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9 Human trafficking and smuggling

RYSZARD PIOTROWICZ AND JILLYANNE REDPATH-CROSS

9.1. INTRODUCTION

Trafficking and smuggling of human beings have increased significantly since the early 1990s, forcing the international community to develop new models to regulate them. Trafficking of human beings has attracted worldwide attention and provoked a considerable response. Smuggling of human beings also poses significant challenges, both to those smuggled and to the States affected.

Trafficking and smuggling may possess common features, which sometimes leads to confusion between them. Whereas smuggling involves the consent of the individual to participation in the process in the belief that he or she will be assisted to enter another State irregularly, trafficking denies the free will and choice of the individual because he or she is forced to move within a State, or between States, for the purpose of exploiting their labour. There is no real consent from the trafficked person. The individual may believe that he or she is being smuggled, when in reality he or she is being trafficked.

This chapter discusses the legal regimes for trafficking and smuggling and addresses salient legal issues, including the protection needs of victims and the tension arising from the fact that trafficking and smuggling are treated primarily as matters of criminal law, yet there is a clear human rights dimension in relation to the treatment of victims.

9.2. TRAFFICKING OF HUMAN BEINGS

Trafficking is commonly, and notoriously, known as a criminal practice that takes place in the context of the sex trade: women and children are taken from one State to another, or within a State, for the purpose of sexual exploitation. A general pattern of trafficking from poorer to wealthier countries is evident.

However, it is misleading to see trafficking as taking place only for the purpose of sexual exploitation. People are trafficked so that their labour can be exploited in sweatshops, for domestic labour, forced marriage, agricultural labour, sport and begging, or for harvesting their organs, body tissue and cells. The victims are often subjected to physical, psychological and sexual abuse (see Case Study 9.1).

Trafficking is a process that usually involves several actors. The victim must first be recruited or brought under the control of the traffickers. This can be by deception (e.g., by recruitment or travel agencies that claim to facilitate jobs and visas), by word of mouth or by force. Transnational trafficking may involve illegal crossing of frontiers: this partly explains why trafficking and smuggling have much in common, and may be confused or difficult to distinguish. The crucial difference is that a smuggled person consents to be smuggled; a trafficked person cannot give real consent to the practice.

Once a victim is under the control of the traffickers, he or she may be transported to the destination State, often through transit countries. This requires the organisation of passports and visas, including the falsification of documents, or else being smuggled across borders. Somebody must supply transport and accommodation during the journey. The victims may be 'sold' on the way. Eventually, they will reach the destination State, where their passports or identity papers will likely be confiscated, and they are then forced to work for the person who controls them. Each of these actors is criminally responsible for their participation. This is important in understanding the legal response to trafficking.

Traffickers exploit their victims by gaining control over them, physically or mentally, with the objective of exploiting their labour for profit. Victims are not necessarily physically restrained. They are often subjected to several criminal practices, including forced labour; physical, psychological and sexual abuse; deprivation of liberty; very poor living conditions; and blackmail.

9.2.1. Trafficking under international law

Trafficking is complex: it is a criminal practice, but also involves human rights law. Issues may also arise relating to possible breaches of immigration law and employment law in transit and destination States, as well as laws on prostitution. From the perspective of international law, the core issues are criminal law and human rights.

There has been much debate about whether trafficking is primarily a criminal act or a breach of the human rights of the victims. There may be significant consequences for victims of trafficking if States see the practice primarily as a matter of criminal law because they may fail fully to appreciate the ramifications for victims, whether in source, transit or destination States.

CASE STUDY 9.1 Trafficking of domestic workers to the United Kingdom¹

Ms Mwanamisi Mruke was hired by Ms Saeeda Khan in Tanzania to work at her home in London. Khan organised a domestic service visa for Ms Mruke and agreed to pay 120,000 shillings (£21) monthly into her Tanzanian bank account and £10 monthly pocket money in London.

Ms Mruke suffered severe abuse at the hands of her employer, who confiscated her passport, forced her to sleep on the kitchen floor and gave her meagre amounts of food. She was required to be available to work from 6 a.m. to midnight daily. Her employer would summon Ms Mruke by ringing a bell whenever she was required to assist her or her two adult children. She was sometimes obliged to work at night. She worked for four years without a day off. Ms Mruke was detained in Ms Khan's house and threatened by her, to the extent that she was cowed into submission.

Ms Mruke spoke only Swahili with her employer, who deliberately failed to teach her English, further increasing her isolation. Eventually her employer ceased paying her altogether. She refused to let Ms Mruke return to Tanzania after her parents died, nor was she allowed to travel there for the wedding of her daughter.

At Ms Khan's trial for the crime of trafficking, the prosecutor said: 'From the moment of her arrival in England Mwanamisi was made to sleep, work and live in conditions that fall by any understanding into that of slavery.'

Ms Mruke was released after an interpreter—who went with her to see a doctor—contacted a charity, Kalayaan, which assists people trafficked into domestic servitude. Kalayaan informed the police, who eventually went to Khan's home and removed Ms Mruke to a place of refuge.

Ms Khan was charged with trafficking a person for exploitation. Police found a letter in Swahili, addressed to Ms Mruke and intended to intimidate her. It warned her not to complain about her conditions in London and told her that she had to obey Khan all the time. It said her life could be in danger if she complained, but that she would receive her reward in heaven.

Khan was convicted of trafficking for domestic servitude, given a nine-month prison sentence, suspended for two years, and ordered to pay £25,000 in compensation to Ms Mruke plus £15,000 in costs.

A police spokesman said it was the first time someone had been prosecuted for trafficking a 'slave' for domestic servitude. He said the Metropolitan Police were currently investigating another fifteen cases of trafficking for forced labour, and had worked with other police forces on similar cases. The cases under investigation involved individuals from Saudi Arabia, India, Bangladesh, Tanzania, Uganda and Vietnam.

Concerning Ms Mruke, the spokesman added: 'She may want to go back to Tanzania, because she has a family there. But if she can't go back for fear of reprisals I'm sure that would be looked upon positively by the UK Border Agency.'

¹ This case study is based on Chris Summers, 'A Case of Modern Day Slavery in the Suburbs', BBC News (online) 17 March 2011 (www.bbc.co.uk/news/uk-12687088).

Trafficking is first and foremost a criminal act, like murder, rape and theft. However, it is erroneous to treat it *only* as a criminal act, measurable by the standards of national law. To do so is to risk taking no account of the impact that trafficking has on its victims, as well as the fact that States may have human rights obligations towards victims. The essence of the argument that trafficking is a criminal act is that—in the absence of direct State involvement—it is primarily a private criminal enterprise. There is no doubt that States have sometimes been complicit in trafficking (such as corruption of border officials to facilitate crossing of national frontiers), but in the absence of complicity the State plays no role in trafficking and cannot, on the face of it, be blamed when someone is trafficked. Human rights obligations, on the other hand, are owed by States to all persons (nationals and non-nationals) within their jurisdiction: they require the State to do, or refrain from doing, certain things in its interactions with human beings. Failure to comply gives rise to state responsibility. As noted by the United Nations Human Rights Committee:

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.²

Further, the Committee stressed that the State had a duty 'to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'.³ Thus, trafficking may give rise to state responsibility for human rights violations, not because the State is directly involved, but because of its failure to prevent trafficking or to protect victims and potential victims. Trafficking is therefore a private criminal enterprise, but with a human rights dimension. The scope and content of that dimension are considered below.

9.2.2. The Trafficking Protocol

There is a significant body of international law on trafficking. The most important instrument is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (2000) ('Trafficking Protocol'), which entered into force in December 2003.⁴ The Trafficking Protocol was negotiated as

² Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess., UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [8].

³ *Ibid.*

⁴ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

one of three Protocols supplementing the parent Convention, namely, the *United Nations Convention against Transnational Organized Crime* (2000) ('UNCTOC') – the other two deal with people smuggling (discussed later in this chapter) and trafficking in firearms.⁵

The Trafficking Protocol is primarily an instrument of criminal law. While it does contain measures for the protection and rights of victims, some are limited, causing it to be criticised for failing sufficiently to address the interests and needs of victims. However, it should not be forgotten that the Trafficking Protocol was never intended to be primarily a victim-protection measure. Nor does it exist in a vacuum: it does not replace the existing human rights regime, which continues to offer important safeguards for those who have been trafficked or are at risk of it.

Article 3(a) of the Trafficking Protocol defines trafficking thus:

'Trafficking in persons' shall mean 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

There are, therefore, three elements:

- the *act* (recruitment, transportation, transfer, harbouring or receipt of persons);
- the *method* (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); and
- the *motivation* (for the purpose of exploitation).

The acts of exploitation listed are only examples. Other forms of exploitation, such as forced begging, are covered so long as the other elements of trafficking are present. The definition shows trafficking to be a process: an individual does not have to perform all of the acts that may constitute the offence to be guilty; one, such as recruitment, is enough. Several actors must be involved to fall within the Trafficking Protocol, and no single individual will necessarily be involved in the whole process from source State to destination State. Were it necessary to demonstrate involvement in all of the qualifying acts, it would probably be impossible to prove that any accused had in fact been trafficking. Moreover, the involvement of the accused must take place knowingly.

⁵ *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

Under art. 3(b) of the Trafficking Protocol, any apparent consent by the victim to the intended exploitation 'shall be irrelevant' where any of the means listed have been used. The aim here is to pre-empt a possible defence that there has been no trafficking because the alleged victim was a willing participant. Furthermore, where the victim is a child (i.e., under eighteen years of age), that person will be deemed, under art. 3(c), to have been trafficked if they have been recruited, transported, transferred, harboured or received for the purpose of exploitation, even if none of the methods set out in art. 3(a) has been employed. Establishing that children have been trafficked is thus considerably easier because it is not necessary to show that there has been fraud, force, deception, and so on.

The Trafficking Protocol deals only with transnational trafficking (art. 4);⁶ it does not therefore cover trafficking within the geographical limits of one State, although this should be criminalised by the State's national law. This raises a potentially problematic issue where a person has been trafficked from State A to State B, and is subsequently trafficked within State B. The latter might be classified as internal trafficking, but it can also be seen as a continuation of the offence of transnational trafficking. If not, the consequence arguably would be that the Trafficking Protocol ceases to have legal effect the moment that the victim is moved from his or her first place of exploitation in the destination State to another place. Much will depend upon the legislation adopted in each State to address trafficking. It is quite possible for national law to adopt the definition contained in the Trafficking Protocol for all instances of trafficking, minus the transnational dimension.

Article 4 stipulates that the Trafficking Protocol only applies where trafficking involves 'an organized criminal group', which is defined in art. 2 of UNCTOC as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit'.

Under art. 5 of the Trafficking Protocol, States parties are obliged to criminalise trafficking – that is, not only the conduct set forth in art. 3, but also attempting to commit the offence, participating as an accomplice in the offence and organising or directing others persons to commit the offence.

Part II of the Trafficking Protocol contains limited measures for the protection of victims. Article 6(3) provides that States parties 'shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking'. This is hardly onerous, although States are obliged to do this in good faith: they cannot simply go through the motions; they must give serious consideration to the adoption of relevant measures.

Particular measures listed are clearly aimed at immediate and, to some extent, longer-term needs: appropriate housing; counselling and information (especially

⁶ See also *ibid.* art. 3(1).

with regard to legal entitlements); medical, psychological and material assistance; and employment and training opportunities. None of these is stated in mandatory terms; any obligation to assist will have to be founded elsewhere. States parties are also required to try to provide for the physical safety of victims – no small task where the victims have fled from the traffickers (art. 6(5)). As with people who have been smuggled, victims are subject to repatriation. This may be enforced should the victim decline to be returned: art. 8(2) stipulates that repatriation should 'preferably be voluntary'. This is subject to the State's international protection obligations, such as the obligation not to return a person to another State where he or she faces the risk of persecution (see Chapter 7).

Part III (prevention, cooperation and other measures) is more stringent. The language is generally mandatory. Article 9(1) provides that States parties 'shall establish comprehensive policies, programmes and other measures . . . to prevent and combat trafficking in persons'. This provision also requires States parties to establish policies, programmes and other measures 'to protect victims of trafficking in persons, especially women and children, from revictimization'. This clearly establishes an obligation of assistance towards those who have been trafficked and may be taken as part of the human rights regime.

The Trafficking Protocol is not the only instrument regulating trafficking. Its significance lies in the fact that it is relatively new and has attracted much support from source, transit and destination States – in late 2011 there were 147 States parties. There exists a plethora of international and regional treaties that address trafficking specifically or are relevant to it (see Box 9.1), including an extensive European Union regime. There are also many non-binding, or 'soft law', measures that relate to trafficking.⁷ Some of these instruments focus on the criminal aspect of trafficking. However, many address the human rights dimension, seeking to place the rights of victims at the centre of anti-trafficking activities.

9.2.3. Trafficking and human rights

The prohibition of trafficking under human rights law

Some human rights instruments expressly outlaw trafficking.⁸ Others, while not mentioning trafficking as such, refer to slavery, forced labour and servitude as

BOX 9.1 Principal international instruments on human trafficking

Year	Instrument
1926	<i>Slavery Convention</i> , opened for signature 25 September 1926, 60 LNTS 254 (entered into force 9 March 1927)
1930	<i>Convention concerning Forced or Compulsory Labour</i> (ILO Convention No 29), opened for signature 10 June 1930, 39 UNTS 55 (entered into force 1 May 1932)
1949	<i>Geneva Convention relative to the Protection of Civilian Persons in Time of War</i> , opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) plus Additional Protocols I and II (1977)
1949	<i>Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others</i> , opened for signature 2 December 1949, 96 UNTS 272 (entered into force 25 July 1951)
1979	<i>Convention on the Elimination of All Forms of Discrimination against Women</i> , opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)
1989	<i>Convention on the Rights of the Child</i> , opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)
1990	<i>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</i> , opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003)
1999	<i>Worst Forms of Child Labour Convention</i> (No 182), opened for signature 17 June 1999, 38 ILM 1215 (entered into force 19 November 2000)
2000	<i>Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography</i> , opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002)
2002	<i>South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution</i> (5 January 2002)
2005	<i>Council of Europe Convention on Action against Trafficking in Human Beings</i> , opened for signature 16 May 2005, CETS No 197 (entered into force 1 February 2008)
2007	<i>Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse</i> , opened for signature 25 October 2007, CETS No 201 (entered into force 1 July 2010)

violations of human rights.⁹ That forced labour, including trafficking, may violate human rights even in the absence of direct State involvement has been confirmed by a number of decisions of human rights tribunals. In 2008, in a case addressing

November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art. 35; *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002); *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS No 197 (entered into force 1 February 2008) Preamble.

⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) art. 4; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953) art. 4; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art. 8; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art. 5.

⁷ Soft law measures include: United Nations High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (UN Doc E/2002/68/Add.1, United Nations Economic and Social Council, 20 May 2002); *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, Council of Europe, No 14981/02 (29 November 2002); *ASEAN Declaration against Trafficking in Persons Particularly Women and Children* (29 November 2004); United Nations High Commissioner for Refugees, 'Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked' (UN Doc HCR/GP/06/07, UNHCR, 7 April 2006).

⁸ See, e.g., *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art. 6(1), which refers to trafficking in women (but not men or children); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art. 6; *Convention on the Rights of the Child*, opened for signature 20

the consequences of holding a person in slavery, the Economic Community of West African States (ECOWAS) Community Court of Justice held that the failure of Niger to denounce the slave status of one of its nationals amounted to tolerance, possibly even acceptance, of that crime.¹⁰ Furthermore, 'the defendant [Niger] becomes responsible under international law as well as national law for any form of human rights violations of the applicant founded on slavery because of its tolerance, passivity, inaction and abstinence with regard to this practice.'¹¹ In this case, it was the slave owner who forced the applicant into slavery; the State was responsible for allowing this situation to happen and for tolerating it.

The matter has been addressed by the European Court of Human Rights, which in 2010 ruled on an alleged violation of art. 4 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ('European Convention on Human Rights'), which prohibits slavery, forced labour and servitude.¹² In *Rantsev v. Cyprus and Russia*, the applicant argued that Cyprus and Russia had failed to protect his daughter from the risk of trafficking and exploitation, contrary to art. 4, although that provision does not refer in specific terms to trafficking.¹³ While the Court did not clarify whether it regarded trafficking as 'slavery', 'forced labour' or 'servitude', it stressed that trafficking was certainly covered by art. 4. Furthermore it bore a clear resemblance to slavery:

trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment... It involves the use of violence and threats against victims, who live and work under poor conditions.¹⁴

Article 4 therefore required States to prosecute and penalise traffickers effectively. They would also have to put in place measures to regulate businesses often used as a cover for trafficking; and immigration rules would have to address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.

These measures would address trafficking in general: States have an obligation to have appropriate laws in place and to enforce them. However, the *Rantsev Case* is significant also because the Court indicated that art. 4 would sometimes oblige States to go further to meet their obligations. In particular, States might have to take measures beyond legislation to protect a victim or potential victim, where:

the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited... In the case of an answer in the affirmative, there will be a

10 *Hadijaton Mani Konou v. Republic of Niger* (Economic Community of West African States, Community Court of Justice, Judgment No ECW/CCJ/JUD/06/08, 27 October 2008).

11 *Ibid.* [95].

12 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953).

13 *Rantsev v. Cyprus and Russia* (European Court of Human Rights, Application No 25965/04, 7 January 2010). See also *Siliadin v. France* (European Court of Human Rights, Application No 73316/01, 26 October 2005).

14 *Rantsev v. Cyprus and Russia*, *ibid.* [281].

violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.¹⁵

This means that States might have to take practical steps to assist particular individuals known to be at risk. This goes beyond having good laws. It might, for instance, include provision of safe accommodation and other steps to ensure the physical safety of the person at risk.

The *Rantsev Case* may prove highly persuasive in influencing the legal response to trafficking in other regions. The judgment addressed the violation of a right guaranteed in all the major human rights instruments. There have been few cases anywhere dealing with the prohibition of slavery, forced labour and servitude as a human rights issue. The reasoning of the Court, addressing the obligation to ensure and secure enjoyment of the right, is coherent and consistent with the general understanding of how this should work. The novelty of the decision is twofold. First, it names trafficking as a violation of art. 4, although trafficking is not mentioned in the treaty. There is no reason to see this interpretation as unduly adventurous or flawed. Second, the Court clarified the substance and extent of the obligation in finding that a State's duty goes beyond having appropriate laws that are effectively implemented, and includes the duty to take specific protection measures in particular cases.

It is thus becoming clear that instruments that do not mention 'trafficking' may nevertheless prohibit it because of the common features found in the practices of slavery, forced labour and servitude on the one hand, and trafficking on the other. The link with slavery was recognised by the International Criminal Tribunal for the Former Yugoslavia in the *Kunarac Case*. The Tribunal said:

indications of enslavement include elements of control and ownership; the restriction or control of a person's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.¹⁶

The characterisation of trafficking as slavery is furthermore recognised in the *Rome Statute of the International Criminal Court* (1998).¹⁷ In naming enslavement as a crime against humanity, art. 7 stipulates that enslavement means 'the exercise of any or all of the powers attaching to the right of ownership over a person and

15 *Ibid.* [286].

16 *Prosecutor v. Kunarac, Kovic and Vukovic* (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Case No IT-96-23-T and IT-96-223/1-T, 22 February 2001) [542].

17 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

includes the exercise of such power in the course of trafficking in persons, in particular women and children'.

International protection obligations

In addition to the obligation to protect individuals from slavery, forced labour or servitude, any State to which a person has been trafficked may have international protection obligations towards that person: an obligation not to oblige a person to return to his or her home State if there is a real risk either that he or she may be re-trafficked or that his or her physical safety may be jeopardised. This obligation is alluded to in art. 14(1) of the Trafficking Protocol, which states that the Protocol does not exclude the application of the *Convention relating to the Status of Refugees* (1951) ('Refugee Convention').¹⁸ Indirect recognition is also found in the Trafficking Protocol for victims' entitlement, or at least need, to remain in the destination State. Article 7(1) obliges parties to 'consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in [their] territory, temporarily or permanently, in appropriate cases'. Moreover, under art. 9(1)(b), States parties are required '[t]o protect victims of trafficking in persons, especially women and children, from revictimization'. This does not mean that victims have a right to asylum, but it may mean a right to remain in the State (as a form of complementary protection) if it is the only way to prevent revictimisation. Furthermore, the risk of which States must take account here is wider than re-trafficking: revictimisation could include physical attacks as a means of revenge or punishment, or ostracism by the victim's own community.

An entitlement to international protection is significant because a State is not normally obliged to allow non-nationals to remain in its territory. It is an exception to the rule (see Chapter 5). The fact that someone has already been trafficked will not itself trigger an entitlement to remain in another State – indeed many who have been trafficked transnationally may wish to be repatriated. International protection is granted only because of some future risk or threat to the individual concerned. Accordingly, such protection will be available only where the individual is at risk of being re-trafficked or some other serious infringement of his or her safety. The fact that the person has been trafficked in the past may be significant in assessing the risk facing him or her in future. It is unlikely that an individual who has never been trafficked would be able to demonstrate a real risk of being trafficked in the future if the person were returned to his or her home State.

International protection is granted where the individual is either a refugee in the sense of the Refugee Convention, or else faces some threat to his or her human rights that, while not entitling the person to refugee status, is recognised as triggering an entitlement to complementary, or subsidiary, protection. Victims of

trafficking have no special right to international protection; the grant of such protection depends upon the individual satisfying the criteria for refugee status or complementary protection.

The Refugee Convention, art. 1A, defines as a refugee any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Most people at risk of being trafficked will not qualify. They may have a well-founded fear of being persecuted and be unwilling to seek protection from their own State. They may also be outside their own country. But the basis for their fear is problematic. If someone fears being trafficked because of their race, religion, nationality, membership of a particular social group or political opinion, there is no difficulty. However, in most cases individuals will not be targeted because they fit into one of these categories; they are trafficked because they are vulnerable to exploitation due to poverty, family breakdown or some other factor. Nevertheless, some may be entitled to refugee status because of their membership of a particular social group. A social group requires that its members be connected by some factor they have in common, additional to the fact that they are being persecuted.¹⁹

There are cases in which persons at risk of being trafficked have been able to demonstrate that they belonged to a particular social group because they came from a particular country, or part of a country, where there was a real risk of being trafficked.²⁰ This is difficult to prove. However, it can be argued that where a person has been trafficked in the past and fears being re-trafficked in the future, the fact that he or she has been trafficked is an undeniable feature of their background – one that he or she has in common with other victims of trafficking – which may be sufficient to make them a particular social group and therefore qualify as refugees. It is not the risk of persecution that unites them; they are connected by the historical fact that they have been trafficked, and are at risk of being trafficked in the future because they have been trafficked in the past.²¹

Even if a trafficked person does not qualify as a refugee, other measures may entitle him or her to international protection. It has long been recognised that the scope of the Refugee Convention is rather narrow; there are many who, while not qualifying for refugee status, face real and substantial risks to their human rights in their home State. This dilemma has been addressed by the concept of

19 Alexander Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group" in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, 2003) 263.

20 See, e.g., *Miss AB v. Secretary of State for the Home Department* (Immigration Appellate Authority Decision CC/64057/2002, 2003), where the social group comprised girls trafficked from West Africa.

21 See also United Nations High Commissioner for Refugees, above n. 7.

18 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

complementary, or subsidiary, protection:²² States have an obligation not to return individuals to their home State if there is a real risk that their human rights will be breached there (see Chapter 7).²³

State practice accepts that a State may not require non-nationals to return to their home States if there is a real risk that they will be exposed to torture or inhuman or degrading treatment or punishment. It is accepted that this threat may come not only from the State itself, but from non-State actors within the State, at least where the State is unable or unwilling to protect against that risk. If one considers the types of harm to which a victim of trafficking might be exposed upon return – for example, through re-trafficking or revenge attacks that could include physical, sexual and psychological abuse – it is evident that the individual may face a risk of being subjected to torture or inhuman or degrading treatment and should therefore qualify for complementary protection.²⁴

Finally, it matters what kind of international protection is granted. The Refugee Convention requires States to provide significant benefits and entitlements for refugees. Complementary protection, by contrast, is fundamentally about the right to remain in another country. It does not automatically entitle the beneficiary to the same level of assistance.

9.3. SMUGGLING OF MIGRANTS

Smuggling of migrants involves the facilitated irregular crossing of a border for financial or other material benefit. Stereotypically, trafficking is portrayed as involving women and children for sexual exploitation, and smuggling as involving young men in search of a better life. However men, women and children of all ages are prompted to migrate irregularly with the assistance of smugglers for a variety of reasons, whether to escape human rights abuses, armed conflict or civil unrest, environmental disaster or degradation, or economic want (see Chapter 8).

Smuggling of migrants is a global phenomenon: no country is unaffected, whether as a source, transit or destination State, and possibly as all three. As with irregular migration generally, given the clandestine nature of human smuggling, the numbers involved can only be estimated. Where figures do exist there are often inconsistencies between States, depending on how data are collected, if at all. This is compounded by the fact that those who are smuggled have little incentive to approach authorities, given that they are often considered to be complicit in a

²² The former term is favoured by the United Nations High Commissioner for Refugees, the latter by the European Union.

²³ Ryszard Piotrowicz and Carina Van Eck, 'Subsidiary Protection and Primary Rights' (2004) 53(1) *International and Comparative Law Quarterly* 107; Hugo Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20(1) *International Journal of Refugee Law* 1; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd edn, 2007) 285–354.

²⁴ The risk is especially real if the victim has given evidence against the traffickers.

criminal activity, or are indeed criminals, and are likely to face immediate removal. According to the United Nations Office on Drugs and Crime ('UNODC'), the two largest flows of smuggled persons are from Latin America (in particular, Mexico) to the United States, and from sub-Saharan Africa to Europe. It is estimated that there are approximately 3 million attempted irregular crossings of the southern border of the United States annually, mostly with the help of smugglers. Attempted irregular crossings from Africa to Europe are estimated at approximately 55,000 people annually. The estimated annual gains for the smugglers from these two routes alone are respectively USD 6.6 billion and USD 150 million.²⁵

Smuggling of migrants poses a threat to state sovereignty and the rule of law. Failure to control the irregular entry of non-nationals, and to adequately defend the State against the activities of organised crime, undermine the authority of the State and are perceived as threatening the safety of its nationals. The fear of uncontrolled irregular migration in destination States has fuelled governments' increasingly tough responses to the issue. Indeed, in many States, migration management is viewed from a law enforcement perspective. Governments around the world are placing greater emphasis on tighter controls of frontiers and safer travel documents, as well as interdepartmental and cross-border cooperation to combat irregular migration. At the same time, opportunities for regular migration have become more restricted, resulting in people resorting to irregular migration. Thus, as States place greater emphasis on border controls and other migration management tools to protect their frontiers, migrants increasingly resort to smugglers to assist them in circumventing these measures.

Smuggling of migrants is often distinguished from trafficking by the vulnerability and exploitation of the trafficking victim, whereas smuggling is framed as a purely commercial transaction. Similarly, smuggling is generally considered to be a consensual transaction based on the migrant's free choice in purchasing the smuggling services, while the victim of trafficking does not truly consent. In reality, however, the migrant may be vulnerable in all stages of the smuggling process. The circumstances pushing an individual to migrate may leave him or her little real choice but to use a smuggler. Further, the journey is often fraught with danger: images of boats overloaded with desperate migrants being dashed against rocks as they attempt to come ashore, bodies washed up on beaches, people dying of exhaustion as they seek to cross land borders or suffocating in the back of trucks are all too familiar. Given the power disparity between the smuggler and the smuggled, the migrant is vulnerable to exploitation and abuse at the hands of smugglers and corrupt officials during all stages of the process, as illustrated by Case Study 9.2.

²⁵ United Nations Office on Drugs and Crime, 'The Globalization of Crime: A Transnational Organized Crime Threat Assessment' (UNODC, 2010) 59, 67.

CASE STUDY 9.2 Smuggling men to South Africa

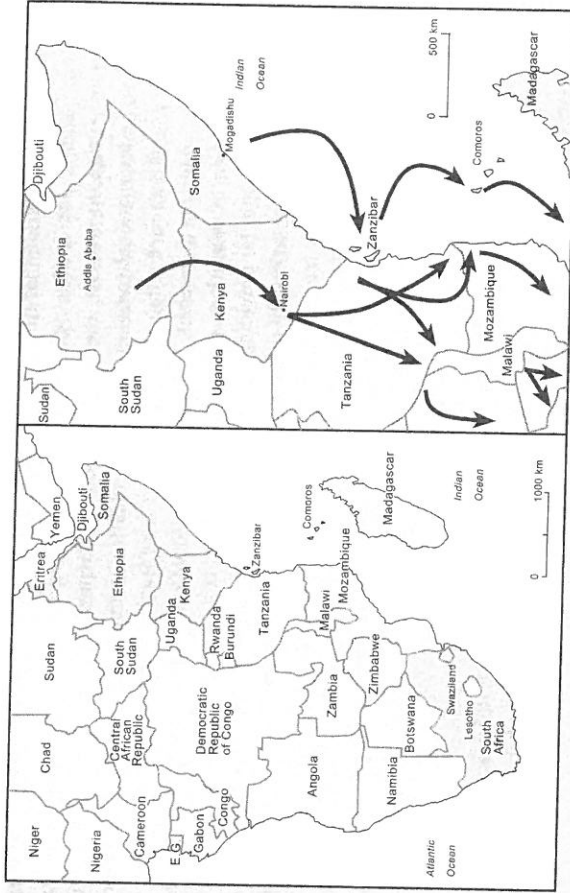
In 2009, the International Organization for Migration ('IOM') undertook an assessment of the irregular movement of men from East Africa and the Horn to South Africa (the 'Study').²⁶ The Study estimated that each year 17,000 to 20,000 men paid smugglers to take them south, which had an immediate value to the smugglers of USD 34–40 million. The Study found that all of the men smuggled to South Africa, or part of the way, were motivated by the desire to improve their lives. Few, however, were prepared for or warned of the treatment they would face during the journey, which on average lasted seven to eight weeks for Ethiopians and Somalis, and one week for Kenyans. According to testimonies, some men never reached their final destination, either serving time in various prisons *en route* followed by deportation, or in extreme cases dying during the journey.

A high proportion of the migrants reported that their experiences during the smuggling process were unexpectedly harsh. Many spoke of deprivation of food and water, exposure to the elements, beatings and robberies, extortion or abandonment. Sexual abuse was also reported. The stories highlighted protection dilemmas in relation to those who were abused. Despite their hardships, the smuggled migrants did not want to be rescued, saved or repatriated during their journey: any intervention during their journey could result in personal setbacks that might only increase their hardship, financial burden and exposure to abuse.

The Study found that due to ill-defined and weak legislation in various States in which the smugglers operated, they were operating with almost complete impunity at the time of the Study. If the smugglers were caught and could not bribe their way out of trouble, they faced small fines and possible deportation. The stories told by the migrants highlighted that alleged corruption and complicity of national officials appeared to be one of the forces driving the regional smuggling business. The allegations made by a large portion of those interviewed suggested that many of the complicit officials were not chance opportunists succumbing to occasional bribes. Rather, the extent of their collusion with smugglers implied that they were part of the overall illegal and abusive enterprise.

For some migrants, arrival in South Africa was the start of a long cherished dream; for many more, it was a step in a process that would lead to Europe or North America via similar means. The Study found that exposure to considerable criminal violence and prejudice appeared to be the price many accepted for new lives of opportunity in South Africa or a third country in the West. In this regard, it was found that voluntary smuggled migrants had similar mindsets to victims of trafficking: they were often ignorant of their human rights and, given their alternatives, came to accept violence and abuse as part of their lives.

²⁶ Christopher Horwood, *In Pursuit of the Southern Dream: Victims of Necessity. Assessment of the Irregular Movement of Men from East Africa and the Horn to South Africa* (International Organization for Migration, 2009).



Map 9.1 Smuggling to South Africa

Instances of physical, psychological and sexual abuse, as well as deprivation of food, water and liberty, during the smuggling process are well documented. Once at the destination this may continue, particularly if the migrant is indebted to the smuggler. Thus, notwithstanding the legal distinction between smuggling and trafficking, there may be similarities between the two practices, and categorising a migration experience as smuggling or trafficking may often prove challenging.

9.3.1. The Smuggling Protocol

The key international instrument dealing with smuggling in migrants is the *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* (2000) ('Smuggling Protocol').²⁷ Its purpose is 'to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants' (art. 2). As noted in art. 1, the Smuggling Protocol supplements UNCTOC and is to be interpreted together with it. As discussed earlier in this chapter, over the past century the international community has adopted a number of instruments responding to the types of

²⁷ *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004). In late 2011 there were 129 States parties.

exploitation that can arise from trafficking, such as slavery and labour exploitation. The Trafficking Protocol is a further development addressing such exploitation. In contrast, the Smuggling Protocol represents one of the first times the international community has responded to the smuggling of migrants as a form of organised criminal activity, distinct from legal or illegal activity on the part of migrants themselves. The Smuggling Protocol's response to the criminal exploitation of migration, and profiting therefrom, is a new development.²⁸ It does so through: (a) providing a definition of smuggling of migrants and mandating its criminalisation; (b) responding to the smuggling of migrants by sea; (c) setting a framework for prevention and cooperation; while (d) protecting the human rights of smuggled migrants. Three of these issues are addressed below; while the smuggling of migrants by sea, on which there is considerable international legal regulation, is discussed in Chapter 10.

Smuggling of migrants and its criminalisation

Under the Smuggling Protocol, 'smuggling of migrants' is defined 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' (art. 3(a)). 'Illegal entry' is defined as 'crossing borders without complying with the necessary requirements for legal entry into the receiving State' (art. 3(b)).

Several points should be noted. First, unlike trafficking, by definition smuggling of migrants involves crossing an international border – that is, the irregular entry of a non-national into the transit or destination State. Second, smuggling of migrants is characterised by a commercial transaction between the smuggler and the smuggled, involving a financial or other material gain for the former. The smuggled migrant has consented to the transaction and, unlike in trafficking, is considered to be a willing participant. Further, it is this commercial transaction that is the focus of the definition. As noted in the *travaux préparatoires*, the reference to 'financial or other material benefit' was included:

in order to emphasise that the intention was to include the activities of organized criminal groups acting for profit, but 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.²⁹

Article 6 of the Smuggling Protocol requires the criminalisation of smuggling and related offences. The activities to be criminalised are: smuggling of migrants;

producing, procuring or possessing fraudulent travel or identity documents for the purpose of enabling the smuggling of migrants; and enabling a person to remain illegally in the State through illegal means. States parties are required to criminalise attempts to commit an offence, acting as an accomplice, or organising or directing others to commit an offence outlined in the Smuggling Protocol. Finally, it requires that States parties establish as aggravating circumstances those circumstances that endanger, or are likely to endanger, the lives and safety of migrants, or entail inhuman or degrading treatment of migrants.

Under art. 6, only intentional conduct is to be criminalised. Thus, in the context of the offence of smuggling, there must have been an intention to procure illegal entry and an intention of obtaining a financial or other material benefit.³⁰ However, pursuant to art. 4, as in the case of the Trafficking Protocol, the Smuggling Protocol applies only where the offences are transnational in nature and involve an organised criminal group.

Establishing a framework for the criminalisation of smuggling and related activities is one of the cornerstones of the Smuggling Protocol. The language used in art. 6 is mandatory: States parties must enact legislation that establishes the named offences. However, the article leaves it to States parties to determine the severity of the penalties in the event of breach. A consistent legislative approach among States parties against smuggling is important given the transnational nature of the phenomenon, where smugglers use routes that present the least resistance. Establishing uniform criminal offences at the national level seeks to promote a common response, thereby avoiding the redirection of flows to or through States where the legislative response is weaker. The Smuggling Protocol specifies the criminal offences that must be established through legislative and other measures, thereby setting a minimum standard. Pursuant to art. 34(3) of UNCTOC, States parties are free to take more stringent responses and establish further measures if they so wish.

The focus of the Smuggling Protocol is on the activities of the smuggler – the organised criminal group – not on those of the migrant. Article 5 provides that '[m]igrants 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'. While some commentators believe this to establish protection for the migrant, it must be read in light of art. 6(4), which states that '[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law'. Thus, the Protocol is neutral on the criminalisation of the migrant for irregular entry: it simply provides that the smuggled migrant shall not be criminalised for irregular entry pursuant to the Protocol. A migrant may, however, be prosecuted for offences relating to irregular entry under national law.

²⁸ United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UNODC, 2004) 339 (UNODC Legislative Guides).

²⁹ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UNODC, 2006) 489.

Prevention, cooperation and other measures

The drafters of the Smuggling Protocol recognised that, for responses to smuggling of migrants to be effective, they must be based on international cooperation: given the global nature of the phenomenon, unilateral responses would have little impact.³¹ The Smuggling Protocol therefore takes a comprehensive view of migration management and recognises that many States lack both the capacity and the resources to respond effectively to the smuggling of migrants. It requires States parties, unilaterally and in cooperation with others, to exchange information (art. 10), strengthen borders (art. 11), take measures to ensure the security and control of travel and identity documents (art. 12), and undertake training and technical cooperation to support these measures (art. 14). In practice, there is now broad recognition of the benefits of international cooperation in responding to this form of irregular migration. Cooperation has developed at the bilateral, regional and international levels on each of the areas outlined in the Smuggling Protocol.

The Smuggling Protocol also recognises the need to address root causes in order to respond effectively to the smuggling of migrants, and focusses on responding to root causes in the country of origin, such as poverty and underdevelopment. It also calls for cooperation in the field of public information concerning the risks of irregular migration and falling victim to organised crime.

Protection

The Smuggling Protocol provides certain minimum protections for smuggled migrants. Article 16 is the main provision on assistance and protection. It calls upon States parties in implementing the Smuggling Protocol to take appropriate measures, consistent with their obligations under international law, to preserve and protect the rights of smuggled migrants, particularly in relation to the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment. It requires parties to take appropriate measures to afford migrants appropriate protection against violence, as well as afford appropriate assistance to those whose lives or safety are endangered by reason of being the object of conduct outlined in art. 6. It specifies that States parties shall take into account the special needs of women and children in applying art. 16. Where the migrant is in detention, he or she must be informed without delay of the right to consular protection and assistance.

In addition, there are various references throughout the text acknowledging that migrants have protection needs. In this context, art. 9 requires that States parties ensure the safety and humane treatment of migrants on board when taking measures outlined in the Protocol against a vessel; art. 14 calls for training for relevant officials

on the humane treatment of migrants and respect for their rights; art. 15 requires that information campaigns highlight the risks involved for migrants during the smuggling process; and art. 18 requires that measures to return smuggled migrants pay due regard to their safety and dignity, while upholding any rights they may have under the national law of the receiving State. In addition, the Smuggling Protocol must be read in light of UNCTOC, which requires each party to take 'appropriate measures within its means' to provide assistance and protection to victims of offences under the Convention, particularly in the context of retaliation or intimidation (art. 25(1)). It also requires that States parties establish appropriate procedures to provide access to compensation and restitution for victims of offences under the Convention.

When contrasted with the protection and assistance provisions of the Trafficking Protocol (art. 6), the Smuggling Protocol is notably thin in the protection it provides. Article 16 essentially restates the right of smuggled persons to physical survival – the right to life; freedom from torture or other cruel, inhuman or degrading treatment; assistance where lives or safety are endangered; and protection from violence. Unlike the Trafficking Protocol, there is no provision for assistance in legal proceedings, or any reference to the physical, psychological or social recovery of the smuggled migrant. Nor is there provision for the possibility of allowing the migrant to remain on the territory permanently or temporarily, nor any reference to cooperation with non-governmental and other relevant organisations. Consistent with the disparity in protections provided under the two instruments, the Trafficking Protocol refers to those who have been trafficked as 'victims', whereas the Smuggling Protocol refers to those who are smuggled as 'migrants'.

This difference in treatment is based on the perception of the drafters that the two groups can be neatly categorised and contrasted: those who are trafficked are deceived or coerced into the process and are subjected to exploitation for the profit of the traffickers; those who are smuggled undertake the journey voluntarily, personally benefit from the process, and are not necessarily subjected to exploitation. However, this distinction often does not accord with the reality experienced by the migrant where, for example, the process starts off as smuggling, but becomes trafficking during the journey or on arrival in the destination State. Similarly, it does not correspond to the reality that many smuggled migrants suffer exploitation and abuse during or after the smuggling process, at the hands of smugglers or third parties, but do not experience all the stages typical of the trafficking continuum. The effect of this rigid distinction is that while victims of trafficking are viewed through a human rights lens, smuggled migrants are primarily seen as irregular migrants complicit in a criminal activity, or as criminals. As a result, the protection and assistance needs of smuggled 'illegal' migrants may be overlooked, notwithstanding that victims of trafficking and smuggled migrants may have similar needs. This could put the destination State in breach of its international protection obligations towards the smuggled migrant.

31 In this regard, the Smuggling Protocol takes a similar approach to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) ('ICRMW'). Part VI of the ICRMW calls on States parties to collaborate with a view to preventing and eliminating illegal or clandestine movements of migrant workers in an irregular situation.

To the extent that the Smuggling Protocol provides for protection of the migrant, it is interesting to note the difference in language used in establishing the obligations of the States parties. Article 16, on assistance and protection, requires that the State take 'appropriate' measures or provide 'appropriate' assistance in relation to the action in question. Thus, it is for the State to determine if any action is necessary and what that action will be. In contrast, in the context of the obligations concerning the criminalisation of smuggling and international cooperation, the language is mandatory: States 'shall' implement the specified measures. In the case of art. 16, leaving such discretion to the State raises concerns that the protection and assistance needs of the smuggled migrant may not be adequately met.

The relatively weak protections provided by the Smuggling Protocol are in keeping with the circumstance that it is primarily an instrument of criminal law that focuses on international cooperation to combat organised crime. It is not a human rights instrument. To the extent that human rights are addressed, given the non-prescriptive language in the areas of protection and assistance, it is arguable that the greatest contribution it makes to protecting the rights of smuggled migrants is an indirect one through the development of state obligations to criminalise smuggling. However, while the Smuggling Protocol does not create any new rights for irregular migrants, it does not detract from their established rights under other instruments. Article 19 expressly maintains the rights of migrants under other areas of international law, including international humanitarian law, international human rights law and refugee law. It further states that measures taken under the Protocol shall be consistent with the principle of non-discrimination. Thus, while the instrument itself is neutral on the issue of the rights of the smuggled migrant, the extensive protections from which the migrant benefits under other branches of international law remain binding on States parties.

9.3.2. Smuggling and human rights

As has been highlighted, the smuggling of migrants often involves serious abuse and exploitation, both during the smuggling process and on arrival in the State of destination. Under international human rights law, the State has an obligation to take positive steps to prevent smuggling and to protect those who have been or may be smuggled. Criminalisation of the activities outlined in the Smuggling Protocol contributes to meeting the first of these obligations. The remainder of this section focusses on the second.

There is a common misconception that, due to their irregular status, smuggled migrants have no rights. This is incorrect. As noted in Chapter 5, States have the right to determine which non-nationals enter their territory and the conditions of such entry. This power to manage migration must, however, be exercised with full respect for the human rights and freedoms of non-nationals, which are granted under a wide range of human rights instruments and customary international law,

regardless of whether those persons are in a regular or an irregular situation. With few exceptions, the core human rights treaties apply to *all persons* in the territory and subject to the State's jurisdiction, without discrimination: this applies to the civil, political, economic, cultural and social rights outlined therein. For example, art. 2(3) of the *International Covenant on Civil and Political Rights* (1966) ('ICCPR') provides that States parties shall respect and ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant, without distinction of any kind, on the basis of, *inter alia*, race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.³² While distinctions between nationals and non-nationals are permitted in certain circumstances, these distinctions must serve a legitimate purpose and measures taken must be proportionate to the purpose in question.

Thus, a State has the obligation to protect all persons subject to its jurisdiction, regardless of their nationality or legal status. The following discussion focusses on those human rights of particular relevance to smuggled migrants when intercepted by state authorities during transit or on arrival in the destination State. It does not deal with the labour rights of smuggled migrants, which are addressed in Chapter 11, or the human rights of irregular migrants more generally, which are dealt with in Chapter 6.

Food, shelter, medical care

Often migrants are discovered by authorities in a state of sheer exhaustion, having been deprived of food, water or shelter for days or even weeks. They may also be in urgent need of medical attention. Regardless of the irregular status of smuggled migrants, the State has an obligation to ensure that their basic needs are met. Under art. 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966) ('ICESCR'), each State party must take steps to the 'maximum of its available resources, with a view to achieving progressively' the full realisation of the rights outlined in the ICESCR.³³ In interpreting this phrase, the Committee on Economic, Social and Cultural Rights has noted that, notwithstanding the progressive nature of the obligation:

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.³⁴

³² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

³⁴ Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations*, 50th sess. UN Doc E/1991/23 (14 December 1990) [10].

Bearing in mind the principle of non-discrimination, the right under the ICESCR to adequate food and shelter, as well as urgent healthcare, applies equally to nationals and non-nationals, and must be ensured by the State without delay.³⁵

Protection of life and security

In addition to food, shelter and urgent medical attention, the State is also obliged to ensure that smuggled migrants are treated in a humane manner and with dignity. As recognised by the Smuggling Protocol, the civil and political rights of particular relevance to smuggled migrants, both during the migration process and on arrival in the destination State, include: the right to life; freedom from torture or cruel, inhuman or degrading treatment; and the right to be free from slavery and servitude. Under human rights law, these rights are non-derogable: they cannot be derogated from even in times of national emergency. Thus, they must be respected at all times by the State in which the migrant finds himself or herself. This applies to treatment on interception, but must also be considered prior to any removal of the migrant from the territory, as many smuggled migrants may have legitimate claims for international protection. In this context the principle of *non-refoulement* is particularly important because many individuals resort to smuggling to escape persecution in their home State. According to this principle, a State shall not remove someone to a place where his or her life or freedom would be threatened. This principle is enshrined in art. 33 of the Refugee Convention and is widely considered to be a principle of customary international law. Similarly, under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984),³⁶ a State cannot remove someone to another State where there are substantial grounds for belief that he or she would be subjected to torture (art. 3). Thus, not only does a State have an obligation to protect the life and security of the smuggled migrant once that person is subject to its jurisdiction, it has an obligation not to take any enforcement action against the migrant that would threaten his or her life or security on removal.

Detention

Some States detain smuggled migrants on arrival and prior to their removal. While detention is permitted under international human rights law, it must be in accordance with the law and must not be arbitrary. Conditions of detention must be humane and the migrant must be entitled to take proceedings before a court so that it can decide on the lawfulness of the detention without delay. Where the migrant is the victim of unlawful arrest or detention, he or she shall have a right to compensation.³⁷

³⁵ Article 2(3) of the ICESCR recognises that developing countries may determine to what extent they will guarantee economic rights to non-nationals, but this primarily relates to the right to work.

³⁶ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

³⁷ *International Covenant on Civil and Political Rights*, above n. 32, arts. 9–10. See also *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, above n. 31, art. 16, which provides additional protections for irregular migrants.

The detention of women and children requires particular attention. Except in the family context, women should be separated from men, and children from adults. The detention of children should be only as a matter of last resort and for the shortest possible time.³⁸ Access to detention centres for non-governmental organisations to identify vulnerable cases is also important. Finally, access to consular protection and assistance from the country of nationality must be granted.

Removal

Where a migrant is in an irregular situation and does not have a claim to international protection, the State has the right to remove him or her from its territory. Similarly, the State of origin is obliged under international law to accept the return of its nationals (see Chapter 4). Often the most humane, effective and sustainable returns are undertaken voluntarily by the smuggled migrant. However, if he or she does not wish to return voluntarily, forced removal is an option. In the context of expulsion, the procedural protections under ICCPR art. 13, which entitle a migrant to a review of the removal decision by a competent authority, apply only to those lawfully in the territory.³⁹ When implementing the return, the emphasis must be on respect for the dignity of the individual. In this context, readmission agreements may facilitate the issuance of necessary documentation and the efficiency of the return process. Where the return involves a child, the best interests of the child must be a primary consideration.

There is no shortage of instruments guaranteeing the human rights of smuggled migrants, the majority of which guarantee these rights on an equal footing with nationals of the destination country. The challenge is to give practical expression to these rights and to make them a reality during and after the smuggling process. Regrettably, there is a marked disparity between the principle of universal application of human rights norms to smuggled migrants and the actual practice of States. This is due both to the resistance of States to be seen as giving rights to 'illegals', but also to a lack of understanding of these rights and how they apply to irregular non-nationals at the operational level. This has led to calls for 'soft law' frameworks to be developed at the universal level to respond to the needs of vulnerable migrants, including those who have been smuggled and have suffered abuse and exploitation during the smuggling process.⁴⁰

Whether such a response is necessary and will materialise remains to be seen. One benefit of such an approach is that it may focus the discussion and responses

³⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art. 37(b).

³⁹ However, under art. 16 of the ICRMW the right of review applies to all migrants, regardless of their immigration status.

⁴⁰ Stefanie Grant, 'International Migration and Human Rights' (Global Commission on International Migration, September 2005); Alexander Aleinikov, 'International Legal Norms on Migration: Substance without Architecture', in Kyszarz Cholewinski, Richard Pernelchoud and Euan Macdonald (eds.), *International Migration Law* (TMC Asser Press, 2007) 467; Alexander Betts, 'New Issues in Refugee Research, Towards a "Soft Law" Framework for the Protection of Vulnerable Migrants' (United Nations High Commissioner for Refugees, 2008).

on the needs of the individual rather than on whether the individual is a victim of trafficking in need of protection or a smuggled migrant who has breached immigration law. At the same time, it is necessary that more be done to draw to the attention of States their existing human rights obligations towards smuggled people and the duty to give full effect to them in good faith.

9.4. CONCLUSION

The Trafficking and Smuggling Protocols have become the cornerstone of the international community's efforts to combat these forms of criminal activity. They make a significant contribution to standardising national legislation in criminalising the phenomena, and promoting cooperation between States in their efforts to combat the activities of organised crime.

While both instruments state as objectives the protection of the human rights of those affected, the protections provided are limited, particularly for those who have been smuggled. However, as acknowledged in both instruments, the Protocols are not exhaustive in the protections they provide. Human rights law has particular relevance and continues to apply to the affected individuals regardless of whether they have been involved in irregular migration.

Since the adoption of the Trafficking Protocol, a substantial body of hard and soft law relating to the trafficking of human beings has developed. The international community has rallied to raise awareness of the plight of victims and appropriate responses by those officials who come into contact with them. However, longer-term protection for those who have been rescued but are still in an irregular situation remains a challenge in most destination countries.

In contrast, the development at the international level of hard and soft law for the protection of smuggled migrants has been far more circumspect. Smuggling has to some extent been neglected by lawmakers, many of whom still believe that those who have been smuggled are complicit in a criminal offence, and still view them simply as irregular migrants, or criminals, to be removed.

Given the clandestine nature of trafficking and smuggling of human beings, it is difficult to quantify the effectiveness of the Protocols in the fight against these practices, or the progress that has been made in combating organised crime in this regard. Nevertheless, the international framework for the criminalisation of the two phenomena, and international cooperation in prevention, detection and return, are far more robust as a result of their adoption. While their effective implementation at the national level has its challenges, a helpful framework has been established, and there are many international and non-governmental organisations working with governments to implement the Protocols at the national level. Nevertheless, a key challenge remains in ensuring the effective protection of those who have been trafficked or smuggled.

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KEY RESOURCES

- Anti-Slavery: www.antislavery.org
- Council of Europe, *Action against Trafficking in Human Beings*: www.coe.int/t/dghl/monitoring/trafficking/default_en.asp
- European Union, *Fight against Trafficking in Human Beings*: <http://ec.europa.eu/anti-trafficking>
- UNODC, *Human Trafficking and Migrant Smuggling*: www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuaside
- US Department of State, *Office to Monitor and Combat Trafficking in Persons*: www.state.gov/g/tp