

# The Compatibility of the Protocol against the Smuggling of Migrants by Air, Land and Sea with International Human Rights Law

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## Abstract

This paper aims to analyze whether the United Nations Protocol against the Smuggling of Migrants by Air, Land and Sea is compatible with international human rights law. This analysis is premised on the assumption that the reality of the migratory experience is more complex than the Protocol presents it to be. The analysis will be done by carrying out a comparative analysis between the contents of the protocol and the different rules and norms within international human rights law that may intersect or clash with migration control related to the Protocol. The aim is to show that the Protocol itself is a reinforcement of sovereignty and that is not compatible with human rights laws and precepts because it indirectly leads to discrimination and the potential *refoulement* of refugees.

## Introduction

“...An illegal immigrant is not an outlaw deprived of all benefit and all protections which the law affords.” - Lord Justice Staughton

Irregular migration is one of the most controversial topics in many Western nations. The existence of borders between states, great economic inequalities and the exclusivity of citizenship has created the current migration regime, whether through regular or irregular means. These factors, in addition to the rise of international terrorism and the domestic politicization of migration have created a generally unfavorable outlook on migration in the West.

As a result, there has been a rise in stringent immigration laws and policies at the national and regional levels in States of migration destination. The increase in harsh policies has forced many migrants to resort to criminal groups like smugglers to facilitate their migration. It is a great source of revenue for such criminal groups. The fact that many migrants rely on criminal groups for the facilitation of their movement puts migration within the sphere of criminal law.

Nevertheless, irregular migration is also a human rights issue because it involves the safety and interests of individuals. It is the movement of persons, in conditions that are usually precarious, exposing them to dangers including unhealthy conditions of transportation and even the potential loss of life. Irregular migration is often spurred by human rights abuses and violations, economic hardships and discrimination. Irregular migrants have multiple layers of vulnerabilities due to their lack of status in the country of destination and limited access to resources.

As a result, while the conventional criminal justice approach is needed stop smugglers, a human rights approach is also critical to remove migrants from the position of vulnerability that leads them to rely on irregular means of migration. At the international level, attempts to reconcile both aspects of irregular migration have been made. The United Nations Convention on Transnational Organized Crime and its Protocols were created to address both the criminal aspect and the human rights aspect of transnational crime. The Protocols delineate irregular migration as being facilitated through either trafficking or smuggling and focus on ways to prevent, suppress and punish those transnational crimes while protecting the migrants involved.

This paper focuses on whether this aim of reconciling criminal justice and human rights is effective or feasible. I will attempt to study the compatibility of one of the Protocols with the general idea of human rights found in international human rights law. Because much research has already been carried out on the Trafficking Protocol, the subject of this study will be the Smuggling Protocol.

The study on compatibility will be carried out by first of all looking at the general development of legislation on irregular migration in international law up to the point of the creation of the Protocol. Secondly, I will look at the role the migration control, State sovereignty and general international law has played in shaping the provisions of the Protocol. Thirdly, I will use the human rights provisions within the Protocol to discuss the human rights of smuggled migrants, juxtaposing the Protocol with State practice and the international, regional and domestic legal stances on the rights of smuggled migrants.

The core question of the paper is whether the provisions of the Protocol pose a compatibility problem when juxtaposed with the existing body of international human rights law. I will be addressing specific human rights such as: the right to leave and the right to life with core human rights principles like non-refoulement, non-discrimination, and due process.

The main argument is that the Protocol is an instrument that States purport to use to protect their sovereignty due to the perception of irregular migration as a threat to the cohesion of the State as evidenced in the Protocol's strong criminal justice focus. The paper secondly argues that current state of international law regarding the sovereignty of the State and the practice of human rights are not at the stage where the rights of irregular migrants can be truly protected as evidenced in the contradictions and problems within the Protocol and State practice. The third argument is that the

elasticity of the culture of human rights allows it to contract and expand according to the rate of the evolution of State sovereignty and international legislation on irregular migration.

### Migration Control and its interaction with the Smuggling Protocol

#### 1.1 A Brief Survey of the Development of Legislation Regulating Irregular Migration in International Law

International legislation regulating transnational unauthorized migration began with international agreements like the Convention for the Suppression of White Slave Traffic in 1904.<sup>1</sup> Subsequent Conventions adopted by the League of Nations in the 1920s and 1930s were also focused on trafficking. By 1949, there was a UN Convention for the *Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.

In the past, international legislation on irregular migration mirrored the growing consciousness among States about the dangerous nature of unlawful migration of persons between countries. At this point, it was the purpose of the “trafficker” that counted and not those of the migrant.<sup>2</sup> Charitable organizations were charged with most of the responsibilities regarding the welfare and rehabilitation of victims; it had little to do with the State.<sup>3</sup>

Since then, there has been a change in the perceptions and responses of States. States have moved from an awareness of the nature and existence of illegal immigration to a more active, self-protective, criminal justice and law enforcement perspective on the issue. Additionally, international human rights norms have been woven substantially into the fabric of legislation on irregular migration, creating a richer tapestry. Globalization particularly also played a role in shifting the focus of States to irregular migration as an issue of State sovereignty. The spectrum has now broadened the focus from just “trafficking” to include “smuggling”, not only of people, but also of certain goods.<sup>4</sup>

This shift specifically accelerated in the 1990s, when the UN General Assembly (GA) adopted a resolution on international cooperation on “smuggling” of migrants with a focus on criminal justice.<sup>5</sup> States were also becoming aware that irregular migration needed to be codified as an international offence to protect national sovereignty and border integrity.<sup>6</sup> Specifically, Italy called for international legislation on “smuggling of people by sea” due to the massive influx of migrants into its territory at the time.<sup>7</sup> However, Austria was the State that put forward “smuggling” as a “transnational” crime in 1997.<sup>8,9</sup>

By 2000, the UN Transnational Organized Crime Convention (UNTOC) came into existence in Palermo, Sicily, and entered into force in 2003. The Convention gave a definition of ‘transnational’ crime, attaching three protocols on three crimes of human trafficking, human smuggling and the illegal manufacturing and trafficking of firearms.<sup>10</sup> The Protocols related to migration touched on all forms of migration (air, land and sea), drawing up on human rights protections for victims.

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<sup>1</sup> See 1904 International Agreement: 92 UNTS 19 / [1949] ATS 19

<sup>2</sup> See preamble of 1949 Convention: 96 UNTS 271 / UN Doc. A/RES/317, 2 December. See also: International Council of Human Rights Policy. *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*. Geneva, 2010, p. 81.

<sup>3</sup> See 1949 Convention, Article 16.

<sup>4</sup> International Council of Human Rights Policy. *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*. Geneva, 2010, p. 82. The shift in the perception of migrants has been from rescue to deterrence. See Van Selm et al. *International Migration and Security: Opportunities and Challenges*. Abingdon, Routledge 2005, p. 76.

<sup>5</sup> See GA Resolution 48/102 (December 20, 1993).

<sup>6</sup> This led to the meeting of the Commission on crime prevention and criminal justice in 1992 by ECOSOC. See Report of the Secretary-General on measures to combat the smuggling of illegal migrants, E/CN.15/1997/8, 18 February 1997.

<sup>7</sup> See IMO doc. LEG 76/11/1, August 1997 (Proposed Multilateral Convention to combat Illegal Migration by Sea). See also: Kirchner Andree and Schiano di Pepe Lorenzo. *International Attempts to Conclude a Convention to Combat Illegal Migration*. International Journal of Refugee Law Vol. 10, no. 4, p. 665

<sup>8</sup> Austria submitted a draft Convention against the Smuggling of Migrants at the UN General Assembly’s 52nd Session (UN doc. A/52/357, 17 September 1997). There was still no standard definition of “smuggling” or “trafficking” at this point, both terms were used interchangeably.

<sup>9</sup> See A/RES/51/62, January 28, 1997 and A/RES/53/111, January 20, 1999.

<sup>10</sup> See Supra note 7.

The Protocols to the UNTOC brought into existence the distinction between migration based on consent and migration based on coercion. It also delineated the relationship between the enablers of migration and the migrants (exploitation versus commercial transaction). The Protocol against Smuggling defines smuggling as the “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national.”<sup>11</sup>

On the other hand, the Protocol to prevent Trafficking delineates trafficking 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.”<sup>12</sup>

The Convention heightened the criminal justice response to the perpetrators of such crimes across borders, obligating States to cooperate to fight against transnational crime.<sup>13</sup> Most importantly, the Protocols created new and specific categories of migrants that did not exist in international law before. Having looked briefly at how international law affecting irregular migration developed, it follows to look at why it developed this way and how this has affected the provisions of the Smuggling Protocol, State practice and perceptions of migration.

## 1.2 Migration as a matter of State Sovereignty and Public Order

Migration is described by some as the last bastion of State sovereignty.<sup>14</sup> After the World Wars, the sovereignty of States has become more limited with the proliferation of human rights norms and instruments. Consequently, issues like irregular migration that further undermine the States control over its territory have become high priority.

Catherine Dauvergne points out that territory is necessary for sovereignty to be viable and that as long as population remains confined to territory, migration will always be an issue of State sovereignty.<sup>15</sup> Dauvergne also holds that migration activates State power since interception, detention, and deportation are all within the powers of the State. Since both regular and irregular migration affect the makeup of the State, it brings to the fore, questions of citizenship, the identity of the State itself and the States control of power and its borders.<sup>16</sup> When irregular immigration is rife, it may be an indication that the State is not in control of its borders and that the sovereignty of the State is weakening.

The conventional concept of sovereignty is that a States control over its borders and the exclusivity of the State from outsiders as the most important features of State sovereignty. According to this concept of sovereignty, the State should be insusceptible to the interference of others. States also have the sovereign prerogative to favor their citizens over outsiders/ others.

Migrants are classified the “other” and as a result, migration (irregular or otherwise) will remain an issue affecting the sovereignty of the State. As such, it will be treated as a matter that affects public order and that needs to be under some sort of control.<sup>17</sup> This is amplified by the rise of international terrorism in recent years, which has served to

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<sup>11</sup> Smuggling Protocol Article 3 A/55/383 (Annex III, p. 62) / [2004] ATS 11.

<sup>12</sup> Trafficking Protocol Article 3 A/55/383 (Annex II, p. 53) / [2005] ATS 27.

<sup>13</sup> See Articles 2, 3, 4, 5 and 6 of Smuggling and Trafficking Protocol.

<sup>14</sup> Dauvergne Catherine. *Sovereignty, Migration and the Rule of Law in Global Times*. 67 Mod. L. Rev 588 2004, p. 588. See also: V. Gowlland Debbas (ed.) *The Problem of Refugees in the Light of Contemporary International Law Issues*. Martinus Nijhoff, The Hague, 1996, p. xii.

<sup>15</sup> Id. at 594

<sup>16</sup> Id. at 592

<sup>17</sup> In 1985 the UN GA had drafted *the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, which was supposed to identify and codify the human rights of migrants but this became another useless/powerless instrument because States believed that it would deplete their sovereignty over migration issues. See A/RES/40/144, 13 December 1985.

increase the reach of sovereignty in the areas of public safety, freedom of movement, identity and security.<sup>18</sup>

The “war on terror” has prioritized immigration as one of the threats to national security and as a result, States have become increasingly defensive and tougher on illegal migration.<sup>19</sup> From the perspective of the State, irregular migration not only affects the sovereignty of the State but also creates enormous political, social, cultural and economic ramifications internally.

This phenomenon is also supported by the current state of international law; though migration is a universal and constant phenomenon, there only exists a right to leave one's country of nationality or origin.<sup>20</sup> There is no corresponding right, *ipso facto*, to enter another State in international law.<sup>21</sup> Entry into a State is at the core of state sovereignty because it directly affects the make-up of the State, its citizens, its security interest and its relations with other States. It is recognized that only States have the right to regulate immigration by issuing or refusing visas or residence permits.<sup>22</sup> If there was no limitation on freedom of movement it would be difficult for States to continue the tradition of territorial exclusivity and the State would lose the essence of its identity.

That there is no right to enter a State is reflective of the norms of the current international system, created by a range of issues ranging from globalization, terrorism, economic instabilities and inequalities and other non-traditional security threats to the existence of the State. The international system is still based on borders and the exclusivity of citizenship; therefore, the right to free movement cannot be an absolute right. Even the proliferation of human rights obligations under international law has not removed the limitations on the freedom of movement.

This is reflected specifically in human rights instruments like the International Convention on Civil and Political Rights (ICCPR), for example. Article 12 (2) of the ICCPR establishes the right to leave one's country as a fundamental human right. However, article 12 (3) limits the absoluteness of this right. The limitations on the right to leave are allowed when protecting national security interests and public policy concerns. States may perceive the smuggling of migrants as one of such concerns because it undermines immigration laws and policies and may be a means of “terrorists” to have access to their territory.<sup>23</sup> As a result, Article 12 (2) does not preclude States from excluding smuggled migrants from their territory.

States must justify any restrictions on the movement of irregular migrants under Article 12 (3) of the ICCPR. This means that without justifications, restrictions on the right to leave are in breach of the ICCPR.<sup>24</sup> Nevertheless, since there is only a right to leave and no right to enter, it follows that any attempt to enter a State without its stamp of approval will be deemed as a breach of its sovereignty in deciding who can enter its borders. The ICCPR is primarily a human rights instrument; therefore, its aim is to protect the civil and political rights of all people, especially those who

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<sup>18</sup> Ginsburg, Susan. Counter Terrorist Mobility: Shaping an Operational Strategy. Migration Policy Institute, February 2006. See also Young Mary A. *Smuggling and Trafficking of Refugees and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crime*. 27 Suffolk Transnat'l L. Rev. 101 (2003-2004) p. 106.

<sup>19</sup> Mallia Patricia. *Migrant Smuggling at Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Martinus Nijhoff Publishers, Leiden, 2010, p.18. A good example of State practice reflecting this perception of migration is the resulting case from the MV Tampa incident involving a ship full of irregular migrants seeking asylum in Australia were repelled to New Zealand and Nauru. In the *Ruddock v. Valdarlis* case, the Australian government supported its response of excluding the migrants from its territory by holding that it was its sovereign prerogative to decide on who enters its territories. Other case examples in Australia, like *Chu Kheng Lim V. The Ministry of Immigration* ((1992) 176 CLR 1) supports this perspective. *I will go into much more detail on the Australian example in Part Two*.

<sup>20</sup> See Article 12 of the International Convention on Civil and Political Rights. UN Doc. A/6316 (1966); 999 UNTS 171; Article 12. Article 13 (2) of the Universal Declaration of Human Rights holds that everyone has the right to leave his/her country, while Article 14 (1) stresses that everyone has the right to seek and enjoy asylum in other countries (G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). These rights are not absolute however.

<sup>21</sup> Satvinder Juss. Free Movement and the World Order. 16 (3) IJRL 289- 335 (2004).

<sup>22</sup> For example, see *Saadi v United Kingdom*, Grand Chamber Judgment, Application No. 13229/03, July 11, 2006, paragraph 72-73. See also United States Supreme Court, *Nishimura Ekiu v. US*, 1892, para. 659. See also Chetail Vincent. *International Legal Protection of Migrants and Refugees: Ghetto or Incremental Protection? Some Preliminary Comments* (2005), p 34.

<sup>23</sup> Supra note 20, Article 12 (3).

<sup>24</sup> Colin Harvey and Barnidge Robert P. *Human Rights, Free Movement and the Right to Leave in International Law*. 19 Int'l J. Refugee L. 1 2007, p. 14.

are most vulnerable to abuses. However, it was not able to overcome the establishment that assigns migration to the domain of State sovereignty, national security and public policy.<sup>25</sup>

The same goes for the protections within the International Convention on the Protection of All Migrant Workers and their Families (ICPMW). Though the Convention applies to all migrant workers, Article 68 and 79 supports the States sole right to control the admission of migrant workers and their families into its territory.<sup>26</sup> The Convention recognizes the plight of irregular migrants; however, it does not provide much protection for this group in its provisions. In fact, the ICPMW has much more protections for regular migrants than for irregular ones.<sup>27</sup> Therefore, the tradition of State sovereignty, as reflected in State practice and even in some international human rights instruments create such an atmosphere where smuggled migrants are perceived negatively and accorded little or no rights implicitly or explicitly.

### 1.3 The Aims of the Anti-smuggling Protocol and its intersection with State Interests and International Obligations

The UNTOC is not a human rights instrument at its core. As a result, its aims and purposes have a different focus. It is mainly a criminal law instrument and a framework for State action and cooperation on issues affecting State interests. Specifically, the Smuggling Protocol is essentially about migration control, and cooperation among States on that issue. It is a reflection of the contemporary perception that States have of migration and is a criminal justice response to smuggling that focuses on prosecution and punishment of a crime.<sup>28</sup> It has two main aims according to Article 2:

#### a) Strengthening State Control and Cooperation on irregular migration:

The Protocol reinforces the right of States to regulate migration within their territories because the very aim of the Protocol is to prevent and suppress migration that is outside the control and authorization of the State.<sup>29</sup> The Protocol affirms the right of the State to prosecute people for violating its national immigration policies.<sup>30</sup> It also aims to foster cooperation among States to prevent smuggling, which creates a community of practice and in turn, systemizes the authority of States on issues pertaining to migrant smuggling in international law.<sup>31</sup>

Via the Protocol, States are allowed to board vessel and search them if they believe that there might be smuggled migrants on board.<sup>32</sup> The Protocol, *inter alia*, concerns migration control but also deals with the legitimacy of identity and travel in international law.<sup>33</sup> This gives it a unique place among international instruments in that sense. The Protocol is part of the jigsaw puzzle of suppression conventions that aim to regulate the actions of non-state actors that are harmful to certain protected interests, which include migration control.<sup>34</sup>

The Protocol makes clear that migration remains within the domain of State sovereignty, enabling States to control migration and to maintain the *status quo* of territorial exclusivity while resolving an international problem. In terms of its aim in international law, the Protocol aims to strengthen the existing legal framework and State

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<sup>25</sup> If the ICCPR upholds the limitations on migration, regardless of the vulnerability of those involved, how much more an instrument whose focus is criminal justice and transnational crime?

<sup>26</sup> *International Convention on the Protection of All Migrant Workers and their Families*, Article 68 and 79, 2220 UNTS 3/ UN Doc. A/RES/45/158.

<sup>27</sup> *Id.* Part IV.

<sup>28</sup> See Benard Ryan and Valamis Mitsilegas. *Extraterritorial Immigration Control*. Koninklijke Brill, the Netherlands (2010), p. 153. See *supra* note 19, Article 6. See also Nadig Aninia. *Human Smuggling, National Security and Refugee Protection*. *Journal of Refugee Studies* vol. 15, no. 1, 2002, p. 9. See *supra* note 43 (Boister) p. 959.

<sup>29</sup> *Supra* note 20, Article 2

<sup>30</sup> *Id.* Article 6

<sup>31</sup> Brolan Claire. *An Analysis of Human Smuggling Trade and the Protocol Against Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective*. 14 Int'l J Refugee L. 561 2002, p. 594.

<sup>32</sup> *Supra* note 20, Article 8

<sup>33</sup> *Supra* note 33 at p. 13.

<sup>34</sup> Boister Neil, 'Transnational Criminal Law?' EJIL Vol. 14, No. 5 2003, p. 955.

practice/cooperation on the interception of vessels at sea, by upholding the Flag principle.<sup>35</sup> It strengthens customary international law as a result. Upholding the Flag principle in the Protocol also reinforces State sovereignty. In addition, Article 8 upholds the principle of non-intervention.<sup>36</sup>

There are certain problems that may arise as a result of this aim of the Protocol. This aim emphasizes crime and a criminal justice response as the core of stemming the smuggling of migrants. However, human rights are central to the reason people resort to smuggling in the first place. The Protocol also does not address what happens to smuggled migrants after they are intercepted. That area is left to the discretion of the State in question. By emphasizing crime, the primary focus becomes one of national or domestic interests, rather than the welfare of migrants.<sup>37</sup>

b) Calling for the protection of the basic rights of smuggled migrants:

Though the Protocol strengthens State control over migration, it also aims to protect migrants from being criminalized based on their status.<sup>38</sup> This reflects that States do recognize that smuggled migrants are vulnerable and in need of some sort of protection. Article 16 states:

1. 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.
2. 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.
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.
4. In applying the provisions of this article, States Parties shall **take into account** the special needs of women and children.<sup>39</sup>

It is evident through this language that though the Protocol aims to ensure the protection of migrants, however, it still remains up to the State to determine what the “appropriate measures”, “appropriate protections” or “appropriate assistance” means.<sup>40</sup> To whom should the measures and assistance be appropriate? Should the appropriateness be to the migrant or the State? Who decides what the level of appropriateness is? There seems to be an underlying ambiguity on the extent to which States should protect smuggled migrants.

State sovereignty is still the central goal, even though the Protocol is aiming to protect smuggled migrants human rights. There seems to be a mismatch between its call for the protection of migrants from criminal prosecution and leaving everything in the hands of the State (who may not afford to waste its resources on outsiders or non-citizens). This mismatch is also complicated by the Protocols reliance on the goodwill of States to abide to other overarching standards and obligations in international human rights law.<sup>41</sup>

It assumes that States already knows their obligations under human rights and refugee law and that States will fulfill those obligations (hence the terse references to these specific obligations within the Protocol). This is a clear message that the Protocol is not a human rights instrument and that States already know what international law says

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<sup>35</sup> Supra note 20, Article 15. The Protocol led States like New Zealand to include the flag principle as a jurisdictional requirement when dealing with people smuggling. See New Zealand 1961 Crimes Act Amendment no. 43, Section 98 C (2005). See also Australia Crimes Legislation Amendment, Act no. 141, 2002. See supra note 37 at 158

<sup>36</sup> See Supra note 20, Article 8.

<sup>37</sup> See supra note 37 (Benard Ryan and Valamis Mitsilegas eds.) at p. 161.

<sup>38</sup> Supra note 20, Article 16 and 19.

<sup>39</sup> Id.

<sup>40</sup> Bhabha Jacqueline. *Human Smuggling, Migration and Human Rights*. International Council of Human Rights Policy Review Meeting, Geneva, July 2005, p. 25.

<sup>41</sup> Supra note 20 (Smuggling Protocol) Article 19.



concerning the human rights and protection of migrants.<sup>42</sup> It leaves it up to States to keep the promises that they made by signing unto various human rights instruments and focuses solely on strengthening a concert response against the transnational crime of people smuggling. In reality, however, the rights of irregular migrants in international law are not as developed as other human rights as discussed earlier.

During the drafting of the Protocol, Article 16 contained a clause on the responsibility of the State concerning the acts of public officials when in contact with smuggled migrants. This article was later taken out because of State interests; thereby weakening the accountability of the State concerning the treatment it accords to smuggled migrants through its officials like the border police and search and rescue teams.<sup>43</sup> This further defeats the Protocol's aim of protecting the rights of smuggled migrants because further abuse of the rights of smuggled migrants may occur through the officials of the State when implementing migration control measures.

However, another dilemma is created by the dichotomies in the identification of migrants that the Protocols to the UNTOC create in the codification of international law on irregular migration, leading to inconsistencies and irregularities in interpretation and implementation of one of the major Instruments that focus squarely on irregular migration.

#### 1.4 Mixed Migration and the Compartmentalization of Migrant identities

The Protocol takes a perspective that supports State interests and only marginally refers to human rights protection for smuggle persons. Being the only instrument that directly deals with the issue of irregular migration and smuggled migrants, there is little or no conceptualization of migration outside of the transnational crime area. The Protocol could have been a sturdier instrument, if it was not limited, as it is, to transnational crime. Instead, the Protocol further blurs the line between migration control and state interest and as a result, impedes and minimizes the human rights aspect of migration inadvertently.

The UNTOC created in international law, distinctions in migration that do not necessary exist in reality. The *binary* characterization of trafficking and smuggling do not exist in practice, as identified by specialized organizations like UNHCR that deal directly with irregular migrants.<sup>44</sup> UNHCR has identified that migration flows are usually mixed, meaning that among a certain group of migrants, each migrant may fit into multiple categories.<sup>45</sup>

For example, a migrant may have been smuggled at first but his or her situation may have changed to one of trafficking during the process of migration. A smuggled migrant may also be a genuine refugee (according to the definition of the Refugee Convention) who paid to be smuggled out of his or her country due to a "well-founded fear of persecution".<sup>46</sup> There are always multiple reasons influencing why and how migrants migrate and different reasons why they choose certain methods of migration over others. Many refugees actually refer to smugglers for transportation. The experience of migration is on a continuum and a process with different stages, rather than a one-track experience.<sup>47</sup>

The UNTOC and its Protocols compartmentalizes the identities of migrants into binary, simple categories, when it is usually more complex in reality. This gives room for injustice and potential refoulement of real refugees and obscures what the actual rights of migrants are. It also enables States to take sweeping action against irregular migrants, under the classification of "smuggled".

The Smuggling Protocol assumes that there is little or no exploitation involved in the experience of smuggled migrants as opposed to trafficking. Smuggled migrants may be exploited by the smuggler in terms of how the payment

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<sup>42</sup> Supra note 40 (14 Int'l J. Refugee L. 2002) p. 596

<sup>43</sup> Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime*. Eleventh session, Vienna, 2-27 October 2000. A/AC.254/4/Add.1/Rev.6

<sup>44</sup> UNHCR. *Refugee Protection and Mixed Migration: a 10-Point Plan of Action*. January 2007.

<sup>45</sup> UNHCR. *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM Global Consultations on International Protection*, May 31, 2001, paragraph 9 (E/GC/01/11).

<sup>46</sup> Article 1(a), *Convention Relating to the Status of Refugees*. 189 UNTS 137/ [1954] ATS 5.

<sup>47</sup> Supra note 28 (Mallia Patricia) at p. 11.

for the service is extracted. It need not be monetary payment; it could be extracted through forced labor or sexual services.<sup>48</sup> Innocence is ascribed to victims of trafficking while smuggled migrants are complicit in the illegal act.

By basing this compartmentalization of irregular migrant types on the presence of consent or coercion, the Protocols to UNTOC further mystifies and complicates the status of irregular migrants and the protections that States must provide for them. It inevitably picks and chooses which migrants are victims and which ones aren't. This creates problems of identification, since the Protocol is unclear about specific characteristics of smuggled migrants outside of consent and or commercial transactions. Factual evidence differs from the law; the distinction between trafficked and smuggled migrants is based on consent, when in reality, some sort of consent is always present at the different stages of migration.<sup>49</sup> Consent and coercion are not as clear-cut as the Protocol presents. Consent may be disguised as coercion and vice versa.

The Protocol also reinforces the divide between what is "legal" versus what is "illegal" in the conceptualization of migration. This helps to relegate the identification of migrants and their movements to the sovereignty of the State, since the concept of legality or illegality rests upon national laws. It supports the exclusivity of the State and the exclusivity of citizenship.

The interpretations of article 9 and 16 on assistance measures that States should provide to smuggled migrants do not include provision of temporary residency as in the Trafficking protocol.<sup>50</sup> According to the Smuggling Protocol, States are supposed to provide only the most basic protections. This may lead to an interpretation that the state does not have any obligation to accept smuggled migrants into their territory, since such basic protections can be offered elsewhere and not necessarily on the territory of the State in question.

The drafting of the Protocol faced huge conflicting issues: the need to protect migrants from criminalization, the promotion of State sovereignty over their borders and the influence of the reason for migrating over the level of protection that the migrant can receive from the State. It uses strong terms to describe State sovereignty and migration control but is neutral on whether illegal migrants should be charged for domestic crimes or offences and on the specific obligations that States have towards smuggled migrants.

As articulated earlier, the Protocols to the UNTOC hold an important and unique position in international legislation on migration because they are the only instruments whose focus is on irregular migration and migrant smuggling. Others like the ICPMW address irregular migration marginally or as a secondary issue and offer more protections to regular migrants.<sup>51</sup> As we have seen, the Protocol has some inconsistencies between its aims and its perception and classifications of migrant identities and reasons for migrating. This leads to the most important question-*Is the Protocol compatible with International Human Rights Law?*

## The Compatibility of the Protocol with International Human Rights Law

### 2.1 The Human Rights of Smuggled Migrants according to the Protocol

In order to understand if the Protocol is compatible with international human rights law, I will start first by looking at what the Protocol itself says about State obligations towards smuggled migrants. There are two Articles in the Protocol that deal with the human rights of smuggled migrants. Firstly Article 16 on Protection and Assistance Measures holds that:

1. 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

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<sup>48</sup> UNICRI. Global Program against Trafficking in Human Beings: Human Smuggling and Trafficking: A desk Review on the Trafficking of Women from the Philippines. 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna. A/CONF.187/CRP .1, April 2000. See also Obokata, Tom. *Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law*. *Int'l J. of Ref. L.*, vol. 17 No. 2, 2005, p. 401.

<sup>49</sup> See supra note 13 at p. 97. See also supra note 49 (Bhabha Jacqueline) p. 27.

<sup>50</sup> See supra note 20 (Smuggling Protocol) Article 9 and 16.

<sup>51</sup> See supra note 35.

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.<sup>52</sup>

Secondly, Article 19, the Saving Clause of the Protocol states that:

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 recognized principles of non-discrimination.<sup>53</sup>

Here, the Protocol generally refers to the obligations under international humanitarian law and international human rights law, particularly the right to life, the right not to be subjected to inhuman or degrading treatment and the principle of non-refoulement. Additionally, the Protocol identifies the principle of non-discrimination as a part of the obligations that States have towards smuggled migrants. The Protocol enumerates principles of general international law to create a basic level of protections for smuggled migrants. This contrasts starkly with the specific and detailed protections afforded to trafficked migrants, which includes temporary permits, access to education and work, et cetera.<sup>54</sup>

The brevity of the Protocol's reference to human rights is evidence that the Protocol did not want to deal with it in an in-depth manner. Perhaps, it would have been much more difficult to encourage States to become signatory to the Protocol, had it been too explicit about State human rights obligations towards smuggled migrants. The dichotomies created by the Protocols in the identification of migrants would have been nullified if the Smuggling Protocol had been too unequivocal about the protection of migrants falling within that definition. Perhaps the drafters of the Protocol felt that it would be better to remain focused on international cooperation and a criminal justice response as the core of the Protocol, leaving human rights to the already established international agreements and conventions. However, as stated before, these different reasons for minimizing human rights in the Protocol might prove to do more harm than good in practice.

We will now look at specific human rights obligations that can arise in the implementation of the Protocol's objectives and how certain States and some international and domestic courts have responded in real cases of migrant smuggling.

## 2.2 The Non-refoulement Exception, the Right to Life and the Prohibition of Inhumane and Degrading Treatment

The Principle of non-refoulement is an established principle in international law via Article 33 of the Convention Relating to the Status of Refugees (1951). According to Article 33:

"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>55</sup>

Noll defines the principle of non-refoulement as the permission to "transgress an administrative border" of a State.<sup>56</sup> This definition looks at the principle as a forgoing of State sovereignty to live up to the international standard of

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<sup>52</sup> See supra note 20 (Smuggling Protocol) Article 16.

<sup>53</sup> Id. Article 19

<sup>54</sup> See supra note 21 (Trafficking Protocol), Article 6 and Article 7.

<sup>55</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 189 UNTS 137/ [1954] ATS 5, Article 33. Furthermore, the UNHCR Executive Committee regards the principle as having acquired a Peremptory status under international law (See General Conclusion on International Protection EXCOM Conclusions Number 25 (xxxiii). , 20 October 1982).

refugee protection and the culture of human rights in the international community. Protection from refoulement ensures that the right to life and the protection from inhumane and degrading treatment are upheld.<sup>57</sup> The idea of “forgoing” sovereignty is already at odds with the Protocol because the Protocol supports the sovereignty of the State over migration.

As discussed above, the Savings Clause of the Protocol holds that the carrying out of the obligations of the Protocol should not affect the principle of non-refoulement contained in the Refugee Convention when dealing with potential asylum seekers. This means that States are supposed to duly ascertain the status of the migrants and ensure that those who meet the criteria set out in the Refugee Convention are given the due protection. By including the principle of non-refoulement, the Protocol ensures that States *at the very least* ensure that all migrants (whether trafficked or smuggled) are fairly assessed and fairly treated during all the stages of migration control. The non-inclusion of the non-refoulement principle in the Protocol would have rendered it completely incompatible with international law because States would have been free to “refouler” or expel any irregular migrant without ascertaining their reasons for migration.

However, the inclusion of the principle in the Saving clause does not change the fact that smuggled migrants are already ascribed some sort of guilt for willingly consenting to “illegal” migration. This perceived consent, guilt and agency in the choice of migration sets the stage for States to act defensively as a response to intruders who willingly broke the immigration laws of the State. Article 6 (4) clearly leaves it up to States to decide whether or not to “take measures” against migrants whose actions are considered offences in domestic law.<sup>58</sup>

The principle of non-refoulement does not expressly affirm migrants’ access to the territory of a State or entrée to the procedures awarding the refugee status.<sup>59</sup> As a result, the inclusion of the principle of non-refoulement in the Saving Clause does not entitle smuggled migrants to any greater set of rights. Much rests on the discretion of the State and the States perception of the plight of the migrant. States have often responded defensively to the arrival or attempted arrival of smuggled migrants on their shores or borders. Very few are willing to grant permission for outsiders to “transgress” their administrative borders. Instead they employ different types of mechanisms to block migrants from reaching their territories; such mechanisms are referred to as non-entrée mechanisms.

a) Non-entrée policies as an obstruction to the principle of non-refoulement

#### **Example: Australia’s “Pacific Solution”**

A defensive response towards smuggled migrants has been seen numerous in situations of the interception of vessels at sea and at borders. A good and well-used example is the *MV Tampa* incident in August 2001, when a merchant ship rescued a vessel with 433 passengers on the high seas, on their way to Australia. Even though the rescuing ship was full beyond capacity and the conditions within the boat were unsanitary, Australia refused to give the *MV Tampa* permission to disembark on its shores. A month later, the ship was directed elsewhere for disembarkation through Australia’s agreement with Nauru and New Zealand.<sup>60</sup>

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<sup>56</sup> G. Noll. “*Seeking Asylum at Embassies: A Right to Entry under International Law?*” Int’l J. of Ref. Law 17, 2005, 542.

<sup>57</sup> The right to life and the Prohibition of Inhumane and Degrading Treatment are fundamental and non-derogable human rights that have been established in international law via the Universal Declaration of Human Rights, the ICCPR, the Convention Against Torture, etc. The Protocol acknowledges the primacy of this right both in the Saving Clause and in the Safeguard Clause (Article 9). In the context of Article 9, States must observe to protect the safety and humane treatment of the migrants on board vessels, regardless of their perceived status or reasons of migration. States are also obligated not to “take any measures to ensure that the vessel is environmentally sound”. This implies that the State should ensure that the migrants are removed from dangerous and life-threatening conditions and reduce their vulnerabilities.

<sup>58</sup> Supra note 20 (Smuggling Protocol) Article 6 (4). Some offences that migrants can be guilty of are: the breach of visa status, fraud, clandestine entry, etc. See Pacurar Andy (5 Eur. J. Migration & L. 265).

<sup>59</sup> Von Bogdandy A. and Wolfrum R. (eds.). *Max Planck Yearbook of United Nations Law*, Vol. 12, Koninklijke Brill, the Netherlands, 2008, p. 208.

<sup>60</sup> See supra note 37 (Benard Ryan and Valamis Mitsilegas eds.) pp. 347-374. See also supra note 67 at 224. Australia had increasingly taken a defensive stance against smuggled and irregular migrants since the 1990s.

Australian courts cited that it was within Australia's sovereign power to decide whether or not to receive migrants.<sup>61</sup> As stated earlier, with reference to migration control and State sovereignty, this is a viable argument that can be based on the current state of international law and specifically, the Smuggling Protocol itself. Australia was only guilty of refusing to carry out a first screening of the migrants to determine if there were refugees among them, especially because the *MV Tampa* and the migrants within were within the full control of Australia, therefore Australia was responsible for their fate.<sup>62</sup>

Here we see that the State has employed means to keep migrants out, regardless of non-refoulement considerations. Australia set a precedent on non-entrée policies that States could employ to circumvent the principle of non-refoulement.<sup>63</sup> Hence, even though the Protocol relies on the principle of non-refoulement in the Savings Clause, it is useless as long as States refuse to observe their human rights obligations and as long as migrants are perceived as a threat to State sovereignty and as breakers of the law. Instead of the cooperation that the Protocol exhorts, we see from the *Tampa* example that States instead transfer the burden to other States, showing the reality that it is very difficult to share the burden of irregular migration without risking refoulement.<sup>64</sup>

Australia employed the "Pacific Strategy", a policy employed after the *Tampa* incident to stop the movement of migrants towards Australia by boat. This is achieved via the excision of outlying islands from Australia's migration zone.<sup>65</sup> As a result, the areas in which migrants can claim asylum are drastically reduced leading to a consequent reduction of Australia's responsibility towards such migrants. Australia's Migrant Act makes it an offence to show false documents to Australian Authorities.<sup>66</sup> Additionally, the Crimes at Sea Act of 2000 stretches the application of Australia's criminal law extraterritorially.<sup>67</sup>

Australia's domestic law allows for the criminalization of migrants and since the Protocol through Article 6(4) leaves the matter of deciding whether or not to charge migrants for acts that breach their domestic law, it follows that while the Protocol aims to protect migrants from criminalization, this protection is not sturdy. It is abstract at best, since the Protocol does not explicitly require States to change all legislation that criminalizes any act of the smuggled migrant. Perhaps it goes with the fact that the Protocol did not want to totally remove the guilt and complicity of smuggled migrants in the act of "illegal" movement. However, as has been discussed above, the ascribing of guilt to only one type of migrant is not equitable because there are more than just two types of migrants and more than two reasons for the choice of the means of migration.

The *MV Tampa* case reinforces the non-existence of the right to enter another territory; States have no obligation to accept migrants into their territory. However, non-refoulement is extraterritorial; therefore, pushing the migrants to another territory does not reduce State obligations under Article 33 of the Refugee Convention.<sup>68</sup> "Illegal" migration happens when there is a crossing of national borders. The fact that Australia has excised outlying islands means that the migrants found within those zones are technically not breaking Australia's Migration Act.

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<sup>61</sup> See *Ruddock v. Vardalis*, 110 FCR 491, 2001 and FCA 1329, 2001. The Federal Court held that Article 33 of the Refugee Convention was not breached because the migrants were not sent to the frontiers of persecution (110 FCR 491, paras 126, 203 and paras 212-215).

<sup>62</sup> See *Vardalis v. Minister for Immigration and Multicultural Affairs and others*. V 900 of 2011 FCA 1297, 2001. It was held that Australia detained the migrants arbitrarily because their detention was for the purpose of migration control, rather than for purposes of screening and investigation related to refugee status determination. Australia had not consulted the migrants on the decision to send them to Nauru and New Zealand,

<sup>63</sup> Australia also amended the Customs Act of 1901 to validate actions against *MV Tampa* and any other such vessel and increased the powers of interdiction (See part 2, ss. 5-6 and sched. 2, cl. 7).

<sup>64</sup> Jurisdiction triggers the responsibility of the State towards such migrants. Therefore, Australia's Pacific Solution was a means of shirking this responsibility by diverting migrants elsewhere. See Amnesty International. *Australia-Pacific Offending Human Dignity-the Pacific Solution*. August 26, 2002, ASA/12/009/2002.

<sup>65</sup> Australia Migration Act 1958, s. 5 (C2004C05364) on definition of "excised offshore place". See also Migration Act 1958 s. 494AA.

<sup>66</sup> Id. s. s.233 A.

<sup>67</sup> *Australia Crimes at Sea Act*. C2004A00605, Act no. 13, 2000.

<sup>68</sup> See supra note 55 (Convention on the Status of Refugees) at Article 33. See UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007.

Australia claimed that to prevent illegal migration, it was crucial to amend the Migration Act. However, the prevention of the violation of migration law is a minor interest and as a result, it does not warrant such intervention of the State.<sup>69</sup> The act of excising its own territory to prevent smuggled migrants from coming in is disproportionate to the foreseen violations that the migrants may commit.<sup>70</sup>

Australia was so intent on blocking migrants from entering its territory that it became creative with its use of non-entrée policies. In the context of domestic politics, it was in fact a political strategy to win the votes of Australians in the coming elections.<sup>71</sup> The matter of migration has become so politicized due to the rhetoric of fear, “aliens”, “terrorists” and “illegals” that politicians are often tempted to use it as a tool to sway public opinion in their favor.

As a result, while States have international obligations relating to the human rights of migrants like non-refoulement, there are internal pressures like domestic politics that interfere with this obligation. Hence, the bare mention of the principle of non-refoulement in the Smuggling Protocol does not have much impact on the reaction of the State to irregular migrants. Additionally, the Refugee Convention did not foresee the phenomenon of “boat people” when the Convention was being drafted. As a result, States can argue that the principle of non-refoulement does not apply to them.<sup>72</sup> Hence, the presence of non-refoulement in the Protocol does not guarantee actual protection of smuggled migrants.

### **Example 2: The Agreement to Stop the Clandestine Migration of Residents of Haiti to the US (1981)**

There are numerous instances where non-entrée policies have blocked the principle of non-refoulement and affected the right to life and the prohibition of inhumane and degrading treatment.

Another example is the practice of the United States via her Interdiction Agreement with Haiti, through which the US has conducted interdiction and return of numerous Haitian migrants on the high seas.<sup>73</sup> When Haitian migrants petitioned this act, the US Supreme Court held that it was part of the exercise of the sovereignty of the State to intercept and return Haitians on the high seas and on US territories and as a result, there was no breach of human rights involved in this practice.<sup>74</sup> According to the US Supreme court, Article 33 on non-refoulement and domestic law did not place any hindrances on the President’s capacity to order the return of Haitians.<sup>75</sup> The Court also held that applying Article 33 extraterritorially would lead to the entitlement of “dangerous aliens” to certain benefits and protections and reinterpreted the term “return” as a defensive act of resistance at the border.<sup>76</sup>

On the other hand, the Inter-American Commission on Human Rights asserted that it is a breach of human rights for the US to interdict and return Haitians in the high seas. The reasoning of the Commission was that the US had breached its obligations under Article 33 of the Refugee Convention because the US did not clearly ascertain the real status and needs of the migrants before repatriating them. The Commission held that this resulted in the breach of the

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<sup>69</sup> Supra note 68 (Von Bogdandy A. and Wolfrum R. eds.) p. 233.

<sup>70</sup> The “intent” of the migrants was to go into Australia originally. The act of migration was not directed towards Nauru or New Zealand. Therefore, any measures of immigration control carried out against those migrants in New Zealand and Nauru is also disproportional and weakens non-refoulement principle.

<sup>71</sup> Supra note 23 (Dauvergne Catherine), p. 605.

<sup>72</sup> In the Appeal Judgment on Tampa, the Federal Court held that though customary international law imposes an obligation on coastal states to provide humanitarian assistance to vessels in distress, international law imposes no obligation on the coastal state to resettle those rescued in the coastal states territories (See Federal Court of Australia Minister for Immigration and Multicultural Affairs & Ors v. Eric Vadarlis V1007/01, and V1008/01 FCA 1329: Beaumont J, para 126, French J para 203).

<sup>73</sup> *Agreement to Stop Clandestine Migration of Residents of Haiti to the United States*. ILM 20, 1198 et seq. 1981 or 46 Fed Reg 48109 (1981), 3 CFR, 1981 Comp, 180. Because of the Agreement, thousands of Haitians were interdicted. There were no procedures to protect those who qualified for asylum. The Kennebunkport Order of May 1992 (Executive Order no. 12.807) allowed for interception on high seas and direct return of migrants to Port- au- Prince without screening. See also Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

<sup>74</sup> The Kennebunkport Order led to litigation on behalf of the migrants. See *Haitian Refugee Center v. Baker* (953 F.2d 1498, 1992) and *Haitian Refugee Centers Council v. McNary*, (969 F.2d 1326, 1330, 1992). In both cases, migrants claimed that the US violated of 234(h) (1) of its Immigration and Nationality Act.

<sup>75</sup> *Sale, Acting Commissioner INS v. Haitian Centers Council*, 509 U.S. 1993. (509 US 180-182, 113, s. ct 2549, 1993).

<sup>76</sup> *Id.* ILM 32 1053 and 1054, 1993. See supra note 67, 205- 246.

right to life (under Article 1 of the American declaration of the Rights and Duties of Man) due to the level of force used against during the act of repatriation, which led to the loss of lives.<sup>77</sup>

When the State refuses the entrance of a vessel into its territorial waters due to suspicion of unlawful passengers, this may lead to refoulement. Both the US and Australia attempted to send back vessels without going through the prescribed procedures in the Refugee Convention. Both States went *beyond* what the law allows both under domestic and international law to stop irregular migration. The exception to the principle of non-refoulement in Article 33 (2) of the Refugee Convention holds only where there is a “clear and critical risk to the security of the State”.<sup>78</sup> It is arguable that irregular migrants do not pose this level of threat to the security of the State.

### **Example 3: *Xhavara v. Albania and Italy* (the Right to Life)**

In European Human rights case law, the right to life can be violated through the States measures to suppress “illegal” migration. The European Court of Human Rights in the case of *Xhavara v. Albania and Italy* held that contracting States are liable for the violation of the rights of migrants by State actors (including border police) involved in the measures of both intra-territorial and extraterritorial immigration control.<sup>79</sup> This shows that there are limits to the States discretion on the treatment of irregular migrants within the European context. The measures of migration control should not surpass the obligation to protect the lives of migrants.

This seems mismatched with the Protocols inclination to leave the discretion up to States to decide what measures to accord to smuggled migrants (hence the removal of Article 16(4) from the draft of the Protocol, which would have made State actors responsible and accountable for the violation of the rights of migrants during migration control). The lack of the inclusion of accountability of State officials when dealing with irregular migrants in the Protocol is a gaping hole that allows for injustices to occur during the process of Immigration control. There is no article within the Protocol that explicitly regulates or limits the behavior of State officials like border police. This creates some incompatibility of the Protocol with the right to life, protection from inhumane and degrading treatment and the principle of non-refoulement.

### **2.3 The Principle of Non-discrimination and Smuggled Migrants**

The principle of non-discrimination is also another established principle in international law and is reflected in all the human rights instruments today, both at the international, regional, national and even sub-national level. All the measures in the prevention, suppression and punishment of smuggling and in the process of immigration are supposed to be done in a non-discriminatory way.<sup>80</sup> However and as stated earlier, the Protocol’s definition of smuggled migrants sets them up for discrimination because they are not identified as “victims” who require the protection of the State.

The compartmentalization of migrants into very strict and limited binary identities is the reason why the principle of non-discrimination is not really reflected within the Protocol. States want to jealously guard their borders and the Protocol increases the likelihood that States will use the term “smuggled migrant” as a catchall or a box for all migrants that the State deems unwanted. It seems like for the migrant to be considered as a “victim”, the level of exploitation has to be so blatantly evident, which might not be the case, even for some migrants under the control of traffickers.

The Protocol does not even state what exactly it is to interpret and apply the measures of the Protocol in a manner that is compatible with non-discrimination. This is problematic because human rights are THE primary issue when it comes to irregular migration. Injustices and human rights violations are part of the reasons that people migrate.

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<sup>77</sup> *Haitian Center for Human Rights v. United States* Case 10.675, Report no. 51/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. para. 156-158 and 162- 166.

<sup>78</sup> See Hathaway J.C. *The Rights of Refugees under International Law*. Cambridge University Press, Cambridge 2005, p 336. The imperative nature of the war on terror is a counter-argument to this stance on irregular migration and the non-refoulement principle.

<sup>79</sup> See Admissibility Decision Application No. 39473/98 (*Viron Xhavara and Fifteen Others v Italy and Albania*), Eur. Ct. H.R. 39473/98, 2001. The measures of Italy had led to the loss of about 58 lives at sea.

<sup>80</sup> *Supra* note 20, Article 19 (2).

“Superficializing” human rights within the Protocol create holes in both interpretation and in implementation of the immigration control measures that the Protocol upholds. The Protocol does not make a thorough case for the human rights of smuggled migrants. The few and basic protections that the Protocol mentions are not detailed in a way that expresses the necessity and importance of a human rights- conscious immigration control procedure. In fact, since the procedure is about “control”, “prevention” and “suppression”, protection is on the sidelines.

### **Example: The Inter-American Court Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants (2003)**

In its Advisory Opinion to the US and Mexico on *the Juridical Condition and Rights of the Undocumented Migrants*<sup>81</sup>, the Inter-American Court of Human Rights held that the principle of non-discrimination is *jus cogens* “because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”<sup>82</sup> The Protocol mentions the principle in a succinct manner in the Saving Clause. This definitely affects the compatibility of the Protocol with human rights law because it glosses over fundamental principles of human rights law like non-discrimination, equality before the law and equal protection before the law. The Protocol does not highlight the necessity of non-discrimination towards smuggled migrants. We have seen already that the Protocol does not include any clause on accountability of State officials in the measures of immigration control associated with preventing, suppressing and punishing the smuggling of migrants.

The court recalled the Protection of Migrants resolution of the GA, which asserts the vulnerability of migrants in an irregular situation to support its opinion that irregular migrants are vulnerable and thus are in need of protection, rather than punishment based on their status. It is important to note however, that the Advisory Opinion allows for distinct treatment to be accorded to irregular migrants but with the stipulation that such treatment should be reasonable, objective, and proportional and should not harm human rights. The Advisory Opinion also upheld the sovereignty of the State to regulate movement and departure of undocumented migrant from the territory of the State BUT that this must be done with “strict regard for the guarantees of due process and respect for human dignity”.<sup>83</sup>

Throughout the Advisory Opinion, the court kept stressing that the objectives of migration policies should be implemented respecting and guaranteeing human rights.<sup>84</sup> According to the Court, in compliance with the principle of non-discrimination in international law, States must not directly or indirectly create situations of *de jure* or *de facto* discrimination. The Court gave examples like the enactment of laws (civil or administrative) or training State officials as ways of ensuring non-discrimination against irregular migrants while regulating migration.<sup>85</sup>

The Court was trying to show that the carrying out of immigration control could be in accordance with human rights law if these specific objectives are strictly adhered to. It is not adverse to the sovereignty of the State to treat smuggled migrants in a way that reasonable and that respects human rights. In fact, the better treatment and protection of migrants may lead to a better implementation of the Protocol (for example, leading to cooperation of migrants with the State in the investigations and arraignment of smuggling rings and gangs).

However, in Article 14, the Protocol does give States the responsibility to train its officials to treat smuggled migrants in a humane manner.<sup>86</sup> Concerning the principle of non-discrimination, the Protocol may have done better to stress the importance the supporting criteria in preventing non-discrimination, similar to those mentioned by the IACHR, i.e. reasonableness, proportionality, objective, strict regard to respect of human dignity and due process. This may have strengthened the obligations on States under the Protocol relating to non-discrimination against migrants. It would have also increased the general visibility of human rights within the Protocol.

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<sup>81</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003).

<sup>82</sup> Id. Para 100.

<sup>83</sup> Id. para. 119.

<sup>84</sup> Id. paras. 84, 89, 105 and 119.

<sup>85</sup> Id. para. 103.

<sup>86</sup> Supra note 20 (Smuggling Protocol) Article 14.



National immigration laws and law enforcement are inherently exclusionary therefore; extra emphasis is necessary in the Protocol to ensure that migrants are treated in a non-discriminatory manner during the implementation of the objectives of the Protocol and to adhere to the principle of non-refoulement. Non-discrimination and non-refoulement go hand-in-hand in guaranteeing the protection of migrant, at least until their status is determined.

To summarize this section, the Protocol is somewhat compatible with the principles international human rights law. This is because it does include Article 16 and Article 19 on non-refoulement, the right to life, non-discrimination and protection from inhumane treatment. However, some incompatibility arises due to the:

- a) Compartmentalization of the identities of migrants under the Protocol,
- b) Mystification of the actual obligations of States towards smuggled migrants within the Protocol and under international human rights law
- c) Lack of accountability to State officials toward smuggled migrants within the Protocol, which may lead to the violation of the right to life, the principle of non-refoulement and non-discrimination.
- d) Omission of the reasonableness, objectivity, proportionality of migration control measures in the Protocol.
- e) Failure to make a thorough case for the protection of the rights of smuggled migrants.

Additionally, the Smuggling Protocol does not go into any detail about the fate of migrants after they have been intercepted.<sup>87</sup> Its focus is on the border or at sea, when the State makes first contact with the smuggled migrant, i.e. during the process of interception. This next section will look at the procedural guarantees that smuggled migrants have both under the Protocol and in international law in general after interception.

### 3.1 Guarantees under the Protocol and International Law

Within the Protocol, there are two main procedural guarantees:

- a) Consular notifications: Article 16(5) on protection and assistance measures mentions a procedural guarantee when detention occurs by stating that:

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.<sup>88</sup>

- b) Safe and dignifying repatriation of smuggled migrants: Article 18 holds that:

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*.

It is important to note that Article 18 on repatriation focuses mainly on the responsibility of the State whose nationals are involved in the smuggling.<sup>89</sup> It creates obligations for the State of origin for the most part; only Article 18 (5) creates an obligation for the State of destination. Taking Article 16(5) and Article 18(5) together show a rather patchy framework for ensuring proper protection of smuggled migrants from the State in the processes after

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<sup>87</sup> There is no definition of “interception” in international law, however, the UNHCR has defined it as the procedures States employ to “prevent embarkation of persons on an international journey; to prevent further onward international travel by persons who have commenced their journey; or to assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law.” See UNHCR. Conclusion on Protection Safeguards in Interception Measures, 2003, No. 97 (LIV), UNHCR Executive Committee, 9 June 2000.

<sup>88</sup> This strengthens the customary international practice on consular notifications as held in the Vienna Convention on Consular Relations.

<sup>89</sup> Supra note 20 (Smuggling Protocol) Article 18.

interception. Article 16 does not mention much about the conditions of detention, which could potentially lead to further injustices towards smuggled migrants. Both Article 16 and 19 are also mainly focused on those under Article 6, i.e. those who facilitate the process of smuggling. Since there is no specification concerning the rights of smuggled migrants after interception, what happens after interception? Does the protection afforded under the Protocol stop at that point? If it does, doesn't this nullify the aim of the Protocol to protect the human rights of smuggled migrants?

First of all, in international law, there are detailed, clear and established procedural standards to regulate the processes after interception.<sup>90</sup> In State practice after interception, the migrants are either redirected to another territory (as was in the case of Australia) or they are detained for status determination or further investigations.<sup>91</sup> We are concerned here with the latter.

The liberty and security of person is a human right under international, regional and national law and detention may obstruct this right.<sup>92</sup> It is also established that detention or the deprivation of liberty is part of the sovereign power of the State and there is no prohibition of detention in international law.<sup>93</sup> However, the limitation on this power is that such deprivation of liberty should not be arbitrary.<sup>94</sup> In order for the detention to be arbitrary, it has to be done without legal basis due to the lack of due process. According to Ryszard Cholewinski, for detention to be legal, it must be founded in a law that itself is not arbitrary.<sup>95</sup>

In this light, the *de facto* detention of the *MV Tampa* passengers was arbitrary since there was no due process involved in prescribing their detention. Detention in this context was used by Australia to penalize the migrants for their attempted unlawful entry into Australia (for purposes of immigration law enforcement, rather than investigation). Ensuring that the extraterritorial processing of the migrants met standards of due process like the right to information and Consular notification was the responsibility of Australia, since it was Australia's decision to divert the migrants to Nauru and New Zealand.<sup>96</sup> The procedural fairness of Australia's migration control and how domestic courts attempted to set procedural standards came into light via cases like *Plaintiff S157/2002 v. Commonwealth of Australia*.<sup>97</sup> State practice in general shows that States are very likely to use detention as a form of migration control and a tool of deterrence, rather than the prescribed purpose.<sup>98</sup>

The way in which the process during the first reception of the migrants is handled determines how much they will be protected from the State (as noted by the working group on Arbitrary Detention in 2009).<sup>99</sup> Detention based

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<sup>90</sup> Supra note 29, Universal Declaration of Human Rights (A/RES/40/144) Art 8 and 10 and ICCPR (UN Doc. A/6316 (1966) Articles 2.3 (a), 13, and 14. See also supra note 55 (Refugee Conv.), Article 16. Some of these standards include due process: the right to information, the right to effective remedy, the right to a fair hearing, protection from life-threatening or demeaning forms of transport; , the right not to be detained for administrative reasons when better alternatives for exist and the right not to be subject to prolonged or indefinite administrative detention for illegal entry.

<sup>91</sup> The UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (26 February 1999) defines detention as confinement within a narrowly bounded or restricted location, where freedom of movement is substantially curtailed and where the only opportunity to leave this limited area is to leave the territory.

<sup>92</sup> Nowak Manfred. *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev. ed.). Kehl am Rhein: Engel, 2005. Migrants who are detained have a right to challenge the legality of the detention (as stated in ICCPR Article 9(4) and ICPMW Article 15).

<sup>93</sup> S. Joseph, J. Schultz and M. Castan. *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*. Oxford, Oxford University Press, 2004, p. 304.

<sup>94</sup> Supra note 29, ICCPR Article 9 (1) and UDHR Article 9. There is however no explicit definition of the term "arbitrary", the Human Rights Council holds that detention, as a tool of immigration control is arbitrary. See Human Rights Council General Comment no. 8 UN Doc HRI/GEN/1/Rev. 7, May 12 2004.

<sup>95</sup> Cholewinski Ryszard et al. *International Migration Law: Developing Paradigms and Key Challenges*. T.M.C Asser Press, the Netherlands (2007), p. 56.

<sup>96</sup> Lawyers were denied access to the migrants in Nauru, breaching both international law and Article 5(2) on the right to legal representation of the Nauruan Constitution. (See supra note 37, p. 365). Women and children were also held in detention centers together with men for unspecified periods of time. In Australia, the Federal Court held that there was no detention or limitation to liberty because the aliens had no legal right to enter Australia. (See supra note 69 110 FCR, paras. 212-215). It was also not mentioned anywhere that Australia informed the Consular authorities of any of the migrants about their situation.

<sup>97</sup> *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 4 February 2003 S157/2002.

<sup>98</sup> See supra note 104 (Cholewinski Ryszard et al) p. 49.

<sup>99</sup> UN Human Rights Council, Report of the Working Group on Arbitrary Detention Addendum, Mission to Italy, Tenth Session, Agenda Item 3, A/HRC/10/21/Add.5, February 16, 2009, paras 70-72.

exclusively on the exercise of the right to seek asylum is arbitrary according to the UNHCHR.<sup>100</sup> The Human Rights Council has defined arbitrariness in terms of its inappropriateness, injustices, lack of predictability, and lack of due process.<sup>101</sup> The inappropriateness, reasonableness or the predictability of detention is dependent on the specific characteristics of each case. According to the Working Group on Arbitrary detention, it should be a last resort, temporary, and alternative non-custodial measures should be considered first.<sup>102</sup>

Immigration detention is allowed in relation to immigration when it is specifically based on the regulation or entry of foreigners in the European context.<sup>103</sup> Therefore, the fact that the Smuggling Protocol does not delve into the matter of detention the detention of smuggled migrants weakens the aim of the Protocol to protect migrants from further vulnerabilities. Be that as it may, in the European context, there are also established procedural standards in place to protect migrants from the State.

In the case of *Amuur v. France*, the European Court of Human Rights held that constant police surveillance coupled with no access to social or legal assistance constitutes a deprivation of liberty under Article 5 of the European Convention on Human Rights.<sup>104</sup> The Court's decision was similar in the *Riad and Idiab* case.<sup>105</sup> Within the European context, it is necessary that detention be founded on national law and that domestic law sanctioning detention is precise and foreseeable to prevent arbitrary detention and to ensure due process.<sup>106</sup> The ECHR grants migrants who are detained the right to be informed about the reasons for detention at the moment of arrest and the right to challenge the lawfulness of detention.<sup>107</sup> In addition, the Court has stipulated the necessary conditions for any detention to be carried out.<sup>108</sup>

Similarly, The Inter-American Court of Human Rights holds that the right to due process should be one of the minimum guarantees that should be provided to all migrants, regardless of their migratory status.<sup>109</sup> Regarding the right to information, the IACHR held that the failure to ensure "a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law..."<sup>110</sup>

The Protocol does not explicitly address the conditions of detention and other procedural standards; neither does it ensure the accountability of the State for the treatment of the migrants. Since the Protocol aims to prevent, punish and suppress smuggling of migrants, while protecting the fundamental rights of the migrants, there must be a balance between the two approaches. However, the mentions of procedural guarantees are so few and far between in the Protocol. It is even more important to highlight guarantees like reintegration assistance because they are more concrete because migrants more directly feel their impact and ensure that the migrants do not fall back on smugglers again for the facilitation of their migration.<sup>111</sup> The Protocol makes no mention of this; there is little reference made to

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<sup>100</sup> UN High Commissioner for Human Rights. *Fact Sheet 26: The Working Group on Arbitrary Detention*, May 2000, No. 26.

<sup>101</sup> HRC, *Mukong v. Cameroon*, July 21 1994, Communication No. 458/1991, UN Document CCPR/C/51/D/458/1991 at 9.8.

<sup>102</sup> Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010,

<sup>103</sup> Cornelisse Galina. *Immigration Detention and Human Rights*. Koninklijke Brill NV, the Netherlands, 2010, p. 279.

<sup>104</sup> *Amuur v. France*, June 25, 1996 Reports 1996 III

<sup>105</sup> *Riad and Idiab v. Belgium*, January 24 2008. Application Nos. 29787/03 and 29810/03, paragraph 66.

<sup>106</sup> *Rashed v. Czech Republic*, November 27 2008, Application No. 298/07, paragraph 73. See also supra note 112 (*Amuur v. France*) para. 50.

<sup>107</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, E.T.S. 5, Article 5 (2) and 5 (4).

<sup>108</sup> Supra note 113 (*Rashed v. Czech Republic*) and supra note 31 (*Saadi v. United Kingdom*) para. 74.

<sup>109</sup> See supra note 90, para 121.

<sup>110</sup> See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999), para. 137. See also *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261 / 21 UST 77 / TIAS 6820, Article 36(1)(b), Article 5 and Article 24. The ICPMW (supra note 35) also upholds the importance of migrants right to Consular notification and information under Article 16 (7) and Article 23.

<sup>111</sup> Since the State refuses to consider accepting those classified as smuggled migrants under the Protocol, the State could at the very least ensure that such migrants have a safe return and provide some reintegration assistance in ways that promote non-refoulement and non-discrimination.

cooperation between source countries and destination countries as a necessary part of guaranteeing the protection of migrants. Cooperation is only mentioned with reference to the criminal aspect of things.<sup>112</sup>

The Protocol is so centered on protecting State interests that it does not thoroughly address the rights of smuggled migrants that arise when within the “control” or “jurisdiction” of the State. The principles of due diligence, effective remedy, fairness and non-discrimination are all very necessary in the protection of the migrants from injustices when the contact between the State and the migrant is prolonged. These principles are particularly important because migration control involves State interference with human rights in order to protect public/State interests.

While the Protocol recognizes the vulnerability of migrants, it refuses to translate this recognition into concrete and explicit obligations for States. It is arguable that smuggled migrants face abuses in the hands of smugglers both during and after the process of migration and as a result, also should have an effective remedy for the rights that have been violated. Does the fact that the migrant was smuggled somehow minimize or nullify this protection? Migrants may also face rough treatment from State officials like the border police but the Protocol has no provision ensuring their accountability.<sup>113</sup>

The Protocol relies on the principle of good faith that States will live up to their human rights obligations regarding procedural guarantees under other international agreements. However, it is highly possible that during the process of migration control (whether it is arrest, detention or repatriation), the occurrence of bad faith and deception on the part of the State.<sup>114</sup> When detention or deportation occurs in this kind of context, the migrant is left without any effective remedy.<sup>115</sup>

According to de Zayas, the principle of *ubi jus ibi remedium* applies regardless of whether or not human rights instruments mention it or not.<sup>116</sup> The same could be said about the migration control procedures envisaged in the Protocol. The principle of compensation should apply whenever there are serious violations of human rights like indefinite, unlawful or arbitrary detention or use of force leading to the loss of life, regardless of whether the Protocol mentions it or not.<sup>117</sup> Migrants cannot be protected without procedural rights to support human rights like the right to life, non-refoulement, non-discrimination and all the other rights that the Protocol identifies as being part of the rights of migrants.

To summarize this section, the Protocol is somewhat compatible with international human rights law on procedural guarantees. The Protocol via Article 16(5) and 18 (5) identifies consular notification and the right to a safe and dignifying repatriation as procedural guarantees to smuggled migrants. Nevertheless, there are problems with the following:

- a) Lack of accountability of State officials after interception conflicts with the idea of due process
- b) The imbalance between protecting State interests and the human rights approach leads the Protocol to avoid delving into the rights of smuggled migrants after interception
- c) The Protocol does not delineate what happens when there are serious violations of due process rights like indefinite detention during the process of migration control.

#### 4.1 The Elasticity of the Concept of Human Rights within the Protocol

The contemporary corpus of international human rights is a result of an accumulation of legal and political

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<sup>112</sup> Cooperation in other areas outside criminal justice was briefly referenced to only in the Preamble and Article 15(3) of the Smuggling Protocol. Article 7, Article 10 and Article 14 support cooperation in the area of prevention, suppression and punishment.

<sup>113</sup> Australian forces were allowed to use force during the transfer of the migrants (See Migration Legislation Amendment (Transitional Movement) Act 2002, no. 10, Schedule 1- Amendments to Migration Act 1958, Section 198B). There was no effective remedy for this treatment.

<sup>114</sup> See *Gebremedhin v. France*, April 26, 2007, Application No. 25389/05, paragraph 7 or *Saadi v. United Kingdom*, Grand Chamber Judgment, para. 69.

<sup>115</sup> For example, See *Conka v. Belgium*, February 5, 2002, Reports 2001-II, no. 51564/99, paragraph 42.

<sup>116</sup> See de Zayas A. *Human Rights and Indefinite Detention*, 87 International Review of the Red Cross, no 857, March 2005, p 15 at p 34.

<sup>117</sup> Effective remedy could be the immediate release from detention, safe return and reintegration assistance to migrants.

occurrences and norms over time. These occurrences ranged from the wars, the genocides and the economic changes that have occurred since the late 20th century. The effect of these occurrences has been the proliferation of human rights instruments, to the assimilation of the principles behind such instruments into domestic constitutions, the standardization of human rights as the cornerstone of legitimacy in international relations and discourse and the development of modern civil societies.<sup>118</sup>

It is known that international human rights norms have a great influence on national immigration regimes and even to the point of limiting State sovereignty and discretion on the matter, even though perhaps marginally.<sup>119</sup> Human rights are not so constrained by national borders and are consequently able to reach beyond the exclusivity of citizenship and nationality. As we have seen, there are already numerous types of protections, which smuggled migrants can have under international human rights law via instruments like the ICCPR and through principles like non-refoulement. There are also regional standards on the matter via the ECHR, the IACHR, and other regional human rights bodies.

There is already a wide support system for the human rights in international law that can lend support to the framework of the Protocol.<sup>120</sup> In other words, the Protocol does not add anything new through the Saving Clause; the Saving Clause in itself is just serving as a reminder to States that there do already exist limitations to State Sovereignty regarding the treatment accorded to non-citizens or irregular migrants in general international law. In fact, the Saving Clause was mentioned towards the end of the Protocol, almost like an endnote.

We have looked broadly at the Protocol's intersection with State practice and human rights law. It has been shown that though the Savings Clause reminds States of their obligations under international human rights law and refugee law, there are still numerous problems with the Protocol's aim of protecting migrants. This is largely due to what is at the core consequence of Protocol, which is the protection of State interests in controlling migration, rather than the protection of the interests of individuals. In other words, the Protocol is somewhat compatible with international human rights law because it calls States to ensure that they meet their obligations within that sphere. It is not fully compatible because human rights are secondary in the focus of the Protocol.

Though human rights instruments have flourished on the international level to protect individuals and their interests and safety, human rights have not been able to completely penetrate the exclusiveness of territorial sovereignty. As mentioned earlier, globalization and the incident of September 11, 2001 have further raised the bar of territorial exclusiveness of States. More than any other time in history, it is now harder to cross borders legally or by other means.

The increase in human rights instruments has not led to a right to cross borders without permission, neither has the vulnerability of asylum seekers led to a right to obtain refuge in any State. It is still the norm for States to treat intruders defensively; a State can still expel a migrant, regardless of the conditions, vulnerabilities or potential abuses that the migrant has faced or may face elsewhere. The obligation of a State to protect the human rights of a migrant ends when the migrant is sent out of its territory. As a result, States usually resort to any means to ensure that migrants do not stay, as seen in the example of Australia and the United States. Therefore, though the Protocol relies on the principles and obligations of human rights law, since there is no change in the practice or perception of States on the connection between human rights and irregular migration, there is actually no guarantee for protection.

Additionally, human rights are premised on needs and vulnerabilities of individuals or groups, rather than status or motive.<sup>121</sup> The Protocol's criminal law approach focuses on *mens rea* (intent to cross the border with false documents) and *actus reus* (the actual act of crossing the border with false documents). As discussed earlier in this paper, Article 6(4) is problematic to the Saving Clause. There seems to be a tension between Article 6(4) that upholds State sovereignty and the Saving Clause that upholds international human rights obligations and norms. Article 5 on the

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<sup>118</sup> Barreto Jose- Manuel. Rorty, *Human Rights Contingency, Emotions and how to Defend Human Rights telling Stories*. Utrecht Law Review, Volume 7 Issue 2, April 2011, p. 8.

<sup>119</sup> Sassen Saskia. *Losing Control? Sovereignty in the Age of Globalization*. New York: Columbia University Press, 1996, p. 95.

<sup>120</sup> See supra note 31 (Chetail Vincent, 2005) p 39.

<sup>121</sup> See supra note 49 (Bhabha Jacqueline) p. 18.

non-criminalization of migrants does not accord immunity of migrants from criminal proceedings; smuggled migrants may face criminal and administrative sanctions for illegally entering the territory of the State.<sup>122</sup>

The Protocol is heavily dependent in distinguishing between trafficking and smuggling. An approach that focuses on protecting migrants and upholding their rights would be focused on the actual vulnerabilities and needs of the individual or group of persons in question. It seems the drafters of the Protocol were torn between recognizing the vulnerability of migrants (a human rights approach) and the interests of States (a criminal law approach) and ended up with an instrument that protects State interests but has weak or superficial undertones of human rights protection.

Granted, the primary aim of the Protocol is to prevent, suppress and punish smuggling of migrants as a transnational crime and the protection of migrants in Article 16 and 19 is just a secondary appendage to ensure the rule of law and the adherence to international norms and standards like non-refoulement. However, there is a missing link between the criminal approach and the human rights approach within the Protocol. The thought behind Article 19 was not so visible in the rest of the Protocol; the Saving Clause appears as a passing mention, rather than a feature that is part and parcel of the entire functioning of the Protocol. Brolan argues that the Protocol would have been better suited to international human rights norms if the contents of Article 19 were reiterated throughout the Protocol.<sup>123</sup> The Protocol tests the elasticity of the concept of human rights due to how it recognizes the need for protection of the rights of smuggled migrants but refuses to express specifically what these protections should be.

#### 4.2 The Contraction of the Concept of Human Rights within the Protocol

The concept of human rights metamorphoses based on certain factors influencing international standards and State practice. The Smuggling Protocol *inter alia* was an immediate response of States to a new threat to the existence/identity of the State and a threat to State security. Before the Protocol, there was nothing existing dealing specifically with that kind of issue in international law. In that sense, the Protocol filled a lacuna. It was a swift normative response to fill the gap that existed to deal with the problem of transnational smuggling. However, while the Protocol filled this criminal justice/law lacuna, it did not do so regarding the specific rights of smuggled migrants.

The Protocol changes little about the situation or vulnerabilities of smuggled migrants. This is because the elasticity of conceptualization of human rights within the Protocol was hindered by the need to address the concerns of States relating to the problem of migrant smuggling domestically. The elasticity of human rights contracted to suit the environment needed for the drafting of the new instruments on transnational organized crime.

There are no instruments that directly focus on expressing the rights of irregular migrants (except the Trafficking Protocol) and the ICCPR and the ICPMW explicitly reduce the visibility of irregular migrants within those instruments. Therefore, it is clear that international norms have not transformed to the point at which the human rights of smuggled migrants are explicit or established. At the moment, the expression of the rights of smuggled migrants is highly dependent on the temperament of the State, which is a soft spot in the general development of the culture of human rights on migration.

The Protocol's lack of explicitness on the specific rights of smuggled migrants, knowing that it is the sole instrument using that term to define a specific group of migrants, represents a "taming and domestication of the promise of human rights by legitimating the silencing logic of territorial sovereignty."<sup>124</sup> The Protocol further stretches the reaches of State sovereignty by creating and encouraging policies like carrier sanctions that allow for States to enforce immigration control outside of their territories.

The Protocol reinforces the impenetrableness of State sovereignty and misses an opportunity to explicitly define the rights of this new group of migrants that it had created. There is nowhere else in international law using the term "smuggled" as a qualifier for the type of migration, therefore, States can use this term within any context, for example,

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<sup>122</sup> Mclean David. *Transnational Organized Crime: A Commentary on the UN Conventions and its Protocols*. Oxford University Press, Oxford, 2007.

<sup>123</sup> See supra note 40 (Brolan) p. 593.

<sup>124</sup> Supra note 112 at p. 312 and 221.

relating it to terrorism or generalizing that all asylum seekers are smuggled migrants with very few rights or claims.<sup>125</sup>

This is a core problem with the Protocol in relation to its coherence with the existing body of international human rights. Domestic laws often criminalize the breach of national immigration law and create a system that treats migrants as criminals.<sup>126</sup> The Protocol may have filled a lacuna if it had made it a strict obligation for States to change their domestic laws that criminalize and punish migrants. Due to the Protocol, smuggled migrants are now identified as those to be accorded with the lowest level of protections in international migration law and with very limited human rights.

#### 4.4 The Problem of Prioritization within the Protocol

Dauvergne argues that human rights are central to the rule of law. Without human rights, States would be free to do whatever they want to individuals and groups within and outside their territories.<sup>127</sup> Human rights are necessary to protect individuals from the interference of the State. This vital connection between rights and the rule of law has been part of the driving force of the development of the human rights standards that exist today both at the international, regional and national levels. Accountability is central to the rule of law. As stated earlier, by removing the clause on accountability of State officials in the processes of migration control, the Protocol may have offended the rule of law, which in turn, creates an incompatibility with the existence of human rights. Procedural fairness is also central to the rule of law and human rights. The Protocol's bare mention of procedural guarantees also weakens the rule of law relating to the interaction between the State and smuggled migrants.

The current human rights framework shows that all rights are interdependent. The Protocol, due to its distinctions between victims and cohorts, prioritized some rights over others, which implies that some rights are more important or crucial than others, regardless of status. All rights are not equal. As a result, States can pick and choose what standards they will apply to those who breach their borders, regardless of how many human rights exist. The numerous amounts of human rights instruments existing today have not led to a strengthening of the rule of law as a result.<sup>128</sup>

However, there is already an abundance of human rights instruments and the Protocol was not meant to be another one. In fact, a complete focus on human rights may have led to "rights inflation".<sup>129</sup> However, as stated earlier, by adding the aim of protecting migrants to its core aims the Protocol opened up a can of worms because it was not ready to go in that direction. This has created the inconsistencies in the Protocol's approach towards migrants- they are vulnerable but they aren't at the same time. There is also a lack of uniformity between different jurisdictions on how to treat smuggled migrants.

There are sufficient existing norms that can potentially protect migrants from vulnerability.<sup>130</sup> However, the existing norms and standards are not well implemented and States are not interested in ratifying human rights instruments that favor the rights of migrants (e.g. the ICPMW). In order to address this problem, treaty bodies, including the UNTOC could adopt clearer standards on how generally recognized rights apply to smuggled migrants.<sup>131</sup>

The Protocol could also strengthen the human rights of smuggled migrants by referring to customary international law that limits the discretion of the State. For example, explicit reference could be made to the Vienna Convention on the Law of Treaties Article 26 on the principle of *pacta sunt servanda*. Article 27 on the prohibition of the use of domestic laws as an excuse for non-observance of treaty obligation could also be reiterated in the Protocol.<sup>132</sup> Measures encouraging accountability of State actors at all the stages of migration control could also be included within the

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<sup>125</sup> Even the Law of the Sea Convention does not mention smuggling. The use of the term is generally recent in international law. Additionally, the Protocol makes no mention about the process of disembarkation, which is a very crucial part of the procedure of migration control.

<sup>126</sup> UN ECOSOC Committee of Human Rights 59<sup>th</sup> session, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to the comm. On Human Rights Resolution 2002/62, UN doc E/CN.4/2003/85, Dec. 30, 2002, para 17.

<sup>127</sup> Supra note 23, p. 610-611.

<sup>128</sup> Id. p. 612.

<sup>129</sup> Wellman Cranston. *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* Boulder, CO: Westview Press, 1999.

<sup>130</sup> See supra note 104 (Ryszard *et al*) at p. 477

<sup>131</sup> Id. at p. 233

<sup>132</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 ILM 679 (1969) / 63 AJIL 875 (1969). This way, States will not use their domestic law as an excuse for not protecting the human rights of smuggled migrants and States would be encouraged to observe human rights due to the explicit reference to customary international law.

Protocol. For example, the Protocol could address what actions activate the principle of non-refoulement, how interceptions should be carried out and the explicit protections that apply to procedures after interception.<sup>133</sup>

## Conclusion

From an anthropological point of view, the act of migration is a part of human nature.<sup>134</sup> Human beings have been migrating for different reasons since time immemorial. However, the influence of politics and economic, social and cultural differences has led to an international system in which migration is regarded as a crime.

In Part One, we saw that the contemporary conceptualization of migration is framed within State sovereignty, territorial integrity and the exclusivity of borders and citizenship. An aversion of migrants encourages States to overlook the precepts of international law and the culture of human rights. The concept of security has changed because of terrorism and the increased push/pull factors influencing migration like the recent financial crises. The current perception among States is that smuggled migrants are eroding sovereignty and participating in crime.<sup>135</sup> Migration is highly politicized and used as a tool to control or influence popular support domestically.

On the one hand, this relationship between State sovereignty and migration has developed, leading to a defensive, criminal justice response, identifying irregular migrants as threats. States are bent on maintaining the *status quo* of territorial sovereignty and order. On the other hand, a culture of human rights has equally developed, spreading into the field of migration and identifying migrants as human beings with some substantive and procedural rights under international human rights law that need to be protected.

The intersection of these two perspectives on migration is embodied in the Smuggling Protocol. We have seen that the Protocol is well intentioned as a response to the increasing threat of transnational organized crime while protecting the rights of smuggled migrants. However, since most of the focus is on the criminal aspect of smuggling, the second aim of protecting smuggled migrants is weakened.

In Part Two, we saw that the Protocol cannot work *in vacuo*; the Saving Clause serves as a channel through which other State obligations under international law can flow into the implementation of the Protocol. There are already some norms and standards in international law that can fill in most of the gaps within the Protocol. However, some provisions of the Protocol undermine each other and thereby create deeper inconsistencies and potential problems in interpretation and implementation, which could lead to the violation of the rights of migrants. We have seen from the examples of Australia and the US that some States are quite adamant to strictly follow human rights tenets when it comes to migrants due to the perception that they are intruders and lawbreakers.

The Saving Cause has not done much to clarify the obligations that States have towards smuggled migrants in a way that would protect migrants during and after interception. As a result, the Protocol ends up being hugely a strong deterrent to migration, regardless of its aim of protecting migrants. This explains why the language on human rights is not too strong. Anything stronger would be going against State interests in stemming migration flows.

The Protocol creates new categories of migrants but does not explicitly state their rights neither does it answer the core question of why migrants resort to smugglers in the first place. Not addressing the reasons why migrants look to smugglers for help is like putting a bandage over a festering wound, with no ointment to kill the underlying disease. It aims to prevent, punish and suppress smuggling of migrants but it is flawed because it encourages States to spend more time and money on controlling migrants than preventing the actual transnational crime of smuggling by effectively prosecuting the smugglers themselves. There is no stipulation on the necessity of cooperation with migrants to suppress and punish smugglers. Most of the focus is on migrants because it is easier to deal with public pressure by handling the physical evidence of the contravention of borders (i.e. the migrants), rather than the smugglers who are behind the scenes.

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<sup>133</sup> See supra note 28, p. 226-227.

<sup>134</sup> For example, see Groody Daniel G. *Crossing the Divide: Foundations of a Theology of Migrations and Refugees*. Theological Studies Vol. 70, no. 3, 2009. See also Liu H. et al. *A Geographically Explicit Genetic Model of Worldwide Human-Settlement History*. *Am. J. Hum. Genet.* 79 (2), 2006.

<sup>135</sup> Ghosh Bimal. *Elusive protection, Uncertain lands: Migrants Access to Human rights*, IOM 2003, p. 17.



We have seen in Part three that core problems lay in the light references to due process after interception and the domination of the functions of the Protocol by State interests. In State practice, it is evident that States are tempted to put all undesirable migrants in the “smuggled” category as an excuse for mass expulsions. States also use detention as a tool for migration control, rather than for the investigation on the smugglers or screening of the migrants. This perpetuates the tension between State or national public interests and human rights.

Migration control in itself is not a bad thing; after all, the current territorial establishment between States requires limitations on movement. However, the problem lies in the fact that it leads to human rights abuses. The implementation of the Protocol is bound to weaken international human rights law because it affects human dignity and respect profoundly during interception, detention and removal of migrants. States use those procedures to flex the sovereignty muscle and to remain in control, rather than to prevent smuggling by focusing on the smugglers. Because smuggled are perceived as criminals, they are treated as such by States during the procedures of migration control.

In Part Four, we discussed the culture of human rights and the elasticity of the concept in relation to the Protocol. The culture of human rights has to develop up to the point where human rights are able to penetrate the veil of State sovereignty. There is still no regime of legal norms relating generally to international migration and none relating to migrant smuggling.<sup>136</sup> Therefore, a holistic approach is crucial, one that holds both the criminal and human rights approach as equal. Both approaches to migration are necessary; none is subordinate to the other.

The Protocol currently holds State interests and the criminal justice response higher than human rights in its content. This gives a confusing message about the place of human rights in international migration and allows States to evade their human rights obligations and hide behind criminal justice. The most important issue is that the close connection between smuggling of migrants to human rights be amplified in international and domestic laws and discourse on migration. A mental shift is needed in the conceptualization of human rights and smuggled migrants and generally in the regime on international migration. Human rights must be seen as a part and parcel of the rule of law, human rights protection as part of the exercise of State sovereignty and human rights violations as a matter of public safety.

One of the main purposes for the existence of human rights is to protect the weak from the powerful and to redirect the interests of the strong to favor the interest of the vulnerable.<sup>137</sup> In the context of migration, the purpose of human rights is to steer the interests of States towards the protection of individuals (migrants), regardless of their status. The current framework of human rights supports this “redirection”. The Protocol does not steer the interests of States in favor of the protection of migrants, though it tries to incorporate protection as part of its aims. More “redirection” of State interests is needed, at least to the point where the rights of smuggled migrants are explicitly enunciated in international law.

I will recall the words of Lord Staughton that “illegal” migrants are not without rights or remedies. The current establishment of human rights can provide some succor to smuggled migrants. There are established rights, obligations and norms that apply under international human rights law. However, what is left is for these established human rights regime to match State interests in relation to irregular or smuggled migrants. This will be heavily dependent on how State sovereignty evolves under the influence of international human rights law and the fairly new field of international law regulating irregular migration. Hopefully, the accumulation of sentiments over time will be in favor of a human rights culture that clarifies the close connection between human rights and migrant smuggling in international law in the future.

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<sup>136</sup> Aleinikoff, T. Alexander, and Vincent Chetail (eds.). *Migration and International Legal Norms*. The Hague: T.M.C Asser Press, 2003, p. 467. To remedy the lack of coherence in the regime of legal norms on international migration, Ghosh calls for a new international normative framework to facilitate migration, with objectives, an institutional arrangement and monitoring mechanisms. See Ghosh Bimal. *New International Regime for the Orderly Movement of People: What Will it Look Like?* In Ghosh Bimal (ed.) *Managing migration: Time for a New International Regime*. Oxford, Oxford University Press, 2000, p. 220 at p. 227. Aleinikoff suggests an International Bill of Rights for migrants with explicit guarantees for human rights.

<sup>137</sup> Dorian Pamela E. John Dewey, *Evolutionary Ethics and Human Rights: An expository, critical essay on John Dewey and his works on Darwinism*. Penn State University, November 2009.

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