

FAQ1 Human Rights in Migrant Smuggling



Global Alliance Against Traffic in Women

FAQ 1: Human Rights in Migrant Smuggling

© 2011 Global Alliance Against Traffic in Women (GAATW)

Writer and Researcher: **Rebecca Napier-Moore**

Cover Photo: <http://www.123rf.com>

Cover Design by: **GAATW International Secretariat**

Printed by: **Suphattra Poonneam**

Global Alliance Against Traffic in Women

P.O. Box 36 Bangkok Noi Post Office

Bangkok 10700 Thailand

Email: gaatw@gaatw.org

Website: www.gaatw.org

FAQ1: HUMAN RIGHTS IN MIGRANT SMUGGLING

Global Alliance Against Traffic in Women

Migrants have human rights no matter what situation they are in or what they are experiencing.

WHAT IS MIGRANT SMUGGLING?

The Global Alliance Against Traffic in Women (GAATW) has become increasingly concerned with immigration measures that criminalise migrants and badly affect trafficked people. Many criminalising immigration policies are framed as ‘anti-smuggling’ measures.

By sheer necessity, many migrants pay a broker to reach their destination. They need to get out of their country or find a way to support their families. Technically, they are seen by many authorities as ‘smuggled migrants’. This term ‘smuggled migrants’ stigmatises migrants as criminals, and, like other human rights groups, we at GAATW prefer to talk about ‘migrants’ or ‘migrants in smuggling situations’.

There is an internationally agreed definition of the *event* of smuggling in the United Nations Smuggling Protocol. This may be slightly different from definitions that States adopt nationally:

Smuggling of Migrants - “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.”¹

Elements Key to the Smuggling Definition:

- **Securing the illegal entry of another person into a country**
- **When this is done for financial or other benefit**

Elements NOT in the Smuggling Definition:

- **Criminalisation of migrants.** (The Smuggling Protocol says migrants shall not become liable to criminal prosecution for being the 'object' of smuggling, though this does not prevent the State prosecuting them for other offences in domestic law.)²
- **Migrants' consent.** (Most people think consent is in the definition. This implies migrant guilt in breaking immigration laws. The Smuggling Protocol only assigns this guilt to the people who facilitate movement for profit.)

In addition to setting out this definition of smuggling, the Smuggling Protocol also requires States who are party to the Protocol to criminalise other actions: enabling illegal residence (Article 6,1,c) and activities surrounding the falsification of travel documents (Article 6,1,b).

DO MIGRANTS IN SMUGGLING SITUATIONS *REALLY* FACE ABUSES?

If you are used to working with trafficked persons or refugees, you are used to seeing these groups as migrants requiring special protection. Their human rights have been violated in a certain way, and this sets them apart from migrants whose rights have not been violated. The trafficked persons and refugees you are working with are due certain protections, and it may not be as obvious that other migrants are also experiencing violations and also require protection.

All migrants, regardless of their migration status have certain inalienable rights, as seen in international human rights, refugee and humanitarian law. The Smuggling Protocol not only states that none of these should be compromised in implementing anti-smuggling measures, but also explicitly preserves a handful of rights. A few of these are below, with added accounts of those rights being violated in smuggling situations by law enforcement officials. It is important to note that these and other rights may also be violated by migration facilitators.³

Violation of the right to life. “A 29-year-old Kurdish Iraqi died after four months in a coma, after being beaten by police at the Greek port of Igoumenitsa.”⁴

Violation of the right to assistance. “On 28 December 2008, it was reported that more than 300 boat people, on their way to Malaysia from Shapuri Dip, Bangladesh were thought to have drowned after Thai navy personnel denied entry to the boat as it attempted to land on the coast of Thailand. The [migrants], mainly Bangladeshis, and a few Burmese, had become lost after travelling for 45 days in

six boats. Those on board were originally destined for Malaysia and had not intended to land in Thailand but were forced to after they ran out of gas and food. The Thai navy sent two boats near Kuraburi, Thailand, with 180 and 108 people respectively, back to sea according to sources from Thailand and India.”⁵

Violation of the right to be protected from violence.

“We got arrested in Mwanza [Tanzania]. Police stopped us and started demanding money and hitting us with the butt of their guns before they had even arrested us. We paid them \$400.”⁶

On the other hand, not all people in smuggling situations have their human rights violated. It is important to respond practically to each situation. If a migrant’s rights have been violated, this should be addressed. If not, there is no need for special assistance but all migrants must be able to exercise all human rights and this may require some special programmes and attention by governments.

Migrants, like other people, can have a lot of control over their situations, making sure that they are getting as many of their rights met as possible, rights to food, to life, to protection from violence. Many are able to control when, where, how and with whom they travel – though increasingly migration management and restrictions are making choices limited.

IS THERE INTERNATIONAL LAW FOR SMUGGLING?

In the Preamble to the Smuggling Protocol, States are “Convinced of the need to provide migrants with humane treatment and full protection of their rights”, and are, “concerned that the smuggling of migrants can endanger the lives or security of the migrants involved”.

Migrant smuggling raises many different international law issues. Migrants in smuggling situations (and indeed facilitators) have rights arising from human rights and refugee law, as preserved in UN Convention on Transnational Organized Crime (UNTOC) and the Smuggling Protocol. States have many different legal obligations relevant to migrant smuggling, including those arising under refugee law, the law of the sea, human rights and UNTOC and the Smuggling Protocol.

States that ratify the Smuggling Protocol agree to cooperate to prevent and combat migrant smuggling, while protecting the rights of smuggled migrants. By ratifying the Protocol, States agree to enact laws criminalising “migrant smuggling” in their country, along with measures aimed at prevention, targeting fraudulent documents and the enabling of undocumented stay. In the Protocol, smuggling is seen as a crime against the State because its border is violated. Migrants are not considered victims of the crime – States are.

Many States (112, as of December 2011) have signed the Protocol, which has human rights protections in it. The protections in the Protocol are useful in advocating that signatory governments uphold *all* their commitments, not only the crime control elements but also the human rights ones. States Parties meet every two years at the UNTOC Conference of Parties in Vienna, Austria, to discuss how well they are upholding their obligations.

WHAT RIGHTS ARE IN THE UN SMUGGLING PROTOCOL?

Many people think that because States prohibit smuggling, they do not need to ensure human rights of people who have been smuggled. This is not the case.

Smuggled migrants have certain inalienable rights, irrespective of their legal status as migrants. These rights arise from human rights and refugee law, and are specifically preserved and even restated in the Smuggling Protocol. Further, the Smuggling Protocol requires that States take steps to ensure the protection of the rights of migrants in smuggling situations. Indeed the whole Protocol – including the obligation to criminalise smuggling – has to be read in light of its purpose: to prevent and combat migrant smuggling, while protecting the rights of smuggled migrants (Smuggling Protocol, Article 2).

Key rights preserved in the Smuggling Protocol include the following:

1. **The right to life** (International Covenant on Civil and Political Rights (ICCPR) Article 6(1), restated in Smuggling Protocol Article 16,1) can be interpreted as something States need to *positively and actively* provide. In addition to being reflected in the UNODC Model Law on Smuggling of Migrants, the UN Human Rights Committee has said that this right should include provision of emergency medical care.⁷ This is in addition to government officials not directly or indirectly causing deaths.
2. **The right not to be subjected to torture⁸ or other cruel, inhumane or degrading treatment or punishment⁹**

(Convention against Torture and ICCPR, restated in Smuggling Protocol Article 16,1): States must take measures, including passing legislation to protect people, regardless of immigration status, from this treatment.

3. **Non-refoulement** (Convention related to the Status of Refugees, Article 33,1, restated in Smuggling Protocol Article 19,1): It is not permissible to send a migrant back to a situation where they would face persecution. Sending, transit and receiving States must take “all appropriate measures to carry out migrant **return processes in an orderly manner and with due regard for the safety and dignity** of the person” (Article 18, 5).¹⁰

Further the Protocol requires States to take ‘appropriate measures’ regarding the following:¹¹

4. **Protect migrants from violence that may be inflicted on them, because they are in smuggling situations** (Article 16,2): Based on criminal justice and human rights standards, State measures should include emergency referrals and direct assistance with medical care, shelter, food, clothing, care for dependents, crisis counselling, information about legal rights, options and processes, and protection from intimidation during legal proceedings.¹²
5. **Assistance to persons whose lives or safety are endangered because they are in a smuggling situation** (Article 16,3): These measures are key: provision of physical security (for example by law enforcement personnel); access to emergency food, shelter and medical care; access to consular services; and legal advice.¹³
6. **Access to consular officials** (Vienna Convention on Consular Relations, Article 36, as restated in Smuggling Protocol, Article 16,5): State authorities must inform a migrant that they have a right to communicate with consular officials. If the migrant chooses

to take the opportunity, then consular officials should be free to communicate with nationals.

7. **During boat interdiction**, officials are required to, **“ensure the safety and humane treatment of the persons on board”** (Article 9). Article 14(1) further stipulates that States are required to **train immigration officials about “the humane treatment of migrants” and to “respect their rights”** as set out in the Protocol (whether on land, in the air or at sea). They must also cooperate with international organisations and civil society organisations to ensure proper training, including on “humane treatment”.¹⁴
8. In applying all these rights, States Parties have agreed to take into account the **special needs of women and children** (Article 16, 4), such as maternal care and Best Interest Determination for children. The Convention on the Rights of the Child, and the Committee on the Elimination of Discrimination Against Women, especially General Recommendation 26 on Women Migrant Workers, can be used in advocacy, holding States to obligations.
9. In applying all these rights, States Parties have agreed to **address root causes, strengthening socio-economic development and poverty-reduction** (Article 15, 3).¹⁵ States have to look at human rights, particularly economic and social rights, in sending countries. **States are thus committed to a broader approach than only law enforcement and border security.**
10. The Smuggling Protocol also has general references to human rights. Article 19 says States must make sure that carrying out responsibilities in the **Smuggling Protocol does not affect other rights obligations including refugee rights**: “Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”

11. Article 19(2) of the Smuggling Protocol protects against **discrimination**, saying the measures called for in the Protocol “shall be interpreted and applied in a way that is not discriminatory to persons [in smuggling situations]. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”¹⁶
12. The main convention UNTOC which holds the Smuggling Protocol also guarantees rights to **witness protection**, to **victim protection against retaliation**, to **access to compensation and restitution**, and for a **victim to have their views heard at appropriate stages of the criminal proceedings**.¹⁷

If only these few human rights and protective measures agreed to in the UNTOC Smuggling Protocol are realised for migrants in smuggling situations globally, their situation would be much improved.

WHY DOES THE GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN (GAATW) CARE ABOUT THIS ISSUE?

GAATW member organisations talk about the blurry lines between these categories on the ground, where a person's migration story includes both smuggling and trafficking, whether experienced at the same time or one after the other. GAATW members also struggle with smuggling in terms of misidentification. When authorities detain migrants, they do not always screen whether they might have been trafficked, but detain them as criminals, as 'smuggled', or as 'irregular' and then deport them before they have a chance to have their rights recognised.

If the human rights of people labelled as 'smuggled' are not recognised, it follows that some non-identified trafficked people are not either. We cannot ignore the anti-smuggling measures that are affecting the people with whom we work.

We also prioritise smuggling because the Smuggling Protocol sits in the same UN Convention as the Trafficking Protocol, and we see it receiving *much* less attention in terms of human rights, though a lot with regards to crime control.

RECOMMENDATIONS

We make the following recommendations to the human rights community:

- Facilitate wider understanding of the human rights obligations to which States Parties to the Smuggling Protocol must adhere;
- Document rights abuses against smuggled migrants, including those committed by the State, and assist those whose rights have been violated to seek remedies;
- Engage in discussions and the formulation of laws and policies on smuggling at national, regional and international levels, holding States Parties to the Smuggling Protocol accountable for their human rights commitments;
- Avoid describing smuggling in a way that implies criminality of migrants. The Smuggling Protocol does not criminalise migrants.

We make the following recommendations to States Parties to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air:

- Uphold the human rights obligations and duties elaborated in the UNTOC Smuggling Protocol;
- Train immigration officials and others such as law enforcement officers and social service providers about “the humane treatment of migrants” and to “respect their rights” as set out in the Smuggling Protocol (Article 14, 1);

- Establish appropriate identification mechanisms which enable authorities to accurately and rapidly identify trafficked persons and smuggled persons whose rights have been violated, and refer individuals to relevant social and legal assistance;
- Ensure that measures to protect migrants from violence and abuse include emergency referrals and direct assistance with medical care, shelter, food, clothing, care for dependents, crisis intervention counseling, and information about legal rights and options and legal processes. Measures should include protection during any legal proceeding from intimidation;¹⁸¹⁹
- Ensure that any detention of migrants is not arbitrary, meaning that it must be appropriate, necessary, proportionate and justifiable;
- Ensure that all migrants at any point of their journey have access to justice;
- Take the necessary steps to address the root causes of smuggling, including:
 - o Ensuring that individuals' social, economic, cultural, civil and political rights are upheld at all times and that efforts to reduce poverty are made;
 - o Increasing affordable and accessible avenues for legal migration.

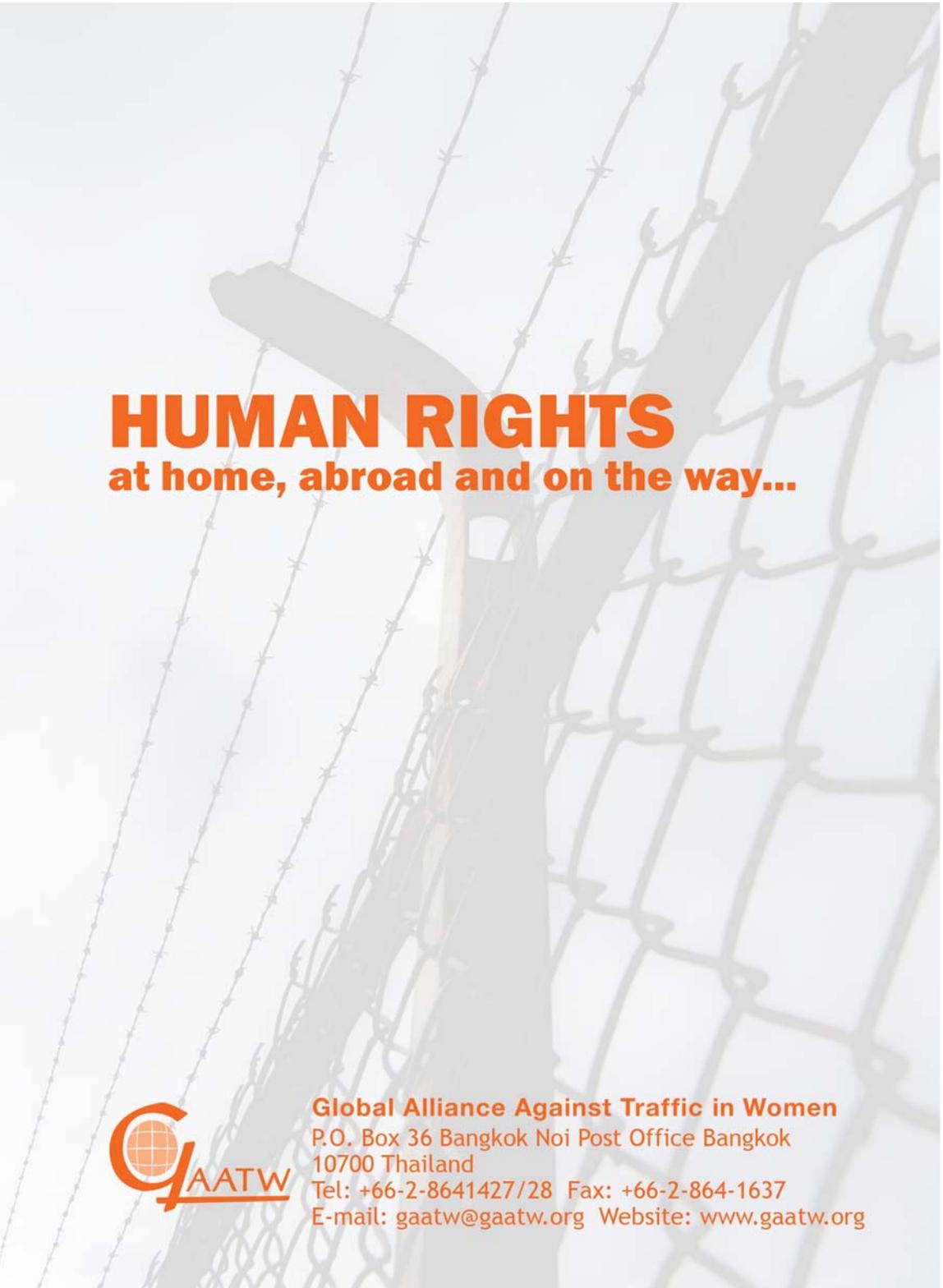
- ¹ Article 3 (a), Protocol against the Smuggling of Migrants by Land, Sea and Air (*hereafter Smuggling Protocol*), 15 November 2000, General Assembly Resolution 55/25, United Nations Convention against Transnational Organized Crime.
- ² Article 5. Smuggling Protocol. “Criminal liability of migrants. Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.”
- ³ See examples for instance in International Organization for Migration (2009). *In Pursuit of The Southern Dream: Victims of Necessity, Assessment of The Irregular Movement of Men From East Africa And The Horn to South Africa*. Geneva: IOM.
- ⁴ Fortress Europe (2009). “Sangue a Igoumenitsa: muore kurdo pestato dalla polizia greca,” 29 July 2009, Available at <http://fortresseurope.blogspot.com/2006/01/pestato-sangue-dalla-polizia-greca-come.html>.
- ⁵ National Coalition Government of the Union of Burma (NCGUB) (2008). *Burma Human Rights Yearbook 2008*, p. 281. Available at: http://www.burmalibrary.org/docs08/HRDU_YB-2008/pdf/trafficking.pdf.
- ⁶ 38 year-old Somali migrant at Port Elizabeth, South Africa,.Quoted in IOM (2009). *In Pursuit of The Southern Dream*, p. 70.
- ⁷ See UNODC (2010). *Model Law against the Smuggling of Migrants*. New York: UNODC., p. 66.
- ⁸ According to the Convention Against Torture, Article 1 “‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”
- ⁹ When for instance smugglers force migrants to travel in overcrowded truck or shipping containers for long periods without food, drink, toilets. Many people experience exhaustion, dehydration, malnutrition. For legal note on this language see UNODC (2010). *Ibid.*, p. 42-44.
- ¹⁰ Another commentator notes that use of safety beacons, training in search and rescue, and other measures are relevant. “Confronted with a similar issue along the U.S.-Mexico border, the U.S. Government initiated the Border Safety Initiative.

This has included the insertion of rescue beacons in deserted locations for migrants who become stranded and need emergency assistance, and training for officials in search and rescue.” (Guerette 2007 cited in David F, (2010) Migrant Smuggling and Human Rights: Notes from the field, *The Gazette*, 72, 3, Available at: <http://www.rcmp-grc.gc.ca/gazette/vol72n3/rights-droits5-eng.htm>

- ¹¹ The language is unspecific about what “appropriate measures” are. One commentary notes that “for the purposes of protection, advocates should make the argument that implementation of these measures should respect the object and purpose of the treaty, which includes protection of the rights of smuggled migrants.” International Council on Human Rights Policy (2010). *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*. Geneva: ICHRP, p. 140.
- ¹² United Nations Office for Drug Control and Crime Prevention [now UNODC] (1999). *Handbook on Justice for Victims*. New York: Center for International Criminal Justice, p. 17, 35.
- ¹³ UNODC (2010). *Ibid.*, p. 69.
- ¹⁴ Taylor-Nicholson notes that “While humane treatment seems a relatively weak standard and has been criticized by some commentators, implementing such a standard would be a great improvement on the current situation. It also underscores the humanity of smuggled migrants.” Taylor-Nicholson, E. (2011). *The Migrant Smuggling Protocol and Human Rights Protections*, Paper presented at GAATW-OHCHR Smuggling Roundtable, 20-22 June 2011, p. 5.
- ¹⁵ The Article calls on States to “promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.”
- ¹⁶ One commentary elaborates: “‘Smuggled’ is not a category in traditional anti-discrimination law, unlike citizenship, so this could potentially imply a new category. More likely, non-discrimination would require that the Protocol and the border strengthening measures contained therein are not used to deny smuggled migrants equal protection of the law within the jurisdiction in which they find themselves, access to essential medical services, and the right to be expelled only in accordance with the law and with a right of appeal.” Taylor-Nicholson, E. (2011). *Ibid.*, p. 3. For additional commentary on when States can and cannot apply differential rights to non-citizens, see also ICHRP (2010). *Ibid.*, p. 51.
- ¹⁷ Articles 24 and 25 UN Convention Against Transnational Organised Crime. Though in the case of the Smuggling Protocol it is unclear if ‘smuggled persons’ are victims.

¹⁸ See Taylor-Nicholson, E. (2011). *Ibid.*, p. 4, citing United Nations Office for Drug Control and Crime Prevention [now UNODC] (1999). *Ibid.*, p. 17, 35.

¹⁹ For legal note on this language, UNODC (2010). *Ibid.*, p. 69.



HUMAN RIGHTS

at home, abroad and on the way...



Global Alliance Against Traffic in Women

P.O. Box 36 Bangkok Noi Post Office Bangkok
10700 Thailand

Tel: +66-2-8641427/28 Fax: +66-2-864-1637

E-mail: gaatw@gaatw.org Website: www.gaatw.org