

Smuggling of migrant women

Many migrants pay a broker to facilitate part or all of their migration: smuggling constitutes service provision where migrants need help to move. In situations of human rights violations, for example armed conflicts, smuggling is a way out of the danger, persecution or deprivation: smuggling saves lives. Smuggling of migrant women and men does not in itself constitute a human rights violation.¹ Many migrants migrate with the aid of smugglers without any problems and voice gratitude for the help, some go on to help future migrations.² However, as cost is central to smuggling – a financial or other material benefit is part of the definition – this can disadvantage women in migration as they typically have fewer resources than men and experience a different range of obstacles and challenges.

International criminal law calls on states to criminalise smuggling – but not the migrants who are smuggled.³ However many states’ legislate outside the scope of this international standard and in ways which do not always have positive outcomes for migrants’ rights.

Though states are entitled to exercise jurisdiction at their international borders, the means by which they do so – focusing on migration management models such as restricting regular migration channels and increasing border security – create opportunities for smuggling. This drives smuggling further underground and in doing so increases the power of these agents, and the dangers for migrants – including the risk of trafficking in persons and gender-based violence.

The obligations of states to criminalize smuggling aggravates circumstances that endanger migrants’ lives or safety, or entail inhuman or degrading treatment of migrants.⁴ Instead, states should ensure that measures aimed at addressing irregular migration or combating transnational organized crime (including the smuggling of migrants) do not adversely affect the enjoyment of the human rights and dignity of all migrants, and take into account the particular needs of women and of children.⁵

¹ OHCHR, *Situation of migrants in transit*, A/HRC/31/35, 2016, para.56. Smuggling of migrants is defined in international law 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” (The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Article 3).

² OHCHR, *Situation of migrants in transit*, para.56; Global Initiative Against Transnational Organized Crime, *Understanding and Responding to the Role of Human Smugglers in Migration*, Policy Brief, September 2016.

³ Smuggling of Migrants Protocol, Articles 6 and 5, respectively. Article 4 extends the scope of the Protocol beyond the prevention, investigation and prosecution of migrant smuggling offences to ensuring the human rights of migrants in situations of smuggling.

⁴ Smuggling of Migrants Protocol, Article 6(3).

⁵ Smuggling of Migrants Protocol, Article 16, and with reference to women, Article 16(4); OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, A/69/CRP.1, 23 July 2014, Principle 5.

Recently, some states have started to cite smuggling charges against civil society organisations and individuals who provide assistance to migrants.⁶ Such action to save the lives and protect the rights of migrants was intentionally not covered by the agreed definition of migrant smuggling.⁷

Smuggling is often erroneously conflated with trafficking in persons. Although migrants in smuggling situations may then be trafficked, the two issues are distinct in law, with different obligations on duty-bearers.⁸ Conflating smuggling and trafficking is contrary to the objective of facilitating safe migration and leads to human rights abuses through increased criminalization—resulting in the over-policing of migrants and the failure to identify and provide assistance to people who have been trafficked, in breach of states’ obligations to protect the rights of trafficked persons.⁹

The Global Compact should:

- Ensure that migrants are not criminalised for irregular entry or stay/residence;
- Ensure that the specific needs and rights of migrant women and girls who have used the services of smugglers are considered; and appropriate protection measures are implemented
- Ensure that migrants who have used the services of smugglers are not criminalised;
- Ensure that measures undertaken to address the smuggling of migrants do not adversely affect the human rights of migrants, including the right to seek asylum;
- Ensure that administrative, civil and criminal sanctions imposed on migrant smugglers or others involved in the facilitation of irregular border crossing are proportionate to any offences or human rights abuses committed by them;¹⁰
- Protect the rights of civil society groups and others working to provide assistance to and defend the rights of migrants and ensure that they are not criminalised for this work, including by being excluded from the application of smuggling offences.¹¹

⁶ See for example, Statewatch, Refugee crisis: Council proposals on migrant smuggling would criminalise humanitarian assistance by civil society, local people and volunteers, *Statewatch*, January 2016, available at <http://www.statewatch.org/news/2016/jan/eu-med-crisis-criminalising-civil-society.htm>; Mariana Gkliati, Proud to Aid and Abet Refugees: The Criminalization of ‘Flight Helpers’ in Greece, *Border Criminologies*, 23 May 2016, available at <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>

⁷ See note 1 – there is a movement of a person across a border for “financial or other material benefit”. In the negotiations of the Smuggling of Migrants Protocol, it was clear that the definition was intended “to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.” Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1, 3 November 2000, para. 88. See UNODC, *The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol: Issue Paper*, 2017.

⁸ Global Alliance Against Traffic in Women (GAATW), *Smuggling and Trafficking: Rights and intersections*, GAATW Working Papers Series, 2011; Global Initiative Against Transnational Organized Crime, *Understanding and Responding to the Role of Human Smugglers in Migration*.

⁹ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 2.

¹⁰ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, Guideline 2.5

¹¹ Human Rights Council, Protection of the human rights of migrants: strengthening the promotion and protection of the human rights of migrants, including in large movements, A/HRC/32/L.22, 28 June 2016, para.10; UNODC, *The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol*