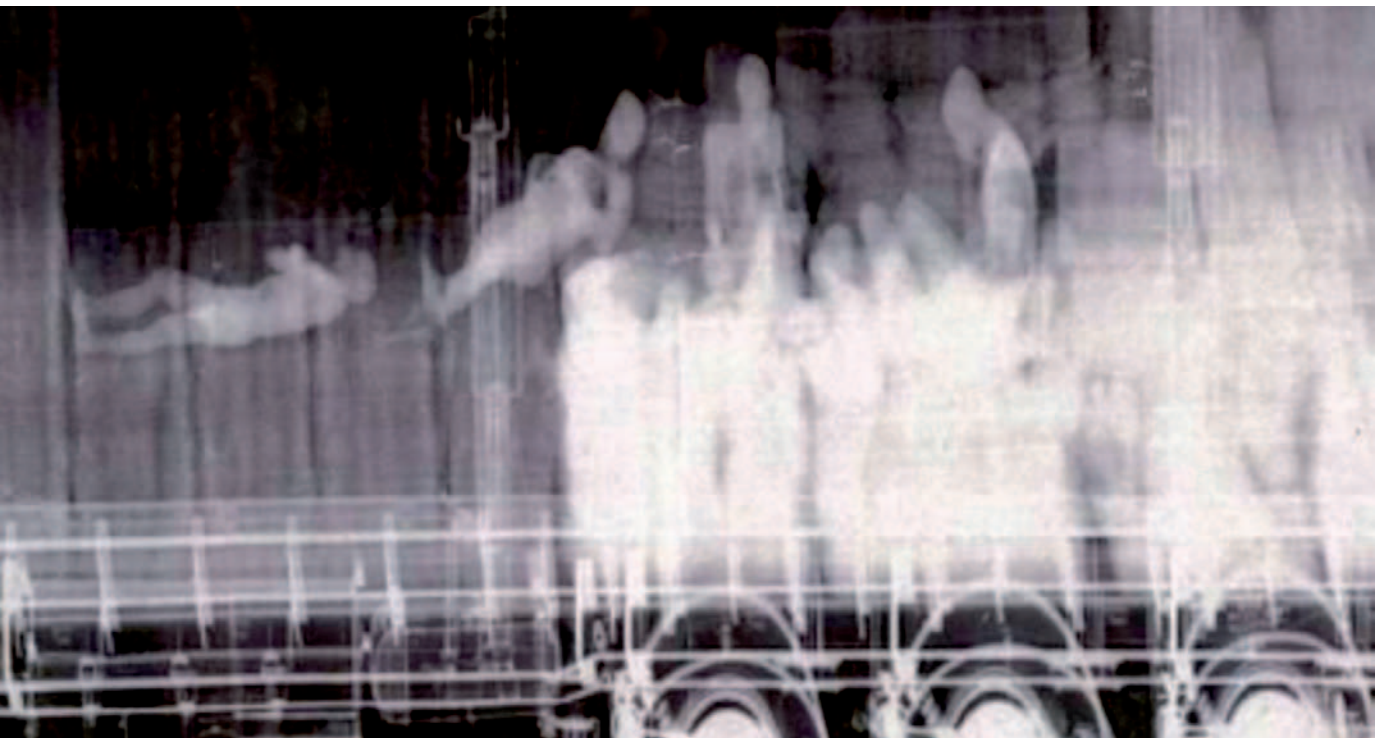




UNODC

United Nations Office on Drugs and Crime



Toolkit to Combat Smuggling of Migrants

Tool 8

Protection and assistance measures



Published with the financial support of the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Toolkit to Combat Smuggling of Migrants

Tool 8

Protection and assistance measures



UNITED NATIONS
New York, 2010

© United Nations Office on Drugs and Crime, September 2010. All rights reserved.

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

This publication has not been formally edited.

Information on uniform resource locators and links to Internet sites contained in the present publication are provided for the convenience of the reader and are correct at the time of issue. The United Nations takes no responsibility for the continued accuracy of that information or for the content of any external website.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

Contents

Overview	1
8.1 Obligations of States to protect and assist	3
8.2 Protection, assistance and human rights	6
8.3 Understanding the psychological impact of smuggling of migrants on the migrant	9
8.4 Rescue at sea	12
8.5 Referral mechanisms	16
8.6 Health and medical assistance	21
8.7 Responses to the vulnerability to HIV/AIDS of smuggled migrants or persons vulnerable to being smuggled	25
8.8 Access to information and legal representation	27
8.9 Human rights of smuggled migrants	30
8.10 Protection of smuggled migrants who are refugees	38
8.11 Non-refoulement	42

Overview

Tool 8 provides an overview of protection and assistance measures that States are required to afford to smuggled migrants.

8.1 offers an overview of the obligation to protect and assist as prescribed in the Smuggling of Migrants Protocol.

8.2 places these obligations in a broader context with respect to commensurate human rights considerations.

8.3 discusses the psychological impact that the smuggling process may have on a migrant, including trauma.

8.4 deals specifically with the issues of rescue at sea as provided for in article 8 of the Smuggling of Migrants Protocol.

8.5 offers an example of a referral mechanism to address mixed migration flows.

8.6 and 8.7 offer specific guidance on medical and health assistance.

8.8 highlights the need for migrants to access information and legal representation, and the advantage that this offers to the criminal justice response to the smuggling of migrants.

8.9 provides an overview of the human rights of smuggled migrants and recommends several relevant resources.

8.10 and 8.11 explain the protection that must be afforded to smuggled migrants who are refugees and the principle of non-refoulement.

8.1 Obligations of States to protect and assist

The following is an excerpt from the Smuggling of Migrants Protocol:

Smuggling of Migrants Protocol

Article 16. Protection and assistance measures

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.
3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.
4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.
5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

*United Nations, *Treaty Series*, vol. 596, No. 8638.

The Protocol contains safeguard requirements in two major areas:

- The rights, legal status and safety of smuggled migrants and illegal residents, including those who are also asylum-seekers
- The rights and interests of States and ship owners under maritime law

Article 16 is a response to concerns about the basic safety, security and human rights of persons who have been the object of one of the major offences established in accordance with the Protocol, including migrants who have been smuggled and those who may have entered legally, but whose subsequent illegal residence has been made possible by an organized criminal group.

The provisions are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter conduct on the part of offenders that involves danger or degradation to the migrants.

Each State party is required to take all appropriate measures:

- To protect smuggled persons from death, torture or other cruel, inhuman or degrading treatment or punishment (article 16, paragraph 1) and violence (article 16, paragraph 2)
- To provide appropriate assistance to persons endangered by smugglers, taking into account the special needs of women and children (article 16, paragraphs 3 and 4)

Each State party is also required:

- To comply with its obligation under the Vienna Convention on Consular Relations to inform the person of the notification and communication obligations under that Convention (article 16, paragraph 5)
- To accept without undue delay and facilitate the return of a smuggled person who is a national of the State party or has the right of permanent residence (article 18, paragraph 1)
- To verify without unreasonable delay whether a smuggled person who is a national or has the right of permanent residence and issue the travel documents required for re-entry (article 18, paragraphs 3 and 4)
- To carry out the return in an orderly manner with due regard for the safety and dignity of the person being returned (article 18, paragraph 5)
- When carrying out measures aboard vessels, States parties shall:
 - Ensure the safety and humane treatment of passengers (article 9, paragraph 1)
 - Compensate the vessel for any loss or damage where enforcement grounds for measures against the vessel prove to be unfounded (article 9, paragraph 2)

Recommended resources

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*.

The modules contained in this training manual address the concepts and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigation, covert investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions throughout the world.

This publication is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Sales No. E.05.V.2).

The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The *Guides* lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The *Guides* have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

United Nations. *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Organized Crime and the Protocols thereto* (Sales No. E.06.V.5).

The publication of the *Travaux Préparatoires* (official records) of the negotiations of the *United Nations Convention against Organized Crime and the Protocols thereto* is intended to provide a better, in-depth understanding of the Convention and its Protocols. The publication tracks the progress of negotiations in the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, established by the General Assembly by its resolution 53/111.

www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html

8.2 Protection, assistance and human rights

Human rights considerations

In addition to the protection and assistance requirements prescribed in article 16, the Protocol requests the State party to apply such rights as are established in article 16, including general basic human rights (article 16, paragraphs 1 and 2, and article 19, paragraph 2) and the right to consular assistance (article 16, paragraph 5). Article 16, paragraph 3 does not create a new right, but does establish a new obligation in that it requires States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol. Particular attention is paid to ensuring that rights established by international humanitarian law, which primarily concern migrants or illegal residents who are also asylum-seekers, are not affected (article 19, paragraph 1).

Article 18, which sets out conditions for the return of smuggled migrants and illegal residents to their countries of origin, also does not require the creation of any substantive or procedural rights for such persons, but paragraph 5 of that article requires measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person.

More on human rights considerations with respect to return of smuggled migrants is contained in Tool 7, section 23.

Promising practices

Mixed Migration Task Force, Somalia

The Mixed Migration Task Force was established in April 2007 with the Office of the United Nations High Commissioner for Refugees and the International Organization for Migration acting as co-chairs, under the auspices of the Inter-Agency Standing Committee's Protection Cluster. The purpose of the Task Force is to develop a rights-based strategy to ensure a comprehensive coordinated response to protection and humanitarian needs of migrants and asylum-seekers transiting through Somalia. The Task Force reports to the United Nations Country Team and the Inter-Agency Standing Committee, through the protection cluster. Task Force membership includes the Office for the Coordination of Humanitarian Affairs, the United Nations Development Programme, the United Nations Children's Fund, the World Food Programme, the Danish Refugee Council and the Norwegian Refugee Council.

Objectives

- A. Develop an inter-agency strategic framework for effective humanitarian interventions with respect to Mixed Migration in Somalia, and to guide the United Nations Country

Team and Inter-Agency Standing Committee in Somalia and other stakeholders in a comprehensive operational response to mixed migration flow.

B. Define an advocacy and capacity-building strategy focusing on enhancing local awareness and local capacity to mitigate the consequences of mixed migration in Somalia.

C. Strengthen inter-country initiatives and promote a regional approach to mixed migration, notably through information sharing and joint planning, involving all relevant stakeholders.

<http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1119266>

Permanent Council of the Organization of American States. *Working Group to prepare an Inter-American Program for the Promotion and Protection of the Human Rights of Migrants Including Migrant Workers and Their Families*

Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and Their Families:

Taking into Account The Plan of Action of the First Summit of the Americas, adopted in December 1994 in Miami, Florida, United States of America; the Declaration of the Second Summit of the Americas, held in Santiago, Chile, in April 1998; and, more particularly, the Plan of Action of the Third Summit of the Americas, adopted in Quebec City, Canada, in April 2001, where the Heads of State and Government stated that they would “[e]stablish an inter-American program within the Organization of American States for the promotion and protection of the human rights of migrants, including migrant workers and their families, taking into account the activities of the Inter-American Commission on Human Rights and supporting the work of the Inter-American Commission on Human Rights Special Rapporteur on Migrant Workers and the United Nations Special Rapporteur on Migration”

One of the specific objectives of the program is prevention and technical cooperation in the fight against the smuggling of migrants, and investigation and criminal prosecution of smugglers of migrants.

www.oas.org/consejo/CAJP/Migrant_default.asp

Recommended resources

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*.

The modules contained in this training manual address the concept and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigations, covert investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions throughout the world.

Module 9 addresses human rights considerations in responding to the smuggling of migrants.

This publication is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

Global Migration Group. *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*. October 2008.

This guide is the collaborative result of the 14 members of the Global Migration Group: the International Labour Organization, the International Organization for Migration, the Office of the United Nations High Commissioner for Human Rights, the United Nations Conference on Trade and Development, the Department of Economic and Social Affairs of the Secretariat, the United Nations Development Programme, the United Nations Educational, Scientific and Cultural Organization, the United Nations Population Fund, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations Institute for Training and Research, the United Nations Office on Drugs and Crime and the World Bank.

Chapter II describes categories of migrants and provides a regional overview of migration.

www.globalmigrationgroup.org

Platform for International Cooperation on Undocumented Migrants. *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*. 2007.

All across Europe, and in different regions throughout the world, a growing number of non-governmental organizations, local authorities, professionals from diverse fields, as well as undocumented migrants uphold the principle that “no human being is illegal”. In their daily work and lives, these local actors strive to defend undocumented migrants’ human rights, including the right to health care, education and training, fair working conditions and housing, as well as many other rights. Yet undocumented migrants are confronted on a daily basis with situations in which they witness that irregular status is an obstacle and a way of discriminating a sizeable part of the population in accessing basic social services and in upholding their human rights.

www.picum.org/sites/default/files/data/UndocumentedMigrantsHaveRights!.pdf

8.3 Understanding the psychological impact of smuggling of migrants on the migrant

The process of smuggling can be extremely difficult for the smuggled migrant. To learn more about the hardships endured by smuggled migrants in the process of being smuggled, see Tool 1, section 13. Some smuggled migrants may experience one or more traumatic incidents as a result of being smuggled and may have adopted psychological tactics to cope. To understand the possible reactions to these events, it is important to understand the concept of trauma. Trauma can have a serious short- and long-term impact on the individual and a failure to treat it appropriately could severely compromise attempts to bring the smugglers of migrants to justice.

What is trauma?

Trauma is defined as follows:

“The essence of trauma is that it overwhelms the (trauma) victim’s psychological and biological coping mechanisms. This occurs when internal and external resources are inadequate to cope with the external threat.”¹

Trauma occurs when a person’s psychological and biological coping mechanism is unable to cope with the external threat. Unpredictability and uncontrollability of events can contribute significantly to trauma. These factors are often key features of a smuggling experience. Smuggled migrants may also have experienced violence either before or during their experience; smugglers often use force or threats and intimidation to keep migrants under control. The conditions that migrants often endure in migrating are often inhuman, with constant risk to life.

What are the symptoms of trauma?

Trauma can manifest in different people in different ways. In all professional situations connected with the smuggling of migrants, supreme respect for each person’s individuality must be shown.

If a migrant reacts in a hostile or aggressive way, even after being rescued, this may have nothing personal to do with the rescuer, their role or the organization they work for. Such reactions may be a coping mechanism developed to survive whatever ordeal the migrant has endured.

Trauma victims can suffer simultaneous mental and physical health problems of varying duration.

¹ J. A. Saporta, and B. A. van der Kolk, “Psychobiological consequences of severe trauma”, in *Torture and its Consequences: Current Treatment Approaches*, Metin Basoglu, ed. (Cambridge, Cambridge University Press, 1992).

Physical health symptoms can include:

- Fatigue and weight loss
- Neurological symptoms
- Gastrointestinal problems

Mental health symptoms can include:

- Depression
- Anxiety
- Hostility

Post-traumatic stress disorder is a mental health disorder caused in part by traumatic events, which can occur over a long period of time. This disorder manifests in a number of severe psychological symptoms experienced by those who have been exposed to life-threatening experiences. Symptoms of post-traumatic stress disorder can include recurrent thoughts, memories of terrifying events, difficulties in sleeping and an inability to feel emotions.

What are the implications of trauma in connection with criminal justice?

Trauma can mean that a person's behaviour towards criminal justice practitioners could be hostile and/or uncooperative. A traumatized person also may suffer from memory loss, lapses and discrepancies in the storyline, outbursts and irrationality and continuing anxiety and disorientation.

The levels of psychological trauma experienced by some migrants (either before or during the smuggling process) may be so high that they are never going to be able to serve as witnesses in court or even give an account that can be used as the basis of intelligence. On the other hand, it is also possible that some individuals who suffer trauma, may, with time and professional support or counselling, become perfectly capable witnesses.

How should criminal justice practitioners respond when smuggled migrants are suffering from trauma?

If a person who has been intercepted is subjected to challenging and direct questioning at too early a stage, this may alienate or even re-traumatize them. A considered, methodological and non-judgemental approach is the most likely to yield an accurate picture of events.

The impact that the psychological reactions of trauma have on investigation and prosecution can potentially be minimized by the following means:

- Addressing the immediate needs of the person before starting the interview
- Taking more breaks than usual during interviews
- Arranging for comfortable shelter or safe houses and other support services
- Ensuring that any promises made can always be kept

Practitioners should always be prepared to terminate interviews with a traumatized person and seek immediate assistance for them.

Recommended resources

United Nations Office on Drugs and Crime. *Anti-Human Trafficking Manual for Criminal Justice Practitioners*. New York, 2009.

The *Manual* was developed in line with the Trafficking in Persons Protocol supplementing the United Nations Convention against Transnational Organized Crime.* Though the purpose of the *Manual* is to support prevention of trafficking in persons, Module 3 specifically addresses trauma and its symptoms.

www.unodc.org/documents/human-trafficking/09-80667_module3_Ebook.pdf

International Organization for Migration. *Introduction to Basic Counselling and Communication Skills: IOM Training Manual for Migrant Community Leaders and Community Workers*. 2009.

This *Manual* is a tool to strengthen basic counselling and communication skills. The *Manual* is designed for use by humanitarian workers such as development and community health workers and leaders who engage with migrants and mobile populations. The *Manual* will strengthen counselling and communication skills that can be used to assist children, adolescents, adults and families living in migrant and host communities and to help them cope before, during and in the aftermath of a pandemic or any other crisis.

http://publications.iom.int/bookstore/index.php?main_page=product_info&products_id=511

Alanna Ryan, International Catholic Migration Commission, *Protecting the human rights of migrant victims of violence or trauma: a question of implementation?*, statement to the 61st annual DPI/NGO Conference, Paris, 5 September 2008.

www.icmc.net/activities/protecting-human-rights-migrant-victims-violence-or-trauma

*Ibid., vol. 2237, No. 39574.

8.4 Rescue at sea

The following is an excerpt from the Smuggling of Migrants Protocol:

Smuggling of Migrants Protocol

Article 7. Cooperation

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

...

Article 9. Safeguard clauses

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

- (a) Ensure the safety and humane treatment of the persons on board;
- (b) Take due account of the need not to endanger the security of the vessel or its cargo;
- (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;
- (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

- (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
- (b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

This section of the Protocol allows States parties that encounter vessels suspected of involvement in smuggling to board and search such vessels under certain circumstances. The dilapidated condition of vessels often used by smugglers and the fact that boarding may take place at sea and far from safe harbour conditions raise concerns about the basic safety and security of migrants and others on board such vessels. Stopping and boarding vessels also raise concerns about the sovereignty of States to which such vessels are flagged or registered and about the commercial losses to shipowners that might result. For these reasons, the Protocol incorporates basic safeguard requirements to protect such interests before and during boarding and to make some provision for access to remedies later, in cases where the search proves to be unfounded. (For more on this, see Tool 7, section 22, in which article 8 of the Smuggling of Migrants Protocol is discussed.)

It should also be noted that the International Maritime Organization and the Office of the United Nations High Commissioner for Refugees have expressed concern that unnecessary searches or detention of vessels may deter masters of vessels from meeting fundamental humanitarian requirements, including the rescue of migrants from small vessels found in distress at sea. In establishing and implementing powers to stop and search vessels and to detain vessels or crew members who may be witnesses (but not criminal suspects), legislators should bear in mind that such procedures should be carefully considered and used with as much restraint as possible.

Obligation to assist

The United Nations Convention on the Law of the Sea (United Nations, *Treaty Series*, vol. 1833, No. 31363), sets out the long-standing obligation of a State to require the master of a ship flying its flag to render assistance to persons and ships in distress at sea.

Article 98, paragraph 1, of the United Nations Convention on the Law of the Sea provides as follows:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

The duty to render assistance is not just applicable in the high seas, but also extends to maritime zones (see article 18, paragraph 2, article 39, paragraph 1 (c), article 45, article 52, article 54 and article 58, paragraph 2, of the United Nations Convention on the Law of the Sea).

Paragraphs 73-76 and 88-92 of General Assembly resolution 63/111 deal with the treatment of persons rescued at sea, including trafficking in persons and smuggling of migrants by sea. In paragraph 91 of the resolution, the Assembly welcomed the ongoing cooperation between members of the inter-agency group on the treatment of persons rescued at sea.

The following is a background note produced by the Office of the United Nations High Commissioner for Refugees, entitled “The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert roundtables convened by the Office of the High Commissioner for Refugees”:

Introduction

The Office of the United Nations High Commissioner for Refugees has convened three recent meetings on rescue at sea and refugee protection:

- The Expert Roundtable on Rescue-at-Sea in Lisbon, Portugal in March 2002;
- The Expert Meeting on Interception and Rescue in the Mediterranean in Athens, Greece in September 2005; and
- The meeting of State Representatives on the same issue in Madrid, Spain in May 2006.

The meetings brought together participants from governments, the shipping industry, international organizations, non-governmental organizations and academia. They resulted in a number of important observations and recommendations, aimed at preserving the integrity of the global search and rescue (SAR) regime for which irregular migration poses a particular challenge, and at meeting the humanitarian and protection needs of those in distress. However, participants also recognized that efforts to improve search and rescue operations for migrants and refugees in distress at sea are only one aspect of addressing the broader challenges of irregular maritime migration. This requires tackling all the different aspects of this phenomenon in a comprehensive manner, from the root causes to differentiated solutions after disembarkation.

The points below synthesize the key conclusions coming out of these meetings. They include suggestions for the strengthening of the maritime SAR regime, as well as recommendations for a broader approach to address irregular maritime migration beyond the imminent rescue phase.

Conclusions and recommendations

Irregular maritime migration

- Irregular maritime migration is only a small component of the overall phenomenon of international migration, but it raises specific challenges which need to be addressed.
- While it is not in essence a refugee problem, there are refugee protection issues to contend with which must be addressed as part of the broader response to irregular maritime migration, and asylum must be effectively made available in such situations for those requiring it.
- Irregular maritime migration requires a collaborative response, involving a wide range of actors, including intergovernmental organizations.
- Human rights and refugee law principles are an important point of reference in handling rescue-at-sea situations.

Preserving the integrity of the search and rescue regime

The rescue of persons in distress at sea is not only an obligation under maritime law but also a humanitarian necessity, regardless of who people are and what their reasons are for moving.

- The integrity of the global SAR regime as governed by the SOLAS and SAR Conventions must be scrupulously protected. This is a responsibility of the international community as a whole.
- All States should implement strict safety standards before authorizing any boat to depart their ports or shores.
- States should be encouraged to support the recently adopted amendments to the SAR and SOLAS Conventions, which provide clarity on the responsibility of Contracting States to provide a place of safety; or to ensure that a place of safety is provided under the coordination of the State responsible for the SAR region in which the survivors were recovered.
- States should facilitate rescue operations by ensuring that the necessary enabling arrangements are in place in their SAR area.
- It may be necessary to support and assist other States in establishing functioning, sustainable SAR facilities. Such support could also lead to gradual harmonization of approaches to SAR.
- States should take the necessary measures to disseminate to shipmasters and government officials involved in rescue-at-sea operations relevant provisions of maritime law and accompanying guidelines, including the new amendments.
- States should avoid the categorization of interception operations as SAR operations, as this can lead to confusion with respect to disembarkation responsibilities.

Duties of shipmasters, shipping and insurance agencies

- The responsibility to rescue is an obligation of shipmasters, established under maritime law. The duty is triggered at the outset of the actual rescue and ends when passengers have been disembarked at a place of safety.
- Decisions as to when and where to land rescued persons will be influenced by factors such as the safety and well-being of the ship and its crew, and the appropriateness of the place of landing (safety, closeness, and the ship's pre-rescue schedule).
- Shipping and/or insurance companies should promptly inform the International Maritime Organization (IMO), UNHCR and other relevant actors when disembarkation proves problematic or when rescued persons claim international protection. This facilitates cooperation in finding an appropriate disembarkation solution.
- Cases of refusal of disembarkation should be documented by shipping companies and reported to the IMO. This information can then be used by relevant inter-governmental organizations to better quantify the problem and devise solutions with the concerned States.
- Shipping and insurance companies should provide regular statistics to the IMO on incidents of stowaways and people rescued at sea.

- Shipping companies should ensure that shipmasters are made aware of the practical consequences resulting from the IMO guidelines on the treatment of persons rescued at sea through the provision of multilingual information material.

Minimizing the inconvenience for private actors in fulfilling their maritime obligations

- Shipmasters who undertake rescue operations should not be seen as part of the problem; rather, their actions in saving lives should be recognized and supported by States.
- Their professional judgment as regards the determination of when and where to land the persons rescued should be respected.
- Shipping companies should not be penalized in any manner whatsoever for disembarking or attempting to disembark people rescued at sea.
- The shipmaster has the right to expect the assistance of coastal States with facilitation and completion of the rescue.
- States should not impose a requirement that shipping companies or their insurers cover the repatriation costs of stowaways or people rescued at sea as a precondition for disembarkation.
- A non-state vessel is not an appropriate place to screen and categorize those rescued, or devise solutions for them. Nor should it be used as a “floating detention centre”.

Disembarkation

- The responsibility for finding solutions to enable timely disembarkation in a humane manner rests exclusively with States and not with private actors. States have a duty to cooperate in finding a place of safety under maritime law.
- Disembarkation procedures should be governed by the maritime regime, not by immigration control objectives.
- Disembarkation procedures should be harmonized, speedy and predictable in order to avoid recurrent case-by-case time consuming negotiation problems, which can endanger the lives of those rescued. Procedures should balance the interests of the shipping industry and the basic needs of individuals rescued at sea.
- Disembarkation, particularly when it involves large numbers, does not necessarily entail the provision of durable solutions in the country of disembarkation.

Reception standards, profiling and referral to differentiated procedures after Disembarkation

- Comprehensive reception arrangements should be established for persons rescued at sea which meet the needs of the rescued persons, according to their different situations.
- Rapid response teams could assist States facing large-scale arrivals.
- There may be value in establishing multidisciplinary teams (including government experts as well as international and local governmental and non-governmental organizations) for maritime arrival situations; such teams would address any immediate needs, provide information and refer arrivals to appropriate response

mechanisms (profiling). These teams may include or benefit from the expertise of non-governmental organizations.

- Persons claiming international protection should be allowed to enter the national asylum procedure without delay; in countries where no asylum procedure exists, they should be referred to UNHCR. The State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged.
- Fair and efficient asylum procedures help to separate individuals with international protection needs from those who do not have such needs.
- Trafficked persons and other vulnerable groups such as separated children will require specific assistance. They may also have international protection needs.

Comprehensive solutions

- Persons with international protection needs should receive protection and, in due course, access to a durable solution, either through local integration or resettlement.
- Persons not seeking asylum, and those who are found not to be in need of international protection or have no other compelling humanitarian reasons to remain, should be encouraged and assisted to return to their country of origin in humane and safe conditions, unless an alternative legal migration option might be available to them. The International Organization for Migration (IOM) and other organizations may offer support to States in implementing assisted voluntary return programmes.
- Return should be complemented by efforts to reintegrate migrants in their community of origin, to ensure the sustainability of return and avoid a “recycling” phenomenon.
- The development of an appropriate response to secondary movements of refugees is a critical challenge.

Combating smuggling and trafficking

- More vigorous and effective action is needed to identify, arrest and prosecute smugglers and traffickers.
- States should renew their cooperation in protecting witnesses and victims who assist in identification and prosecution of smugglers and traffickers.
- Measures to combat people smuggling must not undermine international refugee protection responsibilities.

Prevention: information strategy and addressing root causes

- Multilateral cooperation should include a proper review of mechanisms for the creation of orderly migration and protection channels, to provide alternative opportunities for migrants.
- States, relevant inter-governmental organizations and non-governmental actors should explore the feasibility of establishing mass information campaigns to inform prospective clandestine passengers of the risks associated with irregular maritime migration. Such campaigns would also need to touch on the various risks associated

with overland travel en route to the prospective embarkation point. They should be targeted at communities in countries of origin, transit countries and migrant communities in countries of destination.

- States should adopt broader, longer-term multilateral commitments to address the root causes of irregular migration. Additional efforts are called for, such as re-targeting aid to achieve sustainable development and the development of alternative legal migration channels.

Improved information management

- Empirical data on the scale and scope of irregular maritime migration, interception, rescue at sea, disembarkation and treatment of persons disembarked should be harmonized and more systematically compiled by governments and international agencies. Statistical information should include the number and profile of persons intercepted and disembarked as stowaways or following a rescue.
- An exchange of data would enable all stakeholders to better address emerging trends and reinforce their cooperation to combat trafficking and abuse or exploitation of migrants.
- Improved communication procedures among all actors and a better understanding and analysis of the challenges in relation to disembarkation may facilitate sharing of best practices and the identification and realization of timely and fair solutions.

Cooperation and responsibility sharing

International cooperative efforts to address complex rescue-at-sea situations should be built around burden-sharing arrangements. These arrangements could encompass the processing of asylum applications and/or the realization of durable solutions, such as resettlement. Further, they should address, as appropriate, the issue of readmission to first countries of asylum and/or safe third countries. Burden-sharing arrangements should be in place with regard to persons not in need of international protection.

UNHCR should mobilize States to establish adequate burden-sharing arrangements and/or standby resettlement programmes, as appropriate.

Available from www.unhcr.org/475555192.html

Promising practice

Sicilian trawler and the Office of the United Nations High Commissioner for Refugees help in rescue of 27 Somalis, 10 June 2008

A fishing boat captain from the Italian island of Sicily, Gaspare Marrone, was fishing with his crew south of Lampedusa Island, when they spotted a boat in distress. The Italians started bringing the 30 Somali passengers on board, but in the process the boat capsized and 3 people were unaccounted for. Nicola Asaro, another Italian captain fishing in the area, called the Senior Regional Public Information Officer of the Office of the United Nations High Commissioner for Refugees, Laura Boldrini, by satellite phone and told her that Marrone

and his crew were trying to mount a rescue operation but were having difficulties. Boldrini passed the information (including the coordinates of Marrone's fishing boat) to the Italian coastguard and navy, which sent help. Marrone detached his boat from the tuna pen it was towing and rescued 20 men and 7 women. The migrants were taken to Porto Empedocle, in Italy, after they moved onto a navy vessel.

Both Asaro and Marrone were each presented with a Per Mare award for their efforts. The Per Mare award was established in response to the problem of boat people in distress in the Mediterranean often being ignored by crews of commercial vessels out of fear that they would be investigated for being involved in illegal migration.

Source: www.unhcr.org/484e98002.html

Recommended resources

International Convention for the Safety of Life at Sea. United Nations, *Treaty Series*, vol. 1184, No. 18961.

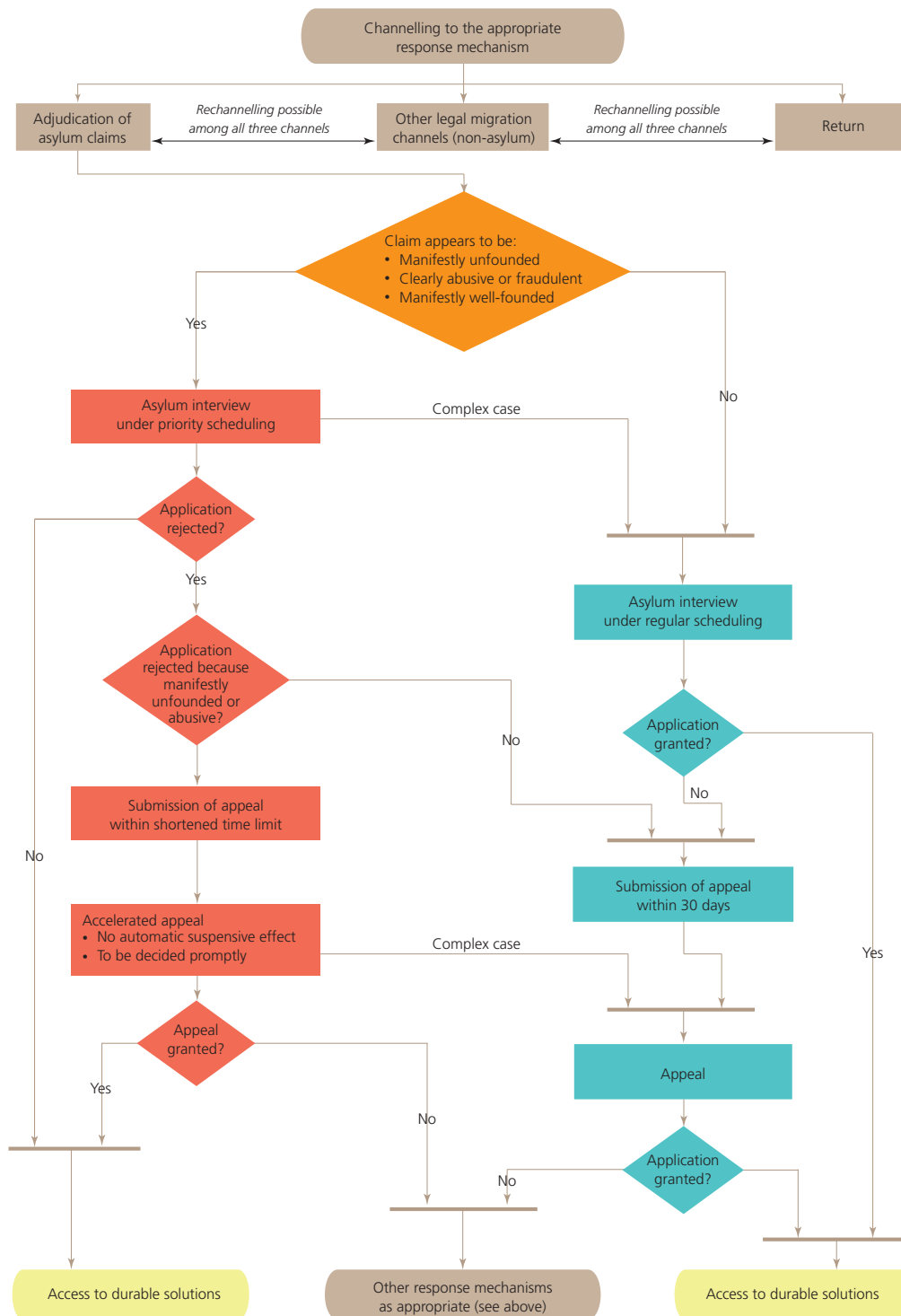
International Convention on Maritime Search and Rescue. United Nations, *Treaty Series*, vol. 1405, No. 23489, annex.

United Nations Convention on the Law of the Sea. United Nations, *Treaty Series*, vol. 1833, No. 31363.

Report of the Office of the United Nations High Commissioner for Refugees on the treatment of persons rescued at sea (A/AC.259/17).

8.5 Referral mechanisms

The figure below is a schematic representation of a profiling and referral mechanism in the context of addressing mixed migratory movements.



Source: Discussion paper on refugee protection and durable solutions in the context of international migration. Available from www.unhcr.org/474acdc42.html.

8.6 Health and medical assistance

All humans have the right to health care. The International Covenant on Economic, Social and Cultural Rights² includes a comprehensive article on the human right to health. By virtue of article 12, paragraph 1, of that Convention, States parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The Committee on Economic, Social and Cultural Rights offered clarification on this article in its General Comment No. 14 (2000) (E/C.12/2000/4), concerning the right to the highest attainable standard of health. In that document (paragraph 34), the Committee stated that:

States are under the obligation to respect the right to health, by inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventative, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy.

The full general comment is available from: www1.umn.edu/humanrts/gencomm/escgencom14.htm

Promising practices

Emergency kits in the desert

Saving migrants’ lives often requires simple but creative responses.

For instance, in response to the deaths that sometimes result from the perilous journey across the Mexican desert to reach the southern border of the United States, law enforcement authorities have placed emergency first aid kits along well-known smuggling routes and trails.

This simple measure can be replicated along other popular smuggling routes in harsh terrains around the world and may result in saved lives.

MIGHEALTHNET

The MIGHEALTHNET project aims to stimulate the exchange of knowledge on migrant and minority health through the development of interactive databases in each of the participating countries. The focus will be on the following sorts of data:

- Background information concerning migrant and minority populations
- The state of health of migrants and minorities
- The health-care system and the entitlement of migrants and minorities to health care
- Accessibility of health care

² General Assembly resolution 2200 A (XXI), annex.

- Quality of care: good practices developed to improve the matching of service provisions to the needs of migrants and minorities
- Achieving change: centres of expertise, general reports and policy documents, journals, training programmes, e-mail groups etc.

By facilitating the transfer of knowledge and expertise and stimulating network formation within and between European countries, the project hopes to further the development of good practices concerned with the health of migrants and minorities.

www.mighealth.net/index.php/Main_Page

NowHereLand

Access to health care is a fundamental human right and, it is especially important for socially disadvantaged and vulnerable people. Although European Union member States do acknowledge the right for health care for everybody, undocumented migrants face considerable barriers in accessing services. The NowHereLand initiative aims at creating a knowledge base for providing, exchanging and developing good practice of health-care services for undocumented migrants through:

- Drawing a landscape of the legal and financial frameworks at the national level in the 27 European Union member States under which health-care services/providers act
- Gaining an overview about needs and strategies of undocumented migrants in getting access to health-care services, compiling experiences from non-governmental organizations and other advocacy groups from their work with undocumented migrants (from European to local level)
- Collecting existing practice of health services in the European Union at the regional and local levels in a database and identifying transferable models of good practice

As part of the initiative, a database on health-care services available to undocumented migrants is being established by the Task Force on Migrant Friendly Culturally Competent Healthcare of the Health Promoting Hospital and Health Services Network.

www.nowhereland.info

Recommended resources

International Organization for Migration. *Activity Manual for Immigration Officers and Relevant Persons in Migrant Health Care*. 2009.

The *Activity Manual* was developed through a series of consultative meetings and a pretest with immigration police, immigration doctors, public health officers and representatives of migrant populations in Thailand. Although the *Manual* is intended to enhance the knowledge, understanding and attitudes of immigration and public health officers on migrant health care in closed settings, it can be adapted to other audiences, including at the community level. In addition to enhancing understanding

of the most common health issues among migrant detainees, such as personal hygiene, tuberculosis and stress management, the *Manual* aims to improve the target audience's understanding of migration-related issues, including trafficking in persons.

http://publications.iom.int/bookstore/index.php?main_page=product_info&products_id=518&zenid=4285ded5fa41b457c60a2b7b8eccea39

International Organization for Migration. *Introduction to Basic Counselling and Communication Skills: IOM Training Manual for Migrant Community Leaders and Community Workers*. 2009.

The *Training Manual* is a development tool to strengthen basic counselling and communication skills. The *Manual* is designed for use by humanitarian workers, such as development and community health workers and leaders, who deal with migrants and mobile populations. The *Manual* is designed to strengthen counselling and communication skills that can be used to assist children, adolescents, adults and families living in migrant and host communities and to help them cope before, during and after a pandemic or any other crisis.

http://publications.iom.int/bookstore/index.php?main_page=product_info&products_id=511

Platform for International Cooperation on Undocumented Migrants. *Access to Health Care for Undocumented Migrants in Europe*. 2009.

This report is a product of a two-year European project co-funded by the Employment and Social Affairs and Equal Opportunities Directorate General of the European Commission. Partners include Austria, Belgium, France, Germany, Hungary, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. The main purpose of the publication is to highlight the various problems associated with existing lack of or insufficient access to health care for undocumented migrants residing in Europe. Access to health care for undocumented migrants is considered in respect of laws and practice through country profiles.

It deals with legal system information concerning:

- The general health-care system
- The legal entitlements of undocumented migrants to access fully or partially publicly subsidized health care
- The procedures and financing of the different systems put in place by European Union member States to give a response to undocumented migrants' health-care needs

Ultimately, the study seeks to serve as an inspiration for new strategies and actions to continue to address the problems associated with insufficient access to health care for undocumented migrants in Europe.

The report offers the following recommendations:

1. Respect international obligations
2. Address health-care needs of particularly vulnerable groups of undocumented migrants (such as children, pregnant women, elderly persons, disabled persons and people with severe health problems, including HIV/AIDS)
3. Ensure implementation of entitlements
4. Ensure access to information about entitlements
5. Detach health care from immigration control
6. Ensure that civil society always plays a complementary role
7. Avoid criminalization of humanitarian assistance
8. Include undocumented migrants in the social inclusion-social protection process
9. Involve civil society in the consultation process
10. Ratify the International Migrant Workers' Convention

The full recommendations can be read in the report, available at www.picum.org or by contacting info@picum.org.

8.7 Responses to the vulnerability to HIV/AIDS of smuggled migrants or persons vulnerable to being smuggled

In addressing the nexus between HIV/AIDS and human mobility, it is essential not to further marginalize migrants or exacerbate the problem with strict migration controls that aim to keep out migrants. That would not only contribute to the stigmatization that migrants and people living with HIV already endure, but would also contribute to the intersection of HIV/AIDS and migration by increasing the number of people who cannot access social and medical services and also, perhaps by fuelling the clandestine movement of people, pushing more people into the hands of smugglers of migrants.

Rather than preventing people from moving, there must be HIV/AIDS interventions targeting migrant populations, ranging from education and prevention through testing and counselling to treatment and care.

Different forms of migration require different policy responses. This is true for migrants who are smuggled or who are vulnerable to being smuggled. Providing migrant communities with appropriately targeted HIV/AIDS interventions is one means of dealing with the HIV/AIDS epidemic.

Migration, whether regular or irregular, is the means by which many people seek security for themselves and their families. It should not also expose them to HIV.

Recommended resources

For more information about the relationship between health and migration, see Tool 1, section 5.

Joint United Nations Programme on HIV/AIDS

The Joint United Nations Programme on HIV/AIDS (UNAIDS) is an innovative joint venture of the United Nations family, bringing together the efforts and resources of 10 organizations in the United Nations system active in the AIDS response to help the world prevent new HIV infections, care for people living with HIV and mitigate the impact of the epidemic. UNAIDS helps to mount and support an expanded response to AIDS—one that engages the efforts of many sectors and partners from government and civil society. Co-sponsors of UNAIDS include the International Labour Organization, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations Development Programme, the United Nations Fund for Population Activities, the United Nations Office on Drugs and Crime, the United Nations Educational, Scientific and Cultural Organization, the World Food

Programme, the World Health Organization and the World Bank. UNAIDS has five areas of focus for a more effective global response to AIDS:

- Mobilizing leadership and advocacy for effective action on the epidemic
- Providing strategic information and policies to guide efforts in the AIDS response worldwide
- Tracking, monitoring and evaluation of the epidemic: the world's leading resource for AIDS-related epidemiological data and analysis
- Engaging civil society and developing partnerships
- Mobilizing financial, human and technical resources to support an effective response

www.unaids.org

United Nations Development Programme. *Readings on Safe Mobility and HIV: II*. 2007

Belinda Dodson and Jonathan Crush consider the intersection between HIV/AIDS and migration in the context of Southern Africa.

<http://data.undp.org.in/hiv/IEC/Vol%202.pdf>

8.8 Access to information and legal representation

States need to encourage the participation of smuggled migrants in the criminal proceedings against the smuggler. The migrants are an important source of evidence for the successful prosecution of a smuggling case.

It is difficult to persuade witnesses to come forward in relation to most crimes. Witnesses may be scared or intimidated but most people who agree to cooperate with law enforcement officials ultimately, despite any fears, attend court, if required, to support the prosecution. The same cannot always be said for smuggled migrants for the following reasons:

- Smuggled migrants may be intimidated by real threats to their physical safety, to members of their families at home, where there may be little prospect of police protection
- Some smuggled migrants may be led to believe that they will be given a full or partial refund of the smuggling fee if they do not cooperate with the authorities
- Smuggled migrants may be scared of being arrested and prosecuted for being party to the crime
- Smuggled migrants may also remove themselves from contact with the immigration or law enforcement agencies as they may want to stay hidden in order to stay in the country reached as a result of the smuggling process (or move on to their country of destination if they have not yet reached it)
- Smuggled migrants may have been removed back to their own country and therefore be unavailable to give evidence in court
- Witnesses have no incentive to give evidence and everything to lose. Migrants are often told that if they do not assist the authorities if caught, they will be allowed a further attempt at illegally entering a country without being charged by the smuggler again

Promising practice

Belgium

An administrative regulation, which entered into force on 26 September 2008 in Belgium, provides that where migrants were smuggled under aggravating circumstances they are offered the same protection as victims of trafficking.

The regulation defines the persons who can benefit from the protection as: (a) victims of trafficking as provided for in article 433 of the Belgium Criminal Code; and (b) smuggled migrants who endured certain forms of aggravated offences of smuggling of migrants as provided for in article 77 of the Belgium Law on Aliens (relating to unaccompanied minors; abuse of a situation of particular vulnerability; use of manipulation, threat or force; endangerment of life; and causing of an incurable illness, injury or permanent disability).

The regulation stipulates that when the police are faced with a situation in which there is evidence to suggest that a person is a victim of human trafficking or smuggling of migrants, the police must first try, in collaboration with the specialist services, to gather additional material evidence indicating that that person is indeed a victim. At this stage, brief information can be provided to the presumed victim concerning the possibilities offered by victim status if the victim collaborates with the judicial authorities.

As a second step, on the basis of the material evidence gathered, the regulation stipulates that the relevant police service: (a) informs the public prosecutor; (b) contacts one of the three specialized non-governmental organization shelters registered in Belgium to request the shelter to take the victim under its charge; and (c) notifies the Department of Federal Immigration. The public prosecutor will then assess whether or not granting victim status is justified at that stage of the procedure.

The regulations outline three general conditions that all have to be met by the presumed victim for victim status to be granted:

- He or she must sever contact with the presumed offender(s)
- He or she must remain under the charge of a specialized shelter at all times
- He or she must cooperate with the judicial authorities by filing a charge or making a statement, which will be assessed by the prosecutor

The procedure of granting victim status comprises, among other things:

- A reflection period: the presumed victim is allowed to stay in Belgium for a period of 45 days, which enables the victim to sever contact with the criminal milieu and decide dispassionately whether he or she wishes to collaborate with the judicial authorities. During this stage, the victim can also decide to return to his or her country of origin, but may not be deported
- Subsequent permission to stay for a maximum of three months (with the possibility of a one-month extension): at that stage the victim decides to file a charge or make a statement. From the time of issue of the registration document, the victim can obtain a class C work permit
- Permission to remain in the country for an unlimited period: this permission is issued when the statements made or charges filed by the victim have led to a conviction or, as a minimum requirement, when the public prosecution service has established the charge of trafficking or aggravated trafficking in the case for the prosecution

Recommended resources

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*.

The modules contained in the training manual address the concepts and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigation, covert

investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts in the field of law enforcement and prosecution from several regions throughout the world.

The publication is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

McBride, Jeremy. *Access to Justice for migrants and asylum seekers in Europe*. Council of Europe, 2009.

The publication contains an assessment of the situation faced by this vulnerable category of persons in accessing justice. It deals with the identification of measures—both existing and new—for facilitating and ensuring such access for those people.

http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=2412

8.9 Human rights of smuggled migrants

Regardless of a person's immigration status, their human rights and dignity should be upheld and given priority at all stages.

In transit and destination countries, that means that human rights considerations must be borne in mind by those who intercept and identify smuggled migrants, those who detain them, those who remove them from a country and, where relevant, those who grant them asylum. Law enforcers in countries of origin also have a role to play in preventing the smuggling of migrants: they protect the human rights of nationals to reduce the root causes that give them an incentive to leave.

While States have a right to detain and remove irregular migrants (assuming they are not found to be refugees), they also have a responsibility to do so using measures that respect human rights and the safety and dignity of the migrant concerned.

Rights of smuggled migrants who are victims of crimes committed in the course of the smuggling process

Law enforcers who are likely to encounter victims of crime should do the following:

- Respond promptly, especially to complaints of violence
- Inform victims of the assistance (legal, material, medical, psychological and social) that is available to them
- Investigate, report and follow up thoroughly and professionally
- Keep a roster of contacts handy, with all information on available services for assistance to victims
- Establish close cooperative procedures with medical, social, legal and other victim assistance providers
- Ensure that a female officer is present during all contact with female victims of crime, especially violence
- Explain to victims their rights, their role in legal proceedings and the nature of the legal proceedings
- Provide transportation to a safe place and, if necessary, to medical services (or arrange for medical services to travel to the victim)
- Keep records secure and carefully protect the confidentiality of victims
- Establish victim assistance guidelines to ensure that prompt, proper and comprehensive attention is given to the legal, material, medical, psychological and social assistance needs of victims

Promising practice

Platform for International Cooperation on Undocumented Migrants

The Platform for International Cooperation on Undocumented Migrants is a non-governmental organization that aims to promote respect for the human rights of undocumented migrants within Europe. The Platform also seeks dialogue with organizations and networks with similar concerns in other parts of the world.

The Platform promotes respect for the basic social rights of undocumented migrants, such as the right to health care, the right to shelter, the right to education and training, the right to minimum subsistence, the right to family life, the right to moral and physical integrity, the right to legal aid and the right to fair labour conditions.

The activities of the Platform are focused on five main areas:

- **Monitoring and reporting:** improving the understanding of issues related to the protection of the human rights of undocumented migrants through improved knowledge of problems, policies, and practice
- **Capacity-building:** developing the capacities of non-governmental organizations and all other actors involved in effectively preventing and addressing discrimination against undocumented migrants
- **Advocacy:** influencing policymakers to include undocumented migrants in social and integration policies on the national and European levels
- **Awareness-raising:** promoting and disseminating the values and practices underlying the protection of the human rights of undocumented migrants among relevant partners and the general public
- **Global actors on international migration:** developing and contributing to the international dialogue on international migration within the different United Nations agencies, international organizations and civil society organizations

More information about the Platform for International Cooperation on Undocumented Migrants can be found at its homepage:

www.picum.org/

Recommended resources

Office of the United Nations High Commissioner for Refugees

The Office of the United Nations High Commissioner for Refugees was established on 14 December 1950 by the General Assembly. The agency is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in

another State, with the option to return home voluntarily, to integrate locally or to resettle in a third country. It also has a mandate to help stateless people. The Office offers several resources and publications on its website.

www.unhcr.org

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*.

Module 9 of the *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* exclusively addresses human rights considerations for criminal justice practitioners responding to the smuggling of migrants.

www.unodc.org/unodc/en/human-trafficking/publications.html

Council of Europe, Commissioner for Human Rights. *The Human Rights of Irregular Migrants in Europe*. Strasbourg, 2007.

Historically, the State has pledged to protect the rights of its citizens at home—for instance from torture or from exploitation—and of citizens of other States who enter the country lawfully. Where refugees flee persecution at the hands of their own State, international law requires other States to provide the protection denied at home. This paper deals with another category: migrants who are not refugees or asylum-seekers and who are in another country without the State’s consent. Perceptions of these irregular migrants are polarized. “Irregular migrant” refers to non-citizens who have no valid leave to enter and/or remain within a State. The countries from which they come often see this as migration out of necessity, not choice, and also as the source of remittances that support families and contribute to development. Host States tend to see them as non-citizens who are illegally in the country and should be removed at the earliest opportunity. From a human rights perspective, migrants are entitled to protection under international law, regardless of any irregularity under national law.

<http://wcd.coe.int/ViewDoc.jsp?id=1237553&Site=CommDH&BackColorInternet=FE C65B&BackColorIntranet=FE C65B&BackColorLogged=FF C679>

Global Migration Group. *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*. 2008.

Current migration flows have placed the issue of migration high on the international agenda. The magnitude and complexity of the phenomenon are such that international migration can no longer be considered peripheral to the mainstream of development policies. Today, every country is affected in some way by migration—either as country of origin, transit or destination, or sometimes a combination of these.

www.globalmigrationgroup.org/pdf/Int_Migration_Human_Rights.pdf

Grant, Stefanie. "International migration and human rights". A paper prepared for the Policy Analysis and Research Program of the Global Commission on International Migration. 2005.

The paper contains a review of the actual and legal situation of international migrants in relation to their enjoyment of human rights. It starts from the position that respect for human rights, the rule of law and core labour standards are essential to political stability and social and economic development. Globalization has encouraged the free movement of goods, services and capital, but barriers to the cross-border movement, particularly of unskilled workers, remain, and globalization of markets has not been accompanied by globalization of the workforce. This has produced a discrepancy between the number of individuals who migrate and the legal opportunities for them to do so.

www.gcim.org/attachements/TP7.pdf

International Labour Office. *The Asylum-Migration Nexus: Refugee Protection and Migration Perspectives from ILO*. 2001.

The paper is intended as a contribution to the discussion of the nexus between refugee and migration issues. It is presented from the perspective of a standard-based international organization committed to upholding protection of human rights of migrant workers and members of their families defined in International Labour Organization and other international norms.

www.unhcr.org/refworld/topic,4565c2251a,470a33e22,3f33797e6,0.html

Office of the United Nations High Commissioner for Human Rights. *The Rights of Non-Citizens*. United Nations publication (Sales No. E.07.XIV.2).

The publication contains a discussion of:

- The general principle of equality for non-citizens
- Specific rights of non-citizens
- Rights of selected non-citizen groups

It also contains recommendations on upholding the rights of non-citizens.

www.ohchr.org/Documents/Publications/noncitizensen.pdf

Ruhs, Martin. *Migrant Rights, Immigration Policy and Human Development*. Human Development Research Paper 2009/23. United Nations Development Programme, 2009.

The author explores the potential impacts of the rights of migrant workers ("migrant rights") on the human development of actual and potential migrants, their families, and other people in migrants' countries of origin. A key feature of the paper is its consideration of how migrant rights affect both the capability to move and work in

higher-income countries (i.e. the access of workers in low-income countries to labour markets of higher-income countries) and capabilities while living and working abroad. The author suggests that there may be a trade-off between the number and some of the rights of low-skilled migrants admitted to high-income countries, and he explores the implications for human development.

http://hdr.undp.org/en/reports/global/hdr2009/papers/HDRP_2009_23.pdf

Cholewinski, Ryszard. *Irregular Migrants: Access to Minimum Social Rights*. (Council of Europe, 2006).

Illegally resident immigrants are a particularly vulnerable group within European societies. This publication aims to identify the minimum rights to be granted to such persons, placing the emphasis on protecting social rights in the host countries.

The author examines the issues in the light of the concern of the Council of Europe to promote human rights, maintain social cohesion and prevent racism and xenophobia, and pinpoints a number of political difficulties encountered by Governments. He stresses the potential role of the Council of Europe in counterbalancing the restrictive approach to illegal migration adopted by the European Union.

Lastly, the author considers each of the minimum rights in the light of the relevant international human rights instruments, including those adopted by the Council of Europe. He also looks at obstacles to access by illegal migrants to a minimum standard of protection in terms of each of those rights, referring to various examples of legislation and practice adopted by selected member States of the Council of Europe.

http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=1969

International Council on Human Rights Policy. *Irregular Migration, Human Smuggling and Human Rights*. 2009.

This draft report (sent out October 2009 for comments by November 2009) discusses the role of law enforcement, economic interest and human rights protection, as core influences on migration policy. It argues that current policies are in contradiction with one another and have largely failed in their purpose. Policies to tighten border controls have not deterred people from leaving their homes to seek security or opportunity abroad but have driven migrants into clandestinity, while policies to promote open markets attract millions of people to centres of prosperity but tend to disregard their abuse and exploitation. Across the world, Government policies respond ineffectively to irregular migration and also fail to protect irregular migrants' rights.

The report argues that part of any solution to the current impasse must be to recognize and reaffirm the State's responsibility to protect everyone who falls within its jurisdiction, including migrants. It concludes that it is morally right, but also in the interests of States, to affirm the rights to which migrants are entitled and integrate those rights in policy.

An annex contains a summary of the rights of irregular migrants that are recognized in international law.

www.ichrp.org/files/drafts/10/122_draft.pdf

International Council on Human Rights Policy (2003) *“Migration: Human Rights Protection of Smuggled Persons”*

This project examines the provisions that protect undocumented and smuggled migrants under international human rights law and suggests how those provisions might be integrated into migration policies, alongside economic and law enforcement considerations. It takes into account the United Nations Convention against Transnational Organized Crime and its Protocols, as well as the Convention to Protect the Rights of Migrant Workers and Their Families. The project will link support for law enforcement and State control over sovereign frontiers, economic policies that seek benefits from migration and the obligation to protect vulnerable people from exploitation and abuse. It argues that sustainable policies on undocumented migration (and on the smuggling of migrants in particular) must integrate human rights protection alongside other policy concerns.

www.ichrp.org/en/projects/122

Lambert, H el ene. *The Position of Aliens in Relation to the European Convention on Human Rights*. Council of Europe, 2007.

The law of the Council of Europe Convention on Human Rights relating to aliens has developed significantly. In 25 years, the number of contracting States has doubled and the scope of rights and freedoms guaranteed under the Convention has broadened with the adoption of new protocols.

Protocol No. 11 has reformed the Convention control bodies and mechanisms in order to accommodate the increasing caseload. Further major amendments are foreseen by Protocol No. 14 to improve the effective operation of the Convention faced with an ever-increasing volume of applications, whereas Protocol No. 12 has enlarged the non-discrimination clause contained in article 14 of the Convention to “any rights set forth by law”.

At the same time, important demographic changes have taken place. The growing integration of the States of the European Union has created greater mobility for its citizens; and political and economic pressures have given rise to an increasing number of refugees and asylum-seekers from Europe and beyond.

It is against this backdrop that the position of aliens in relation to the European Convention on Human Rights is re-examined in a third edition.

http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=2131

Obokata, Tom. Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law. *International Journal of Refugee Law*, vol. 17, No. 2, pp. 394-415. 2005.

Although trafficking in human beings has been widely regarded as a human rights issue, little attention has been paid to human rights aspects of smuggling, as it is mainly characterized as facilitation of illegal migration. The purpose of this article is to demonstrate that smuggling of human beings equally raises human rights concerns. The article begins by exploring the definitions of trafficking and smuggling and their policy implications. It then highlights some human rights issues inherent in the act by examining its causes, process and consequences. It continues with an analysis of human rights obligations imposed upon non-State and State actors. The fact that non-State actors are not held directly accountable under international human rights law points to an investigation of legal obligations imposed upon States, and this article examines an obligation to protect victims as an example.

<http://ijrl.oxfordjournals.org/cgi/content/full/17/2/394>

Pécoud, Antoine and de Guchteneire, Paul. International migration, border controls and human rights: assessing the relevance of a right to mobility. *Journal of Borderlands Studies*, vol. 21, No. 1. 2006.

The authors discuss the arguments in favour of and against a right to mobility. They argue that contemporary migration and border policies are largely restrictive but still fail to meet their proclaimed objectives, which call for alternative approaches to international human flows. From a human rights perspective, tight border controls are accompanied by major challenges; including trafficking, the asylum crisis and the death and vulnerability of irregular migrants, which ultimately threaten the moral foundations of liberal democracies. In this context, a right to mobility may constitute a relevant answer. The authors examine the implications of such a right in terms of world justice, social cohesion, economic wealth, security, and border/migration governance.

www.libertysecurity.org/article1399.html

Platform for International Cooperation on Undocumented Migrants. *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*. 2007.

All across Europe, and in other regions throughout the world, a growing number of non-governmental organizations, local authorities and professionals from diverse fields, as well as undocumented migrants, uphold the principle that “no human being is illegal”. In their daily work and lives, these local actors strive to defend undocumented migrants’ human rights, including the right to health care, education and training, fair working conditions, and housing, as well as many other rights. Yet undocumented migrants are confronted on a daily basis with situations in which they witness that irregular status is an obstacle and a way of discriminating against a sizeable part of the population in terms of their access to basic social services and their human rights.

www.picum.org/sites/default/files/data/UndocumentedMigrantsHaveRights!.pdf

Platform for International Cooperation on Undocumented Migrants. *PICUM's Main Concerns About the Fundamental Rights of Undocumented Migrants in Europe*. 2006.

This report brings together a year's-worth of European, national and local news on irregular migration to foster a better understanding of the main concerns with regard to the human rights of undocumented migrants, as well as of the multifaceted ways in which civil society throughout Europe is responding to this form of social exclusion. The information in the report is based on a review of events reported in the newsletter of the Platform for International Cooperation on Undocumented Migrants during 2008.

www.picum.org/sites/default/files/data/PICUM_AnnualConcerns_2009_EN.pdf

8.10 Protection of smuggled migrants who are refugees

In recognition of the fact that illegal or irregular migration and, in some cases, the criminal smuggling of migrants may involve the movement of legitimate refugees or asylum-seekers, precautions were taken to ensure that the implementation of the Smuggling of Migrants Protocol would not prevent such people from enjoying existing protections under international law.

The Protocol does not criminalize altruistic or charitable groups who smuggle people for purposes other than financial or other material gain (see articles 5 and 19).

Rights of smuggled migrants who are refugees or asylum-seekers and the right to asylum

Simply put, a refugee is a person who, owing to a well-founded fear of persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion or for political reasons, including conflict and war, is unable or unwilling to return to his or her country of origin (or, if stateless, to his or her country of habitual residence).

An asylum-seeker is a person seeking to be admitted into a country as a refugee. If an asylum-seeker's claim for refugee status is unsuccessful, he or she may be expelled as an alien in irregular migration situation unless he or she is granted permission to stay on humanitarian or other related grounds.

Everyone has the right to seek, and to enjoy, in another country, asylum from prosecution. Some asylum-seekers may turn to the services of smugglers of migrants to flee prosecution.

For more on the issue of non-refoulement, see Tool 8, section 11.

The right to asylum

The following is an excerpt from a document by the Office of the United Nations High Commissioner for Refugees on a 10-point plan of action for refugee protection and mixed migration:

While refugees and asylum-seekers account for a relatively small portion of the global movement of people, they increasingly move from one country or continent to another alongside other people whose reasons for moving are different and not protection-related. More often than not, such movements are irregular, in the sense that they take place without the requisite documentation and frequently involve human smugglers and traffickers. The people who move in this manner often place their lives at risk, are obliged to travel in inhumane conditions and may be exposed to exploitation and abuse. States regard such movements as a threat to their sovereignty and security. It has become

imperative for the international community to address this phenomenon in a more coherent and comprehensive manner. States have assumed protection responsibilities for refugees under international instruments which it is in their collective interest to honour.

More specifically, steps must be taken to establish entry systems that are able to identify new arrivals with international protection needs and which provide appropriate and differentiated solutions for them, side by side with such other solutions as need to be pursued for other groups involved in mixed movements. The Office of the United Nations High Commissioner for Refugees is especially mindful of the need to ensure that the provision of protection and asylum to refugees and other people of concern to the Office does not compound the difficulties that States experience in controlling more generally the arrival and residence of foreign nationals and in combating international crime.

This paper sets out 10 key areas in which the Office has an interest and a potential role to play, and where the Office believe initiatives are called for and could make a positive impact. The Plan of Action provided in the paper is especially relevant to situations where refugees are at risk of refoulement, human rights violations and hazardous onward movements:

1. Cooperation among key partners
2. Data collection and analysis
3. Protection-sensitive entry systems
4. Reception arrangements
5. Mechanisms for profiling and referral
6. Differentiated processes and procedures
7. Solutions for refugees
8. Addressing secondary movements
9. Return arrangements for non-refugees and alternative migration options
10. Information strategy

Source: www.unhcr.org/4688b4af2.html

Recommended resources

Global Migration Group. *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*. October 2008.

This guide is the collaborative result of the members of the Global Migration Group: the International Labour Organization, the International Organization for Migration,

the Office of the United Nations High Commissioner for Human Rights, the United Nations Conference on Trade and Development, the Department of Economic and Social Affairs of the Secretariat, the United Nations Development Programme, the United Nations Educational, Scientific and Cultural Organization, the United Nations Population Fund, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations Institute for Training and Research, the United Nations Office on Drugs and Crime and the World Bank.

International Labour Office. *The Asylum-Migration Nexus: Refugee Protection and Migration Perspectives from ILO*. 2001.

This paper is intended as a contribution to the discussion of the nexus between refugee and migration issues. It is presented from the perspective of a standard-based international organization committed to upholding protection of human rights of migrant workers and members of their families defined in International Labour Organization and other international norms.

www.unhcr.org/refworld/topic,4565c2251a,470a33e22,3f33797e6,0.html

International Organization for Migration. *Glossary on Migration*.

The International Organization for Migration Glossary on Migration serves as a guide to the terms and concepts in the area of migration, in an effort to provide a useful tool for the furtherance of international cooperation and the common understanding of migration issues.

http://publications.iom.int/bookstore/index.php?main_page=product_info&cPath=2_8&products_id=198

ECRE European Council on Refugees and Exiles, December 2007, *Defending Refugees' Access to Protection in Europe*

This report assesses the access of migrants, including refugees, to protection in Europe. It addresses issues including:

- Management of external borders
- Refugee and human rights law
- Carrier sanctions
- Immigration and airport liaison officers
- Anti-smuggling measures
- Interception at sea

The report also offers practical recommendations in relation to States actions and policies in these and other respects.

www.ecre.org/files/Access.pdf

Mole, Nuala. *Asylum and the European Convention on Human Rights*. Council of Europe, 2007.

Political upheavals, economic reforms, social instability and civil war have all been factors contributing to changes in the mixed flows of migrants both to and within Europe. Many of those in need of international protection are forced to seek it in Europe and the new member States of the enlarged Council of Europe are now also experiencing the arrival of asylum-seekers.

This revised edition considers the substantial body of case law of the European Court of Human Rights which has examined the compatibility of the Convention with measures taken by States in relation to all aspects of the asylum process. It also observes the role of subsidiary protection offered by the Strasbourg organs in protecting those at risk of prohibited treatment. In addition, the study considers the increasingly relevant provisions of European Union law developments in the field, as well as measures taken in the context of terrorist threats—both of which have had a significant impact on the practical circumstances and law on refugees and asylum-seekers.

http://book.coe.int/EN/ficheouvragephp?PAGEID=36&lang=EN&produit_aliasid=2218

8.11 Non-refoulement

A key consideration to keep in mind in investigating or prosecuting a migrant smuggling case is the principle of non-refoulement.

There are two key points to bear in mind in this respect. Firstly, article 19 of the Smuggling of Migrants Protocol notes that the fact of having been smuggled cannot jeopardize a person's asylum claim. Secondly, the fact that a smuggled migrant makes a legitimate asylum claim and is correctly accorded the status of refugee does not make the actions of the smuggler of migrants any less criminal where he or she has smuggled the person for financial or material gain.

The principle of non-refoulement means that a State cannot send a person back to a country where his or her life is in peril if there are substantial grounds for believing that he or she would be in danger of being subject to other elementary human rights violations (such as torture or cruel, inhuman or degrading treatment or punishment). In respect of this principle, States are also obligated to examine whether such a risk could be posed to the migrant through "chain deportation" (that is, the further deportation of a migrant to another State or other States from the country to which they are sent).

Non-refoulement is a fundamental principle of international law. The principle of non-refoulement is laid down in the Convention relating to the Status of Refugees³ and other human rights instruments. According to the Convention:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (article 33, paragraph 1)

This principle cannot be "claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country" (article 33, paragraph 2).

Article 19 of the Smuggling of Migrants Protocol states that the Protocol shall not affect any other rights, obligations or responsibilities of States and individuals under international law, including humanitarian, human rights and refugee laws. This means that the illegal entry of a person shall not be detrimental to their claim for asylum and the Protocol is not to be read in a way that is discriminatory to the smuggled migrants.

It must be remembered that while some smuggled migrants make legitimate claims of asylum and are correctly accorded the status of refugees, this does not make the actions of the smugglers

³ United Nations, *Treaty Series*, vol. 189, No. 2545.

of migrants any less criminal where they are smuggling the migrants for their own financial gain. In fact, their taking financial advantage of persons who are in vulnerable positions could be considered an aggravating circumstance.

Recommended resources

Office of the United Nations High Commissioner for Refugees. *Refugee Protection and Human Trafficking: Selected Legal Reference Materials*. First edition. 2008.

www.unhcr.org/4986fd6b2.html

1951 Convention and 1967 Protocol relating to the Status of Refugees

www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf

European Union. Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures. *Official Journal C 274*, 19.09.1996.

The objection of this resolution is to establish minimum guarantees for asylum procedures in European Union member States in compliance with the principles of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133103_en.htm

Platform for International Cooperation on Undocumented Migration. *Undocumented and Seriously Ill: Residence Permits for Medical Reasons in Europe*. Brussels, 2009.

www.medimmigrant.be/uploads/Undocumented%20and%20Seriously%20Ill%20Report%20Picum.pdf



UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, PO Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, www.unodc.org