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Criminalisation of human smuggling in Africa

Looking at the law

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Summary

This brief analyses how African states have criminalised human smuggling in their national legislation. This research found that 22 states have criminalised the 'smuggling of migrant's broadly as defined in the UN Smuggling Protocol, which specifies that the intent of the perpetrator must be to reap a 'financial or material benefit.' It finds that even these states have diverged significantly from the approach set out in the Smuggling Protocol, and highlights concerning trends before recommending best practice.

Key points

- Research for this brief found that 22 African countries have criminalised human smuggling broadly in line with the Smuggling Protocol (specifying that the intent of the smuggler must be to reap a 'financial or material benefit').
- Smuggling offences are typically enacted within immigration laws, the criminal code, human trafficking laws or standalone human smuggling laws.
- Domestic definitions of smuggling offences diverge significantly from that in the Smuggling Protocol. Most go beyond the protocol's criminalisation obligations.
- Common divergences include the criminalisation of facilitating emigration, the introduction of mandatory minimum sentencing frameworks, and the exclusion of the prohibition on prosecution of the migrant for using smuggling services.

Recommendations

- Smuggling offences should be incorporated into the criminal code, rather than in immigration laws, human trafficking laws, or (although this causes less harm) standalone smuggling laws.
- Legislation should reflect the definitions of the 'migrant smuggling' offence set out in the Smuggling Protocol, particularly that the intent of the smuggler should be for financial and material benefit and that facilitating the exit of a migrant is not a crime.
- Penalties should be proportionate to the harm caused, with mandatory minimum sentencing avoided. The involvement of state officials should be included as an aggravating factor.
- National legislation should include the Smuggling Protocol's protections granted to smuggled migrants against prosecution.

Introduction

Mobility has been a key facet of resilience across much of the African continent throughout its history, with smugglers an essential part of the equation. But the development of the migrant smuggling industry as a multi-million Euro global business is much more recent. So is the image of the migrant smuggler as a highly organised criminal.

Unprecedented mass displacement and the increasing closure of routes for legal migration have resulted in a sharp increase in people moving irregularly and, as a consequence, a growing need for smugglers.

COVID-19 looks set to drive displacement higher still, forcing many to move in search of a livelihood. It is impossible to know precisely how many irregular migrants will be using the services of smugglers, but even before the pandemic hit, it was recognised that a significant proportion of the world's irregular migrants will have used their services.

Smugglers have played an unprecedentedly pivotal role in modern migration mechanics and look set to become even more important in a post-COVID landscape. Yet there is a patchy understanding of how smuggling offences are addressed in the national legal frameworks

of countries in Africa. This has significant implications for the way smuggling laws are implemented, shaping counter-smuggling enforcement action.

Smuggling first became recognised as a crime under international law in The Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nation's Convention Against Transnational Organized Crime (UNTOC), adopted in 2000 (Smuggling Protocol). That human smuggling was identified as one of only three types of crime requiring an additional protocol to the convention¹ illustrates how smuggling had become a priority for contributing states.

As of 2019, 40 of 54 African states had ratified the Smuggling Protocol.² The research for this report (pursuant to the methodology set out below), found that 22 states had complied with the obligation to criminalise 'smuggling of migrants' and translated the protocol's provisions into the national legal corpus.³ However even these states have introduced smuggling offences defined in ways that vary significantly from the definition set out in the Smuggling Protocol.

This contrasts to the adoption and translation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol), another of the protocols accompanying the UNTOC. As of the end of 2019, 85% of countries in Africa have domestic laws which criminalise all or most forms of trafficking, substantially in line with the Trafficking Protocol.⁴

There is a patchy understanding of how smuggling offences are addressed in the national legal frameworks of countries in Africa

Across Africa, perceptions of migrant smugglers as facilitators of movement and providers of a hugely important service continue to be prevalent, creating a disjunction between the perception and the legal characterisation of smugglers as criminal under international, and in some cases domestic, legal frameworks.

This brief examines the legislative approaches taken by African governments to criminalise human smuggling

(defined pursuant to the Smuggling Protocol).⁵ This comparative analysis enables identification of key trends of concern and best practice structures.

It outlines the analysis set out in the underlying report titled *Human Smuggling in Africa: the creation of a new criminal economy?* The report considers policy responses to human smuggling on the continent and the impact of counter-smuggling enforcement activity on smuggling markets. It sets out case studies analysing counter-smuggling enforcement action in Mali, Ethiopia, Kenya, Algeria, Niger and Egypt.

This brief and the underlying report were researched and written before the COVID-19 pandemic emerged in early 2020. Preliminary evidence of the pandemic's impact are explored in a discrete section of the underlying report and in a policy brief written by the author for the Global Initiative titled 'Smuggling in the time of COVID-19: The impact of the pandemic on human-smuggling dynamics and migrant-protection risks'.⁶

Both this brief and the underlying report draw on field research across a number of the jurisdictions scrutinised (including Egypt, Niger, Algeria and Libya), long semi-structured interviews with over 20 experts on migration dynamics and key informants working in civil society, law enforcement, and the military in Africa, and extensive desktop research.

The legal analysis in this brief is based on a review of the provisions and legislation flagged to be relevant to human smuggling, either in the UNODC SHERLOC, Legal Atlas and Africa Organised Crime Index databases, or in subsequent research and conversations. Consequently, this research is vulnerable to the limitations of the data-gathering exercises conducted for the databases listed above. Although the author has sought to offset these by cross-checking positions with local analysts where possible, this limitation remains. The author welcomes any updates, or additional relevant laws, identified by readers, which can be incorporated into later iterations of this analysis.

The difference between smuggling and trafficking

While the terms are repeatedly used interchangeably in public discourse, it is key to distinguish between 'the smuggling of migrants' and 'human trafficking'.

The Smuggling Protocol defines the offence of 'smuggling of migrants' as (i) the procurement of the illegal entry of a person who is not a national or permanent resident; (ii) intentionally in order to obtain, directly or indirectly, a financial or other material benefit.⁷ Smugglers provide a service to migrants, namely to move through areas or overcome obstacles in their journeys that they could not have navigated independently.

There are many regions in Africa where the smuggling industry is a key source of employment and income. Smuggling in these regions has long constituted an important facet of community resilience. Smugglers often come from the same communities as their clients and rely on their reputation to gain new clients. They are therefore careful to preserve the safety of the migrants on their journey as any mishap would damage the smuggler's reputation and his business.

There are many regions in Africa where the smuggling industry is a key source of employment and income

The majority of smugglers continue to be low level operators who provide their services without abuse or exploitation.

Human smuggling is a services industry, where prices are shaped by supply and demand. The more difficult a stretch of the journey becomes to traverse independently, the more important the services provided by smugglers. Similarly, the more hostile the environment becomes to irregular migration, the riskier the journey of the migrant and operations of the smuggler. In many cases this drives smuggling networks to professionalise in order to operate successfully in a more challenging environment and attracts organised crime groups to enter the market.

In contrast, human trafficking constitutes three elements: (i) an 'action', being recruitment, transportation, transfer, harbouring or receipt of persons; (ii) a 'means' by which that action is achieved (threat or the use of force, or other forms of coercion, e.g. abduction, fraud, deception, abuse of power or of a position of vulnerability) and the giving or receiving

of payments or benefits to achieve consent; and (iii) a 'purpose' – namely, to exploit.⁸

Some smuggling arrangements may end in trafficking, but they are the rare exceptions. In the vast majority of cases, smuggling is a willing transaction between migrant and smuggler, a contract in which the smuggler undertakes to facilitate the client's journey. Once the migrant has completed his or her journey, the smuggler's contract has been fulfilled and all contact ends.

Although human smuggling and trafficking are distinct crimes under international law, in practice they are widely recognised as existing on a continuum, as migrants can move from one section of a journey with characteristics of simple smuggling onto another section with characteristics of trafficking. However, the elements of each crime differ widely, as do the legal and policy responses required.

Smuggling and the law

Twenty-two countries in Africa criminalise the offence of 'smuggling of migrants' defined broadly in line with the Smuggling Protocol, namely: (i) the procurement of the illegal entry of a person into a state; (ii) for the purpose of financial or material benefit (termed 'smuggling' in this brief). These countries are: Senegal, Mali, Kenya, Ghana, Ethiopia, Egypt, Burkina Faso, Algeria, Libya, Niger, Nigeria, Namibia, Guinea, the Central African Republic, Zambia, Mauritania, Eswatini, Guinea Bissau, Lesotho, Djibouti, Mozambique and Equatorial Guinea.⁹ The Government of Namibia is reportedly intending to repeal the current national legislative provisions to counter human smuggling. If this goes ahead, and no additional provisions are enacted, Namibia would have no provisions combatting migrants smuggling.

The remaining 32 countries in Africa either criminalise the facilitation of irregular migration but do not specify the intent of the perpetrator, or they have no relevant offences.

The majority of these 22 states nevertheless diverge from the basic definition of the smuggling offence set out in the Smuggling Protocol,¹⁰ with most going beyond the protocol's criminalisation obligations.

Variations are shaped by the drivers of legislative reform introducing smuggling offences in each country. These

can broadly be categorised as internal and external, the latter predominantly the result of pressure from the European Union (EU) and United Nations.¹¹ In the former category, the perception of migration as a national security threat is a key factor driving the enactment of smuggling offences and shaping the definitions therein.

This brief outlines key trends in the way the Smuggling Protocol has been translated into the national laws of these 22 countries and highlights best practice going forward.

A matter of intent: the benefit element

A key element of the Smuggling Protocol's definition of 'smuggling of migrants' is the intent of the perpetrator to gain 'financial or material benefit' (shortened to 'benefit'). The official record of the UN negotiations surrounding the drafting of the Smuggling Protocol makes clear that the benefit element was included to enshrine the protocol's focus on the activities of organised crime groups for profit. It also sought to ensure that facilitation of irregular migration for no material motive, and in particular on the basis of family ties or for humanitarian reasons, fell beyond the scope of the UNTOC and protocols.¹²

'Smuggling of migrants' is the intent of the perpetrator to gain 'financial or material benefit'

The Smuggling Protocol sets minimum standards for states to comply with in criminalising the smuggling of migrants. However states are permitted to adopt higher or stricter standards into their national laws. Whether the exclusion of the benefit element constitutes a 'more strict' standard, as permitted by the protocol, or a fundamental deviation from the criminalisation obligation, in breach of the protocol, has been a topic of discussion in international organisations.¹³

The author would argue it falls squarely in the latter, distorting the core interpretation of the 'smuggling of migrants', diluting the required link to organised crime, and enabling a far greater scope than envisaged under the Smuggling Protocol.

In line with this, within this brief and the underlying report, benefit has been considered as an integral part of the smuggling offence. Consequently, countries excluding this element have not been deemed to incorporate smuggling offences into national legislation.

Where to house smuggling offences?

Where domestic law provisions criminalising smuggling are housed has a significant impact on the way they are perceived and implemented. The 22 countries criminalising smuggling embed these provisions within one (or in the case of Nigeria, which has slightly different smuggling offences in separate pieces of legislation, two) of the following legislative frameworks, with the ramifications sketched below.

Immigration laws (Ghana, Kenya, Libya, Nigeria)

Immigration laws are the home of offences relating to the facilitation of irregular migration. Together with the EU's policy focus on stemming irregular migration (with criminalising smuggling as a limb of it), this has influenced the continued inclusion of smuggling offences in immigration laws, encouraging the perception of smuggling as an immigration offence.

Placing smuggling offences within immigration laws is detrimental from two key perspectives: perception and investigation. Firstly, it severs the link between smuggling and organised crime, which is clearly crafted in the framework of the Smuggling Protocol read alongside the UNTOC. Instead it blurs the distinction between the irregular migrant and smuggler, treating both as perpetrators in 'migration offences', and encourages the criminalisation of irregular migration more broadly.

For example, Libya's Law No 19/2010 sets out a number of 'acts of illegal immigration', including 'facilitating the transportation of illegal immigrants inside the country with knowledge of their illegality', and then defines human smuggling as the commission of 'an act of illegal immigration' for financial or material gain.¹⁴ The smuggling offence is therefore embedded within the migration control framework, rather than identified as a form of organised crime.

Secondly, in jurisdictions where immigration officials and broader law enforcement officers are employed in different divisions and granted different training,

smuggling offences embedded in immigration laws fall within the ambit of immigration officials but not the law enforcement officers. This means a significant proportion of law enforcement officers will not be familiar with provisions relating to immigration and therefore, where smuggling offences are embedded within these structures, will be unfamiliar with those relating to smuggling.

Placing smuggling offences within immigration laws is detrimental from two key perspectives

Further, in contexts where specific units deal with serious and organised crime – such as Ghana, whose smuggling offence is incorporated in the Immigration Act 2012 – incorporating smuggling offences in immigration laws can mean they fall outside the remit of specialised organised crime units, either by design or merely because they are overlooked. This makes the likelihood of investigations and prosecutions of organised crime groups working in human smuggling, rather than low-level brokers or drivers, diminish further.

The criminal code (Algeria, Central African Republic, Guinea, Namibia and Mozambique)

Incorporating human smuggling offences in the criminal code effectively addresses both the perception and investigation concerns associated with immigration law structures detailed above. Human smuggling is optically and legislatively differentiated from administrative immigration offences and is instead incorporated alongside other instances of serious and organised crime.

In many jurisdictions the criminal code is the legislative instrument that law enforcement officers are most familiar with; it lies at the core of training, and consequently to enforcement. Incorporating human smuggling in this code ensures it automatically falls within the scope of law enforcement awareness.

Embedding human smuggling offences in the criminal code also minimises the risks that human smuggling

offences sit in parallel to other criminal provisions, replicating or contradicting other elements of the criminal code, and making their interaction unclear.

Standalone smuggling laws (Egypt, Niger, Guinea-Bissau and Mauritania)

This structure risks creating parallel legal structures which sit alongside, rather than interacting with, the criminal code. On the other hand, such separate instruments can work as advocacy or awareness tools.

In Niger the title of Loi 2015/36 – Law regarding Human Smuggling – makes its focus clear. This is also true of the smuggling law in Guinea-Bissau ('Lei para combater tráfico de migrantes') and Mauritania ('Loi relative à la lutte contre le trafic illicite de migrants'). However, the title of Egypt's Law, namely the 'Law On Combating Illegal Migration & Smuggling of Migrants', removes one of the key advantages of housing smuggling in a standalone law – to distinguish it from immigration offences.

Trafficking in persons legislation (Burkina Faso, Ethiopia, Mali, Senegal, Nigeria, Zambia, Equatorial Guinea, Lesotho, Eswatini, Djibouti)

This approach reflects and promulgates a failure to distinguish between smuggling and trafficking in international discourse. Although in many contexts the two phenomena are intrinsically linked, and distinguishing between them can appear an academic exercise when faced with practical realities, they are fundamentally different crimes under international law, requiring separate policy and legal responses.

Binding smuggling and trafficking within a single legal instrument, whose title often refers solely to trafficking, shapes the response to the former through a lens focused on the latter. This distorted focus tracks through the law – for example, the preamble to Senegal's Loi 2005/06 exclusively addresses the 'scourge' of trafficking, referring to smuggling only obliquely once as 'organising illegal migration'.

In three of the four Francophone countries, namely Burkina Faso, Mali and Senegal, the relevant legislation is titled 'Trafficking in Persons and Related Practices' ('Portant Lutte Contre La Traite des Personnes et Les Pratiques Assimilees').¹⁵ Referring to smuggling as '*pratique assimilees*' is incorrect, misaligned with the

protocols, and wrongly suggests the two phenomena should be addressed in the same manner.

Failure to distinguish between the two offences in the title of the law enhances the risk that the two distinct offences receive homogenous treatment, as can be tracked in the laws of Burkina Faso, Mali, and Senegal, all of which prescribe the same penalties – a mandatory minimum of five years' imprisonment and a maximum of 10 – for the basic offences of smuggling and trafficking in persons.¹⁶ Further, such legislative structures create confusion surrounding definitions of both the perpetrator and the 'victim' (in the case of trafficking), or 'smuggled migrant' (in the case of smuggling).

Recommendations for where to house smuggling offences

Incorporating smuggling offences into immigration or trafficking laws has damaging consequences for how they are perceived and enforced, while standalone smuggling laws risk creating parallel legal systems for smuggling offences which do not fit into the body of the national criminal corpus. Arguably the most effective way of countering each of these risks is instead to address smuggling within the criminal code.

Incorporating smuggling offences into immigration laws has damaging consequences for how they are enforced

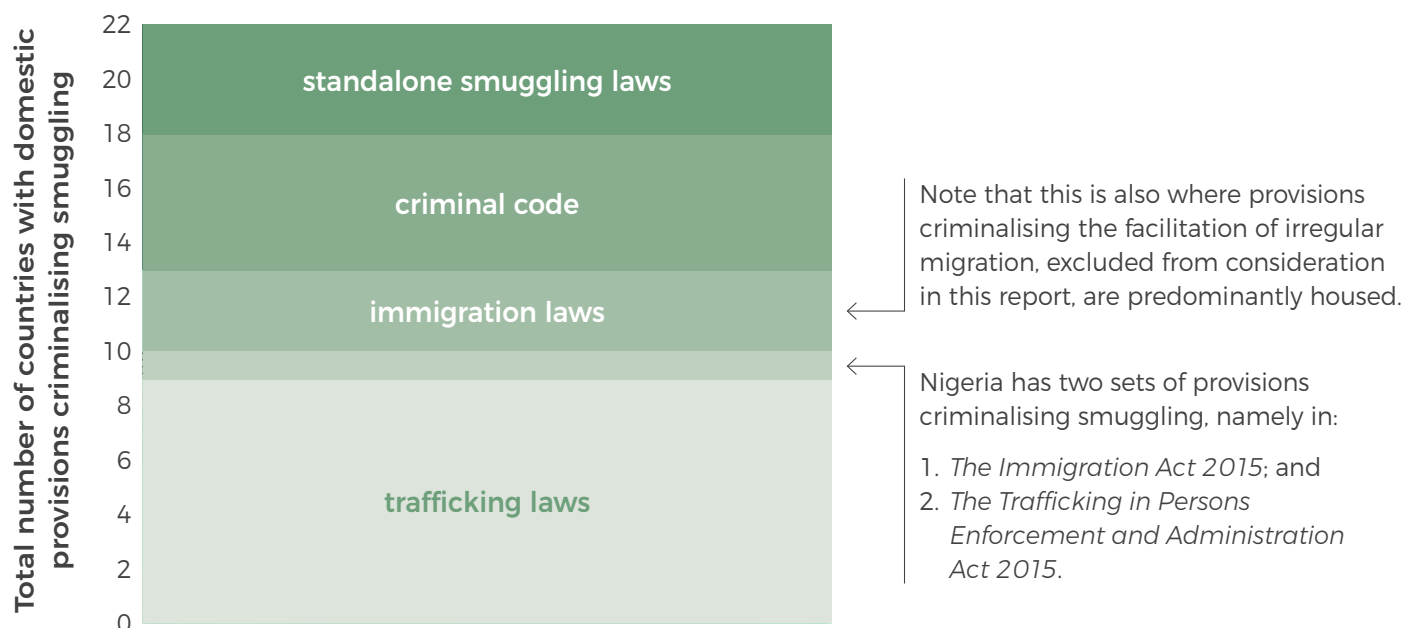
Key trends in legislative translation

A comparative legislative analysis across the 22 countries criminalising smuggling, and against the Smuggling Protocol, reveals a number of trends. These have concerning ramifications for the protection of smuggled migrants, and for the treatment of those charged with smuggling offences, typically low-level operators.

Migrants as criminals: Protection from prosecution

One of the three purposes of the Smuggling Protocol is the protection of the rights of migrants; a key element of

Figure 1 Where to house smuggling offences?



this pillar is the explicit prohibition on the prosecution of migrants merely for having used smuggling services (the Prosecution Prohibition in the Smuggling Protocol).¹⁷

Nine of the 22 African countries which criminalise smuggling include the Prosecution Prohibition.¹⁸ These are Egypt, Ethiopia, Mali, Senegal, Guinea Bissau, Mauritania, Eswatini, Kenya (the latter applies only where the migrant cooperates in the prosecution of the smugglers), and in Nigeria, one of the two laws sanctioning smuggling offences (the Immigration Act 2015, but not the Trafficking in Persons Act 2015).

Thirteen of the 22 countries criminalising smuggling exclude the Prosecution Prohibition.¹⁹ Zambia's current legislation goes further in explicitly enabling prosecution of any person who 'consents to being smuggled' for a smuggling offence. This legislation is currently being reviewed with a view to aligning further with the Smuggling Protocol.²⁰

Excluding the Prosecution Prohibition leaves migrants using the services of smugglers vulnerable to prosecution. Further, the inclusion of the Prosecution Prohibition in the Smuggling Protocol made clear that it was not an instrument to fight against irregular migration, which should not be, in itself, considered a crime. Its exclusion in domestic translation vitiates this point, enabling criminalisation of smuggling to be wielded as a tool in a broader fight against irregular migrants.

Criminalisation of emigration

The Smuggling Protocol's definition of 'smuggling' refers to the facilitation of 'illegal entry' but makes no mention of 'illegal exit'. This respects the position under international law which enshrines the right of any person to leave a country, including their own,²¹ while respecting state sovereignty in deciding the procedures for entry.

Twelve (fifteen including Zambia, Niger and Lesotho, see the explanation below) of the 22 African countries which criminalise smuggling include the facilitation of unlawful exit in the definition of the basic smuggling offence, namely Algeria, Burkina Faso, Egypt, Equatorial Guinea, Ethiopia, Ghana, Guinea Bissau, Kenya, Libya, Mali, Mozambique and Senegal.²² The definition of 'smuggling' in Zambia, Niger and Lesotho's legislation track the definition of the human smuggling offence in the Smuggling Protocol (i.e. refers only to unlawful entry). However, the offence itself refers to smuggling a person 'into or out of Zambia', ensuring their 'entry to or the illegal exit from Niger', or facilitating their 'illegal entry into or departure from Lesotho' respectively. It is unclear whether the offence of smuggling 'out' of Zambia, Niger or Lesotho would be feasible to prosecute given the definition of 'smuggling'

Creating a similar contradiction, Algeria's Criminal Code defines a 'smuggler' as one who facilitates the

unlawful 'entry, circulation, stay or ... departure of a foreigner'.²³ However the act of human smuggling is defined merely as 'the act of organising illegal exit of the national territory of one or more people in order to extract, directly or indirectly, an advantage, financial or otherwise'.²⁴ The focus on 'departure' and 'illegal exit' is not in the Smuggling Protocol.

In some jurisdictions (such as Algeria and Egypt) this focus on exit, particularly of its citizens, can be linked to a fear of a brain drain (also reflected in the shape of Egypt's enforcement efforts – as detailed in Part 2 of the [underlying report](#)). However, in jurisdictions where emigration more broadly is not perceived to be problematic, the drive to criminalise irregular exit appears to originate externally.

The EU has wielded significant influence on counter-smuggling responses across much of Africa. This can be tracked in the shape of smuggling offences enacted by African countries. The EU is widely recognised to have adopted a strategy of externalising its borders and creating buffer zones on the continent. The EU's strategy is driven by the fears of EU destination countries about irregular immigration and their desire to block arrivals onto their territory. The widespread criminalisation of emigration can in some cases most accurately be perceived as one result of the EU's externalisation of borders strategy.

The EU's influence on counter-smuggling responses in Africa can be tracked in the shape of smuggling offences enacted by African countries

In Ethiopia, the facilitation of unlawful exit was not an element of the smuggling offence under the 2004 Criminal Code but was incorporated into Proclamation No 909/2015. This could reflect enhanced EU pressure to stem emigration towards the EU. It could also be driven by a repeatedly reiterated concern of the Ethiopian government regarding the mass emigration of Ethiopians and a desire to change its reputation as primarily a country of origin for migration.

In the case of Niger, where the risk of a brain drain is largely perceived to be limited,²⁵ the policy driver for criminalising the facilitation of emigration appears to be predominantly EU influence. This has been the subject of significant criticism. It appears targeted at seeking to stop persons crossing into Libya, whose borders are minimally patrolled and where enforcement of the law is difficult. Libya of course operates as one of the EU's 'buffer zones' in its border externalisation policies.²⁶

Penal structures: Proportionate sanctions

Many commentators argue that the level of penalties for human smuggling offences is not relevant to their deterrent effect, a key conceptual driver of sanctioning regimes. The effect on deterring high-level smugglers is particularly weak because convictions are almost exclusively of low-ranking human smugglers.²⁷ Despite this, a number of African countries prescribe extremely lengthy prison sentences in sanctioning smuggling, notably Namibia, where the upper ceiling is set at 25 years, Niger where it is 30, and Ethiopia where it is 20.²⁸

Of particular concern are mandatory minimum sentencing frameworks, which dictate the minimum sentence a judge is bound to prescribe to a perpetrator guilty of an offence. Smuggling, as a complex crime for which the wrong people are too often targeted, is an inappropriate offence to carry mandatory minimum sentencing structures, and the Smuggling Protocol does not prescribe such an approach.

Nevertheless, 16 of the 22 smuggling offences in the domestic legislation of African countries carry a mandatory minimum sentence,²⁹ ranging between one year (Guinea, Central African Republic, Guinea Bissau),³⁰ and 15 years (Ethiopia, Lesotho, Zambia),³¹ and averaging six years.

Mandatory minimum sentencing frameworks should be avoided, and high penalties reserved for aggravated smuggling offences. These are defined within the Smuggling Protocol as those which entail danger to the lives of migrants or 'inhuman or degrading treatment, including for exploitation'.³² The Model Law on Migrant Smuggling published by UNODC to guide states in translating the Smuggling Protocol into national legislation recognises the role of corruption in smuggling by suggesting that where the perpetrator is a public official, this should also constitute an aggravating factor.³³

Conclusion

There are limitations to responses to human smuggling that focus exclusively on criminal justice approaches, as explored in the [underlying report](#). However, criminal justice approaches, with laws criminalising smuggling as a key element of such responses, continue to be prevalent. In light of this, it is key to ensure that smuggling offences are drafted in a way in which they are capable of being properly implemented and to mitigate the risk that they are misused to target migrants themselves. Broadly, this means they should be drafted in line with the Smuggling Protocol.³⁴

When considering the drafting of smuggling offences, their amendment, or their analysis, legislators and legal practitioners should ensure that:

- Smuggling offences are incorporated into the criminal code rather than in trafficking legislation, immigration laws or (although this is of less concern) in standalone smuggling legislation.
- The legislation reflects the definitions of 'smuggling of migrants' set out in the Smuggling Protocol, in particular that:
 - the intent of the smuggler must be 'for financial or material benefit'; and
 - the facilitation of the unlawful crossing of borders *out* of a country for 'material or financial benefit' is not criminalised.

- Smuggling offences incorporate aggravated offences in line with the Smuggling Protocol, prescribing greater penalties for smuggling which has a more harmful impact on the migrant. The involvement of state officials should also be included as an aggravating factor deserving a higher sentence, reflecting the damaging impact of corruption.
- Penalties are proportionate to the harm caused by smuggling. This means that mandatory minimum sentencing structures should be avoided to preserve judicial discretion when meting out penalties.
- National legislation incorporates the Prosecution Prohibition (Art 5) and additional protections granted to migrants under the protocol (Art 16). Although the Smuggling Protocol is predominantly focused on the smugglers themselves, these provisions are key to protecting migrants against unfair prosecution.

The Smuggling Protocol is widely recognised to be imperfect. However it provides the most comprehensive framework to date for countering the smuggling of migrants. Closely reflecting the provisions of the Smuggling Protocol constitutes best practice and affords migrants at least one level of protection. It also enhances cross-jurisdictional harmonisation, which in turn facilitates cross-border co-operation, key in holistic counter-smuggling approaches.

Notes

- 1 The other two Palermo Protocols addressed trafficking in persons and the manufacture and trafficking of firearms.
- 2 Data collected for the Organized Crime Index project, part of ENACT, <https://globalinitiative.net/organised-crime-index-africa-2019/>. Data drawn from https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en.
- 3 Note that in certain legal systems (typically those classed as 'monist') some treaties can be 'self-executing', meaning they become part of national law, and thus enforceable by state authorities, upon ratification, without additional steps to incorporate it into domestic legislation. Having said this, in Africa, most Francophone States (typically considered monist), require Treaties to be published domestically to have the force of law. In cases where no domestic legislation has been enacted to translate the Smuggling Protocol into domestic law, there is a risk that the direct applicability of the Protocol will not have been identified through the data sources outlined above, and will therefore not be considered in this report. In Togo, which ratified the Smuggling Protocol in 2010 the ratification instrument states that the protocol will be 'enforced as if it were the law of the state' ('La presente loi sera exécutée comme loi de l'Etat'. Loi autorisant la ratification du Protocole contre le trafic illicite des migrants par terre, air et mer additionnel à la Convention des Nations unies contre la criminalité transnationale organisée, adopté le 15 novembre 2000 à New York, http://ilo.org/dyn/natlex/natlex4.detail?p_lang=fr&p_isn=94356&p_count=96912&p_classification=17&p_classcount=3793). The Smuggling Protocol was not written with a view to being self-executing - for example, although it creates the obligation to criminalise the offence of 'smuggling of migrants,' it does not prescribe specific penalties for such offence. It is therefore not clear that the Smuggling Protocol can be self-executing, and therefore whether in Togo it could be enforced in prosecutions. For this reason, Togo is not counted among the countries that have national provisions criminalising the offence of 'smuggling of migrants'. With this possible exception, and while recognising that prosecutions data is patchy, the research for this report found no evidence that national courts or law enforcement were using the Smuggling Protocol as a directly enforceable element of the national corpus.
- 4 UNODC, Global Report on Trafficking in Persons 2018 (Jan 2019), www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTIP_2018_BOOK_web_small.pdf.
- 5 In identifying legal provisions criminalising human smuggling offences (understood in accordance with the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the 'Smuggling Protocol')) across Africa, this research draws on (i) the Database of Legislation on the UNODC SHERLOC portal; (ii) the Legal Atlas database; and (iii) Global Initiative research conducted for the ENACT Project which included a review of available databases for legislation, together with widespread qualitative expert verification. SHERLOC is an electronic repository of laws compiled by UNODC relevant to the requirements of the Organized Crime Convention, the Protocols thereto and the international legal framework on terrorism. It is available here: <https://sherloc.unodc.org/cld/v3/sherloc/>. The Legal Atlas is a legal intelligence platform which uses both artificial and human intelligence to compile and analyse international laws on a wide range of subjects and which was used by the ENACT programme in its legal analysis. Available (for subscribers) here: <https://www.legal-atlas.com>. The author welcomes any updates, or additional relevant laws, identified by readers, which can be incorporated into later iterations of this analysis.
- 6 L Bird, Smuggling in the time of Covid-19: The impact of the pandemic on human-smuggling dynamics and migrant-protection risks, The Global Initiative Against Transnational Organized Crime, April 2020, <https://globalinitiative.net/wp-content/uploads/2020/04/GIATOC-Policy-Brief-003-Smuggling-COVID-28Apr0930-proof-4.pdf>.
- 7 Article 6(1)(a) of the Smuggling Protocol.
- 8 Article 3 of the Additional Protocol to the United Nations Convention against Transnational Organized Crime (UNTOC) to Prevent, Suppress and Punish Human Trafficking, in particular Trafficking Involving Women and Children.
- 9 Libya: Art 2, 4, 5 Law No 19, 2010; Niger: Art 3, 10, Loi 2015/36; Nigeria: Art 65, 66 Immigration Act 2015, and Art 26, Trafficking in Persons (Prohibition), Enforcement and Administration Act 2015; Namibia: s1, 16 Prevention of Organized Crime Act 2004; Guinea: Art 334-340, Code Penal 2016; Central African Republic: s256-258 Code Penal 2010; Zambia: Art 9, Anti Human Trafficking Law 2008; Mauritania: Art 1 Loi n°2010- 021 du 10 février 2010 relative à la lutte contre le trafic illicite de migrants; Eswatini: Art 9, The 2009 People Trafficking and People Smuggling (Prohibition) Act; Mozambique: Lei n.o 35/2014: Lei da revisão do Código Penal, Art 416; Djibouti: Art 19, Loi N°133/AN/16/7ème Loi portant sur la lutte contre la traite des personnes et le trafic illicite des migrants; Algeria: Code Penal 2012, Art 303 bis 30; Burkina Faso: Art 10-12, Loi No. 029/2008/AN Portant Lutte Contre La Traite des Personnes et Les Pratiques Assimilees; Egypt: Law No. 82/2016; Ethiopia: ss 2, 5, Proclamation No. 909/2015; Ghana: s52A Immigration (Amendment) Act 2012; Kenya: ss 2, 53(1)(p), Kenya Citizenship and Immigration Act 2011; Mali: Art 13, Loi No 2012-023; Senegal: Art 4, Loi no 2005-06 du 10 mai 2005 Relatif à la Lutte Contre la Traite des Personnes et Pratiques Assimilées et à La Protection des Victims; Guinea Bissau: Art 3, Lei para combater tráfico de migrantes 2019-05-06; Lesotho: s12, Anti Trafficking in Persons Act 2011; Equatorial Guinea: Art 1, Ley de Trafico illicito de migrantes y trata de personas 2004. Note that only the first eleven listed stipulate that the person must be a foreign national or not a permanent resident, in line with the Smuggling Protocol.
- 10 It should be noted that while alignment with the Smuggling Protocol in the framing of the smuggling offence is desirable, in some jurisdictions direct mirroring

- across a wide range of provisions could suggest a 'copy and paste' process, rather than thorough domestic translation of the protocols.
- 11 A high-level consideration of the influence of destination countries on the northern (EU), eastern (Gulf States), and southern (South Africa) routes concluded that the EU had by far the greatest impact on the counter-smuggling positions of relevant countries of transit and origin. See the [underlying report](#) for a fuller analysis of this.
 - 12 A/55/383/Add 1, para 88; Travaux Préparatoires, p 469.
 - 13 See Annex 2, UNODC, The Concept of 'Financial or Other Material Benefit' in the Smuggling of Migrants Protocol, Issue Paper, 2017, https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC_Issue_Paper_The_Profit_Element_in_the_Smuggling_of_Migrants_Protocol.pdf.
 - 14 Article 2 and Article 4 Law No (19) of 1378 FDP - 2010 AD on combatting illegal immigration.
 - 15 Mali, Loi No. 2012-023 Relatif à la Lutte Contre la Traite des Personnes et les Pratiques Assimilées; Senegal, Loi n° 2005-06 du 10 mai 2005 Relatif à la Lutte Contre la traite des Personnes et Pratiques assimilées et à la Protection des Victimes; Burkina Faso, Loi No. 029/2008/AN portant Lutte Contre la Traite des Personnes et Les Pratiques Assimilées.
 - 16 For smuggling offences, see ref 9 above. For trafficking offences: Mali: s7, Loi No 2012-023; Burkina Faso: Art 4 Loi No 029/2008/AN; Senegal: Art 1 Loi no 2005-06.
 - 17 Article 5, Protocol Against the Smuggling of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime, www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf.
 - 18 Morocco, which does have provisions criminalising smuggling of migrants but explicitly permits the offence to be with or without the FoMG element, does not have an explicit prohibition for prosecution. This analysis is based on a review of the legislation incorporating the relevant criminalisation of the smuggling provision. The intersection of such provisions with the broader legislative framework has not been analysed; consequently there is a possibility that a prohibition on prosecution could be incorporated in different legislation. However this is unlikely.
 - 19 Algeria, Burkina Faso, Central African Republic, Ghana, Guinea, Namibia, Niger, Libya, Zambia, Equatorial Guinea, Lesotho, Mozambique and Djibouti.
 - 20 UNODC, Zambia reviews legislation relating to smuggling of migrants, March 2020, <https://www.unodc.org/unodc/en/human-trafficking/Webstories2020/zambia-reviews-legislation-relating-to-smuggling-of-migrants.html>
 - 21 This right is enshrined in numerous instruments of international law, including the Universal Declaration of Human Rights, Art 13(2); ICCPR, Art 12(2) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2003, Art 8(1), among others. UDHR, Art 13.2; ICCPR, Art 12; Protocol No 4 ECHR, Art 2; 1981 African Charter on Human and Peoples' Rights, Art 12(2); 1948 American Declaration of the Rights and Duties of Man, Art VIII; 1969 American Convention on Human Rights, Art 22; 1994 Arab Charter on Human Rights, Art 21. See generally Council of Europe Commissioner for Human Rights, The right to leave a country, Issue Paper, 2013.
 - 22 See ref 8 for specific legal provisions.
 - 23 Loi No 08-11 - Article 46: Any person who, directly or indirectly, facilitates or attempts to facilitate the entry, circulation, stay, or the irregular departure of a foreigner on the Algerian territory. (Toute personne qui, directement ou indirectement, facilite ou tente de faciliter l'entrée, la circulation, le séjour ou la sortie de façon irrégulière d'un étranger sur le territoire algérien).
 - 24 Criminal Code 2012, Article 303 bis 30: Illicit traffic of migrants is considered to be the act of organising illegal exit of the national territory of one or more people in order to extract, directly or indirectly, an advantage, financial or otherwise. (Est considéré comme trafic illicite de migrants le fait d'organiser la sortie illégale du territoire national d'une personne ou plus afin d'en tirer, directement ou indirectement, un avantage financier ou tout autre avantage.)
 - 25 International Centre for Migration Policy Development, A Survey on Migration Policies in West Africa, January 2016, https://fmmwestafrica.org/wp-content/uploads/2017/02/en-A_Survey_on_Migration_Policies_in_West_Africa_EN_SOFT2nd.pdf.
 - 26 Saferworld, Partners in crime? The impacts of Europe's outsourced migration controls on peace, stability and rights, 2019, www.saferworld.org.uk/resources/publications/1217-partners-in-crime-the-impacts-of-europeas-outsourced-migration-controls-on-peace-stability-and-rights.
 - 27 Question 11, Annex 2, Annex 2, European Commission, Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA). The majority of respondents on penalty structure opined that the level of penalties was not relevant in deterring migrant smuggling.
 - 28 Namibia: s16 Prevention of Organized Crime Act 2004; Niger: Art 13 Loi 2015/36; Ethiopia: s5 Proclamation 909/2015.
 - 29 Algeria, Burkina Faso, Central African Republic, Djibouti, Ethiopia, Equatorial Guinea, Ghana, Guinea, Guinea Bissau, Lesotho, Mauritania, Mali, Mozambique, Niger, Senegal and Zambia.
 - 30 Guinea: Art 334, Code Penal Loi 2016/0 5 9; Central African Republic: Art 256, Code Penal 2010; Guine Bissau: Art 10, lei para combater tráfico de migrantes 2019-05-06.
 - 31 Ethiopia: s5, Proclamation No 909/2015; Lesotho: s12, Anti-Trafficking in Persons Act 2011; Zambia: s9, Anti Human Trafficking Act 2008.
 - 32 Art 6 (3)(b) Smuggling Protocol.
 - 33 Model Law, Smuggling of Migrants, UNODC, p39, www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf.
 - 34 Together with the Model Law on Migrant Smuggling published by UNODC to guide states in translating the Smuggling Protocol into national legislation.



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ENACT builds knowledge and skills to enhance Africa's response to transnational organised crime. ENACT analyses how organised crime affects stability, governance, the rule of law and development in Africa, and works to mitigate its impact. ENACT is implemented by the ISS and INTERPOL, in affiliation with the Global Initiative Against Transnational Organized Crime.

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