Migrant Smuggling

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Introduction

The term ‘migrant smuggling’ refers to the unauthorized movement of individuals across national borders for the financial or other benefit of the smuggler. While aspects of illegally facilitated migration are established criminal offences in many countries, migrant smuggling itself was not the subject of international legal regulation until very recently. The origins of this shift can be traced back to the late 1980s and early 1990s when the imposition of tighter immigration controls to the preferred destinations, at a time when demand for such migration was rising rapidly, led to the increased involvement of third party facilitators. A focus on those facilitators of irregular migration, rather than just the migrants themselves, was widely viewed as a critical element in any effective response to irregular migration. The development of an international legal regime around transnational organized crime provided concerned States with the opportunity to internationalize the ‘problem’ of migrant smuggling, thereby encouraging the international cooperation that was considered essential to its effective resolution. The new specialist legal framework to emerge from that process comprises the Protocol against the Smuggling of Migrants by Land, Sea and Air\(^1\) (Migrant Smuggling Protocol) and its parent instrument the United Nations Convention against Transnational Organized Crime\(^2\) (UNTOC). In addition to defining smuggling, the Protocol and Convention detail a wide range of obligations on States: from criminalizing migrant smuggling and related offences to cooperating in the exchange of information, evidence and intelligence.

The novelty of the issue contributed to a general perception that this new specialist regime was a complete or self-contained one. However, the relevant international legal framework around migrant smuggling is older and considerably broader, comprising a dense web of rights, obligations and responsibilities drawn not just from the Protocol and Convention but

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also from the law of the sea, human rights law and refugee law. Regional and bilateral migration control treaties are another important source of both rights and obligations in this area. Long-standing norms around sovereignty and jurisdiction dictate the capacity of States to act against migrant smuggling. Equally distinguished principles place a range of limitations on that capacity. The secondary rules of international law are also vital: most particularly in attributing responsibility for internationally wrongful acts associated with migrant smuggling itself as well as with State responses to migrant smuggling.

It is not possible, within the confines of the present chapter, to explore this dense and complex network of rules in any detail, and readers are referred to a recent, in-depth study that provides a full analysis of the relevant legal framework. The scope of the chapter is accordingly a much narrower one. The first part covers the development of specialized rules around migrant smuggling, focusing particularly on examining the origins of the Migrant Smuggling Protocol and its core provisions. The second part of the chapter seeks to provide some insight into how the broader legal framework applies to several migrant smuggling issues of high contemporary significance. The areas selected for analysis are interception and rescue at sea (with specific reference to international maritime law) and protection and return of smuggled migrants (with specific reference to international human rights law).

While the focus of this chapter is firmly on the legal framework, it would be misguided to consider that framework in isolation from the broader political and social forces that have impacted on its development and continue to shape the way in which migrant smuggling is identified and responded to. Irregular migration is a source of long-standing anxiety for States; most particularly for the relatively wealthier countries of destination. The involvement of facilitators, with its implication of increased efficiency in approaching and evading fortified borders, is widely viewed as presenting an additional and serious threat. Criminalization of irregular migration is a common response but may have limited impact and brings with it certain political and legal risks, particularly for liberal democracies. Criminalization of the facilitation of such migration can be seen and sold quite differently: less an attack on individual migrants than on those who are profiting from their vulnerability and desperation. By emphasizing the connection with transnational organized crime, States are more easily able to characterize migrant smuggling as a threat to public order and national security. This in turn helps to both justify and explain the growing externalization of border controls and the increased militarization of all aspects of border control – from surveillance to deterrence.

The politics of migrant smuggling are also very much the politics of asylum. In every part of the world, increasing numbers of asylum seekers, including those with genuine claims to refugee status, are being transported by smugglers. In the words of one refugee law scholar: ‘human smugglers play a critical role in assisting refugees to reach safety.’\(^6\) Efforts to characterize migrant smuggling as a form of transnational organized crime and to encourage its criminalization have been largely driven by this reality and the fear of States that facilitated movement of asylum seekers will lead to greatly increased movements from ever-distant points of origin.\(^8\)

**Migrant smuggling in transnational criminal law**

**History and context**

The issue of migrant smuggling was not the subject of official discussions within international and regional organizations prior to the early 1990s. At that time several high-profile incidents highlighted the growing phenomenon of organized movement of migrants from China,\(^8\) feeding unease amongst affected States, who quickly began pushing for greater international legal cooperation on the issue.\(^9\) These efforts very rapidly found a receptive audience among the destination countries of western and central Europe, North America and elsewhere that had experienced a significant increase in the number of ‘unauthorized arrivals’, apparently facilitated by criminal groups that were organized and sophisticated enough to exploit legislative, policy and law enforcement weaknesses.\(^10\)

Deficiencies in international law were seen as particularly acute and detrimental: as summarized by advocates of a new treaty on the subject, there was no agreed definition of smuggling, no domestic obligation to criminalize smuggling, and no obligation to extradite or prosecute perpetrators,\(^11\) resulting in a ‘legal lacuna under international law [that] is

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8 The most prominent of these was the *Golden Venture* incident, in which a Chinese vessel, carrying 286 migrants, was deliberately run aground off the coast of New York. The migrants, who had each paid up to US $30,000 for a place on the vessel, were advised to jump into the sea and swim to shore. Ten died of drowning or hypothermia, and most of the survivors were deported back to China. The incident prompted significant legislative and policy changes in the United States on the issue of migrant smuggling. See A.J. Sein, ‘The Prosecution of Chinese Organized Crime Groups: The Sister Ping Case and its Lessons’, *Trends in Organized Crime*, 2008, vol. 11, no. 2, p. 157, p. 163.
11 ‘Letter dated 16 September, 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General,’ UN Doc. A/52/357, 17 September 1997, at paras 2–3 (transmitting a draft of the proposed convention).
increasingly perceived as an obstacle to the efforts of the international community to cope in an efficient manner with the phenomenon of smuggling of illegal migrants for criminal purposes. The major destination countries were quick to understand that the default position – a purely national approach to sanctioning those who facilitated such migration, supplemented by ad hoc and largely ineffective bilateral cooperation – played directly into the hands of smugglers and traffickers.

Attention initially focused on the International Maritime Organization (IMO) as a vehicle for promoting and supporting cooperation among States in suppressing ‘unsafe practices associated with alien smuggling by ships’. States also sought to simultaneously engage the United Nations and in December 1993 the UN General Assembly adopted a resolution on ‘prevention of the smuggling of aliens’. The resolution provided the multilateral hook essential for justifying the elevation of migrant smuggling as an issue of common concern, by affirming that these practices have ‘transnational consequences’ such that there is a ‘need for States to cooperate urgently at the bilateral and multilateral levels, as appropriate, to thwart these activities’. It called on States to take a set of actions to prevent ‘the practice of smuggling aliens’.

Parallel developments in Europe fed into and strengthened these early international efforts and interest in developing an international regulatory framework around migrant smuggling quickly gained momentum. In 1997 the Government of Austria formally proposed the development of a new legal instrument to deal with the smuggling of migrants, focusing specifically on creation of a new criminal offence as well as measures related to investigation, prosecution and extradition. In its proposal, the Austrian Government noted that this practice posed ‘a growing threat to the international community as a whole’ and, given that it constituted a ‘very special form of transnational crime’, required a special convention.

Ibid.


Ibid.

Ibid. at para. 2.


initially approaching the IMO with its own proposal, Italy decided to join forces with Austria in pushing for the development of a legal instrument against migrant smuggling within the context of the UN Commission on Crime Prevention and Criminal Justice’s work against transnational organized crime. This goal was secured in late 1998 when the Ad Hoc Committee, established to develop a convention on transnational organized crime, was mandated to also discuss the elaboration of an international instrument on ‘illegal trafficking in and transportation of migrants, including by sea.’

The Migrant Smuggling Protocol, the principal international treaty dealing with the smuggling of migrants and a central plank of the relevant international legal framework, was adopted by the General Assembly in 2000 alongside its parent instrument, UNTOC. The Protocol entered into force on 28 January 2004 and as at 1 January 2014 had 138 States Parties. The Protocol’s stated purpose is to prevent and combat migrant smuggling, to promote international cooperation to that end, and to protect the rights of smuggled migrants.

**Definition of migrant smuggling**

When the international community first came together to take concerted action against what is now known as migrant smuggling, there was still considerable confusion – and indeed overlap – between this concept and what is presently referred to as human trafficking. The differences nevertheless firmed up very quickly, with States agreeing to remove any ‘exploitation’ element from the concept of migrant smuggling, thereby shifting the focus of the definition onto the action of migrant smuggling, rather than its impact on those who are smuggled.

The Migrant Smuggling Protocol defines ‘smuggling of migrants’ as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’. While the term ‘financial or other material benefit’ is not defined in the Protocol, it is clear from a similar provision in UNTOC that the reference is intended to go beyond mere payment of money. The reference to ‘financial or other benefit’ was included as an element of the definition in order to ensure that the activities of those who provide support to migrants on humanitarian grounds or on the basis of close family ties do not come within the scope of the Protocol. The focus of the definition is firmly on those who procure or otherwise

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23 Migrant Smuggling Protocol, Art. 2.
24 Ibid., Art. 3(a).
26 United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UN Sales No. E.06.V.5 (United Nations, 2006) (hereafter: Travaux Préparatoires for the Organized Crime Convention and Protocols), at p. 469. The relevant Interpretative Note (ibid.) adds that ‘[i]t was not the intention of the protocol criminalize the activities of family members or support groups such as religious or non-governmental organizations’.
facilitate the smuggling of migrants. The Protocol does not address mere illegal entry and takes a neutral position on whether those who migrate illegally should be the subject of any offences.\footnote{Migrant Smuggling Protocol, Art. 5. See also UNODC, Legislative Guide, p. 340, p. 347. But see Article 6(4) of the Protocol, which provides that nothing in the Protocol limits the existing rights of States Parties to take action against those whose conduct constitutes an offence under national law.}

\textbf{Criminalization obligations}

Criminalization is at the heart of the Migrant Smuggling Protocol, ‘serving not only to provide for the deterrence and punishment of the smuggling of migrants, but as the basis for the numerous forms of prevention, international cooperation, technical assistance and other measures’.\footnote{UNODC, Legislative Guide, p. 349 (para. 55).} The core obligation is to criminalize the smuggling of migrants when committed intentionally.\footnote{Migrant Smuggling Protocol, Art. 6(1)(a). In accordance with Art. 34(2) of the Organized Crime Convention, the co-requisites of transnationality and involvement of an organized criminal group do not apply to the obligation of criminalization except, as noted by the Legislative Guide, where the language of the criminalization requirement specifically incorporates one of these elements. UNODC, Legislative Guide, pp. 333–334 (para. 20).} States Parties are further required to criminalize certain constituent or related elements of the crime of migrant smuggling, including the production of fraudulent travel or identity documents for the purpose of enabling migrant smuggling;\footnote{Ibid., Art. 6(1)(b).} procuring, providing or possessing\footnote{Ibid. An Interpretative Note attached to Art. 6 makes clear that the reference to ‘possession’ does not extend to possession of a fraudulent travel or identity document by a migrant for purposes of enabling his or her smuggling. Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 489. See also UNODC, Legislative Guide, p. 349 (para. 54).} such a document for the purpose of enabling migrant smuggling; and enabling a person to remain unlawfully within the State concerned\footnote{Migrant Smuggling Protocol, Art. 6(1)(b), 6(1)(c).} – including the procurement of legal residence by some illegal means, ‘even if the actual entry that preceded it was legal’.\footnote{UNODC, Legislative Guide, p. 341, note 9.} States Parties are also obliged to criminalize attempting to commit such offences;\footnote{‘Subject to the basic concepts’ of the legal system of the State: Migrant Smuggling Protocol, at Art. 6(2)(a). The UNODC Legislative Guide, p. 271 (para. 41), notes that this caveat was introduced to accommodate legal systems which do not recognize the criminal concept of ‘attempt’.} participating as an accomplice in such offences;\footnote{Migrant Smuggling Protocol, Art. 6(2)(b).} and organizing or directing others to commit such an offence.\footnote{Ibid., Art. 6(2)(c).} They are further required to recognize as aggravated smuggling offences those that involve danger to the lives of migrants or that entail degrading or inhuman treatment, including exploitation,\footnote{Ibid., Art. 6(3). See further UNODC, Legislative Guide, pp. 346–347; United Nations Office on Drugs and Crime, Model Law against the Smuggling of Migrants (United Nations, 2010) (hereafter: UNODC Model Law on Migrant Smuggling), pp. 40–45.} presumably through the imposition of relatively harsher penalties.\footnote{UNODC, Legislative Guide, p. 346 (para. 46). See also UNODC Model Law on Migrant Smuggling, pp. 41–42.} The Protocol is otherwise silent on the issue of penalties and the basic

27 Migrant Smuggling Protocol, Art. 5. See also UNODC, Legislative Guide, p. 340, p. 347. But see Article 6(4) of the Protocol, which provides that nothing in the Protocol limits the existing rights of States Parties to take action against those whose conduct constitutes an offence under national law.
29 Migrant Smuggling Protocol, Art. 6(1)(a). In accordance with Art. 34(2) of the Organized Crime Convention, the co-requisites of transnationality and involvement of an organized criminal group do not apply to the obligation of criminalization except, as noted by the Legislative Guide, where the language of the criminalization requirement specifically incorporates one of these elements. UNODC, Legislative Guide, pp. 333–334 (para. 20).
30 Ibid., Art. 6(1)(b).
31 Ibid. An Interpretative Note attached to Art. 6 makes clear that the reference to ‘possession’ does not extend to possession of a fraudulent travel or identity document by a migrant for purposes of enabling his or her smuggling. Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 489. See also UNODC, Legislative Guide, p. 349 (para. 54).
32 Migrant Smuggling Protocol, Art. 6(1)(b), 6(1)(c).
34 ‘Subject to the basic concepts’ of the legal system of the State: Migrant Smuggling Protocol, at Art. 6(2)(a). The UNODC Legislative Guide, p. 271 (para. 41), notes that this caveat was introduced to accommodate legal systems which do not recognize the criminal concept of ‘attempt’.
35 Migrant Smuggling Protocol, Art. 6(2)(b).
36 Ibid., Art. 6(2)(c).
38 UNODC, Legislative Guide, p. 346 (para. 46). See also UNODC Model Law on Migrant Smuggling, pp. 41–42.
requirement of the Convention, that sanctions should take into account the gravity of the
goal, will apply.\footnote{39}

The relationship between the Convention and the Protocol creates other obligations on
States Parties to take certain measures with respect to offences established under the Protocol.
For example, through the Convention, States Parties are required to criminalize the laun-
dering of the proceeds of migrant smuggling;\footnote{40} ensure legal persons can be held liable for
migrant smuggling offences;\footnote{41} ensure migrant smuggling offences are given broad jurisdic-
tional application;\footnote{42} cooperate with other States Parties in the investigation, prosecution and
judicial proceedings for migrant smuggling offences, through joint investigations,\footnote{43} mutual
legal assistance\footnote{44} and extradition;\footnote{45} and provide for channels of communication and police-
to-police cooperation in relation to the investigation of migrant smuggling offences.\footnote{46}

\textbf{Migrant smuggling by sea}

The Migrant Smuggling Protocol includes a detailed section on preventing and suppressing
the smuggling of migrants by sea. Critically, it does not seek to provide a new legal regime
around smuggling by sea. Rather, its relevant provisions affirm the following core principles
of the international law of the sea codified in the United Nations Convention on the Law of
the Sea (UNCLOS):\footnote{47} that coastal States have extensive jurisdiction over national waters,
subject only to certain exceptions such as innocent passage; that ships have the nationality
of the flag they are entitled to fly; that a flag State has a duty to exercise its jurisdiction
and control over ships flying its flag; that ships are subject to the exclusive jurisdiction of
the flag State on the high seas;\footnote{48} and that there exists a universal right of visit over vessels
without nationality, and a heavily circumscribed right of approach and visit in other situa-
tions. This reinforcement of existing rules is carried through to the key obligation contained
in Article 7 of the Protocol: for States Parties to cooperate in preventing and suppressing
migrant smuggling by sea, ‘in accordance with the international law of the sea’.\footnote{49} It also
underlines Article 8, which establishes a cooperation regime intended to facilitate law
enforcement action in relation to the smuggling of migrants involving the vessels of other
States Parties.\footnote{50}

\footnote{39} UNODC, Legislative Guide, p. 351 (para. 59) (referring to Article 11(1) of the Convention). See also
Organized Crime Convention, Art. 10(4) (sanctions for legal persons to be effective, proportionate
and dissuasive); United Nations Office on Drugs and Crime, Model Legislative Provisions against

\footnote{40} Organized Crime Convention, Art. 6.

\footnote{41} Ibid., Art. 10. See further UNODC, Model Legislative Provisions against Organized Crime, p. 50.

\footnote{42} Organized Crime Convention, Art. 15. See further UNODC, Model Legislative Provisions against
Organized Crime, p. 25.

\footnote{43} Organized Crime Convention, Art. 19.

\footnote{44} Ibid., Art. 18.

\footnote{45} Ibid., Art. 16.

\footnote{46} Ibid., Art. 27.


\footnote{48} Ibid., Art. 92(1).

\footnote{49} The Interpretative Note attached to this Article confirms that: ‘[t]he international law of the sea
includes the United Nations Convention on the Law of the Sea as well as other relevant inter-

\footnote{50} UNODC Model Law on Migrant Smuggling, p. 83.
The novelty and principal impact of the Migrant Smuggling Protocol relates to situations where a State Party other than the flag State encounters a vessel suspected of being engaged in migrant smuggling that either (i) has the nationality of another State Party, or (ii) is without nationality. However, even in this area, the Protocol does not really break new ground, rather extending and potentially rendering more effective actions that are already well within the law of the sea. The relevant provisions can be summarized as follows:

- A State Party may request the assistance of other States Parties in suppressing the use of a vessel suspected of engaging in migrant smuggling (where the vessel is flying that State’s flag or claiming its registry or, while not flying that State’s flag but in reality of the nationality of that State). States Parties so requested are required to render such assistance ‘to the extent possible within their means.’
- A State Party may further notify another State Party that a vessel exercising its freedom of navigation rights and flying the other State Party’s flag, or apparently registered to that other State Party, is reasonably suspected of engaging in migrant smuggling and may request confirmation of registry. The Requested State must respond expeditiously to such a request. Each State is required to designate an authority to receive and respond to such requests and that designation is to be notified to all States Parties within one month via the UN Secretary-General. If registry is confirmed, the notifying State Party may request authorization from the flag State to take appropriate measures with regard to that vessel.
- Amongst other things, ‘appropriate measures’ that may be authorized by the flag State include authority to board and search the vessel. If evidence of migrant smuggling is found, the flag State may further authorize the Requesting State to ‘take appropriate measures with respect to the vessel and persons and cargo on board’. No additional measures can be taken without express authorization of the flag State except on the basis of relevant agreements or ‘to relieve imminent danger to the lives of persons’. The flag State is further entitled to impose conditions on the measures to be taken, and to be informed of the results of such measures.

51 The nature and extent of ‘assistance’ that may be requested or provided is not specified.
52 Migrant Smuggling Protocol, Art. 8(1).
53 Ibid.
54 I.e. on the high seas or in the exclusive economic zone of another State that is not otherwise part of that State’s territorial sea. UNCLOS, Arts 58(1), 87(1)(a), 90.
55 Migrant Smuggling Protocol, Art. 8(2).
56 Ibid., Art. 8(4).
58 Ibid.
60 Migrant Smuggling Protocol, Art. 8(2)(c).
61 Ibid., Art. 8(5). See also Mallia, Migrant Smuggling by Sea, pp. 123–125. Note that the original wording of this provision referred to imminent danger ‘to the lives or safety of persons’: Travaux Préparatoires for the Organized Crime Convention and Protocols, pp. 501, 503.
62 Migrant Smuggling Protocol, Art. 8(3).
63 Ibid., Art. 8(3).
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- A State Party that has reasonable grounds to suspect that a vessel without nationality on the high seas is engaged in the smuggling of migrants by sea is entitled to board and search that vessel. If evidence of migrant smuggling is found, the State Party is required to take 'appropriate measures in accordance with relevant domestic and international law.'

Article 9 of the Migrant Smuggling Protocol reflects the very real humanitarian, operational and commercial risks that may be involved in stopping, searching and boarding vessels in the maritime environment, by subjecting measures taken by a State Party against smuggling of migrants at sea to detailed safeguards. Most critically, when carrying out such measures, States Parties are required to ensure the safety and humane treatment of all persons on board. If suspicions about the vessel's involvement in migrant smuggling prove to be unfounded, then the State Party is required to compensate the vessel for any loss or damage.

Prevention and cooperation

Article 31 of UNTOC contains a list of measures to be taken by States to prevent, inter alia, the smuggling of migrants. The Migrant Smuggling Protocol additionally requires the adoption of general measures to prevent migrant smuggling with a particular focus on prevention through improved law enforcement. States Parties are required to strengthen border controls to the extent possible and necessary to prevent and detect migrant smuggling. They are also encouraged to establish and maintain direct channels of communication between each other as a way of intensifying cooperation among border control agencies. States Parties are to take steps to ensure both the quality and the security of travel documents issued on their behalf and to cooperate in preventing their fraudulent use. Specialized training aimed at preventing, combating and eradicating migrant smuggling is to be provided or strengthened for immigration and other officials. States Parties are further required to adopt appropriate legal and administrative measures to ensure the vigilance of commercial carriers and their liability in the event of complicity or negligence.

Little attention is given to prevention through addressing the factors that encourage or compel people to seek out the services of migrant smugglers. States Parties are instead subject to a vague obligation of promoting or strengthening 'development programmes and cooperation . . . in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.' A key preventative element is seen to be the

64 Ibid., Art. 8(7).
65 Ibid.
66 Ibid., Art. 9(1) (emphasis added). As noted in the UNODC Legislative Guide, this obligation is of great practical importance, given the poor condition of vessels typically used by smugglers and the likelihood that boarding will take place far away from safe harbour conditions (p. 365 (para. 70)). See also UNODC Model Law on Migrant Smuggling, pp. 91–96.
67 Migrant Smuggling Protocol, Art. 9(2). This provision reflects Article 110(3) of UNCLOS.
68 See generally, UNODC, Model Legislative Provisions against Organized Crime, pp. 1–18.
69 Migrant Smuggling Protocol, Art. 11(1).
70 Ibid., Art. 11(6).
72 Ibid., Art. 14.
73 Ibid., Art. 11(2)–11(4).
74 Ibid., Art. 15(3).
dissemination of negative information aimed at discouraging potential migrants. States Parties are required to ‘increase public awareness of the fact that [migrant smuggling] . . . is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.’

Improved cooperation between countries on the issue of migrant smuggling is the raison d‘être of the Migrant Smuggling Protocol, and the obligation of cooperation is accordingly integrated into a range of provisions, including those related to the sharing of information and the return of smuggled migrants. Cross-border cooperation is also envisaged with respect to the strengthening of border controls and general law enforcement against migrant smuggling. States Parties are encouraged to develop bilateral and regional agreements to further the purposes of the Protocol. These specific provisions are supplemented by the Convention, which, as noted above, constructs a detailed model of mutual legal and other assistance to facilitate cooperation between States in the prevention and suppression of transnational organized crime.

**Assistance to and protection of smuggled migrants**

A review of the drafting history of the Migrant Smuggling Protocol confirms that questions of assistance and protection for smuggled migrants were regularly raised throughout the drafting process, including in initial discussions. However, while some States and regional groupings expressed a view that such matters should receive attention in the Protocol, most did not appear to consider this as a priority issue. In its final version the Protocol includes a number of provisions aimed at protecting the basic rights of smuggled migrants and preventing

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75 Ibid., Art. 15(1)–(2). The Article cross-references Article 31 of the Organized Crime Convention that, inter alia, requires States Parties to ‘endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by transnational organized crime.’

76 Migrant Smuggling Protocol, Art. 15(1).

77 Ibid., Preamble.

78 Ibid., Art. 10.

79 Ibid., Art. 18. Further, on the Protocol’s provisions with respect to return, see infra.

80 Ibid., Arts 8, 11, 13–14.

81 Ibid., Art. 17.

82 The initial draft of the Migrant Smuggling Protocol submitted by Austria and Italy referred to ‘illegal trafficking and transport of migrants’ as ‘a particularly heinous form of transnational exploitation of individuals in distress’ in the Preamble: ‘Draft elements for an international legal instrument against illegal trafficking and transport of migrants (Proposal submitted by Austria and Italy),’ UN Doc. A/AC.254/4/Add.1, 15 Dec. 1998. Other discussions of the need to address the protection of smuggled migrants are noted in the travaux préparatoires with regard to the Preamble, the statement of purpose, the scope of application, the introduction of the aggravated offences, training, and the development of the specific ‘protection’ article: Travaux Préparatoires for the Organized Crime Convention and Protocols, pp. 453, 459, 461, 471–472, 486, 509, 520, 531–532, 537–540.

the worst forms of exploitation that often accompany the smuggling process. However, it is relevant to note the substantial differences between the carefully circumscribed provisions applicable to smuggled migrants and the entitlements provided for trafficked persons under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This is in keeping with the general consensus secured during the drafting process that smuggled migrants are not ‘victims’ in the same way that this term can be applied to those who have been trafficked.

The limited protections granted to smuggled migrants are nevertheless significant. Most critically, migrants themselves are not to become liable to criminal prosecution under the Migrant Smuggling Protocol for the fact of having being smuggled. The aggravated offences provision noted above represents further recognition of the human rights dimensions of migrant smuggling. Several additional provisions reiterate and expand on the obligation to preserve and protect the rights of smuggled migrants.

The Migrant Smuggling Protocol also contains a broad savings clause to the effect that nothing in that instrument is to affect existing rights, obligations and responsibilities of States under international law, including international humanitarian law, international human rights law and, in particular, refugee law and the principle of non-refoulement. The savings clause further requires the Protocol to be interpreted and applied in a way that is not discriminatory to smuggled migrants and that is ‘consistent with internationally recognized principles of non-discrimination.’ The clause was hard won and secured virtually at the last minute. Its significance – both symbolic and substantive – should not be underestimated. While a collision of norms could still occur (for example, between the obligation to act against smuggling of migrants and the obligation to ensure the rights of refugees and asylum seekers), the correct outcome has been clearly articulated: a State that acts against the letter or spirit of international law, including international refugee law, in implementing its obligations under the Migrant Smuggling Protocol is in violation of one of its central provisions.

84 Specific references to ‘protecting’ the rights of smuggled migrants are found in the Preamble (‘Convinced of the need to provide migrants with humane treatment and full protection of their rights’), Article 2 (‘The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants’), Article 4 (‘This Protocol shall apply . . . as well as to the protection of the rights of persons who have been the object of such offences’), Article 14(2) (‘. . . Such training shall include . . . (e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol’), and Article 16, titled, ‘Prevention and assistance measures’.
86 Further, on the agreement secured during the drafting process to replace the term ‘victim of smuggling’ with ‘smuggled migrant’, and the legal implications of this change, see Gallagher and David, The International Law of Migrant Smuggling, Chapter 1.
87 Migrant Smuggling Protocol, Art. 5.
88 See infra.
90 Migrant Smuggling Protocol, Art. 19(2).
Key issues and overlaps

Introduction
As noted previously, the regime established under transnational criminal law to address the phenomenon of migrant smuggling represents only one part of the applicable legal framework. This section seeks to illustrate and expand on that point by examining the constellation of rules that govern several critical issues around State responses to migrant smuggling.

Maritime law: interdiction and rescue at sea
Migrants, including asylum seekers and refugees, have long turned to the sea to escape brutal regimes, humanitarian crises, hunger, poverty and unemployment. Smuggling by sea will often be the cheapest, or even the only option available to individuals who are forced or wish to move. It may also be just one part of a multi-stage journey that includes smuggling by air and across land borders. Sea travel for smuggled migrants is often dangerous, typically involving lengthy journeys on board overcrowded and barely functional vessels. While the data around smuggling-related fatalities is incomplete, available information appears to confirm that smuggling by sea carries with it a particularly high risk of death through drowning, suffocation, dehydration, starvation or violence. Smuggling by sea also places considerable strain on the search and rescue services of affected coastal States.  

Responses to migrant smuggling at sea take place against a complex legal landscape, comprised of cumulative rules and obligations imposed principally under the law of the sea as reinforced and occasionally supplemented by transnational criminal law, but also reflecting rules of international human rights law and refugee law. The core of many legal complexities in this area is jurisdiction. The oceans of the world are divided up into different areas, to which are attached different rights and responsibilities. Deciding which State has the capacity to act in a particular migrant-smuggling situation at sea, and establishing the correct limits on that capacity, is often very difficult. The allocation of responsibilities – toward smuggled refugees, for example, or toward smuggled migrants in distress – is similarly fraught, especially when two or more States are involved in a migrant-smuggling response at sea or where the response is conducted under the banner of an international organization.

There are two ways in which States respond to migrant smuggling at sea. First, consistent with State sovereignty and the prerogative of border control, coastal States are entitled under certain circumstances to intercept or interdict vessels engaged in migrant smuggling at sea in order to prevent unauthorized migrants from entering their territory. Such law enforcement actions must take place in accordance with the law of the sea and other rules of international law, and within the bounds of any multilateral or bilateral agreement for interdiction of migrant smuggling at sea. Second, independently of interdiction, the law of the sea also obliges shipmasters and States to render assistance/rescue to any persons in distress at sea, including to smuggled migrants and migrant smugglers. The obligations of assistance under the law of the sea, including obligations of search and rescue, are motivated purely by humanitarian considerations and apply at all times in respect of any persons in distress at sea.

For detailed references see Gallagher and David, The International Law of Migrant Smuggling, Chapter 6.
Interdiction

Interdiction of vessels carrying smuggled migrants has become a central plank of the anti-smuggling response of many frontline coastal States. Sometimes interdiction is limited to the boarding, inspection and searching of a ship at sea suspected of being engaged in migrant smuggling. However, enforcement measures can extend further. For example, an interdiction could involve taking control of the vessel and either towing it to another regulatory zone (for example, from the territorial waters of the coastal State to the high seas), or returning it to the point of embarkation. A critical legal question that has occupied States, courts and scholars in recent years is if and when these so called ‘push backs’ constitute a legitimate form of law enforcement action. There is no clear answer to be found in the Migrant Smuggling Protocol or under the laws of the sea. The rules to be applied will depend on a wide range of factors including where the interdiction takes place; the status of the vessel; the status of the interdicting authority; and, of course, the conduct and outcome of the interdiction itself.

The rules governing enforcement action over vessels engaged in migrant smuggling generally grant coastal States a wide degree of latitude to take law enforcement action in their national waters against foreign vessels engaged in migrant smuggling to or from that State. For example, a coastal State will usually be able to take law enforcement action within both its territorial sea and its contiguous zone against foreign-flagged vessels and vessels without nationality where this is necessary to prevent breaches of that State’s immigration laws. 93 Action may also be taken against a foreign vessel by a coastal State in its territorial sea or contiguous zone through the exercise of the right of hot pursuit, 94 where suspected breaches of national law are involved. 95 In respect of flagged vessels, the consent of the flag State is not required in these situations. However, the capacity of States to unilaterally exercise law enforcement jurisdiction against flagged vessels in international waters is far more limited as such vessels are, with only narrow exceptions, subject to the exclusive jurisdiction of the flag State. 96

These jurisdictional rules may be modified by consent, and considerable bilateral and multilateral efforts to address migrant smuggling have been directed to that end. For example, under the ship-rider model that has become a familiar feature of United States and European migration control, a State of origin/embarkation (State A) may conclude an agreement with a State of destination (State B) to permit an official of State A to be placed aboard an official vessel of State B. The official from State A is able to authorize an interdiction of a migrant-smuggling vessel within the territorial waters of State A, enforcing State A’s laws. A coastal or flag State may also permit another State to directly engage in interdictions in areas where that State has jurisdiction, for example agreeing to an official vessel from another State entering its territorial waters and interdicting vessels seeking to smuggle migrants through that maritime zone. International law permits States to give consent to other States to assume or share enforcement jurisdiction over a migrant-smuggling vessel to the extent that the consenting State possesses the enforcement jurisdiction it grants to another. However, a State that consents to another State assuming or sharing enforcement jurisdiction over a migrant-smuggling

93 UNCLOS, Arts 19(2)(g), 21, 25, 33(1).
94 A right of hot pursuit effectively permits a coastal State to extend its sovereignty beyond a zone of existing enforcement jurisdiction by commencing and maintaining an uninterrupted pursuit of a fleeing vessel.
95 UNCLOS, Arts 33, 111.
96 Ibid., Art. 92.
A vessel may nevertheless be held responsible for unlawful acts that result from the exercise of enforcement jurisdiction. In relation to the examples given above, the involved States would be individually and jointly responsible for internationally wrongful acts that occur during or as the result of such interdiction.\footnote{97}

The vast majority of maritime vessels used to smuggle migrants are unregistered or improperly registered.\footnote{98} In relation to vessels without nationality suspected of carrying smuggled migrants, the Migrant Smuggling Protocol’s requirements go beyond those set out in the law of the sea. As noted previously, States Parties that have reasonable grounds to suspect that a vessel without nationality is engaged in the smuggling of migrants by sea are empowered to board and search that vessel even if it is on the high seas and, if evidence of migrant smuggling is found, are required to take ‘appropriate measures in accordance with relevant domestic and international law’.\footnote{99} The failure to specify what measures may be ‘appropriate’ means that the scope of enforcement jurisdiction that may be exercised in respect of a stateless vessel carrying smuggled migrants remains unclear.

Irrespective of the jurisdictional grounds for an interception and the maritime zone within which the interdiction takes place, international law requires that the use of force must be avoided as far as possible. When force is used it must be proportionate. Proportionality implies elements of both reasonableness and necessity\footnote{100} Critically, as the Law of the Sea Tribunal has affirmed, ‘[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law.’\footnote{101} Applying these principles to the matter at hand, it becomes clear that States have a duty, when intercepting or otherwise dealing with a migrant-smuggling vessel, its passengers and crew, to avoid using force that causes any unnecessary harm. Examples of unlawful use of force under this standard may include towing a boatload of distressed migrants in an overcrowded vessel back to the point of embarkation; or using weapons to move unwilling migrants from one vessel to another.

Human rights law provides an important, additional constraint on the use of force in responding to smuggling by sea. Recent developments appear to confirm that interdicting States will generally be held responsible under international law for violations of human rights that occur in relation to vessels or persons that are in some way or another under their authority or control, even if the relevant action or omission occurs outside the territorial jurisdiction of that State.\footnote{102} International rules relating to right to life, arbitrary detention, inhumane and degrading treatment and collective expulsion are particularly relevant to situations of interdiction and will bind all States engaged in interdiction irrespective of the purpose, circumstances or location of the interdiction.\footnote{103}

\footnote{97} Further on State responsibility for joint operations see Gallagher and David, The International Law of Migrant Smuggling, Chapter 4.4.
\footnote{99} Migrant Smuggling Protocol, Art. 8(7).
\footnote{102} For a detailed examination of these developments see Gallagher and David, The International Law of Migrant Smuggling, Chapter 6.3.
\footnote{103} Ibid.
While interception of smuggled migrants on the high seas does not, of itself, violate the refugee law prohibition on *refoulement*, it is reasonable to assert that such actions may not result in asylum seekers and refugees being denied access to international protection, or result in persons in need of international protection being returned to a situation in which they are at risk of persecution or serious violations of human rights. However, the question of whether the obligation of *non-refoulement* automatically applies to interceptions that take place outside the territory of an intercepting State has not been settled. While the United Nations High Commissioner for Refugees (UNHCR) and many scholars have affirmed the extraterritorial application of the obligation of *non-refoulement*, State practice in this area is ambiguous. In short, there is not yet strong evidence for State consent to an understanding of the obligation that extends to asylum seekers who are not at the borders or physically within the territory of the State.

**Rescue at sea**

In the context of migrant smuggling the lines between search and rescue and interdiction are often blurred, and rescue operations may coincide with or transform into operations to interdict or otherwise divert migrant-smuggling vessels. However, the relevant rules are very different: the legal framework that governs rescue at sea does not apply to interception operations that have no search and rescue component. At the same time, the right of States to regulate migration, including through interdiction, in no way displaces the duty of States and shipmasters to provide assistance to persons in distress at sea.

International law has long required States and their shipmasters to render assistance to any person or vessel in distress at sea. This obligation, which applies to all States through a combination of customary and treaty law, operates at all times and in all maritime zones. It extends to all persons and vessels regardless of nationality, legal status or any other difference. The obligation is subject to practical contingencies of safety and reasonableness, and the scope of required assistance should be commensurate with the nature and severity of the distress.

The obligation on shipmasters to render assistance and rescue at sea is supplemented by requirements on coastal and port States regarding search and rescue. The relevant legal

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framework around maritime rescue of persons or vessels in distress comprises UNCLOS and two widely ratified treaties: the much-amended 1974 International Convention for the Safety of Life at Sea\textsuperscript{108} and the 1979 International Convention on Maritime Search and Rescue.\textsuperscript{109} Port and coastal States are required to establish search and rescue services aimed at coordinating the rescue of persons in distress at sea around their coasts.\textsuperscript{100} Amendments to the key instruments that entered into force in 2004 following the \textit{Tampa} incident\textsuperscript{111} affirmed a number of additional obligations on port and coastal States, including a duty to ensure that masters of ships providing assistance to persons in distress at sea are relieved from their responsibilities as soon as practicable and that the involved States cooperate with the ship’s master in delivering persons rescued at sea to a place of safety. The amendments further clarified that the State in whose Search and Rescue Region\textsuperscript{112} the assistance is rendered is to take primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety. While adding a measure of substance to the relevant obligations the amendments have not resolved problems related to dysfunctional search and rescue zones and uncertainty and disagreement around whether and when coastal States may deny disembarkation of rescued smuggled migrants.

Human rights: protection and return

Human rights are central to the issue of migrant smuggling: first because they impose important limitations on how States may respond to smuggling, but also because human rights law confers certain legal entitlements on all persons, including smuggled migrants, that States and


\textsuperscript{109} International Convention on Maritime Search and Rescue, 1979, with annexes, 1405 UNTS 97, done 27 April 1979, entered into force 22 June 1985 (SAR Convention). The SAR Convention was amended in 1998 by IMO Resolution MSC.70(69) (‘Amendments to the International Convention on Maritime Search and Rescue, 1979’), and again in 2004 by IMO Resolution MSC.155(78) (‘Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended’). References to the SAR Convention are to the consolidated text.

\textsuperscript{110} UNCLOS, Art. 98.

\textsuperscript{111} This incident involved a Norwegian registered tanker, the MV \textit{Tampa}, travelling from Western Australia towards Singapore, which, following a request by Australian authorities, rescued 438 smuggled asylum seekers from a vessel in distress. After pressure from the rescued migrants, the master of the vessel changed course for Australia. The vessel was instructed by Australian authorities to stop before it entered the Australian territorial sea and the master was threatened with prosecution for ‘people smuggling’ offences if he did not comply. Requests for medical and other assistance were not met for two days until a formal distress call was issued. The master then entered Australian territorial waters without permission, stating that his vessel was unseaworthy for travel to Indonesia and that some passengers were in extreme medical distress. Australian military personnel boarded the vessel and denied disembarkation to the rescued passengers. Further on the facts of this case and its impact on rules around search and rescue see Gallagher and David, \textit{The International Law of Migrant Smuggling}, Introduction and Chapter 6.

\textsuperscript{112} The 1979 SAR Convention was developed with the aim of establishing an internationally agreed search and rescue plan that would cover the world’s oceans. The Convention foreshadowed the establishment of Search and Rescue Regions by agreement as well as the establishment of national Rescue Coordination Centers that would be responsible for search and rescue operations within these zones (SAR Convention, at Annex, Rule 2.1.4). After its entry into force, the world’s oceans were divided into thirteen such regions. The location of the rescue operation determines which State’s Rescue Coordination Center is responsible for coordination of the rescue operation including delivery of any persons in distress to a ‘place of safety’.
others are obliged to protect and respect. In relation to particular fundamental rights, such as the right to life and the prohibition on torture and inhumane treatment, the relevant entitlements are owed to all smuggled migrants (and indeed to all migrant smugglers), without distinction on any grounds including race, nationality or immigration status. Other rights may attach to a smuggled migrant by virtue of that person’s particular status – for example as a child, a woman, a refugee, a person with disability, a victim of trafficking, or indeed a victim of crime or of human rights violations.

**Protection of smuggled migrants**

Persons who have been or are being smuggled are highly vulnerable to ill-treatment, violence, exploitation and life-threatening situations. For some persons, the act of smuggling may operate to enhance existing vulnerabilities. Children, particularly those who are unaccompanied, face risks of exploitation and abuse, and smuggled women migrants are at risk of violence, including sexual violence. For all smuggled migrants, the clandestine nature of their journey, the often unscrupulous and corrupt conduct of their facilitators and collaborators, and the extent to which some States will go to prevent their departure, transit or arrival, all operate to create or exacerbate serious risks to personal security and well-being.

Despite these grim realities, the status of ‘smuggled migrant’ has not been elevated to a legal category to which any special or additional rights are attached. In other words, a State will not necessarily owe different or extra obligations to a person merely because they are being, or have been, smuggled. The question of whether a positive obligation of protection and assistance exists toward smuggled migrants requires a consideration of general rules and instruments of international and regional human rights law, as well as of instruments dealing particularly with migrant smuggling and related issues, such as irregular migration and border management.

As noted previously, human rights protections under the Migrant Smuggling Protocol are equivocal and carefully circumscribed, a reflection of the fundamental tension that underlies its potentially conflicting purposes of addressing smuggling and protecting migrants. By withholding ‘victim’ status from smuggled migrants who have not otherwise been subject to abuse or exploitation, those persons are _prima facie_ excluded from the special protections afforded to victims of crime and human rights violations under international law including transnational criminal law.

However, a number of important protections have been preserved. Most critically, migrants themselves are not to become liable to criminal prosecution under the Protocol for the fact of having being smuggled: a direct and welcome affirmation that the purpose of the Migrant Smuggling Protocol is not to punish irregular migration or smuggled migrants. Of course, as noted previously, this concession does not provide blanket immunity to those who have been smuggled. While States may not use the Protocol to criminalize smuggled migrants, they retain full capacity to prosecute such persons under their national law for any acts that may be criminalized, such as illegal entry, illegal stay and the possession of fraudulent travel documents.

113 Migrant Smuggling Protocol, Art. 5. The non-criminalization of smuggled migrants was raised even in the earliest stages of drafting: the original draft text of the Protocol submitted by Austria and Italy refers to ‘Establishing a principle of penal sanctions against the perpetrators but not the victims’, ‘Letter dated 16 September, 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General’, UN Doc. A/52/357, 17 Sept. 1997, at para. 3.

The main protection and assistance provisions of the Migrant Smuggling Protocol are set out in a provision which is ‘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’.\textsuperscript{115} Article 16 subjects its various obligations to the umbrella requirement that States Parties take into account the special needs of women and children.\textsuperscript{116} Fortunately, the existing legal framework around the rights of children provides important guidance on ascertaining ‘the special needs of children’ and determining how those rights can be integrated into all aspects of a smuggled child’s experience; from the provision of protection and assistance to the question of detention and return.\textsuperscript{117} The situation is less clear in respect of smuggled women migrants, and there is very little useful guidance available on how this particular obligation could be met, or indeed how its implementation could be effectively judged.\textsuperscript{118}

The first part of Article 16 of the Migrant Smuggling Protocol deals with the responsibility of States Parties, when implementing the Protocol, to preserve and protect the rights of smuggled migrants under international law. Specific reference is made to a number of pre-existing human rights (the right to life and to freedom from torture and other inhuman or degrading treatment or punishment) and their continued applicability to smuggled migrants.\textsuperscript{119} The obligation to preserve the rights of smuggled migrants when implementing the Protocol is reinforced by a requirement that specialized training in combating migrant smuggling is to focus on humane treatment of smuggled migrants and protection of their Protocol rights.\textsuperscript{120}

Article 16 sets out three additional obligations of protection and assistance: States Parties are required to:

- take appropriate measures to protect smuggled migrants from smuggling-related violence ‘whether by individuals or groups’;\textsuperscript{121}
- provide assistance to migrants whose lives or safety are endangered through smuggling;\textsuperscript{122} and
- in respect of detained smuggled migrants, ensure their right to be informed of consular access.\textsuperscript{123}

\textsuperscript{115} Ibid., p. 364 (para. 69).
\textsuperscript{116} Migrant Smuggling Protocol, Art. 16(4).
\textsuperscript{117} Further on the protection and assistance of smuggled children see Gallagher and David, \textit{The International Law of Migrant Smuggling}, Chapters 8.2.1 (protection), 9.4.3 (detention) and 10.5.2 (return).
\textsuperscript{118} The drafting history of the Protocol does not provide insight and the UNODC \textit{Legislative Guide} is silent on the point of how States may implement this provision.
\textsuperscript{119} Migrant Smuggling Protocol, Art. 16(1). The \textit{Travaux Préparatoires} confirm that: ‘[t]he intention in listing certain rights in this paragraph was to emphasise the need to protect those rights in the case of smuggled migrants, but the provision should not be interpreted as excluding or derogating from any other rights not listed. \textit{Travaux Préparatoires for the Organized Crime Convention and Protocols}, p. 541. However, the limits of the provision are also clearly noted with a confirmation that it: ‘should not be understood as imposing any new or additional obligations on States parties to this protocol beyond those contained in existing international instruments and customary international law.’ Ibid.
\textsuperscript{120} Migrant Smuggling Protocol, Arts 14(1), 14(2)(e).
\textsuperscript{121} Ibid., Art. 16(2).
\textsuperscript{122} Ibid., Art 16(3). Note that States Parties are required to make smuggling offences that involve danger to the lives of migrants or that entail degrading treatment or exploitation into aggravating circumstances: ibid., Art. 6(3).
\textsuperscript{123} Ibid., Art. 16(5).
The Migrant Smuggling Protocol’s savings clause has been previously noted but deserves to be flagged again at this point. Its intention and effect is to preserve existing rights, obligations and responsibilities of States Parties under international law, including international humanitarian law, international human rights law and, in particular, refugee law and the principle of non-refoulement. The savings clause also requires the Protocol to be interpreted and applied in a way that is not discriminatory to smuggled migrants and that is ‘consistent with internationally recognized principles of non-discrimination’. This provision would operate to prohibit, for example, discriminatory treatment with a negative intent or outcome between different groups of smuggled migrants on the basis of, for instance, their national or ethnic origin or indeed their status as asylum seekers or refugees. It could arguably also extend to prohibit discriminatory treatment of different groups of smuggled migrants, reflecting their different modes of arrival. For example, some countries have established dual systems whereby those who arrive by air are subject to different procedures than those who arrive by sea, with potentially discriminatory results.

Regional law and policy also affirms obligations of protection in relation to smuggled migrants. A useful example is the 2011 Fundamental Rights Strategy of Frontex: the European Border Agency. The Strategy contains a detailed set of rights-based commitments to protection and assistance and sets out a number of measures to promote a rights-based approach to the work of the Agency. However, while identifying groups at particular risk (including unaccompanied children, women and trafficked persons), the Strategy follows the lead of the Migrant Smuggling Protocol in avoiding articulation of any protection or assistance obligations with respect to smuggled migrants who have been or are at risk of abuse or exploitation.

Finally, it is important to note the specialist instruments of international human rights law as a separate and substantive source of legal obligation with respect to obligations of protection and assistance owed to all smuggled migrants. These instruments will often be of most immediate relevance to smuggled migrants who are in danger or who experience violence and exploitation. For example, the right to life will require States to take positive steps to protect smuggled migrants from xenophobic violence, or from situations of extreme danger such as a threatened sinking of their vessel. Human rights instruments will also be of direct

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125 Migrant Smuggling Protocol, Art. 19(2).
128 For a useful insight into risks and shortcomings that have not been fully addressed by the Frontex Fundamental Rights Strategy, see Council of Europe, Parliamentary Assembly, Resolution 1932 (2013) Final version ‘Frontex: human rights responsibilities,’ adopted 25 April 2013, esp. at paras 8–10.
129 The right to life is enshrined in the Universal Declaration of Human Rights, adopted by GA Res. 217A (III), UN GAOR, 3rd sess., 183rd plen. mtg, UN Doc. A/810, at 71, 10 Dec. 1948 (UDHR Article 3); protected as a non-derogable right through International Covenant on Civil and Political Rights, 999 UNTS 171, done 16 December 1996, entered into force 23 March 1976 (ICCPR) (Article 6(1)), and all major regional human rights instruments.
relevance with respect to particular categories of smuggled migrants such as children. However, human rights instruments are not just relevant in these limited situations: they provide important guidance for the treatment of all smuggled migrants who come within the jurisdiction of the State. For example, the prohibition on cruel, inhuman or degrading treatment or punishment will constrain the way in which States treat smuggled migrants who have been rescued, apprehended or detained and the way in which decisions are taken about their return (as discussed further below). The rights to food and shelter will further dictate the way in which the basic needs of smuggled migrants are assessed and met by the State. The right to an adequate standard of health will require States to ensure that smuggled migrants, particularly those in need of emergency assistance, are able to access medical care and treatment.

Return of smuggled migrants

The core obligation of the Migrant Smuggling Protocol does not require return but is rather directed at States Parties of origin, which are to facilitate and accept, without delay, the return of their smuggled nationals and those who have a right of permanent abode within their territories. To that end States Parties may request each other to verify the nationality or right of permanent residence of a smuggled migrant, and the Requested State is required to provide such verification without undue or unreasonable delay. A State Party so requested is also required to issue any travel documents or authorizations required for the smuggled migrant to enter its territory. States Parties carrying out return of smuggled migrants are required to ‘take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.’

Of course the rules around return of smuggled migrants are much more complex and nuanced than those set out in the Migrant Smuggling Protocol. Certainly international law preserves the right of States to return/expel irregular migrants, including those who have been smuggled. However, such return must be in conformity with certain legal obligations that are principally derived from rules of human rights and refugee law. Failure to observe those obligations renders the return of a smuggled migrant to his or her country of origin, or to a third country, an internationally wrongful act.

130 The prohibition of torture is recognized as a fundamental rule of international law from which there may be no derogation. It is enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, done 10 December 1984, entered into force 26 June 1987 (Convention against Torture), as well as all major regional human rights instruments.

131 For a useful and detailed overview of how these rights operate in the context of asylum seekers and refugees (a category to which many smuggled migrants belong) see J.C. Hathaway, The Rights of Refugees under International Law, Cambridge: Cambridge University Press, 2005, pp. 471–507.

132 Ibid., pp. 507–514. The link between the right to life and access to life-saving medical care is noted in the UNODC Model Law on Migrant Smuggling, pp. 65–67.

133 Migrant Smuggling Protocol, Art. 18(1).

134 Ibid., Art. 18(3). The travaux préparatoires indicate that ‘return under this article shall not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified’: Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 552.

135 Migrant Smuggling Protocol, Art. 18(4).

136 Ibid., Art. 18(5).
Migrant smuggling

Arbitrary expulsion
International law prohibits the arbitrary expulsion of persons who are ‘lawfully present’ within the country.\textsuperscript{137} Smuggled migrants are, by definition, present without authorization in the country of arrival and it will therefore only be in relation to smuggled asylum seekers that the status of ‘lawful presence’ will have any chance of being established. Presuming lawful presence can be established (and it is not universally accepted that persons who have entered a country without authorization for purposes of claiming asylum are ‘lawfully present’) the expulsion of such persons will be characterized as ‘arbitrary’ and therefore unlawful if the expulsion decision is not made in accordance with national law and with relevant international rules.

Collective expulsion
International law also prohibits measures compelling non-nationals, as a group or groups, to leave a State or the territory of a State except where such measures are taken on the basis of a reasonable and objective examination of the particular case of each individual member of the group.\textsuperscript{138} This rule applies to asylum seekers even if the collective expulsion does not result in a violation of the rule of non-refoulement.\textsuperscript{139} Interceptions and turn-backs at sea without individualized assessment can be characterized as violating the prohibition on collective expulsion even when undertaken outside the territory of the State (for example, on the high seas).

The obligation of non-refoulement
With only limited exceptions, no person, including a smuggled migrant, may be expelled or returned ‘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’.\textsuperscript{140} Further, international human rights law prohibits the

\begin{itemize}
\item \textsuperscript{137} See, for example, ICCPR, Art. 13.
\item \textsuperscript{139} See, for example, Protocol No. 4 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, 1496 UNTS 263, done 16 September 1963, entered into force 2 May 1968, Art. 4 (‘Collective expulsion of aliens is prohibited.’); American Convention on Human Rights, 1144 UNTS 123, 22 November 1969, entered into force 18 July 1978, Art. 22(9) (‘The collective expulsion of aliens is prohibited.’); African Charter on Human and Peoples’ Rights, 1520 UNTS 217, done 27 June 1981, entered into force 21 October 1986, Art. 12(5) (‘The mass expulsion of non-nationals shall be prohibited’ and ‘[m]ass expulsion shall be that which is aimed at national, racial, ethnic or religious groups’). Note that while the ICCPR does not refer specifically to collective expulsion the Human Rights Committee has interpreted Article 13 of that instrument as prohibiting such expulsion. HRC General Comment No. 15, at para. 10.
\item \textsuperscript{140} A recognized refugee who constitutes a threat to national security or public order; or in relation to whom there are reasonable grounds for regarding as a danger to security; or who, having been convicted of a serious crime, constitutes a danger to the community, may not benefit from the Refugee Convention protections against expulsion and non-refoulement. Convention Relating to the Status of Refugees, 189 UNTS 137, done 28 July 1951, entered into force 22 April 1954, as amended by the Protocol relating to the Status of Refugees, 606 UNTS 267, done 31 January 1967, entered into force 4 October 1967, Arts 32 and 33.
\end{itemize}
return of any person, including a smuggled migrant, to a situation where he or she faces a real risk of torture or other serious violations of human rights.\textsuperscript{141} It is important to recognize that many anti-smuggling measures, from interdiction at sea, to the creation of special zones at airports, to ‘safe third country’ arrangements, have practical implications for the obligation of non-refoulement. There is growing recognition that the obligation of non-refoulement applies in any area or space where the State exercises effective control.\textsuperscript{142} In relation to arrangements with other countries, the test will generally be whether a return exposes the person concerned to the risk of subsequent refoulement.

\textit{Obligation to accept and facilitate return}

International law protects the right of all persons to return home\textsuperscript{143} and smuggled migrants are entitled to exercise that right. This right imposes a corresponding obligation on States of origin (affirmed in the Migrant Smuggling Protocol) to accept returning nationals and to facilitate such return without undue delay. To that end they should cooperate with the returning State in relation to both identification and the issuing of necessary travel documents. These general obligations may be extended or modified by bilateral or regional re-admission agreements. However, all such agreements are subject to the obligation of non-refoulement and related protections.

An otherwise lawful return may be rendered unlawful by the manner in which it is carried out. Smuggled migrants may be entitled to certain due process rights, including the right to challenge the decision related to return. Where such entitlement exists, these procedural rights must be recognized and granted. Any pre-return detention must not be punitive and must be in conformity with established rules, including the prohibitions on discrimination and on torture and cruel or inhuman treatment. The conduct of the return itself must also not violate established rules, including those same prohibitions. The use of excessive force in compelling a return is prohibited.\textsuperscript{144}

International law also provides certain status-based entitlements that may be relevant to decisions about the return of smuggled migrants. For example, smuggled children and smuggled migrants who have been trafficked are entitled to special and additional rights that may preclude an otherwise lawful return or modify the way in which a return decision is taken or implemented.

\begin{enumerate}
\item Convention against Torture, Art. 3(1). Regional human rights instruments provide similar protections. See, for example, Charter of Fundamental Rights of the European Union, OJ C 364/1, 18 December 2000, done 7 December 2000, entered into force 1 December 2009, Art. 19(2) (‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’). Note that smuggled migrants who are refused refugee status or excluded from the benefit of the refugee law prohibition on refoulement on one of the grounds stipulated in the previous note are still entitled to this protection.
\item For a detailed examination of the extraterritorial application of the obligation of non-refoulement see Gallagher and David, \textit{The International Law of Migrant Smuggling}, Chapter 3.4.4.
\item The right of return is established in the UDHR (Article 13(2)) and is affirmed in the ICCPR (Article 12(4)).
\item For a detailed consideration of each of these points see Gallagher and David, \textit{The International Law of Migrant Smuggling}, Chapter 10.4.
\end{enumerate}
Conclusion

In December 2000, the international community confirmed migrant smuggling as an issue of common concern and as a legitimate focus for legal and operational cooperation between States. New legal instruments developed within the field of transnational criminal law imposed highly specific obligations on States to criminalize migrant smuggling within their domestic legal orders and to ensure that structures and processes are in place to enable interstate cooperation. Of course, those rules did not emerge and do not operate in a vacuum. Other areas of international law, including the law of the sea, human rights and refugee law, and general rules around jurisdiction and responsibility, provide additional substance to the specialist obligations and dictate the parameters of State capacity to act against migrant smuggling. The key tasks of the international lawyer – understanding what States must and may not do in the name of addressing ‘migrant smuggling’; identifying practices that are unlawful; confirming specific rights that attach to persons who have been smuggled; and calling States to account for violation of established rules – all require consideration of the full range of applicable norms. That process – ascertaining the relevant rules and ensuring they are applied correctly – is important because international law is ultimately a tool for change. As a collective expression of how things ought to be, it seeks to positively influence the behaviour of States. ‘Practitioners of international law have power over the law, the only thing that can have power over governments.’

It remains to repeat the observation made in the introduction to this chapter: international law may be central but it is ultimately just one part of the migrant-smuggling mosaic. In this area, as in all others, the relevant legal framework cannot be considered in isolation from broader political, social and economic forces that gave rise to and shaped its development, and that will ultimately determine its future. A nuanced understanding of those forces is essential to an appreciation of both the possibilities and limitations of the relevant international rules as well as to identifying opportunities for much needed change.