



Global Alliance Against Traffic in Women

FACILITATING MIGRATION AND FULFILLING RIGHTS – TO REDUCE SMUGGLING OF MIGRANTS AND PREVENT TRAFFICKING IN PERSONS

Global Compact for safe, orderly and regular migration: Thematic consultation on smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims

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Position paper by the Global Alliance Against Traffic in Women (GAATW)

The global compact for migration seeks to realise safe migration. Too often, anti-trafficking legislation, policy and practice are used more to justify and rationalise deterrence policies and strengthen border policing than for addressing human trafficking and providing assistance to trafficked persons. Ensuring that migrants' rights are respected, protected and fulfilled is the basis of preventing such crimes and human rights violations against migrants as trafficking in persons. An approach that respects, protects, and fulfils the human rights of migrants is also the basis of ensuring the identification of individuals who have been trafficked, the provision of assistance and protection, and access to justice including the right to remedy.

Trafficking and smuggling are legally distinct, however the reality is they may overlap in some instances, where persons trafficked may also have been smuggled. It is critical to distinguish the two issues that are too often used interchangeably. One result of this is that authorities do not always screen migrants to assess whether they have been trafficked, but detain them as criminals, as having been smuggled, or as irregular migrants, deporting them before they have a chance to realise their rights and the assistance to which they are entitled.

Conflating smuggling and human trafficking leads to criminalisation or stigmatisation of migrants and all people who assist with the migration process, and the denial of migrants' human rights. The conflation makes plain the anti-migration agenda that underlies such efforts, making it increasingly difficult to enter states through regular channels, it is also next to impossible to enter without someone's help. It undermines efforts to prevent trafficking in persons and assist those who have been trafficked if the emphasis on stopping irregular migration or smuggling results in processes that do not provide for the identification of people who have been trafficked. States and non-state actors should provide rights-based responses and protection which apply under the specific protocols as well as under human rights law.

The global compact offers an excellent opportunity to de-link smuggling and trafficking and GAATW urges states to ensure this clarity in the compact and its implementation. In particular, the global compact is an opportunity to strengthen the understanding of and rights-based responses to smuggling of migrants and thus reduce the need for migrants to rely on smugglers, whereas

trafficking in persons is not wholly tied to migration and the work is better established, with practical guidance on a rights-based approach to anti-trafficking.¹

1. SMUGGLING OF MIGRANTS

In the Global Compact, states should:

- **Distinguish and delink smuggling of migrants from trafficking in persons.**
- **Develop a rights-based approach to the smuggling of migrants.**
- **Commit to opening more regular migration channels that are accessible to all migrants and do not perpetuate underlying gender and other discriminations, to reduce migrants' need to rely on the services of smugglers.**
- **Commit not to criminalise migration or migrants, including where migrants have used the services of smugglers.**
- **Ensure that laws and policies on smuggling of migrants do not criminalise or target those who are providing assistance to migrants or supporting migrants for humanitarian or familial reasons, in line with the Smuggling of Migrants Protocol.**
- **Prioritise rights-based responses to aggravated smuggling.**
- **Ensure that measures aimed at addressing smuggling of migrants shall not adversely affect the enjoyment of the human rights of migrants and facilitate and cooperate with independent human rights monitoring.**²

The global compact on migration needs to work in the real world, where for migrants to find safety there might still be need for some to seek recourse to smuggling.³ The involvement of third party facilitators arises from state policies, which have seen insufficient safe and accessible regular pathways for migration and admission across different types of migration and the increased border securitisation including the externalisation of borders.⁴ Limiting the number of regular migration channels has gendered effect given the systemic discrimination against women. This includes women migrants often having limited access to finances and resources compared to men in their country of origin to pay for the documentation required or because the main labour sectors to which women migrate, such as the care economy, are not adequately valued to be covered by regular migration options. In harmful situations, such as armed conflicts, at home or that emerge during the migration, smuggling may be an essential route to safety – thus efforts focused on preventing or combatting the smuggling of migrants can deny individuals their human rights, including the right of all persons to leave any country including their own and the right to seek asylum.⁵ As such this is one point of intersection of the global compact on migration with that for refugees.

Although the UN Smuggling of Migrants Protocol makes clear that smuggling in the context of organised crime should be criminalised, not all smuggling is organised by criminal networks.⁶ Smuggling is often organised via kinship or social and community networks making use of family or wider diaspora connections.⁷ Moreover, counter-smuggling operations often focus on easier targets such as women, migrants, and the elderly, rather than organised crime – which is unjust and counterproductive to the goal of prohibiting smuggling, and a waste of the state's resources.⁸ Attempting to address smuggling only through a criminal justice lens cannot work: the Smuggling of Migrants Protocol identifies the need to address “socio-economic measures, at the national, regional and international levels” in its first paragraph.⁹ The global compact offers an opportunity to build a consensus towards a rights-based approach to the smuggling of migrants.¹⁰

In large movements of migrants, research shows that migrants' plans frequently evolve during the migration in response to new information and changing circumstances.¹¹ In such situations, migrants may have to rely on local actors rather than their own contacts. By emphasising the connection with transnational organized crime, states are able to represent the smuggling of migrants as a threat to their sovereignty and national security.¹² This drives a circular pattern of responses: limited regular

channels for migration and increased securitisation of borders provides a role for smugglers; in response, states increase border controls, including through militarisation and the externalisation of borders, increasing migrants' reliance on smugglers – at the same time failing to address the underlying structural forces driving these migrations. Moreover, this framing of smuggling of migrants as a threat feeds into wider anti-migrant sentiment currently fuelled by populist politics, driving discrimination and undermining efforts to ensure social inclusion and cohesion.¹³ This focus on stopping the smuggling of migrants also encourages an expansion of the understanding of who is a smuggler beyond the intent of the international law on the issue to family members, or individuals and organisations who work to assist migrants, including those in large movements, with the result that they are erroneously criminalised as smugglers.¹⁴

Although irregular entry constitutes a violation of a country's border and immigration laws, it is an administrative offence and people should not be criminalised for irregular entry, stay, or work;¹⁵ further, international criminal law calls on states not to criminalise migrants for using the services of a smuggler.¹⁶ The relevant international legal framework around the smuggling of migrants also encompasses the separate legal obligations under the law of the sea, human rights law, and refugee law, meaning that counter-smuggling initiatives must not adversely affect migrants' enjoyment of their human rights.¹⁷ Customary international law including the prohibition on racial discrimination, the prohibition on torture, and the right to a remedy, is binding on all states including in the context of the smuggling of migrants. Smuggling is not necessarily a violation of a migrant's human rights and many migrants experience no difficulties and express gratitude to the facilitators.¹⁸ A human rights-based response would be to realise states' commitment to facilitate migration by opening more accessible regular migration channels, address the corruption that facilitates smuggling and worsens conditions for migrants, and focus the response on cases of aggravated smuggling where the smuggler abuses the rights of migrants or endangers their lives or safety.¹⁹ This is also in line with the international law on the smuggling of migrants where states are "*convinced of the need to provide migrants with humane treatment and full protection of their rights*".²⁰

a. APPROPRIATE IDENTIFICATION, PROTECTION, AND ASSISTANCE TO MIGRANTS, INCLUDING IN THE CONTEXT OF SMUGGLING

In the Global Compact, states should:

- **Promote and protect the rights of migrants under international law, including for migrants who have been smuggled.**²¹
- **Ensure anti-smuggling measures, including interdiction at sea, do not breach human rights obligations including the principle of non-refoulement.**
- **Commit to providing gender-responsive protection and assistance, in line with women migrants' self-defined best interests.**
- **Establish, publicise, and monitor the implementation of binding firewalls in order to facilitate migrants' access to justice, complaints mechanisms including labour inspection services, and social services.**

As smuggling is taken to involve some level of consent by the migrant – although the agreed definition does not mention consent – migrants in situations of smuggling are not viewed as victims of crime or human rights abuses in the way that trafficked persons are and consequently there has been less attention to their assistance and protection needs.²² Moreover, states' focus on criminalisation of smuggling and of irregular migration can supersede implementation of their existing commitments including to ensure an individualised assessment of protection needs and identification process to identify migrants who have been subjected to human rights abuses, including trafficking, or have an asylum claim which may be missed in mixed migration flows. The anti-migrant rhetoric often labels migrants as criminals feeding a view that they do not have or deserve rights.²³

A result of this focus on the means of migration rather than the individual who is migrating is that there are serious protection gaps for migrants who experience abuses within the smuggling paradigm and who do not fit existing state protection criteria.²⁴

In addition to the protection of ensuring that migrants are not liable to criminal prosecution for having being smuggled,²⁵ states have agreed to the protection of the rights of persons who have been the object of smuggling,²⁶ and to implement their existing obligations and responsibilities of under international law, including international humanitarian law, refugee law, international human rights law.²⁷ These provide substantive sources of legal obligation with respect to protection and assistance owed to and guidance for the treatment of all migrants in situations of smuggling, including essential human rights principles of non-discrimination and non-refoulement.²⁸ All migrants, regardless of status or whether they used the services of a third party, have the right not to be returned or extradited to their country of origin or to another state where there are substantial grounds for believing that the individual would risk being subject to serious violations of their human rights.²⁹ This is also relevant to anti-smuggling operations such as interdictions at sea.³⁰ In operations at sea, states are required to ensure the safety and humane treatment of all persons on board.³¹

Though many migrants who use the services of smugglers are able to complete their journeys without harm³², the clandestine nature and power imbalance inherent to smuggling creates opportunities for unscrupulous and corrupt state and non-state actors to resort to ill-treatment, violence, and other human rights abuses against migrants, and states have obligations to protect and assist migrants in these situations.³³ The criminalisation of migration and of migrants in irregular status creates a barrier to individuals who have been smuggled reporting and seeking assistance for human rights abuses. States need to implement binding firewalls to eliminate migrants' fear that their personal data will be shared with immigration enforcement authorities leading to arrest, detention and deportation denies migrants access to justice, complaint procedures, and social services.³⁴ For child migrants in situations of smuggling, states are obligated to take into account their special needs, in line with the wider international legal framework around the rights of the child.³⁵ In addition, the Smuggling of Migrants Protocol requires states to provide gender-responsive protection and assistance, however there is little guidance available on how best to achieve this and the global compact could provide an opportunity to develop this, in line with women migrants' self-defined best interests.³⁶

2. TRAFFICKING IN PERSONS

In the Global Compact, states should:

- **Ensure the human rights of trafficked persons are at the centre of all efforts to prevent and end trafficking and that programmes to protect, assist and provide redress to them are adequately resourced.**³⁷
- **Facilitate and cooperate with independent human rights monitoring to ensure that anti-trafficking measures do not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers, and others.**³⁸
- **Review national and regional legal and policy frameworks to ensure that anti-trafficking frameworks are responsive to all genders and types of trafficking and do not rely on profiling or reinforce stereotypes based on gender, nationality, age, or other factors.**
- **Recognise that regular channels of migration may create conditions for trafficking of migrant workers, especially women migrant workers in sectors that are not covered by labour laws, and reform programmes such as temporary, guest-worker, or circular migration programmes to eliminate institutionalised risks such as worker-paid recruitment fees, substandard working**

conditions allowed under such schemes, and sponsorship schemes tying visas to a specific employer.

- **Keep the collection and storage of trafficked persons' personal data to the absolute minimum, ensuring the right to privacy and data protection standards to protect the personal data of trafficked persons, including by not transferring trafficked persons' personal data across national borders.**
- **Ensure the development and implementation of a credible and rights-based oversight mechanism for the Trafficking in Persons Protocol.**

States' agreement in 2000 of the international definition of trafficking in persons was a significant development in addressing this crime and human rights abuse. However, in the years since the adoption of the Trafficking in Persons Protocol, many states still vary in their approach – with some taking a narrow or increasingly broad interpretation of that definition and a move to using made-up concepts that lack the rigour of the legal definition.³⁹ Particularly for work on international cases, the use of a common agreed definition is central to collecting and sharing data and coordinating policy and assistance, as well as to criminal justice measures such as extraditing criminal suspects. The move to vague framings risks undermining the work to identify trafficked persons, provide them protection and assistance including redress, and prosecute perpetrators.⁴⁰

The need to prevent trafficking in persons is often cited by states as ideological cover to justify increased border restrictions and other anti-migration initiatives, including gendered restrictions on women's migrations.⁴¹ However, trafficking is not simply a function of irregular migration: many regular migration schemes that would not be affected by border controls, including those for temporary seasonal work or tied visa schemes including the kafala system, lead to the migrant being in a situation of trafficking.⁴² Bilateral agreements, pre-departure trainings, and other information provided to migrants and workers about their working conditions must not be used to undermine the human rights of migrants or circumvent the means test of the human trafficking definition and states' obligations to migrants, workers, or trafficked persons.⁴³

Moreover, evidence shows that restrictive immigration policies push migrants to use more dangerous routes, necessitating them to pay higher fees to facilitators or as bribes to state actors for documentation or passage, and reducing their time and opportunities to find decent work to pay the exploitative debt they have incurred, all of which can increase the risk of being trafficked.⁴⁴ Together with empowering immigration enforcement officials to raid work establishments in the name of finding trafficked persons, such measures serve to expand criminalisation and detention, often for profit,⁴⁵ and make it more difficult for individuals who experience human rights abuses, including trafficking, to seek assistance and access justice. Research by GAATW and others have repeatedly demonstrated that anti-trafficking initiatives have resulted in human rights abuses against trafficked persons, migrants, and other workers.⁴⁶

Implementing a rights-based approach that facilitates, and does not criminalise, migrations and decent work is the most constructive approach to preventing trafficking in persons, as it reduces opportunities for exploitation and enables individuals to report crimes and seek assistance without fear of detention and deportation. Trafficking and indeed migration cannot be looked at in isolation from development and economic policies that are creating an increasingly unequal world. Without addressing the structural drivers in the global economy that fuel the demand for the cheap goods and services made possible by poor pay and working conditions with little or no labour regulation, the conditions for labour exploitation, including of migrant workers and that may constitute trafficking in persons, will continue.

Although there is increasing focus on data and indicators, including an indicator under the 2030 Agenda for Sustainable Development, and a multiplicity of estimates, indices and rankings, there is currently no sound methodological basis for constructing a global estimate of trafficking.⁴⁷ While

several of these studies describe the context within which the data should be understood or the limitations of the data, these are not as widely publicised as the headline numbers. This is one area where the diversity of definitions of trafficking, in law or in practice, creates problems. The data can only account for what is counted, therefore if the legislation or policy is limited or biased towards certain forms of trafficking over others the data will mirror those differences, giving a misleading impression of the level or types of trafficking in persons and making comparison impossible.⁴⁸ Given the sensitive nature of trafficking as a human rights abuse, it is particularly important that data gathering and storage is undertaken in line with confidentiality obligations to trafficked persons and their right to privacy and the highest standards of data protection. This means that collection and storage of trafficked persons' personal data should be reduced to the absolute minimum and only for a clearly defined purpose and with the informed consent of the trafficked person. To protect the trafficked person and their family, any transfer of trafficked persons' personal data across national borders should be avoided and their data should always be anonymised, secured such that their identities cannot be traced during and after return and reintegration procedures.⁴⁹

The international law on trafficking in persons, along with several regional laws as well as at the national level, draws particular attention to women and children who are trafficked.⁵⁰ This gendered focus can have the effect of positioning women's migrations as well as women themselves as inherently vulnerable, infantilising them through the connection with children, positioning them overwhelmingly as actual or potential victims of a crime and human rights abuses and questioning the appropriateness of women working outside the home. These normative perceptions have resulted in bans on women's migration or in profiling women travellers or migrant workers as trafficked persons. Measures taken to address irregular migration, or to counter human trafficking (or smuggling of migrants), should not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds of discrimination, and regardless of whether or not they have been smuggled or trafficked.⁵¹ Instead we need a fully gendered response: the focus on women has led to services for and the identification of men who have been trafficked being neglected or underdeveloped.

The international human rights treaties and the anti-trafficking convention of the Council of Europe have credible monitoring mechanisms to support states' implementation and offer authoritative guidance, offering a model of participation, transparency and accountability that the global compact should follow.⁵² However, the international law on trafficking in persons has no credible accountability mechanism, nearly two decades after its adoption. Given the complexity of human trafficking, its interrelations with a range of other crimes and human rights abuses, the wide latitude given to states in interpreting and applying their obligations, and the documented abuses arising from some actions undertaken in the name of anti-trafficking, there is urgent need for a credible, independent, transparent and rights-based oversight mechanism, open to all actors engaged in anti-trafficking efforts including NGOs, and inclusive of the experiences and analyses of survivors of trafficking.⁵³

a. APPROPRIATE IDENTIFICATION, PROTECTION, AND ASSISTANCE TO TRAFFICKED PERSONS

In the Global Compact, states should:

- **Improve processes to ensure the rapid and accurate identification of trafficked persons by actors with appropriate training involved in the reception, processing and detention of migrants.**⁵⁴
- **Commit to providing individualised support and assistance to trafficked persons, that is not contingent on their cooperation with the criminal justice system, in the country in which they are identified and if they return to their country of origin or to a third country, for as long as they need it, and ensure that trafficked persons have an enforceable right to fair and adequate remedies, including the means for as full a recovery as possible.**⁵⁵

- **Commit to adopting legislative or other appropriate measures that permit trafficked persons to remain in the territory, temporarily or permanently, considering humanitarian and compassionate factors.**⁵⁶
- **Ensure that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody and will not be detained, charged or prosecuted for irregular entry or stay in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.**⁵⁷
- **Provide adequate, prompt and effective remedies, including reparations, to for trafficked persons for the harm they have suffered.**

States should accord trafficked persons all human rights, including those to which they are entitled as victims of crime and victims of human rights violations. These include the rights to receive protection from further harm including special consideration and care to avoid his or her re-traumatisation in the course of any legal and administrative procedures, be treated with compassion and respect for their dignity and human rights, be provided with access to justice and prompt and effective remedies including reparation, regardless of the individual's immigration status, presence in the country of jurisdiction, criminal case against or identification of the trafficker.⁵⁸ To realise this, states need to ensure they develop a proactive and systematic approach to the identification of victims of trafficking in persons and the provision of assistance.⁵⁹ The frequent conflation of trafficking with smuggling and the reality of mixed migrations necessitates an individualised identification process.

Trafficking in persons is distinguished from smuggling of migrants by the use of force, coercion and/or deception throughout or at some stage of the process, for the purpose of exploitation. That final element of the definition makes it difficult to identify or prove trafficking during the movement phase of migrations and it is important not to rely on profiling which can be discriminatory (see above). Relevant state actors need clear guidelines, procedures and training in the identification of trafficked persons.⁶⁰ This includes border guards, immigration officials and others dealing with the reception and processing of migrants, including in large movements, or who work in immigration detention, and actors such as police and labour inspectors who may encounter trafficking situations. Civil society organisations are critical partners in developing and implementing activities to prevent and end trafficking in persons and, in particular, to protect and assist trafficked persons.⁶¹

Trafficking is not determined by an individual's migratory or residency status, but where trafficked persons are in irregular status they should not be prosecuted for violations of immigration laws.⁶² Trafficked persons should not be prosecuted for the activities they are involved in as a direct consequence of their being in a situation of trafficking.⁶³

State authorities should offer trafficked persons temporary residence permits at least for an adequate time to allow for the start of their recovery (reflection period) and during any legal proceedings.⁶⁴ Although states are obligated to facilitate safe returns to trafficked persons' countries of origin or residency and not insist that they remain in the country in which the exploitation took place for example for what are often a lengthy criminal proceedings, this needs to be understood in the context of creating a safe environment for trafficking persons to support their recovery.⁶⁵ As such, this must not be a summary return and trafficked persons should be offered legal alternatives to repatriation, such as option of residency in the country of destination or third-country resettlement, where returns would pose a serious risk to their safety or that of their families.⁶⁶ However, given the principle of non-refoulement, and in the case of inability to guarantee a secure return, or where there is a risk of re-trafficking, states should provide permanent residency. The global compact should affirm that any returns of all migrants including trafficked persons should be

voluntary, and carried out with due regard for the rights, safety and dignity of the individual, following an individualised pre-return risk assessment.⁶⁷

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- ¹ The crossing of an international border is not an element of the definition of trafficking in persons (Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol). The UN Office of the High Commissioner for Human Rights has set out practical, rights-based policy guidance on addressing trafficking in persons: OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 2010, HR/PUB/10/2
- ² OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, A/69/CRP.1, 23 July 2014, Principle 5
- ³ New York Declaration for Refugees and Migrants (A/RES/71/1), para. 9
- ⁴ F. Crépeau, UN Special Rapporteur on the Human Rights of Migrants, *Fighting Violence against Migrants Through Protecting the Rights of Irregular Migrants: Presentation to the Commission on Crime Prevention and Criminal Justice*, UNODC, Vienna, 24 April 2012; General Assembly, Report of the Special Rapporteur on the human rights of migrants, A/71/40767, 20 July 2016, paras.14, 15, 21, 37; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, A/HRC/35/25, 28 April 2017, paras.30, 31, 44, 45, 50; H. Crawley, F. Düvell, K. Jones, S. McMahon, N. Sigona, *Destination Europe? Understanding the dynamics and drivers of Mediterranean migration in 2015*, Unravelling the Mediterranean Migration Crisis (MEDMIG), Final Report November 2016
- ⁵ F. Crépeau, The fight against migrant smuggling: migrant containment over refugee protection, in J. Van Selm et al. (eds) *The Convention at 50: A View from Forced Migration Studies*, Lanham: Lexington Books, 2003; J.C. Hathaway, Why Human Smuggling is Vital, *National Post* (Canada), 13 September 2010; T. Reitano, L. Adal and M. Shaw, *Smuggled Futures: The Dangerous Path of the Migrant from Africa to Europe*, Geneva, Global Initiative against Transnational Organized Crime, 2014; Crawley et al., *Destination Europe? The Protocol Against the Smuggling of Migrants by Land, Sea and Air*, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling of Migrants Protocol) references in its saving clause (Article 19) the 1951 Refugee Convention and its 1967 Protocol, acknowledging that refugees and asylum seekers may be smuggled into a state in search of international protection.
- ⁶ Smuggling of Migrants Protocol, Article 6; on the delinking of smuggling of migrants with organised crime and other smuggling operations see, UNODC, *Migrant Smuggling in Asia: Current Trends and Related Challenges*, UNODC: Bangkok 2015, p.91; OHCHR, *Situation of migrants in transit*, A/HRC/31/35, 2016, at note 66.
- ⁷ S.X. Zhang and K. Chin, *The Social Organization of Chinese Human Smuggling-A Cross National Study*. San Diego, CA: San Diego State University, 2002; Global Alliance Against Traffic In Women (GAATW) in collaboration with the UN Office of the High Commissioner for Human Rights (OHCHR), *Smuggling Roundtable Meeting Report*, 20-22 June 2011, Bangkok, Thailand; T. Reitano, L. Adal and M. Shaw, *Smuggled Futures: The Dangerous Path of the Migrant from Africa to Europe*, Geneva, Global Initiative against Transnational Organized Crime, 2014; Crawley et al., *Destination Europe?*.
- ⁸ D.M. Provine and G. Sanchez, Suspecting immigrants: exploring links between racialised anxieties and expanded police powers in Arizona, *Policing and Society: An International Journal of Research and Policy*, 21(4), 468-479.
- ⁹ Smuggling of Migrants Protocol, Preamble. The preamble continues, in its second paragraph, with states recalling their commitment “to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned.”
- ¹⁰ In adopting the New York Declaration, states have agreed to consider reviewing their migration policies including policies that criminalise cross-border movements (para.33), with a view to examining their possible unintended negative consequences (para.45). Although they have also committed to review their laws and policy on smuggling of migrants, in line with the international criminal law in this area (para.36), the saving clauses of those laws taken with these other possible reviews offers an opportunity for a more rights-based approach to the smuggling of migrants.
- ¹¹ Crawley et al., *Destination Europe?*

- ¹² General Assembly, Report of the Special Rapporteur on the human rights of migrants, A/68/283, 7 August 2013, para.91; General Assembly, Report of the Special Rapporteur on the human rights of migrants, A/71/40767, 20 July 2016, paras.13, 111; A.T. Gallagher, *Migrant Smuggling*, in N. Boister and R.J. Currie (eds), *Routledge Handbook on Transnational Criminal Law* (2015), available at: http://works.bepress.com/anne_gallagher/32/
- ¹³ Member States have signalled the importance of addressing social inclusion and integration in the global compact process: see Global compact for safe, orderly and regular migration: First informal thematic session on “Human rights of all migrants, social inclusion, cohesion, and all forms of discrimination, including racism, xenophobia and intolerance” – Co-facilitators’ summary, 8-9 May 2017, United Nations Office at Geneva. See also, GAATW, *Migrants’ rights are human rights: the basis of the Global Compact on migration*, Paper for the Global Compact for safe, orderly and regular migration: Thematic consultation on the human rights of all migrants, social inclusion, cohesion, and all forms of discrimination, including racism, xenophobia and intolerance, 8 and 9 May 2017, Geneva
- ¹⁴ The definition of smuggling of migrants in Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling of Migrants Protocol) refers to the element of “financial or other benefit”. This was intended “to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.” See, General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, A/55/383/Add.1, 3 November 2000, para. 88; UNODC, *The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol: Issue Paper*, 2017.
- ¹⁵ In the context of smuggling, the Smuggling of Migrants Protocol does not require the criminalisation of irregular entry or stay: the drafters’ intention was to apply the sanctions of the Protocol to “the smuggling of migrants by organised criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned”: UNODC, *Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime*, para.28
- ¹⁶ Smuggling of Migrants Protocol, Article 5
- ¹⁷ Smuggling of Migrants Protocol, Article 19 (Saving clause); OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, A/69/CRP.1, 23 July 2014, Principle 5
- ¹⁸ OHCHR, Situation of migrants in transit, A/HRC/31/35,2016, para.56; migrants reported requiring the services of smugglers for their expertise and mostly regarded them as a necessity even if the experience was not a positive one, see Crawley et al., *Destination Europe?*, p.56
- ¹⁹ Smuggling of Migrants Protocol, Article 6(3); see also, General Assembly, Report of the Special Rapporteur on the human rights of migrants, A/71/40767, 20 July 2016, para.15. Such abuses are well documented – see for example, in GAATW, *Smuggling and Trafficking*; Crawley et al., *Destination Europe?*; United Nations Support Mission in Libya and OHCHR, *Detained and dehumanised: Report on human rights abuses against migrants in Libya*, 13 December 2016
- ²⁰ Smuggling of Migrants Protocol, preamble; see also, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012, CTOC/COP/WG.7/2012/6, 27 June 2012, para.21
- ²¹ Smuggling of Migrants Protocol, Articles 4 and 16(1)
- ²² T. Obokata, Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law, *International Journal of Refugee Law* (2005), 17(2), 394-415; GAATW, *Smuggling and Trafficking: Rights and Intersections*, GAATW Working Paper Series, 2011; A.T. Gallagher, *Migrant Smuggling*, in N. Boister and R.J. Currie (eds), *Routledge Handbook on Transnational Criminal Law* (2015), pp.197, 203; see Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 19 October 2010, CTOC/COP/WG.4/2010/7, Annex
- ²³ GAATW, *Smuggling and Trafficking: Rights and Intersections*, GAATW Working Paper Series, 2011
- ²⁴ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/7/12, 25 February 2008, para.51; Global Alliance Against Traffic In Women (GAATW) in collaboration with the UN

Office of the High Commissioner for Human Rights (OHCHR), *Smuggling Roundtable Meeting Report*, 20-22 June 2011, Bangkok, Thailand.

²⁵ Smuggling of Migrants Protocol, Article 5

²⁶ Smuggling of Migrants Protocol, Article 4; see discussion in GAATW, *Smuggling and Trafficking: Rights and Intersections*, GAATW Working Paper Series, 2011

²⁷ In ratifying the Smuggling of Migrants Protocol, given Articles 16 and 19.

²⁸ Smuggling of Migrants Protocol, Article 19(2) requires states to interpret and apply the Protocol in a way that is not discriminatory to migrants who have been smuggled and “application of those measures shall be consistent with internationally recognized principles of non-discrimination.” This would prohibit discrimination against a particular group of migrants who have used the services of smugglers, for example on the basis of their national origin. Anne Gallagher suggests it could also “extend to prohibit discriminatory treatment of different groups of smuggled migrants, reflecting their different modes of arrival.” (Gallagher, *Migrant Smuggling*, p.204) The international bill of rights makes only two exceptions between nationals and non-nationals, in relation to Articles 12 and 25 of the International Covenant on Civil and Political Rights, and only in limited circumstances (on Article 12, see Human Rights Committee, General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986). The fundamental principle of non-discrimination that lies at the heart of the international human rights law is essential to the exercise and enjoyment of human rights for everyone, including migrants and across the migration experience.

²⁹ Under international human rights law, see the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, amongst others. In the context of smuggling: Smuggling of Migrants Protocol, Article 16.1.

³⁰ Smuggling of Migrants Protocol, Article 16(1); Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna from 18 to 20 November 2015, CTOC/COP/WG.7/2015/6, 4 December 2015, para.18.

³¹ Smuggling of Migrants Protocol, Article 9(1)(a)

³² GAATW, *Smuggling and Trafficking: Rights and Intersections*, GAATW Working Paper Series, 2011

³³ As well as states’ existing obligations under international human rights treaties, the Smuggling of Migrants Protocol obligates states to protect the rights of individuals who have been smuggled (Article 4), and specifically to protect them from smuggling-related violence by individuals or groups (Article 16(2)) and to provide assistance to migrants whose lives or safety are endangered through smuggling (Article 16(3)). Where migrants who have been smuggled are detained they have the right to be informed of consular access (Article 16(5)). There are some further rights protections such as witness protection, compensation and restitution, in the UNTOC parent convention.

³⁴ See for example, Committee on Economic, Social and Cultural Rights, General Comment No. 23 on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 8 March 2016, para.54; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, paras.63, 64, 74, 77; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, A/HRC/35/25, 28 April 2017, para.68, Targets 6.1, 8.1 and indicator 6(a); General Assembly, Report of the Special Rapporteur on the human rights of migrants: Developing the Global Compact on Migration, A/71/40767, 20 July 2016, paras.36, 83, 123; ILO Committee of Experts, 2006 General Survey on the labour inspection instruments, paras.78 and 161; ILO Committee of Experts, Promoting fair migration: General Survey concerning the migrant workers instruments, ILC.105/III(1B), 2016, paras.480-482; OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, A/69/CRP. 1, 23 July 2014, Guideline 10.11 specifically calls for firewalls and many others cannot be realised without them; OHCHR, *Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations within large and/or mixed movements, on the basis of existing legal norms*, A/HRC/34/CRP.1, 23 February 2017, paras.17, 50, 86, 91, 95, 99, 110; European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination*, adopted on 16 March 2016, Council of Europe, Strasbourg, CRI(2016)16, Recommendations 2, 3, 11, 15, 29, 30.

³⁵ Smuggling of Migrants Protocol, Article 16(4).

- ³⁶ Smuggling of Migrants Protocol, Article 16(4). On the lack of development of gender-responsive measures see T. Gallagher, *Migrant Smuggling*, in N. Boister and R.J. Currie (eds), *Routledge Handbook on Transnational Criminal Law* (2015), p.204 including at note 118; Louise Arbour, Special Representative of the Secretary-General for International Migration: Opening Plenary of the GFMD Common Space, Berlin, 30 June 2017: “the global compact must reflect throughout the best interests of women – as they themselves define their best interests.”
- ³⁷ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 1
- ³⁸ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 3; OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, A/69/CRP.1, 23 July 2014, Principle 5
- ³⁹ For example, at the regional level, the member states of the South Asian Association for Regional Cooperation (SAARC) adopted the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution in 2002, two years after the adoption of the UN Trafficking in Persons Protocol which understands trafficking occurs across genders and sectors/types of trafficking; several states and other bodies are using a broader framework of modern slavery which has no agreed definition, see J. Chuang, Exploitation Creep and the Unmaking of Human Trafficking Law, *The American Journal of International Law*, 2014, 108, 609-649.
- ⁴⁰ J. Chuang, The challenges and perils of reframing trafficking as ‘modern-day slavery’, *Anti-Trafficking Review*, 2015, 5, 146-149. In 2014, the ILO noted: “There has been some concern, in both academic and legal circles, that the phrase [modern slavery] represents a trend to label certain practices as more extreme than is legally accurate. There is no question that slavery, in all its forms, is unacceptable and must be eradicated. However, not all children exposed to hazardous work are “slaves”, and not all labour that is not compensated with a fair wage is necessarily forced.” ILO, *Profits and poverty: the economics of forced labour*, International Labour Office 2014, p.3
- ⁴¹ GAATW, *Smuggling and Trafficking: Rights and Intersections*, GAATW Working Paper Series, 2011; ILO, *No easy exit: Migration bans affecting women from Nepal*, ILO, Geneva, 2015; R. Napier-Moore, *Protected or put in harm’s way? Bans and restrictions on women’s labour migration in ASEAN countries*, International Labour Organization and UN Women, Bangkok, 2017; Khoo Choon Yen and Kellynn Wee, Do Indonesian women want to be ‘rescued’ from ‘trafficking’? *Migrating Out of Poverty*, 12 July 2017, available at migratingoutofpoverty.org/2017/07/12/do-indonesian-women-want-to-be-rescued-from-trafficking/
- ⁴² See for example, International Labor Recruitment Working Group, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse*, ILRWG 2013, available at <https://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf>
- ⁴³ Trafficking requires all three elements of its act-means-purpose definition to be present (Trafficking in Persons Protocol, Article 3)
- ⁴⁴ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/7/12, 25 February 2008, para.53; Human Rights Council, Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, A/HRC/10/16, 20 February 2009, para.49; GAATW, *Smuggling and Trafficking: Rights and Intersections*, GAATW Working Paper Series 2011.
- ⁴⁵ Given the use of private contractors in the administration of using criminal sanctions to enforce civil immigration law. See for example, M.Fan, The Case for Crimmigration Reform, *North Carolina Law Review* (2013), 92, 101-169; M. Flynn, *Bureaucratic Capitalism and the Immigration Detention Complex*, Global Detention Project Working Paper No.9, June 2015.
- ⁴⁶ GAATW, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*, 2007; Empower Foundation, *Hit and Run: Sex Workers’ Research on Anti-trafficking in Thailand*, 2012
- ⁴⁷ J. Quirk and J. O’Connell Davidson, Moving beyond popular representations of trafficking and slavery, Popular and Political Representations, in J. Quirk and J. O’Connell Davidson (eds), *Popular and Political Representations*, Beyond Trafficking and Slavery Short Course: Volume 1, 2015, pp.11-12. The different anti-trafficking and related estimates, indices, and rankings include the US Trafficking in Persons Report, the UNODC Global Report on Trafficking in Persons, the ILO Global Estimate of Forced Labour, and the Global Slavery Index. Under the 2030 Agenda, indicator 16.2.2 looks to count the number of victims of human trafficking per 100,000 population, by sex, age and form of exploitation.
- ⁴⁸ On this and other data challenges see, P. Buckley, The bias in counter-trafficking data and need for improved data collection: reflections on trafficking onto fishing boats, *The Trafficking Research Project*, 10

May 2013, available at <https://thetraffickingresearchproject.wordpress.com/2013/05/10/the-bias-in-counter-trafficking-data-and-need-for-improved-data-collection-reflections-on-trafficking-onto-fishing-boats/>

⁴⁹ Data protection anti-trafficking action (datACT), *Data protection standards for NGO service providers*, datACT and project partners KOK e.V. and La Strada International, available at <http://www.dataact-project.org/en/materials/standards.html>; see also datACT, *Data Protection Challenges in Anti-Trafficking Policies: A Practical Guide*, 2015.

⁵⁰ For example, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children; SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002); ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015). The UN General Assembly has a recurring resolution on the trafficking in women and girls.

⁵¹ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, A/69/CRP.1, 23 July 2014, Principle 8.

⁵² The international human rights treaties each have an independent committee to monitor states parties' implementation of the convention and make authoritative recommendations. The Council of Europe Convention on Action against Trafficking in Human Beings is monitored through the Group of Experts on Action against Trafficking in Human Beings (GRETA).

⁵³ A.T. Gallagher, Two Cheers for the Trafficking Protocol, *Anti-Trafficking Review*, 2015, 4, 14-32; states have been negotiating for a review mechanism to the United Nations Convention against Transnational Organized Crime and its Protocols since 2008. GAATW, Joint Statement to the seventh session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, Delivered 8 October 2014, <http://www.gaatw.org/resources/statements?start=5>

⁵⁴ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, see Guidelines 2(1),(2)

⁵⁵ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guidelines 6(7), 9(1); Surtees, R. 2013. *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*. Bangkok: UNIAP/NEXUS Institute

⁵⁶ From Trafficking in Persons Protocol Article 7

⁵⁷ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, based on Principle 7, see also Guidelines 2(5),(6); Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, CTOC/COP/WG.4/2009/2, para.12; Council of Europe Convention on Action against Trafficking in Human Beings, Article 26.

⁵⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 4; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; see also Basic principles on the right to an effective remedy for victims of trafficking in persons, in A/HRC/26/18; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principles 8 and 17

⁵⁹ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 10 to 12 October 2011, CTOC/COP/WG.4/2011/8, 15 November 2011, para.24

⁶⁰ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 2; Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 19 October 2010, CTOC/COP/WG.4/2010/7, Annex, paras.(h),(i)

⁶¹ Trafficking in Persons Protocol Articles 6.3, 9.3, 10.2; Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 6 to 8 November 2013, CTOC/COP/WG.4/2013/5, 26 November 2013, para.5.

⁶² OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 7 and Guideline 2(5)

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- ⁶³ Council of Europe Convention on Action against Trafficking in Human Beings, Article 26; EU directive on preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU), Article 8; ILO Protocol of 2014 to the Forced Labour Convention, 1930 (No.29), Article 4(2); Trafficking in Persons Protocol Article 7; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 2(5)
- ⁶⁴ Trafficking in Persons Protocol, Article 7; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 9
- ⁶⁵ Trafficking in Persons Protocol, Article 8(2); Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 10 to 12 October 2011, CTOC/COP/WG.4/2011/8, 15 November 2011, para.28:
- ⁶⁶ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 11 and Guidelines 4.6, 6.7
- ⁶⁷ See UNODC, *The Travaux Préparatoires of the negotiations for the elaboration of the UN Convention against Transnational Organized Crime and the Protocols thereto*, UN 2006, pp.387-389; Council of Europe Convention on Action against Trafficking in Human Beings, Article 16; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 6.7; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 2010, HR/PUB/10/2, pp.177-178.