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Smuggling of Migrants by Land, Air and Sea in Pakistan: A Review of National Laws and Treaty Compliance



October 2011



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- *Irregular Migration and Associated Crime in Pakistan: A Review of Federal Investigation Agency (FIA) Training Programmes*, report for UNODC Country Office Pakistan, Islamabad, Feb 2010 (with B Hall)
- *Corruption in the Forestry, Wildlife, and Fisheries Sectors of Tanzania: An Assessment of Investigative and Prosecutorial Capacities*, report for UNODC, Vienna & PCCB, Dar es Salaam, Sep 2009

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Abbreviations

ATU	Anti-Trafficking Unit (FIA), Pakistan
Europol	European Police Office
FIA	Federal Investigation Agency, Pakistan
IATF	Inter-Agency Task Force
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IOM	International Organisation for Migration
MoU	Memorandum of Understanding
NGO	Non-Government Organisation
PISCES	Personal Identification Secure Comparison and Evaluation System
SOCA	Serious and Organised Crime Agency, UK
UAE	United Arab Emirates
UN	United Nations
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Fund
UNODC	United Nations Office on Drugs and Crime
US	United States of America
USD	United States Dollar

Islamic Republic of Pakistan

Figure 1 Islamic Republic of Pakistan, map (2004)



1 Introduction

This report reviews current laws relating to the smuggling of migrants in Pakistan. The report assesses relevant immigration, emigration, penal, and other statutes against the requirements and guidelines set out in the United Nations *Protocol against the Smuggling of Migrant by Land, Air, and Sea* and related international best practice standards. The purpose of this report is to assess compliance of current laws in Pakistan with relevant international norms and to pave the way for future law reform and legislative change.

1.1 Background

Irregular migration, especially in the form of migrant smuggling and trafficking in persons, and associated criminal activities such as money laundering, document fraud, and corruption, are of imminent concern to Pakistan. Recent reports confirm that Pakistan is simultaneously a sending, transit, and destination point for smuggled migrants. Smuggling of migrants involves the procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident.

Virtually every country in the world is affected by these crimes. The challenge for all countries, rich and poor, is to target the criminals who take advantage of desperate people and to protect and assist smuggled migrants, many of whom endure unimaginable hardships in their bid for a better life. In response to the emergence of migrant smuggling, the Government of Pakistan has taken some action to develop national strategies to prevent and suppress this crime. Pakistan's Federal Investigation Agency (FIA), as the country's chief national law enforcement agency, has the mandate to prevent and suppress migrant smuggling and is in a unique position to comprehensively combat this phenomenon, along with associated crime such as money laundering, document fraud, and corruption.

UNODC, the United Nations Office on Drugs and Crime, is the guardian of the United Nations (UN) *Protocol against the Smuggling of Migrant by Land, Air, and Sea (the Migrant Smuggling Protocol)*¹ and the *Convention against Transnational Organised Crime*. UNODC leads international efforts to comprehensively prevent and suppress migrant smuggling and protect smuggled migrants. UNODC's Country Office in Islamabad stands ready to assist Pakistan's authorities in their efforts. To this end, in August 2010, UNODC requested the services of independent experts to assess the compliance of national laws and regulations in Pakistan against the requirements of international law and international best practice relating to the smuggling of migrants.

1.2 Objectives

The purpose of this report is to identify domestic laws, regulations, and policies in Pakistan relating to migrant smuggling and assess them against the requirements articulated in international law and the standards set by international best practice guidelines.

Based on this assessment, recommendations for law reform, policy change, and for further analysis are made.

¹ UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime*, UN Doc A/55/383 (2 Nov 2000) Annex I. The text has also been reprinted in (2001) 40 ILM 335.

1.3 Organisation and Contents

This report is divided into eight parts. Following this introduction, Part 2 of this report explores relevant statutory definitions relating to migrant smuggling and examines the scope of application of international and domestic laws. Part 3 examines a variety of migrant smuggling offences, offences relating to document fraud and harbouring of migrants, and extensions to criminal liability. In Part 4, international and domestic measures pertaining to the protection of smuggled migrants and the prevention of migrant smuggling are explored further. Law enforcement and border measures are analysed in Part 5; specific measures against migrant smuggling by sea are set out in Part 6. Part 7 identifies definitions and technical measures relating to travel and identity documents. A summary of recommendations is set out in Part 8 of this report.

This assessment is limited to laws, regulations, and other measures that relate directly and indirectly to the smuggling of migrants into, across, or out of the territory of Pakistan. It does not explore the situation of smuggled migrants abroad.

In particular, the laws applicable and protection available to Pakistani migrant workers in the Gulf region and other foreign countries are not further examined here. It has to be noted, however, that domestic policies and laws in Pakistan are predominantly concerned with this particular form of labour migration involving Pakistani nationals. Several reports confirm that the circumstances in which many Pakistanis are recruited in their home country, the ways in which they are transported across international borders, and their conditions in the destination countries amount to migrant smuggling and frequently also involve elements of exploitation which raises concerns over labour trafficking and instances of slavery and other forms of servitude. These situations are also closely related to corruption and money laundering. While these issues are outside the scope of this report, it is important that these phenomena are further analysed and that separate assessments of relevant laws in Pakistan and in the destination countries are carried out.

Recommendation 1:

Commission a separate, independent analysis of labour trafficking from Pakistan and allegations of migrant smuggling, exploitation, corruption, and money laundering, with a particular focus on Pakistani migrant workers in the Persian Gulf region.

1.4 Methodology

1.4.1 Domestic Instruments

Pakistan is, at present, not a signatory to the *Migrant Smuggling Protocol* and consequently does not have comprehensive legislation on this point. Offences and other provisions relating directly and indirectly to migrant smuggling are scattered across a large number of legislative and regulatory instruments that form the basis of the assessment in this report. Of particular significance are the *Foreigners Act 1946* and the *Emigration Ordinance 1979* which regulate the entry into and departure from Pakistan for foreign nationals and, separately, for Pakistani nationals. Supplementary regulatory instruments, such as the *Foreigners Order 1951* and the *Emigration Rules 1979* are examined only insofar as they directly address specific issues relating to migrant smuggling.

In the literature and among some Pakistani agencies, the *Prevention and Control of Human Trafficking Ordinance 2002* is often — and mistakenly — referred to as the principal anti-migrant smuggling instrument in Pakistan. These assumptions are based on widespread confusion in Pakistan between the phenomena of migrant smuggling and trafficking in persons. While this confusion is, to a degree, understandable (as is examined in Section 2.1 below), the *Prevention and*

Control of Human Trafficking Ordinance 2002 has no relevance for migrant smuggling. This report only refers to the Ordinance several times for comparative purposes.

Other statutes, instruments, and policy documents assessed are identified individually throughout the report.

1.4.2 International Law and Practice

Pakistan's laws, regulations, and other measures relating to the smuggling of migrants are primarily assessed against the mandatory and optional requirements contained in the *Protocol against the Smuggling of Migrants by Land, Air, and Sea*. Complementary provisions under the *Convention against Transnational Organised Crime*² are also identified. The *Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organised Crime and the Protocols thereto* [hereinafter *Interpretative Notes*] supplement these documents.³

To identify compliance with these instruments, and identify areas for law reform and policy change, the following documents have been consulted as they most accurately articulate international best practice and treaty compliance in relation to migrant smuggling:

- UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto*, New York, NY: UN, 2004 [hereinafter *Legislative Guides*];
- UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants*, New York, NY: UN, 2010; and
- Draft elements of a *Toolkit* on preventing and migrant smuggling, currently under development by UNODC.

Other international conventions, instruments, and policy documents are identified individually throughout the report. A complete list of sources referenced is set out at the end of this report.

1.4.3 Limitations and Obstacles

Although every effort was made to prepare the most accurate and up-to-date assessment of Pakistan's laws relating to migrant smuggling, these efforts have been hampered by a number of external factors.

As this report was prepared outside Pakistan, the authors were unable to access some information and could not always verify that legislation and other material used were indeed the most current versions. UNODC's Country Office in Pakistan provided the authors with copies of some laws, though, regrettably, this material was out of date and incomplete. Consequently, unofficial versions and translations had to be relied upon. The authors were also unable to gain access to the *Foreigners (Amendment) Ordinance 2000* and to supplementary material such as parliamentary bills and explanatory memoranda. Moreover, the available sources could not be validated through direct

² 40 ILM 335 (2001)

³ UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions; Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 (3 Nov 2000) [hereinafter *Interpretative Notes*].

consultation with experts on Pakistani law, with international organisations, and non-government organisations.

During the preparation of this report, Pakistan was hit by catastrophic flooding that affected over 20 percent of the country, killed more than 1,500 people, displaced millions, and concerned the entire nation. The authors extend their thoughts and sincere sympathy to friends and colleagues in Pakistan, especially those who have lost relatives and friends, whose livelihoods were destroyed, or who have otherwise been affected by this major humanitarian crisis. These events also temporarily affected communication between the authors and Pakistani sources to the detriment of this report.

The combination of these factors places obvious constraints on the ability to comprehensively analyse Pakistan's laws and regulations relating to migrant smuggling. Accordingly, the information presented in this report should be considered as an indicative snapshot rather than a detailed account of laws and regulations relating to migrant smuggling in Pakistan.

2 Definition and Scope

At the beginning of any assessment of laws and other measures to counter migrant smuggling stands a discussion of relevant terms and concepts pertaining to this phenomenon. Section 2.1 examines the definition of ‘smuggling of migrants’ and analyses conceptual differences between ‘migrant smuggling’, ‘trafficking in persons’, and ‘irregular migration’. Section 2.2 assesses the scope of application of relevant laws in Pakistan vis-à-vis the requirements of the *Migrant Smuggling Protocol*.

2.1 ‘Smuggling of Migrants’

International Law

Definition of migrant smuggling

In international law, Article 3(a) *Migrant Smuggling Protocol* provides that ‘smuggling of migrants’

shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

The *Interpretative Notes* to the *Migrant Smuggling Protocol* state that the reference to ‘a financial or other material benefit’ was

included in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations.⁴

Furthermore, the reference to ‘other material benefit’ is relevant to the criminalisation of migrant smugglers who request sexual favours rather than financial payment for the provision of smuggling services.

Article 3(b) *Migrant Smuggling Protocol* further defines ‘illegal entry’ as the crossing of borders without complying with the necessary requirements for legal entry into the receiving State. Illegal thus only refers to non-citizens; the Protocol does not cover entry requirements placed on nationals and permanent residents of the receiving State.⁵ The term ‘receiving State’ is left unqualified by the Protocol and as such is not limited to a State Party or to the State in which a prosecution is brought.⁶

The definition of smuggling of migrants in Article 3(a) forms the basis of the offences set out in Article 6 *Migrant Smuggling Protocol*; these are discussed in Section 3 of this report.

Smuggling of migrants — trafficking in persons

Although the *Migrant Smuggling Protocol* provides a straightforward and universally accepted definition of ‘smuggling of migrants’, confusion between migrant smuggling with the issues of ‘trafficking in persons’ and ‘irregular migration’ persists. For the most part, this confusion is purely semantic as the distinction between the words ‘trafficking’ and ‘smuggling’ is somewhat artificial and is usually lost when these terms are translated into languages other than English which do not

⁴ *Interpretative Notes*, Note 88.

⁵ David McClean, *Transnational Organized Crime* (2007) 384.

⁶ David McClean, *Transnational Organized Crime* (2007) 384.

differentiate between the two terms. The distinction between the two concepts in international law and in most domestic systems is, however, essential, as both phenomena are addressed by separate legal instruments with widely different requirements and consequences.

As a general point, 'migrant smuggling' and 'trafficking in persons' can be conceptualised as two varieties of 'irregular migration'. Irregular migration broadly refers to migration taking place outside of a legal framework (eg migration without legitimate travel documents, overstaying a visa, working without a permit, forced or coerced migration, et cetera). 'Migrant smuggling plays a crucial role in facilitating irregular migration as smugglers may provide a wide range of services ranging from physical transportation and illegal crossing of a border to the procurement of false documents.'⁷

The conceptual distinction between 'migrant smuggling' and 'trafficking in persons' is subtle, sometimes blurry, and highly contested.⁸ Indeed, it has been noted that up to the early 2000s the two concepts 'were still used interchangeably in academic literature and expert reports published by inter-governmental organisations.'⁹ The *Trafficking in Persons Protocol*, one of three supplementary protocols to the *Convention against Transnational Organised Crime* adopted by the UN in 2000, now provides an internationally agreed definition of 'trafficking in persons' that is instructive in drawing a distinction between the two concepts. Article 3(a) *Trafficking in Persons Protocol* defines 'trafficking in persons' as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This definition consists of a combination of three basic elements: act, means, and purpose. Figure 2 breaks down the definition into these components.

⁷ Friedrich Heckmann, 'Towards a better understanding of migrant smuggling', IMISCOE Policy Brief No. 5 Europäisches Forum für Migrationsstudien (2007), as cited in UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* (2010) 6.

⁸ See generally, UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* (2010) 8.

⁹ UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* (2010) 7.

Figure 1 Constituent elements of the ‘trafficking in persons’ definition

Article 3(a) <i>Trafficking in Persons Protocol</i>	
Definition of ‘trafficking in persons’	
Act	‘[T]he recruitment, transportation, transfer, harbouring or receipt of persons’
Means	<p>‘The threat of use of’:</p> <ul style="list-style-type: none"> • force or other forms of coercion; • abduction; • fraud or deception; • the abuse of a position of vulnerability • the giving or receiving of payments / benefits to achieve the consent of a person having control over another person.
Purpose	<p>Exploitation</p> <p>This includes at a minimum:</p> <ul style="list-style-type: none"> • the exploitation of the prostitution of others or other forms of sexual exploitation; • forced labour or services; • slavery or practices similar to slavery; • servitude; or • the removal of organs.

Article 3(b) *Trafficking in Persons Protocol* renders any consent of the victim of trafficking in persons to the intended exploitation irrelevant if any of the specified ‘means’ of trafficking have been used.

Despite internationally agreed definitions of ‘smuggling in migrants’ and ‘trafficking in persons’, there remains a degree of overlap between the two concepts. UNODC has identified three principal points of difference between migrant smuggling and human trafficking.¹⁰

The first point relates to the purpose of the criminal enterprise. ‘[T]he primary source of profit and thus also the primary purpose of trafficking in persons is exploitation,’ notes UNODC.¹¹ In the case of migrant smuggling, however, there is typically ‘no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country.’¹² Rather, migrant smugglers seek payment in advance or upon arrival from the smuggled migrant. In many cases this distinction is not an easy one to draw. For example, a person may agree to be smuggled unaware that on arrival he/she will be forced to work in poor or restrictive conditions for the smuggler in order to pay off a ‘debt’ for the service. This situation would be considered an instance of trafficking because there has been exploitation of the smuggled person.

Secondly, the two concepts have differing requirements relating transnationality and the legality/illegality of the trafficked/smuggled person’s entry into another State. For migrant smuggling, there must be ‘illegal entry of a person into a State Party of which the person is not a national or a permanent resident.’¹³ There is thus both a cross-border element as well as a requirement of illegal entry. Trafficking in persons, in contrast, may involve illegal or legal entry into a country. Furthermore, there is no requirement that trafficking in persons can only occur transnationally; trafficking can occur completely within one country.¹⁴

¹⁰ UNODC, *A short introduction to migrant smuggling*, Issue Paper (2010) 10.

¹¹ UNODC, *A short introduction to migrant smuggling*, Issue Paper (2010) 10.

¹² UNODC, *A short introduction to migrant smuggling*, Issue Paper (2010) 10.

¹³ *Migrant Smuggling Protocol*, art 3(a).

¹⁴ David McClean, *Transnational Organized Crime* (2007) 330.

The final and critical difference between the two concepts is the issue of consent, which is considered to be irrelevant by the *Trafficking in Persons Protocol*.¹⁵ The Protocol is based on the understanding that

[v]ictims of trafficking have either never consented — for instance if they have been abducted or sold — or, if they have given an initial consent, their initial consent has become through the means the traffickers have used to gain control over the victim, such as deception or violence.¹⁶

Migrant smuggling, in contrast, involves an agreement whereby a person may pay or give some other benefit to a smuggler in order to facilitate that person’s illegal migration. It has been recognised that smuggled migrants might retract their initial consent during a smuggling operation but be forced to continue on the journey.¹⁷ Retracting consent, however, does not automatically denote an instance of trafficking. Other elements of the trafficking definition, such as the purpose of exploitation, would still need to be satisfied.

Figure 3 illustrates the key differences between the two definitions.

Figure 3 Definitions of ‘trafficking in persons’ and ‘smuggling of migrants’ compared¹⁸

	Trafficking in persons (adults)	Trafficking in persons (children)	Migrant smuggling
Material element	<ul style="list-style-type: none"> Act Means Exploitative purpose 	<ul style="list-style-type: none"> Act Exploitative purpose 	<ul style="list-style-type: none"> Act: Procurement of illegal entry of a person Purpose: For financial or other material benefit. Relationship usually ends after the border crossing.
Consent of the trafficked or smuggled person	Irrelevant once the means are established	Irrelevant. Means do not need to be established.	Smuggled person generally consents to the smuggling (though consent may be retracted).
Victim’s age	Over 18	Below 18	Irrelevant
Transnationality	Not required	Not required	Required. Smuggling involves illegal border crossing and entry into another country.
Involvement of an organised criminal group	Not required	Not required	Not required
Mental element	Intention	Intention	Intention

Many instances of migrant smuggling and trafficking in persons are not easily compartmentalised and considerable overlap between the two definitions. The distinction between trafficking and smuggling, however, is of great importance for several reasons:

¹⁵ *Trafficking in Persons Protocol*, art 3(b).

¹⁶ UNODC, *A short introduction to migrant smuggling*, Issue Paper (2010) 10.

¹⁷ UNODC, *A short introduction to migrant smuggling*, Issue Paper (2010) 10.

¹⁸ Based on UNODC & UN.GIFT, *Anti-trafficking manual for criminal justice practitioners*, Module 1: Definition of Trafficking in Persons and Smuggling of Migrants (2009) 2.

- Firstly, the two phenomena must be criminalised with reference to specific and differing constituent elements. This is of particular significance to perpetrators of the crime, who face different penalties depending on the offence they are convicted of.
- Secondly, victims of and witnesses to these crimes are granted substantially different forms of support and protection.
- Thirdly, the correct identification of the crime as trafficking in persons or smuggling is crucial to the accurate collection of data and statistics on the issue, to cooperation with other countries, and to the development of appropriate responses by policy, legislation, and law enforcement agencies.

Current Pakistani Law

There is, at present, no specific definition of ‘smuggling of migrants’ or synonymous terms anywhere in the laws of Pakistan. Offences containing elements that resemble the definition of ‘smuggling of migrants’ in the *Migrant Smuggling Protocol* are identified and examined in Section 3 of this report.

As mentioned previously, in Pakistan laws relating trafficking in persons are often mistaken for anti-migrant smuggling legislation and ‘many officials refer initially to the *Prevention and Control of Human Trafficking Ordinance 2002* as the primary legislation of relevance to people smuggling’ in Pakistan.¹⁹

Section 2(h) *Prevention and Control of Human Trafficking Ordinance 2002* defines ‘human trafficking’ as:

obtaining, securing, selling, purchasing, recruiting, detaining, harbouring or receiving a person, notwithstanding his implicit or explicit consent, by the use of coercion, kidnapping, abduction, or by giving or receiving any payment or benefit, or sharing or receiving a share for such person’s subsequent transportation out of or into Pakistan by any means whatsoever for any of the purposes mentioned in section 3.

One of the purposes specified in s 3 of this Ordinance is ‘attaining any benefit’.²⁰ It has been reported that

Pakistani law enforcement and judicial officials suggest that s 2(h)’s inclusion of ‘recruiting ... harbouring or receiving a person [...] by [...] receiving any payment or benefit, or sharing or receiving a share for such person’s subsequent transportation out of [...] Pakistan’, combined with s 3’s repetition that one of the covered purposes is of ‘attaining any benefit’, amounts to criminalisation of smuggling.²¹

Despite this interpretation of the definition of human trafficking by Pakistani law enforcement and judicial officials, there is no evidence that offences under the *Prevention and Control of Human Trafficking Ordinance 2002* are used in practice to prosecute persons involved in migrant smuggling. A report published by UNODC in December 2009 also noted that none of the convictions made under the *Prevention and Control of Human Trafficking Ordinance 2002* relate to instances of migrant smuggling and that, ‘in practice, charges are made under the *Emigration Ordinance 1979*.’²²

Assessment and Recommendation

Confusion between trafficking in persons and migrant smuggling is widespread and not unique to Pakistan. It is, however, fundamentally important to ensure that domestic laws adequately distinguish the two concepts. Suggestions that the definition of ‘human trafficking’ in the *Prevention*

¹⁹ UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 49.

²⁰ *Prevention and Control of Human Trafficking Ordinance 2002* (Pakistan), s 3(i).

²¹ UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 49.

²² UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 49.

and Control of Human Trafficking Ordinance 2002 simultaneously captures trafficking in persons as well as migrant smuggling are not sustainable. The two concepts involve the criminalisation of distinctly different constituent elements. The definition of ‘human trafficking’ in the *Prevention and Control of Human Trafficking Ordinance 2002* lacks core elements required by the ‘smuggling of migrants’ definition.

The smuggling of migrants only occurs where the procurement of the illegal entry of a person occurs in order to obtain a financial or other material benefit.²³ Importantly, to constitute migrant smuggling there must be an illegal entry of a person. In contrast, the definition of ‘human trafficking’ in the *Prevention and Control of Human Trafficking Ordinance 2002* requires a ‘person’s subsequent transportation out of or into Pakistan’, regardless whether the entry or exit is legal or illegal. The concept of trafficking in persons both in international law and in Pakistan’s *Prevention and Control of Human Trafficking Ordinance 2002* deliberately captures any form of entry and exit regardless of legality. Illegality of entry or exit is not an element of trafficking in persons. On this particular point the *Prevention and Control of Human Trafficking Ordinance 2002* accurately reflects the international concept of trafficking in persons — but is unsuitable to capture any form of migrant smuggling.

Moreover, the definition of ‘migrant smuggling’ refers to a specific act: the procurement of the illegal entry of a person. In contrast, the acts found in the ‘human trafficking’ definition in s 2(h) *Prevention and Control of Human Trafficking Ordinance 2002* do not accurately reflect this. Whilst some terms such as ‘obtain’ or ‘recruit’ may be construed to have a similar meaning to ‘procurement’, they are ambiguous at best.

It is of critical importance that legislation designed to target the phenomenon of trafficking in persons is sufficiently different from laws against smuggling of migrants. To that end, the *Trafficking in Persons Protocol* and *Migrant Smuggling Protocol* require distinctly different forms of criminalisation. As mentioned earlier, the designation of certain conduct as ‘trafficking in persons’ or ‘smuggling in migrants’ triggers a different consequences relating to criminal liability, protection, assistance, enforcement, and international cooperation.

In so far as it is possible, relevant legislation in Pakistan should be amended to include a clear and certain definition of ‘smuggling of migrants’ as required by Article 3(a) *Migrant Smuggling Protocol*. Within the current framework, this definition would be best placed in Pakistan’s *Foreigners Act 1946*. Any prevailing view that the *Prevention and Control of Human Trafficking Ordinance 2002* in some way criminalises migrant smuggling needs to be addressed and corrected.

Recommendation 2:

Insert a definition of ‘smuggling of migrants’, as per Article 3(a) *Migrant Smuggling Protocol*, into the *Foreigners Act 1946*. Ensure adequate training of law enforcement and judicial officials on the proper meaning of ‘smuggling of migrants’.

It is further recommended that the definition of ‘human trafficking’ in s 2(h) *Prevention and Control of Human Trafficking Ordinance 2002* be amended to make clear that this Ordinance does not apply to instances of migrant smuggling. On this point see further, Andreas Schloenhardt & Jarrod Jolly, *Trafficking in Persons in Pakistan: A Review of National Laws and Treaty Compliance*, report for UNODC Country Office Pakistan, Islamabad, May 2010, for other related recommendations.

²³ *Migrant Smuggling Protocol*, art 3(a).

Recommendation 3:

Amend definition of ‘human trafficking’ in s 2(h) *Prevention and Control of Human Trafficking Ordinance 2002* to remove any possibility that it may be interpreted to criminalise the smuggling of migrants.

The point was made previously that the correct distinction between trafficking in persons and migrant smuggling is also important for accurate data collection and research. In Pakistan, the Federal Investigation Agency (FIA) has reported ‘increasing activity against what it refers to as “human traffickers/agents”.’²⁴ A study has found, however, that ‘very few of these are traffickers; most are people smugglers.’²⁵ This, again, demonstrates the pervasive confusion surrounding both concepts. A legislatively distinct and proper approach to each concept is key to accurate data collection and thus the formulation of any legislative, policy, and law enforcement response. It also facilitates comparisons to other countries and contributes to international research on migrant smuggling, an important aspect of attempts to target this global crime.

Recommendation 4:

Ensure incidences of migrant smuggling and trafficking in persons in Pakistan are recorded correctly on the basis of international law definitions.

2.2 Scope of Application of Laws

International Law

Article 4 *Migrant Smuggling Protocol* sets out the ‘scope of application’ of the Protocol:

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organised criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

This provision has to be read in conjunction with Article 34(2) *Convention against Transnational Organised Crime*, which provides that the offences established in accordance with the Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organised criminal group.²⁶ In other words, while the offences set out in international law apply exclusively to transnational cases, domestic law should be designed to cater for transnational as well as purely domestic cases. The *Interpretative Notes* confirm that the purpose of Article 34(2) is to indicate unequivocally that the transnational element and the involvement of an organised criminal group are not to be considered elements of those offences for criminalisation purposes but is not intended to have any impact on the interpretation of the cooperation articles of the Convention.²⁷

The *Legislative Guides* further remark that:

[W]hile States Parties should have to establish some degree of transnationality and organised crime with respect to most aspects of the Protocol, their prosecutors should not have to prove either element in order to obtain a conviction for smuggling of migrants or any other offence established in accordance with the Convention or its Protocols. In the case of smuggling of migrants, domestic offences should apply even

²⁴ UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 51.

²⁵ UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 51.

²⁶ David McClean, *Transnational Organized Crime* (2007) 330.

²⁷ *Interpretative Notes*, Note 59.

where transnationality and the involvement of organised criminal groups does not exist or cannot be proved.²⁸

For the definition in Article 3(a) *Migrant Smuggling Protocol* it is necessary to establish an element of cross-border activity in order to prove the specific offence of 'smuggling of migrants'. In this instance, the element of transnationality must be incorporated. Offences incorporating the 'smuggling of migrants' definition in the *Migrant Smuggling Protocol* are thus the only ones to require an element of transnationality.

David McClean summarises the effect of Article 4 *Migrant Smuggling Protocol* by stating that it 'effectively applies to the cooperation Articles of the Protocol and, in the absence of any words to the contrary not to criminalisation under Article 6.'²⁹

Current Pakistani Law

So long as Pakistan is not a Signatory to the *Migrant Smuggling Protocol* it is not possible to identify and assess any laws in Pakistan that reflect the requirements in Article 4. The elements of transnationality and organised crime are unique to the concept of smuggling of migrants under the Protocol, which has not been introduced into Pakistani laws.

The scope of application of relevant laws in Pakistan is defined in very standard and predictable ways. As stated in Section 1.4.1 above, laws relating to migrant smuggling in Pakistan are spread across a variety of legislative and regulatory instruments. Each piece of legislation, however, has a different scope of application, particular insofar as foreign nationals vis-à-vis Pakistani citizens are concerned. In this context, Farooq Azam notes that

all laws of the country are applicable to Pakistani citizens as well as any foreign nationals who are in the country, except some laws that only apply to Pakistani citizens. Similarly, certain laws are specific to foreign nationals.³⁰

The *Emigration Ordinance 1979* deals with 'labour migration, illegal migration, and human smuggling from Pakistan to other countries',³¹ however, its application is restricted to Pakistani citizens, wherever they may be.³²

The *Foreigners Act 1946* concerns the entry, stay, and employment of foreign nationals in Pakistan. The term 'foreigner' is defined in the Act to mean 'a person who is not a citizen of Pakistan'.³³ The Act further provides that the Government of Pakistan

may by orders make provision either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into Pakistan, or their departure therefrom or their presence or continued stay therein.³⁴

Offences under the *Emigration Ordinance 1979* and the *Foreigners Act 1946* are capable of being committed by Pakistani citizens and foreigners alike, unless the statute suggests otherwise.³⁵

²⁸ *Legislative Guides*, 334.

²⁹ David McClean, *Transnational Organized Crime* (2007) 392.

³⁰ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 28.

³¹ UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 49.

³² *Emigration Ordinance 1979*, s 2, 27(i).

³³ *Foreigners Act 1946*, s 2(a).

³⁴ *Foreigners Act 1946*, s 3(1).

³⁵ Cf Article 4 of the *Constitution of Pakistan* which states: 'To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being with Pakistan.'

Finally, the *Penal Code* (Pakistan) creates a number of relevant document fraud offences, examined in Section 3.3 of this report. Section 2 of the Code makes clear that all persons who commit an offence under the Code in Pakistan are liable for punishment.³⁶ Section 4 of the Code provides that the provisions of the Code apply to any offence committed by any citizen of Pakistan or any person in the service of Pakistan in any place without and beyond Pakistan. The provision in s 3 *Penal Code* specifies that a person liable to be tried for an offence committed beyond Pakistan shall be dealt with according to the provisions of the Code in the same manner as if such act had been committed within Pakistan.

³⁶ *Penal Code* (Pakistan), s 2.

3 Criminalisation of Smuggling of Migrants

3.1 General International Law Requirements

Article 6 *Migrant Smuggling Protocol* sets out a comprehensive list of obligations that must be satisfied in order to appropriately criminalise the smuggling of migrants. Specifically, Article 6(1) identifies three categories of offences that must be established in domestic law. These offences can be broadly categorised as

- migrant smuggling offences;³⁷
- document fraud offences;³⁸
- the offence of enabling of illegal residence (harbouring).³⁹

These offences are examined and assessed separately in Sections 3.2–3.4 below. The following obligation in the chapeau of Article 6(1) *Migrant Smuggling Protocol* applies to each category:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.

‘Legislative and other measures’

The *Legislative Guides* point out that satisfying this obligation involves legislative measures, except where the necessary provisions already exist.⁴⁰ The inclusion of ‘other measures’ in Article 6(1) refers to measures in addition to those that are legislative and presupposes the existence of a law.⁴¹ David McClean notes that ‘in almost every legal system primary legislation will be needed to create a criminal offence.’⁴²

‘Intention’

Article 6(1) limits the application of relevant offences to ‘intentional’ offences. Article 34(3) *Convention against Transnational Organised Crime*, with which the *Migrant Smuggling Protocol* must be read, however, provides that ‘each State Party may adopt more strict or severe measures’. State Parties are thus free to create offences that require less onerous mental elements than ‘intention’, such as recklessness or, perhaps, negligence.

‘Financial or other material benefit’

The reference to ‘financial or other material benefit’ as an element of the offences in Article 6(1) *Migrant Smuggling Protocol* is explained in Section 2.1 of this report.

Extensions and aggravations

Article 6(2) *Migrant Smuggling Protocol* further requires State Parties to create offences that extend criminal liability in relation to the offences established by Article 6(1). These extensions are discussed in Section 3.5 below. Article 6(3) *Migrant Smuggling Protocol* also obliges State Parties to adopt legislative or other such measures as may be necessary to establish certain aggravating

³⁷ *Migrant Smuggling Protocol*, art 6(1)(a).

³⁸ *Migrant Smuggling Protocol*, art 6(1)(b).

³⁹ *Migrant Smuggling Protocol*, art 6(1)(c).

⁴⁰ *Legislative Guides*, para 56.

⁴¹ *Interpretative Notes*, Note 91.

⁴² David McClean, *Transnational Organized Crime* (2007) 393.

circumstances to the offences established by Article 6(1). Aggravated provisions are discussed in Section 3.6.

As a general point, it should be noted that to effectively criminalise the smuggling of migrants it must be recognised that in the course of migrant smuggling there is a high likelihood of other offences being committed. Furthermore, proving specific migrant smuggling offences may sometimes be difficult in circumstances where initial suspicion for the crime of migrant smuggling cannot be corroborated with all of its components. In these instances prosecutors need to rely on alternative offences to secure the prosecution of a migrant smuggler.

In establishing offences required by the *Migrant Smuggling Protocol*, it is important to consider that the Protocol must be read with the parent *Convention against Transnational Organised Crime*. The provisions of this Convention require a range of offences to criminalise ‘money laundering’, a necessary tool in the effective confiscation of wealth illegally gained in the process of migrant smuggling operations.⁴³ Offences relating to money laundering and corruption are, however, not further examined in this report.

3.2 Migrant Smuggling Offences

International Law

Article 6(1)(a) *Migrant Smuggling Protocol* requires the criminalisation of ‘smuggling of migrants’, as defined in Article 3(a). As mentioned previously,⁴⁴ Article 3(a) *Migrant Smuggling Protocol* defines ‘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.

The requirement of intention (specified in the chapeau of Article 6(1)) when applied to this offence means there must be ‘a primary intention to procure illegal entry and there must have been a second intention, that of obtaining a financial or other material benefit.’⁴⁵

The *Legislative Guides* make an important point about the requirement of ‘illegal entry’ in this offence by noting that ‘the drafters intended that cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence.’⁴⁶ This offence is further examined in Section 3.4 below.

Current Pakistani Law

There is no specific migrant smuggling offence anywhere in Pakistani law. Rather, there are a number of offences that appear to target activities that, in whole or in part, directly or indirectly, relate to migrant smuggling. Specifically, there are relevant offences in the *Foreigners Act 1946* and the *Emigration Ordinance 1979*.

It has been reported that migrant smugglers in Pakistan are commonly charged under the *Emigration Ordinance 1979*.⁴⁷ It must be noted, however, that this Ordinance only applies to

⁴³ See *Convention against Transnational Organised Crime*, art 6.

⁴⁴ See Section 2.1 above.

⁴⁵ *Legislative Guides*, 342.

⁴⁶ *Legislative Guides*, 342. See *Migrant Smuggling Protocol*, art 6(1)(c).

⁴⁷ UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 49; Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 35.

migrant smuggling from Pakistan into other countries and only applies to ‘citizens of Pakistan, wherever they may be’.⁴⁸ The most relevant offence, s 17(2) *Emigration Ordinance 1979*, provides that

Whoever, except in conformity with the provisions of this Ordinance or of the Rules

- (a) makes, or attempts to make any agreement with any person purporting to bind that person, or any other person, to emigrate or depart; or
- (b) causes or assist or attempts to cause or assist, any person to emigrate or depart or to attempt to emigrate or depart or to leave any place for the purpose of emigrating or departing; or
- (c) causes any person engaged, assisted or recruited by him, after grant of the license referred to in section 12, to depart without appearing before the Protector of Emigrants as required by section 15

shall be punishable

- (i) for a first offence, with imprisonment for a term which may extend to five years, or with fine, or with both; and
- (ii) for a second or subsequent offence, with imprisonment for a term which may extend to seven years, or with fine, or with both.

The reference in subsection (c) to the ‘grant of license’ refers to the ‘Overseas Employment Promoters License’ which must be held in order to ‘engage, or to assist or to recruit any person to emigrate’.⁴⁹ Before emigrating from Pakistan it is a requirement that Pakistani nationals register with and appear before the ‘Protector of Emigrants’ and provide any prescribed information.⁵⁰ Emigration from Pakistan to all countries is only considered lawful if it is in conformity with the provisions of the *Emigration Ordinance 1979* and *Emigration Rules 1979*.⁵¹ Indeed, it is an offence for a Pakistani nationals to emigrate/depart, or attempt to do so, without complying with the Ordinance and Rules.⁵²

In relation to migrant smuggling into Pakistan, s 13A *Foreigners Act 1946* prohibits persons from assisting illegal entry into the country:

No one shall make or carry out arrangements for securing or facilitating the entry into Pakistan of any one whom he knows or has reasonable cause for believing to be an illegal entrant.

The penalty for committing this offence is imprisonment for up to three years and a fine.⁵³

Assessment and Recommendation

The offences in s 17(2) *Emigration Ordinance 1979* only target persons who intend to smuggle migrants illegally out of Pakistan into other countries. Under a strict interpretation, the *Migrant Smuggling Protocol* does not actually require this offence. The focus of the offences in the Protocol is on ‘illegal entry’ into a State Party, not on exit. Accordingly, it is not possible — and perhaps unnecessary — to assess the migrant smuggling offences in s 17(2) *Emigration Ordinance 1979* against the requirements of Article 3(a) and 6(1)(a) *Migrant Smuggling Protocol*.

Further questions, however, remain about the rationale and operation of offences in s 17(2) *Emigration Ordinance 1979*. It is possible to conceive these offences as an additional tool prevent migrant smuggling by capturing and prosecuting migrant smugglers before they leave Pakistan. On

⁴⁸ *Emigration Ordinance 1979*, s 1(2).

⁴⁹ *Emigration Ordinance*, s 12(1).

⁵⁰ *Emigration Ordinance*, s 15.

⁵¹ *Emigration Ordinance*, s 8(1).

⁵² *Emigration Ordinance*, s 17(1).

⁵³ *Foreigners Act 1946*, s 14.

the other hand, the rigid requirements the *Emigration Ordinance 1979* places on departure from Pakistan may infringe on the freedom to leave one's country, which is enshrined in international human rights law and may, directly and indirectly, lead to the criminalisation of emigrants. Additional issues pertaining to the criminalisation of departure from Pakistan are discussed in Section 4.2 of this report.

The offence in s 13A *Foreigners Act 1946* is a more accurate implementation of the obligation under Article 6(1)(a) *Migrant Smuggling Protocol*. 'Securing or facilitating' illegal entry is likely comparable to 'procuring' illegal entry as is required by Article 3(a) *Migrant Smuggling Protocol*. There is, however, a fundamental element required by international law that is not incorporated in the present offence. The offence in the *Foreigners Act* does not require that the intention of the 'arrangement' is to 'obtain [...] a financial or other material benefit'.⁵⁴ The practical effect of this offence is that it may apply to family, friends or support groups who facilitate illegal entry. As was previously stated, the intent of the *Migrant Smuggling Protocol* is to target the activities of organised criminal groups acting for profit and not target the aforementioned persons.⁵⁵

Recommendation 5:

Amend s 13A *Foreigners Act 1946* to require an intention to obtain a financial or other material benefit.

3.3 Document Fraud Offences

International Law

Article 6(1)(b) *Migrant Smuggling Protocol* provides that 'producing a fraudulent travel or identity document'⁵⁶ and 'procuring, providing or possessing such a document'⁵⁷ should be criminalised, but only when it is intentionally committed for the purpose of the smuggling of migrants. The reference to 'smuggling of migrants' thus means that the document offences must relate to the procurement of illegal entry into a State Party where that person is not a national or a permanent resident.⁵⁸ There is also the requirement that the smuggling of migrants, and therefore the document offence, is committed for 'financial or other material benefit'.⁵⁹

Terms relevant to these offences are defined in Article 3(c) *Migrant Smuggling Protocol* and discussed further in Section 7.1 below.

The *Interpretative Notes* further remark that Article 6(1)(b)

was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included.⁶⁰

This is an important aspect of the principle of 'non-criminalisation of migrants' enshrined in Article 5 *Migrant Smuggling Protocol* which is discussed further in Section 4.1 below.

⁵⁴ *Migrant Smuggling Protocol*, arts 6(1) & 3(1)(a).

⁵⁵ *Interpretative Notes*, Notes 88, 92.

⁵⁶ *Migrant Smuggling Protocol*, art 6(1)(b)(i).

⁵⁷ *Migrant Smuggling Protocol*, art 6(1)(b)(ii).

⁵⁸ *Migrant Smuggling Protocol*, art 3(a).

⁵⁹ *Migrant Smuggling Protocol*, art 3(a).

⁶⁰ *Interpretative Notes*, Note 93.

Current Pakistani Law

In Pakistan, offences in relation to document fraud are found in the *Emigration Ordinance 1979*. Specifically, s 18(a) creates an offence of ‘fraudulently inducing to emigrate’:

Whoever forges any document required for, or relating to, the emigration of any person, or has in his possession or under his control any instrument or article which may be used for the purpose of such forgery [...] shall be punishable with imprisonment for a term, which may extend to fourteen years, or with fine, or with both.

There are also a range of relevant provisions in relation to document fraud in Chapter XVIII *Penal Code* (Pakistan). Section 463 *Penal Code* creates an offence of ‘forgery’ punishable ‘with imprisonment of either description for a term, which may extend to two years, or with fine, or with both.’⁶¹ Section 471 *Penal Code* also makes it an offence to use as genuine a forged document. Section 177 *Pakistan Penal Code* prohibits the ‘furnishing of false information’:

Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to [three thousand rupees], or with both; or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

There are no relevant offences in the *Foreigners Act 1946*. It is possible that Pakistan’s *Passport Act 1974* contains additional offences relating to the forgery and acquisition of Pakistani passport. The authors were, however, unable to gain access to the full text of this Act.

Assessment and Recommendation

The offence in s 18(a) *Emigration Ordinance 1979* appears to fall generally within the scope of the *Migrant Smuggling Protocol*. It must be recognised, however, that it does not specify that the purpose of committing the forgery is to enable the smuggling of migrants into Pakistan. Rather it criminalises forgery for the purpose of emigration (i.e. exiting Pakistan). The *Migrant Smuggling Protocol* requires criminalisation of the production, procuring, providing or possessing of a fraudulent travel or identity documents where it enables smuggling into a ‘State Party of which the person is not a national or permanent resident’. Thus the offence in s 18(a) *Emigration Ordinance* is compliant to the extent that the person emigrating enters a country that is a Party to the *Migrant Smuggling Protocol*.

The offence has, however, several shortcomings. Importantly the offence only specifies the document be forged in relation to the emigration of any person. The *Migrant Smuggling Protocol* requires that the offence must be connected to the smuggling of migrants (and thus involve an element of financial or material benefit to the offender). Failure to specify this can result in the criminalisation of migrants themselves.⁶² Moreover, the *Migrant Smuggling Protocol* focuses its attention on illegal entry while the *Emigration Ordinance 1979* is — naturally — silent on domestic immigration legislation of the receiving state.

Recommendation 6:

Amend the offence in s 18(a) *Emigration Ordinance* to connect the forging of a document to the requirement that the purpose of that conduct is to enable the smuggling of migrants.

The *Foreigners Act 1946* of Pakistan currently does not contain any relevant document fraud

⁶¹ *Penal Code* (Pakistan), s 465.

⁶² See further, Section 4.1 below.

offences. Given that the principal migrant smuggling offence appears in this Act, it would be advisable that document fraud offences as per Article 6(1)(b) *Migrant Smuggling Protocol* are inserted into this Act. Provided the migrant smuggling offence itself is amended as per Recommendations 5 above, the addition of document fraud offences that enable smuggling of migrants would be an effective strengthening of Pakistan’s migrant smuggling legislation.

Recommendation 7:

Insert travel and identity document fraud offences as per Article 6(1)(b) *Migrant Smuggling Protocol* into the *Foreigners Act 1946*, ensuring the offences can only be proved when committed for the purpose of enabling the smuggling of migrants.

Whilst the *Penal Code* of Pakistan does set out a number of relevant document fraud offences, these are also not linked to the ‘purpose of enabling the smuggling of migrants’. This may create a risk that migrants, rather than their smugglers, are criminalised for engaging in travel and identity document fraud which would contravene the requirement of non-criminalisation, see Section 4.1 below. The best course of action would be to leave the offences in the *Penal Code* unchanged and make amendments to the *Foreigners Act 1946* as per Recommendation 7 above.

3.4 Enabling Illegal Residence (Harbouring)

International Law

Article 6(1)(c) *Migrant Smuggling* creates an offence for

enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

The ‘means mentioned in subparagraph (b)’ refers to the document fraud offences in Article 6(1)(b) *Migrant Smuggling Protocol*.⁶³ The *Legislative Guides* state that the intent of this particular offence is

to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors’ permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorisations to enter.⁶⁴

The conduct element of Article 6(1)(c) is cast widely to capture illegal residence for ‘any other illegal means’. The *Interpretative Notes* indicate that the words ‘any other illegal means’ refer to illegal means as defined under domestic law.⁶⁵

The offence in Article 6(1)(c) is primarily aimed at criminalising harbouring and concealing of persons who have no legal status in the host country in order to avoid their apprehension by law enforcement and immigration authorities (‘safe house’ situation).

As with other offences in Article 6(1) there must be an ‘intention to commit whatever act is alleged as having enabled illegal residence and the further intent or purpose of obtaining some financial or other material benefit.’⁶⁶

⁶³ See Section 3.3 above.

⁶⁴ *Legislative Guides*, 342–343.

⁶⁵ *Interpretative Notes*, Note 94; *Legislative Guides*, 343.

⁶⁶ *Legislative Guides*, 343.

Current Pakistani Law

There is no specific offence in Pakistani legislation that targets harbouring or concealing illegal immigrants or other forms of ‘enabling of illegal residence’. Pakistani law criminalises the employment of unlawful non-citizens and regulates the provision of accommodation to foreigners.

Section 13B *Foreigners Act 1946* makes it an offence to ‘knowingly employ or provide employment to a person who has no permission to stay in Pakistan.’ A person who contravenes this provision can be punished with imprisonment for a maximum term of three years and may also be liable to fine.⁶⁷ Section 14D(2) *Foreigners Act 1946* also requires that foreigners without permission to stay in Pakistan must be registered with the ‘Aliens Registration Authority’. A foreigner, even if registered, must seek approval from the Authority to work in Pakistan.⁶⁸

Section 7(1) and (3) *Foreigners Act 1946* requires accommodation providers (hoteliers and the like) to maintain a record of the particulars of foreigners who stay in the accommodation and to furnish this information to a police-officer or other persons authorised by the District Magistrate. Contravening these provisions is punishable by a term of imprisonment of up to three years or a fine.⁶⁹

Assessment and Recommendation

Pakistan’s existing offences fall short of the obligations under the *Migrant Smuggling Protocol* insofar as they do not criminalise harbouring and concealing illegal immigrants.

The provision in s 13B *Foreigners Act 1946* criminalises the employment of illegal workers. While it may be possible to construe employing or providing of employment to an illegal resident as ‘enabling’ that person to remain in the State by ‘illegal means’, this offence is not an accurate implementation of Article 6(1)(c) *Migrant Smuggling Protocol*.

The provisions in s 7(1) and (2) *Foreigners Act 1946* also do not adequately reflect the requirements of Article 6(1)(c) *Migrant Smuggling Protocol* as these provisions are aimed at creating a system of registration for non-resident foreigners. On the other hand, the provisions only apply if the accommodation is ‘provided for reward’, which resembles the requirement of ‘financial benefit’ specified generally by Article 6(1) *Migrant Smuggling Protocol*. Providing accommodation to a foreigner and not recording particulars or failure to provide such information to the authorities could be construed to satisfy the requirement of ‘enabling a person who is not a national or permanent resident to remain in the State [...] by illegal means’.

Moreover, there is no offence in Pakistan to address the enabling of illegal residence by the means mentioned in the document fraud provisions (Article 6(1)(b) *Migrant Smuggling Protocol*). The issue here is that of smugglers using ‘legal means, such as the issuance of visitors’ permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorisations to enter.’

Recommendation 8:

Create an offence of harbouring illegal non-residents (for the purpose of migrant smuggling).

⁶⁷ *Foreigners Act 1946*, s 14.

⁶⁸ *Foreigners Act 1946*, s 14D(3).

⁶⁹ *Foreigners Act 1946*, s 14.

3.5 Extensions of Criminal liability

3.5.1 Attempts (inchoate liability)

International Law

Article 6(2)(a) *Migrant Smuggling Protocol* requires State Parties to extend criminal liability for migrant smuggling, travel or identity document related offences, and offences relating to enabling illegal residence, to instances in which an accused attempts any of these offences.

Article 6(2)(a) is not a mandatory provision. This is explained by the fact that ‘not all legal systems make for the criminalisation of cases in which an unsuccessful attempt has been made to commit the offence.’⁷⁰ It has been argued, however, that attempt offences can be an effective measure because crimes such as migrant smuggling may be committed over a long period of time and law enforcement need to be able to disrupt the operation before it is complete.⁷¹

Current Pakistani Law

The offences under s 17 *Emigration Ordinance 1979* explicitly cover completed and attempted commission of the relevant provisions.

Section 13 *Foreigners Act 1946* also provides that:

Any person who attempts to contravene, or abets or attempts to abet, or does any act preparatory to, a contravention of the provision of this Act or any order made or direction given thereunder, or fails to comply with any direction given in the pursuance of any such order, shall be deemed to have contravened the provisions of this Act.

A contravention of a provision of the *Foreigners Act 1946* can result in imprisonment of up to three years or a fine.⁷²

Section 511 *Penal Code* (Pakistan) states that:

Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence for a term which may extend to one-half of the longest term of imprisonment provided for that offence or with such fine or with both.

This provision in the *Penal Code* is relevant to the document offences outlined in Section 3.3 of this report. The attempt provision in the *Penal Code* does not apply to the *Emigration Ordinance 1979* and the *Foreigners Act 1946*.

Assessment and Recommendation

Liability for offences relating to migrant smuggling in Pakistan under the *Foreigners Act 1946* and the *Penal Code* extend to attempts, thus satisfying the requirements of Article 6(2)(a) *Migrant Smuggling Protocol*.

While the offences in s 17(2)(a) and (b) *Emigration Ordinance 1979* also extend to attempts, these offences do not directly relate to obligations under the *Migrant Smuggling Protocol*, as they are concerned with emigration and not illegal entry.

⁷⁰ *Legislative Guides*, 347–348.

⁷¹ *Legislative Guides*, 347–348.

⁷² *Foreigners Act 1946*, s 14.

The document fraud offence in s 18(a) *Emigration Ordinance 1979*, however, does not appear to cover attempts to forge documents, but should be extended in that way.

Recommendation 9:

Extend liability for offences under s 18(a) *Emigration Ordinance 1979* to attempts.

3.5.2 Participation (secondary liability)

International Law

Article 6(2)(b) *Migrant Smuggling Protocol* requires Signatories to adopt such legislative and other measures as may be necessary to criminalise

participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article.

This creates a mandatory requirement to extend liability for migrant smuggling offences, travel or identity document related offences, and offences relating to enabling illegal residence to participants and accomplices (so-called secondary liability).

Insofar as the possession of fraudulent travel or identity documents is concerned (Article 6(1)(b)(i) *Migrant Smuggling Protocol*) State Parties have discretion whether to extend liability to participants and accomplices. This safeguard clause recognises that national legal systems may have difficulties in 'in accommodating some aspects of the proposed offence, notably that of 'possessing' a fraudulent document.'⁷³ In some jurisdictions it is not settled 'whether one could be made an accomplice to offence such as possession.'⁷⁴ The introduction of a 'participating offence' in relation to Article 6(1)(b)(ii) *Migrant Smuggling Protocol* is therefore conditional.

Current Pakistani Law

Section 13 *Foreigners Act 1946* provides that:

(1) Any person who attempts to contravene, or abets or attempts to abet, or does any act preparatory to, a contravention of the provision of this Act or any order made or direction given thereunder, or fails to comply with any direction given in the pursuance of any such order, shall be deemed to have contravened the provisions of this Act.

(2) Any person who, knowing or having reasonable cause to believe that any other person has contravened the provisions of this Act or any order made or direction given thereunder gives that other person any assistance with intent thereby to prevent, hinder or otherwise interfere, with his arrest, trial or punishment for the said contravention, shall be deemed to have abetted that contravention.

(3) The master of any vessel or the pilot of any aircraft, as the case may be, by means of which any foreigner enters or leaves Pakistan in contravention of any order made under, or direction given in pursuance of, section 3 shall, unless he proves that he exercised all due diligence to prevent the said contravention, be deemed to have contravened this Act.

A contravention of a provision of the *Foreigners Act 1946* can result in imprisonment for up to three year or a fine.⁷⁵

⁷³ David McClean, *Transnational Organized Crime* (2007) 395.

⁷⁴ *Legislative Guides*, 348.

⁷⁵ *Foreigners Act 1946*, s 14.

There do not appear to be any provisions in the *Emigration Ordinance 1979* that criminalise participants and accomplices.

Part V of the *Penal Code* (Pakistan) creates numerous provisions to criminalise and punish the abetting of *Penal Code* offences.⁷⁶ 'Abetting' is defined to include:

Engages with one or more other person or, persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, And in order to the doing of that thing; or

Intentionally aids, by any act or illegal omission, the doing of that thing.⁷⁷

Assessment and Recommendation

The provisions in the *Foreigners Act 1946* appear to satisfactorily criminalise participating as an accomplice in any offence under that Act. Participating as an accomplice to the relevant document fraud offences in the *Penal Code* also appears to be appropriately criminalised.

The document forgery offence in s 18(a) *Emigration Ordinance 1979* is not reinforced by a provision criminalising participation as an accomplice. Such a provision is mandatory as per Article 6(2)(b) *Migrant Smuggling Protocol*.

Recommendation 10:

Amend the offence in s 18(a) *Emigration Ordinance 1979* to criminalise participating as an accomplice to the offence.

3.5.3 Organising and Directing

International Law

Article 6(2)(c) *Migrant Smuggling Protocol* creates a mandatory obligation for State Parties to adopt such legislative and other measures as may be necessary to criminalise the organisation or direction of other persons to commit an offence established in accordance with Article 6(1).

Current Pakistani Law

Pakistani law currently does not explicitly recognise the concept of organising and directing in relation to criminal offences. The *Foreigners Act 1946* and the *Emigration Ordinance 1979* do not extend liability in this way.

It is conceivable to interpret provisions relating to 'abetting' in the *Penal Code* in a way that would capture organising and directing criminal offences under the Code. This is because one possible interpretation of abetting in the Code is to 'instigate any person' to commit an offence.⁷⁸ This could apply to the fraud and forgery offences under the *Penal Code*. It is, however, not clear whether this interpretation can be supported by relevant case law and other literature and it is perhaps more likely that 'instigate' is understood as incitement rather than organising and directing.

Assessment and Recommendation

To comply with the requirement of Article 6(2)(c) *Migrant Smuggling Protocol* it will be necessary to extend relevant offences in Pakistan to 'organising and directing'. This is particularly important in

⁷⁶ *Penal Code* (Pakistan), Part V.

⁷⁷ *Penal Code* (Pakistan), s 107.

⁷⁸ *Penal Code* (Pakistan), s 107.

relation to the *Foreigners Act 1946* which contains the principal offences relating to migrant smuggling.

Recommendation 11:

Amend the *Foreigners Act 1979* to include ‘organising or directing another person to commit an offence’.

3.6 Aggravations

International Law

Article 6(3) *Migrant Smuggling Protocol* creates obligations to incorporate ‘aggravating circumstances’ into some of the offences established by the Protocol. Specifically, the *Migrant Smuggling Protocol* requires the criminalisation of 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.⁷⁹

These aggravating circumstances need to be connected to the migrant smuggling offence,⁸⁰ the offence of producing a fraudulent travel or identity document to enable the smuggling of migrants,⁸¹ and the offence of enabling illegal residence.⁸²

The offences of participating as an accomplice in an offence⁸³ and organising or directing others to commit offences⁸⁴ only require aggravating circumstances subject to the basic concepts of the legal system of the implementing State Party. This is due to

concerns that, while the primary actors in the offence would be in a position to exercise control over whether dangerous or degrading conditions were present or not, accomplices and others not directly involved in the offences would in many cases not be in such a position.⁸⁵

The *Legislative Guides* to the *Migrant Smuggling Protocol* suggest that ‘without adding further offences’ it is required the aggravating circumstances are incorporated into the specified offences to ‘ensure that cases in which they have occurred are taken more seriously.’⁸⁶ It is suggested that this can be achieved by creating parallel offences, such as an aggravated migrant smuggling offence, or by inserting provisions that require courts to consider more severe penalties where there has been an aggravating circumstance.⁸⁷

The *Legislative Guides* provide some suggestions as to how the aggravations may apply to the base offences:

The most common occurrence towards which this requirement is directed is the use of modes of smuggling, such as shipping containers, that are inherently dangerous to the lives of the migrants but broad enough to encompass other circumstances, such as cases where fraudulent documents create danger or lead to inhuman or degrading treatment.

Other examples of aggravating circumstances may include (but are not limited to):

⁷⁹ *Migrant Smuggling Protocol*, art 6(3).

⁸⁰ *Migrant Smuggling Protocol*, art 6(1)(a).

⁸¹ *Migrant Smuggling Protocol*, art 6(1)(b)(i).

⁸² *Migrant Smuggling Protocol*, art 6(1)(c).

⁸³ *Migrant Smuggling Protocol*, art 6(2)(b).

⁸⁴ *Migrant Smuggling Protocol*, art 6(2)(c).

⁸⁵ *Legislative Guides*, 348–349.

⁸⁶ *Legislative Guides*, 346.

⁸⁷ *Legislative Guides*, 346.

- Abuse of a child or abuse of a position of trust or authority;
- Connections with other crimes such as drug trafficking; for instance, migrants may be compelled to carry drugs when they are themselves smuggled;
- Conditions in which migrants are smuggled; was the vessel used for migrant smuggling particularly hot, cold, wet, dry, crowded? Was the current at sea particularly strong?

Article 34(3) *Convention against Transnational Organised Crime*, with which the *Migrant Smuggling Protocol* must be read, provides that ‘each State Party may adopt more strict or severe measures’. This enables State Parties to create aggravations beyond those set out in the *Migrant Smuggling Protocol*.

It should be noted, however, that the commission of a separate offence during the course of a smuggling operation, such as an assault, rape, homicide et cetera, should not be treated simply as an aggravating factor to the migrant smuggling offence. These offences require separate investigation and prosecution.

By referring to ‘inhuman and degrading treatment, including exploitation’, Article 6(3)(b) creates some overlap between the concepts and offences of trafficking in persons and migrant smuggling. The *Interpretative Notes*, however, make clear that the phrase in the *Migrant Smuggling Protocol* is intended without prejudice to the scope and application of the *Trafficking in Persons Protocol*.⁸⁸ On this point the *Legislative Guides* suggest that if the treatment or exploitation occurs without consent or if consent has been vitiated or nullified (as per the requirements of Article 3(b) and (c) *Trafficking in Persons Protocol*), then the presence of exploitation⁸⁹ will generally make the trafficking in persons offence applicable.⁹⁰

Current Pakistani Law

At present, there are no provisions or offences in Pakistani law that either reflect the aggravating circumstances required by Article 6(3) *Migrant Smuggling Protocol* or create any sort of aggravating circumstance in relation to any of the offences discussed in the previous sections of this report.

Assessment and Recommendation

The lack of any aggravating circumstances in relation to any of the relevant offences is a serious weakness in the legislative regime intended to deal with migrant smuggling in Pakistan. The inherent dangers involved in migrant smuggling and the potential for maltreatment or exploitation of smuggled migrants must clearly be addressed and adequately penalised in the legislation.

It is important that future reforms of laws relating to migrant smuggling in Pakistan adequately recognise particularly dangerous and heinous forms of migrant smuggling that put the safety and lives of smuggled migrants at risk. Current and future offences need to be changed to provide more adequate penalties for aggravated forms of migrant smuggling. At a minimum, these aggravations should reflect the requirements of Article 6(3) *Migrant Smuggling Protocol*.

⁸⁸ *Interpretative Notes*, Note 95.

⁸⁹ There is no definition of ‘exploitation’ in the *Migrant Smuggling Protocol*. The definition of ‘exploitation’ in Article 3(a) *Trafficking in Persons Protocol* does not apply to the *Migrant Smuggling Protocol*. See further, David McClean, *Transnational Organized Crime* (2007) 396.

⁹⁰ *Interpretative Notes*, Note 96.

Recommendation 12:

Incorporate aggravating circumstances as per Article 6(3) *Migrant Smuggling Protocol* into relevant offences.

4 Protection and Prevention

The smuggling of migrants involves the movement of human beings whose life, freedom, and safety are frequently at risk and who are vulnerable to exploitation, abuse, coercion, and fraud, by their smugglers and others, especially if their presence in the host country is unlawful. Accordingly, it is important that international and domestic frameworks protect the fundamental rights and liberties of smuggled migrants, and that any action taken against migrant smuggling adheres to the principles of international human rights law.

4.1 Non-Criminalisation of Smuggled Migrants

One of the most important elements of protection of the rights of smuggled migrants is the principle of non-criminalisation. In essence, this means that smuggled migrants, even if their entry or presence in the host country violates domestic laws or regulations, must not face criminal proceedings and sanctions for their illegal entry or stay.

International Law

In international law, Article 5 *Migrant Smuggling Protocol* states that Signatories should not hold smuggled migrants criminally liable for their involvement in the smuggling process.

Article 5. Criminal liability of migrants

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 *Legislative Guides* further note that it

is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organised criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned [...].⁹¹

The principle articulated in Article 5 is limited to criminal prosecutions relating to migrant smuggling offences (set out in Article 6 *Migrant Smuggling Protocol*). Consequently, smuggled migrants should not be held criminally liable for being the object of migrant smuggling (Article 6(1)(a)), for offences involving document fraud (Article 6(1)(b)), and for remaining in the host country clandestinely or otherwise illegally (Article 6(1)(c)).

Article 5, on the other hand, does not grant blanket immunity to smuggled migrants and they may face criminal prosecution for any offence unrelated to migrant smuggling.⁹² Moreover, Article 5 in no way prevents the removal or deportation of a smuggled migrant from the host country (so long as they are not a citizen or legal resident of that country).⁹³ The *Legislative Guides* note that:

The Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences: article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalisation of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organised criminal groups. At the same time, article 6, paragraph 4, ensures that nothing in the Protocol limits the existing rights of each State party to take measures against persons whose conduct constitutes an offence under its domestic law.⁹⁴

⁹¹ *Legislative Guides*, 340.

⁹² David McClean, *Transnational Organized Crime* (2007) 389.

⁹³ David McClean, *Transnational Organized Crime* (2007) 389. See also *Migrant Smuggling Protocol*, art 18, Section 4.3 below.

⁹⁴ *Legislative Guides*, 347.

The principle of non-criminalisation of smuggled migrants is closely connected to (and partly based on) identical provisions in international refugee law. To that end, the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol* are the key instruments to protect refugees and safeguard their rights and liberties.⁹⁵ This Convention specifically requires State Parties not to penalise refugees for their illegal entry and presence in the host country.⁹⁶ Article 19 *Migrant Smuggling Protocol* also recognises the specific obligations stemming from the *Convention and Protocol relating to the Status of Refugees* and seeks to ensure that these obligations are not infringed by any provisions contained in the Protocol (in countries that are State Parties to the Protocol as well as the international refugee law instruments). Other obligations relating to the protection of refugees are discussed further in Section 4.3 below.

International law, including the *Migrant Smuggling Protocol*, thus recognises that smuggled migrants (who are frequently asylum seekers, including refugees) are often unable to comply with relevant domestic legal and regulatory requirements relating to immigration and emigration. It is accepted that persons fleeing from persecution, emergencies, and other hardship are often unable to collect, keep, or request relevant travel documents and permits, engage in lengthy bureaucratic processes, and that they may sometimes have little choice but to cross international borders unlawfully, often facilitated by migrant smugglers.

Current Pakistani Law

Domestic law in Pakistan pertaining to immigration (of non-citizens) and emigration (of Pakistani nationals) currently does not incorporate the principle of non-criminalisation of smuggled migrants. In contrast, existing laws provide criminal offences for illegal entry into and departure from Pakistan, which may be followed by punishment.

Section 17(1) *Emigration Ordinance 1979* (Pakistan) explicitly prohibits emigration from Pakistan (by Pakistani nationals) without compliance with relevant laws and regulations:

Whenever, except in conformity with the provisions of this Ordinance and the rules, emigrates or departs or attempts to emigrate or depart shall be punishable with imprisonment for a term which may be extended to five years, or with fine, or with both.

Similarly, the *Foreigners Act 1946* in s 14(2) creates a criminal offence for persons entering Pakistan illegally:

Where any person knowingly enters into Pakistan illegally, he shall be guilty of an offence under this Act and shall be punished with imprisonment for a term which may extend to ten years and [a] fine which may extend to ten thousand rupees.

Assessment and Recommendation

Current Pakistani laws potentially depart from international law by criminalising persons who enter or depart the country illegally, or who attempt to do so. At present, Pakistan's *Foreigner's Act 1946* and the *Emigration Ordinance 1979* treat smuggled migrants as criminals rather than victims. A report published in 2009 also noted that:

The main contradiction between [the *Emigration Ordinance*] and international [*Migrant*] *Smuggling Protocol* is that the former prosecutes the migrants as well as the smugglers, whereas the latter clearly states that the migrant should not be prosecuted.⁹⁷

⁹⁵ *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150; *Protocol relating to the Status of Refugees*, 1967, 606 UNTS 267.

⁹⁶ *Convention relating to the Status of Refugees*, art 31.

⁹⁷ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan*:

It has been reported that Pakistani emigrants who have violated emigration laws are, on return to Pakistan, ‘put behind jail in [the] majority of cases.’⁹⁸ It is noteworthy, however, that Pakistan’s *National Emigration Policy* advocates that ‘[a] mechanism needs to be worked out whereby irregular workers on repatriation are let go on “personal security” or at best meted out a non-custodial punishment — either a fine or a warning duly recorded on the passport.’⁹⁹

There are no reliable reports on the enforcement of the immigration offence under the *Foreigners Act 1946* and it is unclear whether persons who have entered Pakistan or reside in the country unlawfully are regularly prosecuted and/or deported. In 2000, the Government of Pakistan instituted measures to legalise the status of the large number of illegal immigrants in the country. The *Foreigners (Amendment) Ordinance 2000* (Pakistan) set up the National Aliens Registration Authority (NARA) to enable non-citizens residing in Pakistan illegally to register and obtain legal status and work rights in Pakistan. It is understood that this amnesty was only available to persons residing in Pakistan at the time the Ordinance was promulgated and not for persons who have entered Pakistan since 2000. Without access to the full text of the Ordinance it is, however, not possible to verify that information.¹⁰⁰

Criminalising illegal immigration and emigration is not unique to Pakistan’s law as many other countries punish (with fines or imprisonments) persons who are entering and leaving their territories without complying with relevant immigration and emigration requirements. These offences may act as a deterrent to some persons. Arrest and detention of illegal immigrants and emigrants also allows national authorities to question offenders, establish their country of origin, and, where necessary, deport them.

However, special offences for persons entering or departing illegally may — actually and potentially — punish persons who are fleeing persecution, war, or torture, and may further traumatise those who have endured dangerous journeys and often gross violations of their human rights and civil liberties. It also reduces the likelihood of cooperation with authorities and involvement in prosecutions of migrant smugglers.

It is difficult to reconcile the current position in Pakistan with international law standards without simultaneously advocating a broader reform of refugee and asylum systems in Pakistan as well as promoting the country’s accession to relevant international instruments, including the *Migrant Smuggling Protocol* and the *Convention and Protocol relating to the Status of Refugees*. Such reforms, however, are beyond the immediate mandate of this assessment.

In the short term it would be desirable to introduce an explicit exclusion from criminal liability into the legislation for those who illegally enter or exit Pakistan as a direct consequence of their situation as smuggled migrants.

Recommendation 13:

Insert into the *Foreigners Act 1946* and the *Emigration Ordinance 1979* an explicit exclusion of smuggled migrants, children, and persons fleeing from persecution, war, and torture from criminal liability for offences relating to migrant smuggling.

Review of Government Policies and Programmes (2009) 36 [emphases added].

⁹⁸ Pakistan, *National Emigration Policy* (2009) 68.

⁹⁹ Pakistan, *National Emigration Policy* (2009) 68.

¹⁰⁰ See further, Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 39–40.

In the medium and long term relevant Pakistani authorities should work in conjunction with UNHCR, the United Nations High Commissioner of Refugees, and other international organisations to review current procedures for asylum seekers and others seeking to enter or remain in Pakistan on humanitarian grounds. To that end, a Private Member's Bill has been introduced into the National Assembly in Islamabad in 2010.¹⁰¹ This Bill seeks to amend the *Foreigners Act 1946* in order 'to ensure better protection of foreigners in general and refugees in particular. It would also serve the purpose of recognition of the term asylum seeker and refugees in the existing protection of refugees and foreigners in Pakistan'. This Bill has, however, not — or not yet — passed.

To develop these proposals further, it would be desirable to conduct an independent assessment of Pakistan's refugee and humanitarian immigration system and compliance with relevant international law and best practice standards.

Recommendation 14:

In conjunction with UNHCR, commission an independent assessment of Pakistan's refugee and humanitarian immigration system and compliance with relevant international law and best practice standards.

4.2 Protection and Assistance Measures

Smuggled migrants are vulnerable to exploitation, deception, threats, and violence. They are particularly vulnerable if they reside in the host country illegally or clandestinely and if they do not speak the local language and are unfamiliar with local procedures and customs. Often they fall victim to gangs and other criminals, and sometimes they engage in petty crimes as they cannot engage in legitimate ways to earn money to support themselves and their families. For these reasons it is important that domestic laws provide basic protection and support to smuggled migrants. This also increases the likelihood that smuggled migrants will cooperate with government authorities and assist in the prosecution of their smugglers.

UNODC further notes:

Regardless of their immigration status, smuggled migrants have the right to expect that their human rights and dignity will be upheld and prioritised at all stages by those who intercept and identify them, those who detain them and those who remove them from the country [...].¹⁰²

Furthermore:

It is a fundamental principle of international human rights law that all persons have a right to be recognised as a person before the law, are to be treated as equal before the law and are entitled without any discrimination to equal protection of the law.¹⁰³

International Law

In international law, Article 16 *Migrant Smuggling Protocol* contains several provisions relating to protection and assistance measures. In summary, 'the provisions are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter

¹⁰¹ Foreigners (Amendment) Bill 2010, introduced by Ms Shireen Arshad Khad, National Assembly Pakistan.

¹⁰² UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants* (2010) Module 9: Human Rights, 3.

¹⁰³ UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants* (2010) Module 9: Human Rights, 2.

conduct on the part of offenders that involves danger or degradation to the migrants.¹⁰⁴ These provisions equally apply to the receiving State and the country of origin or habitual residence of smuggled migrants.

Article 16(1) contains a general statement to protect the basic human rights of smuggled migrants:

In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

While this paragraph refers to specific rights such as life and protection from torture, cruel, inhuman or degrading treatment or punishment, Article 16(1) is generally seen as emphasising the protection of all fundamental human rights and freedoms as accorded in relevant international treaties, especially the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*.¹⁰⁵ The paragraph does not create any new obligations for State Parties.¹⁰⁶ The *Interpretative Notes* further stress that Article 16(1) only refers 'to migrants who have been smuggled [and] is not intended to refer to migrants who do not fall within the ambit of Article 6.'¹⁰⁷

Article 16(2) requires Signatories to protect smuggled migrants from physical violence:

Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

The paragraph contains no specific guidelines about the way in which such protection shall be provided. For example, there is no explicit requirement that the host country provide safe accommodation or other types of physical protection. While the wording of Article 16(2) is mandatory, State Parties have discretion to provide protection as they consider 'appropriate'. The reference to 'individuals or groups' is seen to draw particular 'attention to the vulnerability of migrants who may meet intense opposition from groups of people who do not wish them to enter or remain in' the country.¹⁰⁸

Article 16(3) calls on State Parties to provide assistance to smuggled migrants whose lives or safety may be at risk. Article 16(4) recognises the particular vulnerability of women and children. Neither paragraph contains mandatory requirements relating to specific assistance measures.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

¹⁰⁴ *Legislative Guides*, 364.

¹⁰⁵ *Interpretative Notes*, Note 108: The intention in listing certain rights in this paragraph was to emphasize the need to protect those rights in the case of smuggled migrants, but the provision should not be interpreted as excluding or derogating from any other rights not listed. The words "consistent with its obligations under international law" were included in the paragraph to clarify this point further.' Cf David McClean, *Transnational Organized Crime* (2007) 427.

¹⁰⁶ *Interpretative Notes*, Note 109; *Legislative Guides*, 365.

¹⁰⁷ *Interpretative Notes*, Note 107: 'In accordance with articles 3 and 4, the phrase "persons who have been the object of conduct set forth in article 6 of this Protocol" refers only to migrants who have been smuggled as set forth in article 6. It is not intended to refer to migrants who do not fall within the ambit of article 6. This is clearly set forth in article 19 (saving clause), which provides that nothing in the Protocol shall affect the rights of individuals under international law, including humanitarian law and international human rights law.'

¹⁰⁸ *Interpretative Notes*, Note 110; David McClean, *Transnational Organized Crime* (2007) 428.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

Some receiving countries detain persons who are suspected of illegal entry in order to investigate their situation or facilitate their removal to their home country or another place. Article 16(5) seeks to ensure that persons in immigration detention have access to consular assistance as mandated by the 1963 *Vienna Convention on Consular Relations*.¹⁰⁹

In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the *Vienna Convention on Consular Relations*, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

Current Pakistani Law

While Chapter 1 of the *Constitution of Pakistan* sets out a catalogue of ‘fundamental rights’, neither the *Emigration Ordinance 1979* nor the *Foreigners Act 1946* contains specific measures to protect the safety and human rights of smuggled migrants. The laws also contain no provisions to provide assistance to smuggled migrants.

The Government of Pakistan has set up comprehensive policy and legal frameworks designed to offer victims of trafficking in persons safe temporary accommodation, access to food and medical assistance, and to counselling and rehabilitation programs,¹¹⁰ but these mechanisms are not available to smuggled migrants who are generally not seen as victims.

Assessment and Recommendation

Article 16 *Migrant Smuggling Protocol* does not create any specific obligations; by and large it reiterates international obligations articulated in other international human rights treaties. Accordingly, the *Legislative Guides* note:

Assuming national conformity with the basic pre-existing rights and the instruments in which they are established, none of the requirements to protect or preserve the human rights of migrants and illegal residents should raise legislative issues, although they should be carefully considered in developing administrative procedures and the training of officials.¹¹¹

A comprehensive assessment of compliance of general Pakistani laws with international human rights law is beyond the scope of this assessment. As a general point, the *Legislative Guides* recommend:

Where a State is not already in conformity with the pre-existing standards, they may have to be established to the extent necessary to conform to the Protocol. [...] Where existing national laws do not meet the basic requirements of the Protocol, the following amendments to the laws may be needed:

- (a) To preserve and protect the basic rights of smuggled migrants and illegal residents (art. 16, para. 1);
- (b) To protect against violence (art. 16, para. 2);
- (c) To provide information on consular notification and communication (art. 16, para. 5).¹¹²

As mentioned previously, Pakistan’s Constitution protects a range of fundamental rights. Furthermore, the *Penal Code* (Pakistan) sets out relevant criminal offences designed to protect the

¹⁰⁹ 596 UNTS 261.

¹¹⁰ See further, Andreas Schloenhardt & Jarrod Jolly, *Trafficking in Persons in Pakistan* (2010) 38.

¹¹¹ *Legislative Guides*, 366.

¹¹² *Legislative Guides*, 366.

life, physical integrity, health, and liberty of any persons. Violations of *Penal Code* offences attract severe penalties depending on the harm caused and the blameworthiness of the offences.

Recommendation 15:

Insofar as current Pakistani laws do not meet basic requirements of international human rights laws, existing laws should be amended to preserve and protect the basic rights of smuggled migrants and illegal residents, protect smuggled migrants against violence, and provide immigration detainees with relevant consular rights.

There are, at present, no additional protection and assistance measures designed specifically to protect smuggled migrants. An assessment conducted in 2009 also found that Pakistani law does not set out 'how the human rights of illegal migrants would be protected'.¹¹³ Pakistan's new *National Emigration Policy*, presented in 2009, addresses the issue of protection of rights of migrants, but this policy document is focusing exclusively on Pakistani labour migrants abroad, and its extensive protection mechanisms are only accessible by Pakistani nationals who are working outside the country.¹¹⁴

While international law does not mandate the provision of specific support and services to victims of migrant smuggling, it may be desirable to explore, in conjunction with international organisations such as the International Organisation for Migration (IOM) and donor countries, the feasibility of offering smuggled migrants temporary protection and basic access to accommodation, food, medical care, and legal assistance. In the medium and long term it would be desirable to develop a set of standards pertaining to the treatment of smuggled migrants to ensure their human rights are not violated.¹¹⁵

To that end, UNODC recommends that:

Law enforcers who are likely to encounter victims of crime should do the following:

- Respond promptly, especially to complaints of violence.
- Inform victims of the assistance (legal, material, medical, psychological, and social) that is available to them.
- Investigate, report, and follow up thoroughly and professionally.
- Keep a roster of contacts handy, with all the relevant information on services available to assist victims.
- Establish close cooperative procedures with medical, social, legal, and other victim assistance providers.
- Endeavour to ensure that a female officer is present during all contact with female victims of crime, especially violence.
- Explain to victims their rights, their role in legal proceedings, and the nature of legal proceedings.
- Provide transportation to a safe place and to medical services or arrange for providers of medical services to travel to the victim.
- Keep records secure and carefully protect confidentiality of victims.
- Establish victim assistance guidelines to ensure prompt, proper and comprehensive attention to the legal, material, medical, psychological and social assistance needs of victims.¹¹⁶

¹¹³ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 36.

¹¹⁴ Pakistan, *National Emigration Policy* (2009) 51–55.

¹¹⁵ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 59.

¹¹⁶ UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants*

In dealing with smuggled migrants, the special protection and assistance needs of children and persons with disabilities should also be recognised.¹¹⁷

Recommendation 16:

In conjunction with IOM and donor countries, explore the feasibility of offering smuggled migrants temporary protection and basic access to accommodation, food, medical care, and legal assistance.

Recommendation 17:

Explore avenues to develop a set of standards pertaining to the treatment of smuggled migrants to ensure their human rights are not violated.

4.3 Refugee Protection

Migrant smuggling frequently involves persons fleeing from political upheavals, war, natural disasters, economic hardship, discrimination, torture, environmental degradation, unemployment, poverty, starvation, and other situations of emergency which cause them to seek asylum, a safer existence, and a better life abroad. Among smuggled migrants are often refugees who have been persecuted or fear persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These refugees may require special protection, especially if they face return to their country of origin or to another place where they may face persecution. International law also awards refugees with special rights that need to be protected.

International Law

Article 19 *Migrant Smuggling Protocol* recognises the specific obligations stemming from the *Convention* and the *Protocol relating to the Status of Refugees*:

Article 19 Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 *Convention* and the 1967 *Protocol relating to the Status of Refugees* and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognised principles of non-discrimination.

The 1951 *Convention relating to the Status of Refugees*¹¹⁸ and the 1967 *Protocol*¹¹⁹ are the key instruments to protect refugees and safeguard their rights and liberties. The *Refugee Convention* recognises a person as a refugee if he or she

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his/her nationality and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country.¹²⁰

(2010) Module 9: Human Rights, 4–5.

¹¹⁷ See further, UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants* (2010) Module 9: Human Rights, 8–9.

¹¹⁸ 189 UNTS 150; hereinafter *Refugee Convention*.

¹¹⁹ 606 UNTS 267; hereinafter *Refugee Protocol*.

¹²⁰ *Refugee Convention*, art 1A(2) as amended by the *Refugee Protocol*.

The *Refugee Convention* places obligations on State Parties to provide refuge for persons who fear persecution in another country. The Convention contains provisions relating to the definition of refugee (art 1), provisions that define the rights and legal status of refugees (arts 2-24), and provisions dealing with the implementation of the instruments (arts 25-46). The key aspect of the protection granted under the *Refugee Convention* is that a refugee¹²¹ must neither be expelled nor returned ('refouled')¹²² to 'the frontiers of territories where his [or her] life or freedom would be threatened'.¹²³ A country is in breach of this non-refoulement obligation if its authorities fail to properly identify and protect persons who are entitled to the benefits of refugee status.¹²⁴ Moreover, Contracting States are asked not to penalise refugees for their illegal entry and presence,¹²⁵ to give them free access to courts of law,¹²⁶ and assist in their naturalisation.¹²⁷ Finally, the Convention provides that Member States should provide refugees with welfare, including housing, public education¹²⁸ and opportunity for employment.¹²⁹

In addition to the *Refugee Convention* and *Protocol*, the non-refoulement obligation also arises from a number of other international human rights treaties to which Pakistan is a Signatory. For example, Article 7 *ICCPR*¹³⁰ implies that no one shall be returned to a country where she or he may be 'subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 45 of the *1949 Geneva Convention relative to the Protection of Civilians in Time of War*¹³¹ provides that a protected civilian, as defined in Article 4, 'in no circumstances shall [...] be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs'. Also, the *1984 Convention against Torture and other Cruel or Degrading Treatment or Punishment*¹³² states in Article 3(1) that no one shall be returned to a country 'where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture'. A similar provision can be found in Article 22 of the *1989 Convention of the Rights of the Child*.¹³³ Finally, although not binding, Article 3(1) of the *1967 Declaration on Territorial Asylum*¹³⁴ and Article 14 of the *Universal Declaration of Human Rights* provide for non-return and that every person has a right to seek and enjoy in other countries asylum from persecution, respectively.

Article 19 *Migrant Smuggling Protocol* seeks to ensure that the obligations under the *Refugee Convention* and other relevant international treaties are not infringed by any provisions contained in the Protocol (in countries that are State Parties to the Protocol as well as the international refugee law instruments). Article 19 does not create any additional rights or obligations.¹³⁵

Current Pakistani Law

Pakistan's domestic law, including its *Foreigners Act 1946*, contains no specific provisions relating to the protection of refugees and asylum seekers. There is, at present, also no recognition of other

¹²¹ See the definition in art 1A and the exemptions clauses in art 1C-F *Refugee Convention*.

¹²² *Refugee Convention*, art 32, 'save on grounds of national security'.

¹²³ *Refugee Convention*, art 33.

¹²⁴ See further, UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants* (2010) Module 9: Human Rights, 6.

¹²⁵ *Refugee Convention*, art 31.

¹²⁶ *Refugee Convention*, art 16.

¹²⁷ *Refugee Convention*, art 34.

¹²⁸ *Refugee Convention*, arts 20–24.

¹²⁹ *Refugee Convention*, arts 17–19.

¹³⁰ 993 UNTS 3.

¹³¹ 75 UNTS 287.

¹³² 1465 UNTS 85.

¹³³ 1577 UNTS 3.

¹³⁴ UN General Assembly Res 2312(XXII) (14 Dec 1967).

¹³⁵ *Legislative Guides*, 364, 365.

humanitarian and compassionate grounds that may enable a smuggled migrant who is not a national or lawful resident of Pakistan to remain in the country. Specifically, smuggled migrants who are unable or unwilling to return to their home country for fear of persecution for reasons of race, religion, nationality, political opinion, or membership of a particular social group remain unprotected. Pakistan is not a signatory to the principal instruments of international refugee law, including the *Convention and Protocol relating to the Status of Refugees*, which explains the absence of such mechanisms.

Assessment and Recommendation

In theory, the requirements of Article 19 *Migrant Smuggling Protocol* have no direct application in Pakistan as the country is not a Signatory to the *Refugee Convention* and does not provide other avenues to protect persons fleeing from persecution or fearing persecution should they be expelled from Pakistan. The *Interpretative Notes* also confirm that States that are Signatories to the *Migrant Smuggling Protocol* but are not a party to another international instrument referred to in the Protocol (such as the *Refugee Convention*) do not become subject to any right, obligation, or responsibility under that other instrument.¹³⁶

UNHCR and a majority of states consider the principle of non-refoulement a matter of customary international law which may therefore have some binding effect on Pakistan.¹³⁷ An obligation not to refoule smuggled migrants may also arise from other international human rights treaties to which Pakistan is a State Party.

In reality, many persons smuggled into and through Pakistan are fleeing from persecution in their home country, or are displaced by war or other humanitarian crises.¹³⁸ It is thus important that they are not returned to places where they may face or fear further persecution, discrimination, or other violations of human rights.

While it is beyond the scope of this assessment to advocate compliance with and accession to international refugee law instruments, it would be highly desirable to explore avenues to institute basic protection mechanisms for refugees and other asylum seekers in Pakistan, especially with a view to preventing refoulement. As mentioned earlier, a Private Member's Bill has been introduced into the National Assembly in Islamabad in 2010.¹³⁹ This Bill seeks to amend the *Foreigners Act 1946* in order

to ensure better protection of foreigner in general and refugees in particular. It would also serve the purpose of recognition of the terms asylum seeker and refugees in the existing protection of refugees and foreigners in Pakistan.

This Bill has, however, not — or not yet — passed.

Recommendation 18:

In cooperation with UNHCR, explore avenues to institute basic protection mechanisms for refugees and other displaced persons in Pakistan.

¹³⁶ *Interpretative Notes*, Notes 117, 188; David McClean, *Transnational Organized Crime* (2007) 440.

¹³⁷ See further, David McClean, *Transnational Organized Crime* (2007) 439–440; Patricia Mallia, *Migrant Smuggling by Sea* (2010) 82–95.

¹³⁸ See, for example, UNODC, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009). 10–12.

¹³⁹ *Foreigners (Amendment) Bill 2010*, introduced by Ms Shireen Arshad Khad, National Assembly Pakistan.

4.4 Return of Smuggled Migrants

In many, if not most cases of migrant smuggling, smuggled migrants reside in the receiving country unlawfully. Domestic and international laws usually require unlawful immigrants to leave the host country unless they seek asylum or have other grounds to apply for a visa or residence. The removal from the receiving country may often occur against the known wishes of the smuggled migrant and may in some cases require the use of force. 'In the case of smuggled migrants,' notes David McClean, 'their return will commonly be far from voluntary, as the migrant's hopes will have been dashed.'¹⁴⁰

It is for that reason that best practice guidelines articulate basic standards that, on the one hand facilitate the removal and return of smuggled migrants, while on the other hand ensure that their rights and dignity are respected at all times. The UN Committee which developed the *Migrant Smuggling Protocol* noted that:

[M]aking provisions for the return of migrants [is] necessary as a means of deterring migrants and organised criminal groups and [is] necessary to ensure the right of the migrants themselves to return to it.¹⁴¹

International Law

International frameworks pertaining to the return of smuggled migrants create obligations for both the host country in which the person is currently residing and the receiving state to which the migrant will be returned. Relevant international provisions require cooperation between these two countries to enable and accelerate the return of smuggled migrants.

The *Migrant Smuggling Protocol* sets out a range of mechanisms relating to the return of smuggled migrants in Article 18:

1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.
2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.
3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.
4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.
5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.
6. States Parties may cooperate with relevant international organisations in the implementation of this article.

¹⁴⁰ David McClean, *Transnational Organized Crime* (2007) 435.

¹⁴¹ UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.5 (20 Mar 2000) note 89.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.¹⁴²

Article 18 provides mechanisms to facilitate the return of smuggled migrants; it does not make the return mandatory.¹⁴³ The principal elements of this article are designed to facilitate smuggled migrants to relocate to countries of which they are a national or permanent resident. In this context, '[t]he term "permanent residence" is understood [...] as meaning long-term, but not necessarily indefinite residence.'¹⁴⁴ The *Interpretative Notes* explain that:

Paragraph 1 deals with the case of a person who is a national or has the right of permanent residence at the time of return. Paragraph 2 is supplementary to paragraph 1 and deals with the case of a person who had the right of permanent residence at the time of entry, but no longer has it at the time of return.¹⁴⁵

The *Interpretative Notes* further remark that Article 18 'is based on the understanding that States Parties would not deprive persons of their nationality contrary to international law, thereby rendering them stateless.'¹⁴⁶ Moreover, '[t]his article is understood not to prejudice national legislation regarding the granting of the right to residence or the duration of residence.'¹⁴⁷

The process envisaged by Article 18 is one where the current host country contacts the country of origin (or return) in order to establish the status of the smuggled migrant and subsequently returns that person to that country. Such return must, however, 'not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.'¹⁴⁸ Accordingly, the country of origin (or return) is required to cooperate with the requesting country and facilitate — rather than obstruct¹⁴⁹ — the migrant's return by verifying the status of the migrant without undue or unreasonable delay.¹⁵⁰ For persons without proper travel documents,¹⁵¹ Article 18(4) requires the country of nationality or permanent residence to issue those documents to enable the return of the smuggled migrants.

Article 18 does not require the creation of any substantive or procedural rights for smuggled migrants, but Article 18(5) 'does require measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person.'¹⁵²

In managing the return of smuggled migrants, countries may choose to seek the support of international organisations, which are recognised by Article 18(6). IOM offers assistance to that end.¹⁵³

¹⁴² 'The references to treaties, agreements or arrangements in this paragraph include both agreements that deal specifically with the subject matter of the protocol and more general readmission agreements that include provisions dealing with illegal migration': *Interpretative Notes*, Note 116.

¹⁴³ David McClean, *Transnational Organized Crime* (2007) 433.

¹⁴⁴ *Interpretative Notes*, Note 112.

¹⁴⁵ *Interpretative Notes*, Note 114.

¹⁴⁶ *Interpretative Notes*, Note 111.

¹⁴⁷ *Interpretative Notes*, Note 112.

¹⁴⁸ *Interpretative Notes*, Note 113.

¹⁴⁹ David McClean, *Transnational Organized Crime* (2007) 433.

¹⁵⁰ *Migrant Smuggling Protocol*, art 18(3).

¹⁵¹ 'The term "travel documents" includes any type of document required for entering or leaving a State under its domestic law,' *Interpretative Notes*, Note 115.

¹⁵² *Legislative Guides*, 365.

¹⁵³ David McClean, *Transnational Organized Crime* (2007) 435.

Current Pakistani Law

In a domestic context, the return of smuggled migrants is relevant in two separate but equally important ways. (1) As a destination country arrangements need to be made to enable the removal for non-citizen, non-resident migrants who have been smuggled into the country. (2) As a country of origin, mechanisms need to be established to verify the status of citizens and residents that have been smuggled abroad and facilitate their return home.

Insofar as foreign nationals in Pakistan are concerned, the *Foreigners Act 1946* implies that persons who enter or reside in Pakistan unlawfully must be deported from the country. The Act does not specify the procedures involved in deporting or removing foreigners from Pakistan and does not articulate any rights a deportee or removee may have (such rights of hearing, appeal, etc). The Federal Government may recover all expenses relating to a person's deportation for the deportee, s 14 *Foreigners Order 1951*, and may order commercial carriers to remove inadmissible foreigners, s 6 *Foreigners Order 1951*. In situations in which there are doubts about the nationality of foreigners in Pakistan, s 8 *Foreigners Act 1946* provides some basic guidelines to determine the person's country of nationality.

Pakistan's domestic law does not specify any mechanisms that may assist Pakistani nationals and permanent residents who have been smuggled abroad to return to Pakistan. A report published in 2009 also found that Pakistan's *Emigration Ordinance 1979* does not set out 'what steps would be taken for their early repatriation.'¹⁵⁴ The *National Emigration Policy* articulates some basic principles to facilitate the return of Pakistani nationals that have been smuggled abroad through labour migration schemes,¹⁵⁵ but these policy statements have yet to be translated into domestic law.

Assessment and Recommendation

International law does not contain any mandatory provisions relating to the return of smuggled migrants. It sets out general guidelines to facilitate the return process and, in particular, encourages collaboration between host and home countries as well as international organisations to effect the swift and humane return of smuggled migrants.

As mentioned previously, Article 18 *Migrant Smuggling Protocol* does not require the creation of any substantive or procedural rights for smuggled migrants and thus does not mandate Pakistan to make any legislative or regulatory amendments.¹⁵⁶ Only Article 18(5) requires measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person. The *Legislative Guides* remark that 'this could be implemented administratively in most countries, but could involve legislation if this is necessary to ensure that it is implemented properly.'¹⁵⁷

An assessment of Pakistan's compliance with Article 18 thus does not involve a review of legislative and regulatory frameworks, but should instead focus on a review of administrative processes and an examination of available case studies.¹⁵⁸ Such an assessment should focus specifically on the following questions:

¹⁵⁴ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 36.

¹⁵⁵ Pakistan, *National Emigration Policy* (2009) 58–63.

¹⁵⁶ *Legislative Guides*, 365.

¹⁵⁷ *Legislative Guides*, 367.

¹⁵⁸ See, for example, EU AENAS, *Baseline Study on Illegal Migration, Human Smuggling and Trafficking in Pakistan* (2009) 72–75.

- Whether the return of (foreign) smuggled migrants from Pakistan and the return of smuggled migrants to Pakistan (Pakistani nationals and permanent residents) is carried out safely and with respect to the rights and dignity of persons, Article 18(5);
- Whether Pakistani authorities promptly verify if a person is a Pakistani national or permanent resident, Article 18(3);
- Whether Pakistani authorities promptly issue travel documents to nationals and permanent residents for re-entry, Article 18(4);
- Whether Pakistani authorities cooperate with international organisations such as IOM in return proceedings, Article 18(6) *Migrant Smuggling Protocol*.¹⁵⁹

Pakistan's new *National Emigration Policy*, which was launched in late 2009, also sets out extensive 'reintegration and return migrants and effective use of diaspora resources' that should be integrated in any future assessment.¹⁶⁰

Recommendation 19:

In cooperation with IOM, conduct an independent assessment of administrative processes and available cases pertaining to the return of smuggled migrants to and from Pakistan.

4.5 Prevention Measures

One of the most effective ways to combat migrant smuggling is the use of prevention measures that raise awareness about the causes and consequences of migrant smuggling and warn would-be migrants about the associated risks and dangers. In most countries — sending, transit and destination — prevention and awareness campaigns are part and parcel of national efforts to curb migrant smuggling

International Law

Article 15 *Migrant Smuggling Protocol* advocates public awareness raising and cooperation between State Parties to prevent migrant smuggling.

Article 15 Other prevention measures

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organised criminal groups for profit and that it poses serious risks to the migrants concerned.
2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organised criminal groups.
3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

The *Legislative Guides* specifically note that public information campaigns can 'serve to emphasise that the smuggling of migrants is a serious criminal activity, often harmful to the migrants

¹⁵⁹ Cf UNICEF et al, *Assessment of the Legal System in Vietnam in Comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants* (2004) 44.

¹⁶⁰ Pakistan, *National Emigration Policy* (2009) 58–66.

themselves and with broader implications for community crime levels.¹⁶¹ To that end, Article 15(2) makes specific reference to Article 31 *Convention against Transnational Organised Crime* which, inter alia, recommends the dissemination of information through the mass media and the promotion of public participation in preventing and combating all forms of organised crime. Article 15 *Migrant Smuggling Protocol* also encourages international cooperation to address the root-causes of this phenomenon.

Although Article 15 addresses an issue that is central to any anti-migrant smuggling strategy, it has largely aspirational meaning, creates no binding measures, and proposes no specific domestic or international action.¹⁶²

Current Pakistani Law

Prevention campaigns usually do not require legislative or regulatory basis and it is thus not surprising that Pakistan's laws do not contain any specific measures to that end.

In Pakistan, efforts to alert would-be migrants and warn them about the dangers and consequences associated with migrant smuggling and other forms of illegal migration are, by and large, aimed at preventing Pakistani nationals from falling victim to bogus recruitment agents especially those who offer passage to and employment in the Persian Gulf region. The *National Emigration Policy* also contains several statements to that end. These awareness and prevention mechanisms, however, only apply to a particular kind of migrant smuggling of Pakistani nationals and do not address the wider problem and the issue of foreign migrants smuggled into Pakistan.

In comparison, Pakistan's *National Action Plan for Combating Human Trafficking* contains extensive statements relating to prevention and awareness-raising in relation to trafficking in persons. There is, however, at present no similar policy document relating specifically to migrant smuggling.

Assessment and Recommendation

International law creates no specific obligations on Signatories and Pakistan's limited efforts to campaign against migrant smuggling satisfy requirements under the *Migrant Smuggling Protocol*. While the mechanisms set out in Article 15 are mandatory, they do not require legislative intervention.¹⁶³

Increased education and awareness-raising have the potential to prevent migrant smuggling, reduce the victimisation of vulnerable populations and individuals, and may contribute to efforts to suppress this crime and prosecute offenders. Pakistan already carries out extensive awareness raising and media campaigns to inform Pakistani migrant workers about the rules, regulations, social norms, and dangers associated with working abroad.¹⁶⁴

In the medium and long-term, it would be desirable to develop a comprehensive national anti-migrant smuggling information and education campaign aimed at Pakistani nationals who are vulnerable to be lured abroad by the promises of migrant smuggling and directed equally at foreign nationals that have been smuggled into Pakistan. The use of television, radio, newspapers, billboards, and other forms of advertisement have an important role to play in this context. A separate assessment, conducted in 2009, suggested that the Ministry of Social Welfare and Special

¹⁶¹ *Legislative Guides*, 373.

¹⁶² David McClean, *Transnational Organized Crime* (2007) 425.

¹⁶³ *Legislative Guides*, 372–373.

¹⁶⁴ Pakistan, *National Emigration Policy* (2009) 54.

Education is best equipped to take a lead in implementing public awareness raising activities.¹⁶⁵ It would be further beneficial to disseminate some of the information in foreign languages, especially those dialects spoken by persons smuggled into Pakistan. UNODC can assist in the development of information campaigns, and, to that end, has created a range of audio and visual material that can serve as templates for future campaigns in Pakistan.¹⁶⁶

Recommendation 20:

Develop a comprehensive education and awareness-raising strategy that addresses the smuggling of Pakistani nationals as well as the smuggling of foreign nationals into Pakistan.

Understanding the root causes of migrant smuggling is central to the success of any effort to curb this phenomenon. To that end, Article 15(3) *Migrant Smuggling Protocol* specifically calls on State Parties to take

into account the socio-economic realities of migration and [pay] special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

One of the principal obstacles in combating migrant smuggling in Pakistan more effectively is the limited research that has been undertaken to explore the causes and consequences of this problem. While a small number of recent reports explores the levels and patterns of migrant smuggling in Pakistan, in the medium and long-term it would be greatly beneficial to set up research programmes that generate continuing analysis of the cause and characteristic of this phenomenon domestically and international.¹⁶⁷ Such research should be conducted in close collaboration with similar efforts in other countries and with programmes run by international organisations such as UNODC, UN.GIFT, IOM, and UNHCR.

Recommendation 21:

Develop a research capacity to identify, examine, understand, and address the causes, consequences, and dynamics of migrant smuggling in Pakistan in close collaboration with government agencies, civil society groups, international organisations such as UNODC, UN.GIFT, IOM, UNHCR, and others.

¹⁶⁵ See also, Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 44–45.

¹⁶⁶ See further, UNODC, 'Human Trafficking and Migrant Smuggling Public Service Announcements' available at www.unodc.org/unodc/en/human-trafficking/human-trafficking-public-service-announcements.html (accessed 27 Aug 2010).

¹⁶⁷ See also the recommendations made by Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan: Review of Government Policies and Programmes* (2009) 46–47, 58–59.

5 Law Enforcement and Border Measures

5.1 Current law enforcement arrangements in Pakistan

As the national policing agency, Pakistan's Federal Investigation Agency (FIA) — established in 1974 and governed by the *Federal Investigation Agency Act 1974*¹⁶⁸ — has primary responsibility for investigating and preparing cases involving migrant smuggling and for the prosecution of offenders. It is also involved in the apprehension of fake recruitment and employment agencies.¹⁶⁹

On June 9, 1975,¹⁷⁰ the FIA established an Immigration Wing which is presently divided into two branches: the Immigration Branch and the Anti-Human Smuggling Branch.

The Immigration Branch has the mandate to control and monitor the arrival and departure of international travellers, as well as to prevent and detect instances of migrant smuggling and trafficking in persons at Pakistan's 25 airports, land border crossings, seaports, and (international) railway stations.¹⁷¹ Officers assigned to the Immigration Branch examine travel documents of all arriving and departing passengers at border checkpoints, while also aiming to prevent, detect, arrest, and detain passengers travelling on forged and fake documents. Officers are further charged with arresting offenders on the request of police and other law enforcement agencies, as well as implementing orders and instructions conveyed by the Government in respect of passengers included in various watch lists, stop lists, and black lists.¹⁷² According to the FIA, approximately 500-600 officers are currently assigned to duties within the Immigration Wing. It should be noted, however, that all FIA officers rotate between different parts of the FIA every two to three years (with the exception of some female officers who are exclusively posted at international airports).

Under the Immigration Wing, the FIA operates 16 'Anti-Human Trafficking Circles' in all major cities across Pakistan. These Circles (previously called Passport Circles) are tasked with enforcing relevant immigration laws, including the *Emigration Ordinance 1979*, *Passport Act 1974*, *Foreigners Act 1946*, *Exit from Pakistan (Control) Ordinance 1981*, and various provisions under Pakistan's *Penal Code*.¹⁷³ Members of the Anti-Trafficking Circles are also involved in the deportation and return of persons entering Pakistan on forged documents or who make false representations and declarations in relation to their immigration.¹⁷⁴

The FIA has also established an Anti-Trafficking Unit based at the FIA headquarters in Islamabad as a special division to deal with all trafficking in persons and migrant smuggling matters. The Anti-Trafficking Unit also maintains sub-units in the zonal directorates in Karachi, Lahore, Rawalpindi, Peshawar, and Quetta.¹⁷⁵ The principal tasks of the Anti-Trafficking Unit, as Stated by the FIA, include:

- The prevention and protection of victims of trafficking;

¹⁶⁸ The complete text of the *Federal Investigation Agency Act 1974* (Pakistan) is available at Pakistan, FIA, *Introduction to FIA*, www.fia.gov.pk/abt_background.htm (accessed 27 Aug 2010).

¹⁶⁹ Pakistan, FIA, *Pakistan National Action Plan for Combating Human Trafficking*, available at www.fia.gov.pk/HUMAN.htm (accessed 4 May 2010).

¹⁷⁰ Prior to 1975, immigration check-points were operated by provincial immigration authorities.

¹⁷¹ Pakistan, FIA, *Immigration Wing*, available at www.fia.gov.pk/dep_immigration.htm (accessed 27 Aug 2010).

¹⁷² Pakistan, FIA, *Annual Administration Report 2008* (2009) 7.

¹⁷³ Pakistan, FIA, *Immigration Wing*, available at www.fia.gov.pk/dep_immigration.htm (accessed 27 Aug 2010).

¹⁷⁴ Pakistan, FIA, *Annual Administration Report 2008* (2009) 9.

¹⁷⁵ Pakistan, FIA, *Anti Trafficking Unit*, available at www.fia.gov.pk/dep_trafficking.htm (accessed 27 Aug 2010).

- The investigation and prosecution of cases;
- The building and maintenance of a database of persons involved in trafficking in persons or migrant smuggling;¹⁷⁶
- Liaison with NAS of the US Embassy in Islamabad, non-government organisations, provincial police et cetera; and
- The development of a referral system for the transfer of victims to shelter homes and to facilitate the repatriation of victims of trafficking and smuggling to their countries of origin.¹⁷⁷

Furthermore, Pakistan has set up an Inter-agency Task Force (IATF) consisting of all relevant law enforcement agencies including the FIA, FC Balochistan, Balochistan Levies, Coast Guards, Maritime Security Agency, and Police. The IATF is charged with intercepting people being trafficked and apprehending human traffickers at points of origin (such as internal trafficking originating in Punjab), transit (such as Karachi, Mand Billo, Quetta), and departure (including coastal areas such as Gwader, Taftan etc). The IATF also conducts interception activities on Lee market in Karachi, in hotels, serais, coach stations, et cetera.¹⁷⁸

The Ministry of Interior and the Ministry of Labor also have a separate mandate to ‘take action against recruitment agencies that act as agents for sending victims abroad for trafficking/other forms of exploitation, including camel jockeying et cetera.’¹⁷⁹

5.2 Border measures

International Law

The *Migrant Smuggling Protocol* only contains very general statements relating to border control measures in Article 11. Article 11(1) encourages State Parties to strengthen their border controls to detect migrant smuggling without unduly hampering the free movement of people.

Article 11 Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

[...]

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 11(6) encourages State Parties to improve communication and cooperation between border control agencies.

Current Pakistani Law & Policy

Pakistan’s *National Action Plan for Combating Human Trafficking* sets out a range of policy measures designed to improve border control and the apprehension of victims and perpetrators at Pakistan’s

¹⁷⁶ A ‘list of most wanted traffickers’ is available at Pakistan, FIA, *Most Wanted Human Traffickers*, available at www.fia.gov.pk/Most_Wanted_Human_Traffickers.htm (accessed 27 Aug 2010).

¹⁷⁷ Pakistan, FIA, *Anti Trafficking Unit*, available at www.fia.gov.pk/dep_trafficking.htm (accessed 4 May 2010); Pakistan, FIA, *Pakistan National Action Plan for Combating Human Trafficking*, available at www.fia.gov.pk/HUMAN.htm (accessed 27 Aug 2010).

¹⁷⁸ Pakistan, Ministry of Interior, *Combating Human Trafficking* (2006) para 11.

¹⁷⁹ Pakistan, Ministry of Interior, *Combating Human Trafficking* (2006).

main airports, seaports, and land-border control points. While the *Action Plan* is designed primarily to combat trafficking in persons, it also sets out a number of measures that are equally relevant for combating migrant smuggling:

Also planned is strengthening of measures related to permission of entry, or denial of entry, revocation of visas, or temporary detention of persons accused of being involved in immigration/trafficking related offences, through strengthening of Passport Cells which are being staffed and equipped with additional resources. Responsibility: Director General FIA, Director General Immigration & Passports.

Efforts will be made for strengthening of immigration controls to reduce human trafficking particularly to Middle East and Europe. The proposed measures include creation of additional positions and provision of transport to strengthen Passport circle Gujranwala, sanction of posts and provisions of transport for establishment of new Passport Circles at Taftan, Turbat and Gawader. Manning of all immigration counters by ASIs is also Planned. Responsibility: Ministry of Interior.¹⁸⁰

Assessments and Recommendation

The measures relating to border control called for in international law and Pakistan's *National Action Plan* mostly involve initiatives that do not necessarily require legislative authority.¹⁸¹ Accordingly, domestic law and regulations in Pakistan contain no specific provisions relating to border control procedures.

It would be beneficial to assess separately the processes and procedures in place at Pakistan's land, air, and sea borders, aimed at identifying instances of migrant smuggling. This will require direct consultation with relevant border control and customs agencies, including site visits to selected airports, seaports, and land border crossings.

Recommendation 22:

Conduct an independent assessment of the border control and customs processes and procedures in Pakistan.

5.3 Carrier sanctions

Closely connected to the issue of border control are those measures designed to curb smuggling of migrants onboard commercial vessels, including planes, ships, trains, and trucks. To prevent the arrival of undocumented migrants, including smuggled migrants, most countries set out regulations that make carriers liable for transporting non-citizens who do not possess valid documentation to enter their territory.

International Law

The *Migrant Smuggling Protocol* requires State Parties to adopt legislative or other measures to prevent commercial carriers from being used by migrant smugglers.¹⁸² Article 11(2)–(5) *Migrant Smuggling Protocol* contains several requirements to ensure that persons travelling across international borders hold the necessary documents.

Article 11. Border measures

¹⁸⁰ Pakistan, Ministry of Interior, *Combating Human Trafficking* (2006).

¹⁸¹ *Legislative Guides*, 312.

¹⁸² *Legislative Guides*, 373.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.
3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.
4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.
5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

While the exact nature of measures dealing with commercial carriers is left to the discretion of individual States, Article 11(3) advocates regulations that require commercial carriers to ensure that their passengers are in possession of the travel documents that may be needed to enter the destination country, such as passports and visas. There is, however, no obligation on carriers to assess the validity or authenticity of the documents.¹⁸³ Article 11(4) suggests that carriers are sanctioned if they fail to comply with these requirements, though it does not prescribe specific types of sanctions.¹⁸⁴ There should, however, be no liability on carriers for transporting undocumented refugees.¹⁸⁵ Article 11(5) encourages State Parties to revoke visas of any person implicated in migrant smuggling offences.

The requirements in Article 11(1)–(5) reflect similar obligations in international aviation and maritime standards. This is also acknowledged by the *Interpretative Notes*.¹⁸⁶ For example, air carriers are required to ensure that their passengers are properly documented and meet the immigration requirements at the destination point. Standards supplementing the *Convention on International Civil Aviation*¹⁸⁷ provide that undocumented or otherwise inadmissible passengers, including those travelling with fraudulent documents, are to be returned to the custody of the air-carriers which should return the persons at their expense to the point of departure or another place where the returnees are admissible. Carriers who are found transporting undocumented passengers can be fined if they neglect to verify the documentation of their passengers. Carriers cannot be fined, however, if their passengers possess fraudulent documents. The emphasis of these standards is on the possession of documents, not on their authenticity. Commercial airlines are not burdened with the obligation to apprehend false and altered travel and identity documentation. If, however, fraudulent documents are found, carriers are required to seize them and return them to the authorised agencies of the issuing country.¹⁸⁸

¹⁸³ *Interpretative Notes*, Note 103; *Legislative Guides*, 373.

¹⁸⁴ *Legislative Guides*, 373, 374.

¹⁸⁵ *Interpretative Notes*, Note 103.

¹⁸⁶ *Interpretative Notes*, Notea 103.

¹⁸⁷ 15 UNTS 275, Annex 9. See further, Andreas Schloenhardt, *Migrant Smuggling* (2003) 294–296.

¹⁸⁸ See Ruwantissa Abeyratne, “Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees” (1999) 24(1) *Air & Space Law* 3 at 4-5; Ruwantissa Abeyratne, “Smuggling of Illegal Migrants by Air — Air Carrier Liability” (2000) 25(4-5) *Air & Space Law* 148 at 155-156; James Fox, *The Regulation of International Commercial Aviation* (1995-) Booklet 8, 22-24; Erika Feller, “Carrier Sanctions and International Law” (1989) 1(1) *International Journal of Refugee Law* 48 at 54-55.

Current Pakistani Law & Policy

Section 6 *Foreigners Act 1946* sets out 'obligations of masters of vessel, et cetera' pertaining to incoming and departing passengers. The section requires masters of any vessel arriving in or departing from Pakistan to furnish national authorities with passenger manifests setting out required details about all passengers and members of crew who are not citizens of Pakistan. For enforcement purposes, District Magistrates and any Superintendent of Police may also request that information from the master of any vessel. To ensure that passenger manifests are complete and accurate, passengers themselves are obliged to furnish the master of the vessel with the necessary information. Any contravention of these requirements is a criminal offence under s 14(1). Moreover, masters and pilots of vessels must comply with any orders made and direction given by government officials,¹⁸⁹ otherwise they are assumed to have contravened their legal obligations, s 13(3).

In practice, the information and manifests referred to in s 6 *Foreigners Act 1946* will usually be collected and issued by commercial airlines, railway companies, coachlines, and shipping companies. Frequently, this information will be required at the time passengers book their journey.

Section 6 *Foreigners Order 1951* authorises government authorities to order the master of a vessel to remove any persons who has no authority to enter Pakistan.

Carrier regulations, including sanctions, under Pakistan's aviation and maritime laws are not further examined here.

Assessments and Recommendation

Based on the available information, Pakistan's laws and regulations pertaining to carrier sanctions comply with international law and other international standards. The provisions in the *Foreigners Act 1946* and the *Foreigners Order 1951* adequately ensure that commercial carriers check whether their passengers are in possession of the relevant documents and oblige carriers to return passengers who do not hold valid passports and visas. Not further examined are the obligations of commercial carriers under Pakistan's civil aviation and maritime laws.

It is outside the scope of this assessment to examine the practical implementation and application of these requirements. It would be desirable to examine more closely how carrier regulations are enforced at airports, seaports, and other border control points and what sanctions are imposed on carriers failing to comply with relevant laws and regulations.

5.4 International law enforcement cooperation

Migrant smuggling is an offence that crosses international borders and affects multiple jurisdictions. Moreover, some perpetrators take advantage of discrepancies in legal systems and enforcement measures by residing in or relocating to jurisdictions where the risks of interdiction and arrest are low.

Consequently, cross-border cooperation between law enforcement agencies is essential in curtailing migrant smuggling. In a negative sense, lack of cooperation, information exchange, and mutual legal assistance between countries frequently frustrates criminal investigations, prosecutions, as well as prevention measures.

¹⁸⁹ *Foreigners Act 1946*, s 3.

International Law

The *Migrant Smuggling Protocol* offers limited guidance on the issue of international cooperation. Article 17 contains a very general statement, advocating the creation of bilateral and multilateral frameworks ‘in response to problems that have arisen or are seen as particularly serious only in the context of bilateral or regional situations’, but this Article creates no mandatory requirements for State Parties.¹⁹⁰

Article 17 Agreements and arrangements

States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

- (a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or
- (b) Enhancing the provisions of this Protocol among themselves.

The provisions relating to law enforcement cooperation under the *Convention against Transnational Organised Crime*, however, apply mutatis mutandis, to the *Migrant Smuggling Protocol*.¹⁹¹ This includes, inter alia, provisions on international cooperation for purpose of confiscation (Article 13), extradition (Article 16), mutual legal assistance (Article 18), joint investigations (Article 19), and law enforcement cooperation (Articles 26 and 27 *Convention against Transnational Organised Crime*).¹⁹²

Current Pakistani Law & Policy

Pakistan’s laws pertaining to immigration and emigration contain no specific provisions relating to international law enforcement and judicial cooperation. There is also, at present, no specific policy document that addresses this issue. Pakistan’s *National Emigration Policy* provides some basic frameworks for international cooperation, but these mechanisms are largely not related to combating migrant smuggling.

Pakistan is a Signatory to several international treaties, such as the *Convention against Transnational Organised Crime*, which include a range of law enforcement and judicial cooperation provisions. Domestically, these matters are, for the most part, set out in separate statutes including the *Extradition Act 1972*, the *Code of Criminal Procedure 1898*, the *Mutual Assistance in Criminal Matters Act*, and similar statutes. Pakistan also has entered into a range of bilateral treaties to facilitate mutual legal assistance, extradition, and other forms of cooperation with other countries. Moreover, Pakistan is a party to a range of bilateral Memoranda of Understanding (MoUs) to facilitate cooperation in combating transnational crime, including migrant smuggling. In 2009, Pakistan had signed agreements with China, Greece, Iran, Saudi Arabia, Sri Lanka, and Turkey, and MoUs with Australia, Singapore, Thailand, and the United Kingdom.¹⁹³

Pakistan’s FIA also entertains specific cooperative frameworks with law enforcement agencies in key sending countries and destination countries for smuggled migrants. Bilateral arrangements are in place with Oman and the United Kingdom. Multilateral groups involve Pakistan, Greece, Iran, and Turkey. It has been reported that information is regularly exchanged between these countries and that regular meetings are held to improve the measures for controlling illegal flows of migrants.¹⁹⁴

¹⁹⁰ *Legislative Guides*, 391.

¹⁹¹ *Migrant Smuggling Protocol*, art 1(2).

¹⁹² *Legislative Guides*, 383–384. See further, UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants* (2010) Module 8: International cooperation.

¹⁹³ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan* (2009) 45.

¹⁹⁴ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan* (2009) 45.

Assessments and Recommendation

Pakistan has considerable international, regional, and bilateral frameworks to facilitate cross-border cooperation to combat migrant smuggling. These are important mechanisms in the fight against migrant smuggling and other forms of transnational organised crime. A complete assessment of Pakistan's laws relating to law enforcement cooperation (as well as prosecutorial and judicial cooperation) is beyond the scope of this report.

As a general point, it would be desirable to intensify existing cross-border cooperation and expand bilateral and multilateral agreements to other sending and destination countries. In December 2009, UNODC specifically recommended to create 'platforms for cooperation' with Afghanistan, Indonesia, Malaysia, and the UAE.¹⁹⁵ An assessment completed in February 2009 also observed a lack of arrangements with countries such as Afghanistan, Bangladesh, Myanmar, and Central Asian states. The report also pointed to the lack of any cooperation with neighbouring India which is the main transit country for illegal flows of migrants from Bangladesh and Myanmar. The report further remarked that:

Much more coordinated efforts need to be put in place through cooperation of the law enforcement agencies of the countries concerned not only to check the illegal migration flows but also for the early return of the victims where it does not threaten their safety.¹⁹⁶

The Ministry of Interior of Pakistan also noted that:

Pakistan does not have bilateral arrangements for cooperation in migration matters. We need to negotiate mutual agreements with other countries, which secure benefits like minimum wages and other welfare for the migrants, and protection from indiscriminate arrests, prosecution, deportations etc.¹⁹⁷

UNODC further recommended improving cooperation between national and international law enforcement agencies represented in Pakistan. To that end, it proposed the establishment of 'an information-sharing and mutual assistance committee in Islamabad consisting of FIA and international immigration and law enforcement officers.' It was also recommended to consider placing FIA liaison officers in key migrant smuggling hubs such as Dubai and Kuala Lumpur.¹⁹⁸

For that reason, it is desirable to carry out a separate independent assessment of current Pakistani laws, regulations, and procedures relating to mutual legal assistance, extradition, transfer of proceedings, transfer of sentenced persons, and other measures relating to law enforcement, prosecutorial, and judicial cooperation in relation to migrant smuggling. A review of liaison posts of foreign agencies in Pakistan and of Pakistani agencies abroad should also be included in the analysis.

Recommendation 23:

Commission an independent assessment of international law enforcement, prosecutorial, and judicial cooperation laws, regulations, and procedures in Pakistan.

A separate assessment should be conducted to examine the feasibility of setting up additional bilateral and regional arrangements to combat migrant smuggling.

¹⁹⁵ UNODC, Country Office Pakistan & Country Office Afghanistan, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 71.

¹⁹⁶ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan* (2009) 45–46.

¹⁹⁷ Pakistan, Ministry of Interior, *Combating Human Trafficking* (2006) paras 41, 42.

¹⁹⁸ UNODC, Country Office Pakistan & Country Office Afghanistan, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 71.

Recommendation 24:

Examine the feasibility of setting up bilateral and regional agreements and other arrangements to combat migrant smuggling in Pakistan and neighbouring countries.

5.5 Information Exchange

Along with formal law enforcement cooperation, it is important that all agencies involved in preventing and suppressing migrant smuggling share relevant information and engage in frequent communication, both domestically and internationally. Information exchange is fundamental in gathering intelligence and evidence about ongoing and future investigations, building a knowledge base about the levels and characteristics of migrant smuggling, and in developing appropriate education and awareness campaigns.

International Law

Article 10 *Migrant Smuggling Protocol* requires State Parties to exchange information ranging from general research and policy-related material about migrant smuggling and related problems to more specific details of methods used by smugglers.¹⁹⁹ For the most part, the article reiterates mechanisms under the *Convention against Transnational Organised Crime*.

Article 10 Information

1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:
 - (a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organised criminal group engaged in conduct set forth in article 6 of this Protocol;
 - (b) The identity and methods of organisations or organised criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;
 - (c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;
 - (d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;
 - (e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and
 - (f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.
2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

The *Interpretative Notes* to Article 10(1) further state:

- (a) The obligation to exchange relevant information under this paragraph was adopted on the understanding that this would be done in accordance with both the Protocol and any other applicable treaties, agreements or arrangements that might exist between the States involved.²⁰⁰

¹⁹⁹ *Legislative Guides*, 385.

²⁰⁰ *Interpretative Notes*, Note 101.

(b) The word “engaged” in this paragraph and in paragraphs 1, 2 and 7 of article 8 should be understood broadly as including vessels “engaged” both directly and indirectly in the smuggling of migrants. Of particular concern was the inclusion of both vessels actually found to be carrying smuggled migrants and vessels (“mother ships”) that transport smuggled migrants on open ocean voyages but are sometimes not apprehended until after the migrants have been transferred to smaller local vessels for landing purposes.²⁰¹

As mentioned previously, the provisions relating to international cooperation under the *Convention against Transnational Organised Crime* apply mutatis mutandis, to the *Migrant Smuggling Protocol*.²⁰² Article 10(1) *Migrant Smuggling Protocol* mentions specifically those provisions relating to law enforcement cooperation (Article 27 *Convention against Transnational Organised Crime*) and exchange of information pertaining to transnational organised crime (Article 28) and details their application in the particular context of migrant smuggling.²⁰³

Neither the *Migrant Smuggling Protocol* nor the *Convention against Transnational Organised Crime* contains specific requirements relating to communication and information exchange between national agencies.

Current Pakistani Policy & Practice

From the available information it is not fully clear whether Pakistan has set up domestic strategies to enhance communication and cooperation between domestic agencies involved in preventing and suppressing migrant smuggling. The *National Emigration Policy* ‘is also silent on interagency cooperation within the country and with transit and destination countries is to be forged to check human smuggling’.²⁰⁴ The Ministry of Interior, however, has established a steering committee to monitor and review anti-migrant smuggling efforts (as well as anti-trafficking efforts) in Pakistan. The Joint Secretary (Security) has been chosen as the focal point for coordination and information exchange on these issues.

Moreover, as mentioned previously, the FIA also entertains specific cooperative frameworks with law enforcement agencies in key sending countries and destination countries for smuggled migrants. Bilateral arrangements are in place with Oman and the United Kingdom. Multilateral groups involve Pakistan, Greece, Iran, and Turkey. It has been reported that information is regularly exchanged between these countries and that regular meetings are held to improve the measures for controlling illegal flows of migrants.²⁰⁵

Pakistan is also a member of the so-called *Colombo Process*, which is a regional consultative forum on the management of overseas employment and contractual labour for countries of origin in Asia.²⁰⁶

Assessments and Recommendation

The Government of Pakistan has gone to some length to enable and encourage information exchange between the many agencies involved in the prevention and suppression of migrant smuggling. The creation of a specific inter-departmental steering committee to monitor and review

²⁰¹ *Interpretative Notes*, Note 102.

²⁰² *Migrant Smuggling Protocol*, art 1(2).

²⁰³ David McClean, *Transnational Organised Crime* (2007) 416.

²⁰⁴ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan* (2009) 39.

²⁰⁵ Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan* (2009) 45.

²⁰⁶ Pakistan, *National Emigration Policy* (2009) 29–30.

anti-human trafficking efforts in Pakistan is commendable. In a report released in December 2009, UNODC further recommended to

Establish FIA-led, local inter-agency units on crime facilitating migration, initially as coordination committees. FIA's Anti-Human Trafficking and Smuggling Units (AHTSU) may be appropriate nodes around which to build inter-agency mechanisms.²⁰⁷

Section 5.4 above assesses bilateral and multilateral cooperation and communication efforts. Without additional information and direct consultation with relevant stakeholders, it is not possible to comment on the contents, quality, and depth of domestic committee and international information exchange.

The *Legislative Guides* note that

the mere exchange of information is not likely to require legislative action. Given the nature of some of the information that may be exchanged, however, amendments may be needed to domestic confidentiality requirements to ensure that such information can be disclosed, and precautions may be needed to ensure that it does not become public as a result. The interpretative notes also raise the need for prior consultations in some cases, especially before sensitive information is shared spontaneously and not on request (A/55/383/Add.1, para. 37). These may involve changes to media or public access-to information laws, official secrecy laws and similar legislation to ensure an appropriate balance between secrecy and disclosure.²⁰⁸

It is beyond the scope of this report to assess Pakistani privacy and freedom of information laws, examine the day-to-day information exchange between relevant agencies, and comment on the operation of the steering committee, the frequency of its meetings, and the depth of its efforts.²⁰⁹

5.6 Training

Inadequately trained personnel hamper effective prevention and investigation of migrant smuggling as well as prosecution and conviction of offenders. Relevant authorities and complicit parties often do not perceive migrant smuggling as a criminal activity that poses serious risks to victims and to the wider community.

It is thus crucial that law enforcement agencies, especially Pakistan's FIA, in conjunction with other relevant agencies, maintain a very high standard of training on all issues relating to migrant smuggling. Such training needs to be aimed at two separate, but equally important audiences:

- 1) Recruits, general police officers, and other first respondents who may be involved in the detection of relevant cases; and
- 2) Specialised officers who carry out the investigation and oversight of migrant smuggling cases.

International Law

Article 14 *Migrant Smuggling Protocol* contains a suite of measures relating to training of law enforcement, immigration, customs and other officials and to technical cooperation between relevant agencies:

Article 14 Training and technical cooperation

²⁰⁷ UNODC, Country Office Pakistan & Country Office Afghanistan, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 70.

²⁰⁸ *Legislative Guides*, 309.

²⁰⁹ See further, Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan* (2009) 45.

1. States Parties shall provide or strengthen specialised training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.
2. States Parties shall cooperate with each other and with competent international organisations, non-governmental organisations, other relevant organisations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:
 - (a) Improving the security and quality of travel documents;
 - (b) Recognising and detecting fraudulent travel or identity documents;
 - (c) Gathering criminal intelligence, relating in particular to the identification of organised criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;
 - (d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and
 - (e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.
3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

The Article relates closely to Article 29 *Convention against Transnational Organised Crime* but sets out provisions that are more specific to migrant smuggling. In particular, Article 14(2) *Migrant Smuggling Protocol* sets out elements that should be part of any training syllabus in this field.²¹⁰ It also advocates collaboration with international organisations and NGOs to develop adequate and individualised training modules.

Article 14(3) of the Protocol relates to technical cooperation and thus addresses a concern by developing nations that may require equipment and technical assistance to investigate and analyse migrant smuggling appropriately.²¹¹

Current Training Programs in Pakistan

The FIA Academy offers specialised training courses on migrant smuggling, immigration, money laundering, and forged documents, among a variety of other courses.²¹²

FIA agents are currently offered three distinct streams of training, both on a structured and ad hoc basis. The FIA delivers extended basic and advanced generalist training programs via their training academy based at the FIA headquarters in Islamabad, as well as in zonal centers scattered around the country. FIA personnel also participate in more intensive, specialised training programs offered intermittently to branches of Pakistani law enforcement by international agencies and foreign donor countries.

²¹⁰ David McClean, *Transnational Organized Crime* (2007) 423.

²¹¹ See also *Convention against Transnational Organised Crime*, arts 29, 30.

²¹² Other specialized training courses include terrorism, cybercrime, crime scene evidence and fingerprints, Pakistan, FIA, *FIA Academy*, available at www.fia.gov.ok/dep_academy.htm (accessed 27 Aug 2010).

Assessments and Recommendation

The delivery of training and technical assistance does not require legislation and, accordingly, there are no specific provisions in Pakistan's domestic law relating to these matters. Domestic and international law, however, inform the contents and materials used in such training.²¹³

Existing FIA training programs relating to migrant smuggling (and also trafficking in persons) have recently been reviewed. This assessment revealed a number of shortcomings of current training arrangements, inadequate resources and facilities, a lack of coordination between donor countries, and a range of other areas which require reform and improvement.²¹⁴

The report that followed this assessment also developed a suite of recommendations for the introduction of new training programs relating to migrant smuggling well as the improvement of existing programs. It identified general objectives, learning outcomes, as well as obstacles in setting up these programs, and specifically recommended the creation of a specialized intensive training program, an introductory recruit and refresher program, and supported the wider use of computer-based training modules. For further information see Andreas Schloenhardt & Brendan Hall, *Irregular Migration and Associated Crime in Pakistan* (2010) 23–39.²¹⁵

In addition, UNODC has recently released a *Basic training manual on investigating and prosecuting the smuggling of migrants*. This manual has been developed in cooperation with INTERPOL, the European Police Office (Europol), and the Serious and Organised Crime Agency (SOCA) of the UK. The manual is an important and easily accessible tool to train investigators and prosecutors on key aspects relating to migrant smuggling, such as concepts and categories of the smuggling of migrants and related conduct, the role of smuggled migrants and smugglers of migrants in investigations, investigative approaches, financial investigation, covert investigative techniques, intelligence, legislative issues, international cooperation, and human rights.²¹⁶

²¹³ *Legislative Guides*, 389.

²¹⁴ Andreas Schloenhardt & Brendan Hall, *Irregular Migration and Associated Crime in Pakistan* (2010) 25–26.

²¹⁵ See also Farooq Azam, *Human Trafficking, Human Smuggling and Illegal Migration to and from Pakistan* (2009) 47.

²¹⁶ UNODC, *Basic training manual on investigating and prosecuting the smuggling of migrants* (2010).

6 Smuggling of Migrants by Sea

The smuggling of migrants by sea is widely seen as a particularly dangerous type of smuggling as it leaves migrants vulnerable to bad weather and storms on the open sea. It also frequently involves vessels that are in poor conditions, not seaworthy, and lack food, freshwater, and proper sanitary facilities. Migrant smuggling by seas also creates additional jurisdictional, legislative, and enforcement challenges, especially in international waters.

6.1 Measures against Smuggling of Migrants by Sea

International Law

Cooperation

The *Migrant Smuggling Protocol* contains several measures to address the jurisdictional and enforcement matters associated with the interdiction of migrant smuggling in open waters. As a general principle, Article 7 of the Protocol advocates that:

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

While Article 7 does not create any binding obligations for Signatories, it emphasises the importance of cooperation in international waters. Neither Article 7, nor Articles 8 or 9 permit any activity

in the territorial sea of another State except with the permission or authorisation of the coastal State concerned. This principle is well established in the law of the sea and did not need to be restated in the protocol.²¹⁷

Article 7 also recognises the role of international maritime law, which is left unaltered by the *Migrant Smuggling Protocol*. While the Protocol does not refer to any specific international instruments, the *Interpretative Notes* make specific mention of the *UN Convention on the Law of the Sea (UNCLOS)*:²¹⁸

The international law of the sea includes the United Nations *Convention on the Law of the Sea* as well as other relevant international instruments. References to the United Nations *Convention on the Law of the Sea* do not prejudice or affect in any way the position of any State in relation to that Convention.²¹⁹

The *Interpretative Notes* also stress that countries that are Signatories to the *Migrant Smuggling Protocol* but not a party to *UNCLOS* or another international instrument referred to in the Protocol do not become subject to any rights, obligation, or responsibility under that other instrument.²²⁰

In order to implement the obligations stemming from Articles 7–9 *Migrant Smuggling Protocol* it is necessary to establish jurisdiction over migrant smuggling by sea.²²¹ To that end, Article 15 *Convention against Transnational Organized Crime* requires Signatories to establish jurisdiction when offences have been committed on board a vessel flying their flag. The *Legislative Guides* further suggest that:

In addition and although not a requirement under the Convention or the Protocol, State Parties may wish also to establish their jurisdiction over vessels on the high seas flying the flag of another State party as well

²¹⁷ *Interpretative Notes*, Note 98.

²¹⁸ See also David McClean, *Transnational Organized Crime* (2007) 400.

²¹⁹ *Interpretative Notes*, Note 98 [emphases added].

²²⁰ *Interpretative Notes*, Note 99. Cf David McClean, *Transnational Organized Crime* (2007) 401.

²²¹ See further, Patricia Mallia, *Migrant Smuggling by Sea* (2010) 17–26, 121.

as over those without nationality, as this will ensure the proper functioning of the measures provided for under part II of the Protocol.²²²

Combating Smuggling by Sea

Article 8 contains specific enforcement measures in relation to smuggling of migrants by sea. By and large, the Article sets out basic obligations and procedures for bilateral cooperation in intercepting, boarding, searching, and, where necessary, detaining vessels suspected of engaging in migrant smuggling.²²³ Article 2 *Migrant Smuggling Protocol* defines the term ‘vessel’ to include

any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

The *Interpretative Notes* further define word ‘engaging’ in the smuggling of migrants:

The word “engaged” in [Article 8] paragraphs 1, 2 and 7 of this article and in paragraph 1 of article 10 should be understood broadly as including vessels “engaged” both directly and indirectly in the smuggling of migrants. Of particular concern was the inclusion of both vessels actually found to be carrying smuggled migrants and vessels (“mother ships”) that transport smuggled migrants on open ocean voyages but are sometimes not apprehended until after the migrants have been transferred to smaller local vessels for landing purposes.²²⁴

Article 8(1) *Migrant Smuggling Protocol* concerns situations in which vessels used for migrant smuggling fraudulent fly foreign flags or show no flag. In these situations, the Article enables Signatories to seek assistance from other State Parties and obliges the requested State to provide assistance as soon as practicable:²²⁵

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

Article 8(2)–(5) set out content and procedural guidelines for requests (by the State appearing to be flag State) concerning two separate matters. The first concerns requests for confirmation of registry in that State (Article 8(2)) to which the requested State must respond expeditiously (Article 8(4)):

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry [...].

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorisation made in accordance with paragraph 2 of this article.

The second matter concerns requests to the flag State for authorisation to take action against vessels suspected of engaging in migrant smuggling. Such action may include boarding and searching the vessel as well as other appropriate measures, Article 8(2):²²⁶

²²² *Legislative Guides*, 386.

²²³ On operational and technical approaches to migrant smuggling by sea see, generally, Patricia Mallia, *Migrant Smuggling by Sea* (2010) 27–39.

²²⁴ *Interpretative Notes*, Note 100.

²²⁵ See further, David McClean, *Transnational Organized Crime* (2007) 405–406.

²²⁶ See further, Patricia Mallia, *Migrant Smuggling by Sea* (2010) 123–125.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may [...] request authorisation from the flag State to take appropriate measures with regard to that vessel. The flag State may authorise the requesting State, *inter alia*:

- (a) To board the vessel;
- (b) To search the vessel; and
- (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorised by the flag State.

If the measures are approved by the flag State and subsequently taken by the requesting State, the flag State concerned must be informed of the results of that measure, Article 8(3). This may also pave the way for further consequential action.²²⁷

David McClean notes that ‘nothing is said [in the *Migrant Smuggling Protocol*] about the form and content of requests, but plainly the requesting State will need to provide basic information about the vessel and the grounds for its reasonable suspicion that the vessel is being used for the smuggling of migrants.’²²⁸ He further notes that ‘[t]he request for authorisation may of course be rejected; there is no obligation to grant authorisation, nor are any criteria suggested for its consideration, but this is subject to the general obligation in Article 7 to “cooperate fullest to the extent possible to prevent and suppress the smuggling of migrants by sea”.’²²⁹

In its response to a request, the flag State may place limitations and conditions on the authorisation to the requesting State. Should additional measures be necessary, the requesting State may require further authorisation from the flag State unless these measures are necessary to relieve imminent danger to the lives of persons, Article 8(5):

- 5. A flag State may, consistent with article 7 of this Protocol, subject its authorisation to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorisation of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

In this context, it needs to be noted, however, that the ‘suppression of a criminal activity should not lead law enforcement officers to overlook the duty established under maritime law and custom to rescue those in peril at sea.’²³⁰

In order to facilitate and accelerate the processes set out in Article 8(1)–(5), the *Migrant Smuggling Protocol* encourages Signatories to designate one (or more) authority to receive and respond to requests made, Article 8(6):

- 6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorisation to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

No requests and authorisation are required if the vessel suspected of engaging in migrant smuggling is without nationality, Article 8(7):

- 7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board

²²⁷ David McClean, *Transnational Organized Crime* (2007) 408.

²²⁸ David McClean, *Transnational Organized Crime* (2007) 407.

²²⁹ David McClean, *Transnational Organized Crime* (2007) 407.

²³⁰ *Legislative Guides*, 387; cf Patricia Mallia, *Migrant Smuggling by Sea* (2010) 92–109, 126.

and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

Current Pakistani Law

Pakistan's immigration and emigration laws, and other laws and regulations relating to entry into and departure from Pakistan contain no specific mechanisms relating to seaborne migrant smuggling.

For the most part, issues relating to interception and enforcement of smuggling of migrants by sea are matters of maritime law. Relevant information about Pakistani maritime laws and their enforcement were unavailable at the time of writing and are thus not further assessed.

Assessment and Recommendation

The specific measures articulated in Article 8(1)–(5) *Migrant Smuggling Protocol* require the implementation of domestic legislation on matters such as 'the provision of powers to search and obtain information, powers of arrest and seizure, the use of reasonable force, the production of evidence of authority and the provision of appropriate legal protection for the officers involved.'²³¹

The *Legislative Guides* further suggest that:

Legislation should be drafted and implemented so as to ensure that officials are aware that the duty to effect a rescue has priority in such circumstances and that where there is evidence of peril at sea, vessels should be boarded whether there is a suspicion of smuggling or not.²³²

Moreover, Article 8(6), which requires the designation of a central national authority to deal with maritime cases of migrant smuggling, makes the implementation of legislation necessary. The *Legislative Guides* state that this

may require legislative action establishing an authority and providing for the necessary powers, in particular the power to authorise another State Party to take action against vessels flying its flag. In determining the appropriate location for their designated authority, States Parties should consider factors such as ease of access to the national shipping registry in order to provide confirmation of registry, ease of coordination with other domestic agencies, including maritime law enforcement authorities, and the existence of arrangements for the conduct of business on a round-the-clock basis. The designated authority should also be responsible for outgoing requests to other States parties. It should therefore be able to receive requests from domestic authorities—customs, police and other law enforcement agencies—and be in a position to assist in transmission to foreign States.

Article 8, paragraph 6, further requires States parties to notify their designated authority to the [UN] Secretary-General to permit a list of contact points to be maintained and circulated to all States Parties. Governments responding to this should consider providing essential contact information (addresses, telephone and facsimile numbers, hours of operation and the language or languages in which requests can be processed).²³³

Seaborne smuggling of migrants into and, more importantly, out of Pakistan is a phenomenon that remains poorly researched. Although there is a significant body of data and literature that demonstrate the scale and significance of migrant smuggling by sea in Pakistan, especially across the Persian Gulf, there is little information about the operators and *modi operandi* involved in this phenomenon.²³⁴ Without such information it is, however, impossible to assess the quality of legislation and enforcement action to prevent and suppress seaborne smuggling in Pakistan.

²³¹ *Legislative Guides*, 386.

²³² *Legislative Guides*, 387–388.

²³³ *Legislative Guides*, 387.

²³⁴ See, for example, UNODC, Country Office Pakistan & Country Office Afghanistan, *Crime Facilitating Migration from Pakistan and Afghanistan* (2009) 36.

To provide an accurate and meaningful assessment of migrant smuggling by sea from Pakistan and review the countermeasures set up to prevent, detect, and suppress this particular type of smuggling, it is necessary to conduct a separate investigation of these issues. It would be desirable to conduct an independent study of the patterns and levels of migrant smuggling by sea from Pakistan, focussing specifically on movements across the Persian Gulf. This study should also examine applicable domestic and international maritime laws, enforcement and interception efforts by Pakistan, Iran, Oman, UAE, and other Gulf States, and explore avenues for enhancing cooperation. For this purpose, it will be necessary to liaise directly with coast guard, customs, law enforcement, and other agencies in relevant countries and, insofar as possible, conduct site visits to key embarkation and disembarkation points.

Recommendation 25:

Conduct an independent study of migrant smuggling by sea from Pakistan, also including relevant domestic and international laws and enforcement arrangements.

6.2 Safeguard Clauses

The search and seizure of vessels suspected of smuggling migrants may create risks for the passengers, crew, cargo, and the vessel itself, especially if measures against the vessel are taken on the open seas. For this reason, it is important that any enforcement action is conducted with due regard for the safety of persons and cargo on board.

International Law

Article 9(1) *Migrant Smuggling Protocol* qualifies the measures set out in Article 8, by ensuring that any measures taken against a vessel suspected of smuggling migrants is carried with due regard for the safety of persons, their humane treatment, the need not to endanger cargo, not to prejudice legal or commercial interests, and not to endanger the environment:

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:
 - (a) Ensure the safety and humane treatment of the persons on board;
 - (b) Take due account of the need not to endanger the security of the vessel or its cargo;
 - (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;
 - (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

The principles set out in Article 9(1) are mandatory.²³⁵

If the action taken against the vessel is unfounded, State Parties are obliged to pay compensation for any loss or damage which may include, for instance, damage to the vessel itself, loss of charter hire income, loss of cargo, and compensation for the detention of and injury to the crew.²³⁶ Article 9(2) *Migrant Smuggling Protocol* reflects similar obligations under Article 110(3) *UNCLOS*:

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

²³⁵ See further, David McClean, *Transnational Organized Crime* (2007) 413.

²³⁶ See further, David McClean, *Transnational Organized Crime* (2007) 413–414.

Article 9(3) *Migrant Smuggling Protocol* seeks to ensure that any enforcement action does not affect the exercise of jurisdiction under international maritime law:

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

- (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
- (b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

Article 9(4) *Migrant Smuggling Protocol* reflects similar obligation under Articles 107 and 111(5) *UNCLOS* that measures against vessels suspected of engaging in migrant smuggling should only be taken by clearly marked and identifiable craft.²³⁷

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.

Current Pakistani Law

As mentioned previously in Section 6.1, Pakistan's immigration and emigration laws contain no specific mechanisms relating to seaborne migrant smuggling. Issues relating to interception and enforcement of smuggling of migrants by seas are matters of maritime law and beyond the scope of this assessment.

Assessment and Recommendation

Pakistan ratified *UNCLOS* in February 1997 and should therefore have legislation and practical measures in place to comply with the requirements set out in Article 9 *Migrant Smuggling Protocol*.

As stated previously, to provide an accurate and meaningful assessment of migrant smuggling by sea from Pakistan and review the countermeasures set up to prevent, detect, and suppress this particular type of smuggling, it is necessary to conduct a separate investigation of these issues. This study should also examine applicable domestic and international maritime laws, as well as enforcement and interception efforts by Pakistan. For this purpose, it will be necessary to liaise directly with coast guard, customs, law enforcement, and other agencies in relevant countries and, insofar as possible, conduct site visits to key embarkation and disembarkation points.

Recommendation 25 (repeat):

Conduct an independent study of migrant smuggling by sea from Pakistan, also including relevant domestic and international laws and enforcement arrangements.

²³⁷ See further, *Legislative Guides*, 388.

7 Travel and Identity Documents

The inspection of travel and identity documents by government authorities, especially at border control points, is an important tool to detect and prevent the smuggling of migrants. Accordingly, it is essential that government authorities have the skills, procedures, and equipment in place to properly examine identity documents and detect cases of document fraud. Furthermore, to prevent the forgery of identity and travel documents it is important that official documents are of a quality and contain security features so that they cannot be easily forged or altered.

The following Sections discuss the definition of ‘fraudulent travel or identity documents’²³⁸ and assess the technical measures available to prevent and detect the use of such documents in Pakistan. Offences relating to travel and identity document fraud are analysed separately in Part 3 of this report.

7.1 Use of terms

International Law

The term “travel document” includes any type of document required for entering or leaving a State under its domestic law and the term “identity document” includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.²³⁹

According to Article 3(c) *Migrant Smuggling Protocol* a travel or identity document is fraudulent if it

- (i) has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a State; or
- (ii) has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
- (iii) is being used by a person other than the rightful holder.

The *Interpretative Notes* provide that:

- (c) The words “falsely made or altered” should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. Furthermore, the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.²⁴⁰

The *Legislative Guides* further note that:

- (a) The document can either be “falsely made” from nothing or it can be a genuine document that has been “altered in some material way”;
- (b) “Falsely made” should include both documents that are forged or fabricated from nothing and documents that consist of genuine document forms, but information that is not accurate and put onto the form by someone not authorised to do so or who is not authorized to issue the document in question;
- (c) Whether a document is “falsely made” or “improperly issued” will depend in some cases on how national law treats cases where an official acts illegally or without authorisation. If a consular official issues a travel document beyond his or her powers, systems that would treat this as non-issuance would consider the document as having been made by someone not authorised to do so, falling under subparagraph (i). Systems that considered the basic issuance to have occurred would see the same document as having been “improperly issued” under subparagraph (ii). What is important is that drafters of national legislation

²³⁸ *Migrant Smuggling Protocol*, art 3(c).

²³⁹ *Interpretative Notes*, Notes 89, 104, 106.

²⁴⁰ *Interpretative Notes*, Notes 90, 106.

consider the approach taken by national law and ensure that all of the possible scenarios result in documents that are treated as “fraudulent” and that there are no gaps;

(d) Documents that have been altered must have been changed in some way that is material to the other offences established in accordance with the Protocol, such as changing the identity or photograph of the holder or the dates for which it was valid. If the document is “altered”, this must have been by someone not authorised to do so;

(e) “Fraudulent” documents also include documents that are genuine, but improperly issued through misrepresentation, corruption or duress. Here also the approach of drafters will depend to some degree on how domestic law treats cases where an official acts illegally or without authority;

(f) Finally, “fraudulent” documents include papers that are formally valid and have been validly issued, but are being used by someone other than the person to or for whom they were issued, whether the document in question has been altered (e.g. by changing a photograph) or not.

The purpose of these complex explanations is to ensure that countries comprehensively proscribe and criminalise any form of travel and identity document fraud, ranging from creating new documents, altering existing documents, to using another person’s document, and obtaining documents fraudulently, corruptly or coercively.

Current Pakistani Law

Pakistan’s laws do not provide definitions specifically relating to travel and identity documents. Section 470 *Penal Code* (Pakistan) defines the term ‘forged document’ as ‘a false document made wholly or in part by forgery’. It is thus clear that offences relating to forgery, discussed in earlier parts of this report, capture the creation of forged documents, as well as the alteration of existing documents.

As in Section 3.3 above, s 18(a) *Emigration Ordinance 1979* (Pakistan) contains a specific offence relating document forgery for the purpose of emigration. Sections 463–476 *Penal Code* (Pakistan) contain general offences relating to forgery and other types of document fraud, and s 177 *Penal Code* (Pakistan) criminalises fraudulent representations to government officials.

Assessments

Pakistan’s laws relating to the definition of ‘fraudulent travel and identity documents’ cover, by and large, the same scope as the definition in Article 3(c) *Migrant Smuggling Protocol*. Domestic laws define and criminalise many forms of travel and identity document fraud, including creating new documents, altering existing documents, using another person’s document, and obtaining documents fraudulently.

7.2 Technical measures

International Law

Article 12 *Migrant Smuggling Protocol* requires Signatories to ensure that their travel and identity documents are of a quality that they cannot easily be falsified or misused and prevent their unlawful creating, issuance, and use. This includes such measures as technical elements to make documents more difficult to falsify, forge or alter, and administrative and security elements to protect the production and issuance process against corruption, theft or other means of diverting documents.²⁴¹

Article 12 Security and control of documents

²⁴¹ *Legislative Guides*, 374.

Each State Party shall take such measures as may be necessary, within available means:

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13 obliges State Parties to verify within a reasonable time frame the legitimacy and validity of travel and identity documents as requested by other Signatories.

Article 13 Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

Current Pakistani Law & Policy

The *National Action Plan for Combating Human Trafficking* identifies the following technical measures designed to detect document fraud in relation to trafficking in persons, which are equally relevant to migrant smuggling:

- Establishment of Personal Identification Secure Comparison Evaluation System (PISCES) at all major air, land and sea routes/checkpoints.
- To control document fraud, computerised National Identity Cards have been issued, replacing the old manual NIC.
- Similarly, a new Machine Readable Passport is also now being issued in place of the manual passport.
- An Automated Finger Impression System (AFIS) is also being created, instituting biometric features.
- Installation of forgery detection equipment at checkpoints.
- Replacement of manual border passes (rahdaris) by computerized border passes is also planned.²⁴²

The Plan further states:

- i. Ensuring that travelling or other identity documents are of such quality that they cannot easily be tampered, forged, misused, altered, replicated or falsified. This includes expanding, improving and expanding the coverage of Machine Readable Passports, including the overseas missions. Responsibility: Director General, Immigration & Passport, M/o Interior.
- ii. Creating expertise in the scientific and technical fields in forensic science concerning secure documentation and ensuring that national travel and identity documents are of the highest possible quality and security. Responsibility: Ministry of Interior, National Database & Registration Authority.²⁴³

Personal Identification Secure Comparison and Evaluation System (PISCES)

To prevent the use of fraudulent and forged travel documents, Pakistan introduced PISCES, the Personal Identification Secure Comparison and Evaluation System. PISCES is an electronic database operated by the FIA to collect information on persons entering and exiting Pakistan. It allows officers to collect and compare information, identify persons and, if necessary, question and detain persons of interest. PISCES was initially introduced at all international airports in Pakistan in 2004 and now operates at twelve airports, four seaports, five land border crossings, and two

²⁴² Pakistan, Ministry of Interior, *Combating Human Trafficking* (2006).

²⁴³ Pakistan, Ministry of Interior, *Combating Human Trafficking* (2006).

(international) railway stations across Pakistan. Further expansion of the PISCES project is anticipated in the near future.²⁴⁴

The database records all incoming and outgoing passengers and links all points of entry and exit. The information on PISCES is shared among all law enforcement and immigration agencies and intelligence services in Pakistan. Since its inception, the database has been vital in identifying persons travelling on forged and stolen passports, and fraudulent visas. It is also of great use in identifying cases and patterns of migrant smuggling and human trafficking, and assists in the identification and arrest of persons wanted by Interpol and foreign law enforcement agencies.²⁴⁵

Other measures relating to document fraud

In addition to the FIA, the Director-General of the Immigration and Passport Division of the Ministry of Interior has responsibility for some aspects relating to immigration control and for ensuring the legitimacy, security, and control of travel and other identity documents.²⁴⁶ The National Database & Registration Authority under the Ministry of Interior is responsible for ensuring that Pakistani travel and identity documents are of adequate quality to prevent forgery.²⁴⁷

Other measures to prevent and suppress document fraud include a computerised national identity card, machine readable passports, and automated finger print impression system.²⁴⁸

Assessments and Recommendation

Pakistan comprehensively addresses all technical matters relating to travel and identity document fraud in its *National Action Plan for Combating Human Trafficking* and has implemented many policy objectives through practical measures. Implementation of some requirements under the *National Action Plan* and under international law, especially in relation to verifying the authenticity of travel and identity documents does not require legislation²⁴⁹ and it appears that Pakistan has allocated the necessary resources and made the necessary administrative changes to comply with international requirements.

The *Legislative Guides* further note that '[i]mplementing the requirement to verify travel or identity documents will generally not require legislation, since virtually all States already do this on request, but may require resources or administrative changes to permit the process to be completed in the relatively short time frames envisaged by the Protocol.'²⁵⁰

Measures relating to the improvement of the technical standards of documentation issued by Pakistani authorities may be a legislative matter²⁵¹ which is, however, not only related to migrant smuggling and thus not further explored in this report. To assess the standard of Pakistani

²⁴⁴ Pakistan, FIA, *Personal Identification Secure Comparison and Evaluation System (PISCES)*, available at www.fia.gov.pk/prj_pisces.htm (accessed 27 Aug 2010).

²⁴⁵ Andreas Schloenhardt & Brendan Hall, *Irregular Migration and Associated Crime in Pakistan* (2010) 21.

²⁴⁶ Pakistan, FIA, *Pakistan National Action Plan for Combating Human Trafficking*, available at www.fia.gov.pk/HUMAN.htm (accessed 27 Aug 2010).

²⁴⁷ Pakistan, FIA, *Pakistan National Action Plan for Combating Human Trafficking*, available at www.fia.gov.pk/HUMAN.htm (accessed 27 Aug 2010).

²⁴⁸ Pakistan, Ministry of Interior, *Combating Human Trafficking* (2006) para 9.

²⁴⁹ *Legislative Guides*, 374.

²⁵⁰ *Legislative Guides*, 389; see also Sections 5.4 and 5.5 above.

²⁵¹ *Legislative Guides*, 374–375, 389.

documents and the processes of issuing these documents, it will be necessary to consult directly with Pakistani authorities and also cooperate with technical experts.

8 Summary of Recommendations

8.1 Introduction

Recommendation 1:

Commission a separate, independent analysis of labour trafficking from Pakistan and allegations of migrant smuggling, exploitation, corruption, and money laundering, with a particular focus on Pakistani migrant workers in the Persian Gulf region.

8.2 Definition and scope

Recommendation 2:

Insert a definition of ‘smuggling of migrants’ as per Article 3(a) *Migrant Smuggling Protocol* into the *Foreigners Act 1946*. Ensure adequate training of law enforcement and judicial officials on the proper meaning of ‘smuggling of migrants’.

Recommendation 3:

Amend definition of ‘human trafficking’ in s 2(h) *Prevention and Control of Human Trafficking Ordinance 2002* to remove any possibility that it may be interpreted to criminalise the smuggling of migrants.

Recommendation 4:

Ensure incidences of migrant smuggling and trafficking in persons in Pakistan are recorded correctly on the basis of international law definitions.

8.3 Criminalisation of smuggling of migrants

Recommendation 5:

Amend s 13A *Foreigners Act 1946* to require an intention to obtain a financial or other material benefit.

Recommendation 6:

Amend the offence in s 18(a) *Emigration Ordinance* to connect the forging of a document to the requirement that the purpose of that conduct is to enable the smuggling of migrants.

Recommendation 7:

Insert travel and identity document fraud offences as per Article 6(1)(b) *Migrant Smuggling Protocol* into the *Foreigners Act 1946*, ensuring the offences can only be proved when committed for the purpose of enabling the smuggling of migrants.

Recommendation 8:

Create an offence of harbouring illegal non-residents (for the purpose of migrant smuggling).

Recommendation 9:

Extend liability for offences under s 18(a) *Emigration Ordinance 1979* to attempts.

Recommendation 10:

Amend the offence in s 18(a) *Emigration Ordinance 1979* to criminalise participating as an accomplice to the offence.

Recommendation 11:

Amend the *Foreigners Act 1979* to include ‘organising or directing another person to commit an offence’.

Recommendation 12:

Incorporate aggravating circumstances as per Article 6(3) *Migrant Smuggling Protocol* into relevant offences.

8.4 Protection and prevention

Recommendation 13:

Insert into the *Foreigners Act 1946* and the *Emigration Ordinance 1979* an explicit exclusion of smuggled migrants, children, and persons fleeing from persecution, war, and torture from criminal liability for offences relating to migrant smuggling.

Recommendation 14:

In conjunction with UNHCR, commission an independent assessment of Pakistan’s refugee and humanitarian immigration system and compliance with relevant international law and best practice standards.

Recommendation 15:

Insofar as current Pakistani laws do not meet basic requirements of international human rights laws, existing laws should be amended to preserve and protect the basic rights of smuggled migrants and illegal residents, protect smuggled migrants against violence, and provide immigration detainees with relevant consular rights.

Recommendation 16:

In conjunction with IOM and donor countries, explore the feasibility of offering smuggled migrants temporary protection and basic access to accommodation, food, medical care, and legal assistance.

Recommendation 17:

Explore avenues to develop a set of standards pertaining to the treatment of smuggled migrants to ensure their human rights are not violated.

Recommendation 18:

In cooperation with UNHCR, explore avenues to institute basic protection mechanisms for refugees and other displaced persons in Pakistan.

Recommendation 19:

In cooperation with IOM, conduct an independent assessment of administrative processes and available cases pertaining to the return of smuggled migrants to and from Pakistan.

Recommendation 20:

Develop a comprehensive education and awareness-raising strategy that addresses the smuggling of Pakistani nationals as well as the smuggling of foreign nationals into Pakistan.

Recommendation 21:

Develop a research capacity to identify, examine, understand, and address the causes, consequences, and dynamics of migrant smuggling in Pakistan in close collaboration with government agencies, civil society groups, international organisations such as UNODC, UN.GIFT, IOM, UNHCR, and others.

8.5 Law enforcement and border measures

Recommendation 22:

Conduct an independent assessment of the border control and customs processes and procedures in Pakistan.

Recommendation 23:

Commission an independent assessment of international law enforcement, prosecutorial, and judicial cooperation laws, regulations, and procedures in Pakistan.

Recommendation 24:

Examine the feasibility of setting up bilateral and regional agreements and other arrangements to combat migrant smuggling in Pakistan and neighbouring countries.

8.6 Smuggling of migrants by sea

Recommendation 25:

Conduct an independent study of migrant smuggling by sea from Pakistan, also including relevant domestic and international laws and enforcement arrangements.

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