



INTERNATIONAL COUNCIL
ON **HUMAN RIGHTS** POLICY



Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence

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Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence

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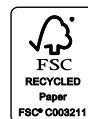
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PREFACE

Human beings have always migrated: it is how they peopled the Earth. For most of human history, when population density rose or land became scarce or exhausted or communities felt insecure, people moved – in search of food and water, to marry and to cement alliances, to occupy land that was empty, or to displace other people by force. Literature tells us that the romance of adventure abroad is as deep a human impulse as nostalgia for home, and that both are intimately connected. The spread of agriculture, just six thousand years ago, anchored farmers to land in firmer ways, creating more formal claims to ownership and new forms of social collision (between nomads and farmers, and warriors and farmers), as well as vertically stratified social hierarchies. Even more recently, the formation of nation-states created fixed frontiers policed by state authorities that claimed sovereignty over territory (and the people occupying it) on the basis of national systems of law.¹ Even as the state system consolidated, mainly during the nineteenth and twentieth centuries, very large numbers of people moved from poor or overpopulated societies to lands that were relatively empty: from Ireland and Central Europe to North America, from Italy and Eastern Europe to South America, from Britain's colonial states in Asia to Southern and Eastern Africa. As has always been the case, these movements were generated by a combination of need and opportunity. Flight from poverty, landlessness, lack of economic prospects, war and disasters at home mingled with the lure of wealth, hope of security from persecution, and dreams of freedom from want and fear.

Today, the need for protection and the attraction of opportunity continue to drive international migration. Poverty and insecurity compel millions of people to consider leaving their homes. Opportunities to expand personal and familial horizons beckon in both the global North and South. Mass communications have made immediately visible the wealth and opportunities that exist abroad. Technologically, it is now much easier and faster for individuals to travel long distances. Transnational networks facilitate this movement and advertise the opportunities available. Changing demographics create a need for migrant labour.

The world today is nevertheless fundamentally different from the days of the great migrations. No large spaces of attractive land remain unclaimed; and states assert legal authority over all the Earth's land surface. This means that, in a way that was never historically the case, human movement is policed. Moreover, almost everywhere migration implies movement *into other societies* – creating sharp issues of social acceptance and integration, and competition over employment, wages and access to resources, and cultural identity.

1 Often dated from the Peace of Westphalia in 1648.

Human movement has therefore become one of the most intractable and sensitive policy issues – not only in the ‘rich’ member countries of the Organization for Economic Cooperation and Development (OECD) but also in states that are comparatively wealthy. Countries like South Africa and Malaysia attract significant numbers of migrants from within their regions, and face challenges that resemble those which confront the United States or the European Union (EU). Some societies, such as India, Mexico and Thailand, both attract migrants and send many of their citizens abroad in search of better opportunities. “Expatriates” too, move across the globe, between countries of the North and to countries of the South, to manage business, conduct diplomacy or do humanitarian work. Finally, very significant movements of people occur within the South, in numbers that surpass the more publicised South-North migration.

The aspect of migration that is currently debated most heatedly is irregular or “illegal” migration, which occurs when people enter or reside in another country without having received legal authorisation from the host state to do so. Irregular migration is a sensitive political and policy issue in all countries. Irregular migrants are frequently perceived as a threat, by governments which are reluctant to create legal channels for their entry, and by the general public which perceives that their presence contributes to insecurity or unemployment. As Koser has pointed out, “the political significance of migration far outweighs its numerical significance”.² For migrants themselves, irregular status simply enhances their vulnerability to human rights abuses, discrimination, marginalisation and exclusion.

This report examines the political predicament that confronts governments and other political actors when they address the issue of irregular migration. Primarily, it sets out the rights, and claims to protection, that migrants are entitled to make under international human rights law and other forms of international law. Recognising that states have a responsibility to manage their borders, and that states and the societies they govern have a common interest in promoting their prosperity, it argues that it is not in fact in the real interest of governments to criminalise or scapegoat irregular migration. Migration brings many benefits, as well as some costs. Moreover, it is an ancient feature of human society that states cannot suppress without sacrificing values that are fundamental to social wellbeing and trust. In terms that we hope are realistic, the report argues that, for ethical reasons but also reasons of interest, states should shun xenophobic rhetoric, which permeates most public discussion of irregular migration and policies designed to address it. Instead, states should affirm their commitment to protect the rights of all those who fall within their legal responsibility, including migrants, because they too are human beings entitled to protection.

2 He also points out that while globally no more than 50 percent of migrants are in an irregular situation, in the EU this figure could be as low as 10 percent of total migrant numbers. See Koser, 2007, p. 59.

Migration, and irregular migration, will not disappear. To the extent that wealth and economic opportunities are unequally distributed and that environmental and other forms of insecurity persist, migration will continue to occur. This report suggests that government policies should make this their point of departure: people move. The question then becomes: what values do societies wish to advance? The report suggests that, for institutions of government, those values should determine the treatment of all those who fall within government's sphere of responsibility, and all who reside or are found within the society in question. It proposes elements of the policy approach that might emerge if migration were to be considered in these terms.

INTRODUCTION

Several points can be made about irregular migration at the outset. First, migrants can become irregular in a number of ways: by entering the country of destination in a clandestine or unlawful fashion, by having their documents arbitrarily confiscated by their employers, or by staying on in the country after their asylum application is rejected. Most irregular migrants will have entered their country of destination in a regular and lawful manner. Having lapsed into a situation of irregularity *after* entry, many will have already established their presence in society, albeit one that is extremely precarious.

Few states have an untroubled record of handling or “managing” migration, and very few have dealt effectively with irregular migration. Across the world, migrants suffer exploitation (mainly by employers), mistreatment (by employers and official authorities), and discrimination (from employers, the authorities and society at large). During their journey, migrants often take great risks to circumvent official frontier or police controls, and many die en route, sometimes in appalling circumstances.

Those who successfully cross the border and find work illegally usually take great pains to avoid contact with public authorities and as a result they and their families may be deprived of education, social security and access to health services. The criminalisation of irregular entry further increases the vulnerability of migrants to abuse and exploitation.

Almost everywhere, political discussion of migration is impoverished. Few political leaders succeed in discussing the issue in terms that are rational, or respectful of those involved, or that properly take account of the complex interests at stake. In many countries different political parties and politicians engage in a race to the bottom over who can sound ‘tougher’ on the issue. Public debate about migration tends to pander to xenophobia and chauvinism, fostering a climate in which the challenges and opportunities that migration generates *cannot* be addressed successfully.

This is perhaps unsurprising. Migration does indeed raise visceral emotions. Migrants may be seen to compete for work, often with less skilled and economically vulnerable groups in the receiving society. They are also different: they bring new lifestyles and languages, traditions and values. Throughout human history, the outsider, the ‘other’, has been the focus of suspicion and often hatred.

For several reasons, nevertheless, the failure of states around the world to develop well-balanced policies or to discuss migration in well-balanced terms needs to be addressed. First of all, migration will continue. It has occurred through human history and there is no reason to suppose it will now stop. Secondly, it is significant economically. Skilled and unskilled migrants make an essential contribution to dynamic economies and generate revenue

for their home communities. A rational, rather than irrational, discussion of their economic roles, not only in countries of origin but also in countries of destination, is clearly desirable. Third, poor migration policies lead to several forms of abuse and criminality. They fail to combat xenophobia, which leads to abuses against minorities; they encourage discrimination and ostracism; they exacerbate the abuses perpetrated by human trafficking and other associated criminal activities; and they foster the development of shadow economies that encourage illegal and abusive conditions of employment. Finally, unbalanced enforcement policies designed to prevent migrants from crossing frontiers illegally can cause unacceptable suffering and misery. Thousands of migrants have suffocated in lorries in attempts to reach Europe, or perished of thirst in the desert between Mexico and the United States, or drowned at sea at the borders of Europe and Asia. Failure to prevent such ghastly suffering discredits claims by the states involved that they respect humane values. Harsh policies of interception may themselves be responsible for violence and abuse, and may push more migrants towards illicit and often dangerous channels of entry.³

THE THREE STRANDS OF MIGRATION POLICY

On what foundation, then, should a sound approach to migration be laid? The research on which this report is based suggests that, historically, migration policies have been constructed on three essential and complementary foundations. The first is the enforcement of sovereignty (that is, the claim of states to exercise political, economic and social control in the territories they govern). Under international law, states are entitled to control movement across their frontiers and determine who can enter, reside and work in their territories (though this entitlement is constrained in certain respects by international human rights obligations that states have voluntarily assumed). At a time when sovereignty is being loosened by other influences (such as transnational business and trade, and the movement of capital or information across borders), governments use migration control measures to demonstrate their sovereign control over territory and to palliate public concerns that sovereignty is being undermined.

Economic interest has been a second strand. Migration is frequently encouraged by states and by employers because migrants meet labour shortages. They take unpleasant jobs that local people do not want, and provide skills that local people lack. Migrants often fill gaps in the labour force of societies with dwindling birth rates. They generate wealth, sustain services, are often a

3 Brouwer and Kumin (2003, p. 9) point out that “most enforcement mechanisms designed to prevent illegal or unauthorized migration, such as ... carrier sanctions and immigration control activities ... have the side effect of encouraging the expansion of smuggling and trafficking networks”. Brolan (2003, p. 579) notes in addition that, for many migrants and particularly asylum seekers, “being smuggled is a reasonable alternative to bureaucratic, time consuming, and therefore life-endangering legal migration”.

dynamic and creative element in society, and frequently cost less to employ. The success of many economies is due partly to the energy and creativity of their migrant communities.

The third key element of policy has been protection. Almost all governments recognise, and it is certainly accepted in law, that states have a duty to protect and safeguard the basic rights of *all* individuals who are in their territory. It is increasingly understood that this responsibility (rather than a capacity to protect its territory from external attack) lies at the heart of a state's claim to be legitimate and, in that context, that states have a sovereign responsibility to uphold voluntarily assumed obligations, including the duty to respect, protect and promote human rights.

States have responsibilities towards non-citizens, including migrants, though they are sometimes different and continue to be less clearly articulated, in practice and in law. This is especially true for those who have no valid documents or have entered a country in an irregular manner.

In international law, migrant non-citizens are separated into several categories that are subject to different treatment and levels of protection, even though every individual is entitled to certain protections under international human rights law by virtue of their humanity, regardless of their legal status at any given moment. A specific regime of international protection has been developed for refugees and those who claim refugee status. International conventions also protect people from being rendered stateless. More recently, new standards have been developed that provide protection to people who are considered to have been trafficked. Migrant workers, both documented and undocumented, benefit from the protection of a specific human rights instrument, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers' Convention), though few receiving states have ratified it. Migrant workers are also protected by international labour law.

Some categories of migrants are protected less completely, or are rendered more vulnerable because their legal claim to protection is (or is perceived to be) unclear. This is true of many temporary or seasonal migrant workers, for whom countries often make specific bilateral or multilateral arrangements that can leave workers under-protected or exposed to unusual risks. Migrants who cross national frontiers in an irregular manner, including those who are smuggled, are even more vulnerable to abuse.

Unsurprisingly, of the three strands of motivation that underpin migration policies, states are most likely to marginalise the protection element. The protection of irregular migrants does not self-evidently advance the interests of states or those of citizens. In some regards, a state's legal obligations towards migrants may also be considered less clear, and less extensive, than its obligations towards its own citizens.

This last statement requires qualification. First, states have specific responsibilities to provide protection to all people who fall within their jurisdiction, including irregular migrants. These duties do not disappear because of the legal status of the person; nor are they over-ruled by sovereignty.⁴ Second, wherever migrants are wholly unprotected, abuse and criminal exploitation tend to proliferate, leading to forms of abuse and suffering that no government with a commitment to the rule of law or basic rights should tolerate. The responsibilities here are both legal and moral. When the criminal effects of illegal exploitation of migrants are taken into account, alongside the contribution that migrants make to the economy and society, we believe it is in the longer-term interests of states and societies to protect the dignity and rights of migrants.

In this context, it is important to underscore the obligations of states and other relevant actors to protect and promote the rights of refugees, who seek international protection from persecution having suffered serious human rights abuses in their own countries. States have specific legal duties in relation to refugees and asylum seekers, including the obligation of *non-refoulement* and the obligations to provide effective protection and to search for durable solutions. This report recognises the particular importance of refugee protection; but it focuses on irregular migrants, whose situation is made vulnerable by legal and policy protection gaps, and who, because they are 'mere' migrants, suffer abuse and discrimination that are often tolerated with impunity.

A comment should also be made regarding internal migrants, who move inside their own countries, from rural to urban areas, or from less to more prosperous parts of the same country, or who are displaced by conflict, development, or for environmental reasons.⁵ The position of such migrants is often precarious and they too are often under-protected. However, this report concentrates on international migrants, who are particularly vulnerable to abuses of their human rights because they live outside their countries.

TOWARDS POLICY COHERENCE

International migration is not mainly or essentially a matter of numbers. A deeply established social process, its ebb and flow reflect large shifts in social,

4 For example, the UN Committee on the Elimination of Discrimination Against Women stated recently that: "While States are entitled to control their borders and regulate migration, they must do so in full compliance with their obligations as parties to the human rights treaties they have ratified or acceded to", CEDAW Committee, General Recommendation No. 26 on Women Migrant Workers, 2008.

5 Estimates suggest that the number of internal migrants is far larger than the number of migrants who cross international borders. The United Nations Development Programme has estimated that there were 740 million internal migrants in the world in 2009, almost four times the number of migrants that have moved internationally. See UNDP, 2009, p. 21.

economic and environmental conditions, as well as great differences in wealth and opportunity across the globe. Firm government action may close some smuggling routes (though entrepreneurs are likely to open new routes very quickly). Energetic policy interventions may succeed in lowering the rate of irregular border crossing, or the number of migrants working clandestinely. Nevertheless, the cyclical character of migration, as well as its forcefulness, need to be understood. When home economies pick up, some migrants will go back; an economic downturn in destination countries will have the same effect. Equally, insecurity and poverty, and international differences in employment demand, will incite people to move.

These points underline the truth that it is inappropriate and unrealistic to set policy objectives that seek to “end” human movement – because that goal is unachievable. Policy should instead focus on managing a flow that is in continuous flux and which, like other large social processes, involves the safety and welfare of numerous human beings. In the absence of policies that protect and promote the rights of migrants and that respond honestly to the needs of economies and societies, harsh immigration restrictions will simply boost trafficking and smuggling, and economic activity that is unregulated and abusive.

A range of strategies will need to be considered in order to develop policies that are effective, and many of these cannot be addressed in this report. They include investments in economic development and poverty alleviation, and policies (including aid, trade and investment strategies) that address the causes of migratory movement. It is encouraging that in recent years international discussion has begun to address the links between migration and development, and the need to deal with causes.⁶ Migration generates many short- and longer-term consequences that, if managed in a balanced way, can contribute positively to the economy and culture of any given society. By focusing on law enforcement and marginalising protection, current policies tend to stifle these positive aspects of migration. They maintain migrants at their most vulnerable and fail to address the causes of human movement or the illicit processes that arise from it. Though this report does not consider in depth these larger systemic issues, it is hoped that, when framing future international policies on migration, states devise long-term measures that will reconcile the concerns of all those who have an interest in migration and its effects, and do not simply export repressive or enforcement models that merely prevent migrants from reaching the frontiers of receiving countries.

The report’s main argument is that domestic policies respectful of the rights of migrants not only benefit individual migrants, but are in a broader sense in the interests of governments (and citizens) in receiving countries. The narrow impulse to exclude feeds intolerance and xenophobia. This is not just morally unpleasant and hypocritical; it undermines principles of law and fundamental

6 See GFMD, 2008.

political values. In a similar way, the impulse to promote or tolerate economic migration where it brings economic benefits, but not to recognise or regulate it appropriately, generates many forms of exploitation and abuse that also undermine principles of law and may have important harmful economic effects in the longer-term. As noted in a recent study, “[migration] policies based on misunderstanding or mere wishful thinking are virtually condemned to fail”.⁷

The report has two aims. It seeks first to set out the *minimum* rights that all migrants should enjoy, including irregular and smuggled migrants. It focuses particularly on irregular migrants and smuggled migrants because these groups are least protected in law and practice. Irregular migrants are in a limbo, without clear status or protection, unable often to access basic rights such as housing, health care and decent work. The situation of smuggled migrants highlights in particular the vulnerabilities that accompany many migrants during their journey and at borders. Asylum seekers, regular migrants, and trafficked persons enjoy more legal protection in certain respects, although they too are vulnerable and will often be denied these rights in practice.

Secondly, the report urges governments to develop and promote more balanced policies that integrate protection (based on human rights principles) with economic interest and law enforcement. It argues that, because perverse and unacceptable consequences follow when protection is marginalised and because most countries that attract migration need migrants, it is in the interest of governments that want their economies to be productive and efficient to protect the rights of migrants who live and work in their societies. In the same manner, governments that respect the rule of law have an interest in developing and applying border control and entry regimes that protect human rights and do not merely exclude and apprehend irregular migrants. These objectives are not just ethically desirable. Protection of migrants from harm is only one element of motive: protection of the reputation of the state and longer-term economic and social interests are also at issue. Descriptions of the suffering and death of migrants during their journeys suggest to the public that their government has lost control of its borders, and to the international community that the state is ignoring its humanitarian obligations. Unbalanced public discussion of migration obstructs the effective integration of migrants, and inhibits the achievement of social cohesion and other larger societal objectives.

TERMS AND LANGUAGE

The report emphasises law and protection, because protection and respect for human rights are indispensable to the coherence and long-term sustainability of migration policies. It does so also in the belief that the migration policies of many governments are essentially self-defeating, because their objectives contradict one another and depend on conceptual distinctions that are confused.

7 Castles and Miller, 2009, p. 300.

This is one reason why the report tussles with terms and language. It describes the general rights that all irregular migrants should enjoy, regardless of their means of travel, and looks in particular at the situation and experience of smuggled migrants. We will see how fluid these groups are, in contrast to the legal or working definitions which tend to be logically exclusive. Thus, the report distinguishes between “smuggled” and “trafficked” migrants (notably in the context of the Palermo Protocols), but recognises that “smuggled” and “trafficked” migrants may be impossible to distinguish in reality. It notes that it is difficult to use motive as the only basis on which to determine status, recognising the continuum that exists between the poles of explicitly forced and explicitly voluntary movements. In short, it analyses law in an area where legal tools are exceptionally difficult to apply for both conceptual and practical reasons.

Chapter I introduces the issue, examines the scale of migration, and defines and explains the different categories of migrants that may be called “irregular”.

Chapter II discusses the relevance of law enforcement policies to protection.

Chapter III outlines the impact of economic interest and its relevance for protection.

Chapter IV summarises some of the dilemmas that current policies generate.

Chapter V sets out references in international human rights legal standards that are relevant to the protection of migrants. It explores the main human rights treaties, including the Migrant Workers’ Convention.

Chapter VI comments briefly on two other bodies of law – labour law and international criminal law – which complement human rights law and in some cases extend, or limit, the legal entitlements of migrants.

Chapter VII describes the recent application of international criminal law, giving particular attention to the two Palermo Protocols which govern the smuggling and trafficking of persons. It outlines some of the conceptual shortcomings of these documents.

The report is mindful throughout that migration generates knotty and conflicting issues for political leaders, policy-makers and officials. It acknowledges that policy-makers must weigh the economic benefits of migration against its costs, uphold the rule of law while protecting victims of criminality, and manage the exceptional sensitivities of public opinion in this area. In the final chapter, the report seeks to provide policy-makers with some elements of a coherent and more humane public policy response to migration and irregular migration.

The Appendix summarises the rights of migrants across a range of international legal instruments, including the rights of migrants implicated in human smuggling.

PART ONE

CONTEXT

NUMBERS AND DEFINITIONS

NUMBERS

It is currently estimated that around 214 million individuals are international migrants, representing some 3.1 percent of the world's population. A first simple point that needs to be made, therefore, is that the vast majority of the world's people do not migrate abroad.⁸

**International (documented and irregular) migrants (in millions)
worldwide 1970-2010⁹**

	Migrants	Population	World %
1970	81.3	3 696	2.2
1975	86.8	4 074	2.1
1980	99.3	4 442	2.2
1985	111	4 844	2.3
1990	154.9	5 280	2.9
1995	165.1	5 692	2.9
2000	176.7	6 086	2.9
2005	190.6	6 465	3.1
2010	213.9	6 793	3.1

It is difficult to draw simple conclusions about migration trends. Though the number of international migrants of all kinds is thought to have more than doubled between the 1970s and 2010, the world's population has also increased sharply. In addition, migration statistics are not uniform and the definitions of migrant categories vary from one country to another. For example, some states offer naturalisation to certain migrants, or remove naturalised migrants from their statistics, whereas others do not.¹⁰ For obvious reasons, too, it is particularly difficult to gather accurate statistics on the number and situation of irregular migrants.

8 UNDP, 2009, p. 21. See also IOM, 2008, p. 2.

9 UN DESA, <http://esa.un.org/migration>. Percentages of world international migrants are calculated from UN DESA's statistics.

10 In 1991, for example, the break-up of the former Union of Soviet Socialist Republics (USSR) gave rise to a statistical discontinuity because people living in one of the newly independent successor states who had been born in another of those states became international migrants at independence without having physically moved. This change resulted in the addition of some 27 million people to the number of recorded international migrants. The addition was backdated to 1990 in order to make 1990 figures comparable with those for 2000 in terms of the countries covered.

Migration is a global phenomenon. The main receiving countries are listed below.¹¹ It is notable that, apart from the United States, no single country receives a disproportionate number of migrants. Even when the United States is included, the “top ten” receiving states account for no more than half the population of reported migrants. The examples of India and Australia are a reminder, too, that proportions of migrants relative to the domestic population are likely to influence the economic and political impact of migration, and perceptions of impact, more than absolute numbers.

International migrants in selected countries (in millions)

	Total (2005)	Total (2010)¹²	% of world total (2005)	National population (2005)	% of national population (2005)
United States of America	38.4	42.8	20.1	298.2	12.9
Russian Federation	12.1	12.3	6.3	143.2	8.4
Germany	10.1	10.8	5.3	82.7	12.3
France	6.5	6.7	3.4	60.5	10.7
Saudi Arabia	6.4	7.3	3.3	24.6	25.9
Canada	6.1	7.2	3.2	32.3	18.9
India	5.7	5.4	3.0	1'103.4	0.5
Australia	4.1	4.7	2.1	20.2	20.3

A small number of people who cross international borders are granted asylum as refugees under international or regional refugee protection regimes, though a much larger number are granted other complementary forms of protection. The estimated numbers of refugees worldwide and by major area are set out below.¹³

11 IOM, 2005, p. 397.

12 The figures for 2010 are taken from UNDP's 2009 Human Development Report, which notes that “2010 predictions are based on long-run tendencies and may not accurately predict the effect of unexpected short-term fluctuations such as the 2009 economic crisis”. See UNDP, 2009, Statistical Tables Annex, <http://hdr.undp.org/en/reports/global/hdr2009>.

13 UNHCR Statistics, available at www.unhcr.org/statistics.html. Figures include refugee populations, excluding “other persons of concern to UNHCR” such as asylum seekers, internally displaced persons, returnees and stateless persons.

Individuals granted refugee status (by region) 1995-2007

	1995	2001	2004	2007
Sub-Saharan Africa	5'972	3'284	3'022	2'272
Asia and Pacific	915	938	837	2'674*
Middle East and North Africa	3'812*	4'811*	3'065*	2'654
Americas	869	682	598	499
Europe	3'527	2'503	2'318	1'580
World	14'860	12'029	9'567	9'679

*Includes Central and South West Asia

IRREGULAR MIGRATION

The United Nations has estimated that globally there are approximately 30 to 40 million irregular or undocumented migrants, a number that amounts to between 15 and 20 percent of all international migrants.¹⁴ About 1.9–3.8 million are estimated to be in the European Union,¹⁵ and some 10.3 million in the United States.¹⁶ Around 30-40 percent of all migration flows in Asia are estimated to take place through irregular channels.¹⁷ Indeed, some commentators estimate that “well over” 50 percent of all migrants in Asia and Latin America are in an irregular situation.¹⁸ It is believed that one in every five migrants living in the United States and Europe entered clandestinely or overstayed a visa.¹⁹ However, while these numbers are clearly significant enough to warrant the attention of the international community and individual governments, it should be noted that most of these figures are estimates. It is widely accepted that the

14 UN DESA, Population Division, Trends in Total Migrant Stock: The 2003 Revision, www.un.org/esa/population/publications/migstock/2003TrendsMigstock.pdf. It is important to bear in mind, however, the fact that it is very difficult to accurately count the numbers of irregular migrants on a national, regional or international level. The 2009 Human Development report makes the point that most estimates of migrant numbers are derived from censuses, and that “there are good reasons to suspect that censuses significantly undercount irregular migrants, who may avoid census interviewers for fear that they will share information with other government authorities”. See UNDP, 2009, p. 23.

15 Clandestino, <http://irregular-migration.hwwi.net>.

16 According to 2005 estimates available at www.migrationinformation.org/Feature/display.cfm?id=329.

17 IOM, www.iom-seasia.org.

18 Koser, 2007, pp. 57-59.

19 UN Economic and Social Survey 2004, www.un.org/esa/policy/wess/wess2004files/part2web/part2web.pdf.

majority of irregular migrants do not appear in statistics, given the particular difficulty of obtaining comprehensive and accurate information on their number and situation.

DEFINITIONS

Definitions matter practically because determination of status decides whether an individual is eligible, or not eligible, to claim certain rights associated with status. It is therefore important to understand the differences of definition that distinguish trafficked from smuggled migrants, smuggled migrants from asylum seekers who have been smuggled, and regular from irregular migrants. In the case of asylum seekers and refugees, definition of status enables states to identify migrants in relation to whom they have international protection obligations.

The fact that distinctions can be made between groups of people, however, does not mean that they are not hazardous to apply in practice. The research undertaken for this report highlights that border or migration officials face acute difficulties in applying legal distinctions to the real experience of migrants. In practice, the choices migrants make (or are compelled to make) are such that it is frequently difficult to assert whether they are wholly smuggled or wholly trafficked, whether they chose or were compelled to leave their countries of origin, and whether they left for reasons which can fit clearly into accepted protection categories. Many asylum seekers adopt (or are forced to adopt) the same means of transport as smuggled migrants and can therefore find themselves classified by officials as smuggled migrants, despite their claim to international protection. Persons defined by the state of destination as “economic migrants” can include people who left voluntarily to take up well-paying expatriate jobs, people who found employment and overstayed, and people compelled by severe socio-economic deprivation or discrimination to leave their countries and take jobs that are dirty, dangerous and demeaning. Generalised definitions fail to take into account the variety of circumstances that migrants are in, or the acute vulnerability of some of them.

A core policy challenge for those who enforce migration policy is therefore that, while some categories of migrants can be defined clearly, individuals cannot be allocated to those categories in any simple manner. Many individuals fall across and between, and this situation is responsible for much of the sense of unfairness that migrants feel, many of the claims of discrimination that are made by migrants' advocates, and some of the high-handedness of which officials are accused. The migration experience is also a dynamic one; an individual can fall in and out of several 'categories' during his or her journey.

For the purposes of this report, the following general definitions are used:

Migrant

There is no internationally agreed definition of a migrant. However, certain definitions have become more useful than others. Migrants can be defined as:

- a. Persons who are outside the territory of the state of which they are nationals or citizens, and are in the territory of another state;
- b. Persons who do not enjoy the legal recognition of rights which is inherent in the granting by the host state of the status of refugee, permanent resident or a similar status; or
- c. Persons who do not enjoy legal protection of their fundamental rights by virtue of diplomatic agreements, particular visas or other agreements.²⁰

This definition applies to individuals who meet any of the above criteria, regardless of how they crossed the border, or whether their stay in a transit or destination country is legal.

Irregular migrant

An irregular (or undocumented) migrant is a person who lacks legal status in a transit or host country. It refers to people who entered the territory of the state without authorisation, as well as to those who entered the country legally and subsequently lost their permission to remain.

Refugee

A refugee is a person who, on grounds provided by the 1951 Refugee Convention, is outside his or her country of nationality and is unable, on the same grounds, to seek the protection of his or her country.²¹ People fleeing conflicts or generalised violence are generally considered to be refugees, although sometimes under legal mechanisms other than the 1951 Convention.²²

20 UN Commission on Human Rights Special Rapporteur on the Human Rights of Migrants E/CN.4/2000/82, 6 January 2000. Other sources have defined a migrant as “any person who lives temporarily or permanently in a country where he or she was not born, and has acquired significant social ties to that country” (UNESCO, 2005); or as “a person who moves from one place to another to live, and usually to work, either temporarily or permanently” (Amnesty International, 2006).

21 The 1951 Refugee Convention provides as grounds “well-founded fear of prosecution for reasons of race, religion, nationality, membership of a particular social group or political opinion”, Article 1A(2).

22 Including the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees.

Asylum seeker

An asylum seeker is an individual who seeks international protection and whose claim has not yet been finally decided by the country in which it was submitted. Not every asylum seeker will ultimately be recognised as a refugee, but every refugee is initially an asylum seeker.²³

Trafficked person

A trafficked person is one who is coerced to travel to another country for the purpose of exploitation.²⁴

Smuggled person

Regardless of whether he or she is a migrant or an asylum seeker, a smuggled person is one who travels voluntarily but illegally to another country with the assistance of a third party.²⁵

Note on the term “illegal” migrant

This report does not use the term “illegal” migrant. Juridically and ethically, an act can be legal or illegal but a person cannot.²⁶ Entering a country in an irregular fashion, or staying with an irregular status, is not typically a criminal activity but an infraction of administrative regulations; such acts are, at most, a misdemeanour rather than a crime. Use of the term “illegal”, moreover, is particularly unhelpful because it lends credence to the assumption that irregular migrants are always engaged in criminal activities.

23 UNHCR, August 2005.

24 The technical definition is one who, subject to “recruitment, transportation, transfer, harbouring or receipt by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve consent of another person under whose control the person lies, for the purpose of exploitation”. UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UNCTOC, Article 3(a).

25 Technically, a smuggled person is someone who is the object of “procurement, in order to obtain a financial or material benefit, to enable that person to gain illegal entry into a state of which that person is not a national nor permanent resident”. UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UNCTOC, Article 3(a).

26 The UN General Assembly endorsed the terms “non-documented or irregular migrant workers” to define workers that illegally or surreptitiously enter another country to obtain work (1975). Regional bodies have also expressed a preference for terminology that does not refer to “illegality”. Thus the Council of Europe has stated that it “prefers to use the term ‘irregular migrants’” (Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), *Human Rights of Irregular Migrants*, point 7). The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers similarly refers to “migrant workers who, through no fault of their own, have subsequently become undocumented” (Association of South East Asian Nations, *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 13 January 2007).

EVALUATING THE SCALE OF IRREGULAR MIGRATION

Irregular migrants rarely have a domestic constituency to advocate on their behalf and are generally perceived to be a political liability. This explains why benign neglect is often the high watermark of government protection. It is common for states to invest far more resources on irregular and smuggled migrants who have died than they would ever consider while they were alive. This posthumous recognition of their humanity is powerfully illustrated in the following report about a group of Mexicans who died while attempting to cross the Arizona desert:

"The unofficial policy was to let them lie where they were found... All cases, for all corpses require paperwork. The Border Patrol is no different. Each corpse generates a case file. Every unidentified corpse represents one case forever left open... But uncollected – unreported – bones generate no files... Forensic evidence would consist of such things as fingerprints. But the nature of desert death is such that forensic evidence is quickly obliterated. The body mummifies. In one of the million ironies of the desert, those who die of thirst become waterproof..."

The bodies that are identified ... are embalmed, then placed in a cloth-covered wooden casket. This undertaking costs \$650. If they are to be flown home, the "air-tray" to hold the casket costs an extra \$50. The Mexican consulates pay for the embalming and other parties – sometimes the governments of the walkers' home states – pay for the flights. For more than 80% of the dead it is the most expensive gift they have ever gotten."²⁷

In practice, the term "irregular migrant" covers a broad range of situations. A person may be in an irregular situation because he or she has overstayed a visa or residence permit, or because an employer has withdrawn arbitrarily an authorisation to work that is tied to immigration status. Some will have been deceived by recruiting agents, smugglers or traffickers into believing that they were entering or working in a regular manner. The term may cover asylum seekers who have been denied refugee status and continue to stay in a country irregularly. It is applied to those who entered clandestinely in the first place, including people who have been smuggled or trafficked across the border, and people who have by themselves entered illegally or in an irregular manner without the use of third parties. It is important to remember that many, if not most, irregular migrants will not have entered their country of destination clandestinely, and that the status of many migrants will become irregular because of an arbitrary or unlawful act by a state or non-state actor. Many migrants will fall in and out

27 Urrea, 2004, pp. 37-38. He writes in addition that: "Ironically, the other expensive investment made for smuggled migrants is the medical cost of resuscitation and rehydration. If a migrant is arrested in the US, medical costs are born by the federal government. If a migrant is sent to hospital for medical treatment, however, the latter pays the bill. In 2000, the University Medical Center in Tucson, Arizona spent \$6.5 million (unrecoverable) on treatment of undocumented migrants... [E]lder care, emergency services and long-term care for American citizens were forced to shut down all over Arizona as the toll mounted", p. 180.

of an irregular status throughout the life cycle of their migration; at times this will occur by choice, at others because of confusing and opaque visa regimes.

It is extremely difficult to assess accurately the precise scale of irregular migration or, within it, the number of migrants who are smuggled or trafficked. This is not simply because human smuggling and trafficking are clandestine and criminal. Migrants are themselves reluctant to present themselves to the authorities in many countries for fear of deportation by those authorities or reprisals by their smugglers or traffickers. Authorities in source countries may be loath to divert resources to combat the irregular migration of their citizens, especially in cases where migrants' remittances make a substantial contribution to the economy. Authorities in destination countries may not undertake serious studies of the issue because the health of their economy depends on low-wage, undocumented workers. Border guards and customs officials may not report accurately because they may themselves be complicit in smuggling or trafficking operations; they may also inflate figures to justify increased policing, or deflate them to make border controls appear more effective than they are.

It has been estimated nevertheless that there are up to 3.8 million irregular migrants in the European Union.²⁸ In the United States, the number of irregular migrants is estimated at over 10 million, with 500,000 unauthorised arrivals every year. 20 million irregular migrants live in India; the Russian Federation has an estimated 2 million. A recent study estimated that the UK hosts around 700,000 irregular migrants, approximately 425,000 of whom live in London.²⁹

At the same time, the Global Commission on International Migration (GCIM) has calculated that between 2.5 and 4 million migrants annually cross international borders without authorisation.³⁰ One commentator has observed that it is important to distinguish “stocks” from “flows” of irregular migrants: “[I]n many countries stocks far outnumber new arrivals. Most irregular migrants worldwide are already present in destination countries. And very often these people have found work, have somewhere to live, and even have children at school. In other words they are already part and parcel of the societies in which they live.”³¹

Not only the numbers require interrogation. The reasons why individuals migrate and are smuggled or trafficked across borders also need to be investigated carefully. Some migrants and asylum seekers will resort to illegal entry or unauthorised stay because avenues for legal migration have become increasingly restricted. For the same reason, growing numbers of asylum seekers have begun to use the services of smugglers to evade immigration controls.

28 Clandestino, <http://irregular-migration.hwwi.net>.

29 GLAEconomics, 2009.

30 GCIM, www.gcim.org/attachements/Migration%20at%20a%20glance.pdf.

31 Koser, 2007, p. 60.

Irregular Migration in Italy

"[I]t is taken for granted that irregular migration is equal to clandestine migration, that clandestine migration takes place mostly across the Mediterranean (now, to Sicily), and that clandestine migration is promoted by mafia-like groups of smugglers, or criminal cartels."³² The reality is quite different from this. The largest share of irregular migrants entered or stayed in the country through the abuse of visa conditions rather than through clandestine means. Police data suggest that: "15% of the illegal migrants in Italy enter the territory crossing borders with false documents or else concealed inside means of transportation; 10% are made up of illegal aliens landed on Italian shores, 75% are overstayers."³³

In 2009, Italy instituted legislation criminalising the movement and residence of irregular migrants. These laws have made irregular entry or stay a crime, punishable by a fine from between 5,000 to 10,000 Euros. In addition, being present irregularly in the country has been made an aggravating circumstance for migrants who commit an offence.³⁴ Civil servants and public employees (doctors, teachers and municipal employees) are obliged to report irregular migrants to the police or face criminal charges. Anyone who knowingly rents property to a migrant in an irregular situation is liable to a prison sentence of up to three years. The law also allows civilian vigilantes (known as *ronde*) to conduct organised patrols in order to alert police to public order offences or suspected criminals. While these vigilante groups would not have the power of arrest, critics of the law fear that it will enable extremist groups to embark on campaigns of violence and intimidation against migrants in Italy. Acknowledging that the intent of the law was punitive, a member of Italy's ruling coalition asserted that "this legislation introduces harsher punishments to ensure more security – this is what Italian citizens want".

As noted, it is important to look closely at the whole migratory journey in order to pinpoint vulnerability along the way. Conceptually, this implies exploring the situation of migrants:

- Before departure
- During transit
- At the border
- Within the country of destination
- On return to the country of origin

This report looks most closely at the situation of migrants in an undocumented or irregular status because they are the least protected, in law and practice, at all the above stages.

32 Sciortino, 2004, p. 19.

33 Delicato, 2004, p. 4.

34 The WGAD noted in this context that: "[I]n other words, if an Italian citizen and an irregularly present foreigner steal a car together, the foreigner is to receive a significantly higher sentence than the Italian. This is a provision that does raise some concern." Statement of the WGAD on the conclusion of its mission to Italy.

Several factors further compound the precarious situation of many migrants. Poverty, discrimination (because of race, gender, ethnicity, religion, nationality or other factors), marginalisation and exclusion will heighten their vulnerability to abuse. Where few channels exist for legal entry, many migrants will find themselves obliged to seek assistance if they are to travel. Those migrants who have few choices at the start of their journey (regarding their destination, mode of transport, and conditions of employment at destination, for example) will often find their vulnerability follows them as they live and work, often irregularly, in their country of destination. For large numbers of migrants, finally, the fact that they were smuggled at the start of their journey will be a factor that enables further abuse.

THE BUSINESS OF HUMAN SMUGGLING

It is often presumed that human smuggling is organised by large, mafia-like criminal networks that transport arms, cultural treasures, body parts and drugs, in addition to human beings. According to a typical characterisation: “[The smuggling network] is like a dragon. Although it’s a lengthy creature, various organic parts are tightly linked.”³⁵ The terms “smuggling” and “trafficking” are often used interchangeably to refer to irregular, commercially-assisted border crossing involving human exploitation.

In reality, “smuggling” of persons spans a wide range of activities. Very small-scale individual entrepreneurs provide transport across a particular border for a moderate fee or payment in kind. Informal groups of agents supply various services (shelter, food, route advice, means of transport) for a lump sum. More formalised networks offer complex products (false documents, coaching with immigration interviews, travel arrangements across several countries, safe houses, links to employers) against a large initial down-payment. In other cases, long-term repayment is based on slave labour after entry, which can then transform the situation into trafficking. The sector is complex and in evolution, reflecting an industry that transforms itself quickly and effectively in response to changes in demand and the effectiveness of state policing.

Several typologies for describing and categorising the human smuggling industry have been suggested. One distinguishes agents who service a single route from agents who service several – specialists versus generalists. Different forms of organisation can be found regionally, nationally and continentally. Another typology distinguishes agents who offer a service tailor-made for the needs of an individual or group, from those whose services are more impersonal. The latter may still be logistically sophisticated: they may smuggle by truck

35 Ko-lin, 2001.

across several frontiers, fabricate false papers, coach migrants for interview, and create plausible profiles (for example construct family groups³⁶).

As with more traditional businesses, in the human smuggling industry demand and risk affect price. Effective immigration controls increase the demand for services that smugglers provide and the cost of those services. According to one study, the price that “snakehead” smugglers charged to bring migrants from China’s Fujian province into the US doubled between the early 1990s and 2001.³⁷ Similarly, when US border controls tightened after September 2001, the price that Mexican migrants paid to “coyotes” to take them across the border into Arizona reportedly tripled.³⁸ As these services become more complex as well as dangerous, prices rise. This produces a situation in which, by some estimates, commercial assistance to help migrants secure undocumented or irregular entry generates up to \$10 billion a year worldwide.³⁹ A highly differentiated, profitable business that yields substantial material rewards, it is a classic growth industry – largely fuelled by, and dependent on, government policies.

Has the scale of human smuggling increased? There is anecdotal evidence of some increase in some countries. Between 1997 and 1999, for example, the number of smuggled migrants detained by the US Border Patrol rose from 9 percent to 14 percent of all apprehended migrants.⁴⁰ Yet, as noted, it is difficult to obtain numbers and unwise to rely on those available. Structural disincentives to record accurate information are compounded by inconsistent terminology. Some studies take into account all irregular migrants (whether assisted or not); others consider smuggled migrants alone; or consider only trafficked migrants; or consider only women or children trafficked for the purposes of sexual exploitation (and not forced labour). Such inconsistency makes inter-agency and inter-governmental information-sharing especially difficult.

As one commentator has noted: “There is a fundamental lack of hard evidence relating to most aspects of the problem. Methodologies for studying both traffickers/smugglers and their clientele are barely developed, the theoretical basis for analysis is weak and, most importantly, substantial empirical surveys are few and far between.”⁴¹

36 Newsmax.com staff, 2006.

37 From \$28,000 to some \$60,000. See Kyle and Liang, 2001.

38 To more than \$1,500. See LeDuff, 2003.

39 Martin and Miller, 2000, p. 969; and Widgren, 1994.

40 Ewing, 2005, p. 454.

41 Salt, 2006, p. 32.

Whatever the facts, it is clear that human smuggling is *believed* to be well organised and pervasive. States have responded to it with an increasing sense of urgency, and to a growing extent have focused their migration policies on the control and containment of migrant smuggling. Recognising the inadequacy of many of the domestic immigration control measures mentioned, they have embarked on ambitious international programmes of transnational law enforcement.

Government officials and policies regularly bracket irregular migration together with international criminal activities like drug trafficking, money laundering and terrorism, a trend that has been more evident since new political and security policies were introduced after September 2001. As a result, irregular migrants have increasingly been seen as a security threat, xenophobia in many receiving countries has intensified, and law enforcement responses have become more punitive. Governments have increasingly turned to criminal law, which imposes fewer responsibilities for the protection of non-citizens, to provide a framework within which to control or “manage” migration.

I. THE LAW ENFORCEMENT CONTEXT

This chapter does not describe or analyse in detail law enforcement policies that address migration. Its purpose is to establish the relevance of law enforcement to protection of migrants and the links between enforcement policy and protection policies.

Border crossing has never been a legal right, or even a human right.⁴² Its regulation is a state right, a quintessentially domestic preoccupation. Unlike the movement of goods or services between states, which have long been the subject of international initiatives, states have tended jealously to guard their exclusive rights to encourage, regulate or prohibit the movement of persons. This is not surprising. Control over territory, and in particular control over who has access to legal residence within state borders, remains an essential feature of state sovereignty.

Migration is therefore generally permitted in law and administrative policy when the state decides that it is beneficial: when migration supplements a domestic need for labour, expertise or investment; when migrants provide a market for domestic businesses, such as education or tourism; or when migration satisfies legal residents' legitimate expectations for family reunification. Where migration is not perceived to be beneficial, on the other hand, it is usually prohibited – and where it occurs nonetheless, it is considered to be irregular or illegal (though often tolerated). In short, the boundaries between legal and illegal migration are generally set by domestic law, enforced by national law enforcement agencies, and managed by political authorities.

A few exceptions can be identified. A century ago governments passed international laws criminalising the “white slave trade” (sexual trafficking of European women and girls).⁴³ These laws brought “white slave traders” to court when possible, encouraged removal or deportation of the women involved, and devised common measures to fortify state borders against irregular entry. Their

42 Even in the context of the refugee protection regime, while refugees have a right to seek and enjoy asylum from persecution (UDHR, Article 14(1)), states have no concomitant duty to accept the entry of asylum seekers on their territory. States retain the right to grant asylum in light of their own interests, though this is tempered by the customary obligation of *non-refoulement*. See Goodwin-Gill, 1998, pp. 172-174. By contrast, the right of all persons to *leave* any country, including their own, and to return to their own country, is universally recognised. The right to leave does not incur a concomitant right to enter a country of which the person is not a national. See ICCPR, Article 12; ICRMW, Article 8; and UDHR, Article 13.

43 The 1904 International Agreement for the Suppression of the White Slave Traffic focused on “the procuring of [European] women or girls for immoral purposes abroad” (Article 2). It was primarily a law enforcement instrument emphasising detection and repatriation.

emphasis was on repatriation and protecting the state's interests, however, rather than on protection of the women in question.

Half a century later, the Holocaust starkly demonstrated that states could destroy their own nationals and that people would sometimes need to cross international borders, with or without permission, to save their lives or escape serious harm. In 1951, governments created the UN Convention Relating to the Status of Refugees (the 1951 Refugee Convention) which affirmed that states have an obligation to assist people from abroad if they are forced to flee their country to protect their lives, freedom or fundamental rights. Concern to protect asylum seekers and refugees, rather than damage to the state, lay behind this initiative; its goal was ostensibly protection of the persons concerned rather than state interest.⁴⁴

Irrespective of the motivation behind the creation of the international refugee regime, it is noteworthy that states did not surrender their prerogative to determine who received refugee status, and retained their right to refuse this status to anyone who was determined to be ineligible to receive international protection. This said, States Parties to the 1951 Refugee Convention are obliged to grant asylum or refugee status to all who qualify. Moreover, they agreed that no one who sought protection would be sent back to a state where his or her life or freedom would be threatened (the principle of *non-refoulement*).⁴⁵ This decision meant at minimum that threatened individuals would be granted temporary permission to stay in the receiving state until danger to them abated. In practice, the availability of refugee status has provided a powerful counter-balance to the general restrictiveness of state migration policy. The 1951 Refugee Convention remains one of the most effective human rights measures created by the international community and was the precursor of other human rights initiatives that protect migrants and other non-citizens.

More recent international collaboration to curb irregular or undocumented migration has continued to include both elements of earlier interventions: a punitive, law enforcement aspect that focuses on harm done to the state by unauthorised border crossing; and a focus on human rights and protection.

Exacerbated by the political impact of terrorist attacks in 2001 and afterwards, however, migration policies around the world – in the EU (and its broad periphery including North Africa and Eastern Europe) and in the United States, in relatively affluent countries of South East Asia, and in Australia – have increasingly

44 Some authors have argued that the 1951 Refugee Convention and post-war refugee policy were in states' self interest, because they enabled states to control what would otherwise have been an unstoppable flow of irregular migrants. "Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self interested control over immigration to the reality of coerced migration." See Hathaway, 1991, p. 231.

45 Convention Relating to the Status of Refugees (CSR), 1951, Article 33.

shifted from protection towards law enforcement, and even criminalisation of irregular migration.⁴⁶ States have recently developed and deployed many new tools to deter entry. They include the construction of defensive walls and barriers; demanding and expensive visa requirements; carrier sanctions; militarised border controls including sniffer dogs; retinal and other biometric scanning techniques; detention; stringent pre-departure checks at departure points; international computerised data storage; reduction of legal channels of entry (including limiting the numbers of migrant workers regularly allowed into the territory through the imposition of quotas); new international laws; and new institutions to advance inter-governmental cooperation and regulation. As one commentator has noted: “[T]he migrant, representing in the public mind a confluence of threats encompassing unemployment, terrorism and international crime, has come to be seen as a problem resolvable only through tighter border controls.”⁴⁷

EU Returns Directive

The EU Returns Directive, adopted by the European Parliament and the Council of the European Union on 16 December 2008, will come into effect in 2010. It addresses the return of irregular migrants, and standardises procedures regulating the expulsion of migrants in an irregular situation, from EU member states. It contains measures that have been widely criticised as abusive of the human rights of migrants.⁴⁸ An irregular migrant may be detained for a maximum of six months even if he or she has committed no crime, and this period may be extended by a further twelve months under certain conditions (if, for example, the immigrant fails to cooperate with the authorities). In addition, an individual subject to a removal order may receive an entry ban, which may prevent him or her from entering the territory of any EU state for a period of five years, regardless of any changes in the situation of the migrant or his or her country of origin. An article inserted by the Council grants the authorities greater flexibility to determine the scope of “emergency situations”. If an “exceptionally large number” of third-country nationals places “an unforeseen heavy burden” on the administrative or judicial capacity of a Member State, that state may authorise longer periods for judicial review as well as less favourable conditions of detention. However, terms such as “emergency situation” are not defined explicitly, creating potential for unbalanced state actions. Human rights groups have criticised many of these provisions, notably the period of detention, the lack of explicit protection for vulnerable groups such as unaccompanied children, and the absence of rigorous judicial oversight. Thomas Hammarberg, the Commissioner for Human Rights of the Council of Europe, has expressed grave concern about the dangers inherent in prolonged detention. In October 2008 the UN High Commissioner for Human Rights also described the detention periods as excessive and an erosion of the right to liberty.

46 It is important to note, nevertheless, that in many countries the events of 9/11 merely justified restrictive policies on migration that had been put in place months if not years before. The trend is not new.

47 Buckland, 2009, p. 153. See also Farer, 1995.

48 See *UN experts express concern about proposed EU Return Directive*, UN Press Release, 18 July 2008. Among others, the South American trade bloc Mercosur issued a declaration voicing “deep rejection” of the European Union’s immigration policy, see Phillips, 2008.

NEW INTERNATIONAL POLICIES

In the late 1990s, states embarked on an ambitious programme of transnational law enforcement in relation to the movement of people. The United Nations Convention against Transnational Organized Crime⁴⁹ (UNCTOC) and its two Protocols on Trafficking and Smuggling (often called the Palermo Protocols), were negotiated and adopted in 2000 with almost unprecedented speed and are examined in detail later in this report.⁵⁰

In the same period, states created new international institutions to regulate the governance of international migration, and processes to improve cooperation in law enforcement matters, including migration. The International Convention on the Protection of All Migrant Workers and Members of Their Families (ICRMW or the Migrant Workers' Convention) came into force in July 2003. In 2004, the UN Committee on Migrant Workers was created under the terms of the Convention, and since then this committee has regularly issued expert guidance on the human rights of migrant workers and their families.

In parallel, international summits and conferences, within and outside the United Nations, have flagged and attempted to define more clearly the links between migration and: development and population (Cairo, 1994); social issues (Copenhagen, 1995); women (Beijing, 1996); and racism and xenophobia (Durban, 2001). A UN High-Level dialogue in 2006 also examined International Migration and Development. In 2003, a Global Commission on International Migration was mandated to analyse gaps and provide a framework for the formulation of a coherent, comprehensive and global response to migration issues and to put migration on the global agenda. Its final report, published in October 2005, recommended six principles for further action to be taken by various state and non-state stakeholders. The Global Forum on Migration and Development (GFMD) is the most recent such initiative. An annual forum which aims to create non-binding, shared understandings on the issue of international migration and development, it is primarily an inter-governmental body that engages with business and civil society interests. The GFMD held its first meeting in Brussels in 2007, to examine economic development incentives for migration.⁵¹ Its second meeting took place in Manila in October 2008 and

49 UNCTOC www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf.

50 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf; UN Protocol Against the Smuggling of Migrants by Land, Sea and Air: www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf.

51 See www.gfmd-fmmd.org.

considered issues of protection in the context of migration and development.⁵² The third Forum meeting was held in Athens in November 2009.⁵³

At regional level, approximately thirteen Regional Consultative Processes on Migration (RCPs) have been created to address common issues on migration. These increasingly important forums discuss migration policy via 'informal exchanges', primarily between states. They vary in size and composition, but all aim in general to contextualise and harmonise migration policies and enhance regional cooperation. While the outcomes of these discussions have been largely symbolic, resulting in non-binding declarations, some have also created agreements and protocols on a variety of issues, including visa arrangements, border controls, the treatment of illegal residence, and expulsion and readmission procedures. An international conference in 2005 on RCPs concluded that many of their decisions led to national initiatives, including amended legislation and new policy on the treatment of migrants.⁵⁴ Such processes demonstrate the growing importance of migration on the international agenda, and can create momentum and enabling conditions for the adoption of more binding policies and practices.

THE POLICY DILEMMA

The effect of recent policies, whether ostensibly to enhance security or to counter trafficking, has generally been to weaken the protections that are or should be available to migrants. Particular groups of migrants and potential migrants, singled out on account of their race, ethnic origin, nationality, or even gender, have found themselves targeted for additional scrutiny, or faced indefinite delay when they attempt to travel.⁵⁵ Virtually all types of legal migration have been affected, including family reunification, temporary migration for study, visits for leisure, visits for business, applications for permanent work permits, and permits for seasonal work. It is especially troubling that it has become

52 See www.gfmd-fmmd.org/en/press-release/philippines-prepares-way-gfmd-manila-october-2008-report-first-fof-meeting.

53 See www.gfmdathens2009.org.

54 See the matrix prepared by the IOM and GCIM, updated in July 2007, based on an IOM-GCIM workshop on Regional Consultative Processes on Migration held in Geneva from April 14-15, 2005.

55 Even recognised refugees have experienced restrictions on movement, such as being unable to access resettlement places. In 2002, the US government made 70,000 refugee spots available, but only 27,070 were admitted for resettlement. In 2003, the ceiling dropped to 50,000, of which fewer than 30,000 were filled. Patrick, 2004.

increasingly difficult for asylum seekers to enter other territories or access procedures in order to claim international protection.⁵⁶

Stringent border controls have not reduced the flow of irregular migrants, however. On the contrary, such controls appear to have triggered the development of increasingly sophisticated smuggling and trafficking networks, and migrants have evolved ever more ingenious techniques for crossing borders. Investigative reports suggest that tight border controls encourage smuggling networks to charge more for their services; thereby rendering migrants more vulnerable to abusive practices. As border surveillance methods become increasingly sophisticated, smuggling and trafficking networks use ever more perilous routes to evade detection, and more migrants are wounded or die as a result.

"It's harder to cross, so there are more Coyotes; the numbers of crossers, in spite of \$5.5 billion spent to stop them, keep swelling; deaths increase; wildlife is endangered; landscape is ruined; and supply and demand rule – Coyotes charge more every year, and because of this, fewer Mexicans are willing to return to Mexico... They simply can't afford to go home."⁵⁷

Nor has the introduction of new definitional distinctions enabled the authorities to classify migrants, or assess their motives for travel, or their entitlement to protection, more objectively. As this report will argue, it is often difficult to make neat distinctions between the various "categories" of migrants, as they make their journeys, present themselves at the border, or go about the business of finding a job, a house, and feeding and educating their children. Official categories have mostly been created to address the desire of states to police and fortify their borders, rather than the real situation of migrants, including their need for protection. As a migrant moves along the migration continuum, his or her position is often fluid, and the distinctions made between "smuggled" and "trafficked" migrants frequently become hard to apply and artificial. Both smuggled and trafficked migrants face a similar variety of challenges to their human rights during their journeys and after arrival. For both, human rights considerations often play a role in their decisions to migrate. In many cases, too, the decision to migrate may be rooted in individuals' desire to improve and take control of their own lives. Even those migrants who clearly use smugglers voluntarily may become victims who require protection if they subsequently

56 Between 1992 and 2002, the number of asylum seekers submitting onshore applications in the EU nearly halved (from 685,000 to 360,000). In the same period, the number of asylum applications submitted in the US and Canada fell by nearly a third (from 142,000 to 98,000). UNHCR Population Data Unit.

57 Urrea, 2004, p. 49. The US border patrol captured over 40,000 children being smuggled into the US from Mexico in 2003: "Their number has soared 70% in the past four years... Parents moved to the United States alone and get settled, then hire smugglers to bring their children across the border", Mariso, 2004.

suffer violence or exploitation. The distinction has merit to the degree that it draws attention to groups of migrants who are particularly exposed to risk and exploitation. However, it would be sounder to think of “smuggled” and “trafficked” as points on a continuum rather than discrete categories. Were points on this continuum to be correlated with degrees of coercion (reflecting a migrant’s reasons for leaving as well as his or her experiences en route and after arrival), it could become feasible to provide corresponding and appropriate levels of rights protection.

The overall effect of restrictive state law enforcement policies has been to put irregular migrants at greater risk, directly and indirectly. Large numbers find themselves in precarious, dangerous or exploitative situations, during transit and increasingly when they reach their destinations. Tighter controls at state borders (nevertheless often ineffective), combined with failure to protect vulnerable migrants from gross human rights violations, have worsened the risks that migrants face without reducing the pressures and incentives that cause them to travel. This is disastrous for migrants and for public policy and, in receiving countries, has created an impression in the public mind that governments have lost control over their borders and simultaneously relinquished their humanitarian obligations.

The increasing criminalisation of irregular migration is also a cause for concern. It is worth re-emphasising the point that, in terms of their legal status, irregular migrants have committed administrative infringements rather than criminal offences. The injury for which they are responsible, such as it is, has been perpetrated on the sovereignty of the receiving state. The Working Group on Arbitrary Detention (WGAD) has noted that “criminalizing irregular entry into a country exceeds the legitimate interest of a State to control and regulate irregular immigration, and can lead to unnecessary detention”.⁵⁸ The mere fact of being at odds with immigration procedures does not mean that the migrant is a criminal. The Special Rapporteur on the Human Rights of Migrants has urged that immigration offences should remain administrative in nature.⁵⁹ Enforcing the law and upholding human rights standards are not always the same thing. This is starkly the case when the content of domestic laws is contrary to international norms, but can also be the case when the objectives of law enforcement are at odds with protection goals.

58 WGAD, Deliberation No. 5, concerning the situation regarding asylum seekers and immigrants.

59 Report of the Special Rapporteur on the Human Rights of Migrants, 2008.

Four key points emerge from this chapter:

- The application of the principle of state sovereignty to border control is deeply established. Border enforcement is a fundamental prerogative of statehood. It is, however, increasingly recognised that sovereignty is bounded by the obligations of international law that states voluntarily assume. Such obligations include human rights protections.
- Coercive law enforcement is not effective in the face of determined attempts to cross borders. This has been as true in recent times as it has been historically.
- Coercive law enforcement without human rights protection has always led to arbitrary applications of law and to morally unacceptable harm to migrants. This too has been true recently and historically.
- Assessment of the situation of migrants and accompanying principles of protection should focus on risk of harm and on the protection of the human rights of migrants, rather than solely on their motives or their purpose in travelling – even if categorical distinctions (such as asylum seeker, irregular, smuggled, trafficked) have some descriptive and legal value.

II. THE ECONOMIC CONTEXT

The purpose of this chapter is not to describe in detail the ways in which governments and businesses have an economic interest in migration, or the various economic impacts that migrants have on economies and societies in their countries of origin or employment. It is self evident that migrants, most of whom are migrant workers (according to the definition of the ICRMW), will play a role in global and local economies. The purpose of this chapter is to establish the relevance of economic interest to protection, and the links between economic policy and protection policy in the sphere of migration.

The following story of migrant workers in Malaysia illustrates the protection gaps which put many migrant workers at risk.

“Local Technic Industry ... [is] a typical Malaysian company, one of many small makers of the cast-aluminium bodies for hard-disk drives used in just about every name-brand machine on the market. But that’s precisely the problem: it’s a typical Malaysian company. About 60 percent of Local Technic’s 160 employees are from outside Malaysia. “They have been fooled hook, line and sinker” [says a company executive], “they have been taken for a ride”. It’s not Local Technic’s fault, he insists: sleazy labor brokers outside the country tricked the workers into paying huge placement fees for jobs that yield a net income close to zero. “They say they were promised 3,000 ringgits [\$950] a month”, the manager says. “How can we pay that? If we did, we would be bankrupt in no time. [One migrant] paid a broker in Bangladesh \$3600 to get him a job at Local Technic. When he arrived, he says, he learned he was making \$114 a month after deductions for room, board and taxes. The math is simple; minus the broker’s fee, his net monthly pay is \$14. If he never spends a penny on himself, three years of back-breaking labour will earn him a grand total of \$504... So why don’t these foreign employees just quit? Because they can’t, even if they find out they’ve been cheated by the very brokers who brought them there. Malaysian law requires guest-workers to sign multiple-year contracts and surrender their passports to their employers. Those who run away but stay in Malaysia are automatically classed as illegal aliens, subject to arrest, imprisonment and caning before being expelled from the country... Malaysian law effectively makes every foreign worker a captive of the company that hired him or her. In the name of immigration control, employers like Local Technic are required to confiscate guest workers’ passports and report any runaways to the police. No one blames company managers for lies told by independent labor recruiters inside or outside the country. Yet new recruits keep coming.”⁶⁰

Economic interest has always been an important strand of migration policy, though the net impact of migration on local and national economies is not clear. While some commentators have condemned the “brain drain” of skilled workers, lured from their countries by promises of better salaries and living conditions, others have welcomed the “brain gain” in newly acquired skills that migrant workers bring back with them when they return to their home countries. Similar arguments pit those who believe global remittance flows reduce poverty and benefit the economies of countries of origin, against those who believe that

60 Wehrfritz, Kinetz and Kent, 2008.

they contribute to inflation and exacerbate socio-economic inequalities.⁶¹ In the context of economic globalisation, complex pull and push factors create a demand for international labour mobility. This demand is felt at all levels, across the range of skills that migrants possess, although this is often recognised only in regard to highly-skilled workers.

People migrate for a variety of complex and interlocking reasons that are social as well as economic. The former include the existence of family and diaspora networks, linguistic and cultural familiarity with the country of destination, and better access to health and education services. The impact of migration is similarly multifaceted, extending to the economies, but also societies and cultures, of countries of origin and destination. Official migration policy is therefore rarely constructed solely in response to economic imperatives, the push and pull of labour markets, the internationalisation of trade, or declines in real wages. Governments must consider the needs and capacity of the societies into which migrants move, and will often restrict migratory movement into their territory in response to societal rather than economic demands.⁶²

Migrants are drawn to wealth and opportunities but also contribute in a distinctive way to economic vitality. Often driven or attracted out of their own economies by the absence of incentives and opportunity, they move to economies that need labour and offer work, and by doing so help to maintain the economic activity and competitiveness of the societies they adopt (in part because the time of migrants is cheap). Contrary to popular opinion, significant numbers of international migrants move between industrialising countries. In industrialised countries, the majority of migrant workers are to be found in the service sector, including construction, catering, health care and domestic service. In industrialising countries, they tend to concentrate in agriculture, fishing and mining, as well as in manufacturing.⁶³

For many migrants the economic and other imperatives that led them to leave

61 World Bank newly available data shows that global officially recorded remittance flows reached USD \$338 billion in 2008. To this figure must be added the flows of money remitted by migrants through irregular channels, which do not show up in official data. Remittance flows have for a number of years significantly exceeded flows of development aid. See World Bank, 2009.

62 After the recent global financial crisis, several countries in Europe and elsewhere announced reductions in the quotas of foreign workers legally entitled to enter and work on their territory, despite little evidence that such cuts are able to target those industries most affected by the crisis. The UK has introduced a points-based system favouring highly skilled over unskilled migrants, Australia has reduced skilled migrant intake by 14 percent, and Spain has introduced a “voluntary return” programme. The World Bank has warned that such measures may be counter-productive, because “[a] crisis is the worst time to impose immigration restrictions both for the sending and the destination country”, IRIN News, 2009.

63 IOM, 2008, p. 32.

their countries in search of work and opportunity will result in improved standards of living for themselves, their families, and even the wider community. Some will return without difficulty to their country of origin, having earned enough to provide a comfortable retirement. Others will circulate between different countries, improving their skills and knowledge base. In one or two generations, some migrant families will carve a niche for themselves in the host society, provide education and a legal status for their children or grandchildren, and secure citizenship. Others will not be so lucky: they will return to their countries of origin, often as old men and women, and some will still be heavily in debt to their recruitment agents or brokers. They will be unable to transfer their pension to their country of origin, a society which they no longer know, and which no longer knows them. Owed wages by their employers, migrants who have returned home may not be in a position to claim compensation in the courts of the host country. Many of this last group will have entered their country of destination in an irregular manner; some will have been smuggled; the unlucky and most vulnerable will have been trafficked.

IMPULSES TO INCLUDE: DEMAND FOR IRREGULAR MIGRANTS

The industrious “illegal” is a familiar stereotype. She serves middle class employers as housekeeper and nanny. She cares for the elderly. She cleans lavatories and offices. Migrants underpin the entertainment, restaurant and hotel industries in cities around the world. In plantations, they spray crops and form the bulk of seasonal workers. In every great city, they are the construction workers doing the most dangerous jobs, often living in cramped quarters and sleeping in shifts. While elite professional migrants – “expatriates” – often enjoy high salaries and superior conditions of work, irregular migrants work long hours for low pay, doing so-called “3-D jobs” (dangerous, degrading and difficult).

At the same time, economic interest, which encourages immigration for commercial and demographic reasons, collides with political hostility. Migrants are perceived to threaten domestic workers’ jobs and working conditions and place strain on public services. The “honest and industrious” migrant confronts the migrant as “illegal scrounger”. This tension is evident in the immigration policies and practices of many destination states. In an increasingly liberalised global economy, competition and the pressure to reduce costs stimulate interest in sources of low cost labour, whether these are imported migrants, or call centres and skilled subcontractors located abroad. In parallel, the evolution of the global economy has tended to destabilise the status of less skilled workers in more industrialised countries, because economic changes have rendered them uncompetitive in relation to countries in the industrialising world, where skills are at least as good and wages and other production costs are far lower. In addition, certain jobs native workers in industrialised countries will just not do. Wealthier populations, having benefited from higher education levels and being protected by well-developed social security systems, can shun 3-D jobs. As a result, industrialised economies, including those in Europe and North

America, experience shortages in low- and semi-skilled labour positions that native workers will not take and that governments do not include in migration quota schemes.⁶⁴ As the ILO notes,

“The recent rise in labour trafficking may basically be attributed to the imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside... The extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply, with migrants serving as the buffers between political demands and economic realities.”⁶⁵

In addition, the OECD has noted that the skills and qualifications of immigrant workers are widely underutilised, and that migrants are more likely than their native-born counterparts to hold jobs for which they appear to be over-qualified. This is particularly the case for migrant women workers.⁶⁶

So it is often claimed that irregular migrant workers drive down wages and take jobs under conditions that nationals are not willing to accept. Some studies, including a report on Mexican migrants in the United States by the Center for Immigration Studies, have found that low-skilled migrants have a negative effect on the receiving state's economy, depressing wages in poorly-paid sectors and taking more out of social services than they contribute.⁶⁷ George Borjas, by contrast, who based his research on 30 years of census data in the US, found no direct correlation locally between the arrival of irregular migrants and lower wages – but a discernible effect at national level.⁶⁸ Other studies, including one commissioned by the UK Home Office in advance of a 2002 White Paper, concluded that immigration has no adverse effects on wages or employment among the resident population and may even be correlated with wage growth.⁶⁹ Similarly, the UN World Economic and Social Survey of 2004 notes that migrants have “only a modest impact” on the wages and employment rates of locals, and some studies suggest that migrant workers contribute more to the receiving state in taxes than they take out in benefits. A Trades Union Congress study in the UK concluded in 2007 that: “[T]he overall impact of immigration is limited but positive. Migrant workers contribute more in taxes than they receive in benefits, and migration probably leads to higher levels of employment and wages for native workers. Migration may possibly be linked to an increase in

64 According to an ILO researcher, in 1998, France only granted one visa to a Chinese garment worker; in the same year approximately 2000 Chinese migrants were working illegally in the garment industry in Paris. Personal Communication, Gao Yun, ICHRP seminar, August 2004.

65 ILO, 2004.

66 OECD, 2007.

67 Camarota, 2001.

68 Borjas, 2004, unpublished paper on file with the author.

69 Dustmann, Fabbri, Preston and Wadsworth, 2002.

wage inequality in this country, but the evidence is not conclusive.⁷⁰ A 2008 UK study on the local impact of migration suggests that migrants benefit local economies by taking “hard to fill” jobs at the margins of the labour market. The overall impact on low-skilled domestic workers is minimal, although there might be some short-term losses. In the long-term, the study determined that migration boosts productivity, particularly in large urban areas.⁷¹

It is therefore worth emphasising that comprehensive data on the impact of migration on wages is limited, uneven and contested. The evidence suggests that migrants are more likely to be unemployed than the local labour force, that they are the first to be laid off in difficult economic times, and that, in industrialised economies such as Western Europe and the US, they earn less than domestic workers in comparable jobs.⁷²

Similarly, there is limited data or analysis about the effects of migration on gross national product and economic growth. Some economists have stated that its impact is positive because migration allows countries with high labour costs to compete with countries where labour costs are lower, to increase the size of the total workforce, and to stimulate capital growth.⁷³ It has been projected that global GDP (gross domestic product) could receive a net benefit from migration in the form of flow-on gains, rising global incomes, and increased remittances to countries of origin.⁷⁴ Others conclude that cheap labour discourages employers from modernising their production systems and therefore reduces competitiveness.⁷⁵ In international fora, such as the UN High Level Dialogue on International Migration and Development and the Global Forum on Migration and Development, governments have increasingly recognised the economic benefits of migration.⁷⁶

In short, the impulse to exclude that is characteristic of restrictive border control policies is counterbalanced by an economic impulse to promote or tolerate economic migration (including undocumented or irregular migration) wherever migration will bring economic benefits. Lack of data and rigorous analysis means that it is difficult to produce a complete picture of the net economic costs and benefits of migration. Moreover, in formulating their migration policies, governments will rarely rely on economic data alone, but will take into

70 Trades Union Congress, 2007.

71 Institute for Public Policy Research, 2008.

72 IOM, 2005, pp. 169–170.

73 White House Council of Economic Advisers, 2007, p. 3.

74 One economist is of the opinion that “even a marginal liberalization of international labour flows would create gains for the world economy”. See Rodrik, 2002.

75 For a brief account of some of these arguments, see IOM, 2005, pp. 163–173.

76 See for example the GFMD, 2008.

account other factors such as the (perceived or real) socio-cultural capacity of the society to integrate migrants.

Calls for amnesty, regularisation of immigration status, and programmes to increase legally sanctioned modes of entry for low- and semi-skilled labour reflect the economic arguments for promoting greater international labour mobility. Businesses and employers are often at the forefront of such calls. Business organisations recognise that it is in their interest to retain workers they have trained. Many acknowledge also that migrants are entitled to protection.⁷⁷

The more general demand for “migration management” is also to some extent an economic response. Governments commend “managed migration” primarily

“The Special Rapporteur observes that the increasing criminalization of irregular migration, in the case of movement for economic purposes, does not adequately address issues of demand driven labour and the needs of the receiving economies. A predominant push factor for migrating is perceived employment and, despite the reciprocal relationship between economies that may be able to absorb additional migrants, labourers which move in search of employment based on perceived demand in the host country, it is often the irregular migrant which is penalized... A clearer picture of the economic needs of a given State and the gaps that labour mobility can fill, through regularized channels and with adherence to basic human rights standards, may contribute to the generation of a shift from xenophobic tendencies in host societies.”

Report of the Special Rapporteur on the Human Rights of Migrants, A/HRC/7/12.

77 As illustrated in the ILO Tripartite Meeting of Experts that resulted in the adoption of the Multilateral Framework for Labour Migration in 2006. The issue of migration is increasingly also being discussed by business leaders. A series of roundtables on business and migration was recently organised under the auspices of The Hague Process which bring together CEOs and senior management from a wide range of sectors (notably finance, services, extractive, construction) to discuss migration from a business perspective. A roundtable held in Denmark in February 2009 noted that “migrant workers provide a cost-effective and hardworking labour force in labour-intensive industries, but they are also vulnerable, isolated and often heavily indebted... Although engaging with policy makers might lie outside the core realm of business responsibility, companies, as the drivers of global labour demand, are in a unique position to have far-reaching impact on an overall paradigm shift in how international labour migration between emerging economies is viewed, legislated and managed. This would require collaboration among businesses and engagement with partners outside the realm of business, with organisations such as NGOs, multistakeholder-initiatives, etc.” Presentation on ‘International Labour Migration – A Responsible Role for Business’ by Peder Michael Pruzan-Jørgensen, Business for Social Responsibility (BSR), DIEH Conference on Migrant Labour in Global Supply Chains, January 2009, www.thehagueprocess.org. See also the Institute for Business and Human Rights, which has recently established the Business and Migration Initiative, a partnership project between the International Business Leaders Forum and the Institute for Business and Human Rights. The initiative seeks to foster greater business involvement, facilitate dialogue, strengthen the debate and support private-sector led initiatives to raise standards in this business-critical field: www.ibhr.org.

because it promises to create orderly and predictable flows of migrant workers by opening legal channels for their entry, stay and return. Critics of the “managed migration” paradigm have highlighted its overwhelming preoccupation with control and containment, and its disregard for protection.⁷⁸ From an economic perspective, in addition, it can be argued that many models of migration “management” pay insufficient attention to the demands for migrant labour made by domestic employers and businesses.

THE POLICY DILEMMA

One commentator has asserted: “There is general agreement that the world is about to enter a new stage in international labour migration, with more labour migration sources and destinations, and migrants employed in a wider range of industries and occupations.”⁷⁹ In addition, as a European trades union official has observed: “Despite what the politicians or commentators might think, it’s the labour market that regulates how many immigrants arrive.”⁸⁰ Predictably, states more frequently encourage and legitimise the migration of ‘highly skilled migrants’ such as business professionals, nurses, computer technicians, young university graduates. They tend to ignore or delegitimise the migration of less educated and skilled migrants, even though most countries that attract significant migrant flows also have a structural need for low- and semi-skilled workers. The proposed common European Union immigration policy, for example, focuses solely on the “highly qualified work force” and proposes no additional protections or legal channels for the movement of semi- or low-skilled migrant labour.⁸¹ Yet Europe’s ageing wealthy societies require large numbers of low- and semi-skilled migrants in such sectors as catering, hospitality and health care. The OECD confirms that “the continued existence of irregular immigration suggests that there is still a very large unmet demand for low-skilled workers in many OECD countries”.⁸²

Consistent with this position, the OECD has encouraged its member countries to look more realistically at the demand for labour in their economies. Its Secretary General has commented that “constructing a country’s migration policy on the assumption that labour immigrants will only stay for a short time is not the way to go. It is neither efficient nor workable”.⁸³ Yet in recent years, governments

78 See for instance Amnesty International, Statement to the 88th Session of the Governing Council of the IOM, 2 December 2004 (AI Index IOR 30/025/2004).

79 Martin, 2008, p. 77.

80 Lorenzon, 2009.

81 Communication from the European Commission, Policy Plan on Legal Migration {SEC(2005)1680}/COM/2005/0669.

82 OECD, 2008.

83 Schifferes, 2008.

have increasingly considered that temporary or circular migration programmes provide the best tools for managing low- and semi-skilled migration. Temporary migration programmes have been promoted by governments as a source of cheap and flexible labour which appears to reconcile the impulse to exclude with the economic demand for migrant labour. This too, according to the OECD, is no solution: “[C]ycling repeated waves of temporary workers in and out of a country to work at the same jobs is inefficient. Enforcing such a scheme on employers entails substantial economic and political costs.”⁸⁴

In other words, government policies that force employers to meet a demand for permanent labour by hiring temporary workers are inefficient from an economic point of view, and fail to protect the rights of the workers involved. Ignoring these economic realities will result in a continuing inflow of irregular migrant workers who are vulnerable to abuse and exploitation.

Many temporary migration programmes do not allow freedom of movement to and from the country of employment, do not provide the migrant worker with a secure legal status for the entire duration of their employment contract, and do not ensure sufficient protection of the rights of the migrant, including protection from discrimination and abuse. In many regions of the world, rigid and inflexible entry regimes have impeded traditional circular migration patterns, and in some cases increase the vulnerability of these migrants to trafficking. Once in a country of employment, migrant workers in temporary migration programmes find that their permits to stay and work are tied to one employer, leading in many cases to serious human rights violations. Restrictions on fundamental labour rights, such as the rights to freedom of association and to collective bargaining, further increase the vulnerability of migrant workers to abuse. Circular migration policies also remove the need for governments to invest long-term resources in migrants, for their integration, or to provide social services for their families.

With such policies in place, undocumented migration is *likely* to be accompanied by high levels of exploitation and abuse, not only during the journeys that migrants make abroad, and at the border (when they enter or are deported), but after their arrival. That exploitation and abuse may continue for years after the migrant enters his or her adopted economy. Absence of regulation, or repressive regulation that sanctions the migrant rather than the abuser, tend to institutionalise and entrench exploitation and coercion. Smuggled and trafficked migrants are both exceptionally vulnerable groups in this context because they have depended upon third parties to cross borders (and often to find employment), and those parties often have an economic hold over them. In the absence of effective and well-conceived protection policies, in fact, undocumented migration is likely to be accompanied by abuse and by exploitation that may become systemic and criminal.

84 Ibid.

This should be of concern both to employers and the state. There is first an issue of reputation: the standing of government and the reputation of companies both suffer when incidents of abuse and violence affecting migrant workers and their families occur. When migrants are found employed in slave conditions on farms or in factories, or die as a result of gross negligence, it damages the reputations (and often sales) of companies that are directly or indirectly associated, just as it damages a government's reputation for competence and commitment to the rule of law. In addition, the entrenchment of a semi-legalised or criminalised grey employment market creates concerns about more profound distortions of the labour market, tax system and economy. In this sense, calls for regulation and protection of migrant workers are matters of more than just ethical concern. Where whole industries depend on such workers to subsist (as the garment industry and key sectors of agriculture do in some countries, and the restaurant and hotel industries do in others), important long-term economic interests and policies are in play. As in other matters, migration policies – including the absence of adequate social regulation – raise wider issues for political authorities and employers, beyond their impact on the lives of migrants and their families.

Four points emerge from this short chapter:

- Countries with declining populations, or that lack skilled or unskilled workers, have an interest in encouraging migration; and when differences in economic opportunity exist between societies, disadvantaged and ambitious individuals have an enormous incentive to take advantage of those opportunities to move to find jobs, safety, and more dignified lives. Globalisation has created such incentives on a global scale.
- Governments and businesses promote migration, which has played, and plays a vital role in most industrialised and industrialising economies. Migrants do essential jobs and are often willing to work for less money and less security.
- In the absence of protection, for the same reasons, migrants are particularly vulnerable to economic exploitation and various forms of harm.
- Governments and business have a rational interest in protecting the rights of migrants. Businesses have a responsibility to respect international human rights norms,⁸⁵ and a desire to protect their reputation and operations. Governments have international legal obligations, and in addition wish to maintain the efficiency and competitiveness of their economies, and to protect their reputation for probity and competence.

85 The Special Representative of the UN Secretary General on Business and Human Rights has noted that: "Failure to meet this responsibility [to respect human rights] can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate." *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Document A/HRC/8/5, 7 April 2008, para. 54.

III. THE POLICY DILEMMA

“Migration is often the subject of shrill debate – a wedge to provoke social tensions, drive political extremes, fan the flames of discrimination and hatred. Let us never forget that in the end, policies and laws are really about people and values. Too many migration policies assume that migrants will behave in ways that most people do not. For instance, policies might assume that migrants would willingly go home after a short time abroad even if they lack a legal pathway to migrate again.”

UN Secretary General Ban Ki Moon, Opening Address to the Global Forum on Migration and Development, Athens, 4 November 2009

The last two chapters have suggested that the current approach that policy-makers have taken to migration, and irregular migration, fails to frame or regulate it appropriately. Punitive and aggressive border control measures rarely succeed in stopping migration but cause considerable suffering and injustice. Economic policies that encourage or tolerate undocumented economic migration, but do not officially recognise it and do not regulate conditions of work in the “grey economy”, create economic inefficiencies and distortions accompanied by high levels of exploitation and abuse.

To complicate matters further, public rhetoric on the subject of migration policy is often fundamentally less than honest. At best, it omits important dimensions of policy; at worst, it is corrupted by xenophobia and hypocrisy. There is a clear need for a franker, more complete and more intellectually cogent discussion of a complex issue that implicates the social, economic and political interests of most countries and affects the lives of a large number of people.

The power of the socio-economic forces that drive migration (which both compel and incite people to move), combined with the acute political sensitivities that the issue of migration generates, has only made these policy weaknesses more apparent. Instead of reducing the incentives to migrate illegally and in irregular ways, policies have embraced the principles of an open economy while continuing to suppress international labour mobility. At the same time, globalisation has made visible the employment opportunities available in richer countries, and generated numerous new legal and illegal networks for moving people across borders and settling them for profit. Current policies to “manage” migration generally focus on “stemming the tide”, but the “tide” is generated by structural incentives and dysfunctions in the global economy and cannot be stemmed by law enforcement, or control and containment of borders, alone.

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

radical transformation takes place: the thing again becomes human, acquires a soul. Paradoxically, at the point of death a smuggled life reacquires value and regains its human identity and dignity: the dying migrant is recognised once more as a person before the law. This perplexing transformation is evident throughout human smuggling. The despised “illegal” sneaking across the border or hidden in the hold of the ship becomes the vulnerable and pitied irregular migrant, heroically clutched from the hand of death, or a shocking corpse eliciting cries of guilt and shame. The Chinese cockle pickers who perished off the coast of England, the Ghanaian boys who froze in the undercarriage of a transcontinental airliner, the many bodies found in the Mediterranean sea and in the Indian Ocean, became human beings again at the point when they were about to cease living.

A policy that produces these results on a regular basis is unjust as well as ineffective. On the other hand, countries of destination today need to respond to the apprehensions of domestic populations particularly in relation to security; to meet economic needs (not least in the context of the current global downturn); and to avoid creating an economy that relies on insecure, disempowered and under-protected migrant workers. For many countries, in recent times, this mix has been too demanding. Fault lines have developed between countries of origin and those of destination. Policy-makers have dealt with short-term political imperatives, many of which concealed a thinly veiled racist sub-text. Where an economic demand existed for migrant labour, this has often been actively ignored by public policy. And in multilateral forums the world over, states have questioned whether they have any responsibility at all to protect the rights of people who are not their citizens.

The result is apparent. Migration policies in general are in considerable disarray. In parallel, nevertheless, awareness is growing that the three main strands of migration policy – border and law enforcement, economic interest, and protection – are interdependent and connected. The next chapters will focus on measures of protection that are integral to a sustainable and responsible migration policy. They will seek in particular to identify the fundamental rights that all migrants are entitled to claim, irrespective of legal or other status.

I am Justice: A journey out of Africa

This is the story of Justice Amin from Effiakuma in Ghana, who first came to the world's attention in May 2007 when he was found with a small group of sub-Saharan migrants, clinging for their lives to a tuna net in the Mediterranean Sea.

In late summer 2005 Justice, aged seventeen, left his hometown fleeing his abusive uncle and in search of work and opportunity. He went first to Accra, the capital of Ghana.

Justice spent his first month in Accra lugging crates of pineapples and fish, and in return the market traders gave him food. At night, the market boys made fires and cooked rice. A few wanted to be taxi drivers or electricians, but most were saving to escape. "Across the desert", they would say, "maybe to Libya. They have money there". "What about Europe?" Justice would ask, "Europe is my target".

The depot [in Kumasi] was seething. All the buses in central Ghana seemed to have arrived at the same time. "You want Togo? Cape Coast? Côte d'Ivoire?" Everyone seemed to own a vehicle. Justice met Babs, who was from a village called Bakado, on the Cape Coast. "It's not easy", Babs said. "My parents, they collected money from everyone in the village so that I could travel. Now they are waiting. Everyone is waiting. The money I send home will be shared by many." On the way to Ougadougou Justice counted five road blocks: police, customs, immigration, forestry commission, then police again. They all demanded money of those travelling on the bus without paperwork, and everyone who wanted to continue their journey had to pay the bribe. Men joined the route from Côte d'Ivoire and Togo in the south, Mali in the west. They swept across Burkina in their thousands, a migration of the young and ambitious, all heading for the same place: Niger – the desert state.

At the desert city of Agadez in Niger more migrants joined the flow. Up to seventy thousand migrants pass through Agadez each year, two hundred every day, all in transit between sub-Saharan Africa and the Mediterranean coast. Here the boys met JD, driver of a pick-up truck which was already half full of other migrants. "Three hundred dollars", he said, wiping the oil from his hands, "there are a hundred ways into Libya. I know them all". Late on the second day JD stopped on a plain with black peaks. "We have just crossed the Libyan border", he said, "you are safe now". They whooped and clapped, and some of them jumped down to feel the new land beneath their feet. At a nearby settlement they asked a tribesman "Which way is Tripoli?" "Tripoli?" replied the man, "Tripoli is a long way. You are still in Niger, this is not Libya". Justice and Babs never saw JD again.

It was four weeks before another vehicle arrived, a giant shaggy beast of a truck. It headed towards Algeria to a small oasis close to the border, where a guide led them through the desert for seven gruelling days. On the seventh day, when they were nearing the peak, they came across a small camp hidden behind rocks. The migrants walked slowly towards the men sitting there and when they reached the edge of the fire some fell to their knees and wept. "These are my friends" said the guide, "you are close now". They remained in the camp throughout the following day and then, when evening came, their guide walked them a short distance to a high ledge. "The border", he said, "behind you is Algeria, in front Libya. The police are watching. Walk only at night and hide during the day".

On the second day the migrants were confronted by three masked men, with dogs straining on ropes. Each of them cradled a gun. "Papers?" said one in Arabic. "Do you have papers?" "If I had papers", said Justice, "then I wouldn't be crossing the desert. I would be in a plane". The man's eyes swivelled in his mask. "We have been watching you for two days", he said. "Now you are in trouble."

The prison is called Qatrun and it is situated in a barren landscape of gravel and sand. Justice was marooned in one of the most isolated prisons on earth. There was nothing here but this. The only sounds were those it created. Justice kept his head low to the ground, his arms folded on top and the blows were like hot metal when they came.

After weeks of torture in the prison Justice managed to escape it and boarded a bus headed to Sabha, which marked the end of their desert crossing. Here, for more money, a Ghanaian man organised a further bus journey to Misratah and finally to Tripoli. Justice arrived in Tripoli in February 2006.

He'd made it to the top of Africa; all that separated him now from his goal was a band of water. Justice still has a little money from working in Sabha but he knew it wouldn't be enough. He'd need to find work. He did odd jobs before finding work as a butcher's apprentice. The Africans stayed away from the Arabs if they could knowing that every encounter could end in violence or a report to the police station for being illegal.

The dangers of *lampa-lampa* were a frequent topic of conversation. Stories of the dead were a kind of currency, passed from one man to the next. The story of the "balloon boat" full of air that had burst while out at sea was told to the men by the sole survivor of the voyage. The bodies were washed up on Zuwarah beach, where they were lined up on the sand and filmed for Libyan television. They were carrying no paperwork, nothing that could identify them. That's how it normally was. If they had made it to Europe they could have claimed to be from wherever they chose – Liberia perhaps, or Sudan, maximising their chances of political asylum and ensuring they could stay, at least whilst their stories were investigated.

It was a Friday evening after Maghreb prayer when it finally happened. "This night it should finally be possible", Justice was told on the phone, "we can offer a price of 500 dollars but I need to know now". It was a good deal. Some gangs charged three times that. Justice agreed.

A few weeks later he is one of twenty seven men being herded onto a small fibreglass boat. It was when they arrived at the water that the first knife came out. The men were piled into the boat. Those at the front reached out their arms to be pulled aboard scrambling over shoulders and heads. When around twenty had boarded it appeared there was room for no more. But somehow the other seven squeezed in tight. Then one of the Libyans was on board. He was moving a lever which appeared to change the pitch of the boat, higher and higher until it fizzed like a drowning hornet. Then, gently, the boat began to pull away. "Next time you see the moon you will be in Europe", the Libyan said. "It's straight, straight all the way." Then the Libyan turned away, lifted one foot onto the side of the boat and with a swing of both arms, launched himself head first into the air and swam to the shore.

Justice couldn't swim. None of the men onboard could swim. Swimming was a gift, like being able to make leaves into medicine. Justice tried to scramble to his feet. Others did the same but the boat rocked wildly and they dropped back down.

If there'd been a stone Justice would have thrown it. "Let him go", shrugged one, "many of my friends have made the journey. We don't need a captain". Justice turned to him sharply. "If you knew the consequences of what has just occurred you would not say this. Anyone who's spent a season in Tripoli knows the dangers of *lampa-lampa* without a guide."

The migrants managed to keep the boat afloat for some days when it began to leak and sink. Then they spotted a Maltese fishing trawler in the sea in front of them. The trawler was pulling a large tuna net.

"Please save us", shouted the migrants, "our boat is broken". And they waved their jackets in the air and bellowed so loudly they thought that even God must hear. The men on the metal boat stood still, thick arms folded and patterned with tattoos. "There is no room here. You must carry on. Do not try to board the boat. If you try again, we will shoot you." The migrants saw what appeared to be a fence in the middle of the ocean. Justice didn't think the fence would take their weight, not all of them. Yet they launched themselves at it. Another one, and another, and still it took their weight. Justice hadn't felt cold like this before. This sea wind lifted no moisture. It was cold and merciless. Whenever Justice opened his eyes, his lids seemed full of grit and even when they were shut they were weeping and crusted. Is this what happens on the sea? Is this the punishment for wanting what they have?

After a total of ten days at sea the men were finally rescued by an Italian naval ship, the *Orione*, and taken to the Italian island centre of Lampedusa – the inspiration for the term *lampa-lampa*. Such was the ordeal they'd endured, the authorities decided to let them stay, at least for a year. Yet two years after their arrival only a handful had found work. Mostly it was shifts in factories, short-term manual jobs, heavy labour – the sort left over when everything else is gone. Their wages barely covered their rent. But at least they'd found some hope, the briefest taste of milk and honey.

In 2008 UNHCR figures indicated that 31,043 people successfully crossed the Mediterranean from Libya to Lampedusa. The number of fatalities in the sea crossing are unknown ranging from 500-2000 every year. Many hundreds or even thousands more die in the desert.

Extracted and adapted from Paul Kenyon, *I am Justice: A Journey Out of Africa*, London, Preface Publishing, 2009.

PART TWO

PROTECTION THROUGH INTERNATIONAL LAW

IV. INTERNATIONAL HUMAN RIGHTS LAW

GENERIC RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS LAW

What forms of protection are available in international law to irregular migrants, including smuggled migrants? This chapter describes the specific rights of smuggled migrants under international human rights law and identifies rights that all irregular migrants enjoy, regardless of how they travelled.⁸⁶ The following chapter briefly reviews protection afforded under international labour and criminal law.

In broad terms, irregular migrants are in a precarious situation. Having neither legal immigration status nor citizenship of the country in which they reside, they lack specific attachment to the state in which they reside and often remain below the radar of national law. This can mean in practice that the protections to which they are entitled under international law may lie dormant.

Historically, states have been reticent about granting rights to non-nationals. In 1985 the UN General Assembly drafted a Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, an attempt to consolidate and codify the existing human rights norms applicable to migrants. Thinking that such a Declaration might weaken their sovereign prerogative to favour nationals, however, states restricted and ultimately relegated it to relative obscurity.⁸⁷ Recognising the specific and pressing need of migrants for protection, nevertheless, states subsequently negotiated an instrument that protects migrant workers (whether or not they are documented) and members of their families. With very few exceptions, the ICRMW does not create new rights; it brings together and makes explicit the rights to which migrant workers and their families are entitled under general human rights law.⁸⁸

The rights to which migrants are entitled derive from implicit and explicit protections that are contained in a range of sources of international human rights law. The most significant instruments are:

- The Universal Declaration of Human Rights (UDHR);
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- The International Covenant on Civil and Political Rights (ICCPR);

86 For a more detailed listing of the legal provisions under international human rights law that are applicable to migrants, please refer to the Appendix.

87 Fitzpatrick, 2003, p. 170.

88 See OHCHR, 2005. See also Oberoi, 2010.

- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The Convention on the Rights of the Child (CRC);
- The Convention against Torture, and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

International human rights treaties adopted since 1945 confer legal form on inherent human rights and have developed the body of international human rights law. In ratifying them, governments undertake to put in place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at regional and international level to help ensure that international human rights standards are indeed respected, implemented, and enforced locally. Human rights treaty bodies are committees of independent experts that monitor implementation of these core treaties. They do this by reviewing reports submitted periodically by States Parties on steps taken to implement treaty provisions. Treaty Bodies also adopt General Comments and convene thematic discussions on particular subjects to provide substantive guidance on implementation of the treaty in question. See OHCHR, 2008b.

Except for the ICRMW, few of the above instruments contain specific references to the rights of migrants. However, their use of inclusive language (pronouns such as “everyone” and “no one”) implies that their provisions must apply to all persons, regardless of their circumstances,⁸⁹ except where specific reference is made to citizenship rights or lawful residence. So, for example, the “right to life, liberty and security of person”,⁹⁰ the right to “recognition everywhere as a person before the law”,⁹¹ and the prohibitions on “arbitrary arrest, detention or exile”,⁹² and on “arbitrary interference with [a person’s] privacy, family, home or correspondence” (Article 12) apply to all.⁹³ In addition, all migrants are entitled to protection of their economic, social and cultural rights: in this respect the ICESCR entitles “everyone” to the rights to just and favourable conditions of work (Article 7), to an adequate standard of living (Article 11), and to the highest attainable standard of physical and mental health (Article 12).

89 Fitzpatrick, 2003, p. 172.

90 ICCPR, Article 3.

91 ICCPR, Article 6.

92 ICCPR, Article 9.

93 Ibid.

THE PRINCIPLE OF NON-DISCRIMINATION AND DIFFERENTIAL TREATMENT

The International Bill of Human Rights (the UDHR, ICCPR and ICESCR) affirms a range of civil, political, economic, social and cultural rights that generally apply to all persons, as well as the principle of non-discrimination that is central to the idea of fairness in international human rights law. This principle circumscribes the scope of differential treatment. Selective derogation made on the basis of citizenship or immigration status must not be disproportionate, arbitrary or discriminatory; an element of fairness and reasonableness is essential to bring such measures within the bounds of international law.

A number of fundamental civil and political rights – including the rights to life, freedom from torture, freedom from slavery and forced labour, equality before the courts, and equal protection of the law – can never be limited even with respect to non-nationals, including irregular or smuggled migrants. Differential treatment on those grounds is never defensible.⁹⁴

While the ICCPR applies to migrants as well as nationals, however, it does not necessarily apply in the same manner or to the same degree. Article 25 (the right to vote) applies only to citizens, while Article 13 (the right to judicial review of an expulsion order) applies only to non-nationals. Moreover, the ICCPR draws a secondary distinction between regular and irregular migrants. Article 12 (the right to freedom of movement and choice of residence) and Article 13 (expulsion after due process) “only protect those aliens who are lawfully in the territory of a State party... [I]llegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions”.⁹⁵

If differential treatment is therefore sometimes permissible, it should be carefully distinguished from discriminatory treatment. When an individual's claim to a particular right conflicts with the state's interests, the state may take into consideration that individual's citizenship or immigration status in deciding the matter. On such grounds, the state may lawfully deprive non-nationals of certain rights even when it upholds those rights for nationals; it may equally deprive undocumented migrants of certain rights while affording those rights to legally resident migrants. The default position, therefore, is that states are obliged to grant migrants the same rights protection as nationals, except when different treatment can be justified. Often, however, states act without such justification.

94 The Committee on Economic, Social and Cultural Rights has further asserted that States Parties are obliged to ensure that each right enunciated in the Covenant is satisfied to, at the very least, minimum essential levels (including the rights to food, education, water, housing and health). In its General Comments Nos. 12, 13, 14 and 15, the Committee has directed that these core obligations are non-derogable.

95 UN Human Rights Committee (1986), General Comment No. 15: “The Position of Aliens under the Covenant”: para. 9.

At the same time, international law limits differential treatment. The Human Rights Committee has noted that differential treatment is permissible only where distinctions are made to achieve a legitimate aim and where an objective justification exists.⁹⁶ The means employed must also be proportionate to the aim.⁹⁷ This principle applies even during times of emergency, when, under strictly defined conditions, the ICCPR permits certain derogations.⁹⁸ The Committee on the Elimination of Racial Discrimination has similarly stipulated that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.⁹⁹

All migrants, like citizens, are also entitled to claim economic, social and cultural rights under the ICESCR, which theoretically extends to all persons – and therefore to all migrants within the territory. These include wide-ranging entitlements in areas where migrants are often at risk, including fair wages, health care, housing and education. The Committee on Economic, Social and Cultural Rights has noted that the Covenant’s Preamble stresses the “equal and inalienable rights of all” and the Covenant expressly recognises the rights of “everyone” to the various Covenant rights. It also concluded that states have an obligation to eliminate indirect as well as direct forms of discrimination. To illustrate the former, it pointed out that requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates. Finally, the Committee has explicitly affirmed that Covenant rights are available without discrimination to all non-nationals, regardless of their legal status or documentation.¹⁰⁰

The ICESCR (Article 4) permits states to limit the rights contained in the Covenant

96 This committee monitors the implementation of the ICCPR: General Comment No. 18 on Non-Discrimination (1989).

97 Fitzpatrick, 2003, p. 172. Article 8 of the General Comment notes that “equal” treatment does not mean “identical” treatment.

98 See Articles 4 and 12(3). Article 4 notes that: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

99 CERD, General Recommendation No. 30, Discrimination against Non-Citizens.

100 CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2, para. 2), E/C.12/GC/20, 10 June 2009.

where this is required to promote the “general welfare”¹⁰¹ – a vague clause that could permit wide interpretation. The Limburg Principles, which provide interpretive guidance on the ICESCR, assert that this article was primarily inserted to protect the rights of individuals, and was not intended to limit rights affecting the subsistence or survival of individuals or the integrity of the person. According to the Principles, the term “promoting the general welfare” should be “construed to mean furthering the well-being of the people as a whole”.¹⁰²

Article 2(3) of the ICESCR also allows industrialising states to limit the provision of economic rights to non-nationals. Again, however, the Limburg Principles conclude that Article 2(3) addressed the economic influence of certain groups of non-nationals under colonisation and that, accordingly, it should be interpreted narrowly.¹⁰³ The principle of “progressive realisation” (ICESCR, Article 2) reflects a recognition that to some extent the realisation of economic, social and cultural rights may be impeded by lack of resources, and that some rights can only be achieved over a period of time.¹⁰⁴ However, it is clear that lack of resources cannot justify indefinite inaction or postponement of implementing measures. Even when resources are limited, states have a duty to ‘take steps’, including targeting programmes to protect the most disadvantaged, vulnerable and marginalised sectors of their society. In many societies, this group would include migrants, including migrants in an irregular situation.

States therefore have certain immediate obligations in relation to economic, social and cultural rights, including the duties to eliminate discrimination, to take steps to respect the prohibition on retrogressive measures, and to ensure minimum core obligations. The latter rights, which apply equally to *all* individuals present on the territory of the state, include access to: employment; basic shelter; water and sanitation; a social security scheme that provides minimum essential benefits; and free and compulsory primary education.¹⁰⁵

101 ICESCR, Article 4: “[T]he State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

102 Limburg Principles, Article 4, para. 52.

103 The history of the Covenant indicates that the drafters intended to protect the rights of nationals of newly-independent former colonies from resident non-nationals who controlled important sectors of the economy. The Limburg Principles further provide guidance that the term ‘developing countries’ applies to those countries that gained independence and fall under the appropriate United Nations definition of the term, in order to stress further the intentionally limited scope of the article. Limburg Principles on the Implementation of the ICESCR, 1986, paras 42-44.

104 ICESCR, Article 2, paras 1-3.

105 OHCHR, 2008a, p. 13.

OTHER GENERAL HUMAN RIGHTS INSTRUMENTS

In addition to general protections that derive from the International Bill of Rights, migrants enjoy the implicit protection of several other human rights instruments. These include the International Convention on the Elimination of all forms of Racial Discrimination (ICERD, 1965), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the UN Convention against Torture (CAT, 1985), and the Convention on the Rights of the Child (CRC, 1989). Importantly, migrant workers and members of their families also enjoy the specific protections provided to them under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 2003).

Racism and xenophobia

The applicability of ICERD to migrants has been discussed at high-level meetings in recent years, following a rise in xenophobic hate-crimes against migrants, particularly in Western states. The final declaration of a UN World Conference on Racism in 2001 noted that “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism”.¹⁰⁶ In 2004, the UN Committee that oversees implementation of ICERD observed that xenophobia lies behind many of the human rights violations migrants suffer. It called on states to prevent and redress instances of discrimination against non-nationals in such areas as labour rights violations, debt bondage and illegal confinement, rape and physical assault, and unfair access to housing, health care and education.¹⁰⁷ The Committee reminded states that differential treatment based on citizenship or immigration status will constitute discrimination “if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.¹⁰⁸ The Committee on the Elimination of Racial Discrimination has in addition noted the lack of labour protections available to undocumented migrant workers, including discriminatory treatment and poor working conditions such as inhuman workload and excessive hours of work. It has called on States Parties to take all appropriate measures to combat discrimination in the workplace.¹⁰⁹

106 Durban Declaration agreed by the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

107 CERD, General Recommendation No. 20 on Discrimination against Non-Citizens.

108 Ibid.

109 CERD/C/USA/CO/6.

Women

CEDAW is an important source of protection for migrant women. Like the other human rights treaties so far mentioned, it is silent about the rights of migrants as such but makes no distinctions when it obliges States Parties to adopt measures intended for “women”. CEDAW therefore covers, for example, the “private” circumstances of undocumented domestic workers employed within the seclusion of private homes who are especially vulnerable to gender-based abuse; and family networks that exploit the many forms of disempowerment (legal, economic, gendered) from which undocumented migrant women suffer. Similarly, the CEDAW Committee has also addressed the fact that traditional public sphere protections, including law enforcement and welfare support, are unavailable to irregular migrants without “papers”, a classic case of double jeopardy.¹¹⁰

With respect to trafficking, Article 6 calls on states to “suppress all forms of traffic in women and exploitation of prostitution of women”.¹¹¹ The trafficking and exploitation of migrant women received further attention at the Fourth World Conference on Women (1995) and in the resulting Beijing Platform for Action. Whereas the report of the previous World Conference on Women (1985) solely addressed traffic in women for prostitution, the Beijing Platform for Action also included forced labour in the definition. The CEDAW Committee recently issued a General Recommendation on women migrant workers. It focuses particularly on women who migrate independently and for purposes of family unity, and on the situation of women migrant workers who are undocumented. Noting that migration is not a gender-neutral phenomenon, it states that: “[R]egardless of the lack of immigration status of undocumented women migrant workers, States Parties have an obligation to protect their basic human rights.” These obligations, which protect the human rights of women migrants at all stages of their journey, cover access to justice, cases of risk to life or to cruel and degrading treatment, cases where women face deprivation of basic health care, and cases where they are abused physically and sexually by employers and others.¹¹²

Torture and ill treatment

The principal human rights instrument against torture, CAT, affirms an absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment. The prohibition is non-derogable and without any exception, and applies to all persons within the jurisdiction or control of a state party. This prohibition incorporates the requirement that the principle of *non-refoulement* should be completely respected.¹¹³

110 Mendelson, 2004, p. 139.

111 The vagueness of the terms “traffic in women” and “exploitation” necessitated General Recommendation No. 19, which refers to practices like sex tourism, forced prostitution, organised marriages and domestic servitude as being incompatible with women’s rights and endangering their safety (para. 14).

112 CEDAW Committee, General Recommendation No. 26 on Women Migrant Workers, 2008.

113 CAT, Article 3.

Children

International law has recognised the distinctive needs of migrant children, refugee children and asylum seeking children (whether accompanied or not), children of refugees, and exploited children. The CRC, which defines a child as “every human being below the age of 18”,¹¹⁴ brings together previous provisions in a comprehensive document, much of which is relevant to the situation of migrant children.¹¹⁵

The treaty is based on two overarching principles, which apply to all children irrespective of status, including nationality and immigration: that the “best interests of the child shall be a primary consideration” in all actions concerning children; and that “a child who is capable of forming his or her views [should have] the right to express those views freely in all matters affecting the child”.¹¹⁶ These principles have important implications for irregular migrant children,¹¹⁷ because they require states to treat them first as children, akin to domestic children, and only secondly as irregular migrants. The provision of services, including health and education services, must therefore not be tied to the legal status of the child on the territory of the host state. Punitive questioning or expedited deportation of smuggled children would also violate these provisions.¹¹⁸

Other more general protections include the right of every child to acquire a nationality,¹¹⁹ the right of every child, irrespective of status, to free primary education,¹²⁰ and the prohibition of discrimination against children based on their parents’ “status”. The latter implicitly includes immigration status, a protection which may be construed to imply that migrants may not be deported in cases where family unity is at stake.¹²¹ The protection of family unity is a key element in the Convention. In mandatory language, Article 9(1) reads: “States Parties *shall ensure* that a child *shall* not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is *necessary for the best interests of the child*” (emphasis added). This rule applies to *all* children within a state, including irregular migrants and children of irregular migrants.

General Comment No. 6 of the Committee on the Rights of the Child provides guidance to states on the appropriate treatment of unaccompanied and separated children outside their country of origin. It draws attention to the particularly vulnerable situation of unaccompanied and separated children; outlines the multifaceted challenges faced

114 Bhabha, 2003, pp. 203-204.

115 “... unless, under the law applicable to the child, majority is attained earlier”, CRC, Article 1.

116 Article 3(1).

117 Some migration destination states, such as the United Kingdom and Germany, have entered reservations to the CRC which stipulate that its provisions cannot affect implementation of domestic immigration and nationality law. See Bhabha, 2003, p. 213: the remainder of this paragraph draws heavily on parts of that chapter.

118 Article 12(1).

119 Article 7.

120 Article 28(1).

121 Article 2(2).

by states and other actors in ensuring that such children are able to access and enjoy their rights; and provides guidance on the protection, care and proper treatment of unaccompanied and separated children, making particular reference to the principles of non-discrimination, the best interests of the child, and the right of the child to express his or her views freely. It highlights that unaccompanied or separated children are at particular risk of being trafficked, and calls on States Parties to provide appropriate protection and assistance, and to prevent such children from being re-trafficked.

The CRC also affirms that detention of children should only be used “as a measure of last resort and for the shortest possible period of time”.¹²² UNHCR has stated that separated children (including those who may have been smuggled) who seek asylum alone should never be detained. In practice these provisions have routinely been ignored by several destination states which often detain smuggled children, sometimes at length and in harsh circumstances, following detection.¹²³

Article 22 of the CRC provides specific recognition of and protection to refugee children. In particular, they are entitled to “receive appropriate protection and humanitarian assistance”; states are also required to protect and assist unaccompanied or separated children.

THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (MIGRANT WORKERS’ CONVENTION OR ICRMW)

The Migrant Workers’ Convention is the only international human rights instrument that explicitly addresses the rights of specific groups of migrants. For the moment, it is the least ratified of the nine major human rights treaties and most states that have ratified it are source or transit countries.¹²⁴ The Migrant Workers’ Convention is nevertheless an important source of international law for the protection of migrant rights.

122 Article 37(b). See Fitzpatrick, 2003, p. 172.

123 Bhabha, 2003, pp. 211-212.

124 A total of 42 countries are currently States Parties to the ICRMW. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

The Migrant Workers' Convention

The Migrant Workers' Convention represents the most comprehensive international legislative attempt so far to address the vulnerabilities of migrants through a human rights framework. It contains extensive civil, political, economic and social provisions which extend rights both to migrant workers and their families. Recognising the particular vulnerability of migrant workers as non-citizens who often lack legal attachment to the country in which they live and work, the Convention provides appropriate protection across a range of areas. Premised on the principle of non-discrimination, the Convention provides that *all* migrant workers should have the same protection of their fundamental human rights as nationals of the host country.¹²⁵ The Preamble calls for appropriate action to “prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental rights”.

The Convention applies specifically to migrant workers and members of their families¹²⁶ and covers the entire migration process, including: preparations for departure; departure; transit; the entire period of stay and remunerated activity in the state of employment; and return.¹²⁷ The migrant workers covered by the treaty include those who are documented as well as those who are irregular or undocumented, the latter being defined as individuals who are not authorised to enter, stay, or engage in a remunerated activity, in the state of employment.¹²⁸ Many of the rights contained in the ICRMW are found in other general international human rights instruments.

One of the most important achievements of the ICRMW is the explicit inclusion of irregular or undocumented migrant workers within its scope, a departure from previous international legal provisions. Though the Convention reserves certain rights for legal workers only (such as the right to form trades unions, and the right to the same treatment as nationals regarding housing and social services), it lists fundamental rights that must be accorded to all migrant workers, whether or not they are resident legally. These rights apply to those who entered legally but overstayed their visas, and those who entered the country illegally.

For example, Article 11(1) and (2) states: “*No migrant worker* or member of his or her family shall be held in slavery or servitude. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour” (emphasis added). Article 21 makes it illegal for anyone, except public officials “duly authorised by law”, to confiscate or destroy identity documents, work permits or residence permits, thus prohibiting employers from confiscating the passports of their migrant employees. Article 22 provides extensive protections against the arbitrary and unlawful expulsion of all migrant workers and their families, regardless of their status. For example, it provides that: “Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.” Under Article 32, all migrant workers and members of their families are entitled to transfer savings and earnings as well as their personal effects and belongings on termination of their stay in the state of employment. Other provisions prohibit interference with the rights of religious freedom, expression, privacy and respect for the family.

125 See International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention, 2009.

126 Article 1(1). Article 2 provides definitions of “migrant worker” for the purposes of the Convention and Article 3 specifies who are not covered.

127 Article 1(2).

128 Articles 5(1) and 5(2).

UN Special Mandates

The UN human rights system also appoints a number of independent experts (Special Rapporteurs) whose work has clarified the rights of documented and irregular migrants and helped promote policies to curb abuse.¹²⁹ These experts have examined specific cases and trends that are relevant to migrants in an irregular situation. The most relevant UN Rapporteurs are those whose mandates cover: the Human Rights of Migrants; Sale of Children, Child Prostitution and Child Pornography; Violence against Women; and Trafficking of Persons, especially Women and Children. The Working Group on Arbitrary Detention is also relevant.

The mandate of the Special Rapporteur on the Human Rights of Migrants covers all countries, irrespective of whether a state has ratified the ICRMW, and explicitly includes “migrants who are non-documented or in an irregular situation”. The Rapporteur is asked to “examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, including obstacles and difficulties for the return of migrants who are undocumented or in an irregular situation”. In reports to the UN human rights body, the Rapporteur has addressed various thematic issues, including the criminalisation of irregular migration and the human rights of migrant domestic workers.¹³⁰

With respect to other mandates, the Special Rapporteur on Violence against Women has engaged in a dialogue about the rights of smuggled and undocumented migrants, and the Working Group on Arbitrary Detention has examined the rights of detained migrants, including irregular migrants. The Special Rapporteurs on Adequate Housing and on the Right to Health have also explored the situation of migrants, in the context of their mandates.

129 Fitzpatrick, 2003, p. 171.

130 For more information on the work of the Special Procedures of the Human Rights Council, see www2.ohchr.org/english/bodies/chr/special/index.htm.

V. LABOUR RIGHTS LAW AND CRIMINAL LAW

Two other branches of international law are relevant to the protection of migrants: international labour law; and international criminal law. Both bodies of law are regularly incorporated in domestic legal jurisdictions.

LABOUR RIGHTS LAW

The International Labour Organization (ILO) has been at the forefront of labour rights legislation and standard-setting for nearly a century, and several of its conventions are especially relevant to migrants. Though individuals cannot take cases to court to enforce their rights under ILO conventions (as they can with some human rights instruments), their assertion of minimum standards establishes a framework for rights enforcement. Most ILO conventions also deal with migrants incidentally, or insofar as migrants find themselves in exploitative situations or belong to specific groups (e.g. children).

First, ILO legislation is applicable in cases where migrants are subjected to forced labour. The Convention on Forced Labour (C29, 1930) and the Abolition of Forced Labour Convention (C105, 1957) call on states to suppress such practices. Forced or compulsory labour is defined as “all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily”. The employment of many irregular migrant workers would fit this definition, though it will remain difficult to decide when migrants act voluntarily.¹³¹

These conventions are not protection instruments and they address forced labour performed for the state rather than private employers. Nevertheless, they “reflect a general consensus that forced labour and other slavery-like practices should be abolished”.¹³² This consensus is reaffirmed in the ILO Declaration on Fundamental Principles and Rights at Work (1998), which requires all states that are members of the ILO to comply with certain core labour principles. These include the rights to freedom of association and collective bargaining, as well as the elimination of forced or compulsory labour, the prohibition of discrimination in employment and occupation, and the prohibition of slavery.

The ILO has also approved legislation on child labour, including the Minimum Age Convention (C138, 1973) and the Convention on the Worst Forms of Child Labour (C182, 1999). The latter extends traditional labour law by including prostitution of trafficked children, which until recently was considered a purely human rights question. In general, these documents treat all children, including migrant children, to be victims of a larger problem of child exploitation. Immigration

131 Yun, 2004, p. 3.

132 Bruch, 2004, n. 46.

status is not considered relevant except to the degree that it influences access to remedies. This approach is consistent with human rights principles that underlie the Convention on the Rights of the Child (see the previous chapter).

Convention 181 (C181, 1997) on Private Employment Agencies is also relevant to the situation of migrant workers. It calls on States Parties to certify and license private employment agencies, and ensure that workers recruited by such agencies are not denied the right to freedom of association or the right to bargain collectively, and that agencies do not charge, directly or indirectly, in whole or in part, any fees or costs to workers.

Finally, two ILO Conventions deal directly with migrant workers: the Convention on Migration for Employment (C97, 1949), and the Migrant Workers (Supplementary Provisions) Convention (C143, 1975). C97 is concerned only with the labour rights of legally resident migrants,¹³³ but C143 calls on ratifying states to “protect the basic human rights of *all* migrant workers” (Article 1). ILO commentaries have confirmed that it includes migrants in an irregular situation.¹³⁴ Having acknowledged that all migrants are entitled to basic human rights, C143 enumerates three categories of workers’ rights: the rights of migrants who have entered legally; the rights of migrants who entered legally but who have become irregular (for example, because they lost their jobs); and (a smaller category) the rights accorded to *all* migrants, even those who entered clandestinely. These include the right to access a competent body when disputes over labour rights occur, and the right not to bear the cost of travel if expelled.¹³⁵

Like other ILO norms, Convention 143 is not primarily a protection instrument. Its aim is to “suppress” clandestine labour migration and encourage states to take action against its organisers. At the same time, its aim is not to punish irregular migrant workers. The labour rights framework aims to regulate the conditions within which labour migration takes place; including by controlling irregular migration and opposing the irregular employment of migrants in order to prevent abuse.¹³⁶ The ILO recognises that labour rights are inextricably linked to human rights and has been moving towards a clearer engagement with migrants’ rights, broadly understood. The International Labour Conference’s General Discussion in 2004 on the theme of migrant workers adopted a Resolution on a fair deal for migrant workers in the global economy and called for an ILO Plan of Action on Labour Migration. The meeting report, *Towards a Fair Deal for Migrant Workers in the Global Economy*, reaffirmed the human rights of migrants, and the Plan of Action incorporates a “Multilateral Framework on Labour Migration

133 Rights to social security, fair remuneration and overtime pay, membership in trades unions, etc. The Convention provides specific standards regarding the protection of female migrant workers.

134 See ILO, 2004, para. 291.

135 See Articles 9-11.

136 See Global Migration Group, 2008, pp. 25-26.

– non-binding principles and guidelines for a rights-based approach to labour migration” (2006), which “represents a considered response to widespread demands for practical guidance and action, with a view to maximising the benefits of labour migration for all parties”. The Framework provides guidance on decent work for all, and the protection of migrant workers.¹³⁷

Historically, nevertheless, the institutional and legislative separation of human rights from labour rights has not served the interests of migrant workers. The implementation mechanisms developed by human rights institutions (reporting obligations and test case litigation) are absent from the ILO’s tripartite structure (of employers, workers and governments), which decreases the practical impact of many ILO norms. Conversely, the ILO’s inclusive and non-stigmatising approach to standard-setting, which emphasises workers’ actual situations (rather than individual responsibility, or immigration and citizenship status) has insufficiently influenced human rights law and practice.

CRIMINAL LAW AND ITS RELEVANCE TO SMUGGLED MIGRANTS

Criminal law is the third and most influential legal framework that is relevant to the situation of irregular migrants. Its dominance dates from the first law enforcement measures adopted to suppress the “white slave trade”, and it continues to be the tool that states turn to when they assert their sovereignty over migration policy, because, unlike human rights and labour law, criminal law does not require states to protect non-nationals.

The last remark requires qualification. Under international criminal law, states have accepted certain responsibilities for non-nationals on their soil. Laws protect witnesses and victims, for example. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the EU Council Framework Decision on the Standing of Victims in Criminal Proceedings (2001) both oblige states to give victims of a crime access to proceedings against those responsible for the crime, and to make translation, legal and social services available to them during those proceedings. This rule applies to all victims of crimes, non-nationals and nationals alike. The UN Declaration also prohibits discrimination and denial of access on the basis of nationality (Article 3). The EU Framework Decision states that its provisions apply to non-nationals regardless of their legal status in the country in which the crime was committed (Article 7). The detention and deportation of non-nationals, if it prevents access to proceedings against their offenders, would violate these provisions.

The International Criminal Court (ICC) and the two transitional justice institutions created in Sierra Leone have introduced imaginative measures to protect witnesses and victims and encourage them to participate in the prosecution of perpetrators. These measures emphasise the importance of creating a safe

137 ILO, 2006.

and enabling environment, and even provide specialist hearings for particularly vulnerable witnesses. National court systems could usefully borrow from these examples when prosecuting cases that involve smuggled and trafficked persons and vulnerable irregular migrants.

In the main, nevertheless, criminal law provides few protections for migrants. Most international criminal law measures seek to address irregular migration by strengthening border controls and criminalising the facilitators. They concentrate on prevention and interception, and focus on two points in time (when a journey starts, and when a migrant crosses the border), leaving other aspects of the migrant's experience to national criminal law, or human rights or labour law.

Most international legislation outside the context of the UN has therefore focused on law enforcement. Many EU instruments criminalise commercially-assisted undocumented migration. The 1985 and 1990 Schengen Agreements treated migration issues as a matter of law enforcement (rather than a humanitarian or welfare concern) and criminalised the facilitation of illegal migration for financial gain (Article 27). The 1992 Maastricht Treaty declared "unauthorized immigration" an area of common interest to member states, alongside organised crime and drug trafficking (Article K.1). Building on this approach, the 1999 Amsterdam treaty recommended closer police and judicial cooperation among member states to facilitate the pursuit and prosecution of smugglers. On 28 February 2002, the EU Council of ministers adopted a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, which prioritised the issues of border control and return.

In sum, the law enforcement approach presumes that exclusion rather than regularisation or recognition will remove the "harm" done by irregular migration. This approach does not directly conflict with the contributions that human rights and labour law can make, nevertheless. It acknowledges the value of witness protection schemes, non-discrimination in access to court proceedings, and the prohibition of forced labour or slavery-like practices. But its emphasis on exclusion, and protection of state boundaries rather than protection of individual rights, increase the risk that individual rights will be infringed. As noted, certain countries have adopted approaches that criminalise third party assistance to irregular or undocumented migrants, or oblige third parties to report illegal migration. These undermine the right to family life of irregular migrants, for whom travel across borders has become increasingly difficult. They also curtail access to basic social rights, particularly health care, education and housing. In extreme cases they have endangered or violated the right to life.

The next chapter examines the application of a criminal law model to the trafficking and smuggling of people, as set out in the UN Convention against Transnational Organized Crime and its two associated protocols, usually called the Palermo Protocols.

VI. THE PALERMO PROTOCOLS

HISTORICAL BACKGROUND

International legislation directly addressing irregular migration first appeared in the early 20th century, when several international agreements facilitated the interception and swift repatriation of women who were traded for “immoral purposes”. The International Agreement for the Suppression of the White Slave Traffic, and the International Convention of the same name were approved in 1904 and 1910 respectively. In 1921 and 1933, the League of Nations adopted two more conventions on trafficking. In 1949 the UN consolidated this previous legislation in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Though these documents were largely toothless as law enforcement instruments, they laid down conceptual foundations that subsequently guided national and international anti-trafficking policy. In addition, they shared a preoccupation with migrants’ reasons for moving rather than their current needs or protection.

The above laws also contained few rights provisions. Any that were included were vague and peripheral and tended to be optional rather than obligatory.¹³⁸

The only aspects of the “white slave trade” which international law was equipped to address, drafters believed, were the act of recruitment and the crossing of borders. For this reason, early laws focused on the plans and recruiting methods of traffickers at the start of the journey. They paid no attention to the intentions of the women or their circumstances on arrival, because prostitution and “the accompanying evil” of trafficking were considered to be “incompatible with the dignity and worth of the human person” and it was presumed that no one could genuinely consent to them. To prove that a case of commercially-assisted migration amounted to trafficking, therefore, states needed to assess the trafficker’s motives at the start of the journey, not the motives of the trafficked migrant or the conditions in which she was subsequently held,¹³⁹ each of which would necessarily raise issues of protection and human rights.

Such was the international legal framework until the late 20th century, when, at a time when states were once more becoming concerned by migration, the

138 Legal instruments that predate the League of Nations suggested that states should entrust the task of assisting victims to “charitable institutions”; they did not specify the nature of the assistance that should be provided. The 1949 Convention introduced some new, albeit weak, protection provisions: it allowed aliens to participate in proceedings against their traffickers (Article 5); forbade states to force prostitutes to register or carry special ID cards (Article 6); made the “temporary care and maintenance” of victims prior to repatriation the state’s responsibility (Article 19.1); and called on states, albeit vaguely, to encourage public and private social services to facilitate prevention and victims’ rehabilitation (Article 16).

139 See the Preamble to the 1949 Convention.

trafficking issue was reconsidered. As it was realised that trafficking flows were not leading *from* but *towards* the industrialised world, the emphasis shifted and immigration control, exclusion and border security came to predominate.

In 1993, the UN General Assembly passed a resolution calling for international cooperation to address human smuggling.¹⁴⁰ It acknowledged the relevance of human rights, but its emphasis was already on criminal justice.

In 1997, Austria proposed a draft convention that established human smuggling as a “transnational crime”.¹⁴¹ In October of the same year, in an unrelated initiative, Italy submitted to the Legal Committee of the International Maritime Organisation (IMO) a draft Multilateral Convention to Combat Illegal Migration by Sea, which also sought to make the exploitation of illegal migration an international offence.¹⁴² (In this period, Austria had become a major transit route from the Balkans and East Europe to Germany and the EU, and Albanian crossings of the Tyrrhenian Sea to Italy had escalated dramatically.) The Italian proposal was eventually shelved because delegates felt the IMO (which deals mainly with maritime safety) was an inappropriate venue for such a law.¹⁴³ However, the Austrian proposal was discussed and similar discussions were engaged under the auspices of the UN Commission on Crime Prevention and Criminal Justice. In 1998, the Commission submitted a report to the General Assembly outlining a preliminary strategy for a new instrument, within the framework of transnational organised crime.

After several drafts, the UN Convention against Transnational Organized Crime (UNTOC) was adopted and opened for signature on 12 December 2000 at a high level conference of states in Palermo, Sicily. The Convention included two protocols: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (hereafter the Trafficking Protocol), and the *Protocol against the Smuggling of Migrants by Land, Sea and Air* (hereafter the Smuggling Protocol). These are generally referred to as the Palermo Protocols. A third protocol, on the Illicit Manufacturing of and Trafficking in Firearms, was finalised three months later.

The choice of location was not accidental: as the birthplace of the Mafia, Palermo was emblematic of transnational organised criminal networks. Negotiations were

140 GA Resolution 48/102 (20 December 1993).

141 The draft was submitted at the UN General Assembly’s 52nd Session (UN doc. A/52/357, 17 September 1997). The United States had presented and withdrawn a similar proposal a year earlier (ECOSOC Press Release, SOC/CP/192, 5 June 1996), 5th Session of Commission on Crime Prevention and Criminal Justice, Vienna 21-31 May 1996.

142 Proposed Multilateral Convention to Combat Illegal Migration by Sea, IMO doc. LEG 76/11/1, 1 August 1997.

143 IMO doc. LEG 76/11/1. Cited in Kirchner and Pepe, 1998, pp. 665-666.

concluded in record time and, according to the UN Office on Drugs and Crime which was responsible for the Convention, a high level of political commitment has been maintained since. Both the Convention and the Palermo Protocols are already in force: the Trafficking and the Smuggling Protocols came into force on 23 December 2003 and 28 January 2004 respectively.¹⁴⁴

THE CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (UNCTOC)

The UNCTOC was designed to promote international action across a spectrum of cross-border criminal activities, including money-laundering, corruption, illicit trafficking in cultural treasures and endangered flora and fauna, and connections between these “ordinary” forms of transnational crime and cross-border terrorist activity. Its purpose was to effectively interdict transnational organised crime, not least by forging and strengthening cross-border links between states.¹⁴⁵ The Convention therefore focuses on offences that make organised criminal activities profitable. The Protocols supplement this objective by targeting certain types of organised criminal activity, including the smuggling of migrants.¹⁴⁶

Under the Convention, an organised criminal group is defined as “a structured group of three or more persons ... established to obtain, directly or indirectly, a financial or other material benefit”. Two points are worth noting. The first is that at least three organisers need to be involved – so a lone boatman ferrying migrants across a waterway, or two smugglers guiding people through the desert across a land border, would not fall within the scope of the Convention, so long as no other clear and organised connections along the “smuggling chain” exist. The second is that benefit from trafficking or smuggling need not be strictly monetary: other forms of remuneration qualify, such as labour, sex or service in kind, some of which may amount to exploitation.

It would have been possible to include organised criminal activity relating to irregular migration in the body of the Convention. Instead, two separate protocols were created to address what was regarded as a major international law enforcement problem. Had the law enforcement task been considered less urgent, an initiative to set new standards on irregular migration would probably not have borne fruit. Previous calls by human rights bodies for laws to regulate the consequences of irregular assisted migration never advanced because

144 On 17 September 2009, 120 states were party to the Smuggling Protocol (in addition to 112 Signatories), and 132 were party to the Trafficking Protocol (in addition to 117 Signatories). See www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html.

145 UNCTOC, Article 1.

146 Article 37 of the Convention and Article 1 of the Protocols together establish the basic relationship between the Convention and its Protocols. The Convention contains many provisions on mutual assistance and other forms of international cooperation.

there was insufficient political will. As a result UNCTOC's language focuses mainly on law enforcement.

Law enforcement need not conflict with protection of human rights, of course. It is consistent to arrest, put on trial and punish torturers, kidnappers and extortionists and to provide resources to protect those whose rights have been violated by them. The two may nevertheless at times work against each other. Securing a human trafficking conviction may jeopardise the safety of witnesses from among the victims; protecting the rights of irregular migrants may require non-enforcement of anti-smuggling measures.

THE SMUGGLING PROTOCOL: BROAD CONTEXTUAL ISSUES

Taking account of the object and purpose of its parent Convention (the UNCTOC), the Smuggling Protocol aims first and foremost to combat transnational¹⁴⁷ organised crime¹⁴⁸ through national efforts and international cooperation. At the same time, it touches on larger contextual issues, including human rights.

The very first paragraph of the Preamble to the Protocol emphasises that a comprehensive international approach is needed to combat and prevent the smuggling of migrants, which should include "socio economic measures, at the national, regional and international levels". Paragraph 2 of the Preamble recalls GA Resolution 54/212 of 22 December 1999, which urged states and the UN "to strengthen international cooperation in order to address the root causes of migration, especially those related to poverty and to maximise the benefits of international migration to those concerned".

The Preamble further states the "need to provide migrants with humane treatment and full protection of their rights" and says that the stated purposes of the Protocol must be achieved "while protecting the rights of smuggled migrants".¹⁴⁹ Protection is thus a basic purpose that should always be considered beside the Protocol's two other basic purposes (prevention of smuggling of migrants, and promotion of inter-state cooperation).¹⁵⁰ Moreover, the provision defining the Protocol's scope of application (Article 4) is broader than the comparable article (Article 3) in the parent UNCTOC. In affirming that "protection of the rights of persons who have been the object [of smuggling]" is a state obligation, Article 4 of the Protocol extends its scope beyond the prevention, investigation and prosecution of migrant smuggling offences.

147 UNCTOC, Article 2, subpara. 2.

148 UNCTOC, Article 3, para. 2.

149 Smuggling Protocol, Article 2, Statement of Purpose.

150 Legislative Guide for the Smuggling Protocol, UN, New York, 2004, para. 17.

THE CRIMINAL ACT OF “MIGRANT SMUGGLING” AND PROTECTION

During drafting, partly to distinguish their situation from that of victims of trafficking, it was considered inappropriate to retain use of the term “victim” to describe smuggled migrants. At the same time, the Protocol does not consider a smuggled migrant to be a perpetrator, an accomplice or a conspirator in the act of smuggling, and reiterates that states are obliged to protect his or her rights. In addition, the interpretative guide to the Protocol makes clear (as does the equivalent guide to the Trafficking Protocol) that, since the “goods” being smuggled are people, human smuggling “rais[es] human rights and other issues not associated with other commodities” such as weapons or narcotic substances, on which the UNCTOC also focuses.¹⁵¹

The state's obligation to protect smuggled migrants is further strengthened by the Protocol's affirmation that migrants are not criminally liable.¹⁵² It targets the criminal act of “smuggling of migrants”, not the illegal entry or illegal residence of the migrant. It is not designed to criminalise illegal migration and takes a neutral position on whether those who migrate illegally should be considered to have committed a domestic offence.¹⁵³ In consequence, the Smuggling Protocol cannot be interpreted to require criminalisation of irregular migration: it targets members of criminal groups that smuggle migrants and those linked to them.¹⁵⁴

In addition to being an organised crime that is transnational, the criminal act of “migrant smuggling” includes two intentions on the part of the smugglers involved:

151 Legislative Guide for the Smuggling Protocol, para. 55.

152 Article 5 of the Smuggling Protocol, on the “Criminal liability of migrants”, states: “Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of the conduct set forth in Article 6 of this Protocol”.

153 The Legislative Guide for the Smuggling Protocol (para. 28) makes clear that 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”.

154 During drafting of the Protocol, the OHCHR submitted an informal note which emphasised that the Protocol must commit to preserving and protecting the fundamental rights of all persons, including smuggled migrants, even though respect for basic rights does not prejudice or restrict the right of states to decide who should or should not enter their territories. The group of Latin American and Caribbean states shared this view and pointed out that the Protocol could not be used to criminalise migration. While the Protocol offers a legal framework for dealing with human smuggling and exempts migrants from criminal liability if they are smuggled, states are not prohibited from “taking measures against a person whose conduct constitutes an offence under its domestic law” (Article 6, para. 4). Measures may include both criminal and administrative sanctions. See *Travaux préparatoires*, Article 6C, Interpretative notes on paragraph 4. However, such measures based on domestic legislation should respect the human rights of all migrants and must therefore respect the rule of law (Legislative Guide for the Smuggling Protocol, para. 56).

a primary intention to procure illegal entry (or illegal residence¹⁵⁵) for the migrant, and a secondary intention to obtain financial or other material benefit from the transaction.¹⁵⁶ Persons who procure their own illegal entry (or illegal residence) are not considered liable to criminal prosecution under the Smuggling Protocol. The same principle applies to so-called “document offences” (i.e. the procurement, provision or possession of fraudulent travel or identity documents),¹⁵⁷ including “for the purpose of enabling illegal residence as opposed to procuring illegal entry”.¹⁵⁸ This is meant to protect migrants who acquire false documents in order to remain in a country without regular status.¹⁵⁹

Nor are persons (or institutions) liable to criminal prosecution if they procure the illegal entry or permit the illegal residence of a migrant in a receiving state for reasons that do not involve financial or material gain.¹⁶⁰ This would apply to individuals who smuggle family members, for example, or charitable organisations that assist in the movement of asylum seekers.¹⁶¹

In its saving clause, the Protocol reasserts the rights that individuals have under international humanitarian and human rights law.¹⁶² It notably affirms the fundamental principle of non-discrimination,¹⁶³ and makes specific reference to the 1951 Refugee Convention and its 1967 Protocol. In this context, asylum seekers who are “smuggled” through or into a destination state are protected by the principle of *non-refoulement* from return to a situation where they would face torture or other serious human rights violations.¹⁶⁴ The Protocol thus recognises

155 In this context, the Legislative Guide for the Smuggling Protocol (paras 34 and 36) notes that: “[T]he drafters intended that cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence.” In other words, the offence of enabling illegal residence would cover a range of acts: enabling migrants to remain for reasons other than those declared at entry; or after expiry of their permit or authorisation to enter, etc.

156 Smuggling Protocol, Article 6 read in conjunction with Article 3(a).

157 Smuggling Protocol, Article 6, para. 1(b)(ii).

158 A/55/383/Add.1, para. 93; also cited in the Legislative Guide for the Smuggling Protocol, para. 41.

159 See also Legislative Guide for the Smuggling Protocol, para. 54.

160 *Travaux préparatoires*, Article 6C. Interpretative notes, para. 1(b). See also Legislative Guide for the Smuggling Protocol, paras 54 and 55.

161 A/55/383/Add.1, para. 92; also cited in the Legislative Guide for the Smuggling Protocol, para. 32.

162 Smuggling Protocol, Article 19, saving clause, para. 1. A saving clause ensures that the provisions of a treaty are applied in a manner which is most favourable to the human rights of the individual.

163 Smuggling Protocol, Article 19, saving clause, para. 2.

164 Smuggling Protocol, Article 19, saving clause, para. 1.

that refugees and asylum seekers may legitimately be smuggled into a state in search of international protection. A provision recognising the special needs of women and children is also included in the framework of protection and assistance to smuggled migrants.¹⁶⁵

It is therefore clear that, while minimal and mostly optional, the Smuggling Protocol includes some provisions that protect the rights of smuggled migrants, and it affirms that international humanitarian and human rights law, and international refugee law, apply to smuggled migrants. States Parties are required for instance to implement their absolute obligations under international law to protect the right to life and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment (Article 16(1)). States that ratify the UNCTOC and its Protocols are required to take prevention and protection measures that will prevent and suppress migrant smuggling while promoting human rights. States also have human rights obligations in relation to smuggled migrants that derive from provisions in other human rights treaties that they have ratified.

While it is therefore a matter of regret that the Protocol does not comprehensively articulate and protect the human rights of smuggled migrants, including their economic, social and cultural rights, and falls short of the standards set by international human rights norms,¹⁶⁶ its references to international human rights law nevertheless provide a basic floor of protection for smuggled migrants who, in common with trafficked persons and other irregular migrants, enjoy the protection of international human rights law by virtue of their humanity.

Though states have so far paid less attention to the human rights provisions in the Smuggling Protocol than to those in the Trafficking Protocol, the Conference of States Parties to the UNCTOC has started recently to examine the “provision of protection and assistance measures” in the treatment of smuggled migrants, even if, at country level, the focus of states remains overwhelmingly on border control and law enforcement.¹⁶⁷

THE PALERMO PROTOCOLS: SIMILARITIES AND DIFFERENCES

Trafficked migrants are understood to have had no meaningful control over their decision to migrate. Transported or transferred with a view to their exploitation by others, they are considered to be in a position of particular vulnerability. Smuggled migrants, by contrast, are considered to have had *some* degree of

165 Smuggling Protocol, Article 16, Protection and assistance measures, para. 4.

166 Gallagher, 2002.

167 Decision 3/3, paras k and l, entitled “Implementation of the [Trafficking] Protocol and the [Smuggling] Protocol”, adopted by the Conference of the Parties to the UN Convention against Transnational Organized Crime, October 2006, Vienna.

meaningful control over the decision to migrate. Yet smuggled migrants too are a diverse class of people, and in practice exercise different degrees of choice when they travel; their freedom to choose may narrow or enlarge at different stages of their journey.

For these reasons the definitions found in the two Palermo Protocols do not readily allow a clear and consistent distinction to be made in real cases between smuggled and trafficked migrants. More important, many smuggled migrants are subject to serious forms of human rights violations – in their countries of origin, during their journeys, or in their countries of destination. Here again, a simple separation between smuggling and trafficking breaks down.

The Palermo Protocols were constructed around three explicit distinctions:

- between coercion and consent;
- between irregular (smuggled) migrants and victims; and
- between victims and agents.

A further moral distinction is implicit: between innocence and guilt.

Applied together, these distinctions bifurcate the field. On one side are the protection needs of innocent and deserving victims of criminal activity – the victims of trafficking – particularly the traditional targets of protective concern, women and children. On the other are culpable and complicit actors who are eventually considered satisfied clients: smuggled “illegals” who are considered less deserving of protection and support than trafficked victims because of their original motive – their decision to *choose* to migrate illegally. The distinction has since become central to policy in the area of migration more generally and has caused states to divide migrants neatly into the deserving “forced” and the undeserving “voluntary”.

The Protocols share several features. Both require States Parties to criminalise the relevant conduct of traffickers or smugglers, establish and implement domestic law enforcement mechanisms, and cooperate with other states to strengthen international prevention and punishment of these activities. Importantly, both stipulate that migrants should *not be subject to criminal prosecution because of their illegal entry*. However, the Protocol does not prohibit states from punishing smuggled migrants who breach immigration regulations. The report of the Secretariat of the Conference of Parties to the UNCTOC acknowledges that most States Parties impose criminal or administrative sanctions on smuggled migrants (including deportation), and that only a handful of states refrain from doing so. It suggests that the Conference of Parties could be an appropriate forum in which to discuss such measures as victim and witness protection schemes, paying due attention to the special needs of smuggled women and children.¹⁶⁸

168 Conference of Parties to the UNCTOC, Report of the Secretariat, CTOC/COP/2005/4/Rev.2, 8 August 2008, p. 10.

The two protocols also require states to address in practical ways the root causes of vulnerability to trafficking and smuggling. The Trafficking Protocol requires states to “take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.¹⁶⁹ The Smuggling Protocol similarly requires states, albeit in less elaborate terms, to promote or strengthen development programmes to combat the socio-economic causes of migrant smuggling.¹⁷⁰ However, neither protocol situates trafficking of persons and migrant smuggling in the larger context of migration, which may require consideration of the mismatch that exists between the number of people who wish to migrate, the incentives to move, and the readiness of receiving states to accept migrants.

The Trafficking Protocol considers a trafficked person to be a victim of the crime of trafficking who therefore requires appropriate protection. Though its provisions are couched in optional rather than mandatory language,¹⁷¹ they establish a framework for protecting the rights of trafficked persons. In particular, reflecting the extensive inputs of human rights organisations during drafting, Article 6(3) requires states to consider “implementing measures to provide for the physical, psychological and social recovery of victims of trafficking”, including cooperation with non-governmental organisations (NGOs), provision of housing, counselling, medical, psychological and material assistance, and employment and training opportunities. The Trafficking Protocol also requires states to consider adopting legislation to enable trafficking victims to remain in their country “temporarily, or permanently, in appropriate cases”.¹⁷² If domestically enacted, adequately funded and energetically enforced, these measures would bring trafficked people significant benefits.

As noted above, the Smuggling Protocol also refers to the protection needs of smuggled persons, but more sparingly. It sets out general principles and makes reference to international protective regimes, such as international human rights law. The Preamble affirms “the need to provide migrants with humane treatment and full protection of their rights”, and expresses concern that “the smuggling of migrants can endanger the lives or security of the migrants

169 Article 9(4).

170 States are encouraged in broad terms to promote and strengthen programmes of development and cooperation that “take into account the socio-economic realities of migration and [pay] special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment”. Article 15, para. 3, Other prevention measures.

171 Each State Party shall consider implementing...”; “... in appropriate cases...”; “... shall endeavour to provide...”: “... shall consider adopting legislative or other appropriate measures...”.

172 Trafficking Protocol, Article 7.

involved". Combined with the prohibition on criminalisation of migrants, this is an important international commitment to a basic level of protection – especially in view of the frequency with which states take punitive measures against smuggled migrants.¹⁷³

Provisions of the two Protocols compared

	Trafficking Protocol	Smuggling Protocol
Stated purposes	Article 2: To prevent trafficking and protect victims, to promote cooperation among States Parties, to protect the rights of victims of trafficking.	Article 2: To prevent and combat smuggling of migrants, to promote inter-state cooperation while protecting the rights of smuggled migrants.
Setting	Organised crime.	Organised crime.
Convention triggered by	Transnational offences <i>and</i> offences involving organised criminal groups.	Transnational offences <i>and</i> offences involving organised criminal groups.
Requires movement across borders	No.	Yes.
Focus	Article 5: Criminalisation and inter-state cooperation. Human beings, particularly women and children.	Article 6: Criminalisation and inter-state cooperation. Smuggled migrants.
Definitions of the prohibited act	Article 3: Trafficking: recruitment, transportation, transfer, harbouring or receipt of persons by coercion, fraud, etc.; includes giving or taking payment to secure consent of person who has control over victim for purposes of exploitation.	Article 3: Smuggling: 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.
Language used to describe person involved	Victim of trafficking in persons.	Article 14: Migrants/persons object of such conduct (smuggling).

173 For further discussion of the Smuggling Protocol and protection of human rights, refer to the Appendix.

	Trafficking Protocol	Smuggling Protocol
States' obligations to deal with victims	Article 6: To provide assistance and protection to victims: measures for psychological, social and physical recovery; information on legal and administrative systems; housing; protection of privacy and identity; counselling; employment and educational opportunities; medical, psychological and material assistance; assure physical safety; access to compensation for damage.	Article 9: When a suspect ship is boarded, ensure safety and humane treatment of persons on board. Article 14: States to ensure adequate personnel training to protect rights of migrants; such training to include humane treatment of migrants and the protection of their rights as set forth in this Protocol.
Additional optional protection measures	Article 7: State Party to consider adopting legislative or other appropriate measures that permit victims of trafficking to remain on its territory, temporarily or permanently; on humanitarian and compassionate grounds.	
Types of rights to be protected	Article 6: Right to privacy; to physical and psychological health; to work; to education; to housing; and to compensation. Judicial and administrative processes.	Article 16: Right to life; right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; protection against violence; assistance where lives or safety endangered. Special needs of women and children. Where detained, Vienna Convention on Consular Relations; states must give information and communicate with consular officials.

	Trafficking Protocol	Smuggling Protocol
Repatriation or return	Article 8: Victim's state must accept return without delay and have regard to victim's safety; return should preferably be voluntary.	Article 18: States whose national or permanent residents are the object of smuggling are to facilitate and accept their return from the receiving state, without delay, including by issuance of travel documents to travel and re-enter. Both states to take appropriate measures to carry out return in an orderly manner with due regard for safety and dignity.
Status of the Protocol with respect to other instruments of international law	Article 14: Shall not affect the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law and the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of <i>non-refoulement</i> .	Article 19: Shall not affect the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law and the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of <i>non-refoulement</i> .
Application of domestic law	Domestic law applies.	Article 18: Repatriation without prejudice to rights under domestic law of receiving state.
Criminal liability of person trafficked or smuggled	No express criminal liability.	Article 5: Migrants not liable to criminal prosecution. Article 6(3)(b): States Parties shall adopt legislative measures which make inhuman and degrading treatment of migrants, including exploitation, an aggravating circumstance in the offence of smuggling. That is, this treatment is a factor of aggravation with respect to offences.

DEFINITIONS

The definition of trafficking in the Trafficking Protocol is complex: “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 or 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. The consent of a victim of trafficking in persons to the intended exploitation is considered irrelevant if any of the means above are used. The recruitment, transportation, transfer of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth.”¹⁷⁴

This definition of coercion is expansive, reflecting input from the human rights and feminist lobbies referred to earlier. Coercion is not simply brute physical force, or even mental domination, but includes “the abuse of a position of vulnerability”. This can encompass a very broad range of situations, since poverty, hunger, illness, lack of education and displacement could all constitute a position of vulnerability. Whether a particular arrangement constitutes “abuse” may be as much about assessing the price of a particular migration service as about a personal interaction.

The definition requires exploitation to occur, but exploitation itself is undefined. It mentions exploitation by the prostitution of others (pimping), and a range of non-sexual labour relationships including “practices similar to slavery”, such as indentured or bonded labour, child labour or oppressive forms of labour. It is agnostic on whether prostitution itself constitutes exploitation, reflecting the deeply polarised views that exist within states and the international community on this matter.

By contrast, the Smuggling Protocol defines “smuggling of migrants” as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (Article 3). Within this definition, “smuggling”¹⁷⁵ refers to a *consensual* transaction where smuggler and migrant

174 Trafficking Protocol, Article 3.

175 There are exceptions to this. See Salt and Stein (1997, p. 471) who use the term “trafficking” in a broad sense that does not require coercion of migrants or exploitation. They define “trafficking” as “an international business, involving the trading and systematic movement of people as ‘commodities’ by various means and potentially involving a variety of agents, institutions and intermediaries”.

agree to circumvent immigration controls for mutual advantage: the smuggler derives a material benefit and the migrant a migration benefit. The two critical ingredients of this definition accordingly are illegal border crossing by the smuggled person and receipt of a material benefit by the smuggler.

CONCEPTUAL SHORTCOMINGS

The Protocols have two main conceptual shortcomings. The first is that they attempt, unsuccessfully, to separate cleanly the definition of a “trafficked” from a “smuggled” person. The other, related problem concerns the notions of “coercion” and “consent”. These underpin the definitions but both prove difficult to apply. In practice, at the crucial moment of allocation of status, it is difficult to determine objectively whether individuals belong to one or another category. In the broader migration context, this can lead to two undesirable outcomes. One is that persons who have been trafficked are mistakenly identified as smuggled and so excluded from protection. The other is that the ambiguous reality of migratory movement is somewhat obscured by the pretence in the Protocols that clean distinctions can be made between people who are forced to move and people who choose to move voluntarily.

This matters enormously because a person’s allocation to the status of a smuggled or a trafficked person has serious practical repercussions on their access to human rights protection. Generally, there is much to gain from being classified as trafficked, and much to lose from being considered smuggled. When smuggled persons are detained, they are usually returned home without due process protections. In certain countries, trafficked persons may be eligible for generous benefits, and may even qualify for residence in the destination state (although in practice it is hard to obtain). Individuals may also be subject to inter-state agreements on repatriation processes that apply to trafficking but do not exist for smuggling. Yet, as Buckland has noted: “the trafficked person described by the Trafficking Protocol represents something of an ideal type, one that only captures a small percentage of those in need of protection.”¹⁷⁶

In addition, many migrants “shape-change” as they pass through different stages of their journey (see below). As a result, decisions that allocate individuals to particular categories may look correct at one time but may not be correct later or earlier. Migrants’ interests may be complex and also counterintuitive: they travel for many reasons, and some choose courses of action that involve exploitation because they consider that it is a lesser evil or will improve their lives and security or the security of dependents.

176 Buckland, 2009, p. 137.

THE UNCLEAR DISTINCTION BETWEEN “TRAFFICKED” AND “SMUGGLED”

The problem arising here is that the definitions of “trafficked” and “smuggled” are based on distinctions that are neither mutually exclusive nor conceptually comparable. The key tests for smuggling are breaches of migration law (illegal border crossing and enabling irregular residence) and payment for assistance with border crossing; but trafficking also breaches these state laws and many trafficked persons make payments when they cross borders. The trafficking tests focus on violations of rights – on duress, exploitation and deprivation of liberty; but rights are often violated in the course of smuggling too. Exploitation, which is a key element in trafficking, can be present in many forms and to various degrees during a smuggling process. The definitions are therefore not exclusive.

Both these issues became apparent during the drafting process. Conceptual blurring emerged early. The draft resolution on smuggling from the UN Commission on Crime Prevention and Criminal Justice (CPCJ) noted that “women and children are particularly vulnerable to becoming *victims* of the crime of illegal trafficking in and transporting of migrants” (emphasis added).¹⁷⁷ The topic was smuggling, the term trafficking. The language of “victimhood” and reference to the vulnerability of women and children, as well as the focus on harm to individuals (not just the state) suggest that those involved in drafting recognised quickly that human smuggling, like trafficking, can give rise to major human rights risks, whatever the initial intentions or desires of the migrant.

During the eleven sessions of the Ad Hoc Committee charged with drafting the new convention, further conceptual difficulties with the Smuggling Protocol surfaced. First, the extent to which exploitation was an aspect of the ongoing situation of smuggled migrants proved contentious. References to vulnerability and sexual exploitation of migrants were gradually replaced by a more generic emphasis on the need to guarantee humane treatment and basic rights. The drafting process mirrored this: protection of migrants’ rights moved from being a key purpose of the Protocol to being a subsidiary aspect of border control objectives.

Second, despite the desirability of distinguishing trafficking from smuggling in the legislative instruments, the practical difficulty of telling the two categories apart was noted. This became a troublesome question because the protocols did not specify who would be responsible for making the identification.¹⁷⁸ It was suggested by some key UN agencies that states might choose to call migrants “smuggled” rather than “trafficked” to avoid incurring extra protection obligations, a concern that has been born out subsequently. On the other hand, some NGOs in the field have shared anecdotal evidence that trafficked migrants

177 CPCJ Draft Resolution to ECOSOC (E/CN.15/1998/11).

178 UNHCR, UNICEF and IOM joint note submitted for Session 8.

do not wish to be classified as “trafficked” where bilateral agreements provide that they can be asked to provide evidence in prosecution and repatriation processes.

To distinguish between the activities of smuggling and trafficking, the drafters settled on a temporal rather than substantive distinction. Considered an event, smuggling became harmful to the state at the point when a border was crossed. By contrast, trafficking was considered an ongoing and relational process that violated rights. The drafters’ emphasis on circumstances at the *start* of the smuggled migrant’s journey and on the act of border crossing led them to disregard the migrant’s experiences during transit, or after arrival, as well as other benefits that smugglers or migrants might derive in addition to those directly associated with the act of border-crossing.

This gave rise to the second problem: because the *premises* of the definitions draw on different legal principles, they are not comparable. In these circumstances, allocating individuals to one or the other category in a hard and fast manner is certain to create inconsistencies and injustice.

Shape-changing

It was claimed that one of the principal achievements of the Palermo Protocols was to have agreed a definition of key terms. In reality, though the distinctions agreed were clear on paper, it was difficult to apply them, and therefore the Protocols, objectively. This has been particularly true when the different phases of a migrant’s experience are considered.

The definitions take no account of the fact that the position in which migrants find themselves may change, sometimes radically, in the course of their journey. At any given point it may be unclear whether a person is trafficked or smuggled; in addition, she may look smuggled at some moments and trafficked at others. Even the most accurate classification system needs to allow for this – not least because these changes in turn trigger different forms of human rights protection. A process that concentrates decision-making on only one moment – the moment of border-crossing, the moment of apprehension – is certain to produce arbitrary and unjust outcomes. A sound system needs also to focus attention on the extent to which migrants, including migrants who are considered to be smuggled, require state protection and assistance. The tension between these two approaches has been, and continues to be, contentious.

On the other hand, it is increasingly the case in many situations that anti-trafficking policies of states prevent migratory movement, and encourage the prosecution of people who facilitate the movement of migrants. In autumn 2007, for example, seven Tunisian fishermen were put on trial in Sicily, on charges of aiding and abetting illegal immigration, and faced a prison sentence of between one to fifteen years. Yet NGOs and UN agencies believed the fishermen had

actually rescued the 44 people found on their boat (including 11 women and two children) from a flimsy rubber dinghy out at sea where their lives were at risk. Vessels fulfilling their duty to rescue people at sea are increasingly encountering problems as states refuse to let migrants and refugees disembark. To the alarm of human rights campaigners and the shipping industry, such incidents may jeopardise the centuries-old humanitarian tradition of sea rescue. A leading anti-trafficking NGO has thus observed that “more efforts are being put into intercepting people who *may* be in the process of being trafficked (but may just be ordinary migrants), than into stamping out the various forms of exploitation listed in the UN Trafficking Protocol”.¹⁷⁹

CONSENT AND COERCION

The weight given to the notions of “consent” and “coercion” is also problematic. The Protocols distinguish between “deserving victims” who are trafficked, and “complicit” (even “deceitful”) migrants who allow themselves to be smuggled across an international frontier. The distinction highlights the difference between two sets of harm: the harm to victims forced or tricked into travelling abroad, deserving of state protection or even (on rare occasion) residency; and harm to the state when smugglers breach immigration controls to secure an economic advantage.

The available evidence suggests that most transported irregular migrants consent in some way to an initial proposition to travel.¹⁸⁰ En route, however, or on arrival in the destination country, their circumstances frequently change. Some children are clearly kidnapped; some migrant workers are defrauded from the outset; some women are taken across frontiers by force. At the other end of the spectrum, completely transparent cross-border transportation agreements also occur, where a fee is mutually agreed and the relationship between the smuggler and the migrant ends at the border. In between, any number of less

179 GAATW, 2007, p. 12. In the context of anti-trafficking measures in Africa, Chapkis has observed that “eliminating any distinction between intentional (if exploitative) migration for work and forced enslavement of millions of Africans ... creates a moral imperative to stop the flow of undocumented workers regardless of their desire to immigrate. Attempts to restrict immigration can then be packaged as anti-slavery measures; would be migrants are would be victims whose safety and well-being are ostensibly served by more rigorous policing of the borders”. See Chapkis, 2003, pp. 926-927.

180 “In the first stage [of irregular migration], potential migrants generally consent to emigrate. Coercion is rarely used prior to departure from the country of origin”, see Yun, 2004.

identifiable transactions and relationships may occur.¹⁸¹ Because migration strategies and circumstances are so varied, it becomes difficult to say how a determination of category should be made or by whom.

Moreover, it is hard to determine when “acts” of migration begin and end. Buckland notes that “in many cases of illegal or semi-legal migration, networks of facilitators are involved. Even in cases that would, according to the relevant sections of international law, be classified as smuggling, such facilitators can profit for many years from high interest on debt incurred by migrants seeking help to cross borders. The difficulty comes in attempting to distinguish between a trafficked person and an irregular migrant suffering exploitative working conditions and/or debt bondage”.¹⁸²

A still more profound difficulty arises, however, because the distinction itself depends on a flawed conception of human agency.¹⁸³ It presupposes a hard and fast divide between two motivational states – consent and coercion – neither of which is measurable in simple terms.

At first sight it is plausible to say that law and policy should separate agreements into which people enter voluntarily from ones based on coercion, because the latter are not real agreements. A person should not be held responsible (or punished) for making an agreement with someone who has had them kidnapped, transported across a border illegally, and forced to engage in domestic slavery, for example. Yet the distinction between coercion and consent is often more complex.¹⁸⁴ Does someone with a gun to their head consent to hand over their money when robbed? Most would say no. Yet does someone who sells his kidneys because his children are starving consent?

Some thinkers have distinguished specific interpersonal *threats* (guns) which are coercive, from personal circumstances (poverty, illness) which restrict choice but are not necessarily coercive.¹⁸⁵ Others have argued that this distinction cannot be morally sustained, because destitution is as coercive as physical force. The Trafficking Protocol adopts a rather bland version of the

181 Skeldon describes a “continuum of facilitation” from “completely transparent, fully invoiced and accountable recruitment on the one hand, through to the movement of people through networks entirely controlled by criminal gangs on the other”. He notes that this continuum is often rooted in opaque and confusing bureaucratic procedures, which compel migrants to seek out the services of intermediaries and facilitators. See Skeldon, 2000, p. 9.

182 Buckland, 2009, p. 146.

183 The following paragraphs draw heavily on the work of Alan Wertheimer. See in particular Wertheimer, 1987.

184 Wertheimer, 1987, p. 6.

185 See, for example the works of Robert Nozick and John Rawls. See also Wertheimer, 1987, p. 5.

latter position when it defines coercion to include not only force but also “the abuse of power or of a position of vulnerability”.

The distinction between consent and coercion generates a further difficulty. It presumes that migrants have the same status, and that their circumstances remain unchanged, throughout their journey and after arrival – as if someone who is consensually transported at one time may not subsequently be coercively trafficked. Consent given in one context does not preclude withdrawal of consent in another context, or at a later time. Indeed, the Secretariat of the Conference of States Parties to the UNCTOC has itself recognised that trafficking and smuggling represent “overlapping crime problems”, noting that actual cases faced by the authorities “may involve elements of both offences or may shift from one to the other, as many trafficked individuals begin their journey by consenting to be smuggled”.¹⁸⁶

This raises a specific question. At what point(s) should the status of smuggled migrants be determined and what is the purpose of such a determination? Neither of the Protocols offer any guidance about how to distinguish between the two categories. States tend to favour the moment of departure, believing it offers the clearest indication of ‘true intention’ and thus enables them to select out those migrants deserving of exclusion. Rights advocates argue that the whole journey, and experiences after arrival, should be considered, and that human needs rather than intentions should determine status. The purpose of determination of status, from their point of view, would be to ensure that a migrant is able to enjoy protection of his or her human rights at all points on the migratory journey.

Either way, the usual presumption that migrants remain in a steady state – either coerced or consenting – not only denies the evidence of experience but evades a crucial policy issue.

THE AGENCY OF CHOICE AND EXPLOITATION

Lastly, the consent/coercion dichotomy raises the issue of agency – the degree to which migrants exercise autonomy of decision. In many respects the current discourse on migration considers trafficked migrants as “victims” and smuggled migrants as “commodities” or “objects”. As such, they are perceived to have incomplete or no autonomy in the decisions they make. Indeed, the Palermo Protocol frameworks impose such thinking. This too flies in the face of experience. Migrants have mixed motives, and frequently have incomplete control over what happens to them; but it is equally evident that in many cases

¹⁸⁶ The report suggests that the Secretariat might remove some of the problems of identification by providing technical advisory services and guidance manuals to States Parties. Conference of the Parties to the UNCTOC, Report of the Secretariat, CTOC/COP/2005/4/Rev.2, 8 August 2008, p. 5.

they are true agents, determining their own lives, often in dramatic and perilous fashion. Migrants are the ones who get up and leave, initiate a new future, risk what they have for the potential they might create elsewhere. They are the opposite of passive. The decision of women to migrate, in particular, can represent an explicit attempt to take control of their lives. This is particularly significant if women come from oppressive situations or are prone to gender-based violence or discrimination.

This links to the further issue of “mutually advantageous exploitation”. Frequently, migrants will knowingly accept an exploitative bargain, because they consider it will produce a relative improvement for them or their dependents, even if it is

at a high cost. The smuggler makes a profit and the migrant benefits from an employment opportunity.

For coercion to occur, additional factors are required. The most obvious one is lack of choice. If a migrant has no other acceptable option but to accept an exploitative offer – if she would otherwise starve, or could not otherwise obtain life-saving medicine for a child – the offer can be considered coercive. In such situations, the fact that the migrant consents (because the deal is mutually advantageous) does not alter the fact that it is coercive. The critical issue is the *quality* of available alternatives.

This logic applies to many employment opportunities. Migrants will accept work that is dangerous, badly paid, insecure, and lacks social protection. Much of this work could be classified as forced labour. Should such contracts be judged by the smuggling standard (on grounds of consent), or by the trafficking standard (on grounds of exploitation), on the assumption that, since no person willingly consents to exploitative terms of employment, the migrants involved have either been misled or coerced?

This brings one back to international norms, and to what Wertheimer calls the “moral baseline”.¹⁸⁷ In assessing what counts as coercive and what counts as consensual, policy-makers are obliged to take moral positions about what conduct is acceptable or permissible in society. Slavery and slavery-like work are clearly not acceptable, but neither are severe destitution (lack of access to essential food, medicine, shelter, etc.) or violations of other fundamental human rights, including economic, social and cultural rights.

These last arguments underline the reality that the vulnerability of smuggled migrants rarely ends at the border, or at the point at which their “classification” as smuggled loses definition. This returns us to a point made throughout this report: the fluid character of migrants’ experiences, by contrast with the rigidity of many of the distinctions made by contemporary migration policies. Whereas,

187 Wertheimer, 1987, p. 5.

for state officials, migrants change from being “smuggled” to (usually) being “irregular” when they cross the border, from a protection point of view they may retain many of the same vulnerabilities and risks. Commentators have made the point that migrants who travel initially from necessity, rather than free choice, are at greater risk of human rights violations throughout the life cycle of their migration. They are less likely to be able to make choices about their condition or formulate exit strategies, and therefore are more likely to migrate in conditions which do not respect their dignity. It has been pointed out that being smuggled can often be an indicator of vulnerability to exploitation and abuse as the migrant establishes his or her irregular residence in the country of destination.

The artificial dichotomy between the “deserving” trafficked victim and “undeserving” smuggled migrant is mirrored in the too-neat distinction between “forced” and “voluntary” migrants. Regular migrants are seen as “good”, those in irregular status as “bad”. There are also widely held preconceptions that smuggled “criminals” are men, while trafficked “victims” are women. This report argues that it would be sensible to see the situation of such migrants along a continuum, by the extent of coercion and exploitation to which they are subject, or in terms of decisions to travel that are more or less voluntary; and accordingly in terms of specific forms of protection. Aronowitz describes the “continuum of victimisation” along which migrants fall as they use, or are forced to use, irregular migration channels.¹⁸⁸ A neat binary distinction between ‘criminals’ and ‘victims’ is difficult to make, and is hazardous, particularly in protection terms, to apply.

188 Aronowitz, 2001, p. 164.

CONCLUSIONS: TOWARDS COHERENT POLICY

A recent report of the OECD noted that migrant workers in Europe are especially vulnerable to recession because they are often employed in more cyclical sectors such as construction, and should be protected by host countries that need them to plug underlying labour gaps. The 2008-2009 international financial crisis brought into sharp focus the exposed position of migrant workers in many societies. Malaysia announced a ban on the hiring of foreign workers in key manufacturing and services sectors, and Malaysian companies were directed to retrench foreign workers before others.¹⁸⁹ In the United Arab Emirates, migrant workers were laid off without labour protection, often in breach of contract, as the construction companies that employ them halted projects.¹⁹⁰ Other governments reduced the legal admission of foreign workers. Australia announced a 14 percent reduction in its skilled migrant intake, and the United States cut the numbers of skilled migrant workers allowed in on H1B visas. For the first time in many years, the allocation limit for the main US temporary work visa was not reached immediately in 2009, while Australia witnessed a decline in temporary skilled migration of more than 25 percent in the first four months of the year.¹⁹¹ The effect of these trends on countries of origin is predicted to be stark, as falling remittance flows exacerbate local unemployment and slower rates of growth. One human rights organisation expressed concern about “the lay-off of hundreds of thousands of migrant and foreign workers as export-driven economies slow down and economic protectionism rears its head. The remittances from foreign workers totalling some USD \$200 billion annually – twice the global level of overseas development aid – are an important source of income to a range of low and middle income countries like Bangladesh, the Philippines, Kenya and Mexico. Falling remittances mean less revenue for these governments and so less cash to spend on basic goods and services”.¹⁹²

This report has argued that government policies are not internally consistent. They include increasingly draconian policies to contain migration and enforce return, alongside programmes which promote open economies and require migrant workers. A tension exists between a political incentive to deter migration (especially of low- or semi-skilled migrants) and an economic incentive to encourage (though not necessarily to recognise or regulate) it. In this context,

189 Aljazeera.net, 2009.

190 Abocar, 2009.

191 OECD, 2009. The Secretary General of the OECD, Angel Gurría, noted at the launch of the report that “migration is not a tap that can be turned on and off at will. We need responsive, fair and effective migration and integration policies – policies that work and adjust to both good economic times and bad ones. We also need to ensure that the benefits of migration are shared between sending and receiving countries. This requires responsible recruitment policies to avoid the risk of brain drain”.

192 Amnesty International, 2009, Foreword, p. 11.

an incoherent and polarised public debate has tended to emerge: on one side it is argued that qualified migrants bring benefit; on the other, that migrants (especially unskilled ones) drive down wages, feed the black economy, and encourage organised crime.

Politically as well as morally this is a *cul de sac*. No amount of political rhetoric will stop people from moving when the forces and incentives that cause migrants to travel remain in place. Draconian law enforcement is unlikely to succeed either: it has failed in countries across the globe – in South Africa and Malaysia as well as Europe and the United States – at a dreadfully high human cost. Yet, if migration is perceived to be ungovernable, political leaders will continue to come under public pressure to introduce increasingly tough regulations and border controls. This vicious cycle of ineffective repression endangers the civil liberties of migrants (and sometimes of the citizens of the countries to which they move) but does not remove the economic need for migrant labour. As a result, migrants continue to be drawn towards opportunity, but their conditions of employment – as well as the journeys they make to obtain work – become more dangerous, more secretive, and more subject to criminalisation.

We have argued also that it is a mistake to represent migrants, including irregular migrants, in terms of criminality. It is wrong to do so for ethical and legal reasons, because most migrants have not committed a recognised criminal offence. It is wrong too because it encourages xenophobic attitudes and discrimination.¹⁹³ The criminalisation of irregular migration is an excessive response to what is essentially an administrative infraction.

The current policy framework is also flawed intellectually, because it frames behaviour atomically, in terms of individual responsibility. Yet context is essential. While it is obvious that migrants are individually responsible for the decisions they make – to migrate in search of work, to employ the services of smugglers, to live or not clandestinely – to analyse migration only in these terms is to miss the whole picture. It is the equivalent of attributing the rise in obesity solely to the moral weakness of individual consumers. Migrants are responsible for their behaviour, but at the same time they are actors in much larger social and economic processes, which provide incentives for such behaviour.

The dangers of encouraging simplistic approaches are all too evident. In the past two decades, xenophobic and discriminatory attitudes towards migrants have moved in many societies from the edge towards the centre of the political

193 The Special Rapporteur on Migrants drew attention in his recent report to the Human Rights Council to “the increasing criminalization of irregular migration and the abuses of migrants during all phases of the migration process. This criminalization is linked in many countries to persistent anti-migrant sentiments, which is often reflected in policies and institutional frameworks designed to manage migratory flows, often in a purely restrictive manner”. Special Rapporteur on the Human Rights of Migrants A/HRC/7/12, para. 15.

agenda. Anxieties generated by the “war on terror” have encouraged thinly veiled racism and even explicit discrimination against migrants and their communities, especially those from particular national and ethnic backgrounds.

On these and other grounds this report therefore argues that, both to establish a sound foundation for policy and to resist a pernicious drift to political intolerance, policy-makers and governments should give more attention to the protection of migrants, and to do so should draw more explicitly upon human rights standards that they have already committed to uphold.

In her report in 2000 to the UN Human Rights Commission, former Special Rapporteur Rodriguez Pizarro proposed a definition of “migrant” that takes into consideration only an individual’s *current* protection status in the receiving country – not how he or she got there. She noted that “definitions that are related to the reasons why people leave their countries of origin are perhaps the least suitable kind of definition... In order to give a definition of a migrant that is based on human rights, the first and most important step is to see whether or not those persons enjoy some form of legal, social and political protection”.¹⁹⁴ Generally, human rights law is concerned with protecting the rights of individuals because they are human beings, and for protection purposes is only exceptionally interested in defining individuals’ legal status.

In contrast, criminal law draws attention to motive. In this respect, human rights and criminal law approaches clearly diverge conceptually.

This is compounded by the fact that the three relevant spheres of legislative activity rarely link up. Advocates of a criminal law approach may eschew human rights provisions because, rather than strengthen the state’s capacity to seal its borders, they require states to acknowledge obligations to non-nationals and thus divert attention and resources from law enforcement. Economic incentives in favour of migration are in their turn undermined by law enforcement initiatives designed to exclude migrant workers. As a result, small islands of status-specific or situation-specific protection emerge within these bodies of law, which remain unconnected. Instead of reaping the benefits of a coherent and interrelated legal approach, governments find themselves applying laws and administrative policies that contradict or even cancel one another out. Nowhere is this situation more marked than in the handling of migrants in irregular situations, who remain the most vulnerable and least protected of non-nationals.

The report argues that a comprehensive, effective and coherent approach to migration will need to balance three strands of policy: economic interest, law enforcement and protection (through the non-selective application of human rights law). In this context, protecting rights should be seen not just in terms of legal duty (though states do have a legal duty to uphold rights) but as sound

194 Special Rapporteur on the Human Rights of Migrants, E/CN.4/2000/82, paras 30-33.

policy. Commitment to policies that protect migrants from abuse should not be perceived to be in contradiction with a government's commitment to law enforcement or a country's economic interest. On the contrary, it should be argued that such policies are in the interests of the state and its citizens, as well as migrants. All states have human rights obligations, whether derived from treaty or customary law. Attempts to devise migration policies which are fundamentally concerned with the movement and situation of human beings, without giving adequate attention to the situation and inherent rights of those human beings, are destined to end in disarray. International human rights law provides a rich source of norms and standards upon which states can draw in order to respond, in a consistent, legal and humane manner, to the various situations of irregular and smuggled migrants.

Governments have a similar responsibility to build sound economic institutions that are efficient, competitive and sustainable. This enterprise also requires governments to give attention *inter alia* to relevant human rights, with respect to education, health, safe working conditions, rights of association, the prohibition of discrimination, etc. Wherever migrant labour is needed by societies to sustain their economies, it is sound policy to ensure that migrants are not drawn into exploitative and dangerous labour ghettos, that migrants as well as other residents are educated and healthy, and that economic markets remain open and transparent rather than illicit and criminalised.

One important step towards developing a more balanced and integrated approach would be to revise forms of classification that do not correspond to the dynamic and fluid nature of the migration process. The report has argued that many of the legal definitions in current use cannot be applied objectively in practice. We have seen that migration situations often blur definitional differences and produce overlaps, so that a migrant can fall into more than one category at the same, or at different times.¹⁹⁵

UNDP's 2009 Human Development Report has recently called for a policy approach to migration that enhances peoples' freedoms rather than controls or restricts human movement. The Human Development Report asserts that: "[C]onventional approaches to migration tend to suffer from compartmentalisation... Categories originally designed to establish legal distinctions for the purpose of governing entry and treatment can end up playing a dominant role in conceptual and policy thinking. Over the past decade, scholars and policy-makers have begun to question these distinctions, and there is growing recognition that their proliferation obscures rather than

195 The CEDAW Committee has recognised that the categories into which migrants are divided (including categories relating to the factors compelling migration, the purposes of migration and accompanying tenure of stay, and the vulnerability to risk and abuse) "remain fluid and overlapping", making it difficult to draw clear distinctions between them. CEDAW Committee, General Recommendation No. 26 on Women Migrant Workers, 2008.

illuminates the processes underlying the decision to move, with potentially harmful effects on policy-making."¹⁹⁶

To integrate the three strands of migration policies in a single strategic framework, governments should resist politicised short-term responses to this complex and sensitive issue, and develop policies in their place that will highlight international cooperation, based on agreed standards, shared experience, and best practices. What might this look like? In the section below we suggest some starting points for a policy that would protect the rights of all migrants while enabling policy-makers and governments to provide responses to the divergent and often competing interests that require their attention in this area. Not all governments will want, or be able, to implement all the elements we list. However, they provide a foundation on which policy could build. Most importantly, they offer a starting point from which to address the greatest political challenge for political leaders and officials in the context of migration: to find and develop a political language that is adequate to address migration responsibly. The poverty of public discussion remains in most countries a principal impediment to coherent policy and effective action.

ELEMENTS OF A COHERENT MIGRATION POLICY

Governments should take a dispassionate look at the objectives they set. In particular, they should review any objectives that seek solely to suppress migration, because such objectives are likely to be operationally unachievable, and expose governments to political criticism. Policy-makers should also review objectives that criminalise migration, because they are likely to be inappropriate (and often unachievable), and put the rights and dignity of migrants at risk.

If governments decide that it is in their country's interest to curb irregular inward migration, the creation of accessible channels for legal migration, incorporating human rights safeguards, is likely to have a positive effect. Since irregular migration is driven by unequal access to opportunity, states will need to address the incentives that cause people to migrate. The evidence suggests that, taken in isolation, policies that narrowly attempt to exclude migrants from reaching and crossing borders will fail, at high cost to human life.

Many national migration policies are internally incoherent. Different ministries have piecemeal responsibility for aspects of policy. While finance and labour ministries recognise the economic need for a continuing inflow of migrant workers, interior ministries devise elaborate barriers to legal entry, often in response to uninformed demands from the media or the public. Local governments may have different objectives again. Governments should seek to resolve such coordination issues. Inter-ministerial coordination is particularly important to counter-smuggling policies, where divergent or competing ministerial priorities

196 UNDP, 2009, p. 12.

may create protection gaps. An unbalanced focus on restrictive border control and entry procedures is likely to create conditions in which asylum seekers are unable to access protection to which they are entitled, and smuggled people are at greater risk of discrimination or physical insecurity.

Many states and international organisations have adopted a “management” approach to migration, which tends to prioritise its control and containment. Such policies should base themselves on the fact that migrants, regardless of their status, are neither commodities nor criminal by virtue of their migration, but human beings with rights, including an entitlement to protection. On these grounds, migration policies must be distinct from management of other legal or illegal flows (goods and services, drugs and weapons).

In redefining their media and public policy positions, governments should emphasise the benefits as well as the costs of migration, and the dignity and value of migrants and their cultures. It is in the interest of governments to promote public discussion that is informed and respectful, that reflects the real complexities of migration and the difficult policy issues it generates. In short, public communication strategies should provide rational forms of assessment. As part of this strategy, governments should explain to the public the obligations in law that they have accepted, which provide certain protections to migrants, and which are in addition fundamental to the freedom and wellbeing of all people on the country's territory. When the public language makes no distinctions between criminals and migrants, and demonises human movement, it encourages xenophobia and an inappropriate focus on security.¹⁹⁷

Governments and other actors lack accurate and consistent data on migration, and should invest in its collection. Much discussion of migration relies on emotionally-charged rhetoric rather than factually-accurate analysis. In addition, violations of migrants' rights are often under-reported, because migrants fear the consequences of seeking redress and conventional data collection methods cannot easily monitor irregular migration or levels of smuggling and trafficking. There is an urgent need for more comprehensive and reliable migration data.

Data collection should clarify the situation of migrants, and their role in local economies and societies. Data collection programmes that seek primarily to exclude or sanction the migrant population are likely to fail. Governments should apply stringent data protection standards to any record keeping in this regard, and pay due regard to the right of all migrants to privacy.

International cooperation

States should make every effort to ratify and implement international instruments that protect migrants' rights, including the International Convention on the

197 Buckland, 2009, p. 164.

Protection of the Rights of All Migrant Workers and Members of Their Families. In addition to providing binding obligations on states to promote and protect the rights of migrants, ratification sends a public message that the state is committed to protecting migrants' rights. States should include the situation of all migrants in their territory when they report to human rights treaty bodies, and should in addition publish national reports on international migration that include disaggregated statistical data explaining the demographics of migration and identifying human rights concerns.

Bilateral or multilateral agreements concerning migration, including agreements conducted within the auspices of Regional Consultative Processes (RCPs), should be transparent and accessible. Open discussion of government policies provides essential checks and balances, and will allow concerned interests (including migrant communities, NGOs, academics and businesses) to engage with government on the basis of reasoned argument. Since no single political actor can successfully manage all the dimensions of migration, cooperation and partnerships are essential.

Countries of employment should ensure, through bilateral agreements with labour-sending countries, that migrants who return to their country of origin have access to legal mechanisms that will enable them to claim unpaid wages and benefits. Many elderly migrants must remain in the state of employment because they are unable to receive pensions and social benefits in their countries of origin. Social security payments and pensions, including old age and disability pensions, should be fully and effectively portable.

Countries of origin should recognise they have a particular responsibility to protect their citizens, who should not journey abroad without adequate information, training or protection. States should discharge this duty of protection at every stage of the migration process. Just as effective consular protection is a vital service, so it is important to ensure that migrants are not destitute after their return home.

Countries of origin and destination should work together to ensure that migrants are provided with adequate training and information about the conditions they should expect to find in their countries of employment, as well as information about accessible channels to report abuse and pursue legal and other remedies.

Such programmes should respect human rights standards and reflect demand for migration. In this context, anti-trafficking and anti-smuggling information campaigns should seek to protect fundamental rights, including the right to freedom of movement.¹⁹⁸

198 GAATW, 2007.

Training and regulation

Law enforcement officials, immigration officials, the police, and other relevant public officials that come into contact with migrants, including subcontracted service providers, should receive adequate training in human rights standards, including training on standards applicable to non-citizens and migrants, and the entitlements of specific groups such as migrant women, migrant children, and smuggled migrants. Where border officials are required to distinguish between trafficked and smuggled persons, their training should emphasise the human rights protections of *all* persons regardless of legal status. Training programmes should be complemented by subsequent supervision and monitoring.

Judicial and administrative procedures should be in place that sanction border officials if they breach human rights standards, thereby meeting the state's treaty obligations but also demonstrating to the public and the international community that government is committed to the human rights protection of migrants as well as responsible border controls.

Government officials should engage in dialogue with businesses, employers' associations, chambers of commerce and trades unions, as well as recruitment and placement agencies, to ensure that all parties are aware of the demand for migrant labour and to ensure that regulatory standards effectively protect migrants' rights.

States should also engage in similar dialogue with recruitment, brokerage and placement agencies. They should ensure in addition that recruitment agencies are not permitted or able to recruit, place or employ migrant workers in jobs where they will be subject to unacceptable hazards and risks or human rights abuse. Fees or other charges for recruitment and placement should not be borne, directly or indirectly, by migrant workers. Recruitment agencies that violate the human rights of migrant workers should be sanctioned appropriately (prohibited from operating, licenses suspended, individual penalties).

National Human Rights Institutions (NHRIs) and similar institutions should be mandated and encouraged, to investigate the human rights situation of migrants and intervene with government to protect and promote the rights of all migrants within their jurisdiction. NHRIs should promote international protection standards to government officials, parliamentarians and the general public, and encourage respect and tolerance for all migrants.¹⁹⁹

199 For example, NHRIs in the Asia Pacific region have agreed to undertake a joint programme on the human rights of migrant workers in the region. They adopted the Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia, and are cooperating in joint research and action. See www.asiapacificforum.net/news/nhris-join-forces-to-tackle-abuse-of-workers.html.

Border protection

Given the particular vulnerability of smuggled migrants, and irregular migrants more generally, their protection should be a central objective. Procedures for border officials should clearly identify the need to protect persons who have been trafficked or smuggled. Government responses to smuggling should avoid automatic detention and deportation, particularly in the case of vulnerable individuals. National law and policy on counter-trafficking should address a range of abuses, such as forced labour, in addition to sexual exploitation. Officials should ensure that anti-smuggling operations do not put at greater risk the lives and dignity of those who are caught up in them. Law enforcement agencies should not prosecute persons who assist asylum seekers to seek international protection. All border enforcement procedures should be applied in a scrupulously non-discriminatory manner, ensuring equal treatment for men and women, between social classes and different minority groups.

As with refugees and asylum seekers, the principle of non-rejection at the frontier, which includes interception measures, should be considered equally important in the context of migration, given that the principle of *non-refoulement*, under human rights law and customary international law, has a wider reach than Article 33 of the Refugee Convention.²⁰⁰ Irregular migrants are particularly affected by disproportionate or unlawful expulsion procedures. Extradition, deportation and expulsion should in all cases be preceded by an individual examination of a migrant's circumstances. Procedural guarantees in the context of expulsion include *inter alia*: a prohibition on mass or collective expulsions; effective entitlement to challenge individually the decision to deport; access to competent interpretation and legal counsel; and access to a review, ideally a judicial review, of negative decisions.

Wherever possible, administrative detention should be avoided in favour of less intrusive methods of border control. States should ensure that adequate and non-discriminatory alternatives to detention are available and accessible, and should resort to detention only where no alternative will be effective. This is particularly important in the case of migrants with particular protection needs, such as children and some smuggled migrants. The mere fact that a person embarks on a migratory journey, often knowing that he or she will be forced to endure harsh conditions along the way including the possibility of being detained, does not mean that he or she is deserving of arbitrary detention or poor detention conditions, both of which are human rights violations.

200 See Article 3 of the CAT which prohibits the expulsion, return or extradition of a *person* to another state where there are substantial grounds for believing that she or he would be in danger of being subjected to torture. In addition, see CERD General Recommendation No. 30 which requires states to "ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment".

States should ensure that their sovereign powers are not applied in a discriminatory way at the border, for example by use of racial profiling. They should also ensure that discrimination against migrants is interdicted in the society at large. National legislation and effective mechanisms should hold public and private entities to account if they discriminate against migrants in purpose or effect.

Complaints and access to justice

For all migrants, including irregular and smuggled migrants, it is important to be able to bring complaints against abusive employers or recruiters.²⁰¹ Governments should ensure that those who violate the human rights of migrant workers are brought promptly to justice, via criminal prosecution where appropriate. Migrants who claim to have been abused should not be subject to automatic deportation or other unnecessary punitive measures.

Just as it is important to ensure that all persons, including migrants, have effective and equal access to justice, migrants' ability to participate in issues that concern them is a crucial element of recognition and inclusiveness. Moreover, migrants and migrants' organisations can help to address many of the "policy problems" that migration raises. Governments should ensure that migrants are included in forums where migration policies are debated and in particular that marginalised groups, such as migrant women, can make their views heard.

Regularisation

Governments should explore ways to address migrants' lack of legal status. Potential solutions include regularisation and the creation of avenues for legal migration that include low- and semi-skilled migrants. For migrants and their host countries, many benefits may accrue from regularisation:

- The skills of migrant workers can be matched more accurately with those needed in the formal employment market.
- Migrants are in a better position, legally and practically, to challenge abuses in court and obtain remedies.
- It becomes easier to integrate migrant workers and their families into society, and avoid the formation of marginalised and excluded "ghettos".
- Migrants can access health, education, housing and other public services without fear of arrest or official reprisal (heightening the visibility of irregular migrants may also mean that particularly vulnerable migrants, such as children at risk, can be brought to the attention of the proper authorities).

201 The Committee on Migrant Workers has called on states to establish effective and accessible complaints channels without retaliation for migrants in an irregular situation.

- Local and national authorities can more accurately plan for the demands that migrants will make on social services.
- Migrants can obtain fair wages, and have their skills and qualifications recognised.
- For governments, tax revenues would rise, in some cases significantly.
- Governments are able to obtain accurate records of the number and situation of migrants on their territory, which assists them to plan in many areas.

Regularisation takes different forms. *De facto* programmes grant legal status to irregular migrants on the basis of long-term residence. “One off” programmes target particular groups of migrants on the basis of length of residence, employment status, family ties, social integration, or absence of a criminal record. (These are also called “earned regularisation”.) In some cases, programmes target irregular migrants who cannot be returned to their countries of origin for legal, humanitarian or administrative reasons.²⁰²

Whether regularisation programmes attract further irregular movement into the host country is a moot point, though studies show that employment demand is the strongest “pull factor”.²⁰³ States therefore need to consider carefully the requirements of their domestic economies, and the extent to which they provide sufficient legal channels of entry to fulfil the demand for labour, including low-skilled labour.

Employment and social policies

Regardless of regularisation, states should ensure that temporary labour schemes do not merely exploit migrants. A recent OECD report questioned the economic efficiency of circular migration schemes that cycle numerous lower-skilled workers through the same jobs. Governments should assess their labour market demands at regular intervals to ensure that legal entry channels are adequate. In terms of protection, host countries should ensure that migrant workers who must leave at the end of temporary contracts can remain for the time they need to claim unpaid wages or obtain redress for any violations of their rights.

202 Some NGOs claim regularisation is a more realistic and less expensive option than repatriation. The British Joint Council for the Welfare of Immigrants claims that regularisation could generate tax revenue of up to £1bn in the United Kingdom, whereas it would cost £4.6bn to deport the estimated 500,000 irregular migrants in the country. See www.jcwi.org.uk/Resources/JCWI/PDF%20Documents/Campaigns/JCWRegularisationfaqs.pdf.

203 *Ibid.*, p. 1.

Domestic labour legislation (notably on employment, maternity protection, wages, occupational safety and health) should apply to all migrant workers. Regardless of their status, migrants should enjoy decent and safe working conditions, a humane workload and work hours, adequate salaries, and sufficient leisure time and annual leave.²⁰⁴ The right of association should be protected, including the right to form and join trades unions. Association rights can take specific forms for domestic workers and migrant workers in unregulated or informal employment; they may be better protected by their cultural or religious networks, for example, than by trades unions.²⁰⁵

Governments should ensure that work permits are not tied to a single employer. Migrants who fear reprisals if they report abuse, or who cannot legally change jobs, will often be forced to accept irregular status to remain in their country of employment. In this respect, note should be taken of good practice examples in countries where migrants are entitled to seek alternative employment for a limited time after the end of their initial contract.

Governments should inspect and regulate all workplaces impartially, according to the law, including smaller and more informal employers which often employ migrant workers. Abusive employers should be prosecuted and to this end the law should protect whistleblowers from reprisals, regardless of their legal status. Workplace inspections should have the purpose of protecting employees as well as public health and safety, and should not aim primarily to detect irregular migrants in order to deport them.

In many countries, health care professionals, local police officers and other public officials are obliged to report the presence of undocumented migrants to national authorities (so called “duties to denounce”). Such policies should be rescinded. As a result of them, many irregular migrants will not seek health care until they are critically ill, and do not report hate attacks or crimes against them to the police. Such policies increase social mistrust, allow criminality to flourish, and endanger public health, and clearly harm the rights and dignity of individual migrants.

204 See the advisory opinion of the Inter-American Court of Human Rights, OC-18/03 of 17 September 2003, *Juridical Condition and Rights of the Undocumented Migrants*, which stated that “[a] person who enters a state and assumes an employment relationship, acquires his labour human rights in the state of employment, irrespective of his migratory status... [T]he migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights”.

205 The Seoul High Court in South Korea issued an important judgement concerning the right to association of irregular migrant workers when, on 1 February 2007, it recognised the Migrant Trade Union, composed of irregular migrants working in the country. South Korea’s Government had previously rejected calls for the formation of a migrant workers’ trades union on the grounds that irregular migrant workers did not qualify as workers under existing legislation.

Governments should attach importance to the social integration of migrant communities. In extreme cases, non-integration creates “ghettos”, pockets of extreme poverty in the midst of wealthy cities. The social alienation, feelings of injustice and disempowerment that result have been well documented. Governments should ensure that all migrants, regardless of status, are included in national plans on the provision of public services, including housing, water and sanitation, health care, and education. Where relevant, migrant communities should be included in MDG (millennium development goals) targets.

Access to family life is often taken for granted. Yet it is denied to migrants across the world, by circumstances or the laws of the country in which they live and work. Circular and temporary migration schemes, in particular, explicitly prohibit migrant workers from bringing their families to their place of employment. Yet, being with family is a condition of sustainable integration. In addition, international human rights law recognises a family’s right to live together: as the fundamental unit of society, it is entitled to respect, protection, assistance and support.²⁰⁶

Gender and age

For women, migration can bring economic security and empowerment but also expose them to abuse. Women migrant workers are often subject to multiple layers of discrimination, disadvantage and marginalisation. Gendered forms of abuse are often related to the sectors into which women migrate, including care work, domestic work and the entertainment industry. Given their specific vulnerability, governments should give attention to the protection of women migrants. Some have been mentioned above: protection of the rights of smuggled and trafficked women; gender-sensitive training for border and immigration personnel. Within the workplace, women migrants should not face discriminatory health testing or be dismissed from their employment if they are pregnant.²⁰⁷

Male migrants also face discrimination. Men who migrate on their own, or who belong to particular ethnic or national groups, are disproportionately singled out for scrutiny at borders, and are often subject to arbitrary ill-treatment or detention. Many irregular migrant men endure cramped, unsanitary and dangerous working conditions.

206 The right to family unity is derived *inter alia* from Article 16 of the UDHR, Articles 17 and 23 of the ICCPR, Article 10 of the ICESCR, in addition to regional conventions, such as Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See UNHCR, 2001.

207 For a comprehensive description of the rights of women migrants, see the expert guidance provided by the Committee on the Elimination of Discrimination against Women in its General Recommendation No. 26, CEDAW/C/2009/WP.1/R, 2009, 5 December 2008.

Child migrants, especially those whose status is irregular, are particularly vulnerable to abuse. Children may be sold to traffickers, and forced into labour and sexual exploitation. Children in detention, notably unaccompanied children, are at great risk of physical and sexual abuse. In accordance with international standards, states should refrain from detaining child migrants, regardless of their status. A particular issue of concern is that children born to irregular migrants are often unable to have their birth registered, and therefore can face difficulties in claiming a nationality, a basic precondition for accessing rights. States should ensure that the law and administrative practices do not render stateless any children born to irregular migrants on their territory. They should equally ensure that all children, whatever their status, have access to primary education, health care and essential food and shelter.

The ILO has underlined that the situation of elderly irregular migrants is a significant cause for concern, particularly when they lack access to pension schemes or adequate health services.²⁰⁸ Many are unable to receive their pensions and other social benefits if they return to their countries of origin, and so are forced to remain in the territory of employment. States should ensure that pensions, including old age and disability pensions, are fully portable.

Domestic and care workers

The flow of domestic and care workers is an important dimension of migration. It enables many women to work in professional careers. At the same time, many domestic workers inhabit a twilight zone of intimidation, violence and impunity. They work without contracts, or contracts that do not provide for conditions of “decent work”, are paid little, lack freedom of movement, often live in seriously inadequate conditions, and work unreasonable hours. Much domestic labour law is silent regarding domestic work, and prosecutions of employers are rare. Policy-makers should ensure that domestic migrant workers are sufficiently protected in law and practice, and that domestic work is recognised as “work”.

This report has argued that governments should not seek to terminate or end migration, first because such an objective is unrealistic – human movement is ancient and inevitable – but also because such policies do not reflect the interests of countries of origin and destination. Policies should reflect the common sense view that the arrival of migrants in more prosperous economies is to be expected and can bring many benefits.

Nor should governments put their faith in ‘elite’ migration schemes which open legal migration channels solely to those who are well-off and highly skilled. That

208 See www.ilo.org/public/english/employment/skills/older/iloprogram.htm.

too is an unrealistic objective. Where economies offer incentives to migrate, migrants will find their way into those economies.

The report argues that governments should adjust the primary focus of their migration policies, from detention and status determination (at the moment of passage across a border) towards protection against risk and harm. This position does not imply that governments should surrender control over their borders. They will continue to act at the border to prevent the spread of crime, disease and other threats. Countries will equally continue to promote their economic interests, including through immigration. It implies instead a nuanced approach, that addresses the larger developmental and social dimensions of migration as well as its regulation, which in turn implies the adoption of policies that will protect migrants from human rights violations, and give attention to their needs as well as the needs of others in society.²⁰⁹

Policies that are designed to regulate or reduce migration should address the reasons why people migrate, and not seek only to block their entry into destination countries. Governments should affirm they offer such protection partly because they support the rule of law and wish to respect their obligations under human rights law, but also because such policies are economically sound, promote more balanced development, and contribute to the reduction of crime, corruption and other forms of abuse, objectives which are in the interests of the country and all its citizens.

In practice, for many governments, the affirmation that they will seek to protect the rights and dignity of migrants (and all other people in their jurisdiction) will not increase greatly the burdens and responsibilities they have already accepted. It would generate sounder policies, create conditions for a more sensible and less xenophobic discussion of those policies, and also permit governments to develop regulatory mechanisms that, rather than being repressive of civil liberties, would focus on promoting sustainable and efficient economic and social policies.

For too long governments have felt obliged to present their policies on migration against a background of racist and discriminatory assumptions. It is time to change this barren, damaging paradigm. Migration is part of mankind's lived heritage – it is an experience shared by all societies and a responsibility of all governments, whether they are countries of origin, destination or transit or all three at once. If this can be accepted, it may become possible – even be considered desirable – to craft policies that respect the contributions and rights of all those who are involved in migration and its consequences.

209 See Mike Dottridge, "Introduction", in GAATW, 2007.

APPENDIX

APPENDIX: THE RIGHTS THAT MIGRANTS ENJOY UNDER INTERNATIONAL LAW

This Appendix provides a non-exhaustive summary of some fundamental rights that all migrants enjoy under international law and standards, including rights implicated in the process of migrant smuggling.

In summary, all migrants regardless of their status have the right to:

- protection from life-threatening, unsafe or highly painful or demeaning forms of transport;
- equal access to justice;
- procedural protection, particularly in the event of arrest and detention; procedural due process in the event of an inquiry into the lawfulness of their presence in the territory;
- protection from coercive, unsafe or inhuman working conditions;
- payment of fair compensation for work performed;
- organise for the protection of their employment interests;
- protection from physical or sexual abuse;
- education, particularly for migrant children;
- adequate housing; protection against grossly inadequate housing conditions; and access to private or non-state subsidised housing where available;
- health; publicly-funded emergency health care, where available within the state, and other forms of social assistance necessary to preserve life;
- leave the country under safe and human conditions;
- consular protection.

And the right not to be:

- detained for administrative reasons where adequate alternatives for verifying identity or ensuring availability for removal exist;
- subject to prolonged or indefinite terms of administrative detention for illegal entry;
- sent back to conditions in which they risk torture or ill-treatment (*non-refoulement*).

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A. RIGHTS PERTAINING TO THE PROCESS OF MIGRANT SMUGGLING

a. USE OF UNSAFE METHODS OF TRANSPORT

All persons, regardless of their nationality or previous conduct, have the right to life.²¹⁰ The universal nature of this obligation is affirmed in the ICRMW,²¹¹ as well as by the Smuggling Protocol which refers to protection of the right to life of smuggled persons.²¹²

In the context of trafficking or smuggling, this positive duty of protection requires states to prevent and punish the use of modes of transport which endanger the lives of smuggled and trafficked persons, and to provide rescue services to persons whose lives are in danger. The latter duty is expressly stipulated by the Smuggling Protocol, which requires States Parties to “afford appropriate assistance to migrants whose lives or safety are endangered” by reason of their being smuggled.²¹³ States are obliged under international law to protect migrants who are being transported in circumstances that could amount to torture or be considered “cruel, inhuman or degrading”.

In fact, if a migrant being smuggled is in any serious physical danger, even if that danger is not life-threatening, states are required under human rights law to protect against that danger in order to ensure the physical “security” of the person, by taking punitive and rescue measures. The basic test is whether the conditions of transport are so bad as to fall below a minimum threshold of human dignity. In determining this question, factors such as migrants’ access to food, water, sleep, adequate space and sanitary conditions are relevant.

Under international maritime law, ship captains and their crews are obliged to respond to distress calls and mount rescue efforts for persons in distress at sea, regardless of their nationality or status, or the circumstances in which they are found. The responsibility to rescue those in distress at sea has become universally recognised and is considered to be customary international law. The obligation of rescue at sea implies that the rescued migrant is able to disembark from the ship at a place of safety. Moreover, traditional maritime humanitarian law on securing the safety of persons in distress at sea has recently been strengthened by adding a new obligation on states to cooperate on rescue operations.

210 ICCPR, Article 6(1): “Every human being has an inherent right to life.”

211 Article 9. It should especially be noted here that the ICRMW explicitly applies “during the entire migration process”: namely to departure, transit, the entire period of stay (and remunerated activity) in the state of employment, and return to the state of origin or habitual residence (Article 1(2)).

212 Article 16(1).

213 Article 16(3).

International Convention for the Safety of Life at Sea (SOLAS) 1974 and International Convention on Maritime Search and Rescue (SAR) 1979

Amendments to the SAR and SOLAS Conventions were adopted in 2004. These clarified the obligations of states in whose search-and-rescue area persons or vessels in distress are found. States must coordinate rescue operations up to the point where rescued people are delivered to a safe place, and “ensure that in every case a place of safety is provided within a reasonable time”. In January 2009 guidelines were issued by the International Maritime Organisation (IMO) for the disembarkation of persons rescued at sea, which state that international protection principles included in international instruments should be followed. The IMO guidelines further underline that all parties involved, including the state responsible for the SAR region where the persons are rescued and other coastal states on the planned route of the rescuing ship, should cooperate to ensure that disembarkation of the persons rescued is carried out swiftly, taking into account the ship master’s preferred arrangements for disembarkation and the immediate basic needs of the rescued persons. The state responsible for the SAR area where the persons are rescued should exercise primary responsibility for ensuring such cooperation occurs. If disembarkation from the rescuing ship cannot be arranged swiftly, the state responsible for the SAR area should allow the persons rescued to disembark in accordance with its immigration laws and regulations, into a place of safety under its control, where they can have timely access to post-rescue support.

b. FREEDOM FROM PHYSICAL ABUSE

The ICCPR (Article 9(1)) and the ICRMW (Articles 16(1) and 16(2)) require states to provide effective police and other criminal justice protection for all persons, including smuggled or irregular migrants, who are subject to physical or sexual violence.²¹⁴ If the abuse can be said to rise to the level of “inhuman” or “degrading” treatment, the state’s positive obligation is reinforced (under Article 7 of the ICCPR and Article 10 of the ICRMW).

Where irregular migrants are minors, the state’s obligation to ensure effective protection against abuse is strengthened by the CRC, which requires states to take appropriate steps to ensure the wellbeing of children, taking into account the obligations of parents and other persons who are legally responsible for them.²¹⁵ Where no person in the state’s jurisdiction can properly be considered legally responsible for a child, the state’s obligation is engaged. Where a smuggler or trafficker continues to have some “care” or control of a child, a state will have additional obligations to “take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual

214 See also *Carmichele v. Minister of Safety and Security*, CCT 48/00 (where the South African Constitutional Court interpreted the analogous provision to Article 9 in s 12 of the South African Constitution).

215 CRC, Article 3(2).

abuse” while in the “care” of that person.²¹⁶

States also have a special duty to irregular migrants who are women. CEDAW (Article 3) requires them to take measures that include the protection of women against the risk of sexual violence or abuse. This obligation is particularly important where the risk of violence is a major impediment to women's full equality in the enjoyment of other human rights.²¹⁷

The Smuggling and Trafficking Protocols require states to provide protection against physical and sexual abuse/violence, although each Protocol focuses on specific kinds of abuse. The Smuggling Protocol identifies any form of violence that is inflicted on the smuggled migrant arising from the smuggling transaction;²¹⁸ while the Trafficking Protocol identifies forms of violence which threaten bodily harm or safety.²¹⁹ The particular circumstances of women and children are explicitly referred to in both Protocols.

C. ACCESS TO NATIONAL COURTS AND TO LEGAL REDRESS

The ICCPR provides that “all persons shall be equal before the courts and tribunals” of States Parties,²²⁰ and that: “Everyone shall have the right to recognition everywhere as a person before the law.”²²¹ The universal nature of this obligation is made clear in other articles of the Covenant,²²² and specifically reinforced in respect of irregular migrants by the ICRMW.²²³

216 CRC, Article 19. It might be argued that this obligation is reinforced by the ICCPR (Article 24(1)) which provides that: “Every child shall have, without any discrimination as to ... birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” However, the grounds on which discrimination is prohibited in Article 24(1) appear to be exhaustive, and do not appear to extend to trafficked or smuggled status. For this reason, it may be sounder to rely on Article 9 of the ICCPR, and CRC (Articles 3(2) and 3(19) rather than Article 24 of the ICCPR.

217 For the connection between sexual violence and restriction on women's liberty and equality more generally, e.g. the discussion in *Carmichele v. Minister of Safety and Security*, CCT 48/00.

218 Article 16(2) of the Smuggling Protocol states that the State Party “shall take appropriate measures to afford migrants appropriate protection against any violence that may be inflicted upon them, whether by individuals or groups, by reasons of being the object” of smuggling.

219 The Trafficking Protocol (Article 6(5)) asserts states “shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory”.

220 ICCPR, Article 14.

221 ICCPR, Article 16.

222 Articles 14 and 16.

223 Articles 18 and 24.

A state's duty to *ensure* these obligations will therefore clearly include an obligation to allow all migrants to have access to the court system. At a minimum, this should enable migrants to seek redress against those who have abused them, and recognise their right as legal persons entitled to redress.²²⁴

Deriving from the principle of equality before the law, smuggled migrants should be entitled to claim substantive redress on grounds such as the right to “liberty and security” of the person under Article 9 of the ICCPR, the right not to be enslaved under Article 8 of the ICCPR, the right to adequate working conditions and other rights.

It is arguable too that a state's duty to *fulfil* the right contained in Article 9 will require it to provide a system of effective civil remedies against those who have engaged in smuggling, as well as a system of criminal penalties.²²⁵ In the case of women who have been smuggled, this duty is reinforced by Article 6 of CEDAW.²²⁶

In cases where it is the migrant who is being prosecuted, he or she must be able to benefit from the right to a fair trial guaranteed by Article 14 of the ICCPR.

B. RIGHTS PERTAINING TO DETENTION

a. FREEDOM FROM UNJUSTIFIED DETENTION RELATED TO IRREGULAR ENTRY OR RESIDENCE

Article 9 of the ICCPR provides that everyone shall have the right to liberty and security of the person, and in particular, that “[n]o one shall be subjected to arbitrary arrest or detention”. This obligation is echoed and reinforced by Article 5 of the ICERD, and by the ICRMW²²⁷ which expressly prohibits the arbitrary arrest and detention of migrant workers both individually and collectively, as

224 This is the broader view of Article 16 taken by Volio, 1981, p. 188.

225 This reading of Article 9 is reinforced by the terms of Article 6(6) of the Trafficking Protocol, which provide that: “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.” To this end, the Protocol imposes an obligation on states to ensure that trafficked migrants have access to information on court proceedings (Article 6(2)), as well as a somewhat less demanding obligation to give trafficked persons’ appropriate information about their legal rights (Article 6(3)(b)).

226 States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

227 Articles 16(1) and 16(4).

well as by customary international law.²²⁸ With regard to children, the CRC details the state's obligation to respect the rights of the child to be protected against unlawful or arbitrary deprivation of liberty (Article 37). Children may only be detained as a last resort, that is, if necessary because there is no other available, reasonable and appropriate alternative.

The effect of this requirement is that any detention of smuggled migrants must be reasonably proportionate to achieving a valid state objective. In the administrative context, this implies that it must substantially advance a state's interest in ascertaining identity or facilitating removal.²²⁹ The Smuggling Protocol allows arrest and detention for purposes of removal. However, the state must show that adequate alternatives to detention, such as systems of supervised release or release on bail, would not be sufficient to ensure that an irregular migrant would remain available for interview or removal. In other words, the principle of proportionality under Article 9 requires a state to show that no available alternative which restricts liberty less will achieve its objectives.²³⁰ Notwithstanding the current concern with security, the administrative detention of irregular migrants for any substantial period of time is still not easily justified in law, particularly in the case of prolonged or even indefinite detention.²³¹

The arrest or detention of smuggled migrants (as distinct from those who smuggled them), for purposes of prosecution, will normally be wholly disproportionate to the aim of effective border control, and therefore contrary to Article 9(1) of the ICCPR and Article 16 of the ICRMW. This is clearly shown by Article 5 of the Smuggling Protocol, which states that: "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object" of smuggling. Even more obviously, any lengthy term of imprisonment would in most cases clearly be disproportionate to either deterrence or denunciation objectives.

228 Helton, 1993.

229 This will require states to show that alternatives less restrictive of liberty and security of the person (such as the use of open-accommodation centres or release on bail) are not adequate to achieve the relevant objectives: see also decision of the Human Rights Council in *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997), available at www.unhcr.ch/tbs/doc/nsf.

230 In addition, in the case of administrative detention of irregular migrants who are minors, Article 39(2) of the CRC further requires that states show that detention has been employed as a "last resort".

231 On 18 February 2009, the European Court of Human Rights upheld a 2004 decision of the UK House of Lords in the case of *A and Others v. the United Kingdom* in relation to the indefinite detention of eleven foreign nationals. The European Court of Human Rights, noting that UK citizens had not been subject to the same detention regime, observed that "[t]he choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists".

In many cases, more generally, criminal punishment of irregular migrants merely for breaching immigration rules would be considered disproportionate, because its infringement of the right to liberty and security of the person would outweigh the state's interest in border control.

b. PROCEDURAL PROTECTIONS IN THE CASE OF DETENTION

When irregular migrants are arrested or detained in a destination country, they are entitled to claim a range of procedural and due process protections under the ICCPR. These include the right to be informed of the reasons for their arrest and the charges which are brought against them;²³² the right to be brought promptly before a judge or other officer exercising judicial power;²³³ the right to challenge the legality of their arrest or detention;²³⁴ the right to compensation in the event of wrongful detention;²³⁵ the rights to be detained in separate facilities from those who have been convicted of an offence (adults except in exceptional circumstances, children in all cases)²³⁶ and the right to humane treatment and respect for the inherent dignity of the human person when detained.²³⁷ Further safeguards include access to medical care,²³⁸ and the right to communicate with the outside world (including family and non-governmental organisations).²³⁹

In order to assist states in the implementation of these rights, the UN Working Group on Arbitrary Detention has adopted guidelines for the detention of irregular migrants and asylum seekers.²⁴⁰ In addition, the following United Nations guidelines provide important “soft law” standards which regulate the conditions under which migrants may be detained: the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988* and the *UN Standards Minimum Rules for the Treatment of Prisoners 1977*.²⁴¹

232 ICCPR, Article 9(2).

233 Article 9(3).

234 Article 9(4).

235 Article 9(5).

236 Article 10(2).

237 Article 10(1).

238 ICESCR, Article 12; ICRMW, Article 28.

239 ICRMW, Article 17(5).

240 WGAD Deliberation No. 5 concerning the situation regarding immigrants and asylum seekers E/CN.4/2000/4 December 1999. The Working Group has suggested that a maximum period of detention should be legally set and that no detention should be prolonged or considered indefinitely.

241 See Amnesty International, 2007.

These obligations are reiterated, with specific reference to migrant workers, in the ICRMW²⁴² which further requires states to communicate with consular officials (in accordance with the Vienna Convention on Consular Relations), to enable migrants themselves to communicate with consular officials, and to inform migrants of these rights.²⁴³ Article 16(5) of the Smuggling Protocol provides the same obligation on consular access.

In the context of detention, children have additional protection under the CRC. Article 37 stipulates *inter alia* that: “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” The provisions of the CRC relate to the state’s obligation to act in the best interests of the child, taking the child’s needs and age into consideration, and are a crucial protection in cases where children might be arbitrarily separated from their families. International standards provide that children in detention should have access to legal and other appropriate assistance, and also that they should be permitted to engage in meaningful activities that promote their development and their health. Key in this regard is the ability of children in detention to access their right to education, in particular the right to free and universal primary education. UNHCR guidelines on the detention of asylum seekers make clear in addition that the detention of vulnerable groups such as children is “inherently undesirable”, and the detention of asylum seeking children and unaccompanied children, should as a general rule be avoided.²⁴⁴ Other UN Guidelines also provide relevant standards for the detention of children, including migrant children. These include the *UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985*, and the *UN Rules for the Protection of Juveniles Deprived of their Liberty*.

Under international law, the norms for conditions of detention of irregular migrants are the same as for any other detainees.²⁴⁵ The rights that have been described above would necessarily apply during such process of detention and determination.

C. ALTERNATIVES TO DETENTION

International expert bodies have increasingly opposed the routine use of detention as an instrument of immigration control. The WGAD has asserted that “criminalizing irregular entry into a country exceeds the legitimate interest of

242 Articles 16 and 17.

243 Article 17(7).

244 UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Geneva, Guideline 6.

245 UN Standard Rules for the Treatment of Prisoners.

States to control and regulate irregular immigration and can lead to unnecessary detention".²⁴⁶ Given the presumption against detention in international law, states are required to consider alternative non-custodial measures before turning to detention as a last resort. The WGAD has accordingly stressed that "alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention".²⁴⁷

Adequate alternatives to detention include: fair reporting requirements, the payment of affordable bails, bonds or guarantees, directed residence, and residence in open centres. It should be noted that, from a human rights standpoint, programmes that employ electronic ankle bracelets or impose burdensome curfews are themselves forms of punitive custody, rather than alternatives to detention.²⁴⁸ Alternative forms of detention must comply with principles of necessity, legality and proportionality; be non-discriminatory in purpose and effect; and be subject to independent scrutiny and judicial review.²⁴⁹

C. RIGHTS PERTAINING TO EXPULSION AND TO REMAIN IN THE COUNTRY

a. THE PRINCIPLE OF NON-REFOULEMENT

The principle of *non-refoulement* imposes a duty on states not to return, expel, extradite or deport an individual to a country where his or her life, integrity or security is in danger, for example when there are "substantial grounds" for believing that he or she would be subject to torture if returned. The responsibility of the state is also engaged when it sends someone to another state that would be the first link in the chain of events leading to *refoulement*.

The principle of *non-refoulement* is governed primarily by the CAT,²⁵⁰ the ICCPR,²⁵¹ regional treaties, international customary law, and, where it concerns asylum seekers and refugees, the UN Convention Relating to the Status of Refugees. The principle applies to all migrants, including irregular migrants. So

246 Report of the WGAD, E/CN.4/1999/63, 18 December 1998.

247 Report of the WGAD, E/CN.4/1999/63/Add.3, para. 33, 18 December 1998.

248 Amnesty International states that: "Reporting requirements should not be unduly onerous, invasive or difficult to comply with, especially for families with children and those of limited financial means. Conditions of release should be subject to judicial review." Amnesty International USA, 2008.

249 See for a general guide on international standards on alternatives to detention, Amnesty International, 2009.

250 Article 3(1).

251 Articles 6 and 7.

long as a risk of torture exists in the country of origin or legal residence, return is prohibited under all circumstances.

When a state decides that an asylum seeker is a refugee within the terms of the Refugee Convention, that person has the right, under Article 33 of the Convention and under customary international law, not to be returned (*refouled*) to the country of origin in any manner whatsoever, as long as his or her need for protection continues.²⁵² Persons whose claims have been rejected by refugee status determination authorities in the country of asylum, but who nevertheless need some form of international protection and would face serious human rights violations if they were returned, can avail themselves of the prohibition of *refoulement* provided for in international human rights instruments, regardless of the legality of their border crossing or their legal status in the host country.

b. FAVOURABLE CONSIDERATION IN RELATION TO THE RIGHT TO REMAIN

Beyond this, international human rights law does not give irregular migrants a right to remain in a destination country. The Trafficking Protocol invites States Parties to “consider adopting legislative or other appropriate measures...” to permit such persons to remain temporarily or permanently. In implementing this recommendation, states are expected to “give appropriate consideration to humanitarian and compassionate factors”.²⁵³

No equivalent right to favourable consideration arises under the Smuggling Protocol. States are not enjoined to provide temporary or permanent legal residence to smuggled migrants and it can therefore be assumed that, under this instrument, it is entirely in their discretion whether they allow smuggled migrants to remain in the country legally, or whether to establish frameworks and modalities to assist them.

This said, the ICRMW provides irregular migrants the right, in any national process that considers the possibility of regularisation, to have the circumstances of their entry taken into account, along with the duration of their employment and other relevant considerations, in particular their family situation.²⁵⁴ Article 69(1) requires states to “take appropriate measures to ensure” that the irregular situation of migrant workers and their families does not persist.

252 Article 33, para. 2 provides the following two exceptions to the principle which must be narrowly construed: there are reasonable grounds that the refugee is a danger to the security of the country; or he/she has been convicted by final judgement of a serious crime constituting a danger to the country's community.

253 Article 7(1).

254 Article 69(2).

C. CONDITIONS AND DUE PROCESS IN RELATION TO REMOVAL

The ICCPR (Article 13) provides that “an alien lawfully in the territory of a State Party ... may be expelled therefrom only in pursuance of a decision reached in accordance with law”, subject to a narrow range of exceptions. Article 13 therefore does not grant irregular migrants threatened with expulsion a direct right to procedural due process;²⁵⁵ but it confers a limited *derivative* right to procedural due process, because a hearing is required to establish whether or not a migrant is “lawfully” present.²⁵⁶ Factors that should also be taken into consideration are that the migrant may become stateless on expulsion or return, or face difficulties because the state of return refuses to receive him or her.²⁵⁷

Mass or collective expulsions are prohibited under international human rights law because they violate the requirement that each person should receive due consideration of his or her individual case. In its General Recommendation No. 30 on non-citizens, the Committee on the Elimination of Racial Discrimination has asserted that States Parties should “[e]nsure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account”. Regional human rights treaties in Europe,²⁵⁸ the Americas,²⁵⁹ and Africa²⁶⁰ categorically affirm this prohibition.

The ICRMW provides a high standard of procedural protection for all migrants who are subject to return measures, including irregular migrants. Article

255 ICCPR Cases and Commentary, *supra* note 9, para. 13.07.

256 A similar treatment is adopted by Articles 32 and 33 of the Refugees Convention and by Article 3(1) of CAT, which require states to afford some degree of procedural due process in any proceedings to expel an alien who has a *bona fide* claim to protection under those Conventions, in order to prevent the wrongful expulsion or *refoulement* of a person entitled to such protection. Even persons who are not ultimately able to sustain a claim to *non-refoulement*, but who have a *bona fide* claim to protection under these Conventions, will be entitled to a degree of *derivative* protection under those articles. A Council of Europe resolution recommends additional procedural rights, including the right to a hearing with interpretation and legal aid if necessary, and entitlement to an effective remedy, with a possible suspensive effect if the returnee can argue that he or she is at risk of ill-treatment on return, etc. Council of Europe resolution 1509 (2006), paras 12.6-12.18.

257 The Human Rights Committee has noted in addition that “if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (Article 26)”. General Comment No. 15.

258 European Convention on Human Rights, Protocol No. 4, Article 4.

259 American Convention on Human Rights, Article 22(9).

260 African Charter, Article 12(5).

22 states that: “Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually ... accord[ing to] law.” It goes on to say that, in the course of such proceedings, irregular migrants should be informed of any decision and the reasons for that decision, except in exceptional circumstances where reasons of national security require otherwise;²⁶¹ and that they have a right to seek review of decisions of an administrative nature, except in exceptional circumstances for reasons of national security, as well as the right to communicate with consular officials.²⁶²

How migrants are arrested and detained before expulsion, as well as their treatment during expulsion, deserve attention, because some states employ coercive and brutal methods.²⁶³ The absolute prohibition on torture, and prohibitions on cruel, inhuman and degrading treatment (CAT and ICCPR, Article 7), significantly circumscribe the freedom of states to use coercive measures. The ICCPR guarantees that all detainees should have access to a remedy if they are ill-treated or wrongfully detained, and the CAT (Articles 12, 13 and 14) requires states to hold a prompt and impartial investigation of any alleged act of torture or ill-treatment, and to provide redress if appropriate. The process of expulsion should respect the humanity and dignity of the migrant, including protection of his or her physical and mental health during deportation.²⁶⁴

During any deportation process, the rights and dignity of children must be protected; state obligations in this regard are reinforced by the provisions of the CRC, which notably affirms that the legal principle of the best interests of the child should determine whether a child is removed or expelled as well as matters of procedure in this regard. Children also have the right to freely express their views; and their views must be given due weight in decisions that affect them.²⁶⁵ States should ensure that unaccompanied children are not subject to deportation proceedings, unless this is determined in each individual case to be in the child's best interests.

261 Article 22(3).

262 Articles 22(4) and 23 respectively. The American Convention on Human Rights has a similar norm against mass expulsions and confers a procedural right to due process to all migrants in deportation or exclusion proceedings.

263 In its Concluding Observations, the Committee against Torture has frequently expressed its concerns, on inadequate external monitoring of migrant deportations, human rights safeguards during deportation, and the human rights training of personnel who conduct deportations. Guidance has been particularly important in the light of the serious injury and even deaths that migrants have suffered during deportations.

264 See Twenty Guidelines on Forced Return, Committee of Ministers of the Council of Europe, September 2005. Guideline 16 provides that a migrant who is medically unfit to travel should not be required to do so.

265 CRC, Article 12(1).

d. FREEDOM TO LEAVE A COUNTRY

The ICCPR states that every person is free to leave any country, including their own. No exceptions are permitted "... except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the [ICCPR]".²⁶⁶ The ICRMW affirms this obligation specifically with regard to migrant workers and their families.²⁶⁷

States must not therefore impose any legal restriction on the right of persons to leave a country. Smuggled or trafficked persons should not suffer practical impediments because of their irregular status, such as confiscation or destruction of travel or identity documents.²⁶⁸ States are also required to facilitate the departure of irregular migrants by taking the measures needed to ensure they can return safely to their country of origin or a third country. The 1975 ILO Migrant Workers Convention (Article 9) provides that, where irregular migrant workers or their families are expelled, "the cost shall not be borne by them".

The Smuggling and Trafficking Protocols²⁶⁹ affirm that states, either of origin or where the migrant had previous legal permanent residence, must "facilitate" or "accept" the return of a smuggled or trafficked migrant without unreasonable delay, and with due regard to the "safety and dignity" of the person.²⁷⁰

D. PROTECTION OF ALL MIGRANTS FROM EXPLOITATION AND ABUSE AFTER ENTRY

A migrant who is smuggled into a country or remains irregularly in the host state does not forfeit his or her human rights by virtue of irregular status. The destination state remains obliged to respect, protect and fulfil certain fundamental rights.

A variety of international rights are relevant to irregular migrants. Those that are most widely recognised are contained in the international bill of rights (namely,

266 Articles 12(2) and 12(3). Guideline 19 notes that any restraint must be strictly proportionate and prohibits the use of techniques that could cause asphyxia; also, any medication administered must be on the basis of an individual medical decision.

267 Article 8(1).

268 The latter obligation is reinforced in express terms by Article 21 of the ICRMW.

269 Article 18(1) of the Smuggling Protocol; Article 8(1) of the Trafficking Protocol.

270 Article 18(5). Article 4 of the ILO Migration Convention provides that States Parties must take measures "as appropriate ... to facilitate the departure, journey and reception of migrants for employment". Where persons are smuggled or trafficked, it could be understood that this requires states to facilitate the departure of irregular migrants; a more natural reading is that Article 4 refers to initial departure.

the UDHR, the ICCPR and the ICESCR). In general, these rights are confirmed and sometimes elaborated in both the ICRMW and the Palermo Protocols. Rights of defined groups of irregular migrants, such as women and children, are affirmed variously in CEDAW and the CRC.

States' primary obligation with regard to economic, social and cultural rights (which include *inter alia* the right to work, housing, education, health, food, and water and sanitation) is to achieve, progressively, the full realisation of these rights according to the maximum of available resources. All states also have an immediate duty to "take steps" (including targeted programmes) to protect the most disadvantaged, vulnerable and marginalised groups in their societies. The Committee on Economic, Social and Cultural Rights (CESCR) has observed that "the ground of nationality should not bar access to Covenant rights" (i.e. economic, social and cultural rights) since these rights apply to "everyone" regardless of legal status or documentation.²⁷¹ The CESCR has defined discrimination in the context of economic, social and cultural rights as "any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment". Non-discrimination is defined by the CESCR as an immediate obligation, subject neither to progressive implementation nor dependent on available resources.

a. FREEDOM FROM ANY FORM OF SLAVERY AND INVOLUNTARY LABOUR

ICCPR (Article 8) provides that "no one shall be held in slavery ... servitude ... or be required to perform forced or compulsory labour". This is reinforced by parallel provisions in the ICRMW,²⁷² and international customary law principles.²⁷³ More indirectly, the obligation is reinforced by Article 6(1) of the ICESCR, which requires states to take "appropriate steps" to safeguard the right to the "opportunity to gain [one's] living by work which [one] freely chooses or accepts".²⁷⁴

271 CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20.

272 Articles 11(1) and 11(2) provide that all migrant workers have the right to be free of slavery or servitude and prohibits forced or compulsory labour.

273 The prohibition on slavery, including sexual slavery, is clearly recognised under customary international law as having *jus cogens* status. (A *jus cogens* norm is a peremptory norm of general international law, i.e. it is a mandatory legal standard from which no derogation, in domestic law or international law, is allowed.) It is also arguable, given the wide ratification of ILO Conventions on Forced Labour No. 29 (1930) and No. 105 (1957) and the reduced use of forced and compulsory labour by states, that its prohibition has customary status.

274 Such steps would include the requirement that states take measures to avoid the kinds of conduct prohibited by Article 8 of the ICCPR.

While the terms “slavery”, “servitude”, and “forced or compulsory labour” are not defined other than by reference to certain exclusions, all three forms of prohibition clearly address circumstances in which persons could reasonably be expected to provide physical or sexual labour, but do not meaningfully consent to do so.²⁷⁵ The prohibition evidently covers a spectrum of conduct, ranging from a situation of total coercion, where one human being effectively “owns” another (slavery), to circumstances involving more indirect or incomplete forms of coercion (compulsory labour).²⁷⁶ States are required to take all necessary measures, including both criminal and labour law measures, to ensure that no migrant is engaged in rendering services to which, because of factors such as physical confinement, actual or threatened violence or the threat of deportation, they have not provided meaningful consent.

This obligation is reinforced by ILO Forced Labour Convention No. 29 (1930),²⁷⁷ which requires States Parties to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period”,²⁷⁸ by taking measures which include making the illegal exaction of forced or compulsory labour “punishable as a penal offence” for which “the penalties imposed by law are really adequate and are strictly enforced”. ILO Convention 105 (Article 1, para. e, and Article 2) and 182 (Article 3) elaborate the content of these obligations and provide a definition of forced labour.

The Trafficking Protocol²⁷⁹ requires states to criminalise the “harbouring” or “receipt” of persons for the purpose of exploitation, which is defined to include the “exploitation of the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery [and] servitude”.²⁸⁰ Article 6 of CEDAW amplifies the content of the obligation with respect to “the exploitation of the prostitution of women”. The obligation is affirmed in Article 16(1) of the Smuggling Protocol, and applies to both trafficked and smuggled migrants.

275 The original focus of the ICCPR was largely on physical forms of labour, but Article 8 is clearly understood today to include sexual slavery and forced prostitution, as well as more traditional forms of enslavement or forced labour. See, for example, the recognition of sexual enslavement as a form of enslavement under international humanitarian law: *Prosecutor v. Kunarac, et al*, Case No IT-96-23T, Judgment, 22 February 2001, *aff'd* on appeal *Prosecutor v. Kunarac, et al.*, IT-96-23 & IT-96-23/1-A, June 12, 2002.

276 See, for example, definitions provided in ICCPR Cases and Commentary, *supra* note 9, para. 10.03-04.

277 Articles 1 and 25.

278 Article 1(1).

279 Articles 3 and 5.

280 Article 3.

International law provides robust standards to protect children from forced labour and exploitation. The CRC calls on States Parties to protect children from economic exploitation and from performing any work that is likely to be hazardous or interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development.²⁸¹ International labour law also protects children from exploitative conditions of work. ILO Convention No. 182 (1999) calls on States Parties to "secure the prohibition and elimination of the worst forms of child labour as a matter of urgency",²⁸² urges the removal of children from such labour, and their rehabilitation and social integration.²⁸³

b. WORK AND THE RIGHT TO A MINIMUM SUBSISTENCE

Right to work / Access to work

ICESCR (Article 6) notes that states shall "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". It is generally understood that states can limit this right in conditions of surplus labour, in order to promote full employment and an adequate minimum wage (i.e. "general welfare"), provided that adequate social assistance is provided to those who are legally barred from access to the labour market.²⁸⁴ Since, in addition, immigration laws are commonly tied to legal accessibility to the labour market, states are generally entitled to limit the access of irregular migrants by demonstrating that they lack residence rights.

Irregular status resembles other prohibited grounds of discrimination contained in Article 2(1) of the ICCPR, in being a socially stigmatised status that is beyond an individual's control. This is supported, in the employment context, by Article 6(3)(d) of the Trafficking Protocol, which requires a state to consider implementing measures for the "social recovery" of victims of trafficking through the provision of employment opportunities. CESCR General Comment No. 18 on the right to work also asserts that the obligation to respect the right to work requires states to refrain from denying or limiting equal access to decent work for migrant workers. It is clear, nevertheless, that a state *will* generally be permitted to restrict access to migrants on the basis of their irregular status.

At the same time, states have a duty to make sure that irregular migrants in their jurisdiction receive a minimum subsistence. They are also required to protect irregular migrants from unfair labour conditions while at work, and from unfair

281 CRC, Article 32(1).

282 C182, Article 1.

283 C182, Article 7(2)(b).

284 ICESCR, Article 4.

remuneration for work performed.²⁸⁵ The CECSR notes that national plans of action should be established to protect migrants from discriminatory denial of their right to work in contravention of Article 2(2) of the ICESCR.²⁸⁶

Right to a minimum level of subsistence

Under the ICESCR (Article 11(1)), States Parties recognise “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing”. This implies that states have a duty to ensure irregular migrants are paid for work *already* performed; and affirms that, if barred from access to work, they are entitled to a minimum level of subsistence.

Emerging national case law suggests that states recognise these obligations. The requirement to provide minimum subsistence clearly flows from the human right to an adequate standard of living. Switzerland, for example, recognised in 1995 that the right applied to Swiss and foreigners alike, irrespective of their status. Minimum subsistence implies providing basic human needs, such as nourishment, clothing and housing, “which constitute the condition of human existence and fulfilment and also an integral part of a democratic society”.²⁸⁷ In similar terms, the British House of Lords decreed in 2005 that removal of minimal state support, leading to destitution, in cases where the state bans asylum seekers from working, constituted “inhuman or degrading treatment”.²⁸⁸

In many societies, civil society organisations, such as churches and non-governmental agencies, meet the “minimum subsistence” needs of irregular migrants. States have an obligation (under ICESCR, Article 11), to allow them to do so and to respect migrants’ access to such services. Unfortunately, where states legally oblige their citizens to denounce the presence of irregular migrants,²⁸⁹ such organisations have been asked to disclose information on the irregular migrants that benefit from their programmes. This greatly limits independent delivery of social services to irregular migrants and reduces their access to subsistence. It may be argued therefore, that under the circumstances, this means that such states are themselves fully responsible for fulfilling the right in question.

285 ICRMW, Article 25.

286 CESCR, General Comment No. 18, E/C.12/GC/18.

287 *P.V., P.V. and M.V. v. Ostermundigen and Bern*, Swiss Federal Court, October 1995.

288 *R (Limbuella, Tesema and Adam) v. Secretary of State for the Home Department*, 3 November 2005. This case was decided under the European Convention on Human Rights.

289 For example, Germany (Article 76, Aliens Law), and Belgium (Article 77, Aliens Law). In Belgium, the exception of “humanitarian reasons” is increasingly narrowly defined.

C. THE RIGHT TO SAFE AND HUMANE WORKING CONDITIONS

Irregular migrants are commonly allocated work at the margins of the labour market where little or no legal protection exists. Much of this work is dangerous and insecure, and the vulnerability of irregular migrants to unfair or abusive working conditions is increased by their “invisibility”.

International human rights law and international labour law both affirm that irregular workers have the same right to fair working conditions as others. A landmark regional advisory opinion from the Inter-American Court of Human Rights states: “A person who enters a state and assumes an employment relationship, acquires his labour human rights in the state of employment, irrespective of his migratory status... [T]he migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights.”²⁹⁰

Safe and humane working conditions

As noted above, the ICCPR and the ICRMW guarantee every person a right to “liberty and security”. A state’s duty to *protect* these rights implies that states must take active measures to protect individuals from third party threats to their safety or integrity, including from employers. The obligation is reinforced by Article 7(1)(b) of the ICESCR, which requires states to “recognize the right of everyone to the enjoyment of just and favourable conditions of work” and in particular “safe and healthy working conditions”.

International human rights law therefore requires states to take all necessary measures to protect migrants from working conditions which pose a threat to their physical safety.²⁹¹ CERD has noted that common threats to the physical and mental integrity of migrant workers include “debt bondage, passport retention, illegal confinement, rape and physical assault”.²⁹²

290 Inter-American Court of Human Rights, Advisory Opinion, Juridical Condition and Rights of Undocumented Migrants, OC-18/03, 17 September 2003. CERD has similarly observed (General Recommendation No. 30 on non-citizens) that States Parties should “[r]ecognize that, while States Parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated”.

291 It is suggested that any deterrence-based rationale for limiting this right would not be compatible with a commitment to fundamental human dignity. Infringement of a basic level of protection from pain and injury, below which a person’s existence would not count as fully human, would fall foul of Article 4 of the ICESCR, and the substantive due process limitations in Article 9 of the ICCPR.

292 CERD, General Recommendation No. 30 on Non-Citizens.

With respect to trafficked migrants, the obligation is reinforced by Article 6(5) of the Trafficking Protocol, which says that states “shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory”.²⁹³

When an unsafe workplace poses a life-threatening risk, the state’s obligation will be particularly strong, given Article 6 of the ICCPR and Article 9 of the ICRMW which protect the right to life of all migrants. The Smuggling Protocol also imposes a special obligation on states to take measures to protect the right to life of smuggled migrants covered by the Protocol.²⁹⁴ In addition, as discussed, states have an obligation to protect irregular migrants from working conditions that are “inhumane” or “degrading” because, for example, they lack ventilation or sanitation, severely restrict movement, or involve severe forms of harassment.²⁹⁵ To the extent that such conditions have the capacity to impair a person’s psychological integrity, it may be argued that states are required to protect irregular migrants against these conditions too.²⁹⁶

All the above obligations are reinforced by Article 25 of the ICRMW, which requires states to make sure that migrants are not deprived of general workplace protections because of their irregular status.

While states clearly need to create a system of civil and criminal penalties to meet the above obligations, additional measures may be required to guarantee protection. For example, where irregular migrants assist authorities to detect and prosecute illegal conduct, they may need to be protected from adverse consequences.

Right to fair compensation

In Article 7, the ICESCR affirms that: “States Parties ... recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular (a) remuneration which provides all workers, as a minimum, with: (i) fair wages and equal remuneration for work of equal value without distinction of any kind ... [and] (ii) a decent standard of living for themselves and their families in accordance with the provisions [of the rest of the Covenant].”

293 The obligation under Article 8(2)(c) of the Trafficking Protocol to consider implementing measures to provide psychological assistance is expressed in terms of a process of “recovery” of victims of trafficking.

294 Article 16(1).

295 ICCPR, Article 7. ICRMW, Article 10.

296 Through Article 9 of the ICCPR and Article 16 of the ICRMW. For reasoning showing that Article 7 of the ICCPR protects against mentally as well as physically degrading treatment, see Human Rights Council, General Comment No. 20, 44th Session. (1992), paras 4-5.

States therefore have a duty, at the least, to protect irregular migrants from employment practices that pay unfair wages, including wages lower than the legal minimum (where it exists). Indirectly, this also protects the rights of workers who work legally, by preventing employers from employing irregular migrants in their stead at rates of pay below a minimum threshold for fair wages.

ILO Convention 143 (Article 9, para. 1) recognises that, while states have the right to control the entry of migrants into their territory, migrants present in the territory should enjoy “equality of treatment... In respect of rights arising out of past employment as regards to remuneration, social benefits and other benefits”.

The obligation to *protect* irregular workers from receiving wages below the legal minimum is also asserted by Article 25 of the ICRMW, which requires states to ensure that all migrant workers “enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other conditions of work such as overtime, hours of work, weekly rest, holidays with pay, safety, health, and termination of the employment relationship”,²⁹⁷ and to “take all appropriate measures to ensure that migrant workers are not deprived of any rights [under Article 25] by reason of their irregularity of stay or employment”.²⁹⁸ The ILO 1975 Migrant Workers Convention requires States Parties to ensure “*equality of treatment*” for irregular migrant workers who are to be expelled in “respect of rights arising out of past employment as regards remuneration, social security and other benefits”.²⁹⁹

States are therefore required to take measures to ensure that employers pay fair wages in all cases. Such measures include, for example, imposing additional penalties on employers who pay irregular workers less than a fair wage, in addition to any penalties that may be imposed for engaging irregular workers in the first place.³⁰⁰ Irregular workers should also be able to take action to recover unpaid wages or the difference between wages received and the fair minimum.³⁰¹ The ICRMW provides in addition that all migrant workers have the right to transfer any savings and earnings from the state of employment at the end of their stay in that state (Article 32).

297 Article 25(1).

298 Article 25(3).

299 Article 9(1).

300 Council of Europe Resolution 1509 on the human rights of irregular migrants (2006), para. 13.5, exhorts states to protect irregular migrants’ rights to “fair wages, reasonable working conditions, compensation for accidents, access to courts to defend their rights”, and provides that employers who fail to comply should be “rigorously pursued”.

301 It should be noted that the United States Supreme Court has rejected this argument as a matter of statutory construction: *cf Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S., No. 00-1595 (March 27, 2002).

ILO Convention 143 (Article 9(2)) recognises that a migrant's right to seek redress in any dispute over work conditions includes the right to present his case to a competent body and to be heard.

Irregular workers may of course be entitled contractually to higher than minimum or average wages, in accordance with the work performed. In such cases, states are obliged (under Article 7(a) of the ICESCR) to ensure enforcement of contracts. This obligation is also affirmed in the ICRMW (Article 25(3)). However, in the interest of deterring irregular work, and in preference to relying on social assistance (pending regularisation or removal), a state may be entitled (under Article 4 of the ICESCR) to block *full* enforcement of contract. Even in this circumstance, a state is obliged to ensure that employers do not profit from any contractual under-payment.

Rights to association and to organise

Irregular workers have the right to associate to protect their interests, as stated in Article 8(1) of the ICESCR and Articles 25 and 26 of the ICRMW. The right to association takes many forms, from the right to join associations or trades unions, to the right to establish and run associations. States may in some circumstances limit certain forms of associations but may not prohibit the right altogether.

Both the ICESCR (Article 8, para. 1) and the ICCPR (Article 22, para. 1) state that "everyone" has the freedom of association, including the right to form trades unions. Both the ICERD (Article 5, para. e-ii) and CEDAW (Article 14, para. 2-e) prohibit discrimination in relation to these rights. At least three ILO Conventions also do so.³⁰² The ICRMW (Article 26, para. 1) recognises freedom of association of irregular workers but not necessarily the right to form trades unions.

At a minimum, therefore, the state is required to permit forms of organisation that promote irregular workers' rights to safe, humane and fair working conditions.³⁰³

The content of this right is currently under deliberation in some national law contexts.³⁰⁴ In Spain, a national law that prohibits irregular migrants from joining trades unions has been the subject of a complaint under ILO Convention 87 on

302 Convention 87, Article 11; Convention 98, Article 1, para. 1; Convention 154, para. 9.

303 It should further be noted that, in providing a right to present a case for recovery of wages/social security benefits, Article 9(2) of the 1975 Migration Workers Convention allows a person to be "represented", presumably by either a lawyer or trades union representative.

304 Council of Europe Resolution 1509 (2006) para. 13.5 recognises the right of irregular migrants to join trades unions.

Freedom of Association.³⁰⁵ In South Korea, a high court has ruled that irregular migrants are eligible to form and join labour unions.³⁰⁶

d. THE RIGHT TO HOUSING

The ICESCR (Article 11) recognises the “right of everyone to an adequate standard of living including adequate ... housing, and to the continuous improvement of living conditions”, and provides that appropriate steps should be taken to ensure the realisation of this right. Both ICERD (Article 5, para. e-iii) and CEDAW (Article 14, para. 2-h) prohibit discrimination in regard to the right.

In the case of irregular migrants, the state’s primary obligation is to respect their right of access to adequate housing (ICESCR, Article 11), both in the private rental market and in respect of public housing. Any legal restriction that limits the right contained in Article 11 requires justification (under Article 4 of the Covenant). A justification can only be valid if it is non-discriminatory in purpose and effect, and is intended to protect the rights of the individuals in question rather than permit state limitations.

Deterrence of irregular migration is a weak justification in this context; migrants should not be forced to live in severely inadequate conditions, or be rendered homeless, in order to deter the arrival of further irregular migrants. Nor is it legitimate for states to limit the access of irregular migrants to the rental market. Article 4 of the ICESCR requires that, if states decide to limit the enjoyment of rights in order to advance the “general welfare in a *democratic society*” (emphasis added), that decision must be consistent with the basic values of a “*democratic society*” (emphasis added), committed to dignity for all.³⁰⁷ This requires states to consider each individual case on its merits; they may not subordinate individuals to broader social policy goals. Moreover, criminalising the provision of housing services to irregular migrants, by private landlords or independent bodies (such as NGOs and churches), would violate the state’s duty to respect the right to housing.³⁰⁸

A state’s duty to respect the right to adequate housing also means that states should not engage in forced evictions, even where a migrant occupying land or buildings has irregular status. International human rights law absolutely prohibits

305 ILO, Committee on Freedom of Association Case No. 2121 (23 March 2001): Complaint by the General Union of Workers of Spain (UGT) – Denial of the right to organise and strike, freedom of assembly and association, the right to demonstrate and collective bargaining rights to “irregular” foreign workers, *Report No. 327*, Vol. LXXXV, 2002, Series B, No. 1, para. 561.

306 Seoul High Court, decision 2006 NU 677431, January 2007.

307 ICESCR, Article 4, Preamble.

308 See discussion above on right to a minimal subsistence.

forced evictions, which are considered grave human rights violations. A state is also prohibited from evicting anyone from their housing without safeguards, which include the provision of adequate alternative or interim housing.³⁰⁹ This is complemented by the principle of progressive realisation (non-retrogression),³¹⁰ which implies that persons should not be evicted without provision of alternative forms of shelter, and applies to all migrants regardless of their status.³¹¹

Under Article 11 of the ICESCR, states have a duty to prevent discrimination in access to private housing, and to prevent exploitation by private landlords. In this context, CERD General Recommendation No. 30 asks states to “[g]uarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices”.³¹²

The state’s duty to fulfil the right to housing requires it to intervene if irregular migrants are found in inhuman housing conditions. By implication, while they remain in the country, the state must provide adequate shelter to irregular migrants who are homeless or intercepted in such conditions, by offering them adequate state housing or directing them to humanitarian agencies that provide shelter.

States are encouraged to give special attention to the housing needs of “disadvantaged groups”, such as “the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, the victims of natural disasters, people living in disaster-prone areas” or “social groups living in unfavourable conditions”.³¹³ Housing impacts directly on other rights, such as the right to physical and mental health,³¹⁴ and the right to freedom and security of the person.³¹⁵

309 CESCR, General Comment No. 4: The Right to Adequate Housing, 6th Session (1991), para. 18.

310 CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, 22nd Session (2000), para. 32.

311 CESCR, General Comment No. 4: The Right to Adequate Housing, 6th Session (1991), para. 7.

312 CERD, General Recommendation No. 30: Discrimination against Non-Citizens, 1 October 2004.

313 CESCR, General Comment No. 4: The Right to Adequate Housing, 6th Session (1991), paras 8 and 11.

314 ICESCR, Article 12.

315 ICCPR, Article 9; ICRMW, Article 16. See also CESCR, General Comment No. 4: The Right to Adequate Housing, 6th Session (1991), para. 7 which notes that the right to housing should be understood broadly as “the right to live somewhere in security, peace and dignity ... [because] the right to housing is integrally linked to other human rights and to fundamental principles upon which the Covenant is premised [namely] the inherent dignity of the human person”.

Where smuggled migrants suffer physical or psychological trauma, in the course of travel or in the country of arrival, they may be considered disadvantaged persons or groups, who require priority access to public housing. Similar arguments could be made in the case of particularly vulnerable groups of irregular migrants, including unaccompanied or separated migrant children.

With respect to irregular migrant children (and children of irregular migrants), the CRC (Article 27) clearly requires states to “provide material assistance” and “support programmes, particularly with regard to, nutrition, clothing and housing” that are necessary to fulfil the “right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”.

A similar requirement in CEDAW (Article 3) is applicable to the protection of women irregular migrants, including women endangered by sexual violence.³¹⁶

Further, a state is required to fulfil the “minimum core” of the right for all persons, namely to provide “basic shelter and housing”.³¹⁷ Read in conjunction with a state’s duty under Article 6 of the ICCPR, the minimum core requirement would clearly impose a duty on a state to provide (within available resources) basic life-preserving shelter to all who need it, at public expense. The implementation of Article 6 of the ICCPR includes not just direct threats to the right to life but also other life-threatening conditions.

Many governments allow that they have a duty to provide public housing for irregular migrants, but argue that the accommodation available in immigration detention or processing centres is adequate. This claim may be challenged on the grounds that the meaning of *adequate* housing must be understood in the context of other human rights enjoyed by migrants, such as freedom from arbitrary detention,³¹⁸ and the right to privacy and to protection of family life.³¹⁹ Where state resources are sufficient to finance individual public housing, therefore, the provision of communal housing in an immigration centre constitutes a partial fulfilment but also a partial non-fulfilment (or limitation) of the state’s obligation, and this calls for justification under Article 4 of the ICESCR.³²⁰

316 Article 3.

317 See also CESCR, General Comment No. 3: The Nature of States Parties Obligations, 5th Session (1990), para. 10, and discussion in Chapman and Sage, 2002.

318 ICCPR, Article 9; ICRMW, Article 16.

319 ICCPR, Articles 17 and 23; ICRMW, Article 14. The CESCR has emphasised this latter aspect in particular: see General Comment No. 4 at para. 9 (noting that “the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing”).

320 For example, the Council of Europe resolution on human rights of irregular migrants states that “adequate housing and shelter guaranteeing human dignity” should be afforded to irregular migrants. Resolution 1509 (2006) para. 13.1.

The principle of proportionality is also applicable. Any limits imposed must be proportional, implying that the benefits of excluding irregular migrants from access to general public housing must outweigh the losses those migrants suffer in terms of their right to adequate housing (under Article 11 of the ICESCR), and their rights to liberty and security, and privacy and family life.³²¹ In addition, states must show that, in imposing such limits, they are not in breach of anti-discrimination requirements (under the ICESCR and the ICCPR³²²).

e. THE RIGHT TO HEALTH

Under the ICESCR, every person has the right to enjoy the highest attainable standard of physical and mental health.³²³ The right to health contains several elements, including access to accessible health care facilities, goods and services, and non-discrimination.³²⁴ ICERD guarantees the right of “everyone” to public health and medical care (Article 5(e)(iv)). CERD’s General Recommendation No. 30 on non-citizens calls on states to “respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to preventive, curative and palliative health services”.

The scope of the principle of non-discrimination in this context is broad and has the aim of ensuring universal enjoyment of the right to health by all persons. It covers accessibility to health facilities, goods and services, which includes access within safe physical reach for all sectors of the population, economic accessibility (affordability), and access to information regarding health.³²⁵ In the context of the state’s duty to *respect* the right to health, discrimination on the ground of irregular status may constitute prohibited discrimination. Even where health care services are provided by non-state entities or the private sector, states are prohibited from denying or limiting equal access to preventive, curative and palliative health services for *all persons*, including “asylum seekers and illegal immigrants”.³²⁶ This implies that states may have a duty to *protect* irregular migrants from discrimination by private actors in the provision of these kinds of health care services.

321 Safeguarded in particular under Articles 9, 17 and 23 of the ICCPR and Articles 16 and 14 of the ICRMW.

322 Under Article 2(2) of the ICESCR and 2(1) of the ICCPR respectively.

323 ICESCR, Article 12.

324 CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, 22nd Session (2000), elaborates on the “interrelated and essential elements” of the right to health.

325 *Ibid.*, para. 12.

326 *Ibid.*, para. 34.

In relation to the duty to fulfil the right to the highest attainable standard of health, the state's obligation with regard to irregular migrants could be slightly more limited. The state may only be obliged to fulfil the right to health, specifically provide access to health care, in limited circumstances. Examples might include cases where irregular migrants cannot afford to access essential care, or face an emergency or life-threatening condition (ICCPR, Article 6).

Article 28 of the ICRMW states that: "Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the state concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment."³²⁷

However, in its Concluding Observations, the CESCR has extended the scope of the duty to fulfil the right to health in relation to irregular or undocumented migrants.³²⁸ In the same vein, the European Social Charter has opposed law or practice that denies the entitlement to medical assistance to foreigners even if they are in an irregular or undocumented situation.³²⁹ The Council of Europe has accordingly encouraged states to "seek to provide more holistic care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly".³³⁰

Where an irregular migrant requires emergency health care, this falls under the right to minimal subsistence. However, though "emergency health care" is generally made available to irregular migrants, the term is applied inconsistently

327 Under the ICRMW only migrants in a regular situation are entitled to claim this broader notion of health care (Article 43). The entitlement of irregular migrants could be interpreted as narrower than corresponding provisions in general human rights law. However, note must be taken of Article 81(1) of the ICRMW which grants to all migrant workers the protection of more favourable international standards where such exist. See Chetail and Giacca, 2009, p. 232.

328 With regard to a report of France, the CESCR noted with concern that, despite the introduction of Universal Health Care Coverage (*Couverture Maladie Universelle*) in July 1999, persons belonging to disadvantaged and marginalised groups, such as asylum seekers and undocumented migrant workers and members of their families, continued to encounter difficulties in gaining access to health care facilities, goods and services, due to lack of awareness concerning their rights, language barriers, and administrative formalities, such as the requirement of continuous and legal residence in the territory of the State Party. It urged the State Party, in line with General Comment No. 14, to adopt all appropriate measures to ensure that persons belonging to such groups have access to adequate health care facilities, goods and services.

329 *International Federation of Human Rights vs. France*, Complaint No. 14/2003, European Court of Justice decision of 8 September 2004, para. 32. In this case, the European Social Charter is the basis for the decision.

330 Council of Europe Resolution 1509 (2006), para. 13.2.

because there is no agreed definition of what constitutes “emergency health care” except in so far as a direct threat to the right to life is concerned. Recent guidance and interpretation have privileged a more integrated notion, in line with the CESCR’s General Comment that “[s]tates are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services”.³³¹ This shifts the emphasis from “essential and urgent treatment” to “necessary care”, which might include early diagnosis and medical follow-up.³³² As well as contravening the fundamental principle of non-discrimination, restricting access solely to “emergency health care” could deny irregular migrants access to primary health interventions; this might cause treatable conditions to become chronic or propagate contagious diseases.

Even where it is granted that irregular migrants have *prima facie* the same entitlement as others to access *all* publicly-funded health care, a state’s duty may still be qualified by lack of resources. Because states have some discretion in deciding how best to achieve the progressive realisation of a right, they might be entitled to reduce the priority they give to the “non-emergency health care” needs of irregular migrants, unless these are particularly vulnerable.

The CESCR has stated that the core obligations in relation to the right to health require all States Parties to ensure *inter alia* a non-discriminatory right of access to health facilities, goods and services, especially for vulnerable or marginalised groups; access to essential food and basic shelter; and equitable distribution of health facilities, goods and services.

Where states have established domestic laws that require officials, such as social care workers or doctors, to denounce the presence of irregular migrants to immigration authorities, this can interfere with the right to health of these individuals, and contravenes the independence and impartiality of the medical profession.

f. THE RIGHT TO SOCIAL SECURITY

In cases where irregular migrants have been making contributions to a social security system for their own and their families’ protection, the ICRMW (Article 25) and the ILO 1975 Migrant Workers Convention (Article 9(1)) state that irregular migrants are entitled to receive social security payments without discrimination.

331 CESCR, General Comment No. 14: The right to the highest attainable standards of health, E/C.12/2000/4 (11 August 2000), para. 34.

332 Schoukens and Pieters, 2004, p. 12.

This right is implied by Article 9(1) of the ICESCR, which states that “everyone shall have the right to social security”, coupled with both the ICESCR’s³³³ and the ICERD’s prohibitions on discrimination. CESCR General Comment No. 12 states clearly that “where non-nationals, including migrant workers, have contributed to a social security scheme they should be able to benefit from that contribution, or retrieve their contributions when they leave the country”.³³⁴ In addition the CESCR calls on States Parties to ensure that all non-nationals on their territory are able to access non-contributory schemes for income support, affordable access to health care, and family support. When an irregular worker is expelled from a territory, Article 4 of the ICESCR might permit a state to refuse to distribute accrued social security benefits, in order to protect the financial stability of the social security system or preserve the fundamental purpose of the system; under these circumstances, at minimum the contributions should be reimbursed.

When a person is unable to earn sufficient income to ensure a minimum standard of living,³³⁵ states have an obligation to assist. This implies a more specific obligation to assist persons who are *legally* (rather than simply economically) unable to support themselves. The principle of non-discrimination, as framed in the ICCPR and the ICESCR, would apply. This duty is buttressed by a state’s positive obligations to protect the right to life³³⁶ and, with respect to irregular migrants in particular, is strengthened by the particular obligation states have under the Smuggling Protocol to take all appropriate measures to preserve and protect smuggled (and trafficked) migrants’ “right to life”.³³⁷

Where states lack the resources necessary to provide social assistance to all those in need, the principle of progressive realisation (ICESCR, Article 11) provides states with a margin of manoeuvre when deciding how best to allocate the resources they have. However, a state’s “minimum core” obligation under Article 11 should be understood to include the obligation to provide life-preserving social assistance to irregular migrants.

333 CESCR, General Comment No. 19 on the Right to Social Security (E/C.12/GC/19, 23 November 2007) suggests the Covenant expresses no explicit jurisdictional limitation (para. 36) on the prohibition on grounds of nationality (Article 2(2)).

334 See Council of Europe Resolution, Human rights of irregular migrants No. 1509, Doc. 10924, 4 May 2006, para. 13.4, which recognises that irregular migrants who made social security contributions should be able to benefit from them or be reimbursed if they are expelled from the country. At the least, irregular migrant workers should be able to draw fully on those benefits while in the country where the need arises.

335 Regarding Article 11(1) of the ICESCR which recognises a general right of “everyone to an adequate standard of living for himself and his family”, in particular in relation to food, clothing and shelter.

336 Protected under Article 6 of the ICCPR and Article 9 of the ICRMW. See also Human Rights Council, General Comment No. 6, 16th Session (1982), at para. 5 (acknowledging a positive, material dimension to the right to life).

337 Article 16(1).

States Parties to the ICESCR who have adequate resources to provide a broader form of social assistance, are required (under ICESCR, Article 11) to do so without discrimination or arbitrary limitation.

g. THE RIGHT TO EDUCATION

The ICESCR provides that States Parties must “recognize the right of everyone to education”.³³⁸ With a view to achieving full realisation of this right,³³⁹ states have a duty to ensure that:

- a) “Primary education shall be compulsory and *available free to all*;
- b) Secondary education in its different forms, including technical and vocational secondary education, shall be made *generally available and accessible to all* by every appropriate means, and in particular by the progressive introduction of free education;
- c) Higher education shall be made *equally accessible to all, on the basis of capacity*, by every appropriate means, and in particular by progressive introduction of free education; [and]
- d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education” (emphasis added).³⁴⁰

These obligations are reinforced by the CRC,³⁴¹ which sets out the rights to primary, secondary and tertiary education in almost identical terms to those in the ICESCR.³⁴² In both cases, the rights are expressed in strongly universal terms, as applying to “all” persons and, in the case of the CRC, to “all” children.³⁴³

338 Article 13.

339 Interpretation of the right to education is provided by CESCR, General Comment No. 13 which establishes that states should ensure that education is accessible, without discrimination, to everyone found within its territory.

340 Article 13(2)(a)-(c).

341 CRC, Article 28, para. 1.

342 Article 28(1)(a)-(c). The only difference is in terms of an express obligation to “offer financial assistance” to support secondary education in the case of need and with no express obligation to work toward the provision of free tertiary education.

343 The recognition that children have a categorical right to education is echoed by Council of Europe Resolution 1509 (2006), which states that all children shall have the right to education to both primary and secondary school levels, and adds that this education “should reflect their culture and language and they should be entitled to recognition, including certification, of the standards achieved” (para. 13.6).

The ICRMW (Article 30) says that “[e]ach child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the state concerned. In any case, access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment”.

Both the ICERD (Article 5, para. 5(e-v)) and the UNESCO Convention against Discrimination in Education forbid discrimination in access to education. The latter calls for the abrogation of any statutory provisions, administrative instructions or practice that involve discrimination, including in the admission of pupils.³⁴⁴ States also undertake to “give foreign nationals within their territory the same access to education” as that of their own nationals.³⁴⁵ The UNESCO Convention does not mention the word “lawfully” when referring to the presence of migrants in the territory.

There is therefore a strong case for de-linking access to education from the status of irregular migrant children, and for abolishing any legal duties of educators or educational institutions to verify the status of pupils or announce the presence of children in irregular situations to the authorities. Treaty law obligations categorically provide for the provision of free and accessible education to children, irrespective of status, a position enhanced by the prohibition of discrimination. National legislation or any practices that inhibit, minimise or hamper access to such free education on the basis of discrimination to children in irregular situations contravene these legal obligations.

In the case of adult irregular migrants, the right to “fundamental education” in Article 13(d) of the ICESCR is not expressed in terms that are as absolute or universal as the right to primary and secondary education. However, adult irregular migrants may be entitled to claim the right to a basic education, in skills that are required in order to function in society and exercise other rights, such as literacy and basic numeracy skills.

More generally, states have a duty to respect the right of adults to attend independent educational institutions. Adult irregular migrants should not be prevented from attending such bodies. On the other hand, state provision of adult education may be said to be an obligation only where the state is clearly in a position to provide such adult education without discrimination to any person within its jurisdiction. States may limit the right of adults to access educational programmes on the basis of resources (progressive realisation).³⁴⁶

344 Ibid., Article 3, paras (a) and (b).

345 Ibid., para. (e).

346 Article 4.

h. THE STATUS OF CHILDREN BORN TO IRREGULAR MIGRANTS

The ICCPR (Article 24(3)) states that every child has the “right to acquire a nationality”, along with the right to be registered immediately after birth and to have a name.³⁴⁷ The CRC (Article 7(1)) imposes a “special obligation” on states to ensure that a child is not rendered stateless.³⁴⁸

The duty requires destination states to take the administrative measures necessary to enable children to obtain citizenship in their parents’ country of origin. Where the laws of the country of origin do not permit this, a state may be required to fulfil the right itself, by granting citizenship to the child, in appropriate circumstances. The ICRMW specifies that the child of a migrant worker shall have a “right to nationality”.³⁴⁹

E. ASPECTS OF THE SMUGGLING PROTOCOL RELEVANT TO HUMAN RIGHTS PROTECTION

The provisions of the Smuggling Protocol cover a range of circumstances. These include the smuggling of migrants by sea (Part II), and prevention, cooperation and other measures (Part III). Provisions in Part III deal with information (Article 10); border measures (Article 11); security and control of documents (Article 12) and their legitimacy and validity (Article 13); training and technical cooperation (Article 14); other prevention measures (Article 15); protection and assistance measures (Article 16); and return of smuggled migrants (Article 18). Some provisions refer specifically to human rights.

a. LIFE, SECURITY AND SAFETY

When it discusses the implementation of programmes to combat migrant smuggling and repress the crime of migrant smuggling, the Protocol pays some attention to protection of the lives, security and safety of migrants who are the “objects” of the crime. These obligations are set out in several provisions.

First of all, the crime of migrant smuggling may be considered aggravated where its commission endangers the lives or safety, or entails inhuman or degrading

347 Article 24(2).

348 Article 7(2).

349 The Inter American Court on Human Rights in *Jean and Bosica vs. Dominican Republic* decided that the rights to health and education of children born to foreign parents are inextricably linked to the ability of such children to access their right to nationality.

treatment, of the migrants involved.³⁵⁰ In such cases, states have a duty to impose harsher punishments on the persons who carried out the smuggling.³⁵¹ These provisions were intended to deter smuggling that involves “degradation or danger to the migrants involved”.³⁵² Endangering the life or safety of migrants includes use of modes of smuggling that may be inherently dangerous to life, such as shipping containers.³⁵³ “Inhuman or degrading treatment” may include certain forms of exploitation,³⁵⁴ such as forced labour and sexual exploitation. In such situations the Trafficking Protocol may apply.

The Smuggling Protocol provides limited but important obligations to protect and assist smuggled migrants. Under Article 16, states shall take “all appropriate measures ... to preserve and protect the rights of (smuggled) persons” in accordance with their obligations under international law.³⁵⁵ These obligations include implementation of non-derogable obligations under international human rights law to protect the right to life, and the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.³⁵⁶ The Protocol’s inclusive reference to “international law” makes clear that listing certain rights in the Protocol does not either imply that other rights not listed are excluded or derogated from, or any new or additional obligation on States are imposed beyond those that apply under existing international instruments and customary international law.³⁵⁷ This prominent provision (i.e. Article 1, para. 1) covers “all rights, obligations and responsibilities under international law”.³⁵⁸

Succeeding paragraphs oblige states to “take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them”³⁵⁹ and “afford appropriate assistance to migrants whose lives or safety are endangered” because they are the object of smuggling.³⁶⁰ What is “appropriate” is to be interpreted in the context of States’ general and specific human rights obligations and should not undercut the general protection elaborated in Article 1, para. 1 of the Protocol.

350 Smuggling Protocol, Article 6, para. 3 (a) and (b).

351 Legislative Guide for the Smuggling Protocol, para. 46.

352 *Ibid.*, para. 53.

353 *Ibid.*, para. 48.

354 *Travaux préparatoires*, Article 6C. Interpretative notes para. 3(f); see also Interpretative notes, para. 96.

355 Smuggling Protocol, Article 16, Protection and assistance measures, para. 1.

356 *Ibid.*

357 *Travaux préparatoires*, Article 16C. Interpretative notes, para. 1(b) and (c).

358 Legislative Guide for the Smuggling Protocol, para. 66.

359 Smuggling Protocol, Article 16, para. 2.

360 *Ibid.*, para. 3.

b. SECURITY AT SEA

The Protocol's provisions on the suppression of the smuggling of migrants by sea³⁶¹ require states to cooperate in establishing jurisdiction and law enforcement action, not least for searches of vessels at sea. The law enforcement measures under these provisions were largely inspired by international norms on illicit trafficking of drugs.³⁶² However, the Protocol recognises that particular concerns arise because the smuggled “goods” are people. It affirms that the suppression of smuggling by sea “should not lead law enforcement officers to overlook the duty established under maritime law and custom to rescue those in peril at sea”.³⁶³ The Protocol also requires states to “ensure the safety and humane treatment of the persons on board” when they apprehend or search vessels at sea.³⁶⁴ The general obligation on states to protect the right to life naturally applies too.³⁶⁵

These duties have been bolstered by the entry into force (on 1 July 2006) of amendments to maritime law which were introduced in response to the many deaths at sea of irregular migrants and asylum seekers.³⁶⁶ Under these amendments, states, by means of vessels under their jurisdiction, are obliged to assist persons in distress “regardless of the nationality or status of such persons or the circumstances in which they are found” and to coordinate and cooperate in delivering them to a place of safety.³⁶⁷ These additional obligations under maritime law enhance long-standing humanitarian maritime traditions and are considered to apply to survivors, “including undocumented migrants, asylum seekers and refugees”.³⁶⁸ Moreover, the amendments impose a new obligation on states to cooperate in the implementation of rescue and assistance measures.

361 Smuggling Protocol, Part II, Articles 7, 8 and 9.

362 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, as cited in the Legislative Guide for the Smuggling Protocol, para. 100.

363 Legislative Guide for the Smuggling Protocol, para. 100.

364 Smuggling Protocol, Article 9, safeguard clauses, para. 1(a).

365 Smuggling Protocol, Article 16, Protection and assistance measures, para. 1.

366 These amendments were enacted under the auspices of the International Maritime Organisation (IMO) and clarified maritime obligations of search and rescue under provisions of the Search and Rescue Convention (SAR) and the Safety of Life at Sea Convention (SOLAS), within the context of the UN Convention of the Law of the Sea.

367 SOLAS, chapter V, on Safety of Navigation, and SAR Convention, para. 2. The latter obligation on inter-state cooperation is a new treaty obligation under the amendments.

368 IMO, Resolution A.920(22).

Concerns arose during negotiation of the Smuggling Protocol about its relationship with maritime law.³⁶⁹ The Protocol therefore “balances” the above human rights obligations against other considerations – such as the security of the vessel and its cargo, commercial and legal interests of the flag state or other interested states, and the duty to ensure that vessels are environmentally sound.³⁷⁰ Nevertheless, the lives and safety of persons at risk, including migrants, take precedence over all other considerations.³⁷¹

C. TRAINING AND EDUCATION

With respect to training and technical cooperation, the primary obligation of states is to train officials in smuggling prevention *and* the “humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol”.³⁷² This is supplemented by a commitment to cooperate. Training programmes are to involve cooperation between states and with other bodies, including international organisations and civil society. These programmes too should “protect the rights” of smuggled migrants³⁷³ and include practical measures to ensure the “humane treatment of migrants and the protection of their rights as set forth in this Protocol”.³⁷⁴

Other measures in the Smuggling Protocol require states to strengthen information programmes to increase public awareness of the dangers facing smuggled migrants; to collaborate with other states to prevent migrant recruitment by criminal gangs; and, most ambitiously, to address “the root socio-economic causes” of migrant smuggling by promoting or strengthening national, regional and international cooperation and development programmes.³⁷⁵ This provision alludes to reforms intended to prevent corruption and promote the rule of law.³⁷⁶ The Protocol therefore calls upon states to examine the human rights situation in countries of origin, particularly economic and social rights. Lastly, this provision on “socio-economic causes” should be read in conjunction with two provisions stipulated by the UNCTOC: promotion of public awareness of the problems

369 Legislative Guide for the Smuggling Protocol, para. 70.

370 Smuggling Protocol Part 11, Article 9, safeguard clauses, paras. 1 (b), 1(c) and 1(d).

371 Legislative Guide for the Smuggling Protocol, para. 100, see discussion above on maritime law.

372 Smuggling Protocol, Article 14, Training and technical cooperation, para. 1.

373 *Ibid.*, para. 2.

374 *Ibid.*, para. 2(e).

375 Smuggling Protocol, Article 15, paras 1, 2 and 3.

376 Legislative Guide for the Smuggling Protocol, para. 84.

linked to organised crime,³⁷⁷ and alleviation of social conditions that render socially marginalised groups vulnerable to organised crime.³⁷⁸

d. DETENTION AND RETURN

The issue of detention raises important questions concerning the rights of smuggled migrants. Under the Smuggling Protocol, detention is considered only in terms of the Vienna Convention on Consular Relations which requires states to inform detainees of their rights of notification and to communicate with relevant consular authorities.³⁷⁹ In such circumstances, the application of detained migrants' general rights would provide the protection needed in accordance with international human rights obligations.

The return of smuggled migrants generates additional state obligations. Most of the provisions in the Protocol that cover this subject deal with the obligations of states in which the migrant is national or resident, and to which the migrant is to be returned.³⁸⁰ First of all, a smuggled migrant cannot be returned unless nationality or residency status has been ascertained.³⁸¹ Secondly, return should not deprive migrants of their nationality or make them stateless.³⁸² The Protocol confirms that *refoulement* is not permissible,³⁸³ an absolute principle that is affirmed in both the 1951 Refugee Convention and the UN Convention against Torture.

Receiving states – and other states involved in return, such as transit states – are obliged to take “all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person”.³⁸⁴ The language is unspecific about what “appropriate measures” are, and for the purposes of protection, advocates should make the argument that implementation of these measures should respect the object and purpose of the treaty, which includes protection of the rights of smuggled migrants.

By comparison, the Trafficking Protocol contains more detailed provisions on the safe and secure return of victims of trafficking, and on the assistance and

377 UNCTOC, Article 31, para. 5.

378 *Ibid.*, para. 7.

379 Smuggling Protocol, Article 16, Protection and assistance measures, para. 5.

380 Smuggling Protocol, Article 18, Return of smuggled migrants, paras 1 to 4. See also Legislative Guide for the Smuggling Protocol, para. 106.

381 *Travaux préparatoires*, Article 18C. Interpretative notes (c).

382 *Travaux préparatoires*, Article 18C. Interpretative notes (a).

383 Smuggling Protocol, Article 19, para. 1.

384 Smuggling Protocol, Article 18, para. 5.

protection they should receive. This reflects the premise that victims of trafficking are subject to additional jeopardy. The Trafficking Protocol notably stipulates that victims should receive medical, psychological or social support towards their recovery and that they should have access to NGOs and temporary legal residency. It also specifies that return “shall preferably be voluntary”.³⁸⁵ The absence of such provisions in the Smuggling Protocol reflects the different reasoning, described in the main report, that underlies the two documents.

Nevertheless, both Protocols affirm that the international obligations of states, governing the rights and treatment of smuggled migrants or asylum seekers, are not prejudiced.³⁸⁶ Those rights are to be implemented even during the return of smuggled migrants. Where applicable, too, these rights should include other human rights treaty obligations as well as those provided by the ICRMW, which provides forms of protection that the Protocols do not. The Legislative Guide for the Smuggling Protocol encourages States Parties to consult these additional provisions,³⁸⁷ whether or not they have ratified the ICRMW.

385 Trafficking Protocol, Article 8, para. 2.

386 Legislative Guide for the Smuggling Protocol, para. 107.

387 Ibid.

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Migration policies across the world are driven by three core concerns: law and border enforcement, economic interest, and protection. This report argues that official policies are failing partly because one of these concerns, protection, has been marginalised. Intensified efforts to suppress migration have not deterred people from seeking security or opportunity abroad but drive many into clandestinity, while the promotion of open economic markets has attracted millions of people to centres of prosperity but tolerated widespread exploitation. As a political consequence, discussion of migration is widely polarised and distorted by xenophobia and racism.

The report suggests that it is in governments' interest to affirm their legal and moral responsibility to protect everyone, including migrants. Human rights law provides a baseline of essential protection for migrants, and also some key components of a more balanced and rational policy approach. A substantial appendix summarises the rights of irregular migrants in international law.

“Irregular migration is a hot topic in a large number of states ... and the debate is often ill-conceived, misinformed and jingoistic. It is essential that it be reframed on the basis of fact and law. The report makes a very useful contribution to that.”

Chris Sidoti, Human Rights Council of Australia

“We welcome the emphasis on protection of rights not just in terms of a legal framework, but also as sound policy that is in the interest of society as a whole.”

Open Society Institute (OSI)

“This report is an extremely useful compilation of relevant migrant rights legislation for civil society organisations. It provides very good conceptual and legal analysis and training material.”

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