# Human Rights Council Resolution on the Protection of the human rights of migrants: study on the situation of migrants in transit

# Contribution made by UNODC/HTMSS

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## Introduction

In their journey towards peace, security and a safe livelihood, many migrants become victims of serious crimes such as trafficking in persons and other human rights violations and abuses, including in the transit country. Data show that these crimes impact disproportionately on migrant children and women.

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter the Trafficking Protocol) and the Protocols against the Smuggling of Migrants by Land, Sea and Air (hereafter the Smuggling of Migrants Protocol), both supplementing the United Nations Convention against Transnational Organized Crime, contain provisions to protect the human rights of trafficked persons and smuggled migrants within their territories, whether this is a country of origin, transit or destination.

As victims of a serious crime, trafficked persons are entitled to special assistance and protection measures. On the other hand, smuggled migrants shall not become liable to criminal prosecution for the fact of having been the object of the crime of smuggling and their rights shall be protected.

Following in this paper, the relevant provisions contained in the Trafficking in Persons and Smuggling of Migrants Protocols will be presented.

## Trafficking in Persons

The purpose of the Trafficking in persons Protocol, as defined in Article 2, is to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights; and to promote cooperation among States Parties in order to meet those objectives[[1]](#footnote-1).

The key pillars of intervention needed to ensure effective and comprehensive anti-trafficking response are: **prosecution, protection, prevention, national coordination and cooperation, and international cooperation and coordination**[[2]](#footnote-2). For each of this pillar there are set of obligations that fall upon States and apply to all victims or potential victims of trafficking within their territory, including migrants in transit who are actual or potential victims of trafficking. This include:

- to ensure that trafficking in person is criminalised according to the Trafficking in Persons Protocol, including with appropriate sanctions;

- to ensure the rights of victims, including the rights of victims and witness to protection before, during and after the prosecution of the crime, as well as effective collaboration between law enforcement and social welfare and civil society

- implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, in particular, the provision of appropriate housing; counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; medical, psychological and material assistance; and employment, educational and training opportunities[[3]](#footnote-3).

The **identification** of trafficked person is a prerequisite for their access to assistance and protection. It is therefore crucial for States to establish or improve victim identification processes and the corresponding referral mechanisms.

Furthermore, State have a **legal obligation to provide remedies to victims of trafficking** in situations where the State is responsible – either directly or indirectly – for their victimization. Even if the State is not directly involved in the trafficking process, States are bound by due diligence obligations and are required to provide remedies to victims of trafficking if they fail to take reasonable steps to prevent human trafficking, to investigate and prosecute traffickers and to assist and protect victims of trafficking.[[4]](#footnote-4)

Finally, States have a duty to protect victims of trafficking from further harm. This include upholding the principle of *non-refoulement*, which is an essential element of refugee law and a norm of customary international law, States must ensure that trafficked persons have access to fair and efficient asylum procedures and that they are not returned to States where they are at risk of persecution, torture, or other forms of ill-treatment[[5]](#footnote-5). If the decision to return a person who has been trafficked to their country exposes that person to re-victimisation or reprisals from traffickers then this may also violate the principle of *non-refoulemen[[6]](#footnote-6)t*.

## Smuggling of Migrants

The purpose of the Smuggling of Migrants Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, while **protecting the rights of smuggled migrants**[[7]](#footnote-7).

The Protocol does not intend to criminalise persons who merely assist others in their search to safety and a better life abroad. The interpretative Notes to the Protocol stress that the intention of the drafters of the Protocol was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations. It is for this reason, that the Protocol limits the definition of smuggling migrants and the criminalisation requirement under Article 6(1) to instances in which the offender seeks to obtain, directly or indirectly, a **financial or other material benefit**. Any act that facilitates the illegal entry or stay of another that is not done for that purpose does not fall within the scope of the Protocol.

Article 5 of the Protocol stipulates the principle of **non-criminalisation of smuggled migrants**, stating that “migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol”.

Smuggled migrants who are victims of human rights violation and have right to access remedies, regardless of their immigration status.

In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to **preserve and protect the rights of persons** who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the **right to life** and the **right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment**. This includes upholding the principle of *non-refoulment* which can only be guaranteed by ensuring access to fair and efficient asylum procedures.

States should also take appropriate measures to afford migrants **appropriate assistance and protection against violence** that may be inflicted upon them, whether by individuals or groups, by reason of being the object of the crime of smuggling of migrants. This includes special protection of witness in criminal procedures involving organised crime, including taking into account the special needs of women and children.

## Conclusions

The Trafficking in Persons and Smuggling of Migrants Protocols are criminal justice responses to organised crimes and their scope is to prosecute criminals while restoring, to the extent possible, the *status quo ante* for the people object of the crimes. Both instruments contain a “saving clause” reiterating that States and individuals are still bound by their rights and obligations 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.

States are bound by International Human Rights Law to respect, protect and fulfil the human rights of people within their territory *without discrimination*. Victims of trafficking and smuggled migrants, especially those who have been strained by a life-risking journey, are often vulnerable to abuses and violence and therefore in more urgent need of protection and assistance.

Migrants face different types of violence in countries of transit. Migrants in regular or irregular situations, may experience violence in different contexts. Lack of avenues for migrants to undertake safe work makes many vulnerable to exploitative work conditions even including violence in the workplace, which they have little recourse to escape from. Furthermore, where migrants are not effectively integrated into communities, racism, discrimination and intolerance may flourish and manifest in violence against minority groups including migrants and their families. Xenophobia may result in hate crimes perpetrated against marginalized groups.[[8]](#footnote-8)

A human rights based approach that puts emphasis to protection measures could also enhance the criminal justice response to the crimes of trafficking in persons and smuggling of migrants by for example, encouraging co-operation of the smuggled migrants with regard to the detection, investigation and prosecution of smugglers.

1. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter the Trafficking Protocol), Article 2 [↑](#footnote-ref-1)
2. UNODC International Framework for Action to Implement the Trafficking in Persons Protocol [↑](#footnote-ref-2)
3. Article 6.3, Trafficking Protocol. [↑](#footnote-ref-3)
4. While recourse to such remedies is rarely had, the European Court of Human Rights has repeatedly held that article 4 of the European Convention on Human Rights, which proscribes slavery, servitude and forced labour, gives rise to a positive obligation to protect victims, or potential victims, of human trafficking: *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: ECtHR, 7 January 2010*;* *C.N. v. the United Kingdom*, Application no. 4239/08, Council of Europe: ECtHR, 13 November 2012. [↑](#footnote-ref-4)
5. Article 14, Trafficking Protocol. [↑](#footnote-ref-5)
6. See UNODC Trafficking in Persons Case Law Database, <https://www.unodc.org/cld/index.jspx>. [↑](#footnote-ref-6)
7. Article 2 Smuggling of Migrants Protocol. [↑](#footnote-ref-7)
8. UNODC, Combating violence against migrants Criminal justice measures to prevent, investigate, prosecute and punish violence against migrants, migrant workers and their families and to protect victims. [↑](#footnote-ref-8)