



Global Alliance Against Traffic in Women



## THE GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN (GAATW) IN COLLABORATION WITH THE UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR)

### SMUGGLING ROUNDTABLE MEETING REPORT 20-22 JUNE 2011, BANGKOK, THAILAND

#### OVERVIEW

In the past year, Northern governments facing public outcry at perceived influxes of migrants have intensified bi- and multi-lateral discussions on ‘mixed-migration’ and smuggling, including its intersects with trafficking. Increasingly smuggling and trafficking are seen as interdependent and often used interchangeably in discourse and policy. The human rights community is largely failing to address the impact of criminalizing anti-smuggling measures which often see States failing in their responsibilities to protect, promote and uphold human rights. This neglect has not just permitted a weakening of rights protections gained for trafficked persons, refugees and other protected migrants, but has the effect of creating an unacceptably weak ‘minimum human rights framework’ for all migrants. Governments have devised policies which address the prevention of migration and the narrowing of protection categories as symbiotic: spaces for refugees, trafficked persons and other migrants with special protections are reduced and increasing numbers of migrants are sorted into the ‘irregular’ category.

The GAATW and OHCHR Asia-Pacific Smuggling Roundtable brought together governmental, inter-governmental and non-governmental representatives to discuss current anti-smuggling measures and developments.

#### KEY OBSERVATIONS AND RECOMMENDATIONS

- Rights protections for smuggled migrants are accorded within the Smuggling Protocol but have yet to be enumerated and developed, through soft law, unlike the Human Trafficking Protocol;
- The human rights community has not significantly engaged in building a consensus towards a rights-based approach to anti-smuggling;
- There are serious protection gaps for migrants who experience abuses within smuggling and who do not fit existing State protection criteria;
- Migration deterrence measures often cause or aggravate rights violations;
- Anti-smuggling measures turn the administrative offense of not filling out correct papers into a criminal offense with often disproportional punishment.

#### Recommendations to the High Commissioner for Human Rights

- Seek to develop a rights-based framework for implementing the Smuggling Protocol through the development and adoption of a similarly groundbreaking text as the Recommended Principles and Guidelines on Human Rights and Human Trafficking (OHCHR: 2002<sup>1</sup>);

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<sup>1</sup> The Recommended Principles and Guidelines on Human Rights and Human Trafficking were submitted in addendum to the 2002 annual report of the High Commissioner for Human Rights to the Economic and Social Council (E/2002/68/Add.1) with the aim of providing “practical, rights-based policy guidance [...] and to] promote and facilitate the integration of a human rights perspective international, regional and international anti-trafficking laws, policies and interventions” (OHCHR: 2002: i).



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- Research and document, with recommendations to States, the harmful effects of anti-smuggling measures when criminalization and detention are used as migration deterrence mechanisms;
- Facilitate wider understanding of the human rights implications of the Smuggling Protocol;
- Call for the integration of human rights into regional consultative processes, specifically the Bali Process, where intergovernmental negotiations on smuggling and trafficking ignore rights obligations.

### **Recommendations to civil society**

- Conduct an evaluation of the Bali Process, researching in particular accountability mechanisms in relation to rights protections;
- Invigorate a network of migrant rights groups to engage in discussions on the Smuggling Protocol at crime control fora;
- Engage with the new Special Rapporteur on the Human Rights of Migrants advocating for a research focus on criminalization;
- Document rights abuses against smuggled migrants, highlighting the role of the State in such abuses.

### **MEETING REPORT**

#### **PRESENTATIONS**

**Ms Rebecca Napier-Moore** (Research Programme Officer, GAATW): Welcome, Explanation of Chatham House Rule, Presentation of Smuggling Cases, Review of Key Questions and Rationale

**Mr Homayoun Alizadeh** (Regional Representative for South-East Asia, OHCHR) and **Hannah Wu** (Deputy Head of Office for South-East Asia, OHCHR): Introduction to the UN Human Rights Framework

**Mr Wanchai Roojanawong** (Public Prosecutor, Deputy Director General of International Affairs, Thailand Office of the Attorney General): Smuggling and Trafficking Cases in Thailand

**Mr Amir bin Nasruddin** (Senior Legal Advisor, Ministry of Home Affairs): Implementation of the Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007: The new smuggling addition and intersections with anti-trafficking work

**Ms Margaret Akullo** (UNODC East Asia and the Pacific Regional Office): When is a Smuggled Person a Victim?

**Ms Eleanor Taylor-Nicholson** (Independent): Smuggling and Human Rights: Protocol and Practice

**Ms Sophie Nonnenmacher** (Regional Policy and Liaison Officer, IOM): Global Governance of Migration including Migrant Smuggling

**Ms Yvonne Carroll** (Political & Economic Section, Australian Embassy Bangkok): The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime - working at the regional level to combat people smuggling and human trafficking



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**Mr Phil Robertson** (Deputy Director Asia Division, Human Rights Watch): Transit Countries' Role in Blocking Smuggling Routes

**Ms Pia Oberoi** (Migration Advisor, OHCHR): A Look at the Impact of the Human Rights Framework on Smuggling and Anti-Smuggling, and Vice Versa

**Mr Robert Larsson and Mr. Thomas Vargas** (UNHCR Regional Protection Hub for the Asia-Pacific Bangkok, UNHCR): Protection Challenges: Addressing Smuggling and Mixed Movements in the Asia-Pacific

**Ms Jackie Pollock** (Director, MAP Foundation): Smuggling: Necessary and Ubiquitous

**Ms Anne Gallagher** (Independent) Challenges and Opportunities of the International Legal Framework

**Mr Don Flynn** (Director, Migrant Rights Network): Addressing the Practical Impacts of the Smuggling Framework

**Group Discussion:** How Civil Society Organisations can Work with Different Actors through Research and Advocacy to Ensure Rights Protections

## SUMMARY OF DISCUSSIONS

The Roundtable operated under Chatham House anonymity rules and therefore the notes below are a summary interpretation of the three days' discussions. Participants' comments have been anonymised and grouped thematically. None of the comments cited are representative of all participants' views, rather of individuals or sub-groups of participants.

The roundtable was facilitated with the following questions at its core:

1. How can we compare smuggling and trafficking?
2. When can smuggled migrants seek remedy?
3. What changes, in practice, when migration is criminalized?
4. How are global governance models changing?
5. What is the future for anti-smuggling measures?

The following is a summary of key points from discussions which took place around these questions. Obviously within the scope of this brief meeting, none of these issues were covered exhaustively but there was general consensus that the roundtable provided a great launch pad for further discussions in this regard.

## 1 COMPARING SMUGGLING AND TRAFFICKING

### Intersections between the smuggling and trafficking protocols

- It was noted that when discussions for the UN Convention against Transnational Organised Crime began, smuggling and trafficking were used interchangeably. Through the drafting process it became clear that two different concerns of states were being discussed and distinctions were made accordingly resulting in two different protocols.
- Although many of the same concerns relate to both smuggling and trafficking, participants noted that States have found the distinction highly useful in practice,



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enabling them to treat some migrants as victims and others as criminals, according to a number of external factors.

- It was noted that whilst the inter-agency group established at the time of the Protocol negotiations advocated for some level of rights for smuggled migrants through the Savings Clause in the Smuggling Protocol, human trafficking occupied most NGOs and IGOs' time.

### ***Key distinctions discussed by participants***

*Trafficking protocol:* offers protection to victims, provides for victims' cooperation in legal proceedings, offers victim support, exploitation is a key element, can be domestic and cross border, there must be three parties to the crime, the victim not liable to criminal prosecution, victims can access protection and support, a 'typical' victim is a woman or child considered vulnerable to abuse of her rights.

*Smuggling Protocol:* focuses on prevention of movement, places an emphasis on adequate documentation, focuses on the prosecution of smugglers, justifies deportations, can only be cross border, only two parties are required, seen as commercial contract between two parties, fails to adequately address victims rights, victims are liable to criminal prosecution without support, a 'typical' victim is a man who is considered strong enough to protect himself from rights violations.

### **Appeal of the 'smuggling paradigm' and possible pitfalls**

- Smuggling was considered as a helpful distraction to States from the main question 'what are the rights of people not lawfully within the country?';
- It was suggested that the 'smuggling paradigm' had been defined by governments, serving their interests rather than reflecting a migrant-centred perspective;
- Participants discussed how states need migrants and yet also do not wish to be seen as welcoming migrants which complicates 'migration management': migration responses often involve offsetting public relations threats while addressing the realities of labour markets which depend upon migrant labour;
- Some discussed the inadequacy of bureaucratic responses which seek to break down migration into 'digestible chunks': categories such as 'forced migration', 'economic migration', 'family migration', were thought not to reflect the fact that many migrants move through different categories throughout their journey (e.g. a person may be a refugee at the first border crossing and thereafter also in need of livelihood, thus an economic migrant), the smuggling category is another such label;
- Some noted how bureaucratic migration procedures can create the conditions and incentives for migrants to turn to smugglers. Arguing that the counter-smuggling paradigm could open up channels that lead to exploitation, including trafficking.
- Some participants saw that refugees often need to use smugglers to exit situations of persecution or distress.

## **2 SEEKING REMEDY FOR SMUGGLED MIGRANTS**

### **Protective categories for migrants and the human rights framework**

- *Aggravated smuggling:* The Smuggling Protocol suggests that states can establish aggravating circumstances to a smuggling situation, ones in which lives are in danger or persons are treated inhumanely. Participants noted that this provision has been useful to States as a means of applying greater penalties to the smuggler who endangers lives, rather than creating a new category of victim. It was agreed that there seems to be no inherent human rights 'added value' in using this terminology. From a human rights perspective it was therefore felt to be more effective to draw on international human rights law and the protections therein;



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- *Trafficking*: Participants considered the possibilities of broadening the Human Trafficking Protocol to include smuggled migrants who've experienced serious rights violations but were concerned that this would either weaken those protections gained or victimize migrants who might prefer to seek more empowering protection frameworks;
- The Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (MWC), the Universal Periodic Review Process and the UN Special Procedures were highlighted as channels for raising rights violations against smuggled migrants.
- The MWC was critiqued for its weak ratification status particularly in South East Asia where ratifications of human rights' instruments were cited as generally low, including the Statelessness and Refugee Conventions.
- Some participants suggested that a way forward in relation to advocacy might be to pose key questions to States in relation to their rights obligations: Are States allowed to send boats back? Who is responsible for the consequences? How does international refugee law apply? Is discrimination against certain groups and certain nationals in policy permissible?
- Participants expressed concern that the smuggling paradigm might be used to create norms which could undermine human rights principles and suggested the human rights community should ensure such a dilution of human rights does not take place.

### 3. CRIMINALISATION OF MIGRATION

#### Causes and consequences of criminalization

- Some participants noted that States can live with trafficking, but not with migrant smuggling, which sees state sovereignty called into question and resulting punishments which are disproportionately severe;
- Others suggested contrastingly that as smuggled people clearly have intentions to enter another country through undocumented channels, they are therefore seen as a security risk by States and action taken to address this is correspondingly severe;
- Some anti-smuggling measures criminalize smugglers, with an additional stated aim to protect smuggled persons by doing so. Participants questioned the link between the criminalization of smuggling and the protection of smuggled persons;
- The negative impact of criminalization was discussed: for example, when smugglers and smuggling routes are obstructed it becomes more expensive for migrants to move, movement becomes harder, so more expensive, and new routes are more dangerous. This places migrants in debt and makes them more vulnerable to exploitation.
- Many participants repeatedly emphasized that criminalization fails to recognise migrants as human beings, who make rational choices about their futures like all human beings. By ignoring migrants' rational motivations for movement and their link to realities of global labour markets, States are not only failing in their responsibility to protect migrants, but also failing in their objectives to prevent movement.
- Participants noted that people choose smuggling as an easier, cheaper, more efficient and often less rights violating means of movement from one country to another than the legal avenues which might be available to them.
- Some participants felt that many migrants have no choice but to leave their country of origin, the only choice is how to do so - the example was given of those leaving Burma who face starvation, extreme poverty, and violence;

### 4 GLOBAL GOVERNANCE OF MIGRATION

#### The Bali Process

- The main motivation guiding the Bali Process at the present time was suggested as States seeking to disrupt smuggling routes and businesses in the region.
- It was noted that the Bali Process includes 40 member states, is co-chaired by Australia and Indonesia with representation from IOM and UNHCR. It is a multi-lateral policy forum on smuggling and trafficking, which seeks to address transnational crime regionally.
- The Bali Process is very ad-hoc, informal, flexible and has no formal monitoring and evaluation systems nor many official documents which can be made publically available.
- Recently the Bali Process has become more active and established an ad-hoc committee to address pertinent issues including protection and resettlement as well as reintegration of asylum seekers.
- At the 4th Bali Conference in March 2011, Ministers agreed to establish a regional cooperation framework based on cooperation and burden sharing including recognition of protections for migrants in the region. Recent bi- and sub-regional agreements have also been realized through the Bali Process;
- It was noted that through the Bali Process, Governments are gradually realizing that border restrictions alone within South-East Asia will not prevent undocumented migration. Governments are looking to development and root causes.
- It was felt that there is little place for human rights protections within the Bali Process instead the lowest common denominator of rights protections is being sought by some governments through regional protection instruments.
- Some participants concluded that along side the Bali process, ASEAN needs a strong instrument on Migrant Workers, as a rights based 'complementary process' to the Bali Process;

#### **Destination-Transit bilateral negotiations**

- The trend of destination countries persuading transit countries to prevent movements was cited as worrying, especially as transit countries including Indonesia, Malaysia and Thailand, have questionable human rights records in relation to documented and undocumented migrants.
- Many transit countries in the region (with Thailand and the Philippines cited as exceptions), have poor or non-existent screening systems for trafficking in persons, only two states have domestic mechanisms for resettlement determination;

## **5 THE FUTURE FOR ANTI-SMUGGLING**

#### **UN agencies roles in relation to smuggling**

- It was noted that there is no UN agency leading on migration, different agencies tackle issues in different fora, including: the Global Forum on Migration and Development, as well as regional processes and the Global Migration Group is seen as an important body for partnership in this area;
- Participants noted that states are reluctant to cede powers to a supra-national body;
- Some stated that as the Smuggling Protocol addresses crime including many features on migration management - cooperation, intelligence, inspection, detection of fraudulent documents. Smuggling consequently cuts across many agency mandates - not just the UNODC;
- It was felt that much debate on irregular migration takes place regionally or bilaterally therefore outside of international agencies' remit.

#### **The role of the human rights advocates in relation to smuggling**

- Some advised that advocates must accept that States will not open their borders. Advocates should try to work within the parameters of the current model, whilst still retaining long term commitments to adjusting the current model;



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- Some participants observed that, for migrant rights groups, smuggling is a small aspect of migration with difficult entry points due to smuggling's placement in criminal laws, which was why there has been little involvement, yet they noted the ramifications for all migrants due to criminalisation are large;
- Participants discussed the lack of engagement on the part of the human rights community in building a consensus towards a rights-based approach to anti-smuggling;
- There was also concern that serious protection gaps for migrants, who experience abuses within the smuggling paradigm and who do not fit existing State protection criteria, are going undocumented and unaddressed;
- Further there was seen to be a lack of widespread understanding of the human rights implications of the Smuggling Protocol;
- Migrant rights groups were seen as a strong catalyst for greater rights protections of smuggled persons and participants felt that there should be greater engagement on their part in discussions on the Smuggling Protocol at crime control fora;