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DRAFT POLICY ON THE PREVENTION OF SMUGGLING OF MIGRANTS IN AFRICA

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CONTENTS

REV 2

ACKNOWLEDGEMENTS

FOREWORD

LIST OF ABBREVIATIONS AND ACRONYMS

- ACERWC   African Committee of Experts on the Rights and Welfare of the Child

- ACRWC   African Charter on the Rights and Welfare of the Child

- ACHPR   African Charter on Human and Peoples' Rights

- ACHPR   African Commission on Human and Peoples' Rights

- AfCFTA   African Continental Free Trade Area

- AfDB   African Development Bank

- Africa CDC   Africa Centres for Disease Control and Prevention

- AU   African Union

- AUBGS   AU Border Governance Strategy

- AUBP   AU Border Program

- AUC   African Union Commission

- AU-HoAI Migrants   AU Horn of Africa Initiative on Human Trafficking and Smuggling of

- CISSA   Committee on Intelligence and Security Services in Africa

- CRC   Convention on the Rights of the Child

- COVID-19   Coronavirus Pandemic

- ENACT crime   Enhancing Africa's response to transnational organized

- EU   European Union

- GCC   Gulf Cooperation Council

- GCM   Global Compact for Safe Orderly and Regular Migration

- ICMPD   International Centre for Migration Policy Development

- IDPs   Internally Displaced Persons

- IGAD   Intergovernmental Agency on Development

- ILO   International Labor Organization

- INTERPOL   International Police Organization

- IOM   International Organization for Migration

- ISCMs   Inter-State Consultation Mechanisms on Migration

- JLMP   Joint Labour Migration Programme

- LMIS   Labour Market Information System (LMIS)

- MIDCAS   Migration Dialogue for Central African States

- MIDCOM   Migration Dialogue from the Common Market for Eastern and Southern Africa Member States [formerly known as the COMESA – RCP]

- MIDSA   Migration Dialogue for Southern Africa

- MIDWA   Migration Dialogue for West Africa

- MLA   Mutual Legal Assistance

- MPFA   Migration Policy Framework for Africa

- NHRIs   National Human Rights Institutions

- PAFOM   Pan-African Forum on Migration [formerly Intra-Regional Forum on Migration in Africa]

- PHEIC   Public Health Emergency of International Concern

- RCPs   Regional Consultative Processes on Migration

- RECs   Regional Economic Communities

- ROCK   Regional Operation Centre Khartoum

- SDGs   Sustainable Development Goals

- SOM   Smuggling of Migrants

- SOM Protocol: Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

- STC   Specialized Technical Committee

- TIP   Trafficking in Persons

- TIP Protocol   Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

- TOC   Transnational Organized Crime

- UN   United Nations

- UNAIDS   Joint United Nations Programme on HIV/AIDS

- UNFPA   United Nations Population Fund

- UNHCR   United Nations High Commission for Refugees

- UNHRC   United Nations Human Rights Council

- UNCTOC   United Nations Convention against Transnational Organized Crime

- UNODC   United Nations Office on Drug and Crime

- UN Women   United Nations Entity for Gender Equality and the Empowerment of Women

DEFINITION OF KEY TERMS

Smuggling of Migrants: Article 3(a) of the UN Smuggling of Migrants Protocol states: Smuggling of migrants shall mean 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. **Trafficking in Persons**: Article 3(a) of the UN Trafficking in Persons Protocol defines human trafficking: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include States to address, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs".

The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking persons" even if this does not involve any of the means set forth in subparagraph (a) of this article - Article 3(c).

Child: shall mean every human being below the age of 18 years - ACRWC (Article 2) & CRC (Article 1).[1]

Gender: means the differences between people within and between cultures that are socially and culturally constructed and change over time. These differences are reflected in roles, responsibilities, access to resources, constraints, opportunities, needs, perceptions, views, etc. Gender is not a synonym for women, but considers both women and men and their interdependent relationships.[2]

Victim of Crime: Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omission that are in violation of criminal laws operative within member states, including those laws prescribing criminal abuse of power, - UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (1985) Para (1)

A person may be considered a victim under this declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victims in distress or to prevent victimization, Para 2.

Forced Labor: According to Article 2.1 of the ILO Forced Labor Convention No.29 (1930), the term "forced or compulsory labor" shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. The Abolition of Forced Labor Convention (No. 105), 1957 further specifies state-imposed forced labor.

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[1] See also similar definition of a child in Article 3(d) of the UN Protocol on Trafficking in Person

[2] Caroline Moser (1993). Gender Planning and Development: Theory, Practice and Training. Routledge, London

Slavery: Article 1 of the UN Slavery Convention (1926) states - slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

According to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, n. 226 (1956) institutions and practices, such as debt bondage, serfdom, forced marriage, exploitation of children should be abolished, whether or not covered by the definition of slavery contained in Article 1 of the Slavery Convention (1926). The prohibition of slavery and servitude is absolute and non-derogable. Its prohibition has attained *jus cogens* status and constitutes an obligation *erga omnes*.
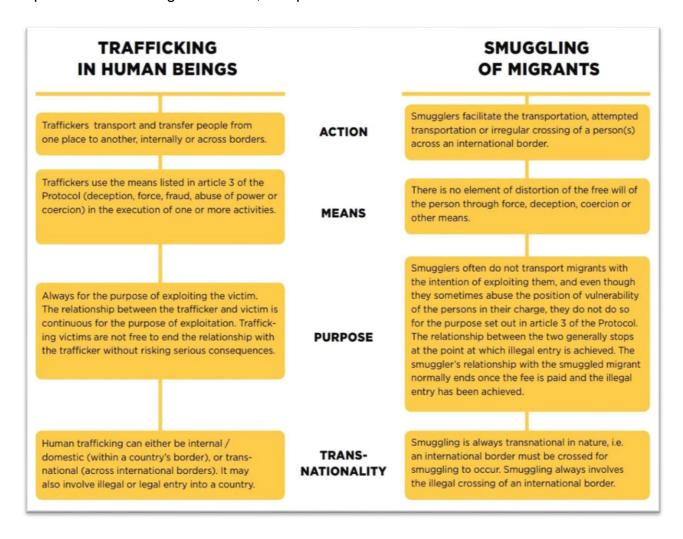
EXECUTIVE SUMMARY

CHAPTER 1: INTRODUCTION

Article 3(a) of the UN Smuggling of Migrants Protocol defines the 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 migrant smuggling is a crime against a state, it is not in itself a human rights violation, but the offence may be aggravated when it is perpetrated in a way that endangers the lives or safety, or entails the ill-treatment of migrants.

As depicted in the table below, there are some fundamental differences between the smuggling of migrants and trafficking in human beings. These differences are important as they have implications on the legislations for, and prosecution of the two crimes.

TRAFFICKING IN HUMAN BEINGS		SMUGGLING OF MIGRANTS
Traffickers transport and transfer people from one place to another, internally or across borders.	ACTION	Smugglers facilitate the transportation, attempted transportation or irregular crossing of a person(s) across an international border.
Traffickers use the means listed in article 3 of the Protocol (deception, force, fraud, abuse of power or coercion) in the execution of one or more activities.	MEANS	There is no element of distortion of the free will of the person through force, deception, coercion or other means.
Always for the purpose of exploiting the victim. The relationship between the trafficker and victim is continuous for the purpose of exploitation. Trafficking victims are not free to end the relationship with the trafficker without risking serious consequences.	PURPOSE	Smugglers often do not transport migrants with the intention of exploiting them, and even though they sometimes abuse the position of vulnerability of the persons in their charge, they do not do so for the purpose set out in article 3 of the Protocol. The relationship between the two generally stops at the point at which illegal entry is achieved. The smuggler's relationship with the smuggled migrant normally ends once the fee is paid and the illegal entry has been achieved.
Human trafficking can either be internal / domestic (within a country's border), or trans-national (across international borders). It may also involve illegal or legal entry into a country.	TRANS-NATIONALITY	Smuggling is always transnational in nature, i.e. an international border must be crossed for smuggling to occur. Smuggling always involves the illegal crossing of an international border.

Effective action to prevent smuggling of migrants requires a regional approach and co-operation based on the exchange of information as well as other approaches such as socio-economic measures at a national, regional and continental level. In order to address the smuggling of migrants, the Commission urges strengthened cooperation among Member States and RECs in order to address the root causes of migrant smuggling, responses proposed, rationale and

justification for the development of policy as well as some guiding principles to address the question of smuggling of persons in Africa.

1. Background, Rationale and Justification

1.1. The causes and magnitude of migrant smuggling in Africa

Most migration within the African continent (including persons in temporary or itinerant migratory situations) represents four out of five African migrants, that is, more than 80% of African migrants who remain on the continent in particular Africa South of the Sahara.[3] However, Africa's migratory profile is fast changing. Most of the continent's migrants (70%)[4] are adolescents and young adults between the ages of 15 and 40. Most are males, but increasingly more women are migrating independently, thereby changing the structure and dynamics of migration on the continent. Most of these young men and women are educated and economically active with the propensity to migrate for work, study and family reunification. Moreover, a globalized economy, which fosters demand for cheap labor and offers images of a better life have added the impetus to migrate. Natural disasters, environmental degradation, unemployment, human rights violations, persecution, gender inequalities, political instability and the pursuit for a better life have all created demand for migration that far exceeds the existing possibilities for safe and regular migration.

Gendered norms play an important role in migration decisions. Girls can face more disadvantages than boys in their countries of departure, such as a lack of access to quality education, limited or lack of access to Sexual Reproductive Health Rights services, risk of child marriage and gender-based violence. When on the move, the risk to girls is greatly exacerbated. They are more likely to be deported, exploited including forced labor, sexual exploitation and domestic abuse, may be detained for longer with less access to basic services, and are more likely to have started their journey alone. All of these are risks in themselves but also increase girls' risks as well

As the propensity to migrate increases, the opportunities offered by states for safe and regular migration pathways are limited. Therefore, some migrants resort to dangerous irregular routes and techniques, finding no other option than to seek the services of smugglers including, often after payment of huge sums of money or using "Go now, pay later" schemes offered by smugglers. In some cases, however, the financial component is not part of the transaction. This involves support to move from point A to point B without financial gain.[5]

Trends in global patterns of migrant smuggling are difficult to assess. A range of factors such as the lack of regular migration channels, high visa fees, the often lengthy bureaucratic procedures and increasingly restrictive entry requirements, coupled with a demand for the various contributions migrants make and services they provide, may create the conditions and incentives for migrants to engage the services of smugglers. In some cases smugglers subject

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[3] AU. 2016, *Evaluation Report of the AU Migration Policy Framework*, www.au.int
[4] Min-Harris, C., xxx, Youth Migration and Poverty in Sub-Saharan Africa: Empowering the Rural Youth, Tropical Review Digest: Human Rights in Sub-Saharan Africa,
https://www.du.edu/korbel/hrhw/researchdigest/africa/YouthMigration.pdf
[5] See report from the former special rapporteur on the human rights of migrants on this issue (OHCHR)

migrants, and in particular migrant women and girls to various human rights violations, including sexual and gender-based violence (SGBV), forced labor and sexual slavery.

Migrant smuggling, which defined in international law6, refers to the procurement of, and the irregular entry of a person into a State of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit. Migrant smuggling is a crime against a state; it is not in itself a human rights violation but the offence may be aggravated when it is perpetrated in a way that endangers the lives or safety, or entails ill-treatment of migrants. Indeed, migrant smugglers often exploit the vulnerability of migrants, resulting in significant profits for their criminal networks. It may be in the interest of the smugglers that the migrants get to the next point in their journey, so that more money can be made and more migrants to smuggle, it may also be the case that the smugglers are community members with close ties with the people they smuggle. Nevertheless, because of the unequal power relationship, smuggled migrants are placed in vulnerable situation, may face coercion, gender-specific abuse, forced labor and sometimes extortion, resulting in high rates of fatality,[7] with women and girls particularly at risk of sexual abuse, economic exploitation and trafficking in persons.[8] This is because the irregular routes being used are hazardous; and the mode and conditions of means of transportation like rickety vehicles, boats and containers are such that migrants may suffocate and die.[9]

The business of migrant smuggling "functions essentially as an illegal travel industry with each contact being a link in the chain".[10] The policies on prevention and combating smuggling of migrants should take cognizance of the evolving nature of migrant smuggling as a profitable organized criminal venture, and its transnational nature involving different groups working in concert. These policies should also be cognizant of and responsive to the vulnerabilities and human rights abuses faced by migrants in the context, as well as the gender-specific risks of smuggling

It is noteworthy that there is often a grey line between smuggling and trafficking. What may start as a consensual arrangement (smuggling) may quickly turn to a situation where the migrant has little control. Often smugglers sell migrants to traffickers, and the smuggled turns into the trafficked.

In some cases, migrants may seek alternative, more dangerous paths which can increase risks of trafficking. Owing to COVID-19 related restrictions, migrant smugglers and human traffickers may also be inclined to take riskier routes in order to avoid checkpoints and medical checks,

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[6] See the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol), supplementing the United Nations Convention against Transnational Organized Crime (UNTOC).

[7] IOM's Missing Migrants Project tracks incidents involving migrants, including refugees and asylum seekers, who have died or gone missing in the process of migration towards an international destination. See https://missingmigrants.iom.int/

[8] A/74/235

[9] United Nations Office on Drugs and Crime (UNODC). (2018). Global Study on Smuggling of Migrants. New York: United Nations.

[10] ICMPD (2015). Migration is about People, Annual Report for 2015

increasing the risks for refugees and migrants.11Studies have also shown that, a large share of modern slavery can be traced to migration, the prevalence ratio of modern slavery in Africa stands at 7.6 per 1,000 people compared to other regions.12Migrant domestic workers in an irregular situation, face numerous challenges in accessing basic services such as health care, social protection and labor rights. Effective migration governance will strengthen prevention of smuggling and trafficking. According to the International Labor Organization (ILO), the African continent records the largest prevalence of children (between 5 and 17 years of age) in labor.

The outbreak of Covid-19 has affected the governance of human mobility as most countries resorted to migration management tools such as border closures and travel bans to contain the spread of the virus. More than ever before, public health considerations are now central to decisions on mobility. Covid-19 has temporarily slowed down migrants' movement due to border closures, followed by increased securitization - heavy military patrols, electronic, radar and related surveillance, etc. by some countries. However, land migration routes in Africa like the Horn of Africa to South Africa and from West Africa across the Sahel into Libya have remained active as smugglers made efforts to evade border closures with fatal consequences and deteriorating humanitarian conditions.[13] Migrants in detention camps, asylum seekers, refugees and IDP camps are already in vulnerable situations and may engage the services of smugglers to escape from humanitarian disaster, should the COVID-19 hit their camps. Further, the economic and health consequences of the pandemic could lead to large-scale outflows of irregular migrants. For instance, there are concerns that if the pandemic overwhelms the weak health systems of poorer states, this could trigger an increase of irregular (in many cases smuggler-assisted) migration to neighboring countries with stronger health systems, smugglers may offer 'COVID-19 escape route' packages, charging high prices to move desperate migrants across borders into countries where their access to healthcare is better.[14]

Thus, the consequences of the Covid-19 economic shutdown might increase the desire of people to migrate, and given the existing limited opportunity for regular migration, will increase the demand for the services of smugglers. On the other hand, border closures and related restrictions are leading smugglers to revert to more dangerous routes in harsher conditions, where migrants are exposed to increased risks of human rights violations such as SGBV and forced labor, as well as the risk of contracting the coronavirus.[15]

1.2. Responses to Migrant Smuggling

In the last 20 years, AU Member States have adopted a number of legal and policy instruments and initiatives in response to migrant smuggling. Key among them are:

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[11] See IFRC, supra note 4, at § 1.3. See also U.N. Secretary-General, Implementation of Resolution 2491 (2019), U.N. Doc. S/2020/876, ¶ 52 (Sept. 2, 2020)

[12] https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575540.pdf

[13] **COVID-19 impact on migrant smuggling and human trafficking**; **https://www.interpol.int/en/News-and-Events/News/2020/COVID-19-impact-on-migrant-smuggling-and-human-trafficking**

[14] Lucia Bird (2020). Smuggling in the time of COVID-19. The impact of the pandemic on human smuggling dynamics and migrant protection risks. Policy Brief by Global Initiative against Transnational Organized Crime, April 2020. https://globalinitiative.net/wp-content/uploads/2020/04/GIATOC-Policy-Brief-003-Smuggling-COVID-28Apr0930-proof-4.pdf

[15] United Nations, (2020). *Policy Brief: Covid-19 and People on the Move.* Version 1 [pdf] Available at: https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_people_on_the_move.pdf

The Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organized Crime which entered into force on 28 January 2003, provides a comprehensive legal and political framework for combating migrant smuggling. As of July 2020, the Protocol has 149 States Parties including 43 AU Member States.[16] Four (4) AU Member States are signatories, and are yet to ratify the Protocol, namely: Congo, Equatorial Guinea, Guinea Bissau and Uganda; while seven (7) have not acceded to the Protocol namely Chad, Comoros, Eritrea, Morocco, Somalia, South Sudan and Zimbabwe.[17]

The Global Compact for Safe, Orderly and Regular Migration (GCM) also provides a renewed commitment of states to counter-migrant smuggling and reinforcing the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organized Crime which entered into force on 28 January 2003. The GCM particularly envisages protection of migrants "[M]igrants shall not become liable to criminal prosecution for the fact of having been the object of smuggling, notwithstanding potential prosecution for other violations of national law".18 Further, under objectives 9 and 10 the GCM commits to strengthening the transnational response to smuggling of migrants and preventing, combatting and eradicating trafficking in persons in the context of international migration.

In 2009, in order to address the ever increasing challenges of forced migration, and building on the 1969 OAU Refugee Convention governing the specific aspects of refugee problems in Africa which provides the most comprehensive legal basis for refugee protection worldwide), the AU Member States adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (The Kampala Convention) which is the first legally binding document on internal displacement worldwide, as it imposes on states the obligation to protect and assist IDPs. The convention was welcomed as a new era for the protection of IDPs and other forced migrants, and created a legal framework to address the root causes of internal displacement, guarantee the human rights of IDPs and devise an early warning mechanism.

The Protocol to the African Economic Community (Abuja Treaty) Relating to Free Movement of Persons, Right of Residence and Right of Establishment which was adopted in 2018 is another important legal instrument for the management of mobility and facilitation of regular migration in Africa. As free movement progressively entails the expansion of regular migration channels, it is expected to reduce irregular migration and potentially some of the crimes associated with migrant smuggling. Migrant smuggling is driven by material gain, and removing barriers to movement reduces the value of smugglers' services, which may also be linked to other criminal activities, involving the exploitation of migrants.

In 2006, the AU adopted the Migration Policy Framework for Africa (MPFA) as the overarching continental approach to migration, and supports effective measures against migrant smuggling and human trafficking with recommended strategies to prevent and combat these two phenomena. The MPFA also serves as a guide to assist Member States and Regional

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[16] http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html

[17] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en#EndDec

[18] The criminalization of illegal entry should not be targeted solely on migrants but also smugglers those who actually commit the crime against the state by facilitating the illegal entry and penalize migrants, *see further* https://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-Thematic-Paper-Counter-Smuggling.pdfhttps://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-Thematic-Paper-Counter-Smuggling.pdf

Economic Communities (RECs) in formulating their own migration policies. However, the evaluation of the MPFA in 2016 revealed that only 54% (of Member States that responded) indicated that their national policies have been at least slightly influenced by the MPFA, while only 9% indicated that the national policies were entirely informed by the MPFA[19]. Also, most have very limited reference to migrant smuggling and the recommendations of the MPFA. The revised MPFA 2018-2030 and its implementation plan were adopted in 2018.

Many countries in Africa have extensive and porous borders as well as weak border management systems, with a number of borders still requiring demarcation. Uncontrolled and irregular migration undermines the concept of free movement, as it happens outside State control, often undermining the capacity of States to manage their own borders. The 2014 Niamey Convention aims to ensure efficient and effective integrated border management.

Similarly, in 2006, the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children was adopted by AU Member States at a Ministerial conference on Migration and Development in Tripoli, Libya, reflecting the high priority of the Member States to combat human trafficking. A similar policy document on smuggling of migrants was not adopted. However, this is not to say that the AU was not engaged with combating migrant smuggling. The AU Horn of Africa Initiative (AU-HoAI) on Human Trafficking and Smuggling of Migrants was formally launched in Khartoum, Sudan in October 2014. The broad objective of the AU-HoAI is to address human trafficking, smuggling of migrants and irregular migration flows within and from the Horn of Africa region as a common scourge that needs to be addressed collectively. Durable solutions for refugees and asylum seekers, and protection of internally displaced persons (IDPs) in protracted displacement are also addressed.

1.3. Rationale of the Development of Policy

In spite of the efforts and measures adopted by AU Member States, smuggling of migrants continues to expand with "increasing social, economic, environmental and political pressures on the continent, juxtaposed with increasingly restrictive migration regimes abroad pushing vulnerable migrants into the arms of international criminal networks who facilitate human trafficking and smuggling."[20] Most AU member states still face numerous challenges in the implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organized Crime, and in developing comprehensive responses. For instance, a recent study by Lucia Bird found that 22 African states (out of the 43 states parties) have criminalized the smuggling of migrants broadly as defined in the UN Smuggling Protocol, which requires that the intent of the smuggler must be to reap "financial or material benefit".[21] Some have included smuggling in human trafficking

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[19] Report of Evaluation of the 2006 Migration Policy Framework for Africa, 2017, p.35

[20] African Union (2019). Report of The Evaluation of the Implementation Status of The African Union's Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (2006) in Africa, p.34

[21] Lucia Bird (2020) Criminalization of Human Smuggling in Africa. Looking at the Law. ENACT, Issue 17 July 2020. https://enactafrica.org/research/policy-briefs/criminalisation-of-human-smuggling-in-africa-looking-at-the-law

laws, thereby confusing the two offences.[22] Moreover, Bird observes that human smuggling offences are typically enacted within immigration laws, which cuts the link between smuggling and organized crime, and could result in the criminalization of the migrant, rather than the smuggler.[23] She suggests that smuggling provisions should be separate from those relating to trafficking, and are best located within Penal code provisions.

Other challenges include, inter alia: inadequate legal and often absent gender-responsive policy frameworks; insufficient and non-disaggregated data, rendering the scale and nature of the crimes unknown; the limited cross-border collaboration between / among member states to combat the crime: the absence of cooperation among key stakeholders at the national, regional and local levels; insufficient awareness and understanding of the crimes; lack of human and financial resource capacity to effectively implement existing laws and policies; a lack of capacity to identify and provide gender-responsive protection and assistance services to address the needs and rights of smuggled migrants who have been subject to violence including sexual and gender-based violence, abuse, and exploitation; and, the need for targeted and tailored awareness-raising campaigns as a means of prevention.[24] There are limited capacities to prosecute smugglers (linked to limited ability to gather evidence), lack of intelligence, and focus on low level smugglers rather than high level and more dangerous groups. Also, challenges remain with regard to the ability of authorities making a distinction between trafficking and smuggling. Difficulties are also faced by some to actually address smuggling because it is deep rooted in the community, and is perceived as the only way to migrate, coupled with corruption by government officials and related enablers, which make smuggling very lucrative.

1.5. Justification of the Policy Document on SOM

Between 2016 and 2018, the African Union Commission evaluated the MPFA (2006) and the Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (2006) respectively. The evaluations identified policy and operational gaps in terms of continental and regional responses to address trafficking in persons and smuggling of migrants on the continent, including the lack of a continental policy or legal document (s) to address these crimes. Among the key recommendations of the Ouagadougou Action Plan is an urgent need for AU Member States and RECs to provide a solid policy and legal frameworks to prevent and counter the trafficking in persons and smuggling of human beings, including modern day slavery on the continent[25] by providing relevant continental policies and/ or legal frameworks on combating trafficking in persons and the smuggling of migrants respectively. On this issue, the revised MPFA (2018) tht ensued from the evaluation of the MPFA recommends the urgent need for AU Member States and RECs to provide a solid policy and legal framework to prevent and counter

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[22] Lucia Bird (2020) Human smuggling /Movement should be safe for migrants; not profitable for smugglers. ENACT 4 August 2020 **https://enactafrica.org/enact-observer/movement-should-be-safe-for-migrants-not-profitable-for-smugglers**

[23] Ibid

[24] `International Organization for Migration (2018).Trafficking in Human Beings and Smuggling of Migrants in ACP Countries: Key Challenges and Ways Forward Informing discussions of the ACP-EU Dialogue on Migration and Development; p.26

[25] African Union (2019). Report of The Evaluation of the Implementation Status of The African Union's Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (2006) in Africa, p.51

smuggling of human beings, by providing relevant continental policies and/or legal frameworks on combating the smuggling of migrants.[26]

This continental policy on prevention and combating smuggling of migrants is based on the aspirations of the African Union's Agenda 2063 - "The Africa We Want", the respect for human rights and dignity of all African as enshrined in the continent's human rights instruments, and the continent's Protocol on free movement of persons. It is also based on the implementation of the Agenda 2030 SDGs, the GCM and the MPFA. Above all, it is based on the objectives of the Palermo protocols on Smuggling of Migrants and Trafficking in Persons supplementing the TOC Convention, and it rests on the Universal Declaration of Human Rights and the core international human rights instruments.

1.6 Guiding Principles

The AU Member States are determined to address migrant smuggling in all its forms and ramifications, and maintaining a holistic approach, including law enforcement and prevention measures. To this end, the continental policy on prevention and combating the smuggling of migrants will have the following interactive principles applicable to all aspects of responding to, and addressing the challenges of migrant smuggling: human rights-based; non-discrimination; child rights-based; gender responsive; evidence-based; cognizance of relevant AU legal instruments; comprehensive international approach; whole-of-government approach; and sustainability.

Human Rights: The human rights of all migrants regardless of their status should be at the core of all efforts to prevent and combat smuggling of migrants, and should take precedence over other considerations. It means that anti-smuggling of migrants policies should be normatively based on international human rights standards and operationally directed to promoting and protecting human rights. Response to migrant smuggling therefore, must be based on respect for human rights and protection of smuggled migrants; ensuring that anti-smuggling measures shall not adversely affect the rights and dignity of those who have been smuggled and of unaccompanied and separated children, IDPs, refugees and asylum seekers.[27] Moreover, in accordance with article 16 of the UN Smuggling Protocol, each State Party shall protect the rights of smuggled migrants as accorded under international law, including the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[28] Finally, a human rights approach must include a gender-based approach as gender-related discrimination is recognized as a violation of fundamental human rights.

Gender Responsive: The vulnerabilities and different experiences of smuggled migrants, especially women in respect of violations to which they are subjected must be acknowledged. Also, the differences in the impact of existing policies on men, women, boys and people with diverse gender identities girls should be acknowledged and corrected. A gender-responsive

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[26] https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english_revised_au_migration_policy_framework_for_africa.pdf

[27] The primacy of human rights

[28] Article 16, paragraph 1, UN Protocol on Smuggling of Migrants

approach should be applied when adopting and implementing anti-smuggling of migrants' measures, including the provision of gender-responsive services, such as essential services for victims of sexual and gender-based violence (SGBV)29. Anti-smuggling of migrants' policies, strategies and measures should address gender-specific discrimination and SGBV and empowerment. In addition, the promotion of gender equality and migrants, including women's and girls' empowerment through the development and implementation of gender-responsive national policies, including capacity building and information sharing, is an important part of preventing migrant smuggling.

Child Rights: All actions undertaken in relation to child victims and children at risk should be guided by human rights standards and by the principle of protection and respect for children's rights as set out in the African Charter on the Rights and Welfare of the Child; the UN Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography. Regardless of the status, child victims are entitled to special protection measures contained in the aforementioned legal instruments, and "in all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration"30 (article 4, ACRWC).

Principle of Non-Discrimination: The measures contained in the UN Protocol on Smuggling of Migrants should be interpreted and applied in a way that is not discriminatory to persons on the grounds that they are smuggled migrants. The interpretation and applications of those measures shall be consistent with internationally recognized principles of non-discrimination.31

AU legal instruments: Africa has experienced important migratory movements throughout its history, both voluntary and forced, which have contributed to its contemporary demographic landscape and the legal instruments adopted to address them. Notable (but not limited to) among these legal instruments with direct relevance to migration are: the Constitutive Act, ACHPR and its supplementing protocols, ACRWC, the 1969 OAU Convention Governing the Specific Aspects of Refugees Situation in Africa; the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention); the Protocol on African Continental Trade Area (AfCTA), and the Protocol relating to Free Movement of Persons, Right of Residence and Right of Establishment. Policies and strategies addressing smuggling of migrants should be guided by these legal instruments.

Comprehensive International Approach: Effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures to punish the smugglers and the need to provide migrants with humane treatment and full protection of their rights.32

Evidence-based: Policies and measures to address migrant smuggling should be developed and implemented based on sex-disaggregated data collection and research as well as regular monitoring and evaluation of the anti-smuggling response. These should be complemented with

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29 The development of such policies should be aligned to guidance provided by UN Women in its forthcoming Policies and Practice Guide to Gender-Responsive Implementation of the GCM

30 Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC).

31 Article 19, paragraph 2, UN Protocol on Smuggling of Migrants

32 Preamble to the UN Protocol on Smuggling of Migrants

reliable data on population movements in Africa to ensure a timely and well-targeted operational and policy response.

Coordinated and Integrated Approach: Smuggling of migrants requires that policies on a variety of issues are coordinated and consistent with the objective of preventing and combating migrant smuggling. Member States must ensure coordination among the following: the various agencies of government involved in anti-smuggling activities at the national level; the agencies of government and other stakeholders, including NGOs and national human rights institutions also at the national level; and the agencies of government across Member States.

Sustainability: A sustainable anti-smuggling response is one that endures over time and is able to adapt creatively to changing conditions. Sustainability refers to coherence of practices in both time and efficiency. There should be no critical dependencies, such as major external donor funding, the absence of which could easily collapse the system.

CHAPTER 2: ANALYSING PREVENTION OF SMUGGLING OF MIGRANTS IN AFRICA

Cross cutting Issues/Challenges
For the continental policy on the prevention and combating migrant smuggling to be meaningful and contribute to the desired outcome of significant reduction in cases of smuggling of migrants, six key cross-cutting issues need to be addressed - alignment of national migration policy with the MPFA, free movement of persons in Africa, knowledge and research, capacity building and monitoring and evaluation, as well as migration dialogue platforms.

a) National Migration Policies

This continental policy on prevention and combating the smuggling of migrants is part of, and supplements the MPFA. Its successful implementation should be anchored within the context of implementing the MPFA and gender-responsive national migration policies of AU Member States. In effect, in order for national migration policies to fully address migrant smuggling, they must be aligned to the MPFA and the Continental Policy on Prevention and Combating Smuggling of Migrants in Africa. A major cross-cutting issue therefore, is how the national migration policies take cognizance of the MPFA and address the issue of migrant smuggling, including from a gender perspective.

As observed from the responses of Member States in the report of the evaluation of the 2006 MPFA, only 54% indicated that their national policies have been at least slightly influenced by the MPFA, while only 9% indicated that the national policies were entirely informed by the MPFA.[33] Moreover, there are a few countries within Africa that have already developed and launched national migration policies, while some are currently at different stages of the process.[34] Most have very limited reference to migrant smuggling and the recommendations of the MPFA; and where provisions exist, they are limited in scope and have limited policy direction. In reality, few countries have developed policies dedicated to prevention and

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[33] Report of Evaluation of the 2006 Migration Policy Framework for Africa, 2017, p.35
[34] Ibid

combating the smuggling of migrants. Indeed, among the recommended strategies of the revised MPFA is for Member States to develop policies to combat migrant smuggling in consultation with relevant stakeholders, including international organizations, as well as civil society actors.[35]

In addition, it is imperative that national and regional migration policies are mainstreamed in national/regional development policies as a matter of course. As noted in the MPFA, "the management of migration is one of the most critical challenges for States this century, and will require well planned migration policies which are developed and implemented through a whole of government approach."[36] Linking national and regional migration policies to national/regional development policies with appropriate cross-referencing will facilitate and contribute to a whole government approach.

Thus, the AUC should ensure that Member States and RECs align their migration policies with the revised MPFA, and use the framework as a guiding tool in designing their own national and regional policies. This will guarantee coherence and harmonization of policies and actions on migration at national and regional levels.

b) Free Movement of Persons in Africa

The desk review undertaken in preparation of this policy document shows a correlation between reduced avenues for regular migration and increased demand for the services of smugglers. The reduced avenues are directly linked to the challenges of free movement of persons which include, the inability to secure national identification documents, entry visas, and tightening or enhanced border controls among others that are a prerequisite to allow access to formal and legal options for migration. For migrant women, access to official travel documents can be further difficult due to certain sex-specific discriminatory laws and practices that undermine the agency of migrant women. Criminal justice measures that wrongly or inadvertently target smuggled migrants coupled with policies that militarize borders and close down regular routes to migration make people more reliant on smugglers. More regular and safe routes would lessen the risks and harm experienced by migrants, reduce profit for migrant smugglers and make the illegal travel industry less attractive to any form of transnational organized crime.

In 2018, Africa took a bold step by putting in place a legal framework for the management of migration and mobility on the continent - the Protocol to the 1991 Treaty Establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment. The Protocol was first adopted at the January 2018 AU Summit and ceremonially adopted at the AU Extraordinary summit in Kigali in March 2108 during the adoption of the Protocol on the African Continental Free Trade Area (AfCTA).

Annexed to the Protocol is an Implementation Roadmap that takes cognizance of the variable geometry in terms of level of free movement in different regions of the continent. It covers the articles and the three main aspects of the Protocol – abolition of entry visas, residence and establishment with implementation commencing in 2018 upon adoption, signature and ratification of the Protocol. The implementation road map also makes provision for RECs to collaborate and advance the implementation of the protocol through agreement that will offer

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[35] Migration Policy Framework for Africa 2018-2030, p.27

[36] Migration Policy Framework for Africa 2018-2030, p.7

the same privileges accorded to citizens of countries within their respective RECs. This is a recognition of the different stages of the RECs in the establishment of the free movement regime. So far, only four (4) countries have ratified the Protocol and while a couple of the RECs have been discussing with each other about collaboration to advance implementation, not much progress has been made.

While the AUC facilitated and played a significant role in the development of the Protocol on Free Movement, the Commission needs to do more to promote its ratification and entry into force. The AUC must put in place adequate human and financial resources to drive and support the implementation process of the free movement regime on the continent, including the establishment of a free movement cluster within the Commission as well as the structure and secretariat that must be approved by the AU Assembly.

However, many AU Member States should be commended for having embarked on or intensified the implementation of the first phase of the protocol - the adoption of an open visa regime in different forms that will ultimately lead to abolition of entry visas for Africans. As noted by the AfDB, "from being seen simply as a question of forms, fees and formalities, a country's decision to allow visa-free or visa-on-arrival access is inspiring more open border policies across the continent. As visa and travel document solutions catch on and the use of digital technology streamlines the visa process, more African travelers can take up tourism, investment and business opportunities".[37]

The implementation and operation of the free movement of persons regime in Africa requires a whole-of-government approach, as it involves the entire society and will expand opportunities for regular migration within the continent, as well as enhance sound border governance without necessarily militarizing borders.

The AUC must embark on a vigorous campaign and advocacy for the ratification and entry into force of the Free Movement of Persons Protocol, as a logical companion of the AfCTA that has entered into force. The movement of people facilitates trade in goods and services both within the continent and the rest of the world. Cross border trade cannot thrive in Africa under stringent visa regimes or reduced opportunities for regular migration within the continent. It is pertinent to recall that the AU Plan of Action on Boosting Intra African Trade[38] recognizes the key role of the free movement of people and, in particular, labor migration management. Its Cluster 7 on Integration of Market Factors recommends a programme on free movement of people and labor migration with specific targets on: (i) ratification of protocols; (ii) creation of regional labor exchanges; (iii) harmonization of labor and social protection frameworks. There is also a programme on mutual recognition of skills/qualifications for certain categories of occupations. These have been encapsulated into the AfCFTA Protocol on Trade in Services that recognizes the presence of natural persons supplying services as one of its means of providing services. These can be both legal/juridical persons (companies) and natural persons supplying services. With the convergence of trade, migration and mobility instruments, continental integration (The Africa We Want) is gaining momentum. This will facilitate a fully integrated but internally competitive continent in which goods and services, capital and labor are free to move across national borders.

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[37] AfDB: Africa Visa Openness Report 2018
https://www.visaopenness.org/fileadmin/uploads/afdb/Documents/VisaOReport2018_R15jan19.pdf
[38] See AU Assembly Decision (Assembly/AU/Dec.394 (XVIII) of January 2012

Similarly, the Joint Labor Migration Programme (JLMP), which was adopted by the AU in 2015, promotes critical areas of facilitating the free movement of workers as a means of advancing regional integration and development. Key activity areas of the JLMP include skills portability and the mutual recognition of qualifications, as well as the development of an African Qualifications Framework. Most African countries face labor and skills shortages in specific sectors, while at the same time battling with unemployment and a growing youth bulge. Regional skills pooling enabled through mobility can help to address this challenge and allocate labor where it is most productive and needed. To aid labor mobility, the JLMP is also working on Labor Market Information Systems (LMIS), skills forecasting and labor migration statistics which collectively support market driven skills development and skills pooling across the continent.

Thus, the implementation of the continental policy framework on the prevention and combating of the smuggling of migrants will be facilitated through the implementation of the Free Movement of Persons Protocol, as the omnibus legal framework for the management of mobility on the continent and the AfCFTA Protocol, both of which are protocols to the Abuja Treaty on African Economic Community, as well as the JLMP.

c) Knowledge and Research

Research, data collection, analysis, and information sharing, in compliance with the right to privacy and data protection, are critical to the development of evidence-based policies. Yet, remain at their infancy and are a challenge in Africa. Gender-responsive research and data on the different situations of vulnerability of and rights abuses against migrant women, men, girls and boys are particularly lacking. Migrant smuggling as a criminal enterprise and the illegal travel industry are always changing and adapting to new methods and technologies to meet growing demands, and to evade detection and remain highly profitable. Yet many Member States and RECs are not collecting basic data in a way that facilitates proper insight into national and regional situations. At the same time, there are increased human rights violations and re-victimization of victims as well as evolving labor exploitation and modern day slavery.

The elaboration, implementation and evaluation of evidence-based, gender-responsive policies on migrant smuggling require sound knowledge and research. Better knowledge and research, including the collection of sex-disaggregated data and gender statistics, are vital to overcoming the present gaps and deficits in understanding the crime and the human rights violations involved in migrant smuggling.

Moreover, and in addition to quantitative data, there is a need for qualitative research to provide better insight into the different dimensions of the demand and supply sides of the crime, as well as on the human rights impacts for migrants, in order to facilitate a balanced and integrated approach to preventing and countering eliminating migrant smuggling and human trafficking. This includes knowledge of the legal, social, cultural and economic dimensions that make people, especially women and children, more prone to use smugglers and therefore a heightened risk of trafficking; knowledge of the demand factors; routes, changing patterns and modus operandi of the perpetrators; the gender-specific risks of vulnerability and rights abuses, and knowledge of what works in respect of gender-responsive protection, rehabilitation and reintegration of the victims.

Fortunately, the AU has set up three continental migration centers as specialized technical offices of the AU. These include the African Centre for the Study and Research on Migration in Bamako, Mali, the African Migration Observatory in Rabat, Morocco, and the Continental Operational Centre in Khartoum, Sudan. The centers seek to improve the overall migration governance regime in Africa. Specifically the center in Khartoum will focus on combating irregular migration, and will work collaboratively and with the Rabat observatory, the Mali research center and other migration research institutions in Africa and beyond in conducting research on the smuggling of migrants. The Khartoum center will provide a platform for data and information sharing on trafficking in persons, migrant smuggling and cross-border crimes among Member States, as well as research on trends on transnational organized crimes. The effective implementation of the policy framework on migrant smuggling will benefit from the research outputs and knowledge generated from these AU institutions, African universities and from UN partners like the IOM and the UNODC. Partners like the IOM and the UNODC. Addressing the gender dimension of migration, including smuggling and trafficking in persons, is critical to ensure that the experiences of women and girls are recognized and addressed in AU and national policy responses. UN Women is a valuable partner to support in this regard.

The AUC must therefore ensure that the legal status of these research institutions guarantees their autonomy and that they are provided with adequate human and financial resources required to realize the objectives for which they are set up.

d) Capacity Building

Another major cross-cutting challenge is capacity faced by most AU Member States in preventing and combating migrant smuggling, starting with identification of smuggled migrants whose rights have been violated. It should be stressed that the capacity challenge varies across countries and regions. In other words, some countries or regions may fare better than others. Nevertheless, strengthening capacity at the national level is essential to facilitate the institutional and technical ability of Member States to develop, implement and assess their migrant smuggling policies and strategies.

Capacity building is not limited to Member States, but should be extended to the RECs and the AU organs and institutions - AUC, ACHPR, ACERWC and especially the migration institutions in Sudan, Morocco and Mali. A common objective of these migration institutions is to provide capacity building and training to Member States: the Continental Operational Centre in Khartoum will assist Member States of the AU in combating irregular migration and improving good practices in the collection, analysis and dissemination of information on transnational organized crime, in particular human trafficking and migrant smuggling[39]; The African Observatory on Migration in Morocco will provide technical assistance, training and capacity building on migration data collection and analysis to Member States and RECs[40] and; The African Centre for the Study and Research on Migration, Mali will provide technical assistance, training and capacity building on migration and mobility to the AU Commission, AU organs, Member States and RECs[41].

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[39] Statute of the Continental Operational Centre in Khartoum

[40] Statute of the African Observatory on Migration in Morocco

[41] Statute of the African Centre for the Study and Research on Migration, Mali

The AUC should as a matter of priority, ensure the functioning of these institutions and in collaboration with them, conduct a comprehensive needs assessment to develop a compendium of the capacity needs of AU Members States and RECs and a plan of action for addressing identified gaps. Capacity building is vital to the implementation of the continental policy framework to prevent and combat smuggling of migrants including reduction of irregular migration.

The assessments should also include gathering evidence on the drivers of irregular migration in order to inform the design of preventive measures. National policies and development plans should seek to address the root causes of irregular migration in order to prevent further escalation and susceptibility of these groups to smuggling and trafficking.

e) Monitoring and Evaluation

Monitoring and evaluation involving systematic gathering and analysis of quantitative data, disaggregated by sex, and qualitative data which are necessary for a clear understanding of what works, and for increasing the cumulative knowledge base. Monitoring relates to the periodic systematic collection of information on different aspects of migrant smuggling. Evaluation focuses on relevance, efficiency, effectiveness, impact and sustainability of measures undertaken to prevent and counter the phenomenon. Current evaluations have focused on assessing the progress of project implementation and the achievement of outputs rather than tracking the achievement of outcomes or impact. This focus has concealed the nature of migrant smuggling as it makes it difficult to establish baselines against which to track progress[42]Yet, Member States, RECs, and the AUC need a reliable baseline to assess progress in the implementation of policies, strategies and programmes.

There are also drawbacks in the current monitoring that relies heavily on self-monitoring by governments' agencies and do not use human rights bodies as part of the monitoring system. As observed in the evaluation report of the Ouagadougou Action Plan to Combat Trafficking in Human Beings, the Palermo Protocols are primarily law enforcement instruments that are weak in terms of language providing for prevention and victim protection.[43] The limited protection provisions are geared towards law enforcement i.e. for purposes of prosecution. However, as also noted in the evaluation report, the deficit in the Protocols is remedied by the presence of other human rights frameworks at international and continental levels. Of significance therefore, is the role that human rights bodies can play in filling the human rights deficits in the Palermo Protocol and the implementation of the proposed continental policy framework on combating the smuggling of migrants.

The monitoring of the human rights components of the law, policies, strategies and programmes geared towards combating migrant smuggling should involve human rights bodies at national, RECs and Continental levels. At the national level, National Human Rights Institutions (NHRIs) or National Commissions on Human Rights (as they may also be called) should play a role in monitoring the implementation of frameworks for preventing and combating the smuggling of migrants. NHRIs are key in monitoring and reporting, advocating legal reforms, and handling

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[42] Katharine Bryant & Todd Landman (2020) Combatting Human Trafficking since Palermo: What Do We Know about What Works?, Journal of Human Trafficking, 6:2, 119-140, DOI: 10.1080/23322705.2020.1690097

[43] African Union (2019).Draft Report of The Evaluation of the Implementation Status of The African Union's Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (2006) in Africa, p.25

complaints from victims seeking justice and remedy. This is in line with the OHCHR's (a) Recommended Principles and Guidelines on Human Rights at International Borders which contains three recommended principles, all of which are derived from international human rights law and establish the obligation of States to protect, respect and fulfil human rights of all migrants at international borders:44 (b) Recommended Principles and Guidelines that Member States establish mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions, assigning this role to NHRIs[45]. It is also in line with one of the key recommendations of the MPFA that urges Member States to "Establish a national human rights institution/ombudsman or, where such an entity exists, expand its mandate to report on issues of migrant smuggling".[46]

At the continental level, the African Commission on Human and People's Rights and the African Committee of Experts on the Rights and Welfare of the Child have important roles to play in the protection of migrants and people on the move, as well as in the implementation of the proposed continental policy framework on smuggling of migrants.

The two human rights bodies already have mechanisms in place to do this including: (a) General Comment that provides interpretive guidance on the overall and specific obligations of States Parties; (b) Guidelines on National Periodic State Reports that provide better guidelines for States to report on relevant articles of the charter and protocols thereto; (c) Appointment of an AU Special Rapporteur on the human rights of migrants; (d) Investigating specific cases of violations of the human rights of migrants or can be part of the Terms of Reference of a Special Rapporteur; and (e) Conducting a day of general debate or discussion on human rights of migrants at one of their regular sessions.

It is important to make a distinction between General Comments and Guidelines for Implementation mentioned above. Both the African Commission and the Committee of Experts on the Rights of the Child use General Comments as a mechanism for the interpretation of the two Charters in line with their mandates.[47] Sometimes, the two bodies work together to issue a joint General Comment on the same subject. These are tools used by treaty bodies to provide a substantive elaboration of the meaning of treaty provisions, as well as an in-depth analysis of procedural concerns regarding human rights treaties. General Comments are therefore, an authoritative interpretation of these Charters in order to clarify their meanings and scope. On the other hand, Guidelines for Implementation are designed to assist States Parties in implementation and reporting.

For illustration, the African Commission recently issued General Comment No.5 on Article 12 (1) on the Right to Freedom of Movement and Residence of the ACHPR.[48] It follows that in their report to the African Commission under Article 62 of the African Charter, States must be guided by this General Comment when reporting on Article 12(1). In particular, States must provide

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[44] OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, Recommended Principles and Guidelines on HRIB_Final.indd (ohchr.org)

[45] ECOSOC, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 6: Protection and support for trafficked persons, E/2002/68/Add.1, 2002, Guideline 1, para 7.

[46] Migration Policy Framework for Africa 2018-2030 p.28

[47] See Article 42 (c) of the ACRWC for instance.

[48] General Comment No.5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1))

details on relevant laws that have been adopted in order to give effect to the rights to freedom of movement and residence. In instances where restrictive laws have been adopted, States must specify in a clear and precise manner the extent to which they are legitimate in a free and democratic society, the legitimate aim they seek to achieve and the absence of less intrusive means.[49]

In line with their mandates therefore, these bodies should monitor the implementation of laws, policies, strategies and programmes of AU Member States and continue to hold them accountable on the human rights violations of migrants and should provide them with appropriate reporting guidance to this effect. Strengthening the capacity of these two human rights bodies and their mechanisms identified above should be a key part of the implementation of this continental policy framework on prevention and combating migrant smuggling, and a priority for the AUC.

f)   **Interstate Migration Dialogues**

Migration dialogues have become a useful forum for developing common understanding on a wide range of migration issues and horizontal issues such as gender equality considerations, the shaping of regional and national migration policies, capacity building, preparation towards global or inter-regional migration conferences, and the development of common regional positions at these conferences. However, there has been a proliferation of these dialogues in Africa with overlapping memberships and nomenclatures, and discussing almost the same issues. There is a need to make a distinction between migration dialogues that deal with issues at the political level and those that are more technical, the collaboration (or lack of it) between these bodies, and the need to forge more linkages in combating migrant smuggling. This raises important questions that address the number of dialogues that fit the bill, how streamlined these dialogues should be, their focus on smuggling of persons related issues, as well as their criteria. Since these dialogues are state-driven, AU Member States will have to decide on the streamlining taking into consideration: (a) overlapping membership; (b) peculiarity of migration challenges faced by each AU region and REC; (c) human and financial resources for participation at the dialogues; (d) addressing linkages between migration and development, thereby contributing to AU Agenda 2063 and the Agenda 2030 Sustainable Development Goals; and facilitating Africa's preparations and implementation review of global policies such as the Global Compact for Safe, Orderly and Regular Migration (GCM). These are critical questions and considerations which perhaps could be addressed by an AU-led evaluation that would assist the Member States in taking appropriate decisions.

CHAPTER 3: STRATEGIC FRAMEWORK FOR PREVENTING THE SMUGGLING OF MIGRANTS IN AFRICA

The policy framework rests on six key pillars (and respective strategies) that will ensure a balanced and integrated response to migrant smuggling: - (a) prevention (b) prosecution, (c) protection, (d) national coordination and cooperation, (e) international cooperation and coordination and (f) border governance.

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[49] Ibid

I. Prevention

Prevention is a vital and effective component of the anti-smuggling response. Migrant smuggling is not just a crime, but a manifestation of organized crime driven by profit and manifestation of lack of safe and regular avenues, of the lack of regular migration channels and of intensified border controls. Prevention of migrant smuggling must be situated within the overall context of migration governance. Expanding the opportunities and pathways for regular migration will significantly contribute to the prevention and reduction of irregular migration and migrant smuggling. The establishment of the Free Movement of Persons regime progressively entails the expansion of regular migration channels, and it is expected to reduce irregular migration and potentially some of the crimes and abuses associated with migrant smuggling, including human rights violations and the needless loss of life.

Furthermore, to be effective, and as envisaged in the MPFA, prevention strategies should be integrated into broader national development frameworks. In addition, prevention strategies should be evidenced-based and supported by research and impact evaluations.

Recommended Strategies:

i. The AU Commission to advocate for Member States to sign, ratify and domesticate the Free Movement of Persons Protocol and core international human rights treaties including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

ii. Open or Incorporate gender equality consideration into national anti-smuggling policies and laws.

iii. Expand pathways for regular migration through implementing sound civil registry systems, including birth registration, identity documents and travel documents, and by ensuring that women have the legal right and independent access to identity and travel documents.

iv. Implement continental programmes that promote regular labour migration, for example the Joint Labor Migration Programme (JLMP)

v. Develop or strengthen policy, programmatic and other measures to reduce risks by addressing the root causes resulting in people falling prey to smugglers.

vi. Develop and implement public information campaigns targeting diverse range of audiences including schools, women's organizations, the media and social networks, in order to raise awareness about migrant smuggling and its adverse effects of migrant smuggling in order to warn vulnerable persons at risk of being smuggled, especially young people and their families.

vii. Strengthen the knowledge base through enhanced gender-responsive research and data collection efforts, aimed at bettering analysis of the nature and extent of smuggling of migrants along various routes, the structure and assets of the criminal networks and links with other forms of organized crime, corruption and terrorism, and the different risks and vulnerabilities of migrant women, men, girls and boys.

viii. Conduct impact evaluations of prevention strategies and programmes for posterity.

ix. Mainstream national/regional policies for combating migrant smuggling into national/regional development plans.

II. Prosecution

Smuggling of migrants continues to evolve as a profitable criminal venture, by disparate transnational organized groups working in concert across frontiers. Migrant smuggling (especially by big time smugglers) remains largely unprosecuted and unpunished. Conviction rates remain low. Notwithstanding the ratification of the Smuggling of Migrants Protocol, most Member States do not have legal frameworks covering all the provisions of the Protocol in a comprehensive manner. They have also not incorporated the recommended strategies in the MPFA (2018-2030) into their national policies.

Recommended Strategies:

Strengthen the Legal Framework:

i. Ratify the Smuggling of Migrants Protocol and incorporate its provisions into domestic law.

ii. Ensure that migrant smuggling is a criminal offence as defined in the Smuggling of Migrants Protocol and prioritize the prosecution of smugglers

iii. Ensure the criminalization of crimes related to smuggling of migrants such as obstruction of justice, participation in an organized criminal group, and corruption and, money laundering

iv. Adopt appropriate sanctions for the migrant smuggling offence that are commensurate with the nature and gravity of the offence, and that proceeds of migrant smuggling are confiscated.

v. Develop proactive, intelligence-led investigative techniques; ensure that recollection of evidence meets evidentiary standards, and that judicial procedures do not re-victimize the migrants, in particular children.

vi. Protect the rights of smuggled migrants and witnesses, including to protection before, during and after the prosecution of the crime, including a child sensitive approach, as well as effective and appropriate collaboration between law enforcement, social welfare services, CSOs and national human rights institutions and CSOs, providing access to gender-responsive services, including essential violence services where needed.

vii. Develop gender-responsive migrant smuggling policies in consultation with all relevant stakeholders, including international organizations, civil society actors and young people.

Enhance Investigation and Prosecution of Migrant Smugglers:

i. Build or strengthen the professional skills of relevant law-enforcement and criminal justice actors to detect, investigate, prosecute and adjudicate cases of migrant smuggling in a gender-responsive manner.

ii.   Strengthen capacity to carry out financial investigations by creating financial intelligence units, building investigators' skills, and establishing regional networks to intercept financial flows and trace proceeds from migrant smuggling.

iii.   Ensure the establishment of relevant institutions such as specialized Police units/ Agency and judicial structure.

III.   Protection

Article 5 of the Protocol absolves the migrant from criminal liability: *"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"*. Moreover, smuggled migrants may be victims of other crimes, ill-treatment, violence, or human rights violations and as such, the Protocol creates obligations for States to protect and assist smuggled migrants with protection concerns (see Art. 16). The Protocol also creates an obligation to establish 'aggravating circumstances' to the crime of smuggling of migrants, which include 'circumstances (a) that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants' (Article 6(3)).

Quite often, many smuggled migrants are not properly identified, and as such may remain unprotected or treated as criminals. Access to assistance and protection is contingent on proper identification as a smuggled migrant and separating from smugglers. There is a need to establish or to improve national mechanisms to adequately identify the system for screening for vulnerabilities and ensure human rights violations and needs for assistance among smuggled migrants, and the corresponding referral mechanisms to legal, medical and psychological services, while providing access to affordable public and social services, such as health care. Migrant smuggling legislation and policies tend to focus on prosecuting the smuggler (and in some cases the smuggled migrant) while neglecting to adequately address the human rights protection needs of smuggled migrants. Adopting protection-sensitive entry systems whereby vulnerable asylum seekers in need of international protection could be identified and referred to the appropriate mandated agencies is of paramount importance. Screening of new arrivals, identifying the categories they fall under (migrants, asylum seekers, stateless persons, etc.) and referring them to the relevant national and international organizations which are meant to protect them plays a key role in terms of protecting people on the move, including by providing them with access to the services they may need. . Particular attention must be paid to the needs of smuggled children.

As part of protection, both law enforcement officials and labor inspectors must be mutually reinforcing in their efforts and work in partnership to combat migrant smuggling and exploitation akin to modern slavery. Member States should strengthen the institutions of work to ensure adequate protection of all workers including irregular migrants.[50] National policy to prevent and combat migrant smuggling must aim at not just fighting the crime but also at liberating migrants from exploitative situations. Member States should therefore adopt a gender-responsive and human rights-based approach to all their SOM responses, including by providing access to services, including essential violence services where needed.

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[50] International Labor Organization (ILO) Centenary Declaration for the Future of Work, June 2019

Recommended Strategies:

i. Develop or strengthen national mechanisms to identify and respond to the vulnerabilities, protection and physical and psychosocial needs of smuggled migrants, in line with international law and standards

ii. Make sure that children who have been victims of smuggling have access to primary education and, to the extent possible, to other educational levels, by facilitating their attendance at regular schools or by providing proper educational arrangements.

iii. Establish or strengthen national and regional referral mechanisms for protection and assistance, including referral to legal, medical and psychological services that are gender and age sensitive and to asylum systems where appropriate.

iv. Conduct situation analyses and gender sensitive needs assessments to determine specific gendered needs migrants for planning purposes, with involvement and participation of the affected.

v. Advocate for the inclusion of migrants and mobile population health issues into national and regional health programmes and strategies.

vi. Ensure the enforcement of legislation measures including by issuing regulations, circulars and or administrative guidelines

vii. Establish appropriate standards of conduct for officials who deal with migrant smuggling situations and implement standard operating procedures in providing assistance to migrants whose lives and safety are in danger.

viii. Provide smuggled migrants who have been victims of other crimes with effective access to justice and to legal assistance. Establish "firewalls" between immigration enforcement, criminal justice and service providers, to ensure that migrant victims of abuse and exploitation can access justice and assistance.

ix. Involve civil society, national human rights institutions and other relevant stakeholders in the response to migrant smuggling, in particular by enabling their contribution to protection and assistance measures, as well as in providing gender specific assistance to smuggled migrants.

x. Establish a national human rights institution/ombudsman or, where such an entity exists, expand its mandate to report on issues of migrant smuggling.

xi. Implement mechanisms for non-custodial community-based alternatives to detention and consider abolishing administrative detention of smuggled migrants.

xii. Promote voluntary return in preference to forced return by encouraging and assisting those who do not qualify for humanitarian or human rights protection to return to their country of origin in humane and safe conditions. Any decision to return a migrant should be preceded by a risk assessment and with due regards to the safety of the migrant taking into consideration, upholding the principle of non-refoulement.

xiii. Ensure the application of international standards and gender-responsive and human rights-based approach to protection and assistance to all migrants irrespective of their status, taking into account the special and gender specific needs of women, men, boys and girls.

xiv. Ensure the non-liability of smuggled migrants for their involvement in unlawful activities as a result of being smuggled.

xv. Strengthen national capacities for the identification, risk assessment and reintegration of smuggled migrants, with special consideration to the best interests of the child, and establish cooperation between countries of destination, transit and origin.

xvi. Ratify and implement ILO's Forced Labor Convention (No. 29), 1930, and the Abolition of Forced Labor Convention (No. 105), 1957.

xvii. Ratify and domesticate the international covenant on the protection of rights of all migrant workers and members of their family and encourage Member States to the instrument to periodically report progress on the implementation of their treaty obligations.

xviii. Ensure the inclusion of updates on the situation of migrants in the periodic reports to ACHPR, ACERWC. Universal Periodic Review, Treaty bodies and Special Procedures mechanisms of the African Union and UN.

IV. National Coordination and Cooperation

Smuggling of migrants is complex and multifaceted, requiring a holistic approach to allow tackling all aspects of smuggling simultaneously. Preventing and combating migrant smuggling requires the involvement of all sectors of the society and different national institutions. Duplications and absence of synergies can result in inefficient use of resources, incoherence and less efficient response. Response to migrant smuggling should explicitly take cognizance of different fields and sectors at both the strategic and operational levels. At the strategic level, there must be linkages with other national sectoral policies and with appropriate cross-referencing between policy frameworks. At operational level, there must be cooperation and coordination among all relevant state and non-state actors - governmental authorities (central and local), law enforcement, migration, labor authorities, judiciary, NGOs, CSOs, researchers, etc. There must be regular exchange of information among and between these different actors.

Recommended Strategies:

i. Develop and implement comprehensive and evidence-based policies on combating the smuggling of migrants and ensure coherence with other national and continental policies as well as the MPFA.

ii. Ensure that policies/programmes on prevention and combating migrant smuggling are integrated in national development strategies.

iii. Establish a system or mechanism of multidisciplinary cooperation and coordination among relevant stakeholders, such as governmental institutions, NGOs, welfare and social services, health institutions, women's organizations, child protection, trade unions, social partners and the private sector.

iv. Strengthen research and data collection initiatives on the relationship between health and migration and enhancing cooperation between countries and relevant agencies including Africa CDC, WHO, UNAIDS, IOM, UNFPA, OHCHRUN Women and ILO.

v. Ensure monitoring and periodic evaluation of national strategies/action plans to assess progress and impact of policies/programmes on prevention and combating migrant smuggling.

vi. Harmonize the collection of migration data at national level, including mainstreaming human rights based approaches to data51, human rights indicator frameworks52 to collect disaggregated data and to ensure that no one is left behind. This includes also the definitions of migration variables (such as those in the UN Recommendations on Statistics of International Migration), data collection tools, methods, intervals, etc. to ensure synergy and comparability of data across different sectors.

V. International Cooperation and Coordination

Smuggling of migrants is a cross-border and transnational crime and therefore requires coordination and cooperation among Member States and with international and regional organizations. Inadequate or absence of international cooperation jeopardizes the ability to prevent, investigate and prosecute transnational crimes. In addition, there must be mechanisms or structures to improve the coordination of efforts of international and regional organizations.

Recommended Strategies:

i. Strengthen or create regional networks of criminal justice officials, and other relevant actors, in order to strengthen border control, conduct joint investigations, and exchange operational information and intelligence informally.

ii. In the absence of bilateral agreements, use multilateral instruments such as the UN Transnational Organized Crime (TOC) Convention and Regional Mutual Legal Assistance as a legal basis for international cooperation, in particular in the form of mutual legal assistance and extradition, to combat the smuggling of migrants.

iii. Carry out joint capacity-building activities and exchange of expertise, in particular in the areas of processing intelligence and other information and handling sensitive information, in order to prevent, detect and respond to the smuggling of migrants.

iv. Promote formal and informal cooperation, such as establishing communications procedures, and information and data exchange.

v. Strengthen national capacities for the identification, risk assessment and reintegration of smuggled migrants, with special consideration to the best interest of the child, and establish cooperation between countries of destination, transit and origin.

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[51] https://www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf
[52] OHCHR | Human Rights Indicators retrieved from
https://www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx

vi.   Strengthen research and data collection initiatives on the relationship between health and migration and enhancing cooperation between countries and relevant agencies including Africa CDC, WHO, UNHCR, UNAIDS, IOM, UNFPA, UN Women and ILO.

vii.   Harmonize the collection of migration data, including definitions of migration variables (such as those in the UN Recommendations on Statistics of International Migration), data collection tools, methods, intervals, etc. at continental and regional levels so that data are comparable across countries and regions.

VI.   Border Governance

Good border governance facilitates the safe and regular movement of persons and will reduce the need to smuggle migrants. On the other hand, poor or weak border governance precipitates migrants smuggling and undermines smooth movement. Therefore, covering protection and assistance of migrants and refugees during all stages of migration/displacement, in all the physical locations is important. There is high level political commitment towards improved management of borders on the continent as evidenced by the AU Convention on Cross-Border Cooperation (Niamey Convention), a legal framework and the AU Border Governance Strategy (AUBGS), a policy framework. Issues of mobility, migration and trade facilitation are important pillars of these two instruments. The recommended strategies in the MPFA (2018-2030) are still relevant and pertinent.

Recommended Strategies:

i.   Ratify and implement the Niamey Convention on Cross Border Cooperation and the AU Border Governance Strategy and affirm and implement the Recommended Principles and Guidelines on Human Rights at International Borders from the Office of the High Commissioner for Human Rights.

ii.   Intensify transnational cooperation between national authorities engaged in border governance to facilitate migration, trade and integration and effectively address security threats.

iii.   Strengthen national laws that regulate migration, including through the creation of clear, transparent categories for admission/expulsion and clear eligibility criteria for protection.

iv.   Improve the capacities of border management mechanisms and personnel by optimising new border management technologies (improving the security of travel documents, computerisation, in conformity with international norms, upgrading inspection, data collection and communication systems) and providing technical training for those involved in border management, including training on border governance and how to deal with vulnerable groups, such as trafficked persons and on rights of migrants.

v.   Provide adequate and gender-responsive information about the requirements, diverse challenges and opportunities of migration for the population in general and particularly for potential labor migrants before they cross borders.

vi.   Strengthen co-operation and co-ordination at the national level between law enforcement officials, immigration and customs services to ensure a more efficient and effective

approach to managing the flow of goods and protection of human rights of individuals and groups across borders.

vii. Establish and maintain adequate, gender-responsive systems for effective search and rescue at sea and predictable disembarkation, ensuring that search and rescue operations operate under a broad understanding of distress and ensure that these measures are in accordance with international laws, with the primary objective of saving lives.

viii. Strengthen co-operation between States' sub-regional/regional agencies, and the international community, in particular in the area of law enforcement, sharing migration-related data and information, training and sustained dialogue.

ix. Enhance the role of the AU, as well as other sub-regional/regional agencies, in mobilising financial/technical resources, harmonising policies and programmes of action, and coordinating activities of Member States for effective border management.

x. Strengthen inter-State dialogue, regional consultations and cooperation for the effective management of borders.