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**Thematic discussions on key issues in the Asia-Pacific region for
facilitating safe, orderly and regular migration:**

**Smuggling of migrants, trafficking in persons and contemporary
forms of slavery, and issues of appropriate identification and
protection and assistance to migrants and trafficking victims**

**Regional cooperation and governance with regard to migration in
all its dimensions, including at borders and during transit, entry,
return, readmission, integration and reintegration**

Conference room paper on smuggling of migrants and trafficking in persons in Asia and the Pacific**

Summary

In Asia and the Pacific, as in all other regions of the world, migrant smuggling and trafficking in persons inflict significant and far-reaching harm: these activities enrich criminals, threaten the rule of law, and undermine public support for enlightened and humanitarian migration policies. The exploitation associated with these activities exacts a particularly heavy toll on vulnerable individuals and communities. Those who are under the greatest pressure to migrate – because of conflict and other crises, human rights violations or dire economic need – are particularly at risk.

This background paper seeks to provide an overview of migrant smuggling and trafficking in persons from three perspectives. First, it describes and explains both phenomena, setting out how they are defined and understood and how they relate to each other. Second, it provides a summary of our current understanding of drivers and trends. Third, it sets out the relevant legal and policy frameworks. The paper concludes with general findings and recommendations aimed at identifying the most pressing obstacles to effective action and the measures that could be taken to strengthen the international, regional and national response.

I. Concepts and definitions

1. “Trafficking in persons” and “smuggling of migrants” have both been defined in international legal instruments to which most States of Asia and the Pacific are party. This section examines those definitions, highlighting particular issues and challenges.

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A. Understanding “trafficking in persons”

2. The first international legal definition of trafficking in persons is set out in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This Protocol also contains a separate definition for the trafficking of children (persons under 18 years of age).¹

The Trafficking in Persons Protocol recognizes that:

1. Trafficking can occur within, as well as between, countries;
2. Women, men and children can be victims of trafficking;
3. The purpose of trafficking extends to forced labour and sexual exploitation, as well as to a non-exhaustive list, including debt bondage and a form of forced marriage, that is included in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;
4. Perpetrators include those who organize and facilitate the crime, as well as those who are directly involved in the exploitation.

Table 1

Trafficking in Persons Protocol and ASEAN Convention against Trafficking

<i>Key element</i>	<i>A situation of trafficking in adults: Three elements must be present</i>	<i>A situation of trafficking in children (persons under 18 years of age): Two elements must be present</i>
1. Action	Recruitment, transportation, transfer, harbouring or receipt of persons	
2. Means	Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another	Not required
3. Purpose	Exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs)	

3. The definition contained in the Trafficking in Persons Protocol has been incorporated, unchanged, into the Association of Southeast Asian Nations (ASEAN) Convention against Trafficking in Persons, Especially Women and Children (see section 5.2 of the present paper) and its substance is reflected in the national anti-trafficking laws of almost all States in Asia and the Pacific.² It is important to note, however, that as States seek to grapple with practical, day-to-day challenges – such as victim identification and prosecution – it has

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. United Nations, *Treaty Series*, vol. 2237, p. 319.

² See United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (New York, 2016), p. 12.

become clear that the parameters around what constitutes “trafficking” have not yet been firmly established.³

B. Understanding “smuggling of migrants”

4. When the international community came together in the late 1990s to take concerted action against what is now known as “migrant smuggling”, there was still considerable confusion and overlap between this concept and what is presently referred to as “human trafficking”. The differences between the two terms were resolved by removing the “exploitation” element from the concept of migrant smuggling, thereby shifting the focus to the *action* of migrant smuggling, rather than its *impact* on those who are *smuggled*. The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air⁴ defines the “smuggling of migrants” as set out below.⁵

Table 2
Smuggling of Migrants Protocol – Definitions

<i>Key element</i>	<i>Smuggling of Migrants Protocol definition</i>
1. Action	Procurement of illegal entry
2. Purpose	Obtaining a financial or other material benefit

5. The drafting history of the Smuggling of Migrants Protocol confirms that the “purpose” element (“for financial or other material benefit”) was incorporated into the definition to ensure that the activities of those who provide support to migrants on humanitarian grounds, or on the basis of close family ties, do not come within its scope.⁶ The Protocol does not address mere illegal entry and takes a neutral position on whether those who migrate illegally

³ A series of issue papers was developed by the United Nations Office on Drugs and Crime after the Working Group of the Trafficking in Persons Protocol noted that critical concepts within the definition were not clearly understood and were not being implemented or applied consistently. See United Nations Office on Drugs and Crime, *Guidance Note on “Abuse of a Position of Vulnerability” as a Means of Trafficking in Persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (2012). Available from www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf. See also United Nations Office on Drugs and Crime, *Issue Paper: The Role of “Consent” in the Trafficking in Persons Protocol* (Vienna, 2014). Available from www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf. See also United Nations Office on Drugs and Crime, *Issue Paper: The Concept of “Exploitation” in the Trafficking in Persons Protocol* (Vienna, 2015). Available from www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf.

⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. United Nations, *Treaty Series*, vol. 2241, p. 507.

⁵ *Ibid.*, Article 3(a).

⁶ See further United Nations Office on Drugs and Crime, *Issue Paper: The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol* (New York, 2017). State practice on this point is considered in Section 4.3 of the present paper.

should be the subject of any offences.⁷ It nevertheless remains sufficiently broad to apply to a wide range of facilitators of irregular migration, including recruiters, organizers, transporters, and providers of fraudulent travel and identity documents. Crucially, the status of the smuggled migrant is not relevant; the cross-border movement of refugees is still considered “smuggling” when it involves a financial or other reward.

6. While there are still a few countries that do not recognize for-profit facilitation of illegal entry as a crime, migrant smuggling is criminalized in most States in Asia and the Pacific. However, unlike with regard to trafficking, many States have deviated from the Protocol in their definition, effectively expanding the concept of migrant smuggling and thereby the scope of criminalized conduct. This trend is considered further in section 4.3 of the present paper.

C. Trafficking and smuggling: Distinctions and overlaps

7. As noted above, international law maintains a distinction between “trafficking in persons” and “smuggling of migrants”. The most important distinction between the two definitions is purpose: migrant smuggling seeks to facilitate a person’s illegal movement for profit; trafficking seeks their exploitation. In a classic migrant smuggling situation, the relationship between the smuggled migrant and his or her facilitator ends when the journey is completed. In cases of trafficking, both profit and purpose are directly tied to the exploitation of the migrant.

8. These and other aspects of the two definitions are compared in more detail in the Table 3.

⁷ Smuggling of Migrants Protocol, Article 5. See also Article 6(4), which provides that nothing in the Protocol limits the existing rights of States Parties to take action against those whose conduct constitutes an offence under national law.

Table 3
Defining migrant smuggling⁸

Key elements of the international legal definition

Action: Procurement of the illegal entry of a person into a State of which the person is not a national or permanent resident. Purpose: In order to obtain, directly or indirectly, a financial or other material benefit.

<i>Migrant smuggling</i>	<i>Compared to</i>	<i>Human trafficking</i>
Profits are fees paid by the smuggled individual for his/her irregular, facilitated migration.	Source of profit	The primary source of profit is the exploitation of the victim or of the victim's labour.
Smuggling always involves two or more countries and entry is always irregular.	Transnational aspect	Trafficking may occur within a country, or across two or more countries. A victim of trafficking may enter the country of exploitation legally.
Smuggling can be "victimless". It is often incidentally exploitative – but exploitation is not an essential element.	Victimization	Trafficking is inherently exploitative – there is always a "victim".
Smuggled migrants are seen to consent to the fact and condition of their smuggling.	Consent	Consent either not present or vitiated by means such as force, fraud, coercion, abuse of vulnerability, etc.

Overlap between migrant smuggling and human trafficking

In some situations (e.g. in Australia), geographical and other factors mean that there is little or no overlap between smuggling and trafficking.

But overlaps are common:

A smuggling situation may morph into one of trafficking – often to compel payment of subsequently inflated transportation debt;

Smugglers may seek to exploit their clients for additional financial gain (e.g. through extortion).

Examples of overlaps include:

Central American and South American migrants seeking to enter the United States kidnapped for ransom in Mexico;

Organized criminal networks operating in East Africa and the Horn of Africa exploit smuggled migrants through extortion and torture.

9. When the respective definitions were developed, there was some acknowledgement of a potential overlap: a person could be smuggled into a situation of trafficking. However, the overlaps are becoming more pronounced. Smugglers are increasingly taking on the role of an abuser, collapsing an earlier distinction between smuggler/client and trafficker/victim. The blurring of the lines between smuggling and trafficking has significant implications for smuggled migrants, who are not entitled to the status-based rights of protection and support granted to persons identified as having been trafficked.

⁸ A.T. Gallagher, "Combating trafficking in persons: Regional opportunities", in: *Briefing Papers: Fourth Meeting, Jakarta, Indonesia, 5–7 March 2017* (Asia Dialogue on Forced Migration, 2017), pp. 19–46.

II. Migrant smuggling: patterns, drivers and trends

10. When compared to trafficking in persons, migrant smuggling has been relatively poorly studied. However, the availability of information that can help to shed light on the dynamics of migrant smuggling, as well as its scope and impacts, is slowly improving. After providing a brief description of the “how” and “why” of migrant smuggling, this section draws on the available data and research to sketch a broad picture of patterns and trends in Asia and the Pacific.

A. Dynamics of migrant smuggling

11. For the millions of people who wish, or are forced, to move, international migration has become increasingly expensive and hazardous. Contemporary migration regimes are built around a framework of State sovereignty, allowing States to choose who they allow to enter and remain in their territory, with the limited exception of the obligation of *non-refoulement* of refugees. However, demand for access is much higher than many State migration regimes allow for. Individuals may wish to migrate to access job opportunities for which limited regular migration opportunities exist, or may need to seek asylum beyond neighbouring countries. Many of those seeking to migrate will therefore make use of smugglers to circumvent these restrictions. Migrant smuggling is reported to be one of the fastest growing and most lucrative forms of organized criminal activity.⁹ Smugglers crowd their human cargo into shipping containers and onto boats and trucks. While many arrive safely and consider their investment well spent, excessive profiteering often places migrants’ lives and well-being at serious risk. At the same time, in many impoverished communities, smugglers are frequently regarded very positively by community members as they are seen as providing a necessary and essential service.

12. For asylum-seekers, reliance on migrant smugglers is especially acute. The rules of international refugee law provide everyone with the right to enjoy and seek asylum from persecution. They also prevent States bound by these rules from returning a person with a valid claim for asylum back to a situation where they face persecution. But asylum-seekers must be outside their country to make a claim for protection. Countries that are easy for asylum-seekers to reach are often unable or unwilling to provide them with the protection and support they need. By seeking the help of facilitators to move further, asylum-seekers increase their chances of finding a safe third country.

B. Data on migrant smuggling in Asia and the Pacific

13. There are currently no reliable figures available on the extent of migrant smuggling globally. The hidden nature of the crime and the fact that States are often either unwilling or unable to collect and share information are two of the major reasons for the paucity of data. The value of available data is further compromised by the fact that statistics on irregular migration are rarely disaggregated based on whether entry or stay was facilitated by a smuggler. Information on irregular migration is nevertheless valuable. This is because our understanding of *how* irregular migration happens supports a presumption that a significant proportion of the world’s irregular migrants, particularly those

⁹ See, for example, EUROPOL, *Serious and Organised Crime Threat Assessment: Crime in the Age of Technology* (European Police Office, 2017). Available from www.europol.europa.eu/activities-services/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017.

traveling long distances and/or escaping conflict, are required to use the services of a smuggler at some point in their journey.¹⁰

14. In 2017, the International Organization for Migration (IOM) published the first-ever comprehensive collation and analysis of migrant smuggling data and research, considering all major regions as well as selected affected countries.¹¹ The following summary draws heavily upon that publication as it relates to the Asian and Pacific region, while also highlighting insights from other recent data collection and analysis initiatives, including several IOM studies and a 2015 United Nations Office on Drugs and Crime (UNODC) report on migrant smuggling in Asia.¹² It should be noted that, while this literature provides a solid basis for the general description of migrant smuggling in Asia and the Pacific, there are substantial gaps, including in geographical coverage.

15. South-West Asia (including Afghanistan and the Islamic Republic of Iran) and South Asia (including Bangladesh, Bhutan, India, Maldives, Nepal and Sri Lanka) are both major hubs of irregular migration. According to UNODC, most cases of irregular migration from and within these subregions involve migrant smugglers.¹³ While political conflict, ethnic violence and dire economic need primarily fuel irregular migration, the pool of irregular migrants also includes relatively well-educated and wealthy individuals in search of a better life.

16. Asylum-seekers, most of them young men, make up a significant portion of migrants smuggled from South Asia and South-West Asia to the preferred destinations of Europe, North America and Australia. However, many migrants are also smuggled to the Middle East and other regions for work. The costs of smuggling are difficult to estimate, but destination is clearly determinative. For example, migrants from South Asia seeking to be smuggled to the United States or Canada can expect to pass through many intermediaries on their multi-stage journey, and can be charged much more than those seeking to travel from South Asia to South-East Asia. The place of origin may also substantially affect cost: smuggling from India or Sri Lanka appears to be more expensive than smuggling from Pakistan.

17. The situation in North Asia and Central Asia is less easy to map, reflecting the relative paucity of available data as well as the diversity of migration experiences in this part of the world. It is apparent, however, that the largest smuggled migrant populations in and out of these subregions comprise mainland Chinese seeking economic opportunities abroad who use facilitators to move irregularly to Europe, North America or Australia. Central Asia continues to be a transit point for many South Asians being smuggled into

¹⁰ See further United Nations Office on Drugs and Crime, *Migrant Smuggling in Asia: Current Trends and Related Challenges* (2015), pp. 14, 47 and 48.

¹¹ See M. McAuliffe and F. Laczko (eds.), *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base* (International Organization for Migration, Geneva, 2016).

¹² See United Nations Office on Drugs and Crime, Bibliographic Database on Migrant Smuggling and Related Conduct (2017). Available from www.unodc.org/cld/v3/sherloc/bibdb/. See also United Nations Office on Drugs and Crime, *Migrant Smuggling in Asia: Current Trends and Related Challenges* (2015).

¹³ See United Nations Office on Drugs and Crime, *Migrant Smuggling in Asia: Current Trends and Related Challenges* (2015), p. 59.

Europe¹⁴. The Pacific region is generally considered from the perspective of major States of destination such as Australia.

18. Migrant smuggling in and from South-East Asia (a subregion that includes all 10 Member States of ASEAN) is better understood. Available information confirms that the multiple, complex migration flows within and from this subregion increasingly involve smuggling. IOM has affirmed that many of the asylum-seekers and refugees moving in, within and out of the subregion rely on migrant smugglers for some or all of their journey, while noting that: “some irregular flows involving smugglers are mixed, comprising migrants in need of international protection, as well as those who do not need protection”.¹⁵ Maritime smuggling routes are the most visible in this subregion. Such complex flows from Bangladesh and Myanmar across the Bay of Bengal and the Andaman Sea to Thailand, Malaysia and Indonesia, as well as those from Indonesia and Sri Lanka to Australia, are particularly evident.

19. Much less is known about the many land and sea routes dominated by large numbers of migrant workers. However, it is clear that, in this part of the world, the link between migrant smuggling and irregular migration for work is a strong one. While labour migration is well entrenched throughout South-East Asia, regular migration channels are expensive and unwieldy. Many workers thus seek out informal facilitators who can offer cheaper and more efficient transport, entry and work placement services. These migrants feed into sectors that rely heavily on unregulated labour. Facilitated irregular migration within South-East Asia often morphs into abuse and exploitation, and may give rise to human trafficking.

III. Trafficking in persons: patterns, drivers and trends

20. Human trafficking is a covert activity involving marginalized individuals and “hidden populations”. But our understanding of trafficking is improving rapidly, not least because of the considerable efforts that have been made over the past decade to map relevant dynamics and assess the scope and nature of the phenomenon. After providing a brief description of the “how” and “why” of human trafficking, this section draws upon available data and research to sketch a broad picture of patterns and trends in Asia and the Pacific.

A. Dynamics of human trafficking

21. Human trafficking, characterized by a situation of exploitation from which an individual cannot escape, can be the result of a range of tactics and methods. To recruit victims, traffickers use a variety of methods, frequently involving deception. For example, migrants seeking to work abroad may be tricked into believing that they are being recruited for legitimate employment or marriage. The deception may also relate to the conditions of work, rather than to the nature of the employment.

22. Traffickers will typically seek to exercise control over a victim’s legal identity by confiscating their passport or official papers and isolating them physically, culturally and linguistically. Debt bondage and the withholding of

¹⁴ International Organization for Migration, *Mapping of Irregular Migration in Central Asia* (2014). Available <http://iom.kg/wp-content/uploads/2015/01/IDFPublicationeng.pdf>.

¹⁵ M. McAuliffe and F. Laczko (eds.), *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base* (International Organization for Migration, Geneva, 2016), p. 218.

wages are widely used means of exercising control over trafficked persons and ensuring their continued profitability. Physical restraint, violence and intimidation, aimed at establishing and maintaining control, are frequently reported.

23. While our understanding of trafficking is far from complete, it is apparent that certain factors render an individual, social group or community particularly vulnerable to trafficking and related exploitation. These include poverty and inequality, gender, race and ethnicity. These factors tend to have a disproportionate and differential impact on groups already lacking power and status in society, including women, children (particularly unaccompanied children), migrants (especially irregular migrants), asylum-seekers, refugees and internally displaced persons.

24. While the international legal definition of trafficking in persons does not require cross-border movement, the link between trafficking and cross-border migration is a strong one. In its *Global Report on Trafficking in Persons 2016*, UNODC used data sets from most countries in the world to show that the nationality of victims detected in a country often strongly correlates with the nationality of the flows of regular migrants into that country.^{16, 17} There were 9.1 million victims who moved either internally or internationally (44% of the total), while the majority – 11.8 million (56%) – were subjected to forced labour in their place of origin or residence.¹⁸

25. Certainly, the existence of a diaspora within the country of destination can act as a pull factor for potential victims, increasing their willingness to take risks regarding employment opportunities. Organized criminal networks in the country of origin are often adept at exploiting regular migration channels: the higher the prevalence of organized crime in countries of origin, the greater the number of victims from these countries that are detected in major destinations.¹⁹

26. There is also a clear link between trafficking and conflict²⁰. Many of the elements known to increase individual and group vulnerability to trafficking – such as gender-based violence, discrimination and a lack of economic opportunity – are exacerbated before, during and after conflict. Conflict fosters the conditions within which trafficking will flourish, often well past the point at which hostilities cease. Those who are escaping anticipated or actual conflict, or the aftermath of conflict, are especially vulnerable to trafficking. The pressure to move is often urgent and intense, leading individuals to take risks that they would otherwise consider unacceptable.

27. Conflict also invariably operates to weaken State structures, remove protections and enable criminal networks to operate more freely. Increasingly, persons who have escaped conflict and seek asylum in another country are subjected to trafficking at some point in their journey or at their intended

¹⁶ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (New York, 2016), p. 9.

¹⁷ *Ibid.*, p. 9.

¹⁸ International Labour Office, *ILO Global Estimate of Forced Labour: Results and Methodology* (2012). Available from www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf, pp. 16 and 17.

¹⁹ *Ibid.*, pp. 59 and 60.

²⁰ International Organization for Migration, *Addressing Human Trafficking and Exploitation In Times of Crisis* (2015).

destination.²¹ Other crises, such as natural catastrophes and environmental disasters, create similar vulnerabilities for individuals and communities, narrowing choices for those who are compelled to move and providing potential opportunities for exploiters.

B. Data on human trafficking in Asia and the Pacific

28. Current knowledge of trafficking prevalence, patterns and trends is imperfect and incomplete. The nature of the phenomenon means that many of those who have been or are being exploited will never be identified or counted. It is therefore necessary to extrapolate from the very little reliable information and data that are available. However, doing so poses considerable obstacles. Most particularly, there are still questions around *what is being counted* when trafficking statistics are produced. For example, the validity of information received from States for compilation by intergovernmental organizations is compromised by differences in how States understand trafficking. Similarly, while there is solid information available about the prevalence of forced labour, the concepts of forced labour and trafficking are not identical in law or practice.

29. Despite these very real obstacles, efforts to improve our understanding of the nature and scope of trafficking in persons are valuable and must continue. An accurate understanding of the problem is critical to the difficult, but essential, task of developing more realistic policies and more effective interventions.

30. There can be little doubt that Asia and the Pacific is a major origin and destination of victims of trafficking.²² This region is home to nearly 60 per cent of the world's population, and many of the world's supply chains originate in Asia and the regional connectivity deepening. Women, men and children from lower income countries are frequently trafficked into exploitation in higher income countries or areas. Most trafficking occurs within the borders of a single country or, more commonly, within the region. However, available information confirms that Asia is also a major source of trafficking to other parts of the world, including North America, Western Europe and the Middle East. One estimate from 2015 suggests that the Asian and Pacific region had the largest number of victims of forced labour, at 11.7 million, of whom approximately 4 million were migrants.²³ Victims of human trafficking have been identified in many sectors in the region, including in the agricultural, fishing, construction, domestic work and sex industries. In 2015, there were about 2,340 victims of trafficking assisted by IOM.²⁴

31. According to the *Global Report on Trafficking in Persons 2016*, the "typical victim" in East Asia and the Pacific is a woman or girl who has been trafficked for the purposes of sexual exploitation. However, this finding is based on *identified* victims and may well reflect a continuing emphasis by national authorities on trafficking for the purposes of sexual exploitation. By

²¹ See further "Report of the Special Rapporteur on trafficking in persons, especially women and children", thirty-second session of the Human Rights Council, A/HRC/32/41 (3 May 2016).

²² The Global Slavery Index, Global Slavery Index 2016. Available from www.globallslaveryindex.org/index/. It should be noted that this figure largely reflects the large number of individuals assessed to be in forced or bonded labour in India.

²³ International Labour Organization, *ILO Global Estimate of Forced Labour: Results and Methodology* (2012).

²⁴ International Organization for Migration, "Counter-trafficking: Regional and global statistics at a glance" (2016). Available from www.iom.int/sites/default/files/infographic/CT2015_10_June_2016.pdf.

contrast, the typical victim in Central Asia is male, trafficked for forced labour. The scant data made available to UNODC in relation to South Asia also indicate a high level of trafficking for forced labour, much of which involves children. IOM victim assistance data, relying on a data collection system that is relatively standardized across borders, for example, does not reflect a typical victim in South-East Asia as being a young woman trafficked for sex but rather a male (86.1%) who was exploited in some form of forced labour (88.4%). In South and Central Asia, the statistics are similar: male (60.5%) and exploited in forced labour (63%).

IV. International, regional and national responses to migrant smuggling

32. This section provides an overview of the international, regional and national responses to the smuggling of migrants, focusing on major legal and policy developments.

A. International legal and policy framework

33. The Smuggling of Migrants Protocol is the principal international treaty dealing with the smuggling of migrants. It was adopted by the United Nations General Assembly in 2000, alongside its parent instrument, the United Nations Convention against Transnational Organized Crime. Its stated purpose is to prevent and combat migrant smuggling, to promote international cooperation to that end and to protect the rights of smuggled migrants.

Table 4

Key provisions and obligations of States Parties to the Smuggling of Migrants Protocol

Purposes of the Protocol

To prevent and combat the smuggling of migrants.	Article 2
To promote cooperation among States Parties to meet that objective.	
To protect the rights of smuggled migrants.	

Key obligations of States Parties to the Protocol

To criminalize “the smuggling of migrants”, as defined in the Protocol. The act of producing, procuring, providing or possessing a fraudulent travel or identity document, and enabling a person who is not a national or permanent resident to remain unlawfully in the State, is also to be criminalized.	Article 6
To cooperate, to the fullest extent possible, to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.	Article 7
To take appropriate measures against the smuggling of migrants by sea, including by promptly informing another State Party where the State has reasonable grounds to suspect that a vessel flying its flag, or claiming its registry, is engaged in the smuggling of migrants.	Article 8
To ensure that, where measures are taken against a vessel reasonably suspected of being engaged in the smuggling of migrants, the State Party ensures the safety and humane treatment of the persons on board, takes due account of the need not to endanger the security of the vessel or its cargo, takes due account of the need not to prejudice the commercial or legal interests of the flag State, and ensures, within available means, that any measures taken are environmentally sound.	Article 9
To exchange relevant information with other States Parties to prevent and combat the smuggling of migrants by sea, in accordance with the objectives of the Protocol.	Article 10
To strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.	Article 11
To take measures as may be necessary to ensure that travel or identity documents issued by the State Party are of a quality such that they cannot readily be falsified and to ensure their integrity and security.	Article 12
To verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to be issued in its name, at the request of another State Party.	Article 13
To provide or strengthen specialized training for immigration and other relevant officials, in accordance with the objectives of the Protocol.	Article 14
To provide or strengthen information programmes to increase public awareness of the fact that the smuggling of migrants is a criminal activity and to identify the risks to the migrants concerned.	Article 15
To take all appropriate measures to preserve and protect the rights of smuggled migrants.	Article 16
To consider concluding bilateral or regional agreements, or operational arrangements or understandings aimed at establishing the most appropriate and effective measures to prevent and combat the smuggling of migrants.	Article 17
To facilitate and accept, without undue or unreasonable delay, the return of smuggled migrants who are its nationals or who have the right of permanent residence in its territory at the time of return.	Article 18

34. Despite the centrality of the Protocol, the international legal framework around migrant smuggling is not confined to one area or instrument. For example, many of the relevant rules that apply to interdiction, and search and rescue referenced in the Protocol reflect core principles of the international law of the sea, codified in the United Nations Convention on the Law of the Sea.²⁵

35. International human rights law in this area is also highly relevant, setting out the rights of smuggled migrants that States and others are obliged to protect and respect. Human rights law is also relevant because it imposes important limitations on how States may *respond* to smuggling. For example, the prohibition on collective expulsion may be considered when evaluating the lawfulness of interceptions and turn-backs at sea that fail to assess smuggled migrants individually.²⁶ In accordance with the obligation of *non-refoulement*, no person, including a smuggled migrant, may be expelled or returned to face persecution.²⁷ International human rights law further prohibits the return of any person, including a smuggled migrant, to a situation where he or she faces a real risk of torture or other serious violations of his or her human rights.²⁸ Additional status-based entitlements, attaching to vulnerable groups such as children, may render an otherwise lawful return unlawful, or modify the way in which a return can be lawfully implemented.

B. Regional legal and policy frameworks

36. The international response to the smuggling of migrants has paved the way for regional-level responses. Thus far, however, that response has been fragmented, with little evidence of regional standard-setting or operational cooperation. For example, while ASEAN has undertaken important work regarding trafficking in persons, it has taken a much lower profile on the issue of migrant smuggling. The recent Andaman Sea crisis exposed a high level of political sensitivity around migrant smuggling and a strong preference, on the part of affected States, to work with each other rather than through ASEAN.

37. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime is a regional forum for policy dialogue, information sharing and practical cooperation. Since its inception in 2002, the principal focus of the Bali Process has been on migrant smuggling, with Member States regularly affirming their commitment to combating smuggling including through criminalization and strengthening cross-jurisdictional cooperation.²⁹ In 2009, an ad hoc group was established “to produce substantive and actionable proposals to maintain the momentum of closer regional engagement on combating people smuggling and human trafficking”.³⁰ Since then, and despite an increasing focus on the issue of

²⁵ United Nations, *Treaty Series*, vol. 1833, p. 3.

²⁶ See further A.T. Gallagher and F. David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) pp. 677–680.

²⁷ Convention relating to the Status of Refugees, Article 33(1).

²⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. United Nations, *Treaty Series*, vol. 1465, p. 85. Article 3(1).

²⁹ Third Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime: Co-Chairs’ Statement, Bali, Indonesia, 14 and 15 April 2009. Available from www.baliprocess.net/UserFiles/baliprocess/File/Co%20chairs%20statement%20BRMC%20III_FINAL.pdf.

³⁰ First Ad Hoc Group Meeting: Co-Chairs’ Statement, Bali, Indonesia, 27–29 July 2009. Available from [www.baliprocess.net/UserFiles/baliprocess/File/Final%20Co-chairs%20of%20AHG%20Meeting%2027-29July09%20\(1\).pdf](http://www.baliprocess.net/UserFiles/baliprocess/File/Final%20Co-chairs%20of%20AHG%20Meeting%2027-29July09%20(1).pdf).

trafficking in persons, the Bali Process has continued to reiterate a unified stance against migrant smuggling and a commitment to more and better regional cooperation on this issue.

C. Trends in national responses

38. It is difficult to access detailed information on national-level responses to migrant smuggling. There is no central repository of relevant legislation and governments are often reluctant to share details of their policies and practices. The available information strongly suggests that there is less uniformity in responses than there is in the case of trafficking in persons; the diverse range of responses apparently reflects very different perceptions of and experiences with the problem.

39. Some rare, albeit limited, insight into State practice can be found in a 2017 study of how States incorporated, interpreted and applied the international legal definition set out in the Smuggling of Migrants Protocol.³¹ While only 4 of the 13 States surveyed were in Asia and the Pacific, the key findings of the study may support several general conclusions regarding trends in national responses. For example, it appears that the incorporation of the international legal definition of migrant smuggling into national law has been highly uneven, with many States omitting the “financial or other material benefit” element of the definition, thereby expanding the concept of migrant smuggling to include facilitated illegal entry for humanitarian or family reunification purposes. Many States of destination, including in Asia and the Pacific, have responded to migrant smuggling by criminalizing unlawful entry and unlawful stay. Sometimes criminalization is extended to those who, by providing accommodation or employment, facilitate smuggling. However, at least at the level of policy, this is recognized as being problematic, particularly in the light of the letter and spirit of the Smuggling of Migrants Protocol. A guide to national anti-smuggling legislation, produced by the Bali Process, explicitly notes the dangers of criminalizing smuggled migrants.³²

40. States that perceive themselves as especially or disproportionately affected by migrant smuggling have also been active in seeking cooperation from other States. While the Bali Process has been an important forum for policy development, operational cooperation in Asia and the Pacific is typically undertaken at the bilateral level, between countries of origin or transit and countries of destination.

V. International, regional and national responses to trafficking in persons

41. This section provides an overview of the international, regional and national responses to trafficking in persons, focusing on major legal and policy developments.

³¹ See United Nations Office on Drugs and Crime, *Issue Paper: The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol* (New York, 2017).

³² Regional Support Office to the Bali Process, *Policy Guide on Criminalizing Migrant Smuggling* (2014), p. 8. (“The important issue when developing domestic legislation is that the focus of the Smuggling of Migrants Protocol is to combat the smuggling of migrants. It is not to criminalize migrants for having been smuggled.”).

A. International legal and policy framework

42. While trafficking has been recognized as being an issue of international concern for over a century, structured and coordinated responses to trafficking are a much more recent development. The Trafficking in Persons Protocol, which was adopted in 2000 and entered into force in 2003, was a landmark development, not least because it set out the first internationally agreed definition of trafficking. Its stated purpose is to prevent and combat trafficking, to assist victims and to promote international cooperation.

Table 5

Key provisions and obligations of States Parties to the Trafficking in Persons Protocol

Purposes of the Protocol

To prevent and combat trafficking in persons, paying particular attention to women and children. Article 2

To assist the victims of such trafficking, with full respect for their human rights.

To promote cooperation among States Parties in order to meet those objectives.

Key obligations of States Parties to the Protocol

To criminalize trafficking in persons as defined in the Protocol and to impose penalties that take into account the grave nature of that offence. Article 5

To protect, to the extent possible under domestic law, the privacy and identity of victims of trafficking in persons and to consider the provision of a range of social services to enable their recovery from trauma caused by their experiences. Article 6

To ensure that the legal system contains measures that offer victims the possibility of obtaining compensation.

To consider allowing victims to remain in their territory, whether permanently or temporarily, taking into account humanitarian and compassionate factors. Article 7

To accept the return of any victims of trafficking who are their nationals, or who had permanent residence in their territory at the time of entry to the receiving State. When returning a victim, due regard must be taken for their safety, with the return preferably being voluntary. Article 8

To establish policies, programmes and other measures to prevent and combat trafficking and protect victims of trafficking from re-victimization. Article 9

To provide or strengthen training for officials in the recognition and prevention of trafficking, including human rights awareness training. Article 10

To strengthen such border controls as might be necessary to prevent trafficking, without prejudice to other international obligations allowing the free movements of people. Article 11

43. The adoption of the Trafficking in Persons Protocol provided impetus for other parts of the international system to take up the issue of trafficking in a serious and systematic way. Until that point, attention to the issue had been piecemeal and sporadic. For example, despite explicit references to trafficking in two human rights treaties, trafficking was rarely identified or discussed within the international human rights system. This has changed substantially in recent years, with the establishment of specialist mechanisms and the growing involvement of relevant parts of the United Nations system in standard-setting and technical support.

44. The international policy framework around trafficking has evolved considerably over recent years. For example, in 2010, the General Assembly adopted the United Nations Global Plan of Action to Combat Trafficking in Persons,³³ which is aimed at promoting concrete actions to prevent trafficking in persons, protect and assist victims, prosecute related crimes, and strengthen partnerships among governments, civil society organizations and the private sector. The United Nations Security Council has also addressed the issue of trafficking in persons, including by convening high-level debates on trafficking during conflicts.³⁴

45. Furthermore, the Agenda 2030 for Sustainable Development includes trafficking-related goals and targets, including Sustainable Development Goals 5, 8 and 16. The Migration Governance Framework of IOM promotes a holistic approach to addressing challenges, including trafficking in persons.

B. Regional legal and policy responses

46. The international response to trafficking in persons has paved the way for, and in turn been influenced by, responses at the regional level. Within Asia and the Pacific, the South Asian Association for Regional Cooperation adopted a treaty on the cross-border trafficking of women and girls for sexual exploitation in 2002,³⁵ but since then it has not engaged strongly in the issue. To date, regional or subregional action concerning trafficking in persons has principally taken place through two forums, as described below.

47. **Association of Southeast Asian Nations:** Trafficking in persons has received constant and increasing attention from ASEAN and its Member States for close to two decades. While much of the impetus has come from the Senior Officials Meeting on Transnational Crime,³⁶ other bodies, including the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, have also made substantial contributions to the development of common standards.³⁷ In November 2015, heads of State from the 10 ASEAN member countries adopted the ASEAN Convention against Trafficking in Persons, Especially Women and Children,³⁸ ending a decade-long negotiation process. The adoption of the Convention established South-East Asia as the

³³ Resolution 64/293 of 30 July 2010.

³⁴ See, for example, United Nations, “Security Council condemns human trafficking in strongest terms, unanimously adopting Resolution 2331 (2016)”, 20 December 2016. Available from www.un.org/press/en/2016/sc12647.doc.htm.

³⁵ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Available from http://saarc-sec.org/digital_library/detail_menu/saarc-convention-on-preventing-and-combating-trafficking-in-women-and-children-for-prostitution.

³⁶ For a comprehensive (albeit dated) overview of the achievements of the Senior Officials Meeting on Transnational Crime, see Association of Southeast Asian Nations, *ASEAN Progress Report on the Criminal Justice Response to Trafficking in Persons* (Singapore, 2011). Available from <http://asean.org/asean-progress-report-on-the-criminal-justice-response-to-trafficking-in-persons/>. An updated version of this report is due to be published in 2018.

³⁷ See, for example, Association of Southeast Asian Nations, *Regional Review on Laws, Policies and Practices within ASEAN Relating to the Identification, Management and Treatment of Victims of Trafficking, Especially Women and Children* (2016). Available from http://asean.org/?static_post=regional-review-laws-policies-practices-within-asean-relating-identification-management-treatment-victims-trafficking-especially-women-children.

³⁸ See <http://asean.org/asean-convention-against-trafficking-in-persons-especially-women-and-children/>.

first region outside Europe to have developed a multilateral treaty on human trafficking. The ASEAN Convention, which entered into force in March 2017, is accompanied by a non-binding action plan³⁹ that sets out a range of policies and commitments to guide ASEAN Member States in formulating their individual and joint response to trafficking.

48. The ASEAN Convention closely follows the Trafficking in Persons Protocol in both language and form. It accepts the Protocol's definition of trafficking and its broad list of obligations. In some areas – such as the provision of aggravated offences, victim identification, non-prosecution or detention for status-related offences and funding of victim support services – the ASEAN Convention is stronger than the Protocol. In other areas, such as the return of victims, it imposes a lower standard of obligation. On balance, the ASEAN Convention represents a net advance, affirming and in some cases extending core obligations in relation to prosecution, international cooperation and victim protection.

49. **Bali Process:** Until recently, the principal focus of the Bali Process was on migrant smuggling. However, over the past several years, attention to trafficking in persons has markedly increased. In 2015, the Working Group on Trafficking in Persons was established. It has been active in many areas, including labour exploitation,⁴⁰ criminalization, victim identification and victim protection. In 2016, Member States recognized that the private sector could play an important role in combating human trafficking, forced labour and related exploitation, and the Bali Process Government and Business Forum was formally launched in August 2017. Key priorities for action, under a work plan agreed upon by business leaders, will include ethical employment, transparency in supply chains, safeguards and redress mechanisms.⁴¹

50. **Almaty Process:** This Process promotes sustained dialogue and the exchange of information on migration issues and on refugee protection challenges, including irregular migration, human trafficking, migrant vulnerabilities, migrant integration, human mobility and human rights of migrants.⁴²

C. Trends in national responses

51. The developments at the international and regional levels outlined above have paved the way for comprehensive national responses to trafficking. While it is not within the scope of this report to provide a full overview of

³⁹ ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children (2015). Available from www.asean.org/wp-content/uploads/2015/12/APA-FINAL.pdf.

⁴⁰ See “Regional Symposium on Trafficking for the Purposes of Labour Exploitation, Bangkok, 25–26 March 2015”. Available from www.baliprocess.net/ad-hoc-group/regional-symposium-on-trafficking-for-the-purposes-of-labour-exploitation-bangkok-25-26-march-2015/.

⁴¹ Bali Process Government and Business Forum: The “Perth Forum”, Co-Chairs’ Statement, Perth, Australia, 25 August 2017. Available from www.baliprocess.net/bali-process-government-and-business-forum/bali-process-business-forum-perth-australia-24-25-august-2017/.

⁴² The member countries are Afghanistan, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey and Turkmenistan. The Islamic Republic of Iran and Pakistan have observer status. Several States in Asia and the Pacific have been invited as guests, and a host of international organizations and civil society organizations are also invited on an ad hoc basis. See www.iom.int/almaty-process.

national responses, the following paragraphs highlight key developments and flag critical challenges.⁴³

52. **National legal and policy frameworks:** Prior to the adoption of the Trafficking in Persons Protocol in 2000, very few States had criminalized what is now understood to be trafficking in persons. It is currently widely accepted that all States require a strong law: one that not only criminalizes and appropriately penalizes trafficking and related conduct in accordance with the internationally agreed definitions, but also specifies rights and obligations regarding victim protecting and support. Most States in Asia and the Pacific now have a particular law related to trafficking or detailed provisions within a broader law, typically the national criminal code, defining and criminalizing trafficking and providing victims with at least some rights and protections.⁴⁴ As they gain experience in implementing these laws, many States are choosing to refine their legal framework further in order to improve its effectiveness. Changes are often aimed at streamlining offences, clarifying certain key concepts or terms that have proven difficult to apply in practice, strengthening provisions relating to victim assistance and compensation, and, more recently, introducing transparency requirements for businesses. National legal frameworks are often supplemented by policies that promote a broad-based and inclusive response.

53. **Victim identification:** The prompt and accurate identification of victims of trafficking is an essential part of an effective national response. However, the identification of victims is often highly problematic and available data suggest that very few victims of trafficking are ever identified.⁴⁵

54. A failure to identify victims quickly and accurately compromises the national response and negates rights or entitlements that have been formally granted to victims. It also compromises the capacity of States to respond effectively to the crime of trafficking. Many States in the region have recognized the need to establish procedures and mechanisms to improve victim identification and have taken steps to that end. These include the preparation of written identification tools, such as checklists, guidelines and procedures

⁴³ This section draws on the United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (New York, 2016), the Association of Southeast Asian Nations, *Regional Review on Laws, Policies and Practices within ASEAN Relating to the Identification, Management and Treatment of Victims of Trafficking, Especially Women and Children* (2016) and *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region* (2011), and the United States Department of State, *Trafficking in Persons Report* (2017).

⁴⁴ In 2016, the United Nations Office on Drugs and Crime reported that 88 per cent of the 179 countries reviewed had criminalized trafficking as a specific offence covering most or all forms as defined in the Trafficking in Persons Protocol and that a further 9 per cent had legislation covering some forms. The figures from 2003 were 18 per cent and 23 per cent, respectively. See further United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (New York, 2016), p. 48.

⁴⁵ See United States Department of State, *Trafficking in Persons Report* (2017), p. 34. (Reporting that a total of 66,620 victims of trafficking were identified worldwide in 2016. Fewer than one quarter of these identifications related to victims of trafficking for forced labour). Estimations by the International Labour Organization (ILO) suggest that the number of persons in forced labour worldwide exceeds 20 million. ILO, "Forced labour, modern slavery and human trafficking" (2017). Available from www.ilo.org/global/topics/forced-labour/lang--en/index.htm. It is expected that the ILO will release another estimate in September 2017. The International Organization for Migration identifies and assists between 7,000 and 8,000 victims per year worldwide, or approximately 1 in every 8 victims who were formally identified in 2016.

that can be used to support identification. Both ASEAN and the Bali Process have developed regional tools to support improvements in victim identification.⁴⁶

55. **Criminal justice responses:** Many States have sought to address the high levels of impunity afforded to perpetrators by strengthening their criminal justice response by, for example, training their officials, establishing investigative bodies and setting up specialist courts to hear trafficking cases. Many have established a special unit within the national police force to investigate trafficking. ASEAN itself has set up a forum – the Heads of Specialist Trafficking Units Process – that brings these specialist bodies together to exchange information and intelligence. Bilateral relationships between national police forces have also been strengthened in recent years. Other responses that are becoming more common include the establishment of specialist prosecutors and multi-disciplinary teams that bring investigators together with victim support agencies to ensure that, from the moment of their identification, trafficked persons receive the assistance and protection they require to be able to cooperate effectively in the prosecution of their exploiters.

56. **Victim protection and support:** The provision of immediate protection and support is of critical importance to trafficked persons. Some States in the region have made considerable progress in developing the systems and mechanisms and allocating the necessary funding to ensure that victims receive appropriate protection and support. In most States, however, such entitlements, even if they do exist in law, are not readily available in practice. Progress in this area continues to be compromised by a range of factors, including: ongoing weaknesses in victim identification; the withholding of assistance from victims who do not agree to cooperate with law enforcement; the detention of victims in shelters; the lack of internal and cross-border cooperation, hampering the effective delivery of services; inadequate resources; and the failure to recognize the legal status of foreign victims. Even among those victims who are formally identified, their safe return and effective reintegration can present significant challenges. While some States in the region have developed protocols and systems to cooperate on returns between them and on assistance to the victims, the structures and resources necessary to ensure safe return and reintegration remain weak.

57. **Prevention through addressing demand and root causes:** International and regional laws require States to take at least some measures to prevent trafficking by addressing its underlying causes. Rather than explicitly legislating to prevent trafficking, most States have relied upon policy instruments, such as national action plans, to raise awareness and empower vulnerable groups, as well as to improve conditions and protections for migrant workers. For example, some States have recently amended their labour laws to stipulate a minimum age for workers in certain industries that are susceptible to trafficking, such as fisheries and agriculture. Some have gone further, requiring employers in specific sectors to provide their workers with a written

⁴⁶ See, for example, Association of Southeast Asian Nations and Coordinated Mekong Ministerial Initiative against Trafficking, “Identifying victims of trafficking and associated forms of exploitation: Common indicators for first responders”, ASEAN-COMMIT Workshop, 15 and 16 December 2015. Available from <http://un-act.org/publication/view/identifying-victims-trafficking-associated-forms-exploitation-common-indicators-first-responders/>. See also Regional Support Office to the Bali Process, *Policy Guide on Identifying Victims of Trafficking* (2015), p. 12. Available from www.baliprocess.net/UserFiles/baliprocess/File/Policy%20Guide%20on%20Identifying%20Victims%20of%20Trafficking.pdf.

contract and leave. Other preventive measures seeking to address “demand” include: campaigns on the illegality of sex tourism; the investigation, punishment and blacklisting of unlawful recruitment agencies and brokers; and trafficking-focused inspections of factory and construction work sites, fishing vessels and entertainment venues.

VI. Findings and recommendation

58. Safe and supported migration brings great benefits to individuals as well as to the national economies of States of origin and destination. Migrant smuggling and human trafficking undermine these benefits; injure victims, their families and their communities; enrich criminals; threaten the rule of law; and undercut public support for enlightened and humanitarian migration policies. It is critical that steps be taken to minimize the vulnerability of migrants to abuse and exploitation at the hands of profiteers, including traffickers and smugglers. The following recommendations are not intended to be exhaustive. Rather, they draw on the major themes addressed in this paper: the link between migrant smuggling and human trafficking; the importance of building on strong legal protections for individuals caught up in both practices; and the need for policies and responses that are informed by evidence and experience.

A. Adopt an explicit, rights-based approach to exploitation in migration

59. Concerns about the importance of human rights and risks of victims’ marginalization have led to repeated calls for a human rights-based approach to trafficking in persons.⁴⁷ It follows that such an approach is equally appropriate to address the broader problem of exploitation in migration. Under a human rights-based approach to exploitation in migration, every aspect of the national, regional and international response should be anchored in the rights and obligations established by international human rights law. This means that, as policies and programmes are formulated, their main objective should be to promote and protect rights: identifying both the rights-holders (for example, trafficked persons or migrants at risk of being exploited or harmed) and their entitlements, and the corresponding duty-bearers (usually States) and their obligations.

60. The elements of a human rights-based approach to trafficking in persons have been well articulated, not least through the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.⁴⁸ Such an approach is focused squarely on the victim, explicitly recognizing and advancing the rights of trafficked persons to protection, support, remedies and a safe, supported return. This includes supporting victims of trafficking and of exploitation in realizing the right to remedy through criminal and civil processes, of which they are generally unaware.

61. A human rights-based approach to migrant smuggling demands a similar approach, requiring States to put in place laws, policies and practices to ensure that the rights of persons who have been smuggled are respected and

⁴⁷ See further Office of the United Nations High Commissioner for Human Rights, *Human Rights and Human Trafficking: Fact Sheet No. 36* (New York and Geneva, 2014). Available from www.ohchr.org/Documents/Publications/FS36_en.pdf.

⁴⁸ Office of the United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (New York and Geneva, 2010). Available from www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf.

protected. This includes the right to basic assistance and protection from violence, exploitation and return to persecution.

B. Build a robust evidence base

62. The lack of reliable data and information on human trafficking and migrant smuggling has been well documented in this paper. In respect of migrant smuggling, the reluctance of States to share information deemed sensitive and the absence of political pressure to generate data have contributed to the current poor state of the evidence base. While research into the nature and scale of trafficking in persons continues to be substantial, there are ongoing problems with methodologies and approaches, to the point where available data and research cannot always be relied upon.

63. To further strengthen the evidence base, the following avenues should be considered:

64. **Strengthen research and analysis partnerships:** Partnerships between policymakers and researchers, public and private entities and across disciplines are essential to generating quality data and research.⁴⁹ Recent partnerships on trafficking in persons underscore the value of such collaboration.⁵⁰ As far as possible, States should commit to sharing data and other information either bilaterally or through regional forums such as the Bali Process or ASEAN.

65. **Support targeted capacity development:** More needs to be done to strengthen data collection and research capacity, most particularly in regions and countries where patterns and flows are not yet well understood. In relation to migrant smuggling, regional monitoring and analysis units could help to redress the current situation in which much research is conducted by and from the perspective of countries of destination. For trafficking in persons, support could focus on building the capacity of local organizations and institutions to undertake detailed investigations of exploitation within specific sectors and geographical regions.

66. **Focus on quality and policy relevance:** In relation to both migrant smuggling and human trafficking, it is important to strike a balance between the *need* for information related to numbers and flows and the *capacity* to generate data that are sufficiently rigorous. While methodological limitations should not inhibit efforts to strengthen the evidence base, difficulties in measurement and assessment must be openly and honestly addressed. In addition, priorities for data collection and research should be established with reference to policy needs.

⁴⁹ M. McAuliffe and F. Laczko (eds.), *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base* (International Organization for Migration, Geneva, 2016), pp. 16 and 17.

⁵⁰ See, for example, S. Murray, "Casting a tight net", *Stanford Social Innovation Review* (Fall 2015). Available from http://ssir.org/articles/entry/casting_a_tight_net. This article documents an innovative partnership between civil society and the media to expose exploitation in the Thai fishing industry. See also Walk Free Foundation, "Media release: ILO and Walk Free Foundation to collaborate on global estimate of modern slavery", 16 March 2017. Available from www.walkfreefoundation.org/news/media-release-ilo-walk-free-foundation-collaborate-global-estimate-modern-slavery/.

C. Strengthen investigation, prosecution and operational cooperation

67. Law enforcement efforts in relation to migrant smuggling are too often disproportionately weighted towards the detection of migrants, rather than their facilitators. When smugglers are the focus of law enforcement efforts, the targets are typically low-level transporters. An effective criminal justice response to migrant smuggling will focus efforts on higher-level offenders in seeking to dismantle smuggling networks, pursue and confiscate proceeds of crime, and ensure that criminal justice agencies charged with pursuing migrant smuggling are well trained and appropriately resourced.

68. Similar priorities must apply to the investigation and prosecution of trafficking crimes. There is a need to examine current approaches and determine why so few traffickers are being convicted, why most of those who end up in the criminal justice system are low-level offenders and why victims are so reluctant to cooperate in the prosecution of their exploiters. States must also develop operational strategies to address the links between migrant smuggling and trafficking in persons, and to redress the current failure to identify trafficking and related exploitation among irregular migrants, including those who have been smuggled.

69. In relation to both migrant smuggling and trafficking in persons, experience confirms that cooperation between affected States – especially between operational agencies – is essential for an effective response. States should work to set up and support bilateral and multilateral mechanisms among judicial authorities, law enforcement, border control agencies and other relevant actors to share information, coordinate operational activities and support prosecution efforts. These and other channels can be used to gather and share information on modus operandi of smugglers and traffickers, routes and economic models of networks, links with other crimes, financial transfers, and factors that shape the smuggling and trafficking industry, including root causes.

D. Seek innovative approaches to prevention

70. There is a growing understanding that prevention must be part of any comprehensive response to migrant smuggling and human trafficking. Without attention to root causes, efforts to address these two crimes can only ever bring short-term results. Priority areas for action should include the following:

71. **Prevention through the creation of legal migration channels:** Individuals who wish, or are forced, to move will turn to smugglers because the alternatives are either unavailable, expensive, slow or burdensome. States are in a position to undercut the trafficking and migrant smuggling business models by developing realistic, safe and accessible channels for migration. This includes expanding legal migration opportunities and making existing migration processes as efficient, inexpensive and accessible as possible. States should also consider increasing opportunities for family reunification, access to asylum or durable international protection through resettlement schemes, humanitarian schemes for refugees and migrants in need, other alternative pathways and/or community-based sponsorship programmes, and academic scholarships. Migrants and potential migrants should have access to clear and unbiased information about the available legal migration channels.

72. **Prevention through understanding and addressing underlying vulnerabilities:** Available evidence confirms that certain groups and communities are especially vulnerable to exploitation through trafficking and exploitative migrant smuggling. Factors that help to shape vulnerability

include conflict, poverty and inequality, as well as human rights violations such as discrimination and gender-based violence. These factors all contribute to creating economic deprivation and social conditions that limit individual choice and make it easier for traffickers and exploitative smugglers to operate.

73. Empowering vulnerable people by protecting their human rights will reduce their susceptibility to being trafficked and exploited. A better understanding of vulnerability to exploitation in migration should result in preventive measures that are realistic, effective and respectful of human rights.

74. **Prevention by reducing demand for cheap goods and services produced by trafficked persons and exploited migrants:** Trafficking is driven by a demand for sexual services, cheap goods, and inexpensive, flexible labour. While criminal agents are involved in delivering trafficked persons to provide those services, it is the end-users of these services that keep the criminal agents in business. Efforts should be made to inform the public of the social costs of these services as a means of driving down demand. Where appropriate, the purchase or use of such services should be criminalized and individual users punished. The private sector, which is heavily involved in migration as employers and purchasers of goods and services, should leverage its significant influence to ensure ethical recruitment and decent work conditions for migrant workers and to strengthen due diligence and remediation. Recruitment agencies should adhere to standards of conduct regarding the ethical recruitment of migrant workers, and States and corporations using such agencies should actively monitor recruitment processes.
