisation prioritises law enforcement and prosecutions. UNODC provides technical advice on reactive, proactive, disruptive and financial investigations, seizure of assets, crime scene investigative procedures, carrier sanctions, seeking consent of smuggled people and smugglers during prosecutions etc.<sup>200</sup> It has worked with other agencies to create the I-Map, an interactive map tracing smuggling routes, with the logic that the more information available to law enforcement stakeholders about smuggling routes, the easier it is for them to stop smugglers using those routes.<sup>201</sup> UNODC works with States in other ways to encourage information sharing. In West and North Africa, as an example, UNODC’s EU-financed Impact Programme involves data collection, international cooperation, legislative development, capacity building of criminal justice responses to smuggling, and public awareness-raising of the risks and criminality of smuggling.<sup>202</sup> In UNODC’s report to the 5<sup>th</sup> session of UNTOC the Secretariat, the IGO talks about efforts to stop the crime in a technocratic way.

While UNODC uses people-centred language and imagery when talking about violations, the organisation uses distancing and derogatory terms at times, like



“passenger contamination”, for situations in which smuggled migrants and “ordinary passengers” travel together on flights.<sup>203</sup>

In terms of aiding legislative development, in late 2010 UNODC published a Model Law Against the Smuggling of Migrants. The Model Law provides commentary and expands on options for introduction or revision of domestic legislation. Related to the section earlier in this paper about intersections between trafficking and smuggling, the Model Law unpacks the Protocol’s wording around aggravating circumstances in smuggling, in which a person’s life is in danger or they suffer inhuman or degrading treatment, including exploitation.<sup>204</sup> A section related to abuse of migrants’ vulnerability was drafted in relation to consultative discussions about migrants experiencing situations which are less exploitative than those outlined as aggravating circumstances.<sup>205</sup> Emphasis is also made in the Model Law about smuggled people’s access to justice.<sup>206</sup> The document expands the definition of smuggling from the Protocol, as well as adds a definition of a smuggled migrant. “Smuggling of migrants” is taken to include “all conduct criminalised” in the section of the law outlining criminal offences. Thus, further than the Protocol calling smuggling “the procurement, in order to obtain... benefit, of the illegal entry of a person...”, the Model Law also includes enabling illegal residence and activities surrounding the falsification of travel documents, as smuggling.<sup>207</sup> UNODC gives options for legislative models to be narrow or broad in terms of criminal offences covered.<sup>208</sup> States can choose when designing legislation.

## UNHCR

Another IGO, the UN High Commissioner for Refugees (UNHCR) has a mandate for a different, though overlapping, group of people, as detailed above in the refugee-smuggling intersection part of this paper. UNHCR was critical of the Smuggling Protocol during and after negotiations on it. On 11 December 2000, UNHCR issued a Summary Position on the Smuggling and Trafficking Protocols saying that a number of provisions in the Smuggling Protocol “may impact on smuggled asylum seekers”, pointing to the authorisation to intercept vessels, the obligation to strengthen border controls, carrier sanctions and the commitment to accept the return of migrants who have been in smuggling situations.<sup>209</sup> Not only noting the problems with anti-smuggling measures, UNHCR highlights violations that smugglers commit: Antonio Guterres, the UN High Commissioner for Refugees said in a short video that, “Smugglers commit some of the worst atrocities imaginable: Beating and killing people. Throwing people overboard with their hands bound. Dumping entire boatloads of people offshore at night leaving them to drown in the dark.”<sup>210</sup> Similarly concerned about deaths of refugees, UNHCR issues reports about smugglers’ inhumane practices and governments’ failure to rescue people at sea.<sup>211</sup>

While highlighting abuses by facilitators, another vein of UNHCR’s discourse has recently been to support anti-smuggling measures, though the organisation was initially critical at the time the Protocol was being drafted.



*While highlighting abuses by facilitators, another vein of UNHCR's discourse has recently been to support anti-smuggling measures, though the organisation was initially critical at the time the Smuggling Protocol was being drafted.*

In 2006, a news article reports “UNHCR and other organisations working in the Horn of Africa to encourage authorities to crack down on smuggling and to educate people about the dangers of resorting to smugglers to cross the Gulf of Aden.”<sup>212</sup> In 2007 UNHCR supported anti-smuggling activities including prevention messaging after a boat carrying Ethiopians and Somalis capsized in the Gulf of Aden.

William Spindler, speaking for UNHCR, said it was essential that messages about the associated risks came from “neutral” media sources as well as the government. This way, potential migrants would “see it’s not an attempt to stop them from leaving.”<sup>213</sup>

As noted earlier Malaysia and Australia recently signed an agreement to deter smugglers by agreeing that Australia can fly 800 people who reach Australia to Malaysia instead. The rationale is that if people think there is a chance of ending up in Malaysia, people will be deterred from trying to reach Australia. In return, Australia will accept 4000 refugees who are currently in Malaysia. UNHCR initially applauded the deal, as well as cited dangers in smuggling,<sup>214</sup> though the organisation has since had more critical distance:

***[The agreement between Australia and Malaysia] has the potential to [deter people smugglers] from the point of view that these individuals prey upon the insecurities of individuals. They extract large sums of money on promises of delivering a result for people, and the danger associated with these journeys is very real and very difficult.***<sup>215</sup>



The UNHCR representative saying the above went on to say that in the spirit of burden sharing, it is equitable for States if refugees seek asylum in places they transit through, and that this deal will encourage that.

*[T]o the extent to which the burden is shared fairly, to the extent to which people are not getting on boats and making dangerous journeys, to the extent to which people can seek asylum and get a fair hearing of their claim, in the first opportunity where they get the chance to do that and that states feel that they're not being over burdened but that there is equitable burden sharing, then that's going to be better for everybody.<sup>216</sup>*

## IOM

The International Organisation for Migration (IOM), another IGO, similarly sees States' interests. IOM speaks of combating crime, and also talks about migrants' well-being if they can be prevented from travelling with criminals:

*The motivation of States to reduce irregular migration may spring from a desire not only to limit the number of irregular migrants entering or transiting their country, but also to weaken or eliminate criminal elements engaged in smuggling, trafficking, and other crimes, including capital crime.*

*Reducing irregular migration can also better secure the well-being of migrants and*

*IOM puts significant emphasis on organised crime, saying migrants or their large numbers are not the biggest threat in smuggling but organised crime syndicates are.*

*potential migrants by keeping them out of the hands of persons who are not concerned for the welfare of migrants, and who are willing to use force and abuse to achieve their purposes.*<sup>217</sup>

IOM puts significant emphasis on organised crime, saying migrants or their large numbers are not the biggest threat in smuggling but organised crime syndicates are.

IOM lists character traits of syndicates on their smuggling website, as well as saying that criminal groups pose a threat to responsible governance.<sup>218</sup> In addition to supporting the Smuggling Protocol as a template for national legislation and practice, one IOM study ends with a recommendation that “most countries have existing laws [ie. not smuggling-related] that, if implemented, would go a long way to protecting irregular migrants and reducing the illegal entry of irregular migrants.”<sup>219</sup>

IOM is concerned with protection at the same time as reducing entry. In terms of reducing entry for instance, IOM promotes carrier sanctions. Similar to UNHCR above, IOM points to the fact that people could seek asylum in embarkation countries or countries neighbouring their own, and therefore do not necessarily need to get on a flight. Letting people on without documents (both smuggled and travelling without a smuggler) undermines the integrity of the refugee system. IOM documentation on carrier sanctions justifies denying passage to asylum-seekers, even though States are obliged to hear and protect asylum seekers, and even though for some migrants it is the case that seeking asylum in a neighbouring country is much more life threatening than boarding an aircraft:

***“Denying Passage” to Asylum-seekers***

*International law does not provide for a right of passage to a specific country. The rights of a person to seek asylum on a specific territory only commence when the person is present in that territory.*

*Experience shows that many travellers make a claim for refugee protection on arrival at their intended destination. In many cases, the individuals concerned could have pursued the option of claiming asylum in the State of embarkation or in a neighbouring country that is a signatory to the UN Convention.*

*Allowing such persons to embark, notwithstanding improper documentation, would render passport and visa requirements meaningless and further increase irregular migration. Irregular migration erodes the integrity of refugee determination systems, ultimately penalizing the legitimate refugee.*

***A carrier who knowingly carries an improperly documented passenger could risk a criminal prosecution for aiding and abetting in migrant smuggling. Carriers are required by law to interdict improperly documented passengers and must pay fines for conveying improperly documented passengers.*<sup>220</sup>**

With more time, other bodies like Frontex,<sup>221</sup> the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), and the Global Migration Group could be examined in this working paper as well. UNODC, UNHCR and IOM are all central players, each with differing mandates in crime control, refugee protection and migration management. All have concerns for migrants' welfare, as the smuggling experience is inherently dangerous. UNODC and IOM take crime control quite seriously, IOM also particularly concerned with protecting States' borders and security. UNHCR is concerned both with refugee rights as well as with political negotiations around refugee hosting or 'burden sharing.'

## ***Media***

Media reports of smuggling vary from matter of fact reporting that a smuggler was arrested, to opinion pieces about the need for more or fewer anti-smuggling measures.

In this sub-section we take a look through two months of news articles from a 'google alert' search set up to look for the term 'smuggling.' Google alerts show one article per news story a day, which means that if 5 or 50 news sources ran an article about a smuggler being caught on the US-Mexican border, only one mention of it would come up in that day's alert synthesis. For this analysis we took 61 days of alerts from 1 April to 31 May 2011, and grouped articles into several categories, showing trends which we detail here. Over that period, several significant events occurred which shape the data: Australia and Malaysia struck a bilateral anti-smuggling agreement; and the Canadian Parliament debated a new anti-smuggling law, while Indonesia passed one. All articles reviewed here are from English-language news sources.

The highest proportion of news pieces (35%) clustered around reports that arrests, detention, highway chases and criminal charging of smugglers and migrants had taken place. For the most part these were rather short articles. Government officials were active in anti-smuggling efforts, 'busting', 'thwarting', 'searching', 'sentencing', 'arresting', 'detaining' people. The majority (56%) of this kind of reporting is from the US, with 10% from Australia and 7% from Canada. Headlines read: "ICE arrests 108 at Phoenix human smuggling drop house"<sup>222</sup> and "Police bust Turkish-German people-smuggling ring."<sup>223</sup>

While for *all* articles found, 33% were from the US, 23% from Australia, and 22% from Canada, it is significant that the latter two countries, as well as Indonesia, have

been debating, negotiating and drafting new policy. Therefore, while more articles from America were on anti-smuggling arrests, detention, chases and charges, stories from Australia and Canada showed that the two countries' governments are stepping up their anti-smuggling efforts. A headline from Australia read: "The government is ramping up the war on people smuggling".<sup>224</sup>

On the flip side of media reporting about governments' anti-smuggling legislation and new initiatives, 12% of all media coverage was critical that governments were not doing anti-smuggling work at all, not doing enough of it, or not doing anti-smuggling work properly. Australian and American opposition party voices said that smuggled people are still coming, which proves anti-smuggling efforts are not working.<sup>225</sup> Canadian and Australian articles reported how much judicial due process or detention for smugglers cost the tax payer,<sup>226</sup> implying that if smugglers could only be kept out of the country, then law-abiding citizens would not incur this expense.



Photo: Ryan Hayes & Sheila Hewlett for No One Is Illegal - Toronto, published in *Rabble*<sup>227</sup>

While some articles report critiques or are critical of the government for not doing enough, some (10%) are critical of anti-smuggling measures or report the critiques of others. Some of this is in alternative media sources, while some is mainstream. **See the picture to the left** in *Rabble*, a Canadian online publication, which details the turning away of a ship of Indians in 1914 and one of Jews in 1939, hoping the same fate does not befall the ship of Tamils who arrived in 2010. Text on the pictures notes that Canada recently apologized for the first two incidents.<sup>227</sup> Other media is critical of the US-Mexico or the South African border fences.<sup>228</sup> And one article reports Canadian opposition to proposed legislation saying anti-smuggling will push people towards smugglers even more.<sup>229</sup> An article series found a few days before starting the Google alert search, both gives exciting details into how Canadian anti-smuggling work is done abroad, but also gives some critique, saying that part of the result of Canada trying to stop Sri Lankans boarding ships to Canada is that Sri Lankans are detained in Thailand in appalling conditions. The journalist calls it the "dark side of Canada's anti-human smuggling program". He says that while he was not able to get into the migrant



detention center, “the National Post [newspaper] was able to communicate with several detainees who sent photographs of the facility and the six- by 20-metre cell where the Sri Lankans are being held. They show a rectangular room so overcrowded there is hardly room to tread. The detainees said 140 men are housed in the cell; they must sometimes sleep in shifts because of the scarcity of floor space.”<sup>231</sup> One person sent the reporter a cell phone photo, which the National Post published. See below photo with original caption.



Courtesy National Post. “A cellphone photo taken inside the Bangkok Immigration Detention Centre, where Sri Lankans arrested while awaiting ships to Canada are being held.”<sup>232</sup>

Next this review looks at media descriptions of ‘smugglers’ and ‘smuggled migrants’. First some stories report smugglers as ‘unscrupulous’ and ‘dangerous’, but smugglers are also ‘cunning.’ A facilitator’s clever scheme or maneuver makes a sellable news article. In terms of their more deviant and threatening features, journalists report facilitators responsible for deaths;<sup>233</sup> report “Southeast Asia’s human smuggling syndicates target[ing] Canada;”<sup>234</sup> and tell of government fears that terrorists exploit smuggling routes.<sup>235</sup> Smugglers are also clever, pretending to be underage to avoid punishment,<sup>236</sup> developing a “‘sophisticated’ smuggling tunnel with electricity and ventilation,”<sup>237</sup> and, as “‘cybercoyotes,’... using smartphones to direct border crossings.”<sup>238</sup>

In the two months of media reviewed, migrants in smuggling situations were not reported as deviant, but as 'desperate', 'innocent', or 'abused'. Human interest stories were in this category, like that of Telke from Ethiopia who "was shot at, beaten by security guards and nearly suffocated while stowed in the false bottom of a truck."<sup>239</sup> Abuse of children featured, as per the headline "Police detain German suspected of abusing boys in Haiti; smuggling them to Europe".<sup>240</sup>

Media is quite varied on smuggling, ranging from simply reporting arrests, to portraying government as doing a good or bad job with anti-smuggling efforts. As to be expected, some media reflects xenophobic sentiment and other articles are pro-migrant. More human interest stories would be welcome, showing migrants' rights violated and showing migrants' strengths and courage in movement. Reporters like that in the Canadian case above who show how national policy is impacting people in third countries (ie showing conditions in non-Canadian detention centres) is especially relevant as intergovernmental and bilateral agreements are resulting in rights abuses for migrants in transit as well as in destination countries.

## *NGOs*

Civil society groups, migrant rights groups particularly, very rarely use the terms smuggling, smuggled person or smuggler. Most advocates and service providers talk about undocumented migrants or simply migrants.

As for academics, this is a way to avoid criminalising the people NGOs work with, and are sometimes comprised of - in the case of grassroots groups. One advocate mentions that smuggling is a government term, "their term", rather than, for instance, a migrant's term or a term which if used would lead to positive fulfillment of human rights claims.<sup>241</sup>

Global or regional networks like Migrants Rights International, Mekong Migration Network, or Migrant Forum Asia do not refer to smuggling or smuggled people but migrants. Some groups like Platform for International Cooperation on Undocumented Migrants (PICUM) talk of undocumented migrants specifically. The term is more inclusive than smuggling, because it encompasses those who entered a country without documents as well as people who overstayed or otherwise became undocumented later. Also trying to be inclusive, and seeing that over-attention is being paid to small subsets like refugees, Migrants Rights International labels migrants as their main stakeholders, saying that historically "little international attention, advocacy, and public education had been devoted to upholding the human rights and dignity of migrants other than refugees".<sup>242</sup>

When groups respond nationally to smuggling legislation or smuggling charges against someone, they use the legal discourse and include the term smuggling.<sup>243</sup> Some NGOs also refer to smuggling in a way that relates it with dominant trafficking language, saying that people, women in particular, can "fall prey" to

smuggling and trafficking.<sup>244</sup> As we saw in other sections in this paper, this is not uncommon phrasing. In other cases, however, smuggling is seen as agential, or a process where the actors have a lot of decision making power.

For some groups smuggling is not wholly negative. Jackie Pollock, the director of MAP Foundation Thailand, says:

***The problem with smuggling is that smuggling is seen as a problem.***

***For what is smuggling? The arrangement of transportation for a fee, with some profit for the person making the arrangements. Sounds like my travel agent.***<sup>245</sup>

Pollock goes on to describe the discrimination in systems of travel between those in which the poor, the hardworking manual labourers, the less educated migrants travel, and the means by which middle and upper class people travel, finding it easier to travel on tourist visas and easier to obtain proper documents. "We need to change the focus of the problem, smuggling is not the problem, but the discrimination that happens in moving across borders is."<sup>246</sup>

No One Is Illegal (NOII), a lobby group, launched a campaign opposed to the proposed Preventing Human Smugglers from Abusing Canada's Immigration System Act (See Government section above for more details). The NGO has taken a lobbying strategy of highlighting famous and well-regarded smuggled people and smugglers, like Albert Einstein and Harriet Tubman who assisted slaves to freedom.

***Whether it be Albert Einstein who fled persecution in 1935 with forged identification papers because of the support of those who would, today, be labeled human smugglers or the tens of thousands in the United States who, with the assistance of dedicated abolitionists like Harriet Tubman, navigated the underground railroad in order to find freedom from slavery – human smuggling has been commemorated and celebrated as an act of necessity, as an act of courage, as an act of resistance to persecution and injustice. Today, with great resolve, many communities and people around the world continue to support each other in attempts to migrate.***<sup>247</sup>



They created the following poster, as one in a series.<sup>248</sup>

My name is  
Irena Sendler. I was  
a Polish Catholic  
Social Worker in  
German-occupied  
Warsaw during WWII.

In December 1942, the  
newly created Zegota  
(the Council to Aid  
Jews) nominated me to  
head its children's  
section. Under the  
pretext of conducting  
sanitary inspections  
during a typhoid  
outbreak, I visited the  
Warsaw Ghetto and  
smuggled out Jewish  
babies and small  
children in boxes,  
suitcases, trolleys, and  
trams.

I used the old courthouse as one of the main routes  
for smuggling out children. I provided false  
documents and shelter in individual and group  
homes. I saved 2,500 Jewish children.



**I am a human smuggler**

Criminalizing smuggling and trafficking cannot prevent  
the migration of those seeking safety and freedom.  
Reject anti-smuggling and anti-trafficking legislation.

n o o n e i s i l l e g a l . o r g

No One Is Illegal Vancouver, Unceded Coast Salish Territories

The statements and poster series of this group have embraced the smuggling terms positively, reminding readers of a people who evoke sympathy nearly unanimously in the western public consciousness and who depended on smuggling. The group sees both trafficking and smuggling legislation as unfairly preventing migration by criminalising movement. As discussed in the first part of this paper, other NGOs including GAATW point out the arbitrariness of the smuggling-trafficking divide, saying that many of the migrants they provide assistance to experience the same or similar violations, but some are deported as smuggled and some are assisted under trafficking measures.<sup>249</sup>

In response to the violations that NGOs see smuggled migrants facing, some NGOs highlight the victimhood of migrants and violations which need to be addressed through human rights protections.

The International Council on Human Rights Policy (ICHRP) says for instance, “Trapped between smugglers who abuse them, employers who often exploit them and States which regard them as criminals (and a potential terrorist threat), smuggled people are among those most exposed to risk.”<sup>250</sup>

Amnesty International Australia meets the Australian government half-way, saying that they respect the Australian government’s sovereignty, yet smuggled people have rights nonetheless. The group uses numbers to demonstrate that the government’s response to smuggling is disproportional to the problem and therefore should be reconsidered. For example, by pointing out that Australia receives many less unauthorised asylum seekers than major European countries – 164 by sea in 2008 (“most fleeing violence in Afghanistan and Iraq”) vs. 38,000 to Italy that year. Amnesty notes that boat arrivals are only 1 percent of refugees arriving in Australia.<sup>251</sup> Like other NGOs, Amnesty is drawing on a refugee message, which groups use implicitly or explicitly to remind governments that refugees are often smuggled and by deterring smuggled people, the government is not meeting its human rights obligations toward refugees.

As with trafficking discourses, in a few cases language (and subsequent NGO programming) can be protectionist, with the idea that if violations are happening during a certain social process, that process should be stopped or disallowed altogether.<sup>252</sup> With trafficking this means that anti-trafficking NGOs have sometimes run anti-migration campaigns. A platform of NGOs organised by UNODC met in 2009 for instance to discuss smuggling prevention. UNODC reports:

***On 3rd and 4th of August 2009, seventy participants from NGOs and relevant national institutions from Egypt, Libya, Algeria, Tunisia and Morocco met to discuss the phenomenon of migrant smuggling in, through and from North African, and explore the role that NGOs can play in preventing migrant smuggling and raising awareness of the fact it is a crime that poses serious risks to the migrants concerned.***<sup>253</sup>

Protectionist NGOs are organising to stop ‘illegal’ and ‘irregular’ migration. The Women’s Association Against Illegal Migration in Senegal was formed by women whose children have died at sea. They use “enlightenment campaigns and job creation programmes to stop people from embarking on illegal migration.”<sup>254</sup>

Another example is Alliance Against Irregular Migration (AAIM), “committed to discouraging irregular migration among Ghanaian youth and providing support to irregular migrants who have been deported or voluntarily repatriated.”<sup>255</sup> These NGOs are, however, the minority, as most validate movement (assisted and unassisted) and ask governments to be less restrictive and penalising.

A different group of NGOs are concerned with crime control.

Transparency International and Anti-Slavery International, together with UNODC, prepared a paper in 2009 saying that corruption aids trafficking and smuggling. They start from a place of seeing trafficked people as victims, thereby wanting to dismantle the process through which trafficking can take place. Corruption is often a big part of that process. Smuggled people and smugglers use the same or similar channels and rely on corruption as well. Because the process through which trafficking can take place must be dismantled by fighting corruption, so must the process through which smuggling can take place. The groups cite the Smuggling Protocol's emphasis on preventing people traveling on fraudulent documents. Preventing corruption is seen as important in its own right, and accounts of whether smuggled people necessarily want corruption to be prevented are not mentioned.<sup>256</sup>

## *Conclusion*

This section has taken us through the language that different stakeholders are using to conceptualise smuggling. Many actors talk about migration much more broadly in varying ways, but for the most part we have kept to discussions that particularly use or address language about smuggling specifically.

For some groups of academics, NGOs, migrants and facilitators, smuggling is a criminalising concept, implying a mis-identified problem. As Pollock from the MAP Foundation NGO says, the problem is not smuggling itself but the problem lies in a discriminatory migration system that lets one group of people travel but not another.

For other groups (IGOs, some NGOs, governments and academics), the problem is a humanitarian one. If people are going to be hurt in travel, they should not travel.

Others, mostly governments, but also some IGOs and academics, see smuggling as a problem of crime. Solutions to crime control vary from intercepting boats, to border controls, to increased jail sentences. Media mirror these voices from following governments' crime control efforts, to criticizing governments for not being hard handed enough, or being too much so.

Understanding the different elements of how different actors frame smuggling is key to being able to make rights-based change, whether that be by working to change the way people talk about smuggling, or change legislation and its implementation.

**While recognizing that crime should be controlled, GAATW sees the crime control discourse as overshadowing rights protections. We encourage stakeholders to avoid language criminalising and stereotyping migrants, and we are clear that humanitarian sentiment, while a positive turn from criminalisation, should not be followed with protective solutions of migration deterrence but with enhancement of positive rights protections.**

# CONCLUSIONS AND RECOMMENDATIONS

By sheer necessity, many migrants pay a broker to reach their destination. They need to get out of their country or find a way to support their families. Technically, they are seen by many authorities as ‘smuggled’ people. As we know from the ground, many people in trafficking situations also classify, in government terms, as having been ‘smuggled’ (in other words, an organised crime group helped them irregularly cross a border for profit).

GAATW members talk about the blurry lines between these categories on the ground, where a person’s migration story includes both smuggling and trafficking, whether experienced at the same or different times. GAATW members also struggle with smuggling in terms of misidentification. When authorities detain migrants, they do not always screen whether they might have been trafficked, but detain them as criminals, as ‘smuggled’, or as ‘irregular’ and then deport them before they have a chance to seek or receive entitled rights. If people labeled as ‘smuggled’ are not getting their rights, it follows that some non-identified trafficked people are not either.

Anti-smuggling measures are affecting the people with whom we work. We also prioritise smuggling as an issue because the Smuggling Protocol sits in the same UN convention as the Trafficking Protocol and receives much less attention in terms of human rights.

In engaging with this issue,<sup>257</sup> we have found that people on the move, including trafficked persons, are affected by anti-smuggling policies in these ways:

- Through anti-smuggling measures, States are weakening rights protections gained for trafficked persons, refugees and other protected migrants.<sup>258</sup>
- Though sometimes well-meaning (in the name of protecting migrants from dangers in travel, or fighting crime), anti-smuggling and anti-trafficking measures can have the adverse effect of making migration more dangerous: brokers raise fees, take more precarious routes and put migrants in situations of increased vulnerability, dependency and debt.
- Anti-smuggling measures can include indefinite detention, the towing of migrants’ boats out of a safe country’s waters, and criminalisation of all people who assist with the migration process and sadly often migrants themselves.
- Arrest, detention and deportation take place so quickly that the result is the denial of access to justice for migrants including trafficked ones who experience abuses from both brokers and law enforcement.
- Arrest, detention and deportation of migrants, followed with media coverage of such events, perpetuate a perception of migrants as “others”, less deserving of dignity and rights.

## *Recommendations*

**We make the following recommendations to the human rights community:**

- Facilitate wider understanding of the human rights obligations to which States Parties to the Smuggling Protocol must adhere;
- Monitor and evaluate States Parties' smuggling measures for their human rights impact and their adherence to the rights contained within the Smuggling Protocol and advocate necessary amendments;
- Document rights abuses against smuggled migrants, including those committed by the State, and assist those whose rights have been violated to seek remedies;
- Engage in discussions and the formulation of laws and policies on smuggling at national, regional and international levels, holding States Parties to the Smuggling Protocol accountable for their human rights commitments;
- Avoid describing smuggling in a way that implies criminality of migrants. The Smuggling Protocol does not criminalise migrants;
- Ensure that humanitarian sentiment for migrants in smuggling situations does not lead to protectionist measures that try to deter migration, but to an upholding of human rights before, during and after movement;

**We make the following recommendations to States Parties to the UN Convention Against Transnational Organised Crime including the Protocol against the Smuggling of Migrants by Land, Sea and Air:**

- Uphold the following obligations and duties elaborated in the UNTOC Smuggling Protocol:
  - To protect migrants in smuggling situations from death, torture or other cruel, inhuman or degrading treatment or punishment (Article 16, 1)
  - To protect migrants from violence (Article 16, 2)
  - To provide appropriate assistance to persons whose lives or safety are endangered in a smuggling situation (Article 16, 3)
  - To ensure safety in return, preventing refoulement (Articles 18, 5 and 19, 1)
  - To provide information on consular notification and communication (Article 16, 5)
  - To ensure the safety and humane treatment of the persons on

- board during boat interdiction (Article 9, 1a)
  - To take into account special needs of women and children (Article 16, 4)
  - To address root causes, strengthening socio-economic development and poverty-reduction (Article 15, 3)
  - To implement the Smuggling Protocol in a way that does not affect other rights obligations in international law (Article 19, 1), or in a way that is discriminatory to persons in smuggling situations (Article 19, 2).
- Integrate human rights into global and regional consultative processes which address migrant smuggling, such as the Bali Process;
  - Train immigration officials and others such as law enforcement officers and social service providers about “the humane treatment of migrants” and to “respect their rights” as set out in the Smuggling Protocol (Article 14, 1);
  - Establish appropriate identification mechanisms which enable authorities to accurately and rapidly identify trafficked persons and smuggled persons whose rights have been violated, and refer individuals to relevant social and legal assistance;
  - Ensure that measures to protect migrants from violence and abuse include emergency referrals and direct assistance with medical care, shelter, food, clothing, care for dependents, crisis intervention counseling, and information about legal rights and options and legal processes. Measures should include protection during any legal proceeding from intimidation;<sup>259 260</sup>
  - Ensure that any detention of migrants is not arbitrary, meaning that it must be appropriate, necessary, proportionate and justifiable;
  - Ensure that all migrants at any point of their journey have access to justice;
  - Take the necessary steps to address the root causes of smuggling, including:
    - Ensuring that individuals’ social, economic, cultural, civil and political rights are upheld at all times and that efforts to reduce poverty are made
    - Increasing affordable and accessible avenues for legal migration.



# ENDNOTES

- 1 Protocol against the Smuggling of Migrants by Land, Sea and Air (hereafter Smuggling Protocol), 15 November 2000, General Assembly resolution 55/25, United Nations Convention against Transnational Organized Crime. Available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.
- 2 Both the Smuggling Protocol and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereafter Trafficking Protocol) are protocols to the Convention Against Transnational Organized Crime (hereafter UNTOC).
- 3 A savings clause limits the scope of repeal of other agreements. In the case of the Smuggling Protocol, it re-emphasizes States' other human rights obligations under international law.
- 4 See Taylor-Nicholson, E. (2011). The Migrant Smuggling Protocol and Human Rights Protections, Paper presented at GAATW-OHCHR Smuggling Roundtable, 20-22 June 2011, p. 4, citing United Nations Office for Drug Control and Crime Prevention [now UNODC] (1999). Handbook on Justice for Victims. New York: Center for International Criminal Justice, p. 17, 35.
- 5 For legal note on this language, UNODC (2010). *Model Law against the Smuggling of Migrants*. New York: UNODC. Available at: [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_Smuggling\\_of\\_Migrants\\_10-52715\\_Ebook.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf), p. 69.
- 6 For instance increased frequency of Bali Process meetings and activity between European and North African governments.
- 7 See Blurring Smuggling and Trafficking sub-section.
- 8 GAATW (2010). *GAATW Beyond Borders Working Papers Series*. Bangkok: GAATW. Available at: <http://www.gaatw.org/publications/>.
- 9 Protocol against the Smuggling of Migrants by Land, Sea and Air (*hereafter Smuggling Protocol*), 15 November 2000, General Assembly resolution 55/25, United Nations Convention against Transnational Organized Crime. Both the Smuggling Protocol and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (*hereafter Trafficking Protocol*) are protocols to the Convention Against Transnational Organized Crime (*hereafter UNTOC*).
- 10 GAATW (2010). *Beyond Borders: Exploring Links between Trafficking and Migration*, in *GAATW Beyond Borders Working Papers Series*. Bangkok: GAATW. Available at: [http://www.gaatw.org/publications/WP\\_on\\_Migration.pdf](http://www.gaatw.org/publications/WP_on_Migration.pdf)
- 11 The principle of non-refoulement concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened. See the 1951 Convention Relating to the Status of Refugees, its 1967 Protocol, and Article 3 of the 1984 Convention Against Torture.
- 12 In 2000 some governments were responding to events leading them to the drafting of the Smuggling Protocol as we have it now, for instance with emphasis on smuggling by boat. Taylor-Nicholson describes: "The Protocol was drafted during the 1990s in the post-Cold War period. During this time, European nations were becoming alarmed about the flows of migrants and asylum-seekers from Eastern Europe after the fall of the Berlin Wall, and the U.S. was taking increasingly strong measures against Haitian migrants and asylum seekers arriving by boat on the Florida coast." Taylor-Nicholson, E. (2011). The Migrant Smuggling Protocol and Human Rights Protections. Paper presented at GAATW-OHCHR Smuggling Roundtable, 20-22 June 2011, p. 1.
- 13 Articles 24 and 25 UN Convention Against Transnational Organised Crime.
- 14 A savings clause limits the scope of repeal of other agreements. In the case of the Smuggling Protocol, it re-emphasizes States' other human rights obligations under international law.
- 15 UNODC (2010). *Smuggling of Migrants: A global review and annotated bibliography of recent publications*. Vienna, UNODC. Available at: [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling\\_of\\_Migrants\\_A\\_Global\\_Review2.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review2.pdf). UNODC has recently

- published several reviews with different regional foci, Available at: <http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menu>. For another, slightly dated, summary of the issues see also Morrison, J. (2002). *Human Smuggling and Trafficking, Forced Migration Online Research Guide*. Available at: <http://www.forcedmigration.org/guides/fmo011/>
- 16 Article 3 (a). Smuggling Protocol.
- 17 Article 5. Smuggling Protocol. “Criminal liability of migrants. Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.” Conduct in Article 6 includes smuggling as defined in Article 3; producing, procuring, providing, or possessing fraudulent documents; and enabling a person to remain in the country without proper documentation. Importantly this provision does not prevent a State from prosecuting a smuggled migrant for violation of national immigration laws. Smuggling Protocol, Article 6(4) says that the state can still take “measures against a person whose conduct constitutes an offence under its domestic law.”
- 18 Article 3 (a). Smuggling Protocol.
- 19 The 2000 UNTOC Human Trafficking Protocol defines trafficking in persons 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.”
- 20 In the 1951 UN Convention Relating to the Status of Refugees, a refugee is “a person who, owing to a well-founded fear of being persecuted on account of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality, and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country.”
- 21 Article 5. See endnote xix above.
- 22 For those who still question migrants’ rights in smuggling situations, or for that matter smugglers’/ facilitators’ rights, we can point to prisoners, a group of criminalised people who are commonly acknowledged to have a set of inviolable rights – rights to food and water, rights to due process etc. We also clearly see examples where migration facilitators’ rights have been violated. For instance, accused Indonesian smugglers protested in Darwin because they had been held in detention for over 9 months without due process. 97 of the 500 detainees at the detention centre were involved in the protest, which partly involved setting mattresses on fire. The Australian. Authorities end fiery protest by accused people-smugglers at Darwin detention centre. *The Australian* 29 Aug 2010.
- 23 Taylor-Nicholson, E. (2011). *The Migrant Smuggling Protocol and Human Rights Protections*. Paper presented at GAATW-OHCHR Smuggling Roundtable, 20-22 June 2011, pp. 2-3.
- 24 Oberoi, P. (2011). *Myths and misperceptions: Anti-smuggling measures and the human rights framework*. Paper presented at GAATW-OHCHR Smuggling Roundtable, 20-22 June 2011, p. 3.
- 25 Fortress Europe. Sanguie a Igoumenitsa: muore kurdo pestato dalla polizia greca. 29 July 2009. Available at <http://fortresseurope.blogspot.com/2006/01/pestato-sanguie-dalla-polizia-greca-come.html>. Cited in PICUM (2010). *PICUM’s Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe*. Brussels: PICUM, p. 73.
- 26 When for instance smugglers force migrants to travel in overcrowded truck or shipping containers for long periods without food, drink, toilets. Many people experience exhaustion, dehydration, malnutrition. See UNODC (2010). *Model Law against the Smuggling of Migrants*. New York: UNODC, pp. 42-44. Available at: [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_Smuggling\\_of\\_Migrants\\_10-52715\\_Ebook.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf) for legal note on this language.

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- 28 38 year old Somali migrant at Port Elizabeth, South Africa. Quoted in IOM (2009). *In Pursuit of The Southern Dream*, p. 70.
- 29 Human Rights Watch (2009). *Pushed Back, Pushed Around*. New York: HRW.
- 30 For legal note on this language, see UNODC (2010). *Model Law against the Smuggling of Migrants*. New York: UNODC, p. 66.
- 31 According to the Convention Article 1 “‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”
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- 37 Gallagher, A. (2009). *Human Rights and Human Trafficking: A Quagmire?* *Virginia Journal of International Law*, 49: 4, p. 840, citing Gen. Assembly, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, Note by the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children’s Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons, U.N. Doc. A/AC.254/27 (Feb. 8, 2000), U.N. Doc. A.AC.254/27/Corr.1 (Feb. 22, 2000), para. 17.
- 38 Taylor-Nicholson, E. (2011). *The Migrant Smuggling Protocol and Human Rights Protections*. Paper presented at GAATW-OHCHR Smuggling Roundtable. 20-22 June 2011, p. 3. For additional commentary on when states can and cannot apply differential rights to non-citizens, see also ICHRP (2010). *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*. Geneva: ICHRP p. 51.
- 39 UNODC, *Legislative Guide for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, UN, New York, 2004, para. 17. Available at: <https://www.unodc.org/tldb/pdf/English-Migrants-Protocol-guide.pdf>.
- 40 UNODC (2010). *Model Law against the Smuggling of Migrants*. New York: UNODC, p. 56.
- 41 UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/34*.

- 42 See outline of relevant documents in Taylor-Nicholson, E. (2011). The Migrant Smuggling Protocol and Human Rights Protections. Paper presented at GAATW-OHCHR Smuggling Roundtable. 20-22 June 2011, p. 6.
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- 44 Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979.
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- 255 "It also offers entrepreneurial training to the youth about best ways of investing their hard-earned savings which hitherto would have thrown away as payments to 'connection men' to facilitate their trips to various destinations in Europe, America, Lybia and currently South Africa." Alliance Against Irregular Migration, Available at: <http://www.aimgh.org/>.
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- 257 Through discussions with GAATW member organisations and through the GAATW-OHCHR Smuggling Roundtable, 20-22 Jun 2011, Bangkok.
- 258 By for instance violating principles of non-refoulement when deporting migrants or pushing boats back to sea; by prioritizing detention and deportation before screening for vulnerabilities or special victim categories; by not allowing asylum claims.
- 259 See Taylor-Nicholson, E. (2011). The Migrant Smuggling Protocol and Human Rights Protections. Paper presented at GAATW-OHCHR Smuggling Roundtable, 20-22 June 2011, p. 4. Citing United Nations Office for Drug Control and Crime Prevention [now UNODC] (1999). *Handbook on Justice for Victims*. New York: Center for International Criminal Justice.
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# HUMAN RIGHTS

at home, abroad and on the way...



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