



COUNTERING MIGRANT SMUGGLING

Building upon the New York Declaration for Refugees and Migrants adopted on 19 September 2016, the Global Compact for Safe, Orderly and Regular Migration (GCM) will set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions. The GCM should make an important contribution to global governance and enhance coordination on international migration. For the consideration of Member States, the “Thematic Papers” developed by IOM, outline core topics and suggestions to inform actors involved in the 2017 consultation process that will lead to the inter-governmental negotiations and final adoption of the GCM.

INTRODUCTION

The smuggling of migrants across international borders on routes traversing land, air and sea continues to undermine migration governance and impede safe and orderly migration. Migrant smuggling is a criminal act under the domestic law of many States, as well as under international law. Many migrants (including refugees) currently have only limited ability to access regular pathways, and smugglers know and exploit this for profit.¹ In the absence of sufficient legal migration pathways, people (including those escaping human rights abuses, gang violence, conflict, food insecurity, dire poverty or other crisis situations) may resort to smugglers as they often do not have the knowledge, means or ability to migrate safely and regularly. In keeping with existing international law, smuggled migrants’ human rights should be protected, regardless of their migration status. Together with other complicating factors, all this undermines migration governance and impedes safe, orderly, and regular migration. All too often, migrants pay with their lives: they suffocate in containers, perish in deserts or drown at sea. In 2016 alone, 7,495 migrant deaths were recorded worldwide, many of them while being smuggled.²

Migrant smuggling involves consent – those being smuggled are receiving a service they requested in exchange for payment. Yet, a combination of factors can blur the lines and coercion and abuse of migrants occurs. Many smuggled migrants – notwithstanding that they began the journey voluntarily - *become* victims (including victims of trafficking, which typically involves a lack of consent).

Given this context, States have been severely tested in fulfilling their responsibility to protect the human rights of migrants while effectively managing their national borders. Countering migrant smuggling requires concerted and coordinated action by and between states and other stakeholders in a number of areas, including migrant protection and assistance, addressing the causes of migrant smuggling, creating more regular channels for migration, enhancing States’ law enforcement capacities to detect and disrupt the activities of migrant smugglers, and increasing research and data collection.³ Our collective ability to effectively counter migrant smuggling remains a core element in the realisation of safe, orderly and regular migration, and thus a central component of the Global Compact for Migration.



EXISTING PRINCIPLES

Normative Framework

The 2000 United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air,⁴ supplementing the United Nations Convention against Transnational Organized Crime (the Protocol) has been widely ratified.⁵ The Protocol defines migrant smuggling 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”. Central to this definition is that the purpose of the smuggler is to obtain a financial or other material benefit. Another important premise is that of consent on the part of the smuggled person, although as noted above, migrants may feel they have little choice but to seek assistance from smugglers. Migrants who use smugglers include not only workers seeking better employment opportunities, but also asylum seekers fleeing persecution, people fleeing poverty and individuals in need of assistance and safety who may not fall into effectively accessible existing protection categories.

Trafficking in persons, on the other hand, is committed for the purpose of exploiting the trafficked person, through the threat or use of force or other forms of coercion, fraud, deception, abduction, abuse of power, 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.⁶ There is thus a clear legal difference between migrant smuggling and trafficking in persons. However, some migrants might start their journey by agreeing to be smuggled into a country irregularly, but find themselves misled, intimidated or forced into an exploitative situation later on in the process by, for instance, being forced to work for extremely low wages to pay for the migrant smuggler’s fees. Migrant smuggling often places migrants at the mercy of criminal networks, thus creating increased vulnerability to abuse, including abduction, torture, sexual assault and extortion at every step of the journey.

The Protocol aims to prevent and combat smuggling, promote cooperation among States and protect the rights of smuggled migrants. Article 6 paragraph 1 (a) and (c) of the Protocol requires States to criminalize the conduct of migrant smuggling and of enabling a person to remain in a country where the person is not a legal resident or citizen without complying with requirements for legally remaining in the State by illegal means, including when it is committed for the purpose of enabling the smuggling of migrants. The conduct needs to be “committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit”. Furthermore, Article 6 paragraph 1 (b) of the Protocol requires States to criminalize producing, procuring, providing or possessing fraudulent travel or identity documents when used for the purpose of enabling the smuggling of migrants and when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.

Importantly, Article 5 of the Protocol states that “migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol”. In other words, a person cannot be charged for making use of a migrant smuggler.⁷ However, Article 6, paragraph 4 of the Protocol states that “nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law”. For example, although it has been recommended that international migrants should in principle not be criminalized for



being in an irregular status,⁸ many countries have laws that criminalize conduct such as possession of fraudulent travel documents or illegal entry.⁹

Article 11 paragraph 1 of the Protocol clearly identifies States' obligations to ensure well-managed borders: "States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants". Article 11 paragraph 6 of the Protocol also mentions "[...] strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication".

Sustainable Development Goals

The Sustainable Development Goals (SDGs) recognize that well-managed migration plays an integral role in and makes an immense contribution to sustainable development. Several SDG targets either mention or are relevant to migration, but the centerpiece for migration in the 2030 Agenda for Sustainable Development¹⁰ is target 10.7: "facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies." Preventing irregular migration and countering migrant smuggling are integral and essential elements of such well-planned and managed migration policies. Other relevant migration-related targets call for eradicating forced labour, trafficking in persons and enhancing international cooperation (SDG Targets 5, 8, 16 and 17).

Berne Initiative/International Agenda for Migration Management

The International Agenda for Migration Management (IAMM), the key outcome of the Berne Initiative Process launched by the government of Switzerland in 2001, was designed to assist governments in developing effective measures for the management of migration. It offered a non-binding yet comprehensive set of common understandings and effective practices, and a reference system for dialogue, cooperation and capacity building at the national, regional and global level, developed in a process of comprehensive consultations among states and other stakeholders from all regions.

The IAMM was one of the first international outcomes to have recognized the complexities described above and to have set forth a range of recommendations to combat human smuggling that in many ways mirror those underpinning the New York Declaration. They included involving all relevant stakeholders, adopting effective national legislation, strengthening cooperation and mutual assistance between law enforcement authorities, strengthening efforts to raise awareness, improving data collection and the knowledge base, and providing capacity building where necessary.¹¹

Sutherland Report

The comprehensive report of Peter Sutherland, the former Special Representative of the Secretary General on Migration,¹² also made a number of recommendations that would go far toward combating human smuggling. Among them were to improve cooperation (while recognizing that much unauthorized migration happens in complicity with State actors or where State capacity is weak); expand legal pathways to offer alternatives to current dangerous migration routes and, thereby, to undercut criminal smuggling networks; and equip migrants with proof of legal identity which would further reduce the risks of migrants being exploited by criminal smugglers.



ISSUES

The topic of migrant smuggling is enormously complex. As a multi-layered criminal industry, migrant smuggling encompasses various issues such as irregular migration, human rights violations and border management. Migrant smuggling endangers the lives of migrants and negatively impacts origin, transit and destination countries. Knowledge and information about migrant smuggling is extremely difficult to obtain due to the covert and rapidly changing nature of the crime. There is an especially sizeable gap in migration policy research and data, particularly in relation to migration patterns and processes involved in migrant smuggling, including its impact on migrants (particularly vulnerability, abuse and exploitation) as well as its impact on irregular migration flows (increasing scale, geography and profile of migrants).¹³ The adaptability of smugglers and smuggling organizations is high, and organizers shift routes in response to law enforcement countermeasures.

The Declaration of the UN General Assembly Second High Level Dialogue on International Migration and Development held in October 2013 highlighted the need for concrete measures to enhance coherence and cooperation at all levels.¹⁴ It reiterated the international community's commitment to prevent and combat migrant smuggling, protect migrants from exploitation and other abuses and implement relevant international instruments on preventing and combating trafficking in persons and smuggling of migrants. The Report of the Secretary-General dated April 2016 (*In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*) emphasized that the failure to reinforce international law and improve common responses to address large migrant movements will lead to greater loss of life, heighten tensions between States and communities, and increase the growth of criminal migrant smuggling networks.¹⁵

A number of issues challenge the effective implementation of the Protocol, including: “(a) insufficient prevention and awareness; (b) lack of data and research; (c) lack of legislation; (d) inadequate policies and planning; (e) weak criminal justice system responses; (f) inadequate protection of the rights of smuggled migrants; and (g) limited international cooperation”.¹⁶

SUGGESTED ACTION

The September 2016 New York Declaration for Refugees and Migrants recognises that UN Member States should, “with full respect for our obligations under international law, vigorously combat human trafficking and migrant smuggling with a view to their elimination”.¹⁷ In the suggested preliminary content of the Global Compact the following element is included: “combating trafficking in persons, smuggling of migrants and contemporary forms of slavery”.

The complex and evolving nature of migrant smuggling demands a comprehensive and coordinated approach to effectively counter smuggler networks and reduce smuggling operations.¹⁸ Without proper detection and investigation of the players involved, the criminal industry responsible for migrant smuggling continues to operate unopposed. Without addressing the causes of irregular migration and the demand for migrant smugglers, increasing border control will merely result in alternative smuggling paths. Without creating safe and regular migration pathways, migrants will continue to lose their lives en route.



By simultaneously concentrating on the protection of and assistance to smuggled migrants whose lives are in danger; addressing the causes of irregular migration; enhancing States' capacity to disrupt the activities of migrant smugglers; encouraging cooperation among States¹⁹; and promoting research and data collection on the phenomenon, the international community would be better able out to effectively implement responses that prevent and disrupt smuggling activities and networks.

Specific actions would include:

- 1) Create or reform, as necessary, national legal frameworks, in line with international legal standards and including the criminalization and prosecution of migrant smugglers and the confiscation and recovery of illegally obtained assets;
- 2) Where necessary, decriminalize in national legislation migrants who have resorted to smugglers, while ensuring effective access to asylum, protection and assistance, including health, legal and psychosocial services;
- 3) Create effective and accessible legal migration channels through well-administered visa and entry schemes with limited waiting times and reasonable fees, effective identity management practices and, if indicated, pre-departure health checks. Regular channels should include opportunities for family reunification; openings for labour migration; access to asylum or durable international protection through resettlement schemes; humanitarian admission schemes for refugees and migrants in need; other alternative pathways; and/or community based sponsorship programmes and academic scholarships;
- 4) Enhance border management procedures and border management information systems that facilitate intelligence gathering and the formulation of risk profiles;
- 5) Strengthen capacity of border management agencies and specialist anti-smuggling units to more effectively combat the crime of migrant smuggling through technical assistance, such as the introduction or amendment of standard operating procedures, training on intelligence cycles, performing risk analyses, investigative skills, debriefing and interviewing, and providing guidance on tackling document fraud, illicit financial flows, money laundering and corruption;
- 6) Ensure availability of unbiased information to potential migrants about the risks of engaging smugglers and the availability of legal migration opportunities;
- 7) Raise awareness among other societal stakeholders, including employers, consumers and migrant communities, of their role in preventing smuggling and its consequences for migrants;
- 8) Set up bilateral and multilateral mechanisms among judicial authorities, law enforcement, border control agencies and other relevant actors to share information, coordinate operational activities, and support prosecution efforts;
- 9) Gather and share information on modus operandi, routes, and economic models of smuggling networks, on links with trafficking in persons and other crimes, financial transfers, and on the factors that shape the smuggling industry, including its root causes;
- 10) Undertake research on the economic and social aspects underpinning smuggling processes, including the variety of actors involved, the information and telecommunications methods used, the sources and types of fees and the organisational/social networks used.



¹ McAuliffe, M. and Koser, K. (2015) Unintended consequences: How Migrant Smugglers are Exploiting the International Protection System, *Advance*, Australian National University, Winter 2015.

² International Organization for Migration (IOM), *Missing Migrants Project* (Geneva, 2017). Available from <http://missingmigrants.iom.int/>.

³ IOM, *IOM's Comprehensive Approach to Counter Migrant Smuggling* (Geneva, 2016). Available from www.iom.int/sites/default/files/our_work/DMM/IBM/IOM-Approach-to-counter-migrant-smuggling-Brochure.pdf.

⁴ United Nations, Treaty Series, vol. 2241, p. 507. See also United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, A/55/383, (New York, 2000).

⁵ To date, it has attracted 142 ratifications.

⁶ Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, defines trafficking in persons as “[...] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

⁷ United Nations Office on Drugs and Crime (UNODC), *Model Law against the Smuggling of Migrants* (Vienna, 2010).

⁸ For example, at the 2010 Global Forum on Migration and Development (GFMD), the Office of the United Nations High Commissioner for Human Rights and the Global Migration Group issued a joint statement expressing concern about the human rights of migrants in irregular situation and called for an end to their criminalization (United Nations, 2012). See also United Nations, *International Migration Policies: Government Views and Priorities* (New York, 2014).

⁹ Ibid.

¹⁰ United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, (New York, 2015).

¹¹ Berne Initiative/International Agenda for Migration Management, 2005, <https://publications.iom.int/books/international-agenda-migration-management>, p. 44.

¹² Report of the Special Representative of the Secretary General on Migration, A/71/728, 3 February 2017.

¹³ McAuliffe, M. and Lazcko, F. (eds) *Migration Smuggling Data and Research: A global review of the evidence base*. IOM: Geneva.

¹⁴ United Nations General Assembly, High-level Dialogue on International Migration and Development, *Making Migration Work*, 3-4 October 2013. Available from www.un.org/en/ga/68/meetings/migration/resources.shtml.

¹⁵ United Nations General Assembly, Report of the Secretary-General, *In safety and dignity: addressing large movements of refugees and migrants*, A/70/59, (New York, 2016).

¹⁶ UNODC, *International Framework for Action to Implement the Smuggling of Migrants* (New York, 2011), p.7.

¹⁷ United Nations General Assembly, *New York Declaration for Refugee and Migrants*, A/RES/71/1, (New York, 2016).

¹⁸ IOM, *IOM's Comprehensive Approach to Counter Migrant Smuggling* (Geneva, 2016). Available from www.iom.int/sites/default/files/our_work/DMM/IBM/IOM-Approach-to-counter-migrant-smuggling-Brochure.pdf.

¹⁹ Also see the Report of the Special Representative of the Secretary-General on Migration, United Nations General Assembly 3 February 2017 A/71/728. It states that “A continued priority for States will and should be to improve cooperation on reducing irregular movements and dismantling criminal networks that have made a business out of smuggling migrants or trafficking people, exploiting their desperation and the search for a better life”.