

# *Barriers to Ratification of the United Nations Protocol Against the Smuggling of Migrants*

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## Abstract

The United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air sets out an ambitious international approach to prevent and combat the smuggling of migrants. Although the Protocol has found widespread adoption worldwide, many countries have not—or not yet—signed and ratified the Protocol. Many critics argue that the Protocol promotes the views of rich, developed destination countries and offers little incentives for developing countries of origin to support the Protocol. This paper examines the reasons why some countries choose not to ratify the Protocol. The paper sheds light on the common concerns and characteristics of the forty-five non-Party States in order to pave the way for wider adoption of the Protocol and for more concerted efforts to combat the smuggling of migrants worldwide.

## I. INTRODUCTION

The United Nations (UN) Protocol Against the Smuggling of Migrants by Land, Sea and Air is the foremost international response to a phenomenon that has emerged as one of the most significant political, social, and criminal justice issues worldwide.<sup>1</sup> Since the end of the Cold War in the late 1980s, few topics have dominated international relations, domestic politics, legislative developments, and global media as much as the smuggling of migrants. The Smuggling of Migrants Protocol is the first and only

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1. *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, 12 December 2000, 2241 U.N.T.S. 507 (entered into force 28 January 2004) [*Smuggling of Migrants Protocol*].

international instrument to define and criminalize the smuggling of migrants, foster international co-operation, and protect the right of smuggled migrants.<sup>2</sup> It supplements the Convention Against Transnational Organized Crime and is part of a suite of measures “to promote cooperation to prevent and combat transnational organized crime more effectively”.<sup>3</sup>

The development of the Protocol was sparked in the late 1990s by concerns over the lack of international co-operation and unanimity in the criminalization of migrant smuggling. The development of a uniform, harmonized approach and a framework to enable international co-operation were thus the main motivators that led to the completion of the Protocol, which was opened for signature in Palermo, Italy, in December 2000. Widespread support and ratification of the Protocol are paramount to ensure the effectiveness of the Protocol’s ambitious goals. This paper examines the levels of and barriers to ratification of the Protocol in order to shed light on the reasons why some countries hesitate or choose not to sign the Smuggling of Migrants Protocol. The goal of the paper is to identify the main obstacles, and develop ideas and recommendations to enable wider ratification.

In the fifteen years since its creation, the Smuggling of Migrants Protocol has garnered considerable support. As on 1 July 2015, the Protocol had 141 States Parties. Twelve states, referred to as signatory non-Parties to the Protocol in this paper, have signed but not, or not yet, ratified the Protocol. Forty-five states are not Parties to the Protocol, hereinafter referred to as non-Party States. While there is a small and growing body of literature examining the application and scope of the Protocol, there is, to this day, no research on the reasons why countries choose—or choose not to—sign and ratify this Protocol. This is, however, a crucial issue as the “success” of the Protocol ultimately depends on its worldwide adoption. This paper seeks to close this gap in the literature and advocate wider adoption of the Protocol.

This paper is divided into six parts. Following this ‘Introduction’, Section II briefly outlines the main provisions of the Protocol and examines the level and spread of ratification to date. Section III summarizes reservations and concerns expressed by States Parties in order to highlight some of the more contentious provisions. In Section IV, the paper examines the non-Party States from several angles, including their geographical location, socioeconomic development, refugee and irregular migration flows, and the role of other regional initiatives to counteract migrant smuggling. This serves to highlight commonalities and differences between the non-Party States and identify common barriers to ratification, which are further analyzed in Section V. Section VI summarizes the main findings and proposes a number of recommendations to address common concerns and pave the way for wider ratification of the Protocol.

By identifying and collating factors that appear widely across non-Party States, and analyzing these factors in reference to prevailing theories of state behaviour, several recurring barriers to ratification of the Protocol are discernible: state capacity concerns, perceived irrelevance of the Protocol, and a lack of political will. Criticism of the

2. *Ibid.*, art. 2.

3. *Convention Against Transnational Organized Crime*, 12 December 2000, 2225 U.N.T.S. 209 (entered into force 29 September 2003), art. 1.

Smuggling of Migrants Protocol is also increasingly widespread among academic scholars and experts working in the field. In particular, there is a widely held view that the Protocol promotes Western-centric views and a perception that the Protocol serves to further fortify developed nations to the exclusion of migrants, many of them refugees and asylum seekers from less developed countries. This paper explores these arguments insofar as they influence the decision by states to ratify or not to ratify the Protocol.

The primary sources of information on which the analysis in this paper builds are the documented deliberations and proposals discussed in the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime (AC.154), which met between January 1999 and November 2000 in Vienna, Austria, to develop the text of the Convention and its three supplementary Protocols, including the Smuggling of Migrants Protocol. Information about the views and intentions of the negotiating states are also drawn from the *Travaux Préparatoires* of the Negotiations for the Elaboration of the United Nations Conventions Against Organized Crime and the Protocols Thereto,<sup>4</sup> and from formal reservations States Parties have filed with the United Nations. The extensive interpretative material, “Toolkits”, model laws, and other documents developed by the United Nations Office on Drugs and Crime (UNODC) provide further insight into the purpose and meaning of the Protocol’s provisions and the way in which they ought to be adopted.

The main limitation of this material is that it provides little to no insight into the specific concerns and hesitations that cause non-Party States to refrain from acceding to the Protocol. It is also very rare for non-Party States to openly express and explain the reasons why they opt not to sign certain international treaties. To get some idea about the causes and motivations of non-Party States, this paper also builds on extensive secondary sources, including academic literature and other data, relating to the smuggling of migrants, irregular migration, socioeconomic development, international relations, and other fields that may influence the decisions states make in this area. The scholarship on theories behind treaty ratification generally has, of course, also been relied upon.

## II. OUTLINE OF THE SMUGGLING OF MIGRANTS PROTOCOL

### A. *Framework and Obligations*

The stated purposes of the Smuggling of Migrants Protocol are “to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants”.<sup>5</sup> To achieve these purposes, the Protocol sets out a comprehensive framework to criminalize migrant smuggling, and enable cross-border co-operation, whilst protecting the rights of smuggled migrants.<sup>6</sup>

4. *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Organized Crime and the Protocols Thereto* (United Nations, 2006) [*Travaux Préparatoires*].

5. *Smuggling of Migrants Protocol*, *supra* note 1, art. 2.

6. See further, Andreas SCHLOENHARDT and Jessica DALE, “Twelve Years on: Revisiting the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air” (2012) 65(1) *Zeitschrift für Öffentliches Recht / Journal of Public Law* 129.

Article 3(a) of the Protocol defines the term “smuggling of migrants” to 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”.<sup>7</sup> Upon signing the Protocol, states agree to make the smuggling of migrants and related conduct under Article 6(1) a criminal offence.<sup>8</sup> Article 6(1) identifies three offences that must be established in domestic law, including: a smuggling of migrants offence in Article 6(1)(a); a document fraud offence in Article 6(1)(b); and an offence of enabling of illegal stay (or harbouring) in Article 6(1)(c). Article 6(2) also encourages States Parties to criminalize attempting, participating, organizing, and directing any of the offences set out in Article 6(1)(a)–(c). Article 6(3) creates an obligation to incorporate “aggravating circumstances” into the offences established pursuant to Article 6(1). The two aggravations specifically listed in Article 6(3) 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”. It is open to States Parties to legislate on other aggravating circumstances. Article 5 of the Protocol stipulates the principle of non-criminalization of smuggled migrants, stating that “migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol”.

The prevention and suppression of the smuggling of migrants by sea is specifically addressed in Articles 7–9. Article 7 requires that all states co-operate “to the fullest extent possible to prevent and suppress the smuggling of migrants by sea”. Article 8 sets out boarding powers at sea—including requesting permission to board and search the vessel of another State Party—as well as obligations, including the establishment of an authority to verify the legitimate registration of vessels. Article 9 is a safeguard clause creating a responsibility to protect the vessel and its passengers, and to reimburse a vessel damaged during a search.

Several Articles in the Protocol make provisions for international co-operation. Article 10 encourages States Parties to exchange information, and Article 13 obliges states to verify the legitimacy of documents at the behest of another state. The Protocol also encourages States Parties to enhance border controls, document security, training of law enforcement and border officials, and the implementation of public information programmes.<sup>9</sup> Articles 14(3) and 15(3) specify that states shall consider providing technical and financial assistance to other states.

The stated purpose of protecting the rights of smuggled migrants is reflected in several provisions relating to assistance and protection. Article 4 extends the scope of the Protocol to “the protection of the rights of persons who have been the object of [migrant smuggling]”. Under Article 9(1), States Parties are obliged to “ensure the safety and humane treatment of the persons on board” suspected smuggling vessels. Article 16 sets out a number of “protection and assistance measures” that afford smuggled migrants some basic guarantees of protection and aid. Article 19 of the Protocol contains a savings

7. The terms “smuggling of migrants” and “migrant smuggling” are used interchangeably throughout this paper.

8. *Smuggling of Migrants Protocol*, *supra* note 1, art. 6(2)(a)–(c).

9. *Ibid.*, arts. 11, 12, 14, 15(1).

clause which obliges State Parties to give deference to the “other rights, obligations and responsibilities of States and individuals under international law”, and to apply the Protocol in a way “that is not discriminatory to persons on the ground that they are the object of” migrant smuggling. The Protocol also sets out a framework for receiving states for the repatriation of smuggled migrants.<sup>10</sup>

The number, breadth, and magnitude of obligations imposed by the Protocol are significant. For the Protocol to be effective and achieve its ambitious purposes, it requires widespread commitment and implementation. Investigations and prosecution will remain ineffective unless the smuggling of migrants is criminalized consistently in all states. Otherwise, smugglers will continue to exploit discrepancies and adjust their routes to avoid detection and punishment.<sup>11</sup> International co-operation is similarly hampered as long as some states fail to extradite suspects and engage in the types of mutual legal assistance, information exchange, and other forms of law enforcement and judicial co-operation advocated by the Protocol and the Convention Against Transnational Organized Crime. The protection of smuggled migrants also remains compromised as long as states fail to respect and adhere to the minimum standards advocated by the Protocol. It is for these reasons that widespread ratification of the Smuggling of Migrants Protocol is not just desirable, but is essential to prevent and suppress this phenomenon effectively.

### B. Ratification

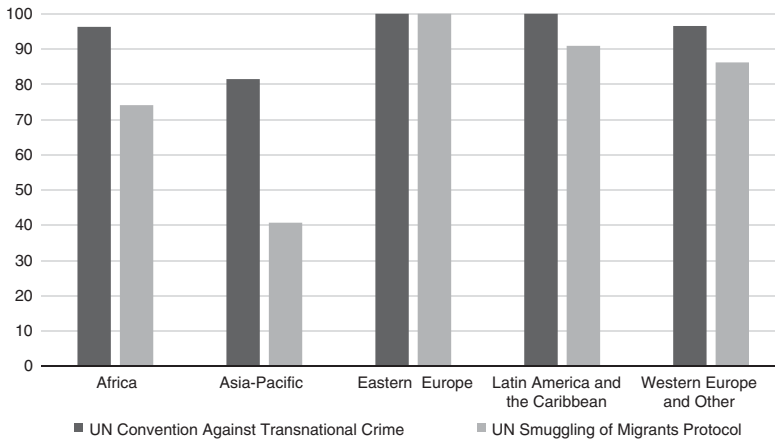
Since its inception, the Smuggling of Migrants Protocol has garnered considerable support worldwide. Within two years of opening the Protocol for signature in December 2000, 112 states from around the world signed it. The Protocol entered into force on 28 January 2004, following ratification by forty states, as required by Article 22(1) of the Protocol. The Protocol has found much popularity among Eastern European, Western European, and other states, and among Latin American and Caribbean states. Uptake by countries of the Asia Pacific region, on the other hand, has been particularly slow, and by mid 2015, the majority of states in the Asia Pacific region had not yet ratified the Protocol. The uptake is particularly poor among Pacific Island states, which somewhat distorts the statistics for the Asia Pacific region. Considerable ratification throughout Africa also came swiftly, although there remain a significant number of African states that have yet to ratify.<sup>12</sup>

Figure 1, which shows the current uptake of the Smuggling of Migrants Protocol along with the Convention Against Transnational Organized Crime, highlights that eighty-five percent or more of Eastern European, Latin American and Caribbean, and Western European and other nations are States Parties to the Protocol. In Africa, some seventy-three percent of states are Parties to the Protocol, while in the Asia Pacific region only forty percent of states are Parties. This is particularly concerning, given that this region is a very

10. *Ibid.*, art. 18.

11. Anne GALLAGHER, “Migrant Smuggling” in Neil BOISTER and Robert CURRIE, eds., *Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2015), 187 at 192.

12. United Nations Treaty Collection, *Chapter XVIII 12.b*, 1 July 2015, online: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en)>.



**Figure 1:** States Parties to the UN Convention Against Transnational Organized Crime and the Smuggling of Migrants Protocol by region (as percentage of total number of states)<sup>13</sup>

significant source, transit point, and destination for the smuggling of migrants.<sup>14</sup> The Convention Against Transnational Organized Crime, which states need to sign before signing the Protocol,<sup>15</sup> has been ratified by eighty percent of Asia Pacific nations, which is considerable, but still much lower than in other parts of the world.

### III. RESERVATIONS AND CONCERNS

#### A. Express Reservations

Formal reservations filed by States Parties offer the clearest evidence of objections by states to individual clauses and obligations of the Smuggling of Migrants Protocol. In international law, a reservation is a formal statement expressing a caveat to the state's acceptance of a treaty, usually purporting to exempt or alter the application of certain provisions to that state. A total of nineteen states have made reservations to the Protocol upon ratification.<sup>16</sup> Of these, thirteen are reservations made under Article 20(3) of the Protocol to exclude the compulsory jurisdiction of the International Court of Justice (ICJ). Other than this, reservations convey two related themes: capacity concerns and concerns over the Protocol's influence on national sovereignty.<sup>17</sup>

13. *Status of Adherence to the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto as at 10 September 2014*, Conference of the States Parties to the Convention Against Transnational Organized Crime, UN Doc. CTOC/COP/2014/CRP.1 (2014).

14. See further, *Migrant Smuggling in Asia: Current Trends and Related Challenges* (UNODC, 2015).

15. *Convention Against Transnational Organized Crime*, *supra* note 3, art. 37.

16. United Nations Treaty Collection, *Chapter XVIII Penal Matters, 12.b Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 3 February 2015, online: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en)>.

17. Note that while reservations excluding the compulsory jurisdiction of the ICJ are concerns over a loss of national sovereignty, the optional nature of that provision means that it has not been considered as evidence of state sovereignty concerns.

Reservations expressed by Indonesia, Greece, and the United States provide examples of sovereignty concerns. Indonesia declared that aspects of the criminalization requirements in Article 6, along with the safeguard clause under Article 8 ensuring safety of the persons on board and compensation to a vessel damaged during a search, would need to be implemented “in strict compliance with the principles of sovereignty and territorial integrity of a State”.<sup>18</sup> Greece made a similar reservation with regard to verifying the legitimacy of documents (Article 12),<sup>19</sup> while the United States limited the extent to which they would criminalize attempts to produce or procure fraudulent documents, in accordance with its legal system (Article 6(2)(a)).<sup>20</sup> These reservations do not significantly limit or obscure the application of the Protocol in these States Parties; they merely ensure compliance of Protocol requirements with pre-existing domestic legal frameworks.

A reservation filed by El Salvador highlights the concerns about the financial burden placed on States Parties by some Protocol provisions. El Salvador’s reservation relates specifically to the obligation to return smuggled migrants under Article 18, stating that the return of smuggled migrants “shall take place to the extent possible and within the means of the State”. El Salvador’s reservation that compensation to a damaged vessel would only by law compensate “the victims of judicial errors that have been duly proved” similarly serves to limit the financial liabilities of El Salvador.<sup>21</sup>

### B. Concerns Expressed During Negotiations

Further traces of the concerns by states over the Protocol’s terms and conditions can be found in the material documenting the Negotiations of the Protocol in the Intergovernmental Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, which was set up by the UN General Assembly in 1998 to draft the text of the Convention and the three supplementing Protocols, including the Smuggling of Migrants Protocol.<sup>22</sup> The documents presented to and discussed in the Ad Hoc Committee are in the public domain. A summary of the main debates and developments has also been published in the *Travaux Préparatoires*.<sup>23</sup>

Naturally, many of the concerns expressed by states during the negotiation of the Protocol relate to implications for and conflicts with domestic laws and policies. Several delegations expressed concerns over the impact that the principle of non-criminalization of smuggled migrants would have on national immigration laws, and on states’ sovereign right to enforce these laws.<sup>24</sup> In particular, there was apprehension among delegates about the possibility of the Protocol granting immunity to illegal immigrants, especially those who had committed other immigration offences under domestic law.<sup>25</sup>

18. *Chapter XVIII Penal Matters, 12.b Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, supra* note 16.

19. *Ibid.*

20. *Ibid.*

21. *Ibid.*

22. *Resolution on Transnational Organized Crime*, UN Doc. A/RES/53/111 (1998).

23. *Travaux Préparatoires, supra* note 4.

24. Cf. *ibid.*, at 478, 482.

25. *Ibid.*, at 482.



As also seen in the formal reservations, concerns further related to the obligations to provide compensation for damage caused to vessels during search and seizure. Several states were particularly concerned that it was not clear who could seek compensation, from whom compensation could or should be sought, and how much compensation would have to be provided.<sup>26</sup>

The conflict between the Protocol's protection obligations and the requirement to implement and enforce stringent border measures has been highlighted during the elaboration process, and several delegations noted that a mandatory obligation to protect (the rights of) smuggled migrants would be too arduous for States Parties.<sup>27</sup> Algeria, on behalf of the Group of 77 (which brings together seventy-seven developing UN Member States) and China, explicitly noted that states would require long-term assistance to implement obligations, and proposed a special technical assistance fund for this purpose.<sup>28</sup>

In summary, the main substantive concerns raised during the negotiations of the Protocol relate, on the one hand, to the potential costs and obligations placed on States Parties and, on the other hand, to fears that the Protocol would limit the ability of states to maintain full sovereign control over all matters relating to border control, immigration, and criminal justice.

It has to be noted that despite these common concerns a great majority of states decided to ratify the Protocol, realizing that the advantages of the Protocol outweigh perceived disadvantages and obstacles. These concerns may, however, also explain why other states have not, or not yet, signed or ratified the Protocol, which is explored in the following part of this paper.

#### IV. NON-PARTY STATES: COMMONALITIES AND DIFFERENCES

In the absence of express opposition or explicit statements rejecting the Smuggling of Migrants Protocol, it is difficult to say with certainty why individual states, or groups of states, have not, or not yet, ratified the Protocol. An examination of the geographical, political, and socioeconomic circumstances of non-Party States, and their exposure to irregular migration, however, reveals a number of commonalities that may explain, in whole or in part, why some states are unwilling or unable to commit themselves to the obligations under the Protocol. The following analysis reveals considerable similarities between non-Party States, but also highlights some of the differences that do not lend themselves to generalizations.

##### A. Geography

As mentioned earlier, the Smuggling of Migrants Protocol has found widespread adoption across Europe and the Americas. Of the five regional groupings used by the

26. *Ibid.*, at 511.

27. *Ibid.*, at 520, 524.

28. *Report of Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, UN Doc. A/JAC.2/54/9 (1999) at 5, para. 17.



United Nations,<sup>29</sup> five states of the Western European and Others Group, and three of the Latin American and Caribbean Group have not ratified the Protocol. Of the African Group, fourteen states have yet to ratify the Protocol, and of the Asia Pacific Group, thirty-five states have not ratified. All states in the Eastern European Group have ratified the Protocol. Non-Party States include landlocked, coastal, and island states.

- Of the Latin American and Caribbean states, Colombia and Saint Lucia are not Parties to the Protocol. Bolivia has signed the Protocol, but has not ratified it.
- Of the Western European and other states, Andorra, the Holy See (Vatican), and Israel are non-Party States. Iceland and Ireland have signed but not ratified the Protocol.
- In Eastern Europe, Kosovo is not a State Party to the Protocol, but the country is also not (yet) a Member of the United Nations.
- Ratification among African states is also widespread, though ten states, including Chad, Comoros, Côte d'Ivoire, Eritrea, Gabon, Morocco, Somalia, South Sudan, Sudan, and Zimbabwe are not Parties to the Protocol. Congo, Equatorial Guinea, Guinea-Bissau, and Uganda have signed but not ratified the Protocol.
- As mentioned earlier, ratification among states in Asia and the Pacific region is particularly sparse. Twenty-nine states in Asia and the Pacific are presently not Parties to the Protocol. These include, Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, PR China, Cook Islands,<sup>30</sup> Fiji, Iran, Jordan, Democratic People's Republic of Korea (DPRK), Malaysia, Maldives, Marshall Islands, Federated States of Micronesia, Nepal, Niue,<sup>31</sup> Pakistan, Palau, Papua New Guinea (PNG), Qatar, Samoa, Singapore, Solomon Islands, Tonga, Tuvalu, United Arab Emirates (UAE), Vanuatu, Vietnam, and Yemen. Japan, the Republic of Korea (ROK), Sri Lanka, Thailand, and Uzbekistan have signed but not ratified the Smuggling of Migrants Protocol.<sup>32</sup>

### B. *Economic and Human Development*

The financial costs and the material and human resources needed to implement and adhere to international treaties are a major impediment for many countries. As mentioned earlier, the Smuggling of Migrants Protocol requires States Parties to introduce complex legislative provisions into their domestic laws, establish

29. UN Department for General Assembly and Conference Management, *United Nations Regional Groups of Member States*, 9 May 2014, online: <<http://www.un.org/depts/DGACM/RegionalGroups.shtml>>.

30. The Cook Islands are an "associate state" of New Zealand. At the request of the Cook Islands government, New Zealand can act on behalf of the Cook Islands in foreign affairs matters. The Cook Islands is not a member of the United Nations, but has full treaty-making capacity recognized by the United Nations Secretariat.

31. Niue is an "associate state" of New Zealand. At the request of the Niue government, New Zealand can act on behalf of Niue in foreign affairs matters. Niue is not a member of the United Nations, but has full treaty-making capacity recognized by the United Nations Secretariat.

32. Since November 2012, Palestine is a non-Member State of the United Nations. Although Palestine is a member of several UN agencies, it is not considered a sovereign state for the purpose of this paper.

Table 1. Human Development Index ranking of non-Party States<sup>33</sup>

Very High	High	Medium	Low	Not Ranked
Andorra	PR China	Bangladesh	Afghanistan	Cook Islands
Brunei	Colombia	Bhutan	Chad	DPRK
Israel	Fiji	Congo	Comoros	Kosovo
Qatar	Iran	Gabon	Côte d'Ivoire	Marshall Islands
Singapore	Jordan	Maldives	Eritrea	Niue
UAE	Malaysia	FS Micronesia	Nepal	Somalia
	Palau	Morocco	Pakistan	South Sudan
	Tonga	Samoa	PNG	Tuvalu
		Vanuatu	Solomon Islands	
		Vietnam	Yemen	
			Zimbabwe	

mechanisms that protect the basic rights of smuggled migrants, and facilitate or engage in international law enforcement, prosecutorial, and judicial co-operation that can be costly and involve technical equipment and know-how that many countries, especially small, developing nations, do not have and cannot afford.

It is thus not surprising that a considerable number of developing countries, as measured by the Human Development Index (HDI), are among the non-Party States.<sup>34</sup> This index, developed by the United Nations Development Programme (UNDP), serves to assess the overall socioeconomic development of a country. The HDI ranks the development of countries into four categories—low, medium, high, or very high—based on the health, education, and standard of living of the population.<sup>35</sup> There is also some correlation between the HDI and the gross domestic product (GDP) of a given state,<sup>36</sup> such that the index serves as a loose measure of economic strength.

By separating the non-Party States according to their respective HDI ranking, it becomes evident that many of them rank low or medium in human development. Table 1 shows that twelve non-Party States are ranked low and a further ten medium. Eight states are ranked high and six very high. Eight countries are not ranked in the HDI.

Among the non-Party States are a considerable number of small states with populations of less than 500,000, and many small island states, especially in the South Pacific. Fiji, Marshall Islands, Federated States of Micronesia, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu, and also the Comoros and the Maldives have been informally classified as Small Island Developing States (SIDS) by the United Nations Conference on Trade and Development (UNCTAD).<sup>37</sup>

33. *Human Development Index* (2014), online: <<http://hdr.undp.org/en/content/human-development-index-hdi>>.

34. *Ibid.*

35. *Ibid.*

36. See further, Miles B. CAHILL, "Is the Human Development Index Redundant?" (2005) 31 *Eastern Economic Journal* 1.

37. *Unofficial List of Small Island Developing States* (2013), online: <<http://unctad.org/en/pages/aldc/Small%20Island%20Developing%20States/UNCTAD%20B4s-unofficial-list-of-SIDS.aspx>>.

For the six non-Party States ranked very high on the Human Development Index, socioeconomic factors are unlikely to constitute a significant barrier to ratification of the Protocol. For these states, it is more likely that political or other factors are the main impediment.

### C. *Irregular Migration and Refugee Flows*

The extent to which states are affected by irregular migration, of which the smuggling of migrants is but one form, is likely to influence how they choose to respond to it. In particular, those states that experience high levels of migrant smuggling and other forms of irregular migration are more likely to explore, develop, and invest in mechanisms—such as the Smuggling of Migrants Protocol—that are designed to prevent and combat illegal immigration.

Although the smuggling of migrants is a worldwide phenomenon that affects most states as sending, transit, and/or destination countries, the levels of migrant smuggling are not evenly spread. And although the Smuggling of Migrants Protocol seeks to set universal standards to combat this phenomenon and serve sending, transit, and destination countries alike, the weight of academic scholarship suggests that the Protocol does not benefit all states in the same way.<sup>38</sup> There is some evidence to show that the Protocol is tailored more for destination countries and that these countries gain greater benefits from—and are more likely to sign and ratify—the Protocol. On the other hand, it has been argued that states that are not, or not significantly, affected by the influx of irregular migrants have fewer incentives to ratify the Protocol.<sup>39</sup>

The existence and levels of irregular migration flows, including the smuggling of migrants, can thus influence the decision by states to ratify the Protocol in one of two ways. First, states may view their irregular migration “problem” as negligible and unworthy of attention and investment. Second, states may be significant sources or transit points for irregular and smuggled migrants, but not want to be bound by the Protocol’s obligations.

#### 1. *Source countries*

Data relating to the levels of smuggling of migrants and irregular migration is, for the most part, non-existent, not least because of the often covert and clandestine way in which such movements occur. Insofar as such data exists, it relates mostly to transit and destination countries, where border and law enforcement agencies may count the number of illegal immigrants, smuggled migrants, or other categories of irregular entrants.<sup>40</sup>

38. Peter ANDREAS and Ethan NADELMAN, *Policing the Globe: Criminalization and Crime Control in International Relations* (New York: Oxford University Press, 2006) at 105; Mireille DELMAS-MARTY, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Oxford: Hart Publishing, 2009) at 107; Neil BOISTER, “The Concept and Nature of Transnational Criminal Law” in Neil BOISTER and Robert CURRIE, eds., *Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2015), 11 at 23.

39. Gallagher, *supra* note 11 at 188.

40. See, for example, *Migrant Smuggling in Asia: Current Trends and Related Challenges* (UNODC, 2015) at 179–320

Table 2. Major source countries of refugees and people in refugee-like situations, 2008–2014 (end of year, UNHCR)<sup>41</sup>

Country	2008	2009	2010	2011	2012	2013	2014
Afghanistan*	2,800,000	2,887,100	3,054,700	2,664,400	2,586,200	2,556,600	2,593,368
Burundi	281,592	94,289	84,064	101,288	73,363	72,652	72,499
DR Congo	368,000	455,900	476,700	491,500	509,300	499,500	516,770
Colombia*	374,000	389,800	395,600	395,900	394,100	396,635	360,298
Eritrea*	186,398	209,200	222,500	252,000	285,400	308,022	363,077
Iraq	1,903,519	1,785,200	1,683,600	1,428,300	746,200	401,400	369,904
Myanmar	184,413	406,700	415,700	414,600	415,400	479,600	479,001
Somalia*	561,000	678,300	770,100	1,077,000	1,136,700	1,121,700	1,106,068
South Sudan*	n.a.	n.a.	n.a.	1	87,009	114,470	616,210
Sudan*	419,000	368,200	395,600	500,000	568,900	649,300	665,954
Syria	15,211	17,914	18,452	19,931	729,000	2,468,400	3,883,585
Vietnam*	328,183	339,300	338,700	337,800	336,900	314,105	313,419

The most comprehensive and reliable data relating to population displacements and irregular migration can be found in statistics published by the UN High Commissioner for Refugees (UNHCR). The UNHCR maintains extensive and systematic data collections relating to refugees, asylum seekers, and internally displaced persons. These migrant categories are not to be equated or confused with smuggled migrants, but they are indicative of the volume and direction of irregular migration flows, especially those driven by persecution, war, gross human rights violations, and other forms of political or generalized violence. Not included here are irregular movements that are caused solely by economic factors, such as general poverty and unemployment, though these factors, too, are often closely intertwined with political causes.

Table 2 lists the major source countries of refugees in the period 2008–2014. Non-Party States to the Smuggling of Migrants Protocol are starred (\*). Table 2 shows that some of the major source countries of refugees, chief among which is Afghanistan, are not parties to the Smuggling of Migrants Protocol. Over the last decade, there have also been significant refugee flows from Colombia, Eritrea, Somalia, South Sudan, and Sudan, which are all non-Party States. Vietnam also broadly falls into this category, though the 300,000+ Vietnamese refugees in Table 2 are, for the most part, Vietnamese nationals of Chinese ethnicity who returned to China in the aftermath of the Indo-Chinese conflict and who receive some protection from the government of China.

Two significant source countries of refugees, Iraq and Syria, are Parties to the Protocol. Syria ratified the Protocol on 8 April 2009, prior to the civil war that erupted in 2011 and the insurgency of the Islamic State militant group, which have displaced millions of Syrians in the years since 2012. In the current circumstances, and given the

41. *Global Trends 2013* (UNHCR, 2013) 16; UNHCR, *Statistical Yearbook 2012* (UNHCR, 2013) 31 at 74–6; *Statistical Yearbook 2011* (UNHCR, 2012) 28 at 64–7; *Statistical Yearbook 2010* (UNHCR, 2011), 27 at 66–9; *Statistical Yearbook 2009* (UNHCR, 2010), 23 at 61–4; *Statistical Yearbook 2008* (UNHCR, 2009), 28 at 69–72; *Global Trends 2013* (UNHCR, 2014) Annexes; *Global Trends 2014* (UNHCR, 2015) Annexes.

Table 3. Major refugee-hosting countries, 2008–2014 (end of year, UNHCR)<sup>42</sup>

Country	2008	2009	2010	2011	2012	2013	2014
Chad*	330,500	301,000	347,900	366,500	373,700	434,500	452,897
Ethiopia	83,583	121,886	154,295	288,800	376,400	433,900	659,524
Germany	582,700	593,800	594,300	571,700	589,700	187,567	216,973
Iran*	980,100	1,070,500	1,073,400	886,500	868,200	857,400	982,027
Iraq	39,503	35,218	34,655	35,189	98,822	246,298	271,143
Jordan*	500,400	450,800	450,900	451,000	302,700	641,900	654,141
Kenya	320,600	358,900	402,900	566,500	564,900	534,900	551,352
Lebanon	50,419	50,413	8,063	8,990	133,940	856,500	1,154,040
Pakistan*	1,780,900	1,740,700	1,900,600	1,702,700	1,638,500	1,616,500	1,505,525
Syria	1,105,700	1,054,500	1,005,500	755,400	476,500	149,292	149,140
Tanzania	321,900	118,731	109,286	13,1243	101,021	102,099	88,492
Turkey	11,103	10,350	10,032	14,465	267,100	609,900	1,587,374

fact that large numbers of Syrian refugees are smuggled into neighbouring countries and further afield, especially to Europe, Syria's ratification has no practical effect and the Syrian government is not in a position to monitor and enforce the Protocol obligations in any way. Iraq, on the other hand, accepted the Smuggling of Migrants Protocol on 9 February 2009, at a time when refugee flows, irregular migration, and the smuggling of Iraqi migrants temporarily receded, not knowing that some years later many thousands of Syrians would seek refuge in Iraq.

The general picture that emerges from the data shown in Table 2 is that countries that experience significant refugee exodus appear to be less likely to ratify the Protocol. Due to their crucial role in the migrant smuggling process, these states are going to find themselves in a difficult situation should they be forced to implement the Protocol's obligations. In particular, the obligation to accept and facilitate the return of smuggled migrants places a particularly onerous burden on source countries and may act as a deterrent to participation in the Protocol. Moreover, refugee flows and other forms of irregular migration usually stem from political turmoil and uncertainties in the source countries, which may also mean that they lack the capacity and/or the political will to accede to and implement international treaties.

## 2. Receiving countries

The UNHCR also collects data about the main host countries for refugees and asylum seekers. The figures shown in Table 3 relate to the countries of first refuge and do not include countries of resettlement, or destination countries to which refugees and asylum seekers may migrate after residing in the country of first refuge for some time.

42. *Global Report 2013* (UNHCR, 2014) at 88; *Global Report 2012* (UNHCR, 2013) at 84; *Statistical Yearbook 2012* (UNHCR, 2013) at 70–2; *Statistical Yearbook 2011* (UNHCR, 2012) at 25, 60–2; *Statistical Yearbook 2010* (UNHCR, 2011) at 25, 62–5; *Statistical Yearbook 2009* (UNHCR, 2010) at 22, 57–60; *Statistical Yearbook 2008* (UNHCR, 2009) at 27, 65–8; *Global Trends 2013* (UNHCR, 2014) Annexes; UNHCR, *Global Trends 2014* (UNHCR, 2015) Annexes.

Table 3 shows that some of the main host countries of refugees are not Parties to the Smuggling of Migrants Protocol. Particularly noteworthy are Pakistan and Iran, which have been home to millions of Afghan refugees, many of whom are smuggled, for very many years. Jordan, which has been a major destination and transit country for refugees from Iraq and Syria, including smuggled migrants, is a further significant non-Party State.

Countries such as Lebanon, Iraq, and Turkey have only recently become affected by major refugee flows and were not similarly affected when they ratified the Protocol on 5 October 2005, 9 February 2009, and 25 March 2003, respectively. On the other hand, Ethiopia, which accepted the Protocol on 22 June 2012, and Syria, which ratified the Protocol on 8 April 2009, became Parties at a time when they were experiencing large inflows of refugees. The nexus between the influx of refugees and ratification of the Protocol thus appears to be less clear.

### 3. *Remaining states*

The reverse way of establishing a nexus between the scale of irregular migration and refugee flows and ratification of the Smuggling of Migrants Protocol is to explore the impact of refugee flows on the remaining non-Party States. Listed in Table 4 are the remaining non-Party States with a population of 1,000,000 or more, along with relevant figures relating to refugees from (source) or present in (host) that country.

Table 4 shows that some of the remaining non-Party States, such as Qatar, Singapore, and the UAE are neither source nor host of significant refugee populations. Gabon, Morocco, Zimbabwe, and Papua New Guinea hosted less than 10,000 refugees in most years between 2008 and 2014. Among the remaining non-Party States are several major host countries of refugees, namely Bangladesh, China, and Yemen, which hosted 200,000 refugees or more, and Côte d'Ivoire, Israel, Malaysia, and Nepal, which were home to 40,000–100,000 refugees in recent years.

Table 4 also shows that some of the non-Party States are significant countries of origin of refugees. Côte d'Ivoire and China, for instance, were the source country of more than 100,000 refugees in some years between 2008 and 2014. Bangladesh and Zimbabwe were the country of origin of more than 10,000 refugees in most years. Israel, the DPRK, Morocco, Nepal, and Yemen were the country of origin for more than 1,000 refugees. Gabon, Malaysia, and Papua New Guinea are not significant source countries.

In the absence of other data relating irregular migration and smuggling of migrants, it is not possible to draw a conclusive link between the levels of irregular migration on the one hand, and the ratification of the Smuggling of Migrants Protocol on the other. The statistics shown in Tables 2–4 do, however, lend weight to the suggestion that countries who are not significantly affected by refugee and other irregular migration flows are less likely to enter into binding agreements to combat the smuggling of migrants, presumably because the issue lacks practical and political relevance for them.

For those states that experience high levels of refugee and irregular migration flows, the picture is less consistent. Many of the main source countries of the world's refugees, such as Afghanistan, Eritrea, Colombia, Côte d'Ivoire, Somalia, South Sudan, Sudan, Vietnam, and Zimbabwe have not ratified the Smuggling of Migrants Protocol. This impacts considerably on the ability to investigate and prosecute migrant smugglers

Table 4. Refugees and people in refugee-like situations by country of origin (origin); refugees and people in refugee-like situations by country of residence/asylum (host), 2008–2014<sup>43</sup>

Country		2008	2009	2010	2011	2012	2013	2014
Africa								
Côte d'Ivoire	source	22,227	23,153	41,758	154,824	100,720	85,729	71,959
	host	24,811	24,604	26,281	24,221	3,980	2,980	1,925
Gabon	source	129	144	165	173	183	177	172
	host	9,010	8,845	9,015	1,773	1,663	1,594	1,013
Morocco	source	3,533	2,286	2,284	2,312	2,407	1,318	1,532
	host	766	773	792	736	744	1,470	1,216
Zimbabwe	source	16,841	22,449	24,089	25,048	22,101	19,681	22,494
	host	3,468	3,995	4,435	4,561	4,356	6,389	6,079
Western Europe and Other States								
Israel	source	1,494	1,310	1,301	1,335	1,340	1,043	971
	host	9,137	17,736	25,471	41,235	48,505	48,325	39,716
Asia and Pacific Region								
Bangladesh	source	10,098	10,432	10,049	10,056	10,161	9,839	10,687
	host	28,389	228,586	229,253	229,669	230,697	231,143	232,472
PR China	source	175,180	180,558	184,602	190,369	193,453	195,137	210,730
	host	300,967	300,989	300,986	301,018	301,037	301,047	301,052
DPRK	source	886	881	917	1,052	1,132	1,166	1,282
	host	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Malaysia	source	608	532	552	537	531	485	468
	host	36,671	66,137	81,516	86,680	90,185	97,513	99,381
Nepal	source	4,189	5,108	5,889	6,854	7,612	8,112	8,563
	host	124,832	108,461	89,808	72,654	56,264	46,305	38,490
PNG	source	46	70	89	128	174	221	288
	host	10,006	9,703	9,698	9,377	9,383	9,378	9,510
Qatar	source	71	68	112	95	124	17	21
	host	13	29	51	80	80	130	133
Singapore	source	109	80	76	67	68	65	59
	host	10	7	7	3	3	3	3
UAE	source	256	414	424	486	584	90	90
	host	209	279	538	677	631	603	417
Yemen	source	1,777	1,934	2,076	2,323	2,594	2,428	2,628
	host	140,169	170,854	190,092	214,740	237,182	241,288	257,645

who recruit their clientele in these countries, and to return smuggled migrants to their home country within the framework set out by the Protocol if it is safe to do so and if the causes or fears of persecution no longer persist. Similarly, some major host countries of refugee populations, such as Bangladesh, Chad, Iran, Jordan, Malaysia, Nepal,

43. *Global Trends 2014* (UNHCR, 2015) Annexes; *Global Trends 2013* (UNHCR, 2014) Annexes; *Statistical Yearbook 2012* (UNHCR, 2013) at 70–6; *Statistical Yearbook 2011* (UNHCR, 2012) at 25, 60–6; *Statistical Yearbook 2010* (UNHCR, 2011) at 62–9; *Statistical Yearbook 2009* (UNHCR, 2010) at 57–64; *Statistical Yearbook 2008* (UNHCR, 2009) at 65–72.



and Pakistan are not States Parties to the Protocol, which hampers their ability to investigate and prosecute the smuggling of migrants and engage in international co-operation with source and transit countries.

#### 4. *Ratification of the Refugee Convention*

For some non-Party States that are significantly affected by refugee flows, either as countries of origin or as host countries, there appears to be a correlation between non-ratification of the Smuggling of Migrants Protocol and non-ratification of the Convention Relating to the Status of Refugees.<sup>44</sup> This applies to Bangladesh, Eritrea, Jordan, Malaysia, Nepal, Pakistan, and Vietnam. Other states that have signed neither the Smuggling of Migrants Protocol nor the Refugee Convention include Andorra, Bhutan, Brunei Darussalam, Comoros, Cook Islands, DPRK, Kosovo, Maldives, Marshall Islands, Federated States of Micronesia, Niue, Palau, Saint Lucia, Singapore, South Sudan, Tonga, UAE, and Vanuatu.

The nexus between ratification of the Smuggling of Migrants Protocol and the Refugee Convention is, however, less clear for several other countries that have experienced major outflows or inflows of refugees. Afghanistan, Chad, China, Colombia, Côte d'Ivoire, Iran, Somalia, Sudan, Yemen, and Zimbabwe, for instance, are States Parties to the Refugee Convention but not to the Smuggling of Migrants Protocol. Fiji, Gabon, Israel, Morocco, Papua New Guinea, Qatar, Samoa, Solomon Islands, and Tuvalu are also Parties to the Refugee Convention and not to the Smuggling of Migrants Protocol, though these countries are not similarly affected by refugee flows.

### D. *Alternative International Initiatives*

The reluctance of several non-Party States to ratify the Smuggling of Migrants Protocol may also be explained by the fact that they participate in other multinational initiatives to prevent and suppress the smuggling of migrants, and that they have formed the view that their involvement in these initiatives makes accession to and ratification of the Protocol unnecessary. Although the Protocol is the only global and binding instrument on this specific topic, there are several other, smaller, regional initiatives that provide fora for international dialogue and co-operation for matters relating to migrant smuggling.

Chief among these regional initiatives is the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, a regional forum, co-chaired by the governments of Australia and Indonesia to discuss and develop strategies to combat the smuggling of migrants.<sup>45</sup> The Bali Process was conceived at a regional ministerial conference held in Bali, Indonesia, in February 2002 to address the growing

44. *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [*Refugee Convention*].

45. See further, Joseph H. DOUGLAS and Andreas SCHLOENHARDT, "Combating Migrant Smuggling with Regional Diplomacy: An Examination of the Bali Process", The University of Queensland Migrant Smuggling Working Group, University of Queensland, Research Paper, February 2012, online: <<http://www.law.uq.edu.au/ms-regionalcooperation>>.

scale and complexity of irregular migration in the Asia Pacific region. The consensus and outcomes of this conference focused on three main points. First, the meeting expressed a formal acknowledgement of the worsening problem of irregular migration, especially migrant smuggling by boat, in the Asia Pacific region.<sup>46</sup> Second, the meeting strongly denounced the practice of migrant smuggling as well as trafficking in persons.<sup>47</sup> Third, the meeting expressed a voluntary commitment of the participating states to, “within the framework of their international obligations” and “respective national circumstances”, co-operate as a region to combat migrant smuggling and trafficking in persons.<sup>48</sup> Ministers insisted, however, that “cooperation should be based on an acknowledgment that each State had a sovereign right and legitimate interest to develop and implement its own laws to address people smuggling and trafficking in persons”.<sup>49</sup> Today, the Bali Process comprises forty-five countries, mostly from the Asia Pacific region. In addition, several European and North American countries,<sup>50</sup> and a range of international organizations, have observer status.<sup>51</sup> Among the Bali Process participants are twenty-five states that have not ratified the Smuggling of Migrants of Protocol. This includes several small island states, such as Fiji, Maldives, Palau, Samoa, Solomon Islands, Tonga, and Vanuatu, but also larger and more populous countries such as Afghanistan, Bangladesh, PR China, Iran, Japan, Jordan, Malaysia, Nepal, Pakistan, Papua New Guinea, Singapore, UAE, and Vietnam, some of which experience large volumes of migrant smuggling and other forms of irregular migration.<sup>52</sup>

A further regional forum in this field is the Budapest Process, a regional consultative forum of forty-nine Member States, set up in April 1993 to provide a co-operation framework addressing a wide range of issues relating to regular and irregular migration, including the smuggling of migrants.<sup>53</sup> Unlike the Bali Process, the Budapest Process was created long before the Smuggling of Migrants Protocol came into existence, and thus provided an international initiative to explore, discuss, and address the smuggling of migrants when no other existed. Unlike the Bali Process, the Budapest

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46. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, “First Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime” (February 2002), online: <<http://www.baliprocess.net/files/ConferenceDocumentation/BRMCI.pdf>> at 3–4.
47. *Ibid.*, at 7.
48. *Ibid.*, at 8–13.
49. *Ibid.*, at 19.
50. The observer countries to the Bali Process are Austria, Belgium, Canada, Denmark, European Commission, Finland, Germany, Italy, the Netherlands, Norway, Poland, Romania, Russian Federation, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States. See The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, “Membership”, online: <<http://www.baliprocess.net/membership>>.
51. Including: International Centre for Migration Policy Development (ICMPD); United Nations Development Programme; United Nations Office on Drugs and Crime; International Labour Organization; Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC); Inter-Governmental Consultations on Migrants, Asylum and Refugees (IGC).
52. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, “Membership”, online: <<http://www.baliprocess.net/membership>>.
53. Budapest Process Secretariat, ICMPD, “About the Budapest Process” (2014), online: <<https://www.budapestprocess.org/about>>.

Process also takes a much broader and less criminal justice and border security centred approach to the topic of migration, thus covering issues that are not further explored in the Protocol. It is also interesting to note that all forty-nine Members of the Budapest Process have signed the Protocol. Only Iceland and Uzbekistan have yet to ratify it.<sup>54</sup>

These regional initiatives may be seen as complementing the goals and efforts of the Protocol, which also explicitly makes reference to bilateral and regional co-operation in Article 17. For those states that have already ratified the Protocol, these fora can provide an opportunity to share their experiences about the implementation and enforcement of Protocol provisions. They can also serve to exchange information and ideas, especially involving local and regional matters that are of particular concern to participating states. To that end, these initiatives may also serve as a tool to encourage non-Party States to ratify the Protocol and learn from the experience of States Parties.

While these fora can complement the efforts and goals of the Smuggling of Migrants Protocol and assist individual states with the ratification and implementation processes, they also rival the Protocol insofar as some states adopt the view that they are doing enough to counteract the smuggling of migrants by participating in non-binding, regional initiatives, the Bali Process in particular, without having to adhere to the seemingly costly and complicated binding measures of the Protocol. Some states may lack the confidence in their capacity to fulfil Protocol obligations, or may prefer to address the issue on their own terms and not under international obligation. It has to be stressed, however, that these regional initiatives are no substitute for comprehensive, binding, and enforceable international instruments such as the Smuggling of Migrants Protocol. For this reason, there should be greater efforts by the chairs of these initiatives to encourage those participants that have yet to ratify the Protocol to do so.

## V. BARRIERS TO RATIFICATION

Based on the available open-source information, it appears that the non-Party States to the Smuggling of Migrants Protocol share several important attributes that may explain why these states have not, or not yet, ratified the Protocol. These attributes, which relate to socioeconomic and political factors in each country, can be examined further in the light of the general theories that explain why states choose—or choose not to—ratify international treaties: rationalism, constructivism, and liberalism:

Rationalism predicts that states ratify treaties when ratification offers material benefits or when coerced by a more powerful state. Constructivism posits that states ratify treaties when they share the values embodied in the treaty. If a state does not share these values initially, it may be persuaded by normative arguments. Liberal theories expect that states ratify treaties when domestic actors support and lobby for ratification and predict that if powerful domestic actors oppose ratification, then ratification is unlikely.<sup>55</sup>

54. See International Organization for Migration (IOM), “Budapest Process”, online: <<http://www.iom.int/cms/en/sites/iom/home/what-we-do/regional-processes-1/rcps-by-region/budapest-process.html>>.

55. Uta OBERDORSTER, “Why Ratify? Lessons from Treaty Ratification Campaigns” (2008) 61(2) *Vanderbilt Law Review* 681 at 694.

Rationalism relates to a cost-benefit analysis of the Protocol obligations and the perceived advantages a state may obtain from the Protocol vis-à-vis the perceived disadvantage.<sup>56</sup> The unwillingness of some states to sign the Protocol may thus be explained by capacity concerns and their ability to meet the financial and institutional obligations imposed by the Protocol. Rationalist theories of state behaviour posit that states act in ways that are comprehensible to rational outsiders, and that states act in pursuit of their own rational self-interest.<sup>57</sup> This in turn means that the larger the cost of participation and the lower the benefits in a treaty are, the less likely it is for a state to ratify the treaty.<sup>58</sup>

The constructivist theory assumes that States Parties support the general purposes of the Protocol or, in turn, that non-Party States reject one or more of these purposes, lack the political will to support them, or consider them to be irrelevant in the domestic context. The latter points also support the liberal theories, such that a lack of domestic pressure from state and non-state actors may explain why individual countries have not ratified the Protocol.

### A. Capacity Concerns

Many states are reluctant to commit to international treaties, such as the Smuggling of Migrants Protocol, if they lack the resources and institutional capacity necessary to properly comply. Ratification of the Smuggling of Migrants Protocol involves considerable direct and indirect costs. These relate, on the one hand, to the expertise and human resources needed to review, adapt, and change existing laws, which may involve long and complicated drafting processes, parliamentary debates and scrutiny, and other elements of law reform processes. Substantial costs also stem from those Protocol obligations that require technical equipment and know-how, training, border and security measures, awareness raising, and the protection and return of smuggled migrants.

Some non-Party States may not have the financial capacity to implement and enforce many of the Protocol's provisions. These financial costs may be one-off, such as investing in new technology or amending existing law, or they may be ongoing, such as maintenance of technical equipment, training, and returning smuggled migrants. Some non-Party States may lack the institutional capacity to fulfil certain Protocol obligations, including the technical expertise to carry out sophisticated border control and law enforcement operations, to receive and respond to requests for international co-operation, to train police and immigration officials, and to develop

56. Oona HATHAWAY, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72(2) *University of Chicago Law Review* 469 at 508–9; Mark CHINEN, "Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner" (2001) 23 *Michigan Journal of International Law* 143 at 160; Louis HENKIN, *How Nations Behave* (New York: Columbia University Press, 1979); Oberdorster, *supra* note 55 at 686.

57. Robert KEOHANE, "Realism, Neorealism, and the Study of World Politics" in Robert KEOHANE, ed., *Neorealism and its Critics* (New York: Columbia University Press, 1986), 1 at 7; Jutta BRUNNEE and Stephen TOOPE, "International Law and Constructivism: Elements of an Interactional Theory or International Law" (2000) 39 *Columbia Journal of Transnational Law* 19 at 27.

58. Hathaway, *supra* note 56 at 498.

meaningful prevention strategies and awareness campaigns. The lack of institutional capacity may not always relate specifically to the smuggling of migrants, but is often a reflection of a general lack of capacity to do highly technical work of this sort, or of a lack of resources to take on the necessary regulatory workload, especially in small, under-resourced, or post-conflict states.

The Protocol makes some concessions for less prosperous States Parties by limiting some obligations “to the extent possible” or “the available means”,<sup>59</sup> or by adopting non-mandatory language for some provisions. Moreover, the UNODC, the International Organization for Migration (IOM), and other international and national agencies provide technical assistance to states, ranging from the creation of model legislation and frameworks for implementation to the training of law enforcement and judicial officials and the facilitation of data collection and information exchange. In addition, Article 30 of the Convention Against Transnational Organized Crime provides that States Parties shall make efforts to enhance international co-operation, including provision of financial and material assistance to developing states to fight transnational organized crime, and suggests the creation of multilateral and bilateral arrangements for assistance.

### B. *Perception and Relevance of the Protocol*

A second barrier to ratification of the Smuggling of Migrants Protocol may stem from the perception that the Protocol and the phenomenon of migrant smuggling lack significance for individual states. In these circumstances, states have no pressure and incentive to ratify the Protocol. This may be the case in countries that do not experience high levels of smuggling of migrants or other forms of irregular migration, or that, wittingly or unwittingly, turn a blind eye to these issues.

Ratification of the Smuggling of Migrants Protocol is also not an option for those states that have not signed the Convention Against Transnational Organized Crime. As mentioned earlier, the Protocol is not an independent treaty. Rather, complementary regimes of jurisdiction are established by the critical link between the Protocol and its “parent”, the Convention Against Transnational Organized Crime. Article 37(2) of the Convention firmly establishes that in order to become party to the Protocol, a state must also be (or become) a State Party to the Convention. The Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto further emphasize that “it is not possible for a State to be subject to any obligation arising from the Protocol unless it is also subject to the obligations of the Convention”.<sup>60</sup> “This ensures that, in any case that arises under the Protocol to which the States concerned are Parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions were drafted on that basis.”<sup>61</sup> At present, fourteen of the non-Party States

59. See, for example, *Smuggling of Migrants Protocol*, *supra* note 1, arts. 11(1)–(2), 12.

60. *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (United Nations, 2004) [*Legislative Guides*] at 330.

61. *Ibid.*, at 329.

have not or not yet signed the Convention Against Transnational Organized Crime. These include Afghanistan, Andorra, Bhutan, Eritrea, Fiji, Iran, DPRK, Kosovo, Palau, Papua New Guinea, Solomon Islands, Somalia, Tonga, and Tuvalu. For some of these states, the main obstacle to ratifying the Protocol may lie in objections to the parent Convention, rather than in specific Protocol obligations. Ascertaining their position towards the Smuggling of Migrants Protocol is thus, at best, speculative.

Much of the critical literature shares the view that the Smuggling of Migrants Protocol is an instrument that protects the interests of wealthy destination countries and that it is of much greater concern to these states than it is to source and transit countries. “Irregular migration is a source of long-standing anxiety for States; most particularly for the relatively wealthier countries of destination”, notes Anne Gallagher.<sup>62</sup> There is growing criticism of the Protocol for being too Western-centric and driven by the desire of wealthy industrialized nations to fortify their borders, deter asylum seekers and irregular migrants, and prevent uncontrolled immigration from less developed nations.<sup>63</sup>

In this context, it is also worth noting that perceptions of migrant smuggling and irregular migration fluctuate over time, and that the practices now referred to as migrant smuggling were hailed as heroic for much of the twentieth century. During the Nazi regime, for instance, many “smugglers” assisted Jews to flee from the Holocaust and often made a considerable financial or material gain from such assistance. Similarly, during the Cold War era, illegal border crossings from Communist into Western states were welcomed, and in many cases encouraged. In 1983, Germany’s Federal Court of Justice specifically confirmed that helping refugees to cross borders illegally conformed to the general views and values of the community.<sup>64</sup> These historical perspectives may also explain why some states oppose the Smuggling of Migrants Protocol, and object to the criminalization of migrant smuggling and other forms of irregular migration.<sup>65</sup>

### C. *Lack of Clarity and Understanding*

Many states lack an understanding of the meaning and dimensions of the smuggling of migrants, and of the purpose, content, and requirements of the Smuggling of Migrants Protocol. This problem may, to some extent, result from a lack of clarity within the Protocol itself, and is magnified by a lack of information about the level and characteristics of migrant smuggling within a given country or region. The normative theory of state compliance with international rules suggests that states are far more likely to take on international obligations where requirements are clear and sufficiently

62. Gallagher, *supra* note 11 at 188.

63. Andreas and Nadelman, *supra* note 38 at 105; Gallagher, *supra* note 11 at 189; Neil BOISTER, “The Concept and Nature of Transnational Criminal Law” in Neil BOISTER and Robert CURRIE, eds., *Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2015), 11 at 23.

64. BGH, 21 February 1980 (1980) 29 *NJW* 1574–6.

65. See further, Kurt SCHMOLLER, “‘Schlepperei’ und ‘Ausbeiterische Schlepperei’—Zwei neue Deliktstypen im österreichischen Strafrecht”, in Gerard WOLF, ed., *Kriminalität im Grenzgebiet, Band 2: Wissenschaftliche Analysen* (New York: Springer Publishing, 1998), 33 at 35.

detailed.<sup>66</sup> This issue may therefore provide a deterrent to signing the Protocol where non-Party States do not properly understand the issue to be addressed or the obligations they would be undertaking.

The Protocol is primarily a crime control and law enforcement instrument. The Protocol's deliberate framing of the smuggling of migrants as a type of organized crime requiring primarily a "crime control" response is what fostered consensus in the first place. Despite the emphasis on criminalization and suppression, input from a range of interest groups led to the inclusion of provisions relating to the protection of the rights of smuggled migrants. While the Protocol is clearly not a human rights instrument, human rights elements are evident within the Protocol's statement of purpose and in its protection and prevention measures.

Article 5, for instance, requires States Parties not to criminalize smuggled migrants for being the object of such smuggling, reflecting a similar obligation in Article 31 of the Refugee Convention.<sup>67</sup> Article 16(1) of the Protocol requires States Parties to adopt measures "to preserve and protect the rights of [smuggled migrants], as accorded under applicable international law". Article 16(2) requires States Parties to protect smuggled migrants from physical violence. Article 16(3) calls on States Parties to afford appropriate assistance to smuggled migrants whose lives or safety are endangered, and Article 16(4) recognizes the particular vulnerability of women and children. Also, Article 19 of the Protocol contains a savings clause stating the continued applicability of international human rights law alongside the Protocol. Article 19(1) draws particular attention to the specific obligations stemming from the Refugee Convention. In addition, Article 19(2) seeks to ensure that domestic laws pertaining to migrant smuggling are not designed or applied in a manner that discriminates against smuggled migrants or illegal residents by reason of their irregular status.

These requirements, whilst not mandatory, can compete and conflict with the Protocol's overall "law and order" approach. For example, strong measures on border protection, addressed in Article 11 of the Protocol, may infringe freedom of movement and non-refoulement. For this reason, a number of states may find it confusing and difficult to balance or reconcile the sometimes conflicting and competing goals of the Protocol. This is particularly the case in countries with poor human rights records and countries that have objections towards international human rights law.

The Protocol itself provides little guidance on the many complex issues associated with the smuggling of migrants, instead promoting a "one size fits all" approach to all forms of migrant smuggling. This may be seen as "glossing over" deeper complexities and nuances, and does not account for specific local dynamics. The Protocol's broad approach was taken to avoid any loopholes and gaps in the definition, and to allow the inclusion of "yet-to-be-conceived" forms of migrant smuggling. While the Protocol

66. Oona HATHAWAY, "Do Human Rights Treaties Make a Difference?" (2002) 111 *Yale Law Journal* 1935 at 1958.

67. See further, Andreas SCHLOENHARDT and Hadley HICKSON, "Non-criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice Under Article 5 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air" (2013) 25 *International Journal of Refugee Law* 39 at 39–50.



contains specific provisions for the smuggling of migrants by sea, no similar provisions have been made for the smuggling by air, or land, which can be similarly dangerous, sophisticated, and complex.

#### D. *Lack of Political Will*

In addition to the points already mentioned, a lack of political will is among the main barriers to ratification of the Smuggling of Migrants Protocol. This is particularly the case in countries that have the resources and capacity to implement and enforce the Protocol obligations and witness significant levels of migrant smuggling, but which nevertheless have opted not to ratify the Protocol. Constructivist theories of treaty participation emphasize the impact of norms on state behaviour, suggesting that ratification is more likely if the state agrees with the norms espoused within a treaty. According to constructivist theories, ratification of the Protocol will be more likely if states perceive migrant smuggling as a crime worthy of legislative response.<sup>68</sup>

By not ratifying the Smuggling of Migrants Protocol, states may be resisting taking on the binding international obligations. This may be because the Protocol is perceived as potentially interfering with state sovereignty, or out of a general hesitation towards binding international obligations. Some countries, States Parties and non-Parties alike, may perceive some Protocol obligations as undermining their sovereign right to determine who enters and remains within their borders. This issue is particularly relevant where states fear that any protection of smuggled migrants may encourage further immigration, including illegal immigration.<sup>69</sup>

The strong involvement of many non-Party States in non-binding initiatives suggests that some states may not be averse to the idea of taking action against migrant smuggling but reject the idea of taking on binding obligations. The fact that regional initiatives like the Bali Process concern themselves primarily with the border control and law enforcement response to migrant smuggling also gives comfort to those states that are reluctant to confront the root causes and the human rights aspects of migrant smuggling.

It has also been shown that the political will to ratify the Protocol is lacking in many countries where non-governmental organizations and other non-state actors have little or no voice and where democratic processes to discuss issues of common concern are only marginally developed or non-existent. This is particularly the case in conflict and post-conflict states and in several authoritarian regimes that have not ratified the Protocol.

## VI. THE WAY AHEAD

The smuggling of migrants creates a complex national security, international relations, and human rights problem that is the subject of fierce and controversial debate,

68. Andreas SCHLOENHARDT and Ellen BEVAN, "To Ratify or not to Ratify? Exploring the Barriers to Wider Ratification of the Trafficking in Persons Protocol" (2011) 9 *New Zealand Yearbook of International Law* 161 at 177.

69. Khalid KOSER "Irregular Migration, State Security and Human Security", University College London, Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005 at 10.

polarizes public opinion, and features prominently in political contests and media coverage. Combatting the smuggling of migrants poses unique challenges to the international community and to national governments. Adding to the complexity is the role many countries play in the web of smuggling routes that connect sending, transit, and destination points by sea, land, and air.

Restrictions placed on the free movement of people are playing into the hands of migrant smugglers, who exploit differences in national laws and legal systems to their advantage. They create illegal ways of migration by using clandestine methods of transporting people and/or by supplying sophisticated false documents, while taking advantage of those willing or forced to migrate. Smuggled migrants are vulnerable to life-threatening risks and exploitation. Thousands of people have suffocated in containers, perished in deserts, or drowned at sea. Generating huge profits for the smugglers, migrant smuggling fuels corruption and empowers organized crime. For many smuggled migrants, however, the illegal services offered by the smugglers represent the only way to escape persecution, violence, discrimination, or other forms of threat and harm. For others, migrant smuggling is seen as the only or most immediate avenue to escape poverty and unemployment and find a better life for themselves, their families, and friends.

The Smuggling of Migrants Protocol is an important milestone in global efforts to prevent and suppress this crime, and in the protection of the rights of smuggled migrants. It has created an international framework for criminalization and co-operation where, up until recently, none existed. The Protocol and its extensive explanatory and interpretative materials provide national legislators with a blueprint to combat the smuggling of migrants at domestic levels, which can be integrated bilaterally, regionally, and multilaterally. Moreover, drafters of the Protocol were cognizant of the need for the provisions to be sufficiently malleable to apply to varying legal systems. To prevent and combat the smuggling of migrants more effectively and more universally, it is thus important that more states ratify this important treaty.

The analysis in this paper has identified a number of concerns and objections that explain why forty-five states are not yet Parties to the Protocol. Among these are countries such as Afghanistan, Bangladesh, China, Eritrea, Iran, Jordan, Malaysia, and Pakistan, which play a major role as sending, transit, and/or destination countries for smuggled migrants. While the specific conditions and circumstances that deter each country from acceding to the Protocol require further, individualized research, some commonalities are evident. The main barriers to ratification relate to the extensive costs and complexities associated with the implementation and enforcement of the Smuggling of Migrants Protocol and a lack of political will or a lack of understanding in some non-Party States. The perceived lack of incentives, the view that enough is already done through national laws or non-binding regional initiatives, and a general reluctance to accept binding obligations on issues that are traditionally matters of national concern, are other reasons why some states have not ratified the Protocol. Regrettably, the Conference of States Parties, and the UNODC, the “guardian” of the Protocol, are not well equipped to rectify these concerns; while they can assist in interpreting the Protocol and give guidance to States Parties,

they have no power to enforce Protocol obligations or compel non-Party States to accede to this body of law.

While the Protocol establishes a basic framework to provide some technical and financial assistance to eligible States Parties, the existing measures, together with the support available through the UNODC and other international organizations, fail to address deeper problems of underdevelopment, corruption, and internal conflict, which greatly diminish a country's ability to ratify and implement the Protocol, or prioritize smuggling of migrants as a political issue. These underlying factors must be acknowledged and dealt with before higher-level technical assistance will be effective in overcoming capacity and resource limitations that concern non-parties and States Parties alike.

This paper gives some insight into actual and perceived objections to the Smuggling of Migrants Protocol and, through such insight, provides a starting point for further discussion and analysis which, in the medium and long term, can lead to greater acceptance and more effective implementation of the Protocol in countries around the world. In the fifteen years since it first came into existence, the Smuggling of Migrants Protocol has gained significant support worldwide. Global efforts to bring domestic law into line with the Protocol should, however, not be levelled exclusively at increasing the number of ratifications but must include "actual implementation at the national and local level".<sup>70</sup> Ratification is "only a first step" in orchestrating an effective international campaign targeting the smuggling of migrants, which must involve realization of the standards in domestic law and administrative practice.<sup>71</sup> While the Smuggling of Migrants Protocol provides a solid foundation on which States Parties can build their domestic efforts to criminalize and combat this phenomenon, the Legislative Guides concede that the Protocol requirements are only a "minimum standard".<sup>72</sup> The way in which States Parties adopt the standards set by the Protocol will necessarily vary, and the process by which the requirements of the Smuggling of Migrants Protocol can be fulfilled will also depend on States Parties' views on international law in this field.<sup>73</sup>

Despite the laudable purposes and ambitious goals of the Smuggling of Migrants Protocol, it is predictable that the smuggling of migrants will continue to pose a great challenge to policy-makers and legislators for many years to come. Many more smuggled migrants will attempt the dangerous journey to destinations that promise a safer life and a better future. Many more migrant smugglers will exploit the hopes, dreams, and desperation of those willing or forced to migrate. Many more lives will be lost on these perilous journeys. This, in turn, will trigger calls for tougher laws and new measures to prevent and combat the smuggling of migrants.

In the context of today's levels and patterns of smuggling of migrants, there is, however, a growing recognition among leading experts that migrant "smugglers play a

70. Susan MARTIN and Rola ABIMOURCHED, "Migrant Rights: International Law and National Action" (2009) 47(5) *International Migration* 115 at 133.

71. Ryszard CHOLEWINSKI and Kristina TOUZENIS, "Irregular Migration Into and Through Southern and Eastern Mediterranean Countries: Legal Perspectives" (2009), online: <<http://cadmus.eui.eu/handle/1814/11296>>.

72. *Legislative Guides*, *supra* note 60 at 331.

73. *Ibid.*, at 323.

critical role in assisting refugees to reach safety”,<sup>74</sup> and that the increasing fortification of national borders has made it impossible for asylum seekers and other irregular migrants to flee from persecution or poverty. Despite the growing support for measures to combat the smuggling of migrants and other forms of irregular migration, it is evident that the Smuggling of Migrants Protocol will not be able to eradicate this phenomenon. Additional innovative strategies that place less emphasis on criminalization but give more attention to the root causes of migrant smuggling are thus desperately needed.

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74. James C. HATHAWAY, “Why Human Smuggling is Vital”, *National Post* (13 September 2010), online: <<http://fullcomment.nationalpost.com/2010/09/13/james-c-hathaway-why-human-smuggling-is-vital/>>.