

**Smuggling of Migrants in International Law**  
**A critical analysis of the Protocol against the Smuggling of**  
**Migrants by Land, Sea and Air, Supplementing the United Nations**  
**Convention against Transnational Organised Crime**

Thesis submitted for the degree of  
Doctor of Philosophy  
at the University of Leicester

by

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2014

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**Abstract**

This thesis investigates whether the Protocol against the Smuggling of Migrants contains the necessary rules to fulfil its principal purposes—namely, to combat and prevent migrant smuggling and to protect the rights of smuggled migrants. To that end, the thesis examines the rules of the Protocol that regulate the legal definition of the smuggling of migrants, the legal features of smuggling organisations, the obligations and rights of States parties, and finally the rights of smuggled migrants. This thesis uses the legal doctrinal approach, and in doing so critically examines the interpretations of the Protocol provided by primary and secondary sources.

This thesis finds that the Protocol fails to provide a clear and comprehensive framework of rules capable of effectively achieving its purposes. It argues that there are deficiencies within the existing rules of the Protocol that address the legal issues aforementioned. The thesis proposes a number of amendments that can address these deficiencies.

One of the key contributions of this work is the provision of a guide for States on how to interpret and implement the rules of the Protocol. Furthermore, it assists the international community – in particular the Conference of the Parties – in improving and strengthening the rules of the Protocol to ensure the combating of migrant smuggling and the protection of the rights of smuggled migrants.

*This thesis dedicated to  
the spirit of my nephew, Basem*

## **Acknowledgements**

I would like to express my very great appreciation to my previous supervisor, Dr Paul Behrens, for his valuable and constructive suggestions during the planning and development of this thesis. My sincere thanks also go to Professor Katja Ziegler, the current supervisor of this thesis. It is hard to find appropriate words to express my deep gratitude for her professional guidance, useful comments and critiques which led to the completion of the thesis.

I would also like to acknowledge with much appreciation the crucial role of the staff at the University of Leicester. Special thanks go to Mrs Jane Sowler, the Postgraduate Research Administrator, who has offered me help and support throughout my studies, particularly in difficult times. I am also most grateful to Anthony Berry, a computer officer, for his assistance. My gratitude also extends to the librarians. I also owe thanks to Mr Feisal Antat, my academic supervisor in the Libyan Embassy, whose assistance made this study much easier.

My deepest appreciation is dedicated to my wife for her continued support and encouragement during the stages of this study. She was always there. Finally, I would like to thank my five lovely children Wesal, Sofyan, Arwa, Hala and Abdelrahman for their understanding and the sacrifices that they made while I undertook this study.

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## Table of Abbreviations

Adel L Rev	Adelaide Law Review
AfCHPR	African Charter on Human and Peoples' Rights
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
All ER	All England Law Reports
AMCHR	American Convention on Human Rights
Amsterdam LF	Amsterdam Law Forum
Arizona J Intl & CL	Arizona Journal of International & Comparative Law
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
AS Intl & CL	Annual Survey of International & Comparative Law
Aus Intl LJ	Australian international law Journal
BC Intl & CL R	Boston College International & Comparative Law Review
BHRC	Butterworths Human Rights Cases
BJ Intl L	Berkeley Journal of International Law
BWLJ	Berkeley Women's Law Journal
Cali L Rev	California Law Review
Case W Res J Intl L	Case Western Reserve University's Journal of International Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CL&J	Criminal Law & Justice Weekly
Con J Intl L	Connecticut Journal of International Law
COP	Conference of the Parties
CTOC	Convention against Transnational Organized Crime
Current Issues Crim Just	Current Issues Criminal Justice
E J Crim	European Journal of Criminology
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EWCA Crim	Court of Appeal (Criminal Division)
ed/eds	editor/editors
edn	edition
EJ Intl L	European Journal of International Law
EJ Migration & L	European Journal of Migration and Law
ELJ	European Law Journal
Emory L J	Emory Law Journal
ESC	Economic and Social Council
EU	European Union
FCA	Federal Court of Australia
F Intl LG	Fordham International Law Journal

Fle FWA	Fletcher Forum of World Affairs
Flor J Intl L	Florida Journal of International Law
Geo Immigr LJ	Georgetown Immigration Law Journal
GLJ	German Law Journal
Goe J Intl L	Goettingen Journal of International Law
Harv Intl LJ	Harvard International Law Journal
HR L Rev	Human Rights Law Review
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Right
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ILM	International Legal Materials
IMO	International Maritime Organisation
Indiana JGLS	Indiana Journal of Global Legal Studies
Indiana L Rev	Indiana Law Review
Intl & CLQ	International and Comparative Law Quarterly
Intl JHR	International Journal on Human Rights
Intl JM& CL	International Journal of Marine and Coastal Law
Intl JPS & M	International Journal of Police Science & Management
Intl JRL	International Journal of Refugee Law
Intl JSL	International Journal of the Sociology of Law
Intl Legal Prac	International Legal Practitioner
Intl LS	International Law Studies
Intl Migration	International Migration
Intl Migration Rev	International Migration Review
Intl Rev V	International Review of Victimology
IOM	International Organisation for Migration
J Armed Conflict L	Journal of Armed Conflict Law
J Mar L & Com	Journal of Maritime Law and Commerce
JE & Migration S	Journal of Ethnic and Migration Studies
JI Just & Intl S	Journal of the Institute of Justice and International Studies
JPL	Journal of Public Law
JRS	Journal of Refugee Studies
JS Afr S	Journal of Southern African Studies
Modern L Rev	Modern Law Review
MSC	Maritime Safety Committee
N Crim L Rev	New Criminal Law Review
New York UJ Intl L & Pol	New York University Journal of International Law and Politics
Nor J Intl HR	Northwestern Journal of International Human Rights

NY Intl L	Netherlands Yearbook of International Law
OJ	Official Journal
Pacific Rim L & PJ	Pacific Rim Law & Policy Journal
QLS Rev	Queensland Law Student Review
S Afr J Crim Just	South African Journal of Criminal Justice
SAR	International Convention on Maritime Search and Rescue
SE & BSS	Southeast European and Black Sea Studies
SOLAS	International Convention for the Safety of Life at Sea
Sri Lanka J Intl L	Sri Lanka Journal of International Law
Suf TL Rev	Suffolk Transnational Law Review
Syracuse J Intl L & C	Syracuse Journal of International Law and Commerce
U Chi L Sch Roundtable	University of Chicago Law School Roundtable
U Que LJ	University of Queensland Law Journal
UDHR	Universal Declaration of Human Rights
UMIA L Rev	University of Miami Inter-American Law Review
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTOC	United Nations Convention against Transnational Organized Crime
UNGA	United National General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNTS	United Nations Treaty Series
Van JTL	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of the Treaties
Vir J Intl L	Virginia Journal of International Law
Way L Rev	Wayne Law Review
Whi JD & Intl R	Whitehead Journal of Diplomacy and International Relations
Wis Intl LJ	Wisconsin International Law Journal

### 1. Introduction

#### 1.1. Background to the study

In 2005, while serving in the police force in Libya, I worked as a criminal investigator in one of the police stations that overlooks the sea in Benghazi, Libya's second largest city. During this period, I investigated several tragedies involving dead bodies washed up on the beach. These were people who had lost their lives at sea in attempting to reach Italy and other European countries. In each case, my responsibilities included inspecting the beach site and taking steps to identify the corpse. Naturally, many questions arose in my mind. For example, I wondered whether there exist any international rules obligating Libya and other States to prevent the activities of migrant smuggling. If there are such rules in place, why do these activities continue to occur at such a scale? To what extent do the States themselves bear any responsibility? Are States required to provide any protection for such migrants? These and other questions led me to embark upon an in-depth analysis and critical evaluation of the international rules that regulate the activities of migrant smuggling.

Although migrant smuggling is not new it has only recently attracted the attention of the international community, particularly Western governments, after these activities started to become increasingly global, diverse and complex.<sup>1</sup> For instance, Chinese migrants have been smuggled across the Pacific into the US and Afghan

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<sup>1</sup> David Kyle and Rey Koslowski (eds), *Global human smuggling: Comparative perspectives* (Johns Hopkins University Press 2001) 5; Georgios A Antonopoulos and John Winterdyk, 'The Smuggling of Migrants in Greece an Examination of its Social Organization' (2006) 3 E J Crim 439; Anne Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 1.

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migrants into Australia.<sup>2</sup> Huge steel ships and large trucks have been used to smuggle large numbers of migrants, sometimes transporting hundreds in a single journey.<sup>3</sup> Hence, the smuggling of migrants has been transformed into an illicit global trade, possibly the second most lucrative after drug trafficking, with profits estimated at between \$5 and \$10 billion annually.<sup>4</sup> For instance, the price to smuggle a person from India to the UK is £10,000, and from China to the UK between £25,000 and £50,000.<sup>5</sup> The profits from these activities might be used to fund other illegal activities, such as drug trafficking, the arms trade or terrorist activities.<sup>6</sup>

Moreover, as Schloenhardt observes, ‘Migrant smuggling is also both a criminal justice and a human rights issue.’<sup>7</sup> Since the activities of migrant smuggling involve the crossing of borders by sea, land or air, they violate immigration laws and the legislation governing the entry and exit of the origin, transit and destination States.<sup>8</sup> These activities challenge the sovereignty of States by undermining their sovereign right to control who crosses their borders and remains within their territory.<sup>9</sup> This makes

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<sup>2</sup> Friedrich Heckmann and others, ‘Transatlantic Workshop on Human Smuggling’ (2000) 1 *Geo Immigr LJ* 167; Andreas Schloenhardt, ‘Migrant Smuggling and Organised Crime in Australia: Research Paper’ (The University of Queensland, Migrant Smuggling Working Group 2011) 6.

<sup>3</sup> Rebecca Tailby, ‘Organised Crime and People Smuggling/Trafficking to Australia’ (Australian Institute of Criminology 2001).

<sup>4</sup> Philip Martin, ‘Smuggling and Trafficking: A Conference Report’ (2000) 34 *Intl Migration Rev* 969.

<sup>5</sup> Sarah Webb and John Burrows, ‘Research Report 15: Organised Immigration Crime: A Post-Conviction Study’ (Home Office, July 2009) 24.

<sup>6</sup> Andree Kirchner and Lorenzo Schiano di Pepe, ‘International Attempts to Conclude a Convention to Combat Illegal Migration (1998) 10 *Intl JRL* 662,663; Nilufer Narli, ‘Human Trafficking and Smuggling: The Process, the Actors and the Victim Profile’ in Nilufer Narli (ed), *Trafficking in Persons in South East Europe - A Threat to Human Security* (National Defence Academy and Bureau for Security Policy at the Austrian Ministry of Defence 2006) 24.

<sup>7</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 5.

<sup>8</sup> *Ibid.*

<sup>9</sup> Khalid Koser, ‘Strengthening Policy Responses to Migrant Smuggling and Human Trafficking’ (Geneva Centre for Security Policy 2008) 11. See also, John Morrison, ‘Human Smuggling and Trafficking’ (October 2002) <<http://www.forcedmigration.org/research-resources/expert-guides/human-smuggling-and-trafficking/alldocuments>> accessed 22 Feb 2013.

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migrant smuggling a criminal justice issue. What is more, smugglers sometimes fuel corruption<sup>10</sup> by bribing visa-issuing officials and immigration directors to either aid their smuggling of migrants or at least to turn a blind eye to it.<sup>11</sup> When a smuggler was asked whether smugglers pay bribes to immigration police in Thailand, he responded that this was an ‘essential part of the business’.<sup>12</sup> For example, one Chinese smuggled individual explains how he passed through Thailand:

I got past Thai immigration by means of *maiguan* (buying checkpoint). That is, my snakehead [the nickname for a Chinese criminal organisation] slipped a \$100 bill in my passport. A Thai Immigration officer took the money, stamped my passport, and I went through.<sup>13</sup>

In regard to human rights, the lives of smuggled migrants are often put at risk.<sup>14</sup> The smuggled migrants may suffer from exhaustion, dehydration, suffocation during concealment, drowning at sea, and rape and sexual abuse by smugglers.<sup>15</sup> For example, 58 migrants from China suffocated to death in the back of a tomato truck in Dover during an attempt to smuggle them from the Netherlands into the UK.<sup>16</sup> In Mexico,

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<sup>10</sup> United Nation Office on Drugs and Crime, ‘Migrant Smuggling’ <<http://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html>> accessed 20 July 2013.

<sup>11</sup> Marika McAdam and others, ‘Issue Paper: Migrant Smuggling by Air’ (UNDOC 2010)11.

<sup>12</sup> Ko-Lin Chin, ‘The Social Organisation of Chinese Human Smuggling’ in Kyle and Koslowski (n1) 228.

<sup>13</sup> Ibid.

<sup>14</sup> Marika McAdam and others, ‘International Framework for Action to Implement the Smuggling of Migrants Protocol’ (UNDOC 2011) para 5.

<sup>15</sup> Jacqueline Bhabha, ‘Human Smuggling, Migration and Human Rights’ (International Council on Human Rights Policy 2005) para 9.

<sup>16</sup> Kyle and Koslowski (n1) 2.

gangs of *Coyotes* use kidnapping, extortion, and murder to exact additional fees from smuggled migrants.<sup>17</sup>

These negative implications resulting from the involvement of organised crime in the smuggling of migrants provided a clear incentive for an international response.<sup>18</sup> The international community has become aware that the smuggling of migrants is serious enough to be the subject of detailed rules under international law.

Thus, in September 1997, the Austrian Government submitted to the Secretary-General of the United Nations a draft ‘International Convention against the Smuggling of Illegal Migrants’.<sup>19</sup> This proposal aimed to establish the smuggling of migrants as a ‘transnational crime’ and to fill the gaps in international law.<sup>20</sup> In addition, during the 76<sup>th</sup> session of the Legal Committee of the International Maritime Organisation (IMO), held on 13–17 October 1997, the Italian delegation proposed another draft for a ‘Multilateral Convention to Combat Illegal Migration by Sea’.<sup>21</sup> The Italian draft was based on the codification of an international offence of illicit trafficking and exploitation of illegal migration by sea, seeking to establish cooperation measures between States through judicial and police assistance.<sup>22</sup> Although the Italian draft received support from a number of delegations at the IMO, it was generally agreed that

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<sup>17</sup> Gabriela A Gallego, ‘Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy’ (2004) 92 *Cali L Rev* 1729, 1753.

<sup>18</sup> Tom Obokata, ‘Smuggling of human beings from a human rights perspective: obligations of non-State and State actors under international human rights law’ (2005) 17 *Intl JRL* 394; Anne Gallagher, ‘Human Rights and new UN Protocol on trafficking and Migrant smuggling: A Preliminary Analysis’ (2001) 23 *HRQ* 975, 977.

<sup>19</sup> David McClean, *Transnational Organised Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press 2007) 21.

<sup>20</sup> Kirchner and Pepe (n6) 670.

<sup>21</sup> *Ibid*, 664-65.

<sup>22</sup> *Ibid*, 665.

the IMO is not an appropriate body to discuss such a proposal.<sup>23</sup> The IMO is concerned with maritime safety and the protection of the marine environment, while the Italian proposal raised political, criminal, economic and social issues that require the involvement and backing of an international organisation like the United Nations (UN).<sup>24</sup>

Due to these international initiatives and following a recommendation by the Commission on Crime Prevention and Criminal Justice made to the UN General Assembly, the latter by its Resolution 53/111 of 9 December 1998 established an open-ended intergovernmental Ad Hoc Committee to develop a Convention against Transnational Organised Crime (UNTOC) together with supplemental protocols for certain specific crimes, of which the smuggling of migrants was one.<sup>25</sup> The Ad Hoc Committee began its work on 19 January 1999 and, after 11 sessions, the draft Protocol against the Smuggling of Migrants by Land, Sea and Air (the Migrant Smuggling Protocol) was approved by the Committee in October 2000 for submission to the General Assembly for adoption.<sup>26</sup> The Italian and Austrian proposals make up the present text of the Migrant Smuggling Protocol.<sup>27</sup> The General Assembly by its Resolution 55/25 of 15 November 2000 adopted the draft of the Migrant Smuggling Protocol and opened it for signature at the High-level Political Signing Conference that was held in Palermo, Italy, on 12 – 15 December 2000 in accordance with its Resolution

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<sup>23</sup> Ibid, 666.

<sup>24</sup> Ibid.

<sup>25</sup> *Travaux préparatoires* of the Negotiations for the Elaborations of the United Convention against Organised Transnational Crime and the Protocols thereto (United Nations 2006) v. See also, McClean (n19) 24.

<sup>26</sup> *Travaux préparatoires* of the Protocol (n25) v.

<sup>27</sup> Ibid, 451.

54/129.<sup>28</sup> In accordance with Article 22 of the Protocol, which states that the ‘Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession’, the Protocol entered into force on 28 January 2004.<sup>29</sup> At the time of writing, 138 States are now a party to the Protocol.<sup>30</sup>

The Migrant Smuggling Protocol regulates an area of international law that had not been addressed by earlier conventions.<sup>31</sup> Moreover, it played a key role in addressing a number of fundamental issues, such as what the smuggling of migrants is and whether or not smuggled migrants need protecting.<sup>32</sup> Such questions were not settled prior to the Protocol despite national, regional and international efforts to deal with the problem.<sup>33</sup>

## 1.2. The research question

Every document or instrument should be drafted specifically to attain its purposes.<sup>34</sup> Consequently, it may be supposed that the provisions of the Protocol have been duly drafted so as to ensure the accomplishment of the purposes in Article 2 of the Protocol. Accordingly, this study asks the following question: To what extent are the substantive rules in the Migrant Smuggling Protocol capable of achieving the purposes of the

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<sup>28</sup> Ibid, 741.

<sup>29</sup> See United Nation, ‘Treaty Collection’ < <http://treaties.un.org/Pages/ViewDetails.aspx?src>> accessed 24 November 2013.

<sup>30</sup> Ibid.

<sup>31</sup> Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime* (n7) 361.

<sup>32</sup> Gallagher, ‘Human Rights and the New UN Protocols’ (n18) 977.

<sup>33</sup> Ibid.

<sup>34</sup> Charles Chatterjee, *Methods of Research in Law* (2 edn, Old Bailey Press 2000) 39.

Protocol in Article 2, particularly in regard to combating migrant smuggling and protecting the rights of smuggled migrants?

In the context of this question, a recent study by Schloenhardt and Dale concludes that ‘the Protocol provides a solid platform from which to build effective strategies to combat smuggling of migrants.’<sup>35</sup> However, it will be argued in this study that the substantive rules of the Protocol are only minimally, if at all, able to combat migrant smuggling or to protect the rights of smuggled migrants. There is clear and growing evidence for this position. For example, the United Nation Office on Drugs and Crime (UNODC) estimates that every year about 55,000 migrants are smuggled from Africa to Europe.<sup>36</sup> Furthermore, according to a report by Department of Homeland Security in the US, the number of unauthorised immigrants living in the US grew by 27% between 2000 and 2010, with 62% of individuals having been smuggled through Mexico.<sup>37</sup> Lastly, the figures in the Yearbook of 2008 on Illegal Migration, Human Smuggling and Trafficking in Central and East Europe show that the borders of these transit and destination States have been violated with the highest frequency<sup>38</sup> during the time the provisions of the Migrant Smuggling Protocol have been in force. In regard to the violations of the rights of smuggled migrants, 2011 was regarded as the worst year to date; during that year, at least 2,352 migrants died at the gates of Europe.<sup>39</sup> Recently, on 21 June 2012 a boat carrying smuggled refugees on the 6,000-mile journey from

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<sup>35</sup> Andreas Schloenhardt and Jessica E Dale, 'Twelve years on: Revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air' (2012) 67 JPL 129, 153.

<sup>36</sup> UNODC ‘Transnational Organised Crime’ <<http://www.unodc.org/toc/en/crimes/migrant-smuggling.html>> accessed 27 Feb 2013.

<sup>37</sup> Michael Hoefler and others ‘Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010’ (Homeland Security, Office of Immigration Statistics 2011) 1.

<sup>38</sup> Peter Futo, ‘Year Book on Illegal Migration, Human Smuggling and Trafficking in Central and Eastern Europe’ (International Centre for Migration Policy Development 2010) 14.

<sup>39</sup> See ‘Fortress Europe’ <<http://fortresseurope.blogspot.co.uk/2006/01/fortress-europe.html#uds-search-results>> accessed 27 Feb 2013.

Pakistan to Australia sank with the loss of 94 lives.<sup>40</sup> Moreover, these statistics do not reflect the true scale of the phenomenon of migrant smuggling which takes place clandestinely.<sup>41</sup>

This study argues that this ongoing and widespread failure both to combat migrant smuggling and to protect smuggled migrants is the result of several specific deficiencies in the Migrant Smuggling Protocol. These deficiencies extend to the fundamental notions upon which the Protocol is based, beginning with the legal definition of the smuggling of migrants itself, also covering the actors who engage in these activities, the situation of the States parties,<sup>42</sup> and finally the rights of the migrants who are the subject of smuggling.

### **1.3. Aims of the thesis**

This thesis seeks to achieve the following aims:

- To evaluate and analyse the substantive rules of the Migrant Smuggling Protocol.
- To explore the deficiencies within the substantive rules of the Protocol and how they affect the achievement of the main purposes of the Protocol.
- To propose a number of amendments to address any deficiencies within the substantive rules of the Protocol.

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<sup>40</sup> Jason Burke, 'The Night the Refugee Boat Sank: Victims Tell their Stories' *The Guardian* (London, Monday 3 June 2013).

<sup>41</sup> The Financial Action Task Force 'Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants' (July 2011) para 41.

<sup>42</sup> The phrase 'parties to the Protocol' will be used throughout this thesis instead of the term 'States parties to the Protocol'.

## 1.4. Significance of the thesis

To date, there has been no comprehensive study that elaborates and critically analyses the provisions of the Migrant Smuggling Protocol and the extent of their effectiveness. This is in contrast to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which was also adopted on 15 November 2000 but has been the subject of detailed research by Gallagher.<sup>43</sup> Existing work on the Migrant Smuggling Protocol either approaches this subject from a single perspective, such as in regard to human rights,<sup>44</sup> or in relation to a particular jurisdiction.<sup>45</sup> That said, there are a number of journal articles that examine some aspects of the Migrant Smuggling Protocol, albeit briefly.<sup>46</sup>

Consequently, this thesis contributes toward filling this gap and enriches the body of literature concerning the smuggling of migrants by building a comprehensive legal framework for analysing the fundamental issues that are addressed by the Migrant Smuggling Protocol, as well as for evaluating the effectiveness of the Protocol itself. This study provides a guide for States parties on how to interpret and implement the provisions of the Protocol. It also enables governments, specialised agencies and decision makers to understand the Protocol clearly and therefore to assess whether it is able to combat the activities of migrant smuggling effectively and protect the rights of smuggled migrants. Finally, this study provides some recommendations to assist the Conference of the Parties<sup>47</sup> in improving the existing international law on the smuggling

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<sup>43</sup> Gallagher, *The International Law on Human Trafficking* (n1).

<sup>44</sup> Obokata (n18).

<sup>45</sup> Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime* (n7).

<sup>46</sup> Gallagher, 'Human Rights and the New UN Protocols' (n18); Schloenhardt and Dale (n35)129.

<sup>47</sup> The Conference of the Parties is a mechanism established by Article 32 of UNCTOC to improve the capacity of States parties to combat transnational organised crime and to promote and review the

of migrants and to develop effective measures to confront these dynamic global activities. In particular, the activities of migrant smuggling have become a preoccupation of many Western governments, especially as the pace of smuggling has increased because of new factors that might push migrants to resort to smugglers more than before, such as the economic crisis and the Arab spring. For example, Amnesty International stated that 55,000 refugees from Syria had reached EU countries and claimed asylum, but many had risked their lives to do so by using smugglers.<sup>48</sup> Also, the Home Secretary of the UK declared that ‘you can never say you have done everything in the immigration world; you always have to look because people will look for a new way to abuse the system.’<sup>49</sup> These examples reveal that the activities of migrant smuggling and violations resulting from these activities are still going on and therefore international rules need to be improved in order to assist States to combat organised crime relating to migrant smuggling and to protect the rights of smuggled migrants.

### **1.5. Methodology of the thesis**

To answer the research question, the doctrinal or legal positivist approach is important in this study because it explains a law as it is, clarifies ambiguities within its rules, and places those rules within a logical and coherent structure.<sup>50</sup> An explanation and analysis that employs the doctrinal legal approach will tend to reveal discrepancies, inconsistencies and ambiguities within established rules.<sup>51</sup> This approach is therefore

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implementation of UNCTOC. For more clarification on the role of the Conference of the Parties in relation to the Migrant Smuggling Protocol, see chapter 4 section 4.1.1.2.

<sup>48</sup> ‘Syrian refugees: UK pilloried for keeping its borders closed’ *the Guardian* (London, 13 December 2013).

<sup>49</sup> Interview with Theresa May, the Home Secretary of the UK (BBC one, Panorama, 10 February 2014).

<sup>50</sup> Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell Publishing Ltd, 2008) 29; Robert Cryer and others, *Research Methodologies in EU and International Law* (Oxford and Portland, 2011) 38.

<sup>51</sup> Michael Salter and Julie Mason, *Writing Law Dissertations* (Pearson Longman 2007) 100.

likely to lead to a call for reforms to substantive rules.<sup>52</sup> On the basis of such a doctrinal legal approach, it will be argued that the substantive rules of the Protocol are not compatible with its purposes. These substantive rules have a number of deficiencies that adversely affect the achievement of the purposes of the Protocol. These deficiencies must be addressed by re-establishing a coherent relationship between the substantive rules of the Protocol and its purposes, where such reform is valid and permitted within the doctrinal legal approach.<sup>53</sup> In order to critically evaluate the Protocol and develop cogent lines of reasoning about its deficiencies, a number of primary sources such as the Migrant Smuggling Protocol itself, the provisions of UNCTOC and the official reports of the Conference of the Parties on the implementation of the Protocol will be used. Also, case law, national legislation and the UN guidelines on the implementation of the Migrant Smuggling Protocol – including the *travaux préparatoires* of the Protocol, the Legislative Guide for the implementation of the Protocol and the Model Law against the Smuggling of Migrants – constitute additional primary sources. The analysis of these primary sources will be complemented with a careful, in-depth analysis of secondary sources, including books, journal articles and research papers, news reports and press releases.

### **1.6. Structure of the thesis**

This thesis consists of seven chapters, with this introduction forming Chapter 1 and the final conclusion constituting Chapter 7. Chapter 2 examines the legal definition of the smuggling of migrants in Article 3(a) of the Protocol by addressing its three constitutive elements. The first section of Chapter 2 examines the *actus reus*, or element of ‘action’.

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid, 108.

## Chapter 1

It explores the nature of the acts that fall within the legal definition of the smuggling of migrants. The element relating to ‘benefit’ in the definition will be the focus of the second section. The overlap between the smuggling of migrants and trafficking in persons will then be discussed through the element of ‘consent’, forming the focus of section three of Chapter 2.

Chapter 3 highlights the legal features of actors who engage in the smuggling of migrants. This chapter will begin by elucidating the criterion of ‘a structured group of three or more persons’ that must form the actors who engage in the smuggling of migrants according to the Migrant Smuggling Protocol. It will then examine the ‘purpose’ of those actors.

Chapter 4 addresses the obligations and rights of States to combat the activities of migrant smuggling. The substantive framework of the obligations of criminalisation, prevention, non-commission and cooperation and state responsibility for these obligations will form the main subject of the first section of this chapter. The second section of the chapter then analyses the rights of States to take measures to combat and prevent migrant smuggling on the high seas.

Chapter 5 elaborates the rights of smuggled migrants in the Protocol. This chapter divides these rights into rights related to non-prosecution, life and dignity, detention, and return. These categories of rights will be critically examined in separate sections in this chapter.

Chapter 6 sets out a proposal for a future law to combat migrant smuggling and protect the rights of smuggled migrants. This chapter begins with a section that sets out the fundamental principles upon which such a law must be based. The second section of Chapter 6 then sets out suggested substantive rules for this new proposed law. Finally, the third section of this chapter focuses on how best to monitor the future law.

## 2. The legal definition of the smuggling of migrants in light of the provisions of the Protocol

Becoming aware of the constituent elements of smuggling of migrants and related conduct is the precondition for identifying, investigating and prosecuting such conduct.<sup>1</sup>

Prior to 15 November 2000,<sup>2</sup> there was no agreed legal definition in international law for the smuggling of migrants. What is more, a variety of phrases had been used by scholars and international organisations in the past to encompass such activities, such as ‘trafficking in migrants’, ‘people smuggling’ and ‘alien smuggling’.<sup>3</sup>

The 2000 Migrant Smuggling Protocol established, for the first time, an international definition for the smuggling of migrants.<sup>4</sup> Article 3(a) of the Protocol defines these activities as follows:

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

The aim of this chapter is to examine and critically evaluate the legal definition of the smuggling of migrants mentioned above. In doing so, each of the main elements

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<sup>1</sup> Marika McAdam, ‘Toolkit to Combat Smuggling of Migrants: Tool 1’ (UNDOC 2010) 27.

<sup>2</sup> Date of adoption of the Migrant Smuggling Protocol.

<sup>3</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 13 and 21-22; Tom Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17 Intl JRL 394, 396.

<sup>4</sup> Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective’ (n3) 395.

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of the legal definition of the smuggling of migrants as outlined in Article 3(a) of the Protocol will be examined in turn.

The legal definition of the smuggling of migrants represents a cornerstone of the Protocol and plays an intrinsic role in defining States' obligations under the Protocol.<sup>5</sup> For instance, the Protocol obligates States in Article 6 (1)(a) to criminalise the acts laid down in the definition of the smuggling of migrants as a stand-alone offence.<sup>6</sup> Thus, when the *actus reus*, or the acts that comprise the offence, are clearly established in the definition, States will find no difficulty in enacting domestic legislation criminalising the smuggling of migrants in a way that distinguishes it from other offences governed by the Protocol. For this reason, this chapter will begin by exploring the nature of the acts that fall within the legal definition of the smuggling of migrants, through a careful analysis of the *actus reus* — or the element of 'action'.

Second, the constitutive elements in the legal definition of the smuggling of migrants ought to be unambiguous and easily understandable, thus making it easy to determine who can be charged and in what way they can be charged with the offence of the smuggling of migrants.<sup>7</sup> To that end, the second section of the chapter highlights the element of 'financial or other material benefit', which is the required motive or intent for committing the offence. The negative and positive implications of this element in the context of prosecution will be discussed in detail.

Third, the definition of the smuggling of migrants ought to be distinguished from the definition of trafficking in persons. However, it should be stated here that there

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<sup>5</sup> Andreas Schloenhardt and Jessica E Dale, 'Twelve years on: revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air' (2012) 67 JPL129, 135.

<sup>6</sup> UNODC, 'In-Depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 1. Understanding Migrant Smuggling and Related Conduct' (United Nations 2011) 3.

<sup>7</sup> *Ibid*, 6.

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is often an overlap between the two definitions in practice. This overlap might affect the process of identifying whether a person is a smuggled migrant or a trafficked person.<sup>8</sup> Misidentification of trafficked victims as smuggled migrants deprives those victims of the rights they have under the Trafficking Protocol.<sup>9</sup> Therefore, the third section of this chapter will examine the demarcation between these two definitions and will touch on the legal consequences of this demarcation through the element of ‘consent’.

In the context of this discussion, it will be argued in this chapter that the definition of the smuggling of migrants is in certain respects inadequate.<sup>10</sup> It has a number of deficiencies, which might affect adversely the Protocol’s purpose of combating migrant smuggling.

### **2.1. The element of action**

This section seeks to define the specific actions that are required to establish the smuggling of migrants in Article 3(a) of the Protocol. According to the legal definition of the smuggling of migrants in this article, the ‘action’ element can be established on the basis of the phrase ‘the procurement ... of the illegal entry of a person into a State Party’.

The Trafficking Protocol, which was drafted at the same time as the Migrant Smuggling Protocol, adopted a clear framework for the element of ‘action’ in the definition of trafficking in persons. It listed a number of the acts that fall within the

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<sup>8</sup> Anne Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 278-81. See also, Pia Oberoi and others ‘Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence’ (International Council on Human Rights Policy 2010) 14.

<sup>9</sup> Gallagher, *The International Law on Human Trafficking* (n8) 281.

<sup>10</sup> Anne Gallagher, ‘Trafficking, Smuggling and Human Rights: Tricks and Treaties’ <<http://www.fmreview.org/sites/fmr/files/.pdf>> accessed 5 August 2012.

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legal definition, such as recruitment, transportation, transfer or harbouring.<sup>11</sup> By contrast, the drafters of the Migrant Smuggling Protocol have not followed the same approach; instead, they used a single act to define smuggling, namely that of ‘procurement’.

During the codification history of the definition, one of the delegations observed that the concept of ‘procurement of the illegal entry’ is problematic, thus stating that ‘it would be better to make reference to complicity in and aiding and abetting the violation of national migration laws.’<sup>12</sup> Moreover, the Libyan delegation suggested that the concept of ‘procurement of the illegal entry’ should be understood as encompassing such acts as facilitating the illegal entry of persons into another State, preparation, dealing with documents, planning, supervision and financing.<sup>13</sup> The Ad Hoc Committee of the Protocol did not comment at all on these suggestions. For example, the Committee did not report on whether or not the term ‘procurement of the illegal entry’ already covers the acts mentioned above. The Ad Hoc Committee of the Protocol left the term ‘procurement’ undefined, providing no guidance as to its interpretation. However, it defined the term ‘illegal entry’ ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State.’<sup>14</sup>

This issue arose again during the drafting of the Model Law against the Smuggling of Migrants which was developed by UNODC in response to a request by

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<sup>11</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (adopted 15 November 2000 and entered into force on 25 December 2003) 40 ILM 335 (The Trafficking Protocol) Article 3(a).

<sup>12</sup> *Travaux préparatoires* of the negotiations for the elaborations of the United Convention against Organised Transnational Crime and the Protocols thereto (United Nations 2006) 464.

<sup>13</sup> United Nations General Assembly (UNGA) Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, ‘Proposals and contributions received from Governments’ UN Doc A/Ac. 254/5/Add.21. (11 February 2000).

<sup>14</sup> Article 3(b) of the Protocol.

## Chapter 2

the General Assembly to the Secretary-General to assist States in implementing the provisions contained in the Migrant Smuggling Protocol.<sup>15</sup> In the commentary of the Model Law, the drafters opined that the act of ‘procurement’ – a term that is integral to the definition of the smuggling of migrants – is not defined in the Protocol itself and that, accordingly, it may be necessary to add a definition of this term.<sup>16</sup> Nonetheless, the drafters of the Model Law did not themselves proffer any definition of ‘procurement’. Instead, they merely put forward a number of suggestions of the word based on the Oxford Dictionary.<sup>17</sup>

In the absence of a clear meaning of the term ‘procurement’, the question that can be asked is whether the definition of the smuggling of migrants through the element of action covers only the action of illegal entry or whether it also encompasses acts of facilitation, which create the conditions for illegal entry into a State party. The answer to this question is, of course, critical in a number of different respects.

First, the clarification of the acts that fall within the definition of the smuggling of migrants is important because it permits harmonisation between the criminal law of the many States that are party to the Protocol, thereby furthering the ultimate purpose of the Protocol.<sup>18</sup> When the acts that constitute smuggling are apparent within the definition, the offence of the smuggling of migrants in Article 6(1)(a) of the Protocol will be criminalised in the same manner by the parties to the Protocol. When the acts that constitute smuggling are unclear or unspecified, the lack of clarity and specificity will result in a lack of uniformity. This can happen in two broad ways. States may

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<sup>15</sup> UNODC, ‘Model Law against the Smuggling of Migrants’ (United Nations 2010)1.

<sup>16</sup> Ibid, 31.

<sup>17</sup> Ibid.

<sup>18</sup> Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’ (2002) 14 Intl JRL 561, 594.

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choose to interpret the definition themselves when enacting domestic legislation, so as to address the lack of specificity. Alternatively, States may carry the lack of specificity into their own domestic legislation, leaving it to the courts to then interpret and develop the definition as they please. Either way, the result will be a lack of uniformity in the criminalisation of the smuggling of migrants — potentially rendering the laws of some States more attractive to smugglers than those of others.<sup>19</sup> To illustrate, consider the following example. Imagine that smuggler X fuels a truck for smuggling, and smuggler Y uses this truck to transport a migrant across a border.<sup>20</sup> In the absence of a clear framework for the *actus reus* because of the term ‘procurement’, the offence of the smuggling of migrants will in some jurisdictions capture the conduct of both smuggler X and Y because both contributed to the illegal entry of the migrant even if only smuggler Y actually drove the migrant across the border.<sup>21</sup> Other jurisdictions, however, might well adopt a different approach, with the smuggling of migrants encompassing only the act of transportation that resulted in the illegal entry. In these jurisdictions, smuggler X will not be prosecuted for the offence of the smuggling of migrants. Thus, the lack of specificity in the *actus reus* can potentially lead to widely varying results in the implementation of the Protocol by different States.

Second, the parties to the Protocol are required under Article 6(1)(a) to criminalise the acts that comprise the smuggling of migrants in Article 3(a) of the Protocol as a stand-alone offence.<sup>22</sup> Consequently, the element of action within the legal definition of the smuggling of migrants must be sufficiently clear if States are to be able

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<sup>19</sup> Ibid.

<sup>20</sup> UNODC, ‘In-Depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants’ (n6) 6.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid, 3.

## Chapter 2

to fulfil their obligations under Article 6(1)(a) of the Protocol. Without such clarity, it becomes difficult to distinguish between the offence of the smuggling of migrants in Article 6(1)(a) and other offences, such as the offence of participating in the smuggling of migrants in Article 6(2)(b) of the Protocol or facilitating the commission of organised crime in Article 5(1)(b) of UNCTOC. Pacurar has drawn attention to this issue by pointing out that, since the acts involved in participating are different in practice from the act of conducting the smuggling operation itself, it is not clear whether participatory acts fall within the ambit of smuggling in the Migrant Smuggling Protocol.<sup>23</sup>

Third, States are required under a number of the provisions in the Protocol to adopt measures to prevent migrant smuggling, as it is defined in the Protocol.<sup>24</sup> Accordingly, it is essential to define clearly the nature of the specific acts that constitute smuggling and that are subject to the provisions on prevention. For instance, Articles 7 and 8 of the Protocol obligate States to prevent migrant smuggling at sea. In this context, it is unclear whether the acts of mother vessels that transfer smuggled migrants into small boats at sea for the purpose of illegal entry into a destination State fall within the definition of the smuggling of migrants and therefore whether these acts are subject to Articles 7 and 8 of the Protocol. If facilitative actions fall within the definition of the smuggling of migrants, Articles 7 and 8 of the Protocol are applicable to the acts of mother vessels; otherwise, they are not.

The academic literature takes different approaches in regard to whether or not facilitative actions fall within the definition of the smuggling of migrants. On the one hand, Muntarbhorn adopts a narrow approach by claiming that the smuggling of

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<sup>23</sup> Andi Pacurar, 'Smuggling, Detention and Expulsion of Irregular Migrants: a Study on International Legal Norms, Standards and Practices' (2003) 5 EJ Migration & L 259, 265.

<sup>24</sup> Articles 2, 7, 8 and 11 of the Protocol.

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migrants is essentially ‘a cross-border situation entailing the procurement of the illegal entry of a person into another country.’<sup>25</sup> This view implies that the smuggling of migrants occurs at the time the border is crossed or illegal entry is made into another State. It focuses only on the final stage of smuggling – that is, the crossing of a border – and does not therefore cover any preparatory or facilitative actions that enabled or assisted this crossing.

On the other hand, Pacurar, Liempt and Schloenhardt adopt a broad approach wherein they state that ‘the procurement of the illegal entry’ of a migrant applies to all acts that facilitate the smuggling of migrants, such as the acts of transportation.<sup>26</sup> Gallagher has expressed a similar view by stating that the ‘smuggling of migrants is sufficiently broad to apply to all irregular migrants whose transport has been facilitated’.<sup>27</sup>

It can be argued that the narrow interpretation adopted by Muntarhorn is the correct one in interpreting the definition of the smuggling of migrants given in the Protocol, particularly with reference to the element of action. The element of action in the definition of the smuggling of migrants is restricted only to acts that lead to illegal entry. A contextual interpretation of a number of the provisions of the Protocol supports this view. First, the Protocol specifies a number of related acts in Article 6(1)(b) that can be committed to facilitate the smuggling of migrants, such as producing, procuring or providing a fraudulent travel or identity document. If facilitative acts were included

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<sup>25</sup> Vitit Muntarhorn, ‘Combating Migrant Smuggling and Trafficking in Persons, Especially Women: the Normative Framework Re-appraised’ in T A Aleinikoff and V Chetail (eds), *Migration and International Legal Norms* (T.M.C Asser Press 2003) 151.

<sup>26</sup> Ilse V Liempt, *Navigating Borders: Inside Perspectives on the Process of Human Smuggling into the Netherlands* (Amsterdam University Press 2007) 40; Pacurar (n23) 263; Schloenhardt (n3) 352.

<sup>27</sup> Anne Gallagher, ‘Human Rights and new UN Protocol on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 HRQ 975, 1000.

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within the definition of the smuggling of migrants, then there would arguably be no need for Article 6(1)(b), as this would be covered already by Article 6(1)(a) that reflects the definition of the smuggling of migrants. In other words, such an inclusion would render Article 6(1)(b) nugatory. In addition, interpreting the element of action in light of the broad approach leads to an unnecessary and unhelpful overlap between the various provisions of the Protocol. For example, a person who assists a smuggler by providing fraudulent identity documents could be prosecuted either for the smuggling of migrants under Article 6(1)(a) or the offence relating to fraudulent documents under Article 6(1)(b)—or possibly under both provisions.

Second, in a separate provision the Protocol specifically deals with the act of participating as an accomplice,<sup>28</sup> as well as organising or directing other persons.<sup>29</sup> This in itself might well capture many participatory and facilitative acts. For instance, if smuggler X in the example mentioned above fuels a truck in full knowledge that it is being used to smuggle migrants, his act arguably falls within the scope of participating as an accomplice and not the smuggling of migrants itself.

Third, the Protocol seeks to set the minimum legal standards that States must apply to prevent migrant smuggling.<sup>30</sup> This view is supported by Article 6(4) of the Protocol, which provides that nothing in the Protocol shall prevent States from criminalising whatever else they choose. In the same way, the provisions of the Protocol must under Article 1(1) be interpreted together with the provisions of UNCTOC, including Article 34(3). This article states that States can adopt stricter or more severe measures than those provided for by UNCTOC in regard to the preventing and

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<sup>28</sup> Article 6(2)(b).

<sup>29</sup> Article 6(2)(c).

<sup>30</sup> UNODC, 'Model Law against the Smuggling of Migrants' (United Nations 2010) 28.

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combating of transnational organised crime. On this basis, the Protocol should arguably be read strictly and narrowly, rather than widely. If States wish to adopt a wide approach, they can; but they are not required to do so by the Protocol itself, which sets only minimum standards. It can thus be said that the narrow approach in defining the element of action is the right one that reflects the minimum legal standards of the Protocol. However, the narrow approach might be less effective from the perspective of achieving the purpose of combating migrant smuggling. This approach excludes facilitative actions from the definition of the smuggling of migrants and therefore the perpetrators of these actions will not be subject to punishment for the offence of the smuggling of migrants in Article 6(1)(a) of the Protocol. While the illegal entry as outlined in the definition will not occur unless there are a number of prior or facilitative actions paving the way for that entry. For instance, the act of fuelling a truck for smuggling is not less important than the act of transportation that leads directly to an illegal entry or crossing. It would be better to say then that the narrow approach does not generate a sufficient deterrent framework for those who contribute to the accomplishment of the act of the smuggling of migrants.

It can be concluded that the element of action in the definition of the smuggling of migrants includes only an action that leads directly to an illegal entry or crossing. The facilitative actions that occur prior to the illegal entry do not in themselves represent the required element of action. These actions might be covered by other concepts which have been criminalised in Article 6 of the Protocol, such as producing and providing a fraudulent document or participating as an accomplice.

### 2.2. The element of benefit

Article 3(a) of the Protocol, which establishes the legal definition of the smuggling of migrants, stipulates that the act of smuggling must be carried out for the purpose of obtaining ‘a financial or other material benefit’. The phrase ‘a financial or other material benefit’ has not been defined either in Article 3 of the Migrant Smuggling Protocol, entitled ‘Use of terms’, or in the interpretative notes to this article. Nevertheless, this phrase is also used in Article 2(a) of UNCTOC as an element of the definition of ‘organised criminal group’,<sup>31</sup> and it has been defined in the interpretative notes to that article. According to these interpretative notes, the phrase ‘financial or other material benefit’:

... should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children members of paedophile rings or cost-sharing among ring members.<sup>32</sup>

Furthermore, the Model Law against the Smuggling of Migrants states that payment arising from the smuggling of migrants can include non-financial inducements, such as a free train or airplane ticket, or property, such as a car.<sup>33</sup>

It can be inferred that the phrase ‘financial or other material benefit’ ought to be interpreted as broadly and comprehensively as possible.<sup>34</sup> Such an approach entails that the definition of the smuggling of migrants thus encompasses all the activities of smuggling that aim to obtain any kind of advantage, as mentioned either in the

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<sup>31</sup> Ibid, 13.

<sup>32</sup> *Travaux préparatoires* of UNCTOC (n12) 17.

<sup>33</sup> UNODC, ‘Model law against the smuggling of Migrants’ (n30) 13.

<sup>34</sup> Ibid.

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interpretative notes to Article 2(a) of UNCTOC or in the Model Law against the Smuggling of Migrants.

In this section, it will be argued that the element of benefit creates two conflicting trends in the context of combating migrant smuggling. The reference to the element of benefit within the legal definition of the smuggling of migrants was intended to underline that the definition is only concerned with the activities of organised criminal groups acting for benefit, and not the activities of those who assist migrants to cross borders for humanitarian reasons or on the basis of close family ties, such as the acts of religious or non-governmental organisations.<sup>35</sup> A good illustration of those who assist migrants to cross borders for humanitarian reasons is acts undertaken by the International Organisation for Migration (IOM) aimed at assisting Syrian refugees to cross the border into Jordan and Lebanon because of the current armed conflict in Syria.<sup>36</sup> Another example would be the acts of Oskar Schindler, a German national, who saved Jewish workers in his factory from persecution during World War II by transporting them illegally from Plaszow, Poland – where they were facing certain death – to Brunnlitz, in the then-occupied Czechoslovakia.<sup>37</sup> If the element of benefit was not included within the definition of the smuggling of migrants, the acts of IOM and Schindler would be captured by the definition of the smuggling of migrants. The Federal Court in Canada confirmed such a conclusion in the case of *JP and GJ v. Canada* in which the defendants were smuggled migrants, who assisted the smugglers in the smuggling operation. In this case, the court rejected a broad interpretation of ‘people smuggling’ – as applied by the Immigration and Refugee Board – that aims to

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<sup>35</sup> *Travaux préparatoires* of the Protocol (n12) 469.

<sup>36</sup> IOM, ‘IOM Regional Response to the Syria Crisis: Situation Report’ (14 March 2013).

<sup>37</sup> Josh Kelly, ‘People smugglers: Saviours or Criminals? A Report on 16 Convicted People Smugglers in Australia between 2001 – 2006’ (Australian Lawyers for Human Rights 2010)10-11.

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cover acts not done for financial or material benefit.<sup>38</sup> The court stated that such an interpretation would capture individuals who are clearly not smugglers, including relatives, refugee advocates, settlement service workers, and human rights organisations.<sup>39</sup>

From another perspective, however, the element of benefit constitutes a distinct weakness in the Protocol, negatively affecting the Protocol's chances of achieving its purpose of combating migrant smuggling, particularly by criminal prosecution. In this regard, Kelly claims that the requirement of financial or material benefit in the definition of the smuggling of migrants does not make it impossible to prosecute people smugglers.<sup>40</sup> However, the invisibility of the benefit element renders Kelly's claim imprecise at best, if not also somewhat naive. In practice, the element of benefit has been misused by criminal organisations claiming before courts that the act migrant smuggling had not been carried out for any benefit.<sup>41</sup> For instance, the allegation that migrant smuggling was not for benefit was one of the defences that contributed to a drop in the conviction rate for people smugglers in Australia in 2012 to below 40%.<sup>42</sup> A public prosecutor in such cases must prove an intention or agreement to receive payment in order to satisfy the element of benefit.<sup>43</sup> At the same time, this element is sometimes difficult to establish in the first stages of investigations, particularly when it

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<sup>38</sup> *JP and GJ v Canada* (Minister of Public Safety and Emergency Preparedness) 2012 FC 1466.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 9.

<sup>41</sup> Bregie Pieters, 'Dutch Criminal and Administrative Law Concerning Trafficking in and Smuggling of Human Beings: The Blurred Legal Position of Smuggled and Trafficked Persons: Victims, Instigators or Illegals?' in Elspeth Guild and Paul Minderhoud, *Immigration and Criminal Law in the European Union* (Martinus Nijhoff Publishers 2006) 222.

<sup>42</sup> 'Legislation' (The University of Queensland, Migrant Smuggling Working Group) <<http://www.law.uq.edu.au/migrantsmuggling-statistics>> accessed 8 March 2013.

<sup>43</sup> UNODC, 'In-Depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants' (n6) 7.

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is invisible and there are no investigative methods used at borders.<sup>44</sup> This issue arises in the cases of the smuggling of refugees. For example, an illegal organisation known as ‘Snakeheads’ assisted many refugees to reach Hong Kong for a benefit following the protests of Tianamen Square;<sup>45</sup> however, the successful prosecution of such smugglers is difficult, if not impossible, because the element of a benefit in such cases seems invisible for the States concerned.<sup>46</sup>

It can be concluded that there is a degree of conflict in the element of benefit in the definition of the smuggling of migrants. On the one hand, this element is necessary so as to exclude the acts of non-governmental organisations and charitable institutions assisting migrants and refugees to cross borders for humanitarian reasons or on the basis of close family ties. On the other hand, smugglers are able to abuse the element of benefit in order to avoid criminal responsibility. This tension has been found in practice in the case of *R v. Appulonappa*.<sup>47</sup> In this case, the applicants argued that Section 117 of the Immigration and Refugee Protection Act (IRPA) in Canada adopts an implied definition of the smuggling of migrants that does not include the element of benefit. It is therefore overly broad and could therefore capture in its ambit the acts of certain categories of persons such as humanitarian workers and close family members. In contrast, the Crown stated that this broad definition is necessary in order to combat migrant smuggling, where the narrow definition can be abused by smugglers. The Crown affirmed that Section 117 of the IRPA is consistent with Canada’s international obligations in the Migrant Smuggling Protocol and that there is no intention to

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<sup>44</sup> Pieters (n41) 208. See also, Liempt (n26) 39.

<sup>45</sup> John Morrison, ‘Report on the Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy?’ (UNHCR’s Policy Research Unit, July 2000) 55.

<sup>46</sup> Johanne Vernier, ‘French Criminal and Administrative Law Concerning Smuggling of Migrants and Trafficking in Human Beings: Punishing Trafficked People for their Protection?’ in Guild and Minderhoud (n41) 9-10.

<sup>47</sup> *R v Appulonappa* 2013 BCSC 31. See also, *JP and GJ v Canada* (n38).

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prosecute humanitarian workers and family members. However, the Supreme Court of British Columbia in this case stated that this intention is not expressed as an exception either in the definition of the smuggling of migrants under the Protocol or in Section 117 of the IRPA as a matter of law. The court's view means that this intention cannot be regarded as a legal basis that can protect those who assist the smuggled migrants on the basis of humanitarian reasons or close family ties. Furthermore, the expert witnesses who were brought by the court conceded that, although the likelihood of prosecuting those who commit activities of migrant smuggling on the basis of these reasons is nil, these activities might technically fall within the definition of the smuggling of migrants in Section 117 of IRPA. These main reasons encouraged the Supreme Court of British Columbia to hold that Section 117 of IRPA is overbroad and therefore must not be given any force or effect. This case reveals that the Supreme Court of British Columbia tends to the narrow definition of the smuggling of migrants that explicitly includes the element of benefit. This narrow definition protects the interests of those who allege that they assist the smuggled migrants on the basis of humanitarian reasons or close family ties. In other words, the court did not consider the interests of Canada, which seek to combat migrant smuggling through a broad definition.

However, it is possible to find a degree of balance that can reconcile these interests. This balance can be in the form of a law that ensures the successful prosecution of smugglers who profit from the smuggling of migrants and, at the same time, the exclusion of those who assist the smuggled migrants and refugees on the basis of humanitarian reasons or close family ties. In fact, such a balance can be found in Article 1 of the Council Directive 2002/90/EC, which defines the facilitation of unauthorised entry. This article was tantamount to a compromise during the stage of the directive's drafting between the human rights organisations that were calling for regard

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to humanitarian assistance in the context of the smuggling of asylum seekers, and the delegations of the EU States that were seeking to widen the definition of facilitation of unauthorised entry.<sup>48</sup> Article 1(a) of the directive defines the facilitation of unauthorised entry as:

any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens

As can be seen, the element of benefit is not mentioned within the definition of facilitation of unauthorised entry. Thus, the EU States are able to draft the offence of facilitation of unauthorised entry or its equivalent without reference to the element of benefit. For instance, the offence of smuggling of human beings in Article 197a of the Dutch Criminal Code is devoid of any element of benefit.<sup>49</sup> Accordingly, public prosecutors in the Netherlands are not required to prove that smugglers are motivated by benefit.<sup>50</sup> They only need to prove that a smuggler assisted a person who is not a national to cross borders illegally. Furthermore, Section 25(1) of the Immigration Act of 1971 in the UK criminalises the act of assisting unlawful immigration without any reference to the element of benefit.<sup>51</sup> In the UK, a person can be prosecuted for the smuggling of migrants even if he or she manages to conceal the benefit resulting from

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<sup>48</sup> The European Council on Refugees and Exiles ‘An overview of proposals addressing migrant smuggling and trafficking in persons: ECRE Background Paper’ (July 2001).

<sup>49</sup> Criminal Code of the Kingdom of Netherlands (1881, amended 2007)  
<<http://www.legislationline.org/documents/id/15753>> accessed 5 April 2013.

<sup>50</sup> Richard Staring, ‘Controlling Immigration and Organised Crime in the Netherlands: Dutch Developments and Debates on Human Smuggling and Trafficking’ in Guild and Minderhoud (n41) 241-42.

<sup>51</sup> Immigration Act 1971 <<http://www.legislation.gov.uk/ukpga/1971/77/section/25>> accessed 5 April 2013.

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the smuggling process. For instance, in *R v. Vuemba-Luzamba*<sup>52</sup> the smuggler appealed against his sentence of 18 months issued by the Crown Court at Canterbury by arguing that he had helped a fellow countryman who had now claimed political asylum and that he had not acted with a motive of profit. The Court of Appeal dismissed the appeal and confirmed the sentence. The reason for this is that the offence of assisting unlawful immigration in Section 25 (1) of the Immigration Act of 1971 (UK) does not include any element of benefit that may be used as a defence.<sup>53</sup> It can thus be concluded that the first part of the balance, namely the successful prosecution of smugglers, can be achieved through paragraph 1(a) of Article 1 of the directive.

The second part of the balance is addressed in paragraph 2 of the same article, which provides as follows:

Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

This paragraph addresses the concerns of humanitarian organisations by granting the EU parties the authority to exclude those who facilitate unauthorised entry of persons for humanitarian reasons from prosecution. On this basis, the EU States are able, through the methods of national laws and practices, to exclude those who assist migrants to cross borders for humanitarian reasons. A good illustration of the method of national laws in paragraph 2 of Article 1 of the directive is the Criminal Code of Finland. Section 8(2) of Chapter 17 of this Code provides that the arrangement of illegal immigration does not apply to an act that aims to ensure the safety of a foreigner in his

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<sup>52</sup> *R v Vuemba-Luzamba* [2006] EWCA Crim 579, [2006] All ER (D) 354.

<sup>53</sup> *Ibid*; *R v Kapoor and others* [2012] EWCA Crim, 435 [2012] 2 All ER 1205. See also, Dora Kostakopoulou, 'Trafficking and Smuggling in Human Beings: the British Perspective' in Guild and Minderhoud (n41) 363.

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or her home country or country of permanent residence.<sup>54</sup> The method of practice laid down in paragraph 2 of Article 1 of the directive to exclude those who assist migrants to cross borders for humanitarian reasons has also been adopted by a number of EU States. For instance, on 26 September 2012 the European Commission made a request through the European Migration Network for information from the EU States on their implementation of paragraph 2 of Article 1 of Council Directive 2002/90/EC. Upon reviewing the responses of EU States, the Netherlands, Portugal, Slovenia and Sweden declared that the facilitation of the unauthorised entry of persons for humanitarian reasons has in practice been taken into consideration on a case-by-case basis in cases wherein it is not explicitly treated in the immigration law or formal legislation of a State.<sup>55</sup>

In the jurisdiction of EU States, whether those States exclude humanitarian acts through domestic legislation or through judicial practice, a smuggler must prove that the act of the facilitation of illegal entry was performed for a humanitarian motive in order to sidestep the offence of facilitation of illegal entry.<sup>56</sup> The burden of proof thus falls on those who wish to claim that the act of smuggling was for humanitarian reasons.

It can be said that the second part of the balance – i.e. the non-prosecution of those who assist smuggled migrants and refugees for humanitarian reasons – can be achieved through paragraph 2 of Article 1 of the Council Directive 2002/90/EC. However, the discretionary authority granted to the EU States under the phrase ‘may decide’ in paragraph 2 of Article 1 of the directive might compromise the value of this

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<sup>54</sup> The Criminal Code of Finland (39/1889, amendments up to 940/2008 included) <<http://legislationline.org/documents/section/criminal-codes>> accessed 3 April 2013.

<sup>55</sup> European Commission, ‘Ad-Hoc Query on Exemption from Sanctions within the Context of Offence of Solidarity’ (20 December 2012).

<sup>56</sup> Pieters (n41) 235.

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paragraph in redressing the balance.<sup>57</sup> An EU State could adopt strict laws or practices and prosecute those who facilitate unauthorised entry regardless of whether their actions were for benefit or for humanitarian reasons.

### **2.3. The element of consent**

Although the legal definition of the smuggling of migrants in Article 3(a) of the Protocol does not explicitly include an element of consent, consent may be regarded as a default element within the definition. As we shall see, the definition of the smuggling of migrants can be interpreted to suggest that those smuggled are voluntary participants in the smuggling process.<sup>58</sup>

The element of consent is basically rooted in the definition of ‘migrants’, who are the object of smuggling according to Article 3(a) of the Protocol. Smuggled migrants are ultimately ‘international migrants’ who decide to change their country of usual residence.<sup>59</sup> That means that there is willingness on the part of a potential migrant to move and change country of residence. The potential migrant expresses this willingness when, for instance, he or she begins to look for somebody to assist him/her to bring about this movement and change. For this reason, it has been said that ‘it is not smugglers who recruit their potential clients, but it is the migrant who seeks a smuggler in his community and enters a contract based on mutual trust’.<sup>60</sup> It can be said that voluntary movement is an inherent characteristic in the definition of a ‘migrant’ who

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<sup>57</sup> Valsamis Mitsilegas, ‘Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens, Strengthening the State’ (2012) 19 *Indiana JGLS* 3, 10.

<sup>58</sup> Obokata (n3) 397.

<sup>59</sup> Zaid A Zaid, ‘Illegal Immigration in International Law and Practice in Selected Countries: The Case of Libya and Italy’ (DPhil thesis, Glasgow Caledonian University 2007) 14.

<sup>60</sup> Friedrich Heckmann and others, ‘Transatlantic Workshop on Human Smuggling’ (2000) 1 *Geo Immigr LJ* 167, 170.

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might be the object of smuggling.<sup>61</sup> In particular, this characteristic has been considered an essential criterion in the definition of the smuggling of migrants adopted by the IOM in 1994.<sup>62</sup> It can be concluded that the consent of the smuggled migrants constitutes an element within the legal definition of the smuggling of migrants laid down in Article 3(a) of the Protocol.<sup>63</sup>

In the context of the element of consent, the legislative guide for the implementation of UNCTOC and the protocols thereto states that this element constitutes the major distinction between the smuggling of migrants and trafficking in persons.<sup>64</sup> It clarifies that the voluntary movement of migrants characterises the former concept, while the latter concept is based on the coercive movement of trafficked persons.<sup>65</sup> This approach has been widely supported in the academic literature.<sup>66</sup> For example, in their study on the Migrant Smuggling Protocol, Schloenhardt and Dale observe that, after adopting the Protocol, most signatories have become capable of distinguishing between the smuggling of migrants and trafficking in persons in their

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<sup>61</sup> Samuel V Jones, 'Human Trafficking Victim Identification: Should Consent Matter?' (2012) 45 *Indiana L Rev* 483, 485.

<sup>62</sup> Schloenhardt (n3) 14.

<sup>63</sup> Liempt (n26) 40.

<sup>64</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (United Nations 2004) para 30.

<sup>65</sup> *Ibid.*

<sup>66</sup> Mila Paspalanova, 'Undocumented vs. Illegal Migrant: Towards Terminological Coherence' <[http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S1665-89062008000100004](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1665-89062008000100004)> accessed 10 April 2012. See also, Jarrod Jolly, 'Fighting Crime or a Fight for Rights? Assessing the Human Rights Value of the UN Protocols on Trafficking in Persons and Migrant Smuggling' (2011) 4 *QLS Rev* 103,110; Carolyn Burke, 'Smuggling versus Trafficking: Do the U.N. Protocols have it right?' 105 <<http://www.du.edu/korbel/hrhw/researchdigest/trafficking/UNProtocols.pdf>> accessed 24 April 2012; The Human Smuggling and Trafficking Center 'Fact Sheet: Distinctions between Human Smuggling and Human Trafficking' (April 2006) 4; Bo Cooper, 'A New Approach to Protection and Law Enforcement under the Victims of Trafficking and Violence Protection Act' (2002) 51 *Emory L J* 1041, 1047.

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domestic legislation on the basis of the definition of the smuggling of migrants in the Protocol,<sup>67</sup> which implicitly includes the element of consent.

Nevertheless, it will be argued that, while in many cases the consent of the smuggled migrant may be clear in practice,<sup>68</sup> in other cases it may well be blurred.<sup>69</sup> In other words, the element of consent is not capable in every situation of distinguishing between the smuggling of migrants and trafficking in persons. The reason for this is that the consent of the smuggled migrants can sometimes be affected by the coercion referred to in Article 3(a) of the Trafficking Protocol. Thus, it is difficult in some cases to decide whether migrants are smuggled or trafficked.<sup>70</sup> To put it another way, it becomes ambiguous whether a particular case is one of smuggling of migrants or of trafficking in persons.

For example, the consent of a smuggled migrant predicated on economic pressure is questionable. It is generally acknowledged that smuggled migrants are often economic migrants, fleeing unemployment and poverty in their countries of origin. In this regard, it is not entirely clear whether economic pressure might fall within, or contribute toward, the element of coercion, particularly with reference to the position of vulnerability in Article 3(a) of the Trafficking Protocol.<sup>71</sup> Does someone with a gun to their head consent in handing over their money when robbed?<sup>72</sup> In the context of the

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<sup>67</sup> Schloenhardt and Dale (n5) 153.

<sup>68</sup> Gallagher, 'Human Rights and the New UN Protocols' (n27) 1001; Jacqueline Bhabha and Monette Zard, 'Smuggled or Trafficked?' <[www.fmreview.org/pdf/bhabha&zard.pdf](http://www.fmreview.org/pdf/bhabha&zard.pdf)> accessed 30 September 2011.

<sup>69</sup> Ibid. See also, Md Shahidul Haque, 'Ambiguities and Confusions in the Migration-Trafficking Nexus: A Development Challenge' in Karen Beeks & Delila Amir (eds), *Trafficking and the Global Sex Industry* (Lexington Books 2006) 6.

<sup>70</sup> Oberoi and others (n8) 14.

<sup>71</sup> Gallagher, *The International Law on Human Trafficking* (n8) 49.

<sup>72</sup> Jacqueline Bhabha, 'Human Smuggling, Migration and Human Rights' (the International Council on Human Rights Policy 2005) 27.

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smuggling of migrants, does a father who accepts being smuggled in order to bring food to his starving children consent? If consent is held to be present, the act becomes one of smuggling. If consent is absent, it becomes one of trafficking. Nozick and Rawls consider this type of situation to be one of consent. They distinguish between interpersonal threats such as a threat with a gun, which are coercive, and personal circumstances such as poverty and illness, which are not coercive.<sup>73</sup> This differentiation, while certainly apposite in general jurisprudence, is arguably inappropriate here because the Trafficking Protocol specifically states that coercion not only includes use of force but also abuse of power or abuse of a position of vulnerability.<sup>74</sup> However, Bhabha opines that the issue will depend on the interpretation of the States and courts in regard to the concept of a position of vulnerability.<sup>75</sup> Accordingly, it is unclear whether or not this concept might include extreme poverty. Indeed, the *travaux préparatoires* of the Trafficking Protocol states that ‘the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.’<sup>76</sup> In this case, poverty might conceivably give rise to a position of vulnerability if a migrant has no choice but to resort to being smuggled, in which case the act becomes one of trafficking and not smuggling. Consequently, it is not possible to decide whether consent is valid or not without an ‘investigation into the availability of the individual’s reasonable alternatives to withholding the consent and the circumstances that led the actor to a condition of vulnerability and lack of palatable alternatives’.<sup>77</sup>

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<sup>73</sup> Oberoi and others (n8) 82.

<sup>74</sup> The Trafficking Protocol (n11) Article 3(a).

<sup>75</sup> Bhabha (n72) 27.

<sup>76</sup> *Travaux préparatoires* of the Trafficking Protocol (n12) 347.

<sup>77</sup> Jones (n61) 510.

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Another difficulty with consent is that smuggled migrants may not always be informed, or may even be misled about the method of transportation and find themselves crammed into airless containers or overfilled boats.<sup>78</sup> In such cases, the initial consent that is given to an act or situation does not preclude withdrawal of consent at a later stage if some circumstances have changed.<sup>79</sup> However, it may be asked at what moment should the decision on how to characterise the conduct be made?<sup>80</sup> Is it the point of departure or arrival of the smuggled migrant that ought to be considered in defining the nature of the act in such cases?

On the one hand, States tend to favour the point of departure, believing that it offers the clearest indication of ‘true intention’ and that it best enables them to select those migrants deserving of exclusion.<sup>81</sup> On the other hand, rights advocates argue that the whole journey and experience, including after arrival, should determine status.<sup>82</sup> This conflict between States and rights advocates has arisen in the case of some Burmese migrants.<sup>83</sup> On 9 April 2008, 121 Burmese migrant workers were smuggled into Thailand in the rear refrigeration compartment of a cold storage truck. During the journey, the storage compartment’s air conditioning broke down; eventually, the driver pulled his truck to the side of the road in response to noises coming from the storage compartment, and discovered that many of his passengers appeared close to death. When the police arrived, they found that 54 of the 121 passengers had suffocated. The police charged 46 workers with illegally entering Thailand, and did not offer any level

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<sup>78</sup> Morrison (n45) 72.

<sup>79</sup> Bhabha (n72) 26.

<sup>80</sup> Ibid.

<sup>81</sup> Oberoi and others (n8) 83.

<sup>82</sup> Ibid.

<sup>83</sup> Erick Gjerdingen, ‘Suffocation inside a Cold Storage truck and other Problems with Trafficking as “Exploitation” and Smuggling as “Choice” Along the Thai-Burmese Border’ (2009) 26 *Arizona J Intl & CL* 699,702.

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of protection for the survivors despite them suffering from physical injuries. Thai human rights expert Vitit Muntarbhom criticised the police response for not processing the case as trafficking, stressing that the migrants had been exploited at every step of their journey. In contrast, the police argued that the smugglers had not forced the Burmese migrants to come to Thailand and that they had come to Thailand voluntarily. As such, this represented a case of smuggling, a crime with significantly less harsh penalties for the smugglers and no protection for the smuggled migrants.<sup>84</sup> In this case, the Thai police adopted the point of departure to distinguish smuggling from trafficking, while the rights advocate adopted the point of arrival. Notwithstanding this, the Explanatory Report on the Convention on Action against Trafficking in Human Beings states that in such cases ‘the question of consent is not simple and it is not easy to determine where free will ends and constraint begins’.<sup>85</sup> However, the Thai police’s view is not logical, and not compatible with the narrow interpretative approach that has been adopted as a standard to define the definition of smuggling, in particular in reference to the element of action. In other words, a broad interpretative approach, as reflected in the view of the Thai police, means that it is sufficient for consent to exist at any point during any stage of smuggling and such consent need not necessarily exist at the time of crossing the border. Thus, if a migrant gives initial consent and then withdraws it at the time of crossing a border, under the broad interpretative approach the acts of the smuggler could possibly fall within the definitions of smuggling and trafficking simultaneously. By contrast, under a narrow interpretative approach, consent needs to exist at the time of actually crossing the border, and therefore the act of smugglers in the case of these Burmese migrants can be classified as trafficking even

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<sup>84</sup> Ibid, 703.

<sup>85</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (Warsaw 16.V.2005) Article 97.

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though it started off as smuggling. Thus, the narrow interpretative approach is arguably also preferable in the context of the element of consent.

The aforementioned cases illustrate how the differentiation between the concepts of the smuggling of migrants and trafficking in persons can sometimes be challenging in practice on the basis of the element of consent.<sup>86</sup>

Crucially, the Migrant Smuggling Protocol does not provide any guidance on how to distinguish between the concepts of the smuggling of migrants and trafficking in persons where the consent is not obvious or there is some overlap between the smuggling and trafficking.<sup>87</sup> Gallagher rightly points out that this failure represents a significant weakness in the Protocol, and one that was deliberately ignored despite a plea during the eighth session by the Inter-Agency Group of the United Nations Children's Fund (UNICEF), the United Nations High Commissioner for Refugees (UNHCR) and the IOM to the Ad Hoc Committee to further develop the Migrant Smuggling Protocol so as to create a clearer divide between smuggling and trafficking in practice.<sup>88</sup> Indeed, the States that are parties to the Protocol have an interest in ensuring that the Protocol is free from any measure of international control over the distinction between smuggling and trafficking.<sup>89</sup> This gap confers upon these States some discretion in regard to how to draw the line between smuggling and trafficking.<sup>90</sup> For example, the framework of rights in the Migrant Smuggling Protocol and Trafficking Protocol affords greater protection for trafficked persons than for smuggled

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<sup>86</sup> Liempt (n26) 41; Oberoi and others (n8) 80; Gallagher, 'Human Rights and the New UN Protocols' (n27) 1000.

<sup>87</sup> Ibid.

<sup>88</sup> Gallagher, 'Human Rights and the New UN Protocols' (n27) 1000-01.

<sup>89</sup> Ibid, 1001.

<sup>90</sup> Ibid.

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persons and imposes a greater financial and administrative burden on States in the case of trafficked migrants, thereby creating a clear incentive for national authorities to identify migrants as smuggled rather than as trafficked.<sup>91</sup>

In effect, the distinction between the smuggling of migrants and trafficking in persons is critical on many levels. These two different categories of illegal movement of people across borders lead to quite different legal consequences.<sup>92</sup> For instance, law enforcement institutions must be able to distinguish between the two categories in order to adopt enforcement strategies that meet the victims' needs as well as the needs of the State.<sup>93</sup>

In terms of the needs of victims, trafficked persons and smuggled migrants are treated differently in the Trafficking and Smuggling Protocols.<sup>94</sup> Trafficked persons are entitled under the Trafficking Protocol to rights within the scope of criminal investigations and proceedings, compensation for damages suffered, temporary or permanent residence, accommodation and employment, educational and training opportunities.<sup>95</sup> It can thus be said that the Trafficking Protocol has a comprehensive framework of rights for trafficked persons.<sup>96</sup> By contrast, the Migrant Smuggling Protocol has a limited framework of rights for smuggled migrants.<sup>97</sup> Generally, there is

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<sup>91</sup> Ibid; Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and Treaties' (n10).

<sup>92</sup> Raimo Väyrynen, 'Illegal Immigration, Human Trafficking, and Organised Crime: Discussion Paper No. 2003/72' (United Nations University, World Institute for Development Economics Research 2003) 1. See also, Kelly E Hyland, 'Protecting Human Victims of Trafficking: An American Framework', (2001) 16 *BWLJ* 29, 34; Kate L Stacey, 'On Assistance and Protection of Smuggled migrants: International Law and Australian Practice: Research Paper' (The University of Queensland Australia, Migrant smuggling Working Group 2012)16.

<sup>93</sup> Adrian James, 'Criminal Networks, Illegal Immigration and the Threat to Border Security' (2005) 7 *IJPSM* 219, 223.

<sup>94</sup> Obokata (n3) 397.

<sup>95</sup> See the Trafficking Protocol (n11) Articles 6 and 7.

<sup>96</sup> Obokata (n3) 397; Gallagher, *The International Law on Human Trafficking* (n8) 278-79.

<sup>97</sup> Ibid. For more clarification, see chapter 5 of this study.

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much to gain from being classified as trafficked, and much to lose from being deemed smuggled.<sup>98</sup> Consequently, any confusion between smuggling and trafficking would lead to the implementation of the wrong legal framework of rights. Trafficked persons who are mistakenly identified as smuggled will be excluded from protection,<sup>99</sup> and smuggled migrants who are incorrectly classified as trafficked victims will get more than they deserve.

In addition, the smuggling of migrants and trafficking in persons ought to be distinguished clearly, so that States can apply the correct criminal framework when dealing with perpetrators. Clearly, smugglers of migrants ought to be prosecuted for their offence under Article 6(1)(a) of the Migrant Smuggling Protocol, while traffickers in persons ought to be prosecuted for their offence under Article 5(1) of the Trafficking Protocol. Consequently, smuggling and trafficking must be disconnected from each other not only in theory but also in practice, and should not have an impact on each other.<sup>100</sup> Hence, there must be a suitable criterion that is capable of effectively determining between smuggling and trafficking.<sup>101</sup>

In this regard, it may be suggested that where it is not possible to rely on the element of consent to distinguish between smuggling and trafficking, the element of exploitation in the definition of trafficking in persons provides a suitable alternative test for differentiation. In particular, the element of exploitation was mentioned in the report of the secretariat on the implementation of the Migrant Smuggling Protocol, specifically in relation to the issue of distinguishing between smuggling and trafficking in

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<sup>98</sup> Oberoi and others (n8) 78.

<sup>99</sup> Ibid.

<sup>100</sup> Gjerdingen (n83) 717; Burke (n66) 104.

<sup>101</sup> Bhabha and Zard (n68).

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persons.<sup>102</sup> Moreover, the literal interpretation of the definition of trafficking in persons in Article 3(a) of the Trafficking Protocol lends support to this approach.

The literal interpretation of the phrase ‘for the purpose of exploitation’ in the definition of trafficking in persons<sup>103</sup> indicates that the acts of recruitment, transportation, transfer and harbouring or receipt of persons, taking place through coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits, must be committed specifically to exploit the persons involved. This means that forms of coercion alone are insufficient to establish trafficking in persons; the purpose of exploitation must also be present.<sup>104</sup> To put it more simply, the element of exploitation is crucial in the offence of trafficking in persons.<sup>105</sup> Lack of consent or the invalid consent of the smuggled migrants will not shift the act of smuggling into trafficking unless the element of exploitation is also present. The act of smuggling, in which the relationship between the smuggler and the smuggled migrant ends upon the migrant’s arrival in a destination State will not amount to trafficking<sup>106</sup> even if the coercion in the definition of trafficking was used to recruit the smuggled migrant. In the absence of exploitation, the act of smuggling cannot convert into an act of trafficking.<sup>107</sup>

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<sup>102</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, ‘Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the first reporting cycle: Report of the Secretariat’ UN Doc CTOC/COP/2005/4/Rev.2 (8 August 2008) 4.

<sup>103</sup> The Trafficking Protocol (n11) Article 3 (a).

<sup>104</sup> Stacey (n92) 17; Jolly (n66) 110.

<sup>105</sup> Aronowicz, ‘Victimization of Trafficked Persons and Illegal Migrants’ (2004) 11 Intl Rev V 11,22.

<sup>106</sup> Mary A Young, ‘The Smuggling and Trafficking of Refugee and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organised Crime?’ (2004) 27 Suf TL Rev 101,108.

<sup>107</sup> Veronika Bilger, ‘Human Smuggling as a Transnational Service Industry Evidence from Austria’ (2005) 4 Intl Migration 3.

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Importantly, Article 3(a) of the Trafficking Protocol does not specifically define ‘exploitation’. However, it does provide examples, such as forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs.<sup>108</sup> Moreover, the phrase ‘at a minimum’ is used in Article 3(a) of the Trafficking Protocol ‘to ensure that unnamed or new forms of exploitation would not be excluded by implication.’<sup>109</sup>

That said, not all of the forms of exploitation should be identified as trafficking.<sup>110</sup> For instance, exploitation that takes the form of inhuman or degrading treatment during the smuggling process per se (such as sailing in unseaworthy vessels, smuggling in an airless container or hitting the smuggled migrants) are all acts that fall within the ambit of smuggling. In particular, the Migrant Smuggling Protocol recognises this sort of exploitation through the following arguments. The Protocol obligates States to increase the punishment for smuggling in cases of inhuman or degrading treatment, including the exploitation of smuggled migrants.<sup>111</sup> In other words, the Protocol does not state that the act of smuggling can shift into trafficking when a smuggled migrant is exposed to inhuman or degrading treatment by smugglers. Furthermore, the Protocol states through the interpretative notes to Article 6 that the reference to the words ‘inhuman or degrading treatment’ within Article 6(3)(b) will not affect the scope and application of the Trafficking Protocol.<sup>112</sup> This means that the concept of the smuggling of migrants is still applicable rather than that of trafficking in persons in cases involving the inhuman or degrading treatment of smuggled migrants.

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<sup>108</sup> Gallagher, *The International Law on Human Trafficking* (n8) 34.

<sup>109</sup> *Travaux Préparatoires* of the Trafficking Protocol (n12) 344.

<sup>110</sup> Gallagher, *The International Law on Human Trafficking* (n8) 49.

<sup>111</sup> The Migrant Smuggling Protocol, Article 6(3) (b).

<sup>112</sup> *Travaux Préparatoires* of the Protocol (n12) 489.

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This view is echoed in the academic literature. Gjerdingen, for instance, states that incidents falling into the category of smuggling may be less severe or exploitative than those falling under the category of trafficking.<sup>113</sup> Hathaway confirms this view by stating that although migrants are prone to abusive situations because of smuggling, this is far from the usual case that occurs in the context of trafficking.<sup>114</sup> It can be said, therefore, that violations that include inhuman or degrading treatment of smuggled migrants during the smuggling journey do not convert an act of smuggling into trafficking. Accordingly, Gallagher's view that there is an overlap between trafficking in persons and aggravated smuggling that includes inhuman or degrading treatment<sup>115</sup> can be decisively rejected.

### **Conclusion**

The legal definition of the smuggling of migrants in Article 3(a) of the Protocol has a number of deficiencies. First, it fails to define the term 'procurement' and therefore whether or not actions that facilitate illegal entry fall within the remit of the smuggling of migrants. In particular, the drafters of the Protocol have not provided any clear guidance as to the approach that should be used. That said, a narrow approach that interprets the element of 'action' to include only actions that lead to an illegal entry seems more logical and appropriate, especially as this accords with a contextual interpretation of the various provisions of Article 6 of the Protocol.

Second, the element of benefit has been included within the definition of the smuggling of migrants so as to exclude the acts of those who assist migrants to cross

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<sup>113</sup> Gjerdingen (n83) 718.

<sup>114</sup> James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 *Vir J Intl L* 1, 9.

<sup>115</sup> Gallagher, *The International Law on Human Trafficking* (n8) 52.

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borders because of humanitarian reasons or family ties. However, this element creates an obstacle in combating the activities of smugglers. Since the element of benefit is difficult for prosecutors to prove, smugglers are able to seize upon this element in order to establish a defence and avoid criminal responsibility. In trying to reconcile the successful prosecution of smugglers and the exclusion of humanitarian assistance, EU-Directive 2002/90/CE makes no reference to the element of benefit within the concept of facilitation of unauthorised entry. Rather, the directive treats humanitarian reasons as a permissible motive in a separate paragraph, thereby shifting the burden of proof from the prosecutor to the smuggler who wishes to avail him-or herself of this defence.

Third, the element of consent set forth implicitly in the definition of the smuggling of migrants sometimes fails in practice to distinguish between the smuggling of migrants and trafficking in persons. This is because the forms of coercion in the definition of trafficking in persons can affect the consent of the smuggled migrants. As a result, the difference between smuggling and trafficking becomes blurred. Consequently, in cases where consent is not obvious, it is possible to rely on the element of exploitation in the definition of trafficking in persons to distinguish between the smuggling of migrants and trafficking in persons. The smuggling of migrants thus becomes trafficking when there is an element of exploitation during one of the smuggling stages. That said, exploitation through inhuman or degrading treatment, which might well occur in the course migrant smuggling, is specifically recognised by the Migrant Smuggling Protocol. The smuggling of migrants therefore is dominant and such cases are not regarded as trafficking in persons.

This chapter critically analysed the elements that comprise the legal definition of the smuggling of migrants and highlighted their limitations and shortcomings. The next

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chapter will focus on the legal features of the actors involved in the smuggling of migrants.

### 3. The position of smuggling organisations in light of the provisions of the Protocol

The words of one smuggler: 'I am the border. I can do whatever I like to cross this border, and you just have to bring money.'<sup>1</sup>

The Migrant Smuggling Protocol does not include any article that explicitly defines the legal features of the actors who engage in activities of migrant smuggling. Furthermore, the academic literature on migrant smuggling lacks a comprehensive study on the legal features of those actors. The academic debate has instead largely focused on the structures of smuggling organisations and the various roles defined within the smuggling process.<sup>2</sup> However, the combined reading of Article 4 of the Protocol and Article 2 (a) of UNCTOC can help us to explore a number of legal features that characterise the actors involved in migrant smuggling.

Article 4 of the Protocol concerning the scope of application states that the Protocol applies when the smuggling of migrants involves an organised criminal group.<sup>3</sup>

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<sup>1</sup> Darshan Vigneswaran and others, 'Criminality or Monopoly? Informal Immigration Enforcement in South Africa' (2010) 36 JS Afr S 472.

<sup>2</sup> Daphné Paquet, 'Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications' (UNDOC 2010) 67; Sheldon Zhang and Ko-lin Chin, 'Enter the Dragon: inside Chinese Human Smuggling Organizations' (2002) 40 Criminology 750 – 754; Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 127; Ferruccio Pastore and others, 'Schengen's Soft Underbelly? Irregular Migration and Human Smuggling across Land and Sea Borders to Italy' (2006) 44 Intl Migration 101 - 108; Marika McAdam, 'Toolkit to Combat Smuggling of Migrants: Tool 1' (UNDOC 2010) 3 -5; Paola Monzini and others, 'Smuggling of Migrants into, through and from North Africa: A Thematic Review and Annotated Bibliography of Recent Publications' (UNDOC 2010) 27.

<sup>3</sup> See Article 4 of the Migrant Smuggling Protocol.

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The concept of an organised criminal group is not defined in the Protocol; however, it is defined in UNCTOC, with Article 2(a) stating:<sup>4</sup>

‘Organised criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Since the provisions of UNCTOC apply, *mutatis mutandis*, to the Migrant Smuggling Protocol unless otherwise provided in the Protocol,<sup>5</sup> the criminal groups engaging in migrant smuggling must therefore meet the criteria in Article 2(a) of UNCTOC in order to be subject to the provisions of the Protocol. Thus, a criminal group involved in migrant smuggling must consist of a structured group of three persons or more and exist for a period of time to commit in concert such activities in order to obtain, directly or indirectly, a financial or other material benefit.

It can be seen from Article 4 of the Protocol that the concept of ‘an organised criminal group’ is very important in the context of the provisions of the Protocol. It represents a precondition for applying the provisions of the Protocol,<sup>6</sup> in particular in the field of cooperation between the parties to the Protocol.<sup>7</sup> For example, the presence of an organised criminal group is required for requesting the cooperation of other States under Articles 10 and 14 of the Protocol. This is much the same way as legal assistance or extradition under UNCTOC cannot be requested by a State party unless the State is able to establish that there is an organised criminal group at work that is engaged in

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<sup>4</sup> Article 2 (a) of the UNCTOC.

<sup>5</sup> Article 1 (2) of the Migrant Smuggling Protocol.

<sup>6</sup> David McClean, *Transnational Organised Crime: A Commentary the UN Convention and Its Protocols* (Oxford University Press 2007) 392.

<sup>7</sup> Yasmin Damme, ‘Issue Paper on Organised Crime Involvement in Trafficking in Persons and Smuggling of Migrants’ (UNDOC 2010) 17.

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migrant smuggling.<sup>8</sup> For example, in the context of the activities of Indonesian migrant smuggling into Australia, the Australian government is only able to prosecute Indonesian fishermen, farmers, or labourers who are approached by organisers of migrant smuggling offering large sums to navigate vessels into Australian territory,<sup>9</sup> while the leading organisers who are in the State of origin, the State of transit or some other unconnected State cannot be prosecuted unless they are extradited to Australia. Such extradition occurs through cooperation between Australia and the States in which the organisers hide. Cooperation in the field of extradition requires that Australia abides by the provisions of the Protocol, including the criteria pertaining to the concept of an organised criminal group, which Australia must then prove is present here. It can be said that, generally speaking, a State party that calls for the application of the Protocol is obligated to show the criteria in the concept of an organised criminal group with respect to the actors who engage in the activities of migrant smuggling in its territory.

In looking at the criteria set out in Article 2(a) of UNCTOC defining an organised criminal group, the first section of this chapter aims specifically to highlight the criterion of the structured group of three persons or more. The section explores how this criterion constitutes a weakness in the Protocol—one that can adversely affect the combating of migrant smuggling. The second section of the chapter will then examine and critically evaluate the ‘purpose’ criterion in the concept of an organised criminal group in order to find out whether it covers family networks and terrorist groups that engage in migrant smuggling.

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<sup>8</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (United Nations 2004) para 19.

<sup>9</sup> Charles Martin, ‘Scum of the Earth? People Smuggling Prosecutions in Australia: Research paper’ (University of Queensland, Migrant Smuggling Working Group 2011) 21.

### 3.1. The 'structured group' criterion

The criterion of the structured group requires that the smuggling organisations that are subject to the Protocol must consist of three persons or more.<sup>10</sup> However, the interpretative notes to Article 2(a) of UNCTOC concerning the concept of an organised criminal group provide that the inclusion of a specific number of persons within the concept would not prejudice the rights of States pursuant to Article 34 (3) of UNCTOC.<sup>11</sup> A literal interpretation of Article 34(3) of UNCTOC indicates that, for the purpose of preventing and combating transnational organised crime, the parties to UNCTOC can adopt strict laws that are not in line with the provisions of the convention, including the criterion of the structured group of three persons or more. Accordingly, the permission articulated in the interpretative notes of Article 2 of UNCTOC is likely to be relevant only for the purpose of criminalisation. The States that are a party to the Protocol have the right to structure the concept of an organised criminal group within their criminal law as they prefer, as long as this helps them to combat and prevent migrant smuggling effectively within their territory.<sup>12</sup>

In contrast, the permission in the interpretative notes to Article 2 of UNCTOC does not apply to the Protocol's provision on cooperation. Put differently, the criterion of the structured group of three persons or more still constitutes a precondition for benefitting from the provisions of cooperation between the States in the Protocol. This conclusion is supported by the interpretation of Article 34(3) of UNCTOC as related only to the subject of criminalisation, as was mentioned above. Furthermore, both Articles 10 and 14 of the Protocol regarding cooperation specifically refer to the

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<sup>10</sup> Article 2(a) of UNCTOC.

<sup>11</sup> *Travaux préparatoires* of the negotiations for the elaborations of the United Convention against Organised Transnational Crime and the Protocols thereto (United Nations 2006) 17.

<sup>12</sup> Damme (n7) 17.

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concept of an ‘organised criminal group’. That indicates that the concept of an organised criminal group – including its requirement of three persons or more – is a necessary condition for cooperation between States under the Protocol.<sup>13</sup>

Consequently, a State party is not able to request cooperation from other parties to the Protocol if a criminal group involved in migrant smuggling in its territory contains fewer than three persons. Such a conclusion is likely to represent an obstacle in combating migrant smuggling, whether these activities are carried out by an organised criminal group that can meet the criterion of structured group, as will be explored in section (3.1.1) or by persons that lack this criterion of structure, as section (3.1.2) will seek to illustrate.

### **3.1.1. Involvement of an organised criminal group**

In this subsection, it will be argued that the criterion of the structured group of three persons or more might constitute an obstacle to combating migrant smuggling even if these activities are committed by an organised criminal group that meets this criterion. In this situation, the smuggling of migrants is accomplished by a structured group of three persons or more. However, the border-crossing stage might well be carried out only by one or two persons within the organised criminal group. In other words, smugglers at this stage of the smuggling process are often fewer in number than the threshold stipulated within Article 2(a) of UNCTOC regarding the concept of organised criminal group. For example, a study on migrant smuggling into Hungary has shown that the majority of interviewed persons crossed into Hungary with only two smugglers.<sup>14</sup> What is more, there are cases where smugglers avoid crossing borders

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<sup>13</sup> Ibid.

<sup>14</sup> John Salt, ‘Trafficking and Human Smuggling: A European Perspective’ (2000)1 Intl Migration 31, 42.

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themselves and simply deliver and collect the smuggled migrants at certain meeting points.<sup>15</sup> In these cases, although an organised criminal group might be engaged in the activities of smuggling migrants, a State party does not have the right to request any measure of cooperation, whether under UNCTOC or under the Protocol — although such cooperation might very well be necessary to establish the existence of a wider organised smuggling operation. Thus, when a State requires the cooperation of another State, it is precisely because the smuggling operation is organised outside its own territory; yet the State is required to establish this first before being able to request the cooperation it needs to establish such a situation. A State party needs the benefits of the Protocol, particularly those relating to cooperation between States in the field of information and identification,<sup>16</sup> in order to be able to identify an organised criminal group or the remaining members of such a group. In the absence of such cooperation, combating migrant smuggling will generally only target the low-level members of the operation (i.e. those who actually take smuggled migrants across borders). Accordingly, Martin argues that combating migrant smuggling in Australia needs to focus on investigating, extraditing and prosecuting the leading organisers who have so far largely escaped prosecution, rather than the Indonesian fishermen typically caught operating smuggling vessels in Australian waters.<sup>17</sup> In these cases, Australia might not obtain any kind of cooperation if the apprehended smugglers were only one or two in number, rather than the three persons or more as required under UNCTOC.

The issue of the application of the Protocol to smuggling activities committed by less direct involvement of organised criminal groups was raised in the codification

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<sup>15</sup> Veronika Bilger and others, 'Human Smuggling as a Transnational Service Industry Evidence from Austria' (2006) 44 *Intl Migration* 59.

<sup>16</sup> Article 14(2) (c) of the Migrant Smuggling Protocol.

<sup>17</sup> Martin (n9) 5.

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history of Article 4 of the Protocol.<sup>18</sup> Several delegations underlined the importance of being able to seek assistance with an ongoing investigation when it might not be known whether or not organised crime was involved.<sup>19</sup>

McClellan states that delegations supported the opening expressions ‘except as otherwise stated herein’ and ‘involve’ in Article 4 of the Protocol, which regulates the application of the Protocol.<sup>20</sup> They did so in an attempt to weaken or erode the criterion of an organised criminal group, particularly a structured group of three persons or more.<sup>21</sup> Nonetheless, it can be argued that both expressions are not capable of widening the application of the Protocol in cases where it is unknown whether or not an organised criminal group is involved in migrant smuggling.

The expression ‘except as otherwise stated herein’ in Article 4 of the Protocol was ‘proposed to allow some flexibility to extend the application of the Protocol further with respect to specific articles should this prove necessary.’<sup>22</sup> However, the expression is not used either in the Protocol or in UNCTOC in the context of the specific criterion of a structured group of three persons or more. There is no provision to be found in the Protocol that states that the measures of cooperation in the Protocol are excepted from the criterion of a structured group of three persons or more in UNCTOC, as is the case with criminalisation.<sup>23</sup> The existence of such a provision would grant States the ability to request cooperation at the first stages of smuggling operations, when it is still unknown whether or not an organised criminal group is at work.

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<sup>18</sup> McClellan (n6) 386.

<sup>19</sup> *Travaux préparatoires* of the Protocol (n11) 472.

<sup>20</sup> McClellan (n6) 386.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Damme (n7) 17.

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Similarly, UNCTOC, which also uses the expression ‘except as otherwise stated herein’ in Article 3 on the application of the convention, does not use this expression to modify the criterion of structure in the definition of an organised criminal group so as to extend the application of the convention in the context of cooperation. For instance, the provisions relating to confiscation, extradition, legal assistance and investigation<sup>24</sup> do not use this expression to exclude the criterion of a structured group of three persons or more in the case of cooperation between States parties to UNCTOC in these criminal measures.

In regard to the term ‘involve’, there was a debate during the codification history of Article 4 about whether to employ the words ‘when committed by’ or the word ‘involve’.<sup>25</sup> The majority of delegations supported the latter because it extends the application of the Protocol when it is unknown whether or not organised crime is involved.<sup>26</sup> This means that the measures of cooperation in the Protocol could be used to uncover whether or not there is an organised criminal group involved in the activities of migrant smuggling.

However, the term ‘involve’ does not actually grant States the ability to seek cooperation at the first stages of the smuggling of migrants, when it is still unclear whether an organised criminal group is at work. Put differently, it does not give Article 4 of the Protocol regarding the scope of application any broader meaning so as to permit the parties to the Protocol to demand cooperation regardless of the required structure of an organised criminal group engaged in migrant smuggling. The literal interpretation of

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<sup>24</sup> Articles 13, 16, 18 and 19 of UNCTOC.

<sup>25</sup> *Travaux préparatoires* of the Protocol (n11) 472.

<sup>26</sup> McClean (n6) 386 -387.

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the word ‘involve’ is to ‘cause to participate in an activity or situation’.<sup>27</sup> According to this interpretation, the term might be used to extend the level of participation in the organised criminal group, but the structure of three persons or more that comprises the concept of an organised criminal group will still represent a precondition for applying the Protocol’s provisions on cooperation.

It can be concluded that the words ‘except as otherwise stated herein’ and ‘involve’ in Article 4 of the Protocol are unable to bypass or weaken the criterion of a structured group of three persons or more in requiring cooperation between States that are parties to the Protocol.

However, in cases where it is unknown whether or not the smuggling of migrants involves organised crime, informal cooperation between law enforcement or regulatory agencies and their foreign counterparts without a formal request for mutual legal assistance under the Protocol or UNCTOC<sup>28</sup> might be a practical alternative, and one that circumvents the criterion of structure that is a prerequisite for formal cooperation. That said, the question that might arise is how such informal cooperation would be treated at the trial stage. For instance, judges might refuse extradition or the procedures of investigation used where these fall outside the measures on formal cooperation in the Protocol or UNCTOC.

### **3.1.2. Involvement of persons who do not constitute an organised criminal group**

In this subsection, it will be argued that the criterion of a structured group of three persons or more in the concept of an organised criminal group can hinder the Protocol’s

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<sup>27</sup> Oxford Dictionary < <http://www.oed.com/> > accessed 25 December 2012.

<sup>28</sup> Mike Price and others, ‘Basic training manual on investigating and prosecuting the smuggling of migrants: Module 8 International cooperation’ (UNODC 2010) 2 and 7.

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purpose of combating migrant smuggling whenever these activities are committed by persons who do meet this criterion.

By virtue of Article 4 of the Protocol, the provisions of the Protocol are applicable to the offence of the smuggling of migrants in Article 6(1)(a) of the Protocol only when the offence is committed by three persons or more. This leaves open the possibility that small-scale smugglers fall outside the ambit of the Protocol.<sup>29</sup> The scenario here is, of course, different to the one already discussed in the previous section of this thesis. In the previous section, we examined the situation where the smuggling of migrants is committed by a structured group of three persons or more but wherein the intercepting authorities apprehend only two or fewer individuals within that group. Here, however, the smuggling of migrants is committed by fewer than three persons in total. For example, a lone boatman ferrying migrants across a waterway or two smugglers guiding people through the desert across a land border would not fall within the scope of the Protocol.<sup>30</sup> The main question at hand then is why fewer than three actors who engage in the activities of migrant smuggling are excluded from the concept of an ‘organised criminal group’, and therefore from the application of the Protocol?

McClean claims that while two people might be guilty of conspiracy to commit a crime under common law, UNCTOC nonetheless requires a larger number of participants.<sup>31</sup> The author makes a link between organised crimes such as migrant smuggling, which are subject to UNCTOC, and the number of criminals that must be involved for such crimes to take place. In other words, McLean brings the criterion of

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<sup>29</sup> Khalid Koser, ‘Strengthening Policy Responses to Migrant Smuggling And Human Trafficking’ (Geneva Centre for Security Policy 2008) 7.

<sup>30</sup> Pia Oberoi and others ‘Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence’ (International Council on Human Rights Policy 2010) 67.

<sup>31</sup> McClean (n6) 41.

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three or more smugglers within the very definition of the smuggling of migrants itself. Such a view is open to two criticisms.

First, it may be argued that the number of criminals involved is not a precise criterion to use to define organised crimes, including migrant smuggling. The recruitment and transportation of migrants in trafficking in persons and in migrant smuggling can just as easily be carried out by one or two smugglers who can easily make a lot of money from a single victim or a small group of victims.<sup>32</sup> Individuals or amateur smugglers who provide a single service to migrants,<sup>33</sup> or even who achieve a short-distance operation,<sup>34</sup> are a good illustration of smugglers who do not constitute an ‘organised criminal group’, being fewer than three in number. Amateur smugglers do not usually need other collaborators; they complete all the stages of the smuggling operation themselves.<sup>35</sup> Individual fishermen who engage in migrant smuggling from Morocco to Spain are a case in point.<sup>36</sup> Another example is the occasional smugglers who operate in the border area between Iraq, Iran, and Turkey.<sup>37</sup>

Clearly, the individuals or amateur smugglers in these cases would not be subject to the provisions of the Protocol. What is more, this exclusion might extend to the actors who commit the activities in Article 6(1)(b) and (c) of the Protocol that are often committed by individuals or amateurs, where the criterion of the structured group of three persons or more cannot be met. For instance, the falsification of documents

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<sup>32</sup> Damme (n7) 8. See also, Twelfth UN Congress on Crime Prevention and Criminal Justice, ‘Criminal Justice Responses to the Smuggling of Migrants and Trafficking in Persons: Links to Transnational Organised Crime: Working Paper Prepared by the Secretariat’ A/CONF.213/7 (5 February 2010) para5.

<sup>33</sup> Andrea D Nicola, ‘Trafficking in Human Beings and Smuggling of Migrants’ in Philip Reichel, *Handbook of Transnational Crime & Justice* (SAGE Publications 2005) 186.

<sup>34</sup> Bilger and others (n15) 19.

<sup>35</sup> Ibid.

<sup>36</sup> Jørgen Carling, ‘Unauthorized migration from Africa to Spain’, (2007) 35 Intl Migration 3, 23.

<sup>37</sup> Ilse V Liempt, *Navigating Borders Inside Perspectives on the Process of Human Smuggling into the Netherlands* (Amsterdam University Press 2007) 124.

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under Article 6(1)(b) of the Protocol is often committed by lone amateurs who are specialised in this field;<sup>38</sup> therefore, the Protocol does not apply to them, particularly in the area of cooperation to bring such perpetrators to justice. In the same way, this defect extends to individuals who specialise in the offence of enabling illegal residence under Article 6(1)(c) of the Protocol. Landlords and small hotel owners who rent their properties out as dormitories to smuggled migrants<sup>39</sup> serve as a good illustration of actors who would fall outside the ambit of the Protocol, as a result of an absence of a structured group of three persons or more.

For this reason, Azerbaijan criticised in its proposal the criterion of the criminal group comprising three people or more, stating that it is illogical to say that two international professional assassins who have been travelling the world for years carrying out their assignments could not be classified as a criminal group because, according to UNCTOC, they would need one additional participant in order to qualify as such an organised criminal group.<sup>40</sup> This criticism is valid, especially given that the criterion of a specific number of participants was not included in the definitions of organised crime prior to UNCTOC. For instance, the Eighth Congress on the Prevention of Crime and Treatment of Offenders held in 1990 defines organised crime by reference to the large-scale or complex criminal activities that are carried out by tightly or loosely organised associations.<sup>41</sup> This definition does not require any specific number of actors to be engaged in such an organised crime.

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<sup>38</sup> Monzini and others (n2) 28.

<sup>39</sup> Ibid.

<sup>40</sup> UNGA Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, 'Proposals and contributions received from Governments' A/AC.254/5/Add.17 (5 January 2000) 3.

<sup>41</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of offenders, 'Effective National and International; Action against Organised Crime and Terrorist Criminal Activities: Report of the Secretary General' A/CONF. 144/7 (26 July 1990) para12.

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In looking at State practice, it is apparent that a considerable amount of domestic legislation does not take into consideration the criterion of a specific number of persons in articulating the legal concept of an organised criminal group. For example, Article 28 of the Criminal Code of the Republic of Albania states that a criminal organisation ‘represents particular forms of collusion which differ not only with respect to the number of participants, but also on their level of organisation and persistence to commit a number of criminal acts’.<sup>42</sup> Similarly, Article 132-71 of the French Criminal Code states that, ‘An organised gang within the meaning of the law is any group formed or association established with a view to the preparation of one or more criminal offences...’<sup>43</sup> According to these definitions, then, there is no specific number of persons necessary to form an organised criminal group. However, even where a specific number of participants is required by domestic legislation, the threshold is sometimes below that set by UNCTOC. For instance, Article 34 of chapter 7 of the Azerbaijan Criminal Code states that an organised criminal group must consist of two persons or more.<sup>44</sup>

Furthermore, the criterion of a criminal group comprising a specific number of persons is not mentioned in academic literature that addresses the definition of criminal organisations. In the context of the relationship between organised crime and illegal migration, Heikkinen and Lohrmann, for instance, define an international criminal organisation by reference to the transnational nature of such organisations and their

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<sup>42</sup> Criminal Code of the Republic of Albania, Chapter IV, art 28.  
<<http://legislationline.org/documents/section/criminal-codes>> accessed 22 October 2012.

<sup>43</sup> Criminal Code of the French Republic, Article 132-71.  
<<http://legislationline.org/documents/section/criminal-codes>> accessed 22 October 2012.

<sup>44</sup> Criminal Code of the Azerbaijan Republic, Chapter 7, art 34 (3).  
<<http://legislationline.org/documents/section/criminal-codes>> accessed 22 October 2012.

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criminal activities, which are diverse.<sup>45</sup> Similarly, Williams makes the point that, although criminal organisations have something in common, they are often diverse in structure, outlook and membership.<sup>46</sup>

Accordingly, State practice and the academic literature adopt an approach that is wider than that of UNCTOC by not referring to any particular number of actors comprising an organised criminal group. This means that the number of members is not generally a crucial criterion that is used to define the concept of an organised criminal group in practice.

Second, Article 2 of the Protocol, which sets out the purpose of combating migrant smuggling, has been drafted in a general manner in reference to the perpetrators. The article does not stipulate any specific structure or numerical threshold in referring to the smuggling of migrants. Consequently, it may be argued that the smuggling of migrants should be combated under the provisions of the Protocol, including that relating to cooperation, irrespective of the number or structure of the actors who engage in such activities. Such a conclusion is reflected in EU law on the smuggling of migrants. Article 1 of the Council Directive 2002/90/EC states that the act of assisting a person to enter, or transit across, the territory of a Member State in breach of the laws of the State on the entry or transit of aliens can be committed by ‘any person’.<sup>47</sup> By virtue of the term ‘any person’, Directive 2002/90/EC on the smuggling of migrants is rendered applicable to the activities of migrant smuggling regardless of the number of smugglers involved. In particular, there is no article in the directive that

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<sup>45</sup> Hanni Heikkinen and Reinhard Lohrmann, ‘Involvement of the Organised Crime in the Trafficking in Migrants’ (1998) <[http://migration.ucdavis.edu/rs/more.php?id=54\\_0\\_3\\_0](http://migration.ucdavis.edu/rs/more.php?id=54_0_3_0)> accessed 10 June 2012.

<sup>46</sup> Phil Williams, ‘Transnational Criminal Organisations and International Security’ (1994) 36 *Survival* 96.

<sup>47</sup> See Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/18.

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limits its application to the offence of the smuggling of migrants committed by a specific number of perpetrators, unlike as is the case in Article 4 of the Migrant Smuggling Protocol. Consequently, the EU law on the smuggling of migrants is wider in reach than the Migrant Smuggling Protocol in this regard.<sup>48</sup>

It can be concluded that the criterion of a structured group of three persons or more in the concept of an organised criminal group constitutes an obstacle to combating the activities of migrant smuggling as committed by individuals or amateur smugglers. Since this criterion is, under Article 4 of the Protocol, a precondition to applying the provisions of the Protocol, it is possible that two actors engaging in the smuggling of migrants or any of the related offences set out in the Protocol, such as providing fraudulent documents or enabling illegal residence, escape criminal liability because of the non-application of the measures on cooperation in the Protocol and UNCTOC.

### **3.2. The ‘purpose’ criterion**

Article 2(a) of UNCTOC defines an organised criminal group as a structured group of three persons or more, acting in concert, who commit one or more of the serious crimes or offences established in accordance with the convention ‘in order to obtain, directly or indirectly, a financial or other material benefit’.<sup>49</sup> By virtue of Article 4, the Migrant Smuggling Protocol is applicable only to smugglers operating with this specific purpose or intent. In other words, smugglers who assist migrants to cross borders for humanitarian, social, political or ideological purposes are not subject to the Protocol.

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<sup>48</sup> Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU* (Ashgate Publishing Limited 2010) 45.

<sup>49</sup> See Article 2 (a) of UNCTOC.

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This requirement as to purpose is compatible with the intention of the Protocol's drafters,<sup>50</sup> and is to be found also in Articles 3(a) and 6(1) of the Protocol. While the requirement has already been discussed in Chapter 2,<sup>51</sup> it needs to be re-examined here from a different angle. This subsection will highlight the financial or other material benefit as a criterion within the concept of an organised criminal group that is applicable to the actors who engage in the activities of migrant smuggling according to Article 4 of the Protocol. To be more specific, it will examine the extent to which the criterion of a financial or other material benefit as referred to in the concept of an organised criminal group can cover smugglers whose purposes are varied.

In the context of the purpose of the actors who engage in migrant smuggling, there are cases where a financial or material motive is not apparent. For instance, it has been reported that one of the forms of migrant smuggling is a family or village community suffering from poor living conditions, authorising smugglers to carry out the smuggling operation or participating in the operation.<sup>52</sup> The Fuzhounese human smuggling networks that transport their relatives from Hong Kong to New York is a case in point.<sup>53</sup> In this context, Martin, Miller and Damme claim that family networks that facilitate the illegal entry of their relatives for the purpose of looking for a better life abroad fall outside the Migrant Smuggling Protocol.<sup>54</sup> To be sure, a strictly

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<sup>50</sup> *Travaux préparatoires* of the Protocol (n11) 469.

<sup>51</sup> See chapter 2 section 2.2.

<sup>52</sup> McAdam (n2) 14.

<sup>53</sup> Peter Kwong, 'Impact of Chinese Human Smuggling on the American Labor Market' in David Kyle and Rey Koslowski (eds), *Global Human Smuggling Comparative Perspectives* (The Johns Hopkins University Press 2001) 236.

<sup>54</sup> Philip Martin and Mark Miller, 'Smuggling and Trafficking: A Conference Report' (2000) 34 *Intl Migration Rev* 969; Damme (n7) 59.

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economic or financial motive is not clear in such cases;<sup>55</sup> the previously mentioned view has relied on social dimensions in such actions that can serve to put a smuggling circle outside the concept of an organised criminal group, and thus outside the application of the Protocol.

Nevertheless, the social dimension that is the visible purpose of the actors in such cases at the beginning might change to become an economic motive when parents or households in the State of origin receive remittances that are sent back by the smuggled migrants from the destination State.<sup>56</sup> The family that smuggles one of its members may obtain a financial or other material benefit that thus brings it within the concept of an organised criminal group. With this specific category of smugglers in mind, the main question is whether the Migrant Smuggling Protocol is indeed applicable to those actors who engage in such activities or whether they fall outside the reach of the Protocol on account of the criterion of purpose, which forms part of the concept of an organised criminal group.

Since these networks are not of a direct monetary nature,<sup>57</sup> it would appear that such actors do not fall within the concept of an organised criminal group under the stipulation of the ‘direct’ obtaining of financial or material benefit. Nevertheless, it can be argued that these family networks could fall within the concept of an organised criminal group by ‘indirectly’ obtaining a financial or other material benefit. This argument can be based on a literal interpretation of the term ‘indirectly’ as used in Article 2(a) of UNCTOC. The word ‘indirectly’ means ‘happening in addition to an

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<sup>55</sup> Emma Herman, ‘Migration as a Family Business: The Role of Personal Networks in the Mobility Phase of Migration’ (2006) 44 *Intl Migration* 191, 197.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, 199.

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intended result, often in a way that is complicated or not obvious<sup>58</sup> or ‘not going straight to the point’.<sup>59</sup> Accordingly, the concept of an organised criminal group can, by virtue of the term ‘indirectly’, also encompass those actors who engage in organised crime for the purpose of obtaining a financial or other material benefit, albeit through other purposes.

This conclusion has been confirmed during the codification history of UNCTOC. The delegations stated at the third session of the Ad Hoc Committee on the elaboration of UNCTOC that although organised criminal groups might, for example, commit murders, those acts could nonetheless be seen as being indirectly intended to obtain a financial or other material benefit, and consequently the actors would fall within the concept of an organised criminal group.<sup>60</sup> An organised criminal group thus covers actors who obtain a financial or other material benefit indirectly through the commission of an offence or crime.

By analogy, it can be said that the concept of an organised criminal group also covers actors who engage in migrant smuggling primarily for social purposes, but where a financial or other material benefit is also an intended purpose for those actors, as in the case of family networks that smuggle their relatives. Thus, the Migrant Smuggling Protocol is applicable to those actors in such cases.

A related question in this context is whether or not the Protocol is applicable when the direct purpose of the smugglers is financial while the indirect purpose is political or some other non-financial purpose. Many States have indicated that terrorist

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<sup>58</sup> Cambridge dictionary <<http://dictionary.cambridge.org/>> accessed 12 December 2012.

<sup>59</sup> Merriam Webster dictionary <<http://www.merriam-webster.com/>> accessed 12 December 2012.

<sup>60</sup> UNGA Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, ‘Revised draft United Nations Convention against Transnational Organized Crime’ A/AC.254/4/Rev.2 (12 April 1999) 5.

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groups have frequently been involved in migrant smuggling and other forms of exploitation of illegal markets in order to support their terrorist activities.<sup>61</sup> For instance, migrant smuggling is undertaken in Turkey and the Balkan countries by terrorist groups that need money to finance their activities.<sup>62</sup> In this case, the underlying motive of the terrorist groups is political and therefore it may be supposed that these groups are not subject to the Protocol. However, terrorist groups do fall within the concept of an organised criminal group. This is because obtaining a financial or material benefit for other purposes, as in the case of terrorist groups, is captured by Article 2(a) of UNCTOC through the word 'directly'. While the financial benefit may not be the ultimate underlying purpose of these terrorist groups, such groups do not engage in migrant smuggling for free. These groups obtain a financial benefit directly, which thus clearly satisfies the criterion of purpose as it appears in the concept of an organised criminal group. As such, these terrorist groups fall within the concept of an organised criminal group, a view that is supported by the legislative guide to UNCTOC. The guide states that although the concept of 'an organised criminal group' does not apply to groups that do not seek to obtain any 'financial or other material benefit', such as terrorist or insurgent groups, these groups fall within the concept when they commit crimes covered by UNCTOC if they are undertaken in order to obtain financial and material benefits.<sup>63</sup> Since migrant smuggling is one such crime covered by UNCTOC, a terrorist group engaging in migrant smuggling for the purpose of obtaining a financial

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<sup>61</sup> Eleventh UN Congress on Crime Prevention and Criminal Justice, 'International cooperation against terrorism and links between terrorism and other criminal activities in the context of the work of the United Nations Office on Drugs and Crime: working paper prepared by the Secretariat' A/CONF.203/5 (11 February 2005) para10. See also, Paquet (n2) 10.

<sup>62</sup> Nilufer Narli, 'Human Trafficking and Smuggling: the Process, the Actors and the Victim Profile' in Nilufer Narli (ed), *Trafficking in Persons in South East Europe - a Threat to Human Security* (National Defence Academy and Bureau for Security Policy at the Austrian Ministry of Defence 2006) 24.

<sup>63</sup> Legislatives Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto (n8) para 26.

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benefit will fall within the concept of an organised criminal group under UNCTOC. The issue of whether or not these financial or material benefits will ultimately be used to pursue political or other motives is irrelevant within Article 2(a) of UNCTOC. As long as the criterion of obtaining a financial or other material benefit is found to exist in connection with the acts of a terrorist group engaged in migrant smuggling, the Migrant Smuggling Protocol is applicable.

### **Conclusion**

The legal features of smuggling organisations have not been considered by the Migrant Smuggling Protocol; the Protocol simply does not include a provision that defines the concept. Nonetheless, a number of these features can be ascertained through the combined reading of Article 4 of the Protocol and Article 2(a) of UNCTOC. The former article creates a link between an organised criminal group and the application of the Protocol, while the latter article actually defines the concept of an organised criminal group. A number of deficiencies can be identified in the concept of an organised criminal group, given the features that characterise the actors who engage in the smuggling of migrants.

The criterion of the structured group of three persons or more in Article 2 (a) poses an obstacle to combating migrant smuggling. Where migrant smuggling is committed by an organised criminal group, the border-crossing stage is frequently carried out by fewer than three persons. A State that apprehends those smugglers is unable then to request cooperation from other States in order to identify the remaining members of the group. This is because under Article 4 of the Protocol the concept of an organised criminal group, which includes the requirement of a structured group of three persons or more, constitutes a precondition for applying the provisions of the Protocol,

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including those provisions on cooperation between the parties of the Protocol. When migrant smuggling is committed by individual or amateur smugglers, those actors fall outside the ambit of the Protocol. This is because individual or amateur smugglers engage in migrant smuggling independently and not within a structured group of three persons or more. This criterion is incompatible with the purpose of combating the activities outlined in Article 2 of the Protocol. The purpose of the Protocol, as set out in Article 2, has been drafted generally and does not require any number or structure with respect to the actors who engage in the activities of migrant smuggling.

Turning now to the criterion of purpose in Article 2(a) of UNCTOC, those who engage in migrant smuggling must intend to ‘obtain, directly or indirectly, a financial or other material benefit’. A literal interpretation of the word ‘indirectly’ significantly broadens the scope of the concept of an organised criminal group. This scope then encompasses smugglers who use social purposes in migrant smuggling in order to obtain a financial or other material benefit. Family networks are a case in point. In addition, the term ‘directly’ in the article also covers terrorist groups who engage in migrant smuggling for financial benefits where those benefits are used ultimately for political purposes. Nevertheless, it is clear that the criterion of purpose, as set out in Article 2(a) of UNCTOC, needs to be more sharply defined to understand the full extent of its coverage.

Having clarified the constitutive elements of the smuggling of migrants in Chapter 2, as well as the legal features of smugglers that have been set out in this chapter, the next chapter will evaluate the situation of the parties to the Protocol by examining the obligations and rights of these States under the Protocol in regard to preventing and combating migrant smuggling.

## **4. The position of States in light of the provisions of the Protocol**

Commitment to the Smuggling of Migrants Protocol alone does not challenge migrant smuggling unless it results in meaningful implementation of the provisions therein.<sup>1</sup>

To achieve the purpose of combating and preventing the activities of migrant smuggling laid down in Article 2 of the Protocol, the Protocol imposes a range of obligations on States and also grants them a number of rights. The principal aim of this chapter is to explore whether or not the activities of migrant smuggling can be combated and prevented by States in light of the current wording of these obligations and rights laid down in the Protocol.

This chapter is divided into two main sections. The first section deals with the obligations of States to combat and prevent the activities of migrant smuggling. The second section highlights the rights of States under the Protocol to take measures on the high seas to combat and prevent such activities.

### **4.1. Obligations of States under the Protocol**

States are required to comply with a number of obligations in the Protocol that aim to combat and prevent the activities of migrant smuggling.<sup>2</sup> For example, Article 4

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<sup>1</sup> Marika McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (UNDOC 2011) 21.

<sup>2</sup> Since parties to the Protocol are required also to be parties to UNCTOC under Article 37(2) of this convention, they have additional obligations under UNCTOC to combat transnational organised crimes, of which the crime of the smuggling of migrants is one. Nevertheless, these obligations are procedural in nature, such as the obligations concerning jurisdiction, confiscation, extradition and so on (Articles 10-29 of the UNCTOC). These obligations have been regulated in a broad framework to cover all transnational crimes, while the obligations of States under the Protocol have a substantive nature and satisfy certain requirements concerning specifically the crime of the smuggling of migrants. See UN General Assembly

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indicates explicitly the obligations of prevention, investigation and prosecution. Furthermore, the obligations of criminalisation and cooperation are contained in Articles 6 and 7. Finally, the obligation of States not to commit the offences in Article 6 of the Protocol can be inferred from the combined reading of the obligations of criminalisation and prevention.

In the context of the obligations mentioned above, Schloenhardt and Dale claim that the Protocol employs mandatory and emphatic language in the context of the obligations of States in order to combat and prevent the smuggling of migrants.<sup>3</sup> This view seems imprecise and can be criticised on the basis of the phrases that have been used in formulating these obligations. For instance, States are required to adopt such legislative and other measures ‘*as may be necessary*’ to criminalise the smuggling of migrants and other related activities.<sup>4</sup> Likewise, States are required to take ‘*appropriate measures*’<sup>5</sup> to prevent migrant smuggling, to adopt measures ‘*within available means*’<sup>6</sup>, and to implement the measures of cooperation ‘*to the extent possible*’.<sup>7</sup> Such phrases are flexible, open-ended and vague<sup>8</sup> and might detract from the obligatory nature of the provisions of Protocol, because vague and flexible terms appearing in any treaty often create unenforceable obligations.<sup>9</sup> What is more, such wording can confuse States as to

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Economic and Social Council (UNGA ESC), ‘Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime’ UN Doc A/AC 254/13(12 April 1999).

<sup>3</sup> Andreas Schloenhardt and Jessica E Dale, ‘Twelve years on: Revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air’ (2012) 67 JPL129.

<sup>4</sup> See Articles 6(1) of the Migrant Smuggling Protocol.

<sup>5</sup> Article 8(2) (c) and (7) of the Protocol, and also Article 11(2).

<sup>6</sup> Articles 8(1) and 12 of the Protocol.

<sup>7</sup> Articles 7 and 8(1) of the Protocol.

<sup>8</sup> The European Court of Human Rights in the case of *Medvedyev and others. v. France* has described the phrase ‘appropriate measures’ in Article 17(4)(c) of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as ‘the vague wording’. See *Medvedyev and Others v France* App no 3394/03 (ECtHR 29 March 2010) para10.

<sup>9</sup> Louis Henkin and others, *International Law: Cases and Materials* (West Publishing Co 1980) 585-586.

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how to apply an international rule.<sup>10</sup> If international law is to influence and attach consequences to the actions of States, the latter must understand exactly what international law requires of them.<sup>11</sup>

Consequently, it will be argued in this section that the provisions of the Protocol as currently formulated offer great discretion to States, ‘allowing them to implement and interpret the Protocol to their own liking and their best national interest’.<sup>12</sup> Thus, the provisions are unable to achieve their aim of combating or eliminating migrant smuggling.<sup>13</sup> Even worse, the establishment of State responsibility for the obligations of States is not certain due to the flexibility and vagueness of these obligations. In exploring this issue, this section of Chapter 4 will begin by examining the substantive framework of the States’ obligations (section 4.1.1), then exploring the extent of the State responsibility of States for these obligations (4.1.2).

### **4.1.1. The substantive framework of obligations laid down in the Protocol**

The Migrant Smuggling Protocol includes, as mentioned above, several obligations that aim to prevent and combat migrant smuggling. However, this subsection discusses only the substantive content of the obligations of criminalisation, prevention, non-commission and cooperation. In addition, it will elaborate how the flexible, open-ended and vague language that has been used to formulate these obligations affects their interpretation and implementation.

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<sup>10</sup> Anne Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 8.

<sup>11</sup> Ibid.

<sup>12</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 361. See also, Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’ (2002) 14 Intl JRL 561.

<sup>13</sup> Anne Gallagher, ‘Trafficking, Smuggling and Human Rights: Tricks and Treaties’ <<http://www.fmreview.org/sites/fmr/files/.pdf>> accessed 5 August 2012.

### 4.1.1.1. Obligation of criminalisation

The obligation to criminalise migrant smuggling constitutes the cornerstone of the adoption of all other obligations to combat these activities. All the necessary measures to be taken derive their legitimacy from the obligation of criminalisation. From an international perspective, the Migrant Smuggling Protocol, through Article 6, seeks to establish harmonisation in States' domestic laws in relation to the smuggling of migrants and to smugglers.<sup>14</sup>

To that end, the Protocol obligates States under Article 6(1)(a) to criminalise the act of the smuggling of migrants.<sup>15</sup> The obligation of criminalisation extends to some of the offences related to migrant smuggling, such as those offences relating to fraudulent documents set out in Article 6(1)(b) and the offence of enabling illegal residence in Article 6(1)(c). States are also obligated under Article 6(2) to ensure the criminalisation of attempting, participating in and organising migrant smuggling. Finally, the aggravating circumstances that enable States to intensify the level of punishment for offences relating to migrant smuggling are also set out in Article 6(3) of the Protocol. The obligation of criminalisation in relation to the offence of the smuggling of migrants and the related offences has a number of deficiencies.

First, States are required to criminalise a specific form of conduct and adopt a series of mandatory domestic legislative provisions to create the offences mentioned

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<sup>14</sup> Brolan (n12) 594.

<sup>15</sup> For terminological purposes, the term of the offence of the smuggling of migrants will be used to refer to the smuggling of migrants as a stand-alone offence in Article 6 (1) (a) of the Protocol, while the term of the offences related to migrant smuggling will be used to express all the offences in Article 6 of the Protocol.

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above.<sup>16</sup> By way of example, Article 6(1)(a) of the Protocol requires States to criminalise the act of the smuggling of migrants as it has been defined in the Protocol, a subject examined in detail in Chapter 2 of this work. Nevertheless, a number of States that are party to the Protocol do not have specific laws on the offence of the smuggling of migrants that are in accordance with Article 6(1)(a) of the Protocol.<sup>17</sup> For instance, Egypt, Jamaica, Nigeria and Tanzania indicated in the questionnaire distributed by the Conference of the Parties that they do not have a specific piece of legislation in place criminalising the smuggling of migrants, but that the constituent elements of the offence are contained in various other pieces of legislation, such as legislation on passports, aliens and immigration.<sup>18</sup> This raises the question of whether such reliance upon the general criminal code or on a variety of separate legislative acts meets the obligation to criminalise the smuggling of migrants under Article 6(1)(a) of the Protocol.

In the context of this question, the obligation of States set out in Article 6(1) stipulates that a State must adopt legislative measures ‘as may be necessary’ to establish certain acts as criminal offences, including the smuggling of migrants. The article specifically provides that the need to adopt legislation is dependent upon necessity. It is essential to interpret the phrase ‘as may be necessary’ in order to understand the scope

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<sup>16</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, ‘Activities of the United Nations Office on Drugs and Crime to promote and support the implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: Report of the Secretariat’ CTOC/COP/2012/5(2 July 2012) para 28.

<sup>17</sup> Khalid Koser, ‘Strengthening Policy Responses to Migrant Smuggling and Human Trafficking: Discussion paper prepared for the Civil Society Days of the Global Forum on Migration and Development’ (Manila 2008) 2. See also, Twelfth UN Congress on Crime Prevention and Criminal Justice, ‘Criminal justice responses to the smuggling of migrants and trafficking in persons: links to Transnational Organised Crime: working paper prepared by the Secretariat’ A/CONF.213/7 (5 February 2010) para 47.

<sup>18</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, ‘Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the first reporting cycle: Report of the Secretariat’ UN Doc CTOC/COP/2005/4/Rev.2 (8 August 2008) para 5.

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of the conduct required on the part of a State to meet the obligation to criminalise the act of migrant smuggling. This phrase has been interpreted in the context of the European Convention on Human Rights. When the European Convention was not a part of English law, there was a view that incorporation was unnecessary because English law was already in conformity with the European Convention.<sup>19</sup> It seems obvious that necessity is therefore linked with conformity. In other words, necessity is closely related to whether or not a State already has legislation in place that is in conformity with the required international obligation. However, if this is so, what about the criterion of conformity between such legislation and the required obligation? Otherwise, to what extent should the existing legislation be in conformity with the obligation so that it can be decided that there is no necessity to enact new legislation? Thus, this interpretation of the European Convention on Human Rights does not solve the problem—it only raises other complicated issues.

In fact, if we interpret the phrase ‘as may be necessary’ in light of the Protocol’s purposes and objectives, a State must enact laws that lead to the effective combating of migrant smuggling. Thus, if a State has laws that achieve this purpose, it may be said that there is no necessity to enact new legislation. This interpretation is compatible with the approach in the legislative guide on the implementation of the Migrant Smuggling Protocol. The legislative guide states that the obligation to criminalise requires legislative measures unless there are laws in place that already achieve so.<sup>20</sup> This means that ‘legislators should therefore bear in mind that it is the meaning of the Protocol and

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<sup>19</sup> F A Mann, ‘The Consequences of an International Wrong in International and National law’ in Rene Provost (ed), *State Responsibility In International law* (Dartmouth Publishing Company 2001) 294.

<sup>20</sup> Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto (United Nations 2004) para 56.

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not the literal language that matters.<sup>21</sup> There is thus no necessity to enact new legislation as long as a State already has legislation in place aimed at combating the activities of migrant smuggling effectively, regardless of whether such legislation is an enactment concerned specifically with the offence of the smuggling of migrants or is a general criminal code. Consequently, it can be said that the conformity of Egypt, Jamaica, Nigeria and Tanzania with the obligation of criminalisation will depend on whether or not the legislation and codes of these States allow them to prosecute individuals engaging in the activities of migrant smuggling effectively.

Second, States are required under Article 6(1)(b) to criminalise various activities related to fraudulent documents when these are committed so as to enable the smuggling of migrants. It can be argued that there are a number of limitations to this article. Pacurar claims that this offence has room to encompass the acts of procuring or possessing fraudulent documents by smuggled migrants themselves.<sup>22</sup> This view can be criticised because the interpretative notes on Article 6(1)(b) of the Protocol specifically explain that this article applies only when the possession of fraudulent documents was for the purpose of migrant smuggling.<sup>23</sup> Accordingly, ‘a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included.’<sup>24</sup> Moreover, the purpose requirement in migrant smuggling, as laid down in Article 6(1)(b), results in activities related to fraudulent documents not falling within this article that are committed by migrant smugglers for the purpose of other offences, such as

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<sup>21</sup> Ibid.

<sup>22</sup> Andi Pacurar, ‘Smuggling, Detention and Expulsion of Irregular Migrants: a Study on International Legal Norms, Standards and Practices’ (2003) 5 EJ Migration & L 259,265.

<sup>23</sup> *Travaux préparatoires* of the negotiations for the elaborations of the United Convention against Organised Transnational Crime and the Protocols thereto (United Nations 2006) 489.

<sup>24</sup> Ibid.

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trafficking in persons, drug trafficking and smuggling of arms.<sup>25</sup> This limitation is justified because these activities have already been criminalised elsewhere. The final limitation that represents a deficiency in Article 6(1)(b) is that the activities related to fraudulent documents that are subject to criminalisation are restricted to those that involve travel and identity documents only, such as passports, other identification documents, and visas.<sup>26</sup> The interpretative notes to Article 3(c), which define the fraudulent travel or identity documents referred to in Article 6(1)(b), confirm this interpretation. They state that the term ‘travel document’ includes any type of document required for entering or leaving a State under its domestic law, and the term ‘identity document’ includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.<sup>27</sup> It is remarkable that the Protocol focuses here exclusively on documents that are directly used to travel or verify identity. This raises doubts as to whether or not other documents used for migrant smuggling fall within Article 6(1)(b). For instance, in the context of the development of the activities of migrant smuggling, smugglers may set up bogus language schools or employment agencies as a vehicle for making fraudulent offers to study a language or other academic discipline, or for issuing fraudulent employment contracts to enable smuggled people to procure visas for the purpose of study or work. A report by the *Telegraph* found that more than one in ten foreign students arrives in Britain through bogus or suspect colleges, and the report states that this has led to concerns that the student visa system has been exploited by criminals.<sup>28</sup> Similarly, *The Times* has uncovered close ties between 11 colleges in London, Manchester and Bradford, all formed in the past five

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<sup>25</sup> Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime* (n12) 355.

<sup>26</sup> See Article 6(1)(b)(i) of the Protocol.

<sup>27</sup> *Travaux préparatoires* of the Protocol (n23) 469.

<sup>28</sup> Tom Whitehead, ‘One in Ten Students at Suspect Colleges’ *The Telegraph* (London, 27 February 2010).

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years and controlled by three young Pakistani businessmen, one of whom fled to Pakistan after earning an estimated £6 million from false offers for the purpose of study.<sup>29</sup> Furthermore, when the police in Delhi (India) arrested a man involved in migrant smuggling, they found in his house 21 job agreements and false contracts, in addition to the details of 12 bank accounts, all of which were used to procure visas for the purpose of work.<sup>30</sup>

These documents are not considered travel documents or identity documents according to the meaning of Article 6(1)(b) and the interpretative notes to Article 3(c). They are not directly used to enter or leave a State, or to verify the identity of a person; they are instead documents that support or supplement the travel and identity documents in Article 6(1)(b). Thus, the activities of possessing, producing, procuring and providing such documents relating to language school offers and work agreements etc. do not fall within Article 6(1)(b) of the Protocol even if they are specifically used for the purpose of the smuggling of migrants. This deficiency might not affect States that have previous experience in what is involved in effectively criminalising migrant smuggling. In particular, State practice, as evidenced by a number of national laws, reveals that offences relating to fraudulent documents for the purpose of the smuggling of migrants have frequently been drafted widely, and without reference to any specific kind of documents.<sup>31</sup> By contrast, States that lack legislative experience in the domain of migrant smuggling are likely to adhere to the narrow approach adopted by the Protocol in criminalising those acts relating to fraudulent documents in Article 6(1)(b). Thus, the

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<sup>29</sup> Andrew Norfolk, 'Sham colleges open doors to Pakistani terror suspects' *The Times* (London, 21 May 2009).

<sup>30</sup> 'Fake immigration visa racket: gang leader held in Kolkata' *Indian Express* (India, 22 Jan 2010).

<sup>31</sup> The Migration Act 1958 (sects. 234-234A) (Australia) <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/)> accessed 4 August 2011; Law No. 189 of 2002 on changes in Regulations on the Matter of Immigration and Asylum (Italy) <<http://www.unhcr.org/refworld/docid/3fd9cd6d4.html>> accessed 4 August 2011.

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offences of possessing, producing, procuring and providing fraudulent documents for the purpose of the smuggling of migrants in the national laws of these States would include gaps that can be exploited by perpetrators. For example, Article 2 of Law No. (19) 2010 on the fight against illegal immigration in Libya states that the acts involved in illegal immigration include the preparation, provision or possession of false travel or identity documents for immigrants.<sup>32</sup> Accordingly, this article excludes documents such as fraudulent employment contracts from criminalisation, and this gap is a result of a literal implementation by the Libyan legislators of Article 6(1)(b) of the Protocol.

Third, States are required under Article 6(1)(c) to criminalise activities that enable an individual who is not a national or a permanent resident of a State to remain in that State unlawfully, whether by the means mentioned in subparagraph (b) of Article 6 or by any other illegal means. The unlawful means that might be used to enable illegal residence are not limited to activities relating to fraudulent documents as set out in subparagraph (b); the term ‘other illegal means’ covers any activity that is defined as illegal under domestic law.<sup>33</sup> A State that is a party to the Protocol is authorised under this article to criminalise any activity that would enable an illegal migrant to remain in its territory.

With respect to this offence, it may be asked whether or not the activities of employers who engage illegal migrants fall within the ambit of Article 6(1)(c). In particular, the employment of illegal migrants is sometimes directly connected to the smuggling of migrants.<sup>34</sup> For example, in December 2001, the managers of Tyson Food,

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<sup>32</sup> See Law No. (19) 2010 on the fight against illegal immigration (Libya) < <http://www.libya-na.com/vb/showthread.php?t=54094>> accessed 10 November 2012.

<sup>33</sup> *Travaux préparatoires* of the Protocol (n23) 489.

<sup>34</sup> Raimo Väyrynen, ‘Illegal Immigration, Human Trafficking, and Organised Crime: Discussion Paper No. 2003/72’ (United Nations University, World Institute for Development Economics Research 2003) 5.

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Inc., an American multinational corporation based in Springdale, Arkansas, requested 2,000 Mexican and Central American workers and paid smugglers \$100–\$200 per worker to deliver them to the US.<sup>35</sup>

In this context, Schloenhardt states that Article 6(1)(c) is not only concerned with acts related to migrant smuggling but might equally be applicable to the employers of illegal workers.<sup>36</sup> However, Okolski opines that facilitating illegal employment does not fall within the scope of smuggling.<sup>37</sup> This means that activities by employers that enable illegal workers to reside in a State are not criminalised under Article 6(1)(c) of the Protocol.

It may be argued that Schloenhardt's view is more convincing because the involvement of an organised group is not a constituent element in the offence of enabling illegal residence.<sup>38</sup> Therefore, the expression 'any other illegal means' in Article 6(1)(c) can be interpreted broadly to cover the acts of individuals, such as employers, who engage illegal migrants and thereby enable them to remain illegally in the relevant State.

However, this broad interpretation of the words 'any other illegal means' in Article 6(1)(c) depends on domestic law, as was previously mentioned. If employing an illegal migrant is not an offence in a specific State, then the act in question does not fall within 'any other illegal means', as it is not 'illegal'. In most States, employing an

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<sup>35</sup> Cited in Gabriela A Gallego, 'Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy' (2004) 92 CLR 1729, 1754.

<sup>36</sup> Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime* (n12) 353.

<sup>37</sup> Marek Okolski, 'Illegality of International Population Movements in Poland' in Reginald Appleyard (ed), *Perspectives on Trafficking of Migrants* (IOM 2000) 59.

<sup>38</sup> See Article 6(1) of the Protocol. See also, Legistatives Guides for the Convention and the Protocols thereto (n20) para 20.

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illegal migrant is in fact illegal<sup>39</sup> but this need not necessarily be the case in all States. The States that have not signed the Migrant Workers Conventions of 1975 and 1990 are a good illustration.<sup>40</sup> Furthermore, some States might criminalise only the deliberate employment of someone whom an employer knows to be an illegal migrant, and not the employment of someone whom an employer does not know, or merely suspects, to be an illegal migrant, as this places an inordinate burden on employers. Similarly, in some States it might be illegal for a landlord to knowingly take on a tenant who is an illegal migrant. In other countries, this might well not be the case. It can thus be said that what is 'illegal' depends upon domestic criminal law, and will vary from one State to another; this indeed represents a deficiency in the wording of Article 6(1)(c) of the Protocol.

In summary, it may be concluded that Article 6(1)(c) on enabling illegal residence will not encompass the acts of employers who engage illegal migrants unless this article is interpreted broadly by a State and employing an illegal migrant is an illegal act under the domestic law of that State.

### 4.1.1.2. Obligation of prevention

The obligation of prevention refers to positive measures to stop future acts of smuggling from occurring. The performance of this obligation might lead to reducing the human

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<sup>39</sup> See, for example, Immigration Act 1971, section 25 (United Kingdom) <<http://www.legislation.gov.uk/ukpga/1971/77/section/25>> accessed 25 January 2011; Decree No 81-891 of 1981 (France) cited in Richard Plender, *International Migration Law* (Martinus Nijhoff Publishers 1988) 317; Migration Act 1958 (N.62) Section 30(2) (Australia) <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/)> accessed 25 January 2011.

<sup>40</sup> The Migrant Workers Conventions of 1975 and 1990 obligate the parties to criminalise the activities of those who employ illegal workers. See, Migrant Workers (Supplementary Provisions) Convention [1975] OJ C 143 (adopted 24 June 1975 and entered into force 9 December 1978) Article 3(b); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) (adopted on 18 December 1990 and entered into force on 1 July 2003) 2220 UNTS 3 Article 68(2).

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costs resulting from smuggling operations, as well as avoiding the financial and institutional costs of investigating and prosecuting the perpetrators of smuggling.<sup>41</sup>

The States that have signed the Protocol are required under Article 11 to strengthen their borders and adopt measures that obligate carriers to ascertain that all passengers have the required travel documents. Parties are also obligated under Article 12 to ensure that travel and identity documents cannot be altered or misused. As a part of the measures for prevention of migrant smuggling, States should, under Articles 14 and 15, provide training programmes for their officials to prevent migrant smuggling, public information campaigns to educate people about the dangers of smuggling and development programmes to deal with the root causes of smuggling. Regarding the obligation of prevention, it will be argued that a number of the articles that deal with prevention have some degree of vagueness and flexibility that confers upon States wide powers of discretion in the interpretation and implementation of these articles.

First, Article 11 (1) of the Protocol enjoins that ‘States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.’ McCreight maintains that States are required under the measures in this article to strengthen their borders.<sup>42</sup> However, this paragraph does not include any specific measures or techniques that may be used by States to strengthen their borders and thereby prevent the activities of migrant smuggling.<sup>43</sup> The precise

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<sup>41</sup> Legislatives Guides for the Convention and the Protocols thereto (n20) para 81; Conference of the Parties to the United Nations Convention against Transnational Organized Crime, ‘Challenges and good practices in the prevention of the smuggling of migrants: Note by the Secretariat’ CTOC/COP/WG.7/2012/4 (23 March 2012) para 6.

<sup>42</sup> Matilde V McCreight, ‘Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration on a Comparative Perspective’ (2006) 12 *European Law Journal* 106, 111.

<sup>43</sup> Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime* (n12) 355.

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nature of these measures is left to the discretion of the States, with the words ‘to the extent possible’ providing a large degree of flexibility and manoeuvre for States.

In light of this vague and flexible wording, the location of a State on the migrant smuggling route – in other words, whether the State is an origin, transit or destination State – may play an important role in the implementation of Article 11 (1) on measures for border controls. States that are frequently the destination of migrant smuggling will tend to take positive steps to implement this article effectively. For example, in the replies of States to the questionnaire distributed by the Secretariat on implementation of the provisions of the Protocol, Spain indicated that it was running joint patrolling teams as part of its implementation of Article 11(1) regarding border controls.<sup>44</sup> By contrast, States of origin in migrant smuggling often do not have the will to combat the activities of smugglers,<sup>45</sup> and therefore they might use the flexible and open-ended wording of this article to adopt only limited measures. They may, for instance, not be particularly concerned about allowing the poorest of the population, the unskilled or unemployed, or transgressors of the law to leave the country.

Second, Article 11(3) of the Protocol calls on States to impose an obligation on commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers have the travel documents required for entry into a destination State.<sup>46</sup> This paragraph has been formulated in a way that specifically limits its implementation. For example, the task of commercial

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<sup>44</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime: consolidated information received from States for the second reporting cycle: Report of the Secretariat’ UN Doc CTOC/COP/2006/7/Rev.1 (18 August 2008) para 25.

<sup>45</sup> David Kyle and John Dale, ‘Smuggling the State Back in: Agents of Human Smuggling Reconsidered’ in David Kyle and Rey Koslowski (eds), *Global human smuggling: Comparative perspectives* (The Johns Hopking University Press 2001) 33.

<sup>46</sup> See Article 11 (3) of the Protocol.

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carriers according to Article 11(3) is merely to confirm that passengers have travel documents and not to assess the validity of these documents.<sup>47</sup> This limitation may, however, be regarded as acceptable, because carriers do not generally have the necessary resources or expertise to ascertain the validity of such documents.<sup>48</sup>

A further limitation of Article 11(3) is that it relates solely to carriers, which means that airport authorities do not fall within the framework of this article.<sup>49</sup> On this basis, the parties to the Protocol are not required to adopt measures that obligate the airport authorities to prevent the activities of migrant smuggling by air by ascertaining that passengers located in airport areas and facilities have the required documents for entry or exit. This limitation can be criticised because the misuse of airport transit facilities in common transit hubs is an increasingly used *modus operandi* by migrant smugglers throughout the world.<sup>50</sup> In such cases, smugglers send migrants on an airplane with legitimate documents to a transit State.<sup>51</sup> In the international lounge of the transit State's airport, a member of the smuggling organisation meets the smuggled migrants in order to provide them with falsified documents and new travel tickets to their intended destination.<sup>52</sup> The case of *R v. Kapoor* is a good illustration of this method of smuggling.<sup>53</sup> In this case, a group of five migrant smugglers of Indian nationality purchased flights from Mumbai to London with a stop in Bangkok. They boarded the flights to Bangkok and then transferred boarding passes issued in their own names, together with forged Indian passports containing visas to enter the UK, to

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<sup>47</sup> *Travaux préparatoires* of the Protocol (n23) 521.

<sup>48</sup> *Ibid*, 405.

<sup>49</sup> Marika McAdam and others, 'Issue Paper: Migrant Smuggling by Air' (UNDOC 2010)13.

<sup>50</sup> *Ibid*, 5.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*.

<sup>53</sup> *R v Kapoor and others* [2012] EWCA Crim, 435 [2012] 2 All ER 1205.

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Afghan migrants who were waiting in the transit lounge of Bangkok airport. The smuggled migrants arrived in the UK and claimed asylum. In this respect, it may be noted in general that although migrant smuggling by air is mentioned explicitly in the title and preamble of the Protocol, there are no explicit measures to prevent these activities in the Protocol, unlike the measures in the Protocol for preventing the smuggling of migrants by sea.<sup>54</sup> Indeed, the Protocol's focus on measures against migrant smuggling by sea was the result of Italian interest and involvement, as the predominant flow of migrants into Italy is by sea.<sup>55</sup> Also, it would appear that migrant smuggling by air was not widespread at the time of the drafting of the Protocol.

Today, however, it is pertinent to ask whether or not the measures of prevention in the Protocol are properly applicable to migrant smuggling by air. Several cases of migrant smuggling by air have been reported recently.<sup>56</sup> For instance, in the case of *R v. Anderson*, migrants were smuggled from Turkey into small airfields in the UK on a private six-seater Cherokee Piper airplane and then driven to London.<sup>57</sup>

In this context, Schloenhardt and Dale state that, although the measures of prevention in Chapter Three of the Protocol are general, the routes of migrant smuggling by air are 'often particularly irregular and labyrinthine'.<sup>58</sup> In other words, the measures of prevention in the Protocol may not accord with the special nature of the smuggling of migrants by air. In fact, the issue of the application of these measures to the smuggling of migrants by air depends on the nature of the measure. On the one

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<sup>54</sup> Schloenhardt and Dale (n3) 149.

<sup>55</sup> Andree Kirchner and Lorenzo Schiano di Pepe, 'International Attempts to Conclude a Convention to Combat Illegal Migration (1998) 10 Intl JRL 662; Erick Gjerdingen, 'Suffocation inside a Cold Storage truck and other Problems with Trafficking as "Exploitation" and Smuggling as "Choice" Along the Thai-Burmese Border' (2009) 26 Arizona J Intl & CL 699,713.

<sup>56</sup> McAdam and others 'Issue Paper: Migrant Smuggling by Air' (n49).

<sup>57</sup> *R v Anderson* [2010] EWCA Crim 615,[2010] 174 CL&J 254.

<sup>58</sup> Schloenhardt and Dale (n3)149.

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hand, the measures in Articles 7 and 8 of the Protocol are only related to the activities of migrant smuggling by sea. On the other hand, the measures concerning the strengthening of border controls<sup>59</sup> or the security and control of documents<sup>60</sup> are applicable to all of types of migrant smuggling, including by air.

Consequently, it can be said that the current substantive framework of the measures of prevention in the Protocol is insufficient to deal with the activities of migrant smuggling by air. In particular, there is a kind of reticence on the part of airport authorities to get involved in addressing such activities, because they are not responsible for acts or omissions in these areas under the carrier provisions in the Migrant Smuggling Protocol.<sup>61</sup> There is therefore a lacuna in the Protocol with respect to measures that aim to prevent migrant smuggling by air, particularly in international transit areas.<sup>62</sup>

Third, the vague and flexible wording is not restricted to the measures on border controls in Article 11(1) and (3) but also expands to the measures concerning security and control of documents laid down in Article 12, which must be adopted by States ‘within available means’. It is important to note that the flexible wording of Article 12 through the phrase ‘within available means’ is necessary for States that lack the technical expertise and resources to implement this article. For example, Ecuador declared itself unable to implement the measures on the effective control of documents in Article 12 because of a lack of funds and personnel.<sup>63</sup> For this reason, the phrase

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<sup>59</sup> Article 11 of the Protocol.

<sup>60</sup> Article 12 of the Protocol.

<sup>61</sup> McAdam and others ‘Issue Paper: Migrant Smuggling by Air’ (n49) 13.

<sup>62</sup> Ibid.

<sup>63</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, ‘Implementation of the Protocol against the Smuggling of Migrants’ (n44) para 30.

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‘within available means’ was inserted in Article 12 by the drafters of the Protocol, in recognition of developing countries that may not be able to afford the cost of issuing high-quality documents under subparagraph (a) of the article.<sup>64</sup> This phrase grants Ecuador and others developing countries the authority to implement Article 12 according to their capacity.

However, the flexible and vague wording used in Article 12 might be invoked to avoid implementing the measures in this article or to justify ineffective implementation by a State where prevention of migrant smuggling is not considered a priority. These measures require a high standard of technology, and this allows States to use the phrase ‘within available means’ to argue that it has implemented these measures according to its capacity or, alternatively, that it does not have the capacity to implement the measures. This raises the question of who is to assess the capacity of a State to implement Article 12 of the Protocol. Furthermore, how can that capacity be assessed? These questions are difficult to answer in the context of implementation of the Protocol because assessing a State’s capacity to implement the measures of prevention required by the Protocol amounts to unacceptable interference in its internal affairs. In particular, Article 4(1) of UNCTOC expressly stipulates that the States shall carry out their obligations in a manner consistent with the principles of sovereignty and non-intervention in the domestic affairs of other States.<sup>65</sup>

Having clarified how the flexible and vague wording of a number of the articles regarding measures of prevention affects the implementation of these articles by States, it is important to emphasise that the provisions of the Protocol, including those on

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<sup>64</sup> *Travaux préparatoires* of the Protocol (n23) 524.

<sup>65</sup> This rule is relevant to the obligations of States in the Protocol, because the latter in general has to be interpreted together with UNCTOC according to Article 1 (1) of the Protocol.

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prevention, ultimately have to be interpreted and implemented according to the purposes of the Protocol.<sup>66</sup> The main purpose of the Protocol is preventing and combating migrant smuggling.<sup>67</sup> Accordingly, States are required to implement the articles on prevention in light of this purpose. For instance, States must adopt measures of border control under Article 11(1) to the extent necessary to combat and prevent migrant smuggling. To be more specific, as long as States have an obligation to control their borders so as to prevent migrant smuggling, they should consider effective measures to that end. These might include pre-screening of arriving persons, pre-reporting by carriers of passengers, and the use of modern technology, including biometrics.<sup>68</sup>

Nonetheless, such implementation based on the purposes of the Protocol cannot be performed by all States in practice unless there is a monitoring mechanism to ensure this implementation.<sup>69</sup> The Conference of the Parties established in Article 32 of UNCTOC was authorised from the outset only to monitor and review the implementation of UNCTOC.<sup>70</sup> The reviewing and monitoring of the implementation of the Migrant Smuggling Protocol therefore did fall within the authority of the Conference of the Parties.<sup>71</sup> Nonetheless, the Conference of the Parties extended its monitoring and other functions in Article 32 of UNCTOC to the Migrant Smuggling

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<sup>66</sup> Rebecca Napier-Moore, 'Human Rights in Migrant Smuggling' (Global Alliance against Traffic in Women 2011) 10.

<sup>67</sup> Article 2 of the Protocol.

<sup>68</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n1) paras 168 -69.

<sup>69</sup> Schloenhardt and Dale (n3) 152.

<sup>70</sup> See Article 32 of UNCTOC.

<sup>71</sup> Gallagher, *The International Law on Human Trafficking* (n10) 467.

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Protocol during its first session in July 2004.<sup>72</sup> Although this amendment constitutes a significant step toward the reviewing of the Protocol, it had no positive impact on the implementation of the obligations of States on the basis of the purposes set out in the Protocol. The reason for this is that the Conference of the Parties, fundamentally, ‘does not have a power to compel States to take specific measures.’<sup>73</sup> For instance, the lack of response by the majority of the States in the Protocol to questionnaires from the Conference of the Parties on the implementation of the Protocol that were distributed in 2005 and 2006 shows the weakness of the Conference of the Parties.<sup>74</sup> Hence, it can be said that the lack of a strict monitoring or supervisory mechanism within the Protocol constitutes a deficiency that is likely to undermine the obligations of States and, consequently, the full effectiveness of the Protocol.<sup>75</sup>

### 4.1.1.3. Obligation of non-commission

There are many cases where the smuggling of migrants is committed by a State through its agents.<sup>76</sup> The documented case of the South African Police Service, which turns a blind eye to illegal migrants crossing into Zimbabwe for a fee of ZAR 50 (the currency of South Africa) and the same fee for unauthorised entry in the context of competition

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<sup>72</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, ‘Report of the Conference of the Parties to the United Nations Convention against Transnational Organised Crime on its first session, held in Vienna from 28 June to 8 July 2004’ CTOC/COP/2004/6 (23 September 2004) 6.

<sup>73</sup> Tom Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea under UN Protocol on the Smuggling of Migrants by Land, Sea and Air’ in Bernard Ryan and Valsamis Mitsilegas (eds) *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010) 165.

<sup>74</sup> *Ibid.*, 166.

<sup>75</sup> Anne Gallagher, ‘Human Rights and New UN Protocol on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 HRQ 975, 1004.

<sup>76</sup> Tom Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17 Intl JRL394, 403.

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with smuggling organisations<sup>77</sup> is a good illustration. Another example is that of a female migrant who was deported back to China by Mexican authorities, having confessed that she and hundreds of illegal migrants were smuggled from Fuzhou to a seaport on Chinese military trucks.<sup>78</sup>

While the Protocol does not include an explicit provision that obligates States not to smuggle migrants, it can be asked whether or not non-commission of the offence of the smuggling of migrants by a State is a presumed obligation in the Protocol. The answer to this question is important because the governmental sector is often complicit in the smuggling of migrants.<sup>79</sup> Accordingly, a State must be aware that non-commission of the offence of the smuggling of migrants by its agents falls within its obligations as laid down in the Protocol.

Under the preamble and Article 2 of the Protocol, the principal purpose of the Protocol is to combat and prevent the smuggling of migrants. To achieve this purpose, the Protocol clearly imposes on States the obligations of prevention and criminalisation. Nevertheless, the obligations of prevention and criminalisation should be read not merely as an obligation to prevent and criminalise the smuggling of migrants but more broadly to include an obligation on the part of States not to commit the offence. To illustrate the validity of this theoretical argument, it is possible to follow the approach of the International Court of Justice (ICJ) in its conclusion regarding the obligation not to commit the crime of genocide in the case of the former Yugoslavia.

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<sup>77</sup> Darshan Vigneswaran and others, 'Criminality or Monopoly? Informal Immigration Enforcement in South Africa' (2010) 36 JS Afr S 465, 477.

<sup>78</sup> Ko Lin Chin, 'The Social Organisation of Chinese Human Smuggling' in Kyle and Koslowski (n45) 225-26.

<sup>79</sup> Koser (n17)11. See also, Fiona David, 'Migrant Smuggling and Human Rights - Notes from the Field' (January 2010) < [http://works.bepress.com/fiona\\_david/12/](http://works.bepress.com/fiona_david/12/)> accessed 10 March 2012.

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The ICJ has stated in the case of former Yugoslavia that the nature of the obligations imposed on parties by the Convention on the Prevention and Punishment of the Crime of Genocide depends upon the ordinary meaning of the terms of the convention read in context and in light of the convention's object and purpose.<sup>80</sup> Consequently, the court held that the obligation on States not to commit the crime of genocide flows from the obligation to prevent the commission of acts of genocide as stipulated in Article 1 of the convention.<sup>81</sup>

Of course, the obligation of non-commission applies not only to the crime of genocide but extends to all human rights crimes.<sup>82</sup> The offence of the smuggling of migrants falls within the category of a human rights crime, as it has been reported that several fundamental human rights are frequently violated by smugglers, such as the right to life and the right to freedom from torture and ill-treatment.<sup>83</sup> By analogy with the crime of genocide, the obligation of States to prevent individuals from committing the offence of the smuggling of migrants<sup>84</sup> leads by implication to an obligation on the part of those States not to smuggle migrants. Any other conclusion would be illogical. This conclusion similarly applies in relation to the obligation to criminalise the smuggling of migrants. It seems implausible that a State should have an obligation to criminalise the offence of the smuggling of migrants, but should retain the right to commit this prohibited act itself. In other words, the obligations that contribute to achieving the purpose of a convention but that are not explicitly detailed in a convention

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<sup>80</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) [2007] ICJ Rep 2007.

<sup>81</sup> *ibid.*

<sup>82</sup> John Quigley, *The Genocide Convention An International Law Analysis* (Ashgate publishing Limited 2006) cited in John Quigley, 'International Court of Justice as a Forum for Genocide Cases' (2007-2009) 40 Case W Res J Intl L 243, 263.

<sup>83</sup> Obokata, 'Smuggling of Human Beings from a Human Rights Perspective' (n76).

<sup>84</sup> See chapter 4 section 4.1.1.2.

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are deemed to exist as implied obligations in that convention. The obvious nature of the obligation might be the reason for it not being mentioned explicitly by the drafters of a convention, as in the Genocide Convention and the Migrant Smuggling Protocol. Accordingly, it can be said that the parties to the Protocol are obligated not to commit the offence of the smuggling of migrants.

What is important is that this obligation is not only related to the offence of the smuggling of migrants in Article 6(1)(a) of the Protocol but that a State is also obligated not to commit any of the offences outlined in Article 6 of the Protocol. These acts enumerated in Article 6 of the Protocol are criminalised equally along with the act of the smuggling of migrants. Moreover, the obligation of prevention in the Protocol covers all these offences and not only the offence of the smuggling of migrants. As long as these offences fall within the scope of the obligations of prevention and criminalisation, the obligation of non-commission also extends to them.

### **4.1.1.4. Obligation of cooperation**

Since smuggling operations generally begin in source States, involve transit States and finally arrive at receiving States, cooperation between States is an essential obligation for combating such activities.<sup>85</sup> It is difficult for States to achieve positive results on their own in the effort to combat migrant smuggling because of the transnational nature of such operations.<sup>86</sup> For this reason, the General Assembly of the UN has emphasised

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<sup>85</sup> Friedrich Heckmann and others, 'Transatlantic Workshop on Human Smuggling' (2000) 1 *Geo Immigr LJ* 167,179. See also, Koser (n17) 2.

<sup>86</sup> Kirchner and Pepe (n55) 662.

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in its resolution 51/62 the importance of international cooperation in combating the activities of migrant smuggling.<sup>87</sup>

The fields of cooperation in the Migrant Smuggling Protocol are numerous. States are required under Articles 7 and 8(1) to cooperate in order to combat migrant smuggling at sea. In addition, the Protocol specifically mentions cooperation between States in the fields of information, borders, documents and training to combat migrant smuggling.<sup>88</sup> In regard to cooperation in the field of information, Article 10 of the Protocol encourages States to exchange information according to their legal and administrative systems. The article identifies a series of categories of information ranging from details about smuggling organisations, routes and means used in the operations of smuggling, to scientific and technological information.

However, it has been mentioned in the report of the Secretariat on implementation of the Migrant Smuggling Protocol, which was submitted to the Conference of the Parties in October 2012, that States have in practice been unable to acquire the necessary information concerning migrant smuggling at regional and global levels.<sup>89</sup> This is because Article 10 does not address how the process of information exchange is to be run. The basic training manual on investigating and prosecuting the smuggling of migrants issued by the UNODC confirms this, stating that ‘without the presence of effective channels of communication, operational and general information

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<sup>87</sup> UNGA Res 51/62 (12 December 1996) UN Doc A/RES/ 51/62.

<sup>88</sup> Articles 10, 11, 13 and 14 of the Protocol. Furthermore, the States parties are required under UNCTOC to cooperate in the fields of extradition, investigation, confiscation, mutual legal assistance and transfer of criminal proceedings. See Articles 13, 16, 18, 19 and 21 of the convention.

<sup>89</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, ‘Activities of the United Nations Office on Drugs and Crime to promote and support the implementation of the Protocol against the Smuggling of Migrants’ (n16) para 23.

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cannot be obtained.’<sup>90</sup> In particular, there is a lack of trust between States in the field of information exchange, which constitutes an obstacle to combating the activities of migrant smuggling. Tessier notes that the destination States are often unwilling to exchange information with the sending States where there is evidence confirming that this information will be passed to the smugglers themselves because of government corruption in the sending States.<sup>91</sup> For example, according to FBI information published in 2005, Mexican government officials had been corrupted by Los Zetas, a Mexican drug criminal cartel that is also involved in migrant smuggling between Mexico and the US.<sup>92</sup> Consequently, the US government is reluctant to provide the Mexican government with any information on this criminal cartel, assuming that it would probably be passed on to those smugglers. The lack of cooperation between the governments of both the US and Cuba in the field of information exchange concerning vessels suspected of being used to smuggle migrants is another case in point.<sup>93</sup>

In this context, one might argue that it is possible that the parties to the Protocol resort to alternatives such as INTERPOL as a mechanism for cooperation in the sharing of information, particularly as it is the world’s largest international police organisation, with 188 member countries.<sup>94</sup> Furthermore, recent developments in the field of the activities of migrant smuggling have motivated INTERPOL to develop tools that can facilitate the exchange of information among law enforcement officials in member countries so as to combat these activities. For example, INTERPOL currently has a

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<sup>90</sup> Mike Price and others, ‘Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 8 International Cooperation’ (UNODC 2010) 14.

<sup>91</sup> Kevin Tessier, ‘The New Slave Trade: The International Crisis of Immigrant Smuggling’ (1996) 3 *Indiana JGLS* 261, 264.

<sup>92</sup> Daphné Paquet, ‘Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications’ (UNDOC 2010) 97.

<sup>93</sup> Donald L Brown, ‘Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States’ (2002) 33 *UMIA L Rev* 273, 290.

<sup>94</sup> ‘About the Interpol’ <<http://www.interpol.int/public/icpo/default.asp>> accessed 25 January 2011.

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communication tool known as the Human Smuggling and Trafficking message, which provides a standardised format for reporting cases of trafficking and migrant smuggling between member countries and to INTERPOL's database.<sup>95</sup> Nonetheless, it is widely recognised that recourse to INTERPOL by States is rare, undesirable and depends on the voluntary basis of bilateral agreements between the relevant States and INTERPOL.<sup>96</sup>

It can be inferred then that the obligation of cooperation in the field of information exchange will be nominal in light of the current wording of Article 10 of the Protocol—in other words, because of the lack of a mechanism in the Protocol that can put this article into practice.

### **4.1.2. State responsibility for the obligations laid down in the Protocol**

The lack of attention paid to State responsibility in the legal literature on migrant smuggling implies that this area of international law is regarded as being of minor importance. Formal recourse to the rules of State responsibility through international courts and tribunals as a consequence of a breach of the obligations in the Trafficking Protocol is uncommon,<sup>97</sup> and this is also applicable to breaches by States regarding the Migrant Smuggling Protocol. Such recourse might be expensive, time-consuming, and

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<sup>95</sup> 'Fact Sheet on People Smuggling' < <http://www.interpol.int/Public/ICPO/FactSheets/THB01.pdf>> accessed 25 January 2011.

<sup>96</sup> Andreas Schloenhardt, 'Transnational Organised Crime and the International Criminal Court: Developments and Debates' (2005) 24 U Que LJ 95; Carrie Lyn D Guymon, 'International Legal Mechanisms for Combating Transnational Organised Crime: The Need for a Multilateral Convention' (2000) BJ Intl L 53, 73.

<sup>97</sup> Gallagher, *The International Law on Human Trafficking* (n10) 218.

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often not seen to be in the long-term interests of even those States directly affected by a breach of these obligations.<sup>98</sup>

However, a finding of State responsibility can be used in many ways, by different mechanisms and different parties to enforce, encourage, and facilitate compliance with international law.<sup>99</sup> Rules of State responsibility are helpful in determining the existence of an international wrong in relation to the obligations of States as they are laid down in the Protocol. They can therefore be used outside international courts and tribunals, through mechanisms that are less formal, such as correspondence between governments, or the declarations issued by intergovernmental commissions and human rights treaty bodies to determine the breach of these obligations and then State responsibility for this breach.<sup>100</sup> Such determinations might play an important role in forcing States to comply with the rules of the Protocol.

Hence, this subsection seeks to explore the doctrine of State responsibility with a view to determining whether responsibility can be established in light of the current formulation of the obligations of States that were examined earlier. It explores only an internationally wrongful act in the context of these obligations, while the consequences resulting from this act fall outside the scope of this study.

The main principle of State responsibility is that ‘every internationally wrongful act of a State entails the international responsibility of that State.’<sup>101</sup> There must be two elements in place to establish an internationally wrongful act. The first is an action or

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid, 219.

<sup>100</sup> Ibid, 218-19.

<sup>101</sup> International Law Commission (ILC) ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/49 (vol. I)/Corr.4. Art 1.

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omission that constitutes a breach of an international obligation of a State.<sup>102</sup> The second necessary element is that this action or omission must be attributable to the State under international law.<sup>103</sup> It will be argued in the subsection below that it is in practice difficult to establish the element of breach in the context of the obligations of States laid down in the Protocol. This is due to the open-ended and vague or even discretionary wording of these obligations. Furthermore, the element of attribution raises controversial issues that will be addressed in the second subsection below.

### **4.1.2.1. Element of breach**

Under Article 12 of Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), ‘there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.’<sup>104</sup> An initial reading of this article suggests that a failure by parties to the Protocol to comply with the obligations of criminalisation, prevention, non-commission and cooperation (as described above) constitutes a breach of these obligations.

However, the commentary on Article 12 explains that the question of ‘whether and when there has been a breach of an obligation will depend on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.’<sup>105</sup> On this basis, the standards and terms in the Protocol concerning the obligations of States are the crucial element in determining

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<sup>102</sup> Ibid, Article 2(b).

<sup>103</sup> Ibid, Article 2(a).

<sup>104</sup> Ibid, Article 12.

<sup>105</sup> ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001 (ARSIWA Commentaries)’ UN Doc A/56/10 (United Nations 2008) Article 12, para 1.

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whether or not there has been a breach of these obligations. Accordingly, it can be said that the element of breach cannot be established readily in light of the flexible, open-ended and vague terms surrounding the obligations of States. It is difficult to activate the rules of State responsibility, in particular Article 42 of ARSIWA. Put differently, the State affected by migrant smuggling – such as the State receiving smuggled migrants or refugees – cannot invoke the responsibility of another State, on account of this deficiency in the primary rules in the Protocol. As long as an obligation, such as to criminalise the smuggling of migrants or to prevent these activities, is itself unclear, the invoking State will likely encounter an objection from the State not wishing to recognise responsibility for the breach of an obligation. The flexible and vague wording of the obligations grants the defendant State the advantage in refuting the allegation of breach. For example, Kalaitzidis concludes that Turkey is not vigilant about the activities of migrant smuggling, arresting only a small fraction of smuggled migrants compared with the numbers of migrants who succeed in crossing the borders into Greece.<sup>106</sup> However, Greece might not be able to invoke the responsibility of Turkey for breach of the obligation to prevent the activities of migrant smuggling. The reason for this is that Turkey might allege that it controls its borders *to the extent possible*, as required by Article 11(1) of the Protocol, thereby avoiding any breach of its obligation of prevention. The small fraction of smuggled people arrested by the Turkish authorities might in such a case represent for Turkey the extent of the required conduct—according to its interpretation to the phrase ‘to the extent possible’.

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<sup>106</sup> Akis Kalaitzidis, ‘Human Smuggling and Trafficking in the Balkans: Is It Fortress Europe’ (2005) 5 *Jl Just & Intl S* 1, 6-7.

### 4.1.2.2. Element of attribution

In order to determine that a State is responsible for an internationally wrongful act, a breach of an obligation, whether through an act or an omission, must be attributed to that State. While determining attribution may initially appear to be a straightforward process, the reality is in fact quite different.<sup>107</sup> The major obstacle lies in the fact that a State is an abstract entity and, as such, States ‘can only act by and through their agents and representatives.’<sup>108</sup> However, Shaw states that attribution ‘depends on the link that exists between the State and the person or persons actually committing the unlawful act or omission.’<sup>109</sup> This link has been delimited by Articles 4 to 11 of ARSIWA.

In the course of migrant smuggling, attribution can be established without difficulty when the conduct in question is related to the breach of the obligations of criminalisation and cooperation. A breach concerning these obligations is clearly the conduct of a State on the basis of Article 4 of ARSIWA. This article states that ‘The conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or other functions...’.<sup>110</sup> Accordingly, the failure of the legislator in a State to criminalise the smuggling of migrants or the failure of the government of the State in cooperation with other States to combat and prevent migrant smuggling are both breaches of the obligations of criminalisation and cooperation. These are undoubtedly attributed to the State concerned.

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<sup>107</sup> Gallagher, *The International Law on Human Trafficking* (n10) 223.

<sup>108</sup> ILC, ‘ARSIWA Commentaries’ (n105) Article 2, para 5.

<sup>109</sup> Malcolm N Shaw, *International Law* (Sixth edn, Cambridge University press 2008)786.

<sup>110</sup> See Article 4 of ARSIWA.

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By contrast, establishing attribution for breaches of the obligations of prevention and non-commission seems rather more complicated. For example, it is sometimes not readily apparent whether a person was acting in his private capacity or was acting for or on behalf of State in the context of a breach regarding the obligation of non-commission. In view of that, the following subsections will examine the element of attribution in the context of the obligations of prevention and non-commission.

### **4.1.2.2.1. Attribution of a breach relating to the obligation of prevention**

Increasingly, there is a trend to privatise matters of immigration control, where States tend to delegate to private security firms the task of protecting their borders from migrant smuggling.<sup>111</sup> The main question is whether or not a State that delegates its duties in the matters of immigration controls – specifically its duty to prevent migrant smuggling – can evade State responsibility where there has been a clear failure by these firms to prevent such activities. The answer to this question lies in Article 5 of ARSIWA on the attribution of the conduct of persons or entities that are not part of the formal structure of a State but that exercise elements of governmental authority. On this basis, the conduct of these security firms – including of course their failure to prevent the activities of migrant smuggling – is attributed to a State through the two following conditions in Article 5 of ARSIWA.

First, the private entities in question must exercise elements of governmental authority. Thus, it must be recognised whether or not the task of preventing migrant smuggling entrusted to the security firms meets this requirement. However, the commentary on Article 5 has not identified what will constitute ‘elements of

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<sup>111</sup> Gallya Lahav, ‘Immigration and the State: The Devolution and Privatisation of Immigration Control in the EU’ (1998) 24 JE & Migration S 675.

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governmental authority'. It suggests that the decision will rely on the particular society, its history and traditions.<sup>112</sup> This view can be criticised because if the historical nature of the function is to be considered, 'it will become increasingly difficult to determine which functions are intrinsic State functions as more and more functions are privatised.'<sup>113</sup>

There is an alternative approach that arose in the case of *Maffezini*.<sup>114</sup> Maffezini, an Argentine citizen, worked with the private Spanish corporation Sociedad para el Desarrollo Industrial de Galicia (SODIGA) to establish a Spanish corporation named Emilio A. Maffezini S. A. for the production of chemical products in Spain. This project collapsed, and for this reason Maffezini sued Spain on the grounds that the failure of SODIGA to prevent this collapse was attributed to Spain. The latter rejected this claim, declaring that SODIGA is a private entity whose conduct could not be attributed to Spain. The tribunal in this case held that SODIGA was charged with functions, which are by their very nature 'typically' governmental tasks, not usually carried out by private entities and, therefore, cannot normally be considered to have a commercial nature. This test does not solve the problem, though, as it would also require a determination of which functions are typically exercised by governments rather than by private entities.

Indeed, it is possible to say that a function that entails governmental authority can be restricted to the sovereign functions of a State.<sup>115</sup> These are the functions that lie

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<sup>112</sup> ILC, 'ARSIWA Commentaries' (n105) Article 5, para 6.

<sup>113</sup> See 'Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions' (Convened at International Conference Centre, Geneva 29-30 August 2005)16.

<sup>114</sup> International Centre for Settlement of Investment Disputes *Emilio A. Maffezini v the Kingdom of Spain* (1997) Case No ARB/97/7, para 86.

<sup>115</sup> Smriti Pradham, 'Immunity to Sovereign Functions: Research Paper for the Competition on Commission of India' (National Law Institute University 2010) 17-20.

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at the very core of the jurisdiction of a State, and which are inevitably governmental whether they are exercised by public or private entities.<sup>116</sup> The functions of security and defence are good illustrations of this test.<sup>117</sup> Since the activities of immigration control represent a matter of national security,<sup>118</sup> there is no doubt that these activities (including the activities of the prevention of migrant smuggling) fall prima facie within the areas of governmental authority. Thus, the security firms authorised by a State to prevent the activities of migrant smuggling meet the requirement of exercising elements of governmental authority as set out in Article 5 of ARSIWA.

Second, it is not enough that private entities, such as security firms, exercise a governmental function. They must also be empowered by the law of a State to carry out this function if attribution is to occur. Article 5 of ARSIWA requires that empowerment should be through 'law'. However, since the empowerment of private entities in matters of immigration control is not generally effected through specific legislative means,<sup>119</sup> it can be asked whether or not the conduct of such entities, when empowered by other instruments such as agreements or contracts, can be attributed to the relevant State. An agreement between France and the UK on the one hand and France-Manche on the other hand provides a good example. The agreement empowered France-Manche, a wholly owned subsidiary of Eurotunnel SA, to exercise the function of control in the matters of policing, immigration, customs and health in the Channel Tunnel that links

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<sup>116</sup> Ibid.

<sup>117</sup> Oliver R Jones, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms' (2009) 24 *Con J Intl L* 239, 249.

<sup>118</sup> Paul J Smith, 'Military Responses to the Global Migration Crisis: Glimpse of Things to Come' (1999) 23 *Fle FWA* 77.

<sup>119</sup> Valsamis Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in Ryan and Mitsilegas (eds) (n73) 61.

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France and the UK.<sup>120</sup> It is suggested that this question can be answered through the interpretation the phrase of ‘empowered by the law’ in Article 5 of ARSIWA.

Since there is no clarification about the meaning of the phrase in the commentary on the article, it has not been interpreted consistently. A narrow view put forward by Crawford (the Special Rapporteur of the International Law Commission) and others scholars holds that the empowerment needs a law, whether specific or general, that allows a State to transfer its powers to the private entity.<sup>121</sup> However, this interpretation seems inconsistent with the purpose of empowerment in Article 5 of ARSIWA. The narrow view focuses on the necessity of offering a framework that ensures the legitimacy of the procedure within the State, while the purpose of empowerment by law in the law of State responsibility is the establishment of a nexus between the acts of the private entity and the State.<sup>122</sup>

Jones, who argues for a broad view, observes that the authorisation to exercise governmental authority through license or contract from the State can satisfy the requirement for empowerment.<sup>123</sup> This view seems correct, particularly as the use of legislation as an instrument to grant private entities specific governmental functions is a rather uncommon occurrence.<sup>124</sup> Nevertheless, alternative instruments such as agreements or contracts must explicitly include the element of empowerment within their provisions. In other words, they must explicitly transfer the powers of the State to that private entity. Agreements must not focus only on the features of the function, and

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<sup>120</sup> Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (signed on 12 February 1986) Article 4.

<sup>121</sup> UNGA ‘First Report on State Responsibility by Mr. James Crawford, Special Rapporteur’ UN Doc A/CN.4/490/Add.6 (24 July 1998); ‘Expert Meeting on Private Military Contractors’ (n113) 18.

<sup>122</sup> Jones (n117) 267.

<sup>123</sup> *Ibid*, 268.

<sup>124</sup> *Ibid*, 269.

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ignore the element of empowerment for this function. The reason for this is that the lack of the element of empowerment in the instruments would weaken State attribution, if not render it impossible.<sup>125</sup> It can be inferred then that the failure of security firms to prevent migrant smuggling can be attributed to a State when this function is empowered by a law or other alternative instrument, such as an agreement or contract, provided that this instrument includes the element of empowerment within its provisions.

That said, it is nonetheless possible for the failure to prevent migrant smuggling by security firms to be attributed to a State even when such firms are not empowered by that State to exercise this function. This possibility could occur if these firms were acting ‘on the instructions of, or under the direction or control of, that State in carrying out the conduct.’<sup>126</sup> The commentary on Article 8 of ARSIWA clarifies that the three terms ‘instructions’, ‘direction’ and ‘control’ are disjunctive and thus it is sufficient to establish any one of them.<sup>127</sup> The failure of security firms to prevent migrant smuggling would be attributed to a State by the Protocol if this State gave instructions to these firms or exercised direction or control over them. Nevertheless, there is a debate on the level of direction or control required to establish attribution, a subject that will be discussed in the following subsection.

### **4.1.2.2.2. Attribution of a breach relating to the obligation of non-commission**

Since a State is an abstract legal entity, acting through agents,<sup>128</sup> the offence of the smuggling of migrants in Article 6(1)(a) of the Protocol is sometimes committed by

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<sup>125</sup> Mitsilegas (n119) 61.

<sup>126</sup> Article 8 of ARSIWA.

<sup>127</sup> ILC, ‘ARSIWA Commentaries’ (n105) Article 8, para 7.

<sup>128</sup> Ibid, Article 2, para 5.

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those agents. An example is the involvement of the customs inspector Guy Henry Kmett in the smuggling of Salvadorans, Guatemalans and Dominicans into the US. Kmett was responsible for the inspection lane in San Ysidro port which was used by a criminal organisation in the operations of migrant smuggling. This organisation had estimated profits of about \$1 million per month for smuggling around 1,000 migrants monthly through Kmett's lane.<sup>129</sup> Another example is the smuggling of migrants from China to Southeast Asian countries by a number of labour-export Chinese companies, which are sponsored and directed by the Chinese government.<sup>130</sup> In such cases, it is necessary to recognise when the conduct of an agent of a State is attributable to the State itself. This question will be examined in light of Articles 4, 7 and 8 of ARSIWA, which are the articles most relevant to the question.

The offence of the smuggling of migrants can be attributed to a State under Article 4 of ARSIWA when the offence is committed by an organ of the State, provided that the official capacity of this organ is apparent. In the case of the customs inspector Guy Henry Kmett, mentioned above, Kmett's conduct is attributable to the US because Kmett exercised the functions of supervision and control on the inspection lane of San Ysidro port with the full authority granted by the State. These functions and this authority constitute the official capacity considered the crucial factor in attributing the conduct of an agent to a State.<sup>131</sup>

The absence of such official capacity during the commission of the offence would lead to the dissolution of the connection between an organ and a State and, as a result, the conduct of the organ is not attributed to the State. For instance, Christiane

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<sup>129</sup> Peter Andreas, 'The Transformation of Migrant Smuggling across the U.S-Mexican Border' in Kyle and Koslowski (n45) 121.

<sup>130</sup> Lin Chin, 'The Social Organisation of Chinese Human Smuggling' (n78) 226.

<sup>131</sup> ILC, 'ARSIWA Commentaries' (n105) Article 4, para 13.

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Chocat, a councillor in the town of Lumigny-Nesles-Ormeaux in France, was arrested with her son Benjamin on their arrival at Portsmouth in the UK on a ferry from the French port of Cherbourg, where UK Border Agency officers found 16 Vietnamese migrants hiding inside their van.<sup>132</sup> In this case, Chocat committed the offence of the smuggling of migrants under Article 6(1)(a) of the Protocol in her private capacity and not in her official capacity. The French town councillor was acting as a private individual and not as a French officer. For this reason, her conduct, which constituted the offence of the smuggling of migrants, ought not to be attributable to France, provided that no further grounds of attribution under ARSIWA are present.

In all cases, attribution under Article 4 will be determined on the basis of distinguishing between unauthorised conduct that is undertaken within an official capacity and unauthorised conduct that is purely private.<sup>133</sup> However, difficulty arises when unauthorised conduct is committed through the private capacity of an organ but by using one of the means of the State. What is the situation, for example, in the case where the Spanish border patrol in the town of Ceuta arrested an officer of the consulate of the Republic of Benin who tried to smuggle two African migrants from Morocco to Spain during his weekly holiday, and inside the car of the consulate?<sup>134</sup> Here, the officer committed the offence of the smuggling of migrants outside his official working hours, but in committing the offence used one of the means of the State, i.e. the car granted to him to exercise his diplomatic function. This act can be examined in light of Article 7 of ARSIWA concerning ultra vires acts. The commentary on this article suggests that the

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<sup>132</sup> Ian Sparks, 'French politician arrested for smuggling 16 Vietnamese migrants into Britain' *Daily Mail* (London, 9 October 2009).

<sup>133</sup> ILC, 'ARSIWA Commentaries' (n105) Article 4, para 13.

<sup>134</sup> Alqoaiti S, 'A Benin Consulate officer in Morocco arrested for trying to smuggle illegal migrants across the Ceuta' *Maghreb Akhbars* (Translation: *Morocco News*) (Morocco, 5 August 2010) <<http://akhbars.marweb.com/morocco/politique/14597.html>> accessed 6 November 2010.

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unauthorised act remains official and is attributed to a State when it constitutes ‘the actions and omissions of organs purportedly or apparently carrying out their official functions’.<sup>135</sup> Accordingly, the use by the officer of a car belonging to the consulate of Benin suggests that this officer was exercising an official function even if he committed an unauthorised act (i.e. the offence of smuggling) in a private capacity. In this case, it can be said that the act of the officer is attributed to the government of the Republic of Benin according to Article 7 of ARSIWA concerning ultra vires acts.

This conclusion is in line with the US–Mexican General Claims Commission. This commission stated that the US is responsible for Franco, a local police deputy of the town of El Paso in Texas, who arrested the Mexican consul and took him to jail by showing him his official badge. The commission reported that Franco showed his official badge to assert his official capacity.<sup>136</sup> Hence, Franco’s acts are attributed to the US on the basis that the illegal act was made by abuse of governmental means.<sup>137</sup> By analogy, the appearance of the Benin officer in the consulate car reflects the official position of this officer during the commission of the offence of the smuggling of migrants. Consequently, the conduct of this officer is attributed to the government of Benin on the grounds of the official means which were put at the consulate officer’s disposal. In a similar vein, other means that reveal the official position of an organ – such as the use of an official uniform, badge or police intelligence – to achieve the operation of smuggling would be sufficient to establish attribution even if the organ of the State committed the offence of the smuggling of migrants in his or her private capacity.

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<sup>135</sup> ILC, ‘ARSIWA Commentaries’ (n105) Article 7, para 8.

<sup>136</sup> Francisco Mallen case (*Francisco Mallén (United Mexican States) v USA* (1927) vol IV RIAA 173.

<sup>137</sup> Franciszek Przetacznik, ‘The International Responsibility of States for the Unauthorized Acts of their Organs’ (1989) 1 Sri Lanka J Intl L 151, 171.

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Furthermore, it is possible for one of the offences in Article 6 of the Protocol, when committed by a person or group outside the official structure of a State, to also be attributable to that State. Article 8 of ARSIWA would be the basis for this possibility if the person or group of persons acted on the instructions of, or under the direction and control of, the State in carrying out the act. A good example of this presumption is a case involving migrant smuggling from France to the US.<sup>138</sup> The US embassy in Paris recruited a person at an airport in Paris to inform on the operations of migrant smuggling from Paris to the US and Canada. At the same time, the recruit was himself a member of a smuggling organisation, engaged in the operations of migrant smuggling into the US. By virtue of his position, the recruiter was able to supply advice to the smugglers about the possibility of smuggling at a certain time. Interestingly, this recruit continued in the operation of migrant smuggling for a long a period and without any suspicion because of his active role in intercepting smuggled individuals who were not his clients. To establish attribution under Article 8 of ARSIWA in this case, it is necessary to prove that the US embassy exercised ‘control’ over this recruit. The related question at hand is how much control is necessary to establish attribution. In fact, there is incompatibility in the case law on the required level of control for establishing attribution.

In the case of *Nicaragua v. U.S.A.*, the ICJ has indicated that the acts of financing, organising, training, supplying and equipping the Contras are insufficient for the purpose of attributing to the US the acts committed by the Contras in the course of their military or paramilitary operations in Nicaragua.<sup>139</sup> To establish attribution, the court suggested that ‘it would in principle have to be proved that that State had effective

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<sup>138</sup> M Soudijn, *Chinese Human Smuggling in Transit* (Boom Juridische Uitgevers 2006) 69.

<sup>139</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*) General List No 70 [1986] ICJ 14, para 115.

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control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>140</sup> The ‘effective control’ is the preferred test by the ICJ in this form of attribution.

By contrast, in *Prosecutor v. Tadic* the International Criminal Tribunal for the former Yugoslavia (ICTY) highlighted the question of attribution in the context of individual criminal responsibility rather than State responsibility. While the Appeals Chamber had mentioned that the degree of control may be various according to the factual circumstances of each case,<sup>141</sup> the ICTY decided that ‘in order to attribute the acts of a military or paramilitary group to a State, it ought to be proved that the State wields overall control over the group.’<sup>142</sup> Thus, the ‘overall control’ test is sufficient to establish attribution to a State of the acts of individuals who are under the control of that State. Subsequently, in the case of genocide, the ICJ rejected the test of the ICTY and confirmed the test of ‘effective control’.<sup>143</sup>

Although the commentary on Article 8 of ARSIWA does not reject either of the doctrines mentioned above,<sup>144</sup> the precedent set in *Nicaragua v. U.S.A.* seems unconvincing. The test of ‘effective control’ itself needs to be properly defined, and the ICJ has not explained when or how control is ‘effective’. If the activities of financing, organising, training, supplying and equipping do not satisfy the test of ‘effective control’, as the ICJ has held, the court could be asked about the nature of the required activity that renders control ‘effective’. As Gibney states: ‘if extraterritorial state

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<sup>140</sup> Ibid.

<sup>141</sup> *Prosecutor v Tadic* (Judgment) ICTY - IT- 94 -1-A (15 July 1999).

<sup>142</sup> Ibid, para 131.

<sup>143</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (n80) 170-72.

<sup>144</sup> ILC, ‘ARSIWA Commentaries’ (n105) Article 8, para 5.

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responsibility could not be established in this particular case, it is difficult to imagine under what circumstances it ever could be established.’<sup>145</sup>

In effect, any test that aims to define the required level of ‘control’ must focus solely on the nexus that must exist between a State and an individual. The commentary on Article 8 states that as soon as there is a ‘specific factual relationship’ between the person or entity engaging in the conduct and a State, the attribution occurs.<sup>146</sup> General control, based, for example, on planning, funding and support to carry out a certain function, is sufficient to reveal this relationship or link, as indicated in the commentary on Article 8. Judge Ago in his separate opinion on the case of *Nicaragua v. U.S.A.* has expressed a similar view by suggesting that attribution requires only an authorisation to commit a particular act or carry out a particular task of some kind on behalf of the US.<sup>147</sup> It can be said that the test of ‘overall control’ adopted by the ICTY in *Prosecutor v. Tadic* is therefore the most appropriate for applying Article 8 of ARSIWA. Thus, the conduct of the recruit in the Paris airport would be attributed to the US if this recruit was funded, supervised and directed by the US in order to inform on smuggling operations. These elements would be sufficient to prove that there is a factual link between the recruiter and the US government.

### 4.2. Rights of States under the Protocol

The rights of States to take measures that aim to combat and prevent the activities of migrant smuggling are mostly located in Chapter II of the Protocol, which concerns the

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<sup>145</sup> Mark Gibney, ‘Genocide and State Responsibility’ (2007) 7 HR L Rev 760, 771.

<sup>146</sup> ILC, ‘ARSIWA Commentaries’ (n105) Article 8, para 1.

<sup>147</sup> *Nicaragua v United States of America* (n139) (Separate Opinion of Judge Ago).

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smuggling of migrants by sea. There are, however, two issues that ought to be highlighted before discussing these rights in detail.

The first issue is that the activities of migrant smuggling by land or air are not the subject of these rights, and the approach adopted by the drafters of the Protocol is justified given the specific nature of these rights. Exercising these rights in the context of the activities of migrant smuggling by land or air might require access to the territories of other States, an action which is not endorsed by the Protocol. The provisions of the Protocol must be interpreted and applied within the provisions of UNCTOC, including Article 4(2), which states that nothing in the convention ‘entitles a State party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.’<sup>148</sup>

The second issue is that these rights are limited even in the context of the activities of migrant smuggling by sea. They should be read in the context of the international law of the sea, in particular the 1982 UN Convention on the Law of the Sea (UNCLOS).<sup>149</sup> For instance, the interpretative notes of Article 7 of the Protocol enjoins that the parties to the Protocol cannot undertake the measures in this chapter in the territorial sea of another State without authorisation by the coastal State, as this principle is well established in the law of the sea and there is no need for it to be restated in the Protocol.<sup>150</sup> Accordingly, it must be concluded that the rights of States to take any of the measures in Chapter II in order to combat the activities of migrant

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<sup>148</sup> Article 4 (2) of UNCTOC.

<sup>149</sup> Marika McAdam and others, ‘Issue Paper: Smuggling of Migrants by Sea’ (UNDOC 2011) 36.

<sup>150</sup> *Travaux préparatoires* of the Protocol (n23) 494.

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smuggling by sea are applicable only on the high seas and will not cover operations in the territorial sea of third-party States.<sup>151</sup>

In the context of these rights, Mallia states that the Migrant Smuggling Protocol is valuable, as it filled in the lacunae concerning the activities of migrant smuggling in reference to the law of the sea.<sup>152</sup> What is more, Zagaris observes that the Protocol in this regard emulates UNCLOS, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the 1988 Convention on illicit drug trafficking) and certain interim measures prepared by IMO.<sup>153</sup> Indeed, it is clear that the Protocol, by articulating the rights of States to take maritime measures, played an important role in suppressing migrant smuggling by sea at the international level for the first time. However, it will further be argued that the rights of States to take measures to combat migrant smuggling by sea are not truly effective and might not be rigorously pursued by States<sup>154</sup> because the Protocol leaves a number of problems unresolved in this regard.

To develop this argument, the following two subsections will examine the right of interception (4.2.1) and the right of assistance (4.2.2) in Article 8 of the Protocol. In addition, they will examine the law of the sea as well as other rules of international law as they are relevant to these rights.

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<sup>151</sup> Efthymios Papastavridis, 'Fortress Europe' and FRONTEX: Within or Without International Law?' (2010) 79 *Nordic J Intl L* 75,92.

<sup>152</sup> Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers 2010) 127.

<sup>153</sup> Bruce Zagaris, 'UN Convention on Transnational Organised Crime Gains 124 Signatures on Opening' (2001) 26 *Intl Legal Prac* 123,126.

<sup>154</sup> Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea' (n73) 163.

### **4.2.1. Right of interception**

In this subsection, the legal framework of the right to intercept vessels engaging in the activities of migrant smuggling on the high seas will be critically examined in light of the provisions of the Protocol, UNCLOS and other instruments that contribute to filling in the gaps in the Protocol, such as the 1988 Convention on illicit drug trafficking. This legal framework will include the legal basis, content and conditions of the right of interception.

#### **4.2.1.1. The legal basis of the right of interception**

The Protocol makes no explicit reference to the right of States to intercept vessels on the high seas to combat and suppress the activities of migrant smuggling within its provisions. However, it can be argued that the measures granted to States under paragraphs (2) and (7) of Article 8 of the Protocol come within the concept of ‘interception’.

‘Interception’ is defined as ‘measures applied by States outside their national boundaries which prevent, interrupt or stop the movement of people without the necessary immigration documentation from crossing the borders by land, sea or air’.<sup>155</sup> This definition corresponds with the contents and purposes of paragraphs (2) and (7) of Article 8 of the Protocol, which aim to block vessels suspected of engaging in migrant smuggling. Papastavridis affirms this view by stating that interception has appeared vigorously in the wake of the adoption the Migrant Smuggling Protocol.<sup>156</sup> Moreover, Miltner maintains that the Protocol, through Article 8, recognises a State’s right to

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<sup>155</sup> UNHCR, ‘Interception of Asylum-seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach’ UN Doc EC/50/SC/CRP.17 (9 June 2000) 10.

<sup>156</sup> Efthymios Papastavridis, ‘Interception of Human Beings on the High Seas: a Contemporary Analysis under International Law’ (2009) 36 *Syracuse J Intl L& C* 145, 148.

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intercept the activities of migrant smuggling on the high seas.<sup>157</sup> It can therefore be concluded that interception is indeed a right of States under the provisions of the Protocol.

Another basis of the right to intercept vessels engaged in migrant smuggling on the high seas can be derived from Article 110 of UNCLOS, as it is a rule of international law that is applicable to the issue.<sup>158</sup> The activities of migrant smuggling are not among those prohibited under Article 110 of UNCLOS, which grants States the right to board foreign vessels on the high seas. Nevertheless, Article 110(1)(d) of UNCLOS, which entitles States to board stateless vessels, might constitute another legal basis for the right to intercept stateless vessels suspected of migrant smuggling.<sup>159</sup> This follows from the fact that every vessel is required to have a nationality and this is a prerequisite for the right to enjoy the protection of the law in relation to interception on the high seas.<sup>160</sup> A vessel loses this protection if it is without nationality<sup>161</sup> and therefore the vessel can be intercepted under Article 110(1)(d) of UNCLOS. Stateless vessels suspected of migrant smuggling on the high seas can therefore be intercepted on this legal basis and not because of the activities of migrant smuggling per se, which are not covered by Article 110 of UNCLOS.

This conclusion is confirmed by a number of judicial decisions regarding stateless vessels that were involved in illegal migration. For example, in *Molvan v. Attorney- General for Palestine*, the Privy Council held that there was no breach of

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<sup>157</sup> Barbara Miltner, 'Irregular Maritime Migration: Refugees Protection Issues in Rescue and Interception' (2007) 30 F Intl LG 75, 105.

<sup>158</sup> Vienna Convention on the Law of the Treaties (adopted on 23 May 1969 and entered into force on 27 January 1980) 1155 UNTS 331, Article 31(3) (c).

<sup>159</sup> Papastavridis (n156) 159.

<sup>160</sup> Ibid, 160.

<sup>161</sup> Andrew W Anderson, 'Jurisdiction over Stateless Vessels on the High Seas: an Appraisal under Domestic and International Law' (1982) 13 J Mar L & Com 323.

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international law by a British destroyer that intercepted a ship carrying illegal immigrants bound for Palestine.<sup>162</sup> The ship was without flag when first spotted, then a Turkish flag was hoisted, and finally an Israeli flag was pulled up when the boarding party approached.<sup>163</sup> Another example is the case of the *Pamuk* in 2001, in which Italian custom officers intercepted on the high seas a stateless vessel that transferred illegal migrants to another vessel heading toward the Italian coast.<sup>164</sup> A national court in Italy held that the statelessness of the vessel had been a sufficient ground to intercept such a vessel bound for the coast of Italy.<sup>165</sup>

In sum then, the right to intercept vessels engaging in the activities of migrant smuggling on the high seas can be established by paragraphs (2) and (7) of Article 8 of the Migrant Smuggling Protocol or by Article 110(1)(d) of UNCLOS.

### 4.2.1.2. The content of the right of interception

A State party to the Protocol must adhere to a number of the measures in exercising the right of interception. The boarding and searching of a vessel are the key measures according to paragraphs (2) and (7) of Article 8 of the Protocol. A State is also authorised under these paragraphs to take ‘appropriate measures’. However, such appropriate measures, as Guilfoyle rightly points out, are ‘disjunctive and sequential’.<sup>166</sup> If the vessel was already engaged in the activities of migrant smuggling at the time of boarding and searching, the appropriate measures could be adopted by the intercepting

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<sup>162</sup> *Naim Molvan v Attorney General for Palestine* [1948] 81 LI L Rep 277 (UKPC).  
<<http://www.unhcr.org/refworld/docid/3ae6b6544.html>> accessed 7 September 2011.

<sup>163</sup> Ibid.

<sup>164</sup> Cited in Papastavridis (n156) 160-61.

<sup>165</sup> Ibid.

<sup>166</sup> Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 185.

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State.<sup>167</sup> The appropriate measures must be authorised by the flag State in the case of a flagged vessel,<sup>168</sup> and must be taken according to the relevant domestic and international law in the case of a stateless vessel.<sup>169</sup> As usual, the Protocol has not elucidated the phrase ‘appropriate measures’ as used in Article 8(2)(c) and (7).<sup>170</sup>

Mallia prefers an interpretation of the phrase on the basis that the flag State undertakes to authorise the requesting State to take all appropriate measures deemed necessary by the requesting State.<sup>171</sup> This clarification is unhelpful for two reasons. It does not define the nature of the appropriate measures. Moreover, since Mallia states that appropriate measures will be decided by the flag State, it does not apply to stateless vessels.

In effect, Article 8 of the Protocol is derived from Article 17(4) (c) of the 1988 Convention on illicit drug trafficking.<sup>172</sup> In January 1995, the Council of Europe adopted the Agreement on Illicit Traffic by Sea, implementing Article 17 of the 1988 Convention on illicit drug trafficking. Article 9 of the agreement illustrates the concept of the appropriate measures in the 1988 Convention on illicit drug trafficking by stating that it includes a set of measures that generally aim to collect and secure evidence relating to the crime of illicit drug trafficking discovered by the intercepting State.<sup>173</sup>

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<sup>167</sup> See Articles 8(2) and (7) of the Protocol.

<sup>168</sup> Article 8(2)(c).

<sup>169</sup> Article 8(7).

<sup>170</sup> Mallia (n152) 125.

<sup>171</sup> Ibid.

<sup>172</sup> *Travaux préparatoires* of the Protocol (n23) 497.

<sup>173</sup> See Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 31 January 1995 and entered into force 1 May 2000) Article 9.

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By analogy, the intercepting State in the case of migrant smuggling might require the same kind of measures to establish the involvement of smugglers in the offence. Any measure that would lead to the collection and protection of evidence concerning the offence of the smuggling of migrants, as discovered by the intercepting State on the high seas, falls within the concept of appropriate measures in Article 8(2) and (7) of the Protocol.

The related question is whether or not authorisation by the flag State to take appropriate measures pursuant to Article 8(2)(c) of the Protocol extends to enforcement measures, such as measures of seizure, arrest and trial. In this context, Mallia claims that enforcement measures (including seizure and arrest) fall within the scope of ‘interception’.<sup>174</sup> In other words, the reference to ‘appropriate measures’ in Article 8(2)(c) of the Protocol covers enforcement measures. However, this view can be rejected on the basis of a number of arguments.

In the case of *Medvedyev a.o. v. France*, the European Court of Human Rights (ECtHR) implied that the phrase ‘appropriate measures’ contained in Article 17 of the 1988 Convention on illicit drug trafficking was not sufficient as a legal basis for the arrest of persons on board a ship on the high seas suspected of being engaged in drug trafficking.<sup>175</sup> Since Article 17 of the 1988 Convention on illicit drug trafficking is the original source of Article 8 of the Protocol,<sup>176</sup> this interpretation – which is adopted by the ECtHR – is applicable to the concept of ‘appropriate measures’ in Article 8(2)(c) of the Protocol. To put it more simply, it is unlikely that the concept of ‘appropriate

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<sup>174</sup> Mallia (n152) 21-22.

<sup>175</sup> *Medvedyev and Others v France* (n8).

<sup>176</sup> *Travaux préparatoires* of the Protocol (n23) 497.

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measures' in Article 8(2)(c) of the Protocol covers enforcement measures, including seizure and arrest. The latter measures require further authorisation by the flag State.

In addition, Article 97 of UNCLOS states that in the case of collisions or any other accidents on the high seas, no arrest, detention, penal or disciplinary proceedings, can be adopted by any State other than the flag State. Furthermore, Article 10 regarding enforcement measures in the Agreement on Illicit Traffic by Sea provides that following the notification of a flag State, the intercepting State may arrest persons and detain the vessel.<sup>177</sup> These articles previously mentioned demonstrate that the flag State has exclusive jurisdiction over its vessels on the high seas in the scope of enforcement measures.

This exclusive jurisdiction of the flag State regarding enforcement measures is implicitly confirmed by the Migrant Smuggling Protocol. Although Article 9(3)(b) does not refer to enforcement measures by that name, it recognises the jurisdiction of the flag State in the administrative, technical and social matters of the vessel. Article 8(5) of the Protocol also states that a State party cannot take any additional measures without the express authorisation of the flag State, except those which are necessary to relieve imminent danger to the lives of persons or such measures as derive from relevant bilateral or multilateral agreements.

It can be concluded then that an intercepting State is unable to take any enforcement measures in cases of migrant smuggling discovered on the high seas unless it obtains the prior consent of the flag State.<sup>178</sup> In such a context, the following question may be raised in the case of a stateless vessel engaging in migrant smuggling on the

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<sup>177</sup> See Agreement on Illicit Traffic by Sea (n173) Article 10.

<sup>178</sup> Papastavridis (n156) 198. See also, Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer 2007) 169.

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high seas: as long as a vessel is stateless, can intercepting States adopt enforcement measures towards this vessel? The Protocol is silent on this question.

Papastavridis argues that, since Article 110 of UNCLOS does not contain any further jurisdictional measures against the stateless vessels other than the right to visit and board, the intercepting State is not entitled to full jurisdictional powers such as arrest and trial unless one of the international criminal jurisdictions applies.<sup>179</sup> According to this view, the intercepting State in the case of a stateless vessel is able to adopt enforcement measures if there is a link between the stateless vessel and that State.<sup>180</sup> For instance, the intercepting State may undertake such enforcement measures if the vessel engaged in migrant smuggling was heading toward the territorial sea of the intercepting State. In this case, the State is entitled to intervene and exercise the measures of seizure, arrest and trial on the basis of the protective jurisdiction principle.<sup>181</sup>

This view has been echoed by the Spanish Supreme Court in *Spain v. Alvaro and others*.<sup>182</sup> On 16 June 2006, a Spanish marine lifeboat arrested an open boat carrying 55 migrants from sub-Saharan Africa on the high seas, approximately 55 nautical miles to the south of the Canary Islands. The smugglers on board the boat were not Spanish nationals. The Provincial Court of Las Palmas decided that the Spanish courts were not to hear this case, as there was neither the principle of territoriality nor the principle of personality at play. However, the Supreme Court overruled the judgement of the Provincial Court of Las Palmas and decided that the Spanish

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<sup>179</sup> Papastavridis (n156) 194.

<sup>180</sup> Mallia (n152) 69.

<sup>181</sup> Papastavridis (n156) 194.

<sup>182</sup> *Spain v Alvaro and others* (Appeal judgment on admissibility) Case no 582/2007 ILDC 994.

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authorities did have jurisdiction over this case. The court founded its judgment on the argument that there was an obvious interest on the part of the Spanish authorities in adopting enforcement measures against this vessel, given that the intercepted vessel was clearly heading toward the coast of the Canary Islands. This decision confirms the view of Papastavridis that the intercepting State must rely on some basis to exercise enforcement measures over stateless vessels on the high seas.

Nevertheless, although Papastavridis's view is a reflection of the rules of jurisdiction, it would render a stateless vessel immune from prosecution for the offence of the smuggling of migrants on the high seas in a case where the intercepting State has no international criminal jurisdictions over the stateless vessel. In addition, the States that already have jurisdiction over cases of migrant smuggling are often unwilling to be held responsible for hearing such cases.<sup>183</sup> In such a case, therefore, the statelessness of the vessel becomes an advantage for the smugglers.

Consequently, it can be argued that the intercepting State can adopt enforcement measures against a stateless vessel engaging in migrant smuggling at sea even if it cannot rely on the ordinary grounds of jurisdiction over this vessel. Universal jurisdiction could be an alternative jurisdictional basis because of a number of arguments.

First, universal jurisdiction over crimes can be established through international provisions that empower domestic laws to establish the jurisdiction of a State over certain crimes, such as in Article 15(6) of UNCTOC.<sup>184</sup> This article states that 'this Convention does not exclude the exercise of any criminal jurisdiction established by a

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<sup>183</sup> Pacurar (n22) 261.

<sup>184</sup> Tom Obokata, *Transnational Organised Crime in International Law* (HRT Publishing Ltd 2010) 52.

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State party in accordance with its domestic law.’<sup>185</sup> In this context, Bassiouni points out that such provisions imply the authorisation of a State to exercise universal jurisdiction.<sup>186</sup> The term ‘any’ in this article opens the door for all criminal jurisdictions, including universal jurisdiction. On this basis, the parties to the Protocol can, under Article 15(6) of UNCTOC, establish universal jurisdiction in their domestic laws over stateless vessels engaging in migrant smuggling on the high seas.<sup>187</sup> In the same way, Article 8 (7) of the Migrant Smuggling Protocol can serve as another example of provisions empowering domestic laws to establish universal jurisdiction. This article enjoins that the ‘State party shall take appropriate measures in accordance with relevant domestic and international law.’<sup>188</sup> Thus, an intercepting State that cannot rely on one of the ordinary grounds of jurisdiction over a stateless vessel engaged in migrant smuggling can adopt enforcement measures over this vessel as long as it has universal jurisdiction according to its domestic law, based on Article 8(7) of the Protocol. The weakness in this article is that, as mentioned earlier, the concept of ‘appropriate measures’ can be interpreted as covering only measures that aim to collect and protect evidence concerning the offence of the smuggling of migrants, as discovered by the intercepting State on the high seas. This concept can hardly cover enforcement measures.

Second, there is also scope for applying the principle of universal jurisdiction to organised crime,<sup>189</sup> including the smuggling of migrants. This argument takes its cue

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<sup>185</sup> Article 15 (6) of UNCTOC.

<sup>186</sup> M. Cherif Bassiouni, *International Extradition: United States Law and Practice* cited in Obokata, *Transnational Organised Crime in International Law* (n184) 52.

<sup>187</sup> Article 15 (6) of UNCTOC can be used by parties to the Migrant Smuggling Protocol, because these States must also be parties to UNCTOC according to Article 37 (2) of this Convention.

<sup>188</sup> Article 8 (7) of the Protocol.

<sup>189</sup> Obokata, *Transnational Organised Crime in International Law* (n184) 49.

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from the crime of piracy, which ‘contributed to the initial development of universal jurisdiction.’<sup>190</sup> Despite piracy constituting *hostis humani generis*, which justifies the practice of universal jurisdiction over this crime,<sup>191</sup> Bingham and others justify universal jurisdiction over piracy upon a different legal basis. The authors correctly argue that in relation to this crime every State has an extraordinary jurisdiction allowing it to seize, prosecute and punish persons, as well as to seize and dispose of the property of offenders.<sup>192</sup> This is because piracy is a crime committed by foreigners against foreign interests outside the territorial or other ordinary jurisdictions of the prosecuting State.<sup>193</sup> It is difficult for States to establish ordinary grounds of jurisdiction over piracy in light of these circumstances.<sup>194</sup> Universal jurisdiction is needed in the case of piracy on the high seas in order to ensure that pirates cannot evade prosecution.<sup>195</sup> By analogy, the offence of the smuggling of migrants that is committed by a stateless vessel, beyond ordinary jurisdictions, as on the high seas, where it is difficult to apply the territorial or flag State jurisdictions, is no different from the crime of piracy. In this case, the intercepting State that cannot establish any of the ordinary jurisdictions over the stateless vessel can undertake enforcement measures in relation to this vessel on the basis of universal jurisdiction. Smugglers who use stateless vessels to engage in the activities of migrant smuggling on the high seas must be apprehended and punished, just as much as smugglers who operate using flagged vessels.

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<sup>190</sup> Ibid.

<sup>191</sup> Joshua M Goodwin, ‘Universal Jurisdiction and the Pirate: Time for an Old Couple to Part’ (2006) 39 Van JTL 973.

<sup>192</sup> Joseph W Bingham and others, ‘Codification of International Law: Part IV: Piracy (1932) 26 AJIL Supplement 739, 760.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid, 761.

<sup>195</sup> Obokata, *Transnational Organised Crime in International Law* (n184) 49.

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Third, there is no international penal tribunal that can prosecute and punish perpetrators of organised crime in the same way as the International Criminal Court does in relation to international crimes.<sup>196</sup> In this case, the smuggling of migrants as an organised crime committed on a stateless vessel at sea can go unpunished, particularly if a State that has ordinary jurisdiction is unable or unwilling to prosecute and punish perpetrators for this offence (e.g. in case wherein corrupt officials have cooperated with smugglers). This case grants the intercepting State of the stateless vessel the authority to resort to universal jurisdiction in order to undertake enforcement measures over this vessel and its crew. The Permanent International Court of Justice in the *Lotus* decision has implied that such jurisdiction exists. The court reported in this decision that States are allowed to exercise criminal jurisdiction whenever this jurisdiction does not come into conflict with international law.<sup>197</sup>

Finally, universal jurisdiction over stateless vessels in terms of the enforcement measures by an intercepting State that cannot invoke the ordinary grounds of jurisdiction over these vessels is in line with resolution 55/25 of the General Assembly of the United Nations, which has been adopted as the Preamble of the UNCTOC. The General Assembly in this resolution, ‘Determined to deny safe havens to those who engage in transnational organised crime by prosecuting their crimes wherever they occur...’<sup>198</sup> Accordingly, the resolution of the General Assembly also constitutes a legal basis to adopt enforcement measures on the basis of universal jurisdiction toward stateless vessels engaging in migrant smuggling on the high seas.

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<sup>196</sup> Ibid, 50. See also, Andreas Schloenhardt, ‘Conference Paper: Transnational Organised Crime and the International Criminal Court towards Global Criminal Justice’ (Australian Institute of Criminology International Conference, 29-30 November 2004).

<sup>197</sup> *France v Turkey* PCIJ Rep Series A No 10.

<sup>198</sup> UNGA Res 55/25 (8 January 2001) UN Doc A/RES/55/25.

### **4.2.1.3. Conditions of the right of interception**

The right of interception in the Protocol is not absolute, where the Protocol includes some conditions which must be considered by the States. This subsection highlights only those conditions that have generated significant controversy.

#### **4.2.1.3.1. The criterion of the ‘reasonable grounds’**

The right to intercept vessels on the high seas depends upon there being ‘reasonable grounds’ for suspecting that the vessel is engaged in the activities of migrant smuggling. This condition applies in relation both to a vessel’s flag State and to a stateless vessel.<sup>199</sup> Nonetheless, the Protocol does not define the meaning of ‘reasonable grounds’. Therefore, this phrase can be interpreted differently by different parties to the Protocol.<sup>200</sup>

Papastavridis suggests that given the exceptional character of the right to intercept and its effects on the principle of the freedom of navigation on the high seas, the concept of reasonable grounds should be established using an objective approach.<sup>201</sup> More specifically, the decision to intercept a vessel that is suspected of migrant smuggling should not be subject to the discretion of the commander of the intercepting vessel, who may abuse this right.<sup>202</sup>

Needless to say, such a view is vague and requires further clarification. Although Papastavridis has not provided any outline of the objective approach he

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<sup>199</sup> Article 8 (2) and (7) of the Protocol.

<sup>200</sup> Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea’ (n73) 163.

<sup>201</sup> Papastavridis (n156) 191.

<sup>202</sup> *ibid.*

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recommends for defining the concept of reasonable grounds, there are two possible interpretations of this objective approach articulated by Papastavridis.

The first possibility is that Papastavridis might mean that the concept of reasonable grounds should be defined through an exhaustive list of the reasonable grounds for suspicion. This interpretation is impossible to achieve, since, as Obokata rightly states, the concept of ‘reasonable grounds’ is subject to various interpretations by the States involved.<sup>203</sup> Accordingly, an exhaustive list of the reasonable grounds for suspicion must encompass the majority, if not all, of these interpretations.

The second possibility is that Papastavridis’s objectivity may entail the establishment of some form of central authority, rather than having the master of the vessel determine whether there are reasonable grounds for suspicion. This view will not, however, solve the issue of abuse that worries the author—the concept of reasonable grounds will be subject to the discretionary authority of this central authority and, consequently, the possibility of the abuse of the concept remains.

In fact, it is extremely difficult – if not impossible – to decide whether or not there is a reasonable ground for suspicion unless the intercepting State boards the vessel in question. In particular, smugglers are keen to hide the smuggled migrants they are carrying, as well as to disguise vessels in order to avoid detection.<sup>204</sup> For instance, when the Florida Marine Patrol boards a vessel and discovers that it has quantities of food and fuel that are inconsistent with what might be expected for a vessel on a short pleasure

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<sup>203</sup> Obokata ‘The Legal Framework Concerning the Smuggling of Migrants at Sea’ (n73) 163.

<sup>204</sup> Ibid.

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cruise or fishing trip, they immediately suspect that the boarded vessel is engaged in migrant smuggling from Cuba to the US.<sup>205</sup>

However, the problem is that the process of establishing a reasonable ground for suspicion following the boarding of a vessel is an illegal action according to Article 8 (2) and (7) of the Protocol. The article stipulates that the case for suspicion must be declared prior to the measure of boarding.<sup>206</sup> Consequently, the current wording of Article 8 (2) and (7) will result in two scenarios. The first scenario is that the discovering State might establish reasonable grounds for suspicion on the basis of its subjective criteria. In the case that the vessel was not involved in migrant smuggling, the intercepting State would be liable to State responsibility because of a breach of the principle of the freedom of navigation. In addition, the intercepting State would have to compensate the intercepted vessel under Article 9(2) of the Protocol for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken. The second scenario is that, on account of the vagueness of the concept of ‘reasonable grounds’, the State that discovers the vessel might choose not take any action against the suspected vessel simply in order to avoid State responsibility.

Nevertheless, even in the absence of a clear definition of the concept of ‘reasonable grounds’, States are able to build reasonable grounds for suspicion through the activation of the other provisions of the Protocol. For instance, Article 10 regarding the exchange of information could play an important role in terms of complementing the operations of interception successfully.<sup>207</sup> In particular, this technique for building

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<sup>205</sup> Brown (n93) 290.

<sup>206</sup> See Article 8 (2) and (7) of the Protocol.

<sup>207</sup> Marika McAdam, ‘Toolkit to Combat Smuggling of Migrants: Tool 1’ (UNDOC 2010) 62.

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reasonable grounds for suspicion has been found in Code A of the Police and Criminal Evidence Act 1984 of the UK, which clarifies for police officers how to exercise the powers of stop and search set out in this Act. Paragraph (2.2) of the Code provides that reasonable grounds for suspicion as a precondition to stop and search a person must be built on an objective basis. Thus, suspicion must be based on facts, information or intelligence that are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under Section 43 of the Terrorism Act 2000, to the likelihood of that person being a terrorist.<sup>208</sup> The information or intelligence that aims to build reasonable grounds for suspicion can include information describing an article being carried, a suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area.<sup>209</sup> Accordingly, a State party to the Protocol is able to establish a case of suspicion on the basis of information exchanged with other parties concerning the appearance and route of vessels engaged in the activities of migrant smuggling.

Furthermore, Code A also offers an interpretation of the phrase ‘reasonable suspicion’ on the basis of the behaviour of a person.<sup>210</sup> For example, if an officer encounters someone on the street at night obviously trying to hide something, this clearly constitutes conduct that might reasonably lead the officer to suspect that stolen or prohibited articles are being carried.<sup>211</sup> By analogy, the behaviour of a person in Code A as a basis for ‘reasonable suspicion’ can be translated into ‘the attitude of the vessel at sea’ in cases of migrant smuggling by sea. According to this criterion, the

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<sup>208</sup> Police and Criminal Evidence Act 1984 (UK): Code A para 2.2  
<<https://www.gov.uk/government/publications/pace-code-a-2011>> accessed 17 April 2013.

<sup>209</sup> Ibid, para 2.4.

<sup>210</sup> Ibid, para 2.3.

<sup>211</sup> Ibid.

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dilapidated conditions of vessels used in migrant smuggling at sea, which suggest that the smugglers are not providing basic levels of safety and security for the passengers on board, may constitute a reasonable ground for stopping and boarding such vessels.<sup>212</sup> Furthermore, a vessel sailing without a flag or spotlights can also result in ‘reasonable suspicion’ according to the criterion based on the ‘attitude’ of the vessel at sea. However, the weakness in this criterion is that these signs of reasonable suspicion are not related specifically to migrant smuggling, i.e. the establishing of reasonable suspicion that a vessel is engaged in drugs or arms smuggling would be based on the same signs.

In sum then, it can be concluded that a State party to the Protocol is able to interpret the phrase ‘reasonable grounds’ in such a way as to suspect that a vessel is engaged in migrant smuggling by sea on the basis of information or intelligence concerning a vessel in question, as well as the conditions and surrounding circumstances or the ‘attitude’ of the vessel at sea.

### **4.2.1.3.2 The consent of the flag State**

Article 8 (2) obligates the discovering State to obtain the flag State’s consent to intercept its vessels.<sup>213</sup> The main question in this regard is whether the flag State is obligated to grant this consent or whether the process is optional and not mandatory.

Mallia claims that the flag State’s refusal to allow the boarding and searching of its vessels would amount to a lack of cooperation in the act of suppressing migrant

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<sup>212</sup> McAdam and others, ‘Issue Paper: Smuggling of Migrants by Sea’ (n149) 39.

<sup>213</sup> See Article 8 (2). According to Article 8 (7) of the Protocol, States do not need such procedure in the case of stateless vessels, where the intercepting State could immediately exercise the measures of boarding and searching against stateless vessels as long as there were reasonable grounds for suspecting.

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smuggling by sea.<sup>214</sup> In other words, a State that refuses to allow interception of its vessels violates its obligation to cooperate to prevent and suppress migrant smuggling by sea as set out in Article 7 of the Protocol. This view makes the consent of the flag State obligatory by linking it with Article 7 of the Protocol. However, this view can be criticised because, as Barnes rightly points out, Article 7 refers only to the general and facilitative frame of cooperation between States in maritime matters to combat the activities of migrant smuggling.<sup>215</sup> This article is not concerned with the compulsory aspect, as it has been worded in flexible language through its use of the phrase ‘to the fullest extent possible’, which grants parties to the Protocol the discretionary authority to cooperate in order to prevent migrant smuggling by sea. To put it more simply, Article 7 of the Protocol does not impose any compulsory nature on the consent of the flag State in Article 8 (2) of the Protocol.

By contrast, Obokata argues that States often do not want their vessels to be subject to being boarded and searched by other States and, consequently, the authorisation of the flag State in Article 8(2) has been framed softly through the use of the word ‘may’ rather than ‘shall’.<sup>216</sup> The author indicates implicitly that the flag State is not obligated to give consent to the interception of its vessels.

Obokata’s point is persuasive, because it is in line with the literal interpretation of Article 8(2), which refers to the authorisation to board, search or take any appropriate measures being optional and not mandatory. Inclusion of the word ‘may’ in Article 8(2) gives the flag State freedom of choice as to whether to grant authorisation to intercept its vessels. The flag State is only obligated to respond to the requesting State, either

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<sup>214</sup> Mallia (n152) 124.

<sup>215</sup> Richard Barnes, ‘The International Law of the Sea and Migration Control’ in Ryan and Mitsilegas (eds) (n73)129.

<sup>216</sup> Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea’ (n73) 162-163.

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with an approval or a rejection.<sup>217</sup> If the flag State responds with an approval, this consent could be restricted under certain conditions, such as those related to State responsibility.<sup>218</sup> For example, Article 9 (2) of the Protocol regarding compensation of an intercepted vessel for any loss or damage recognises this possibility explicitly. For the sake of facilitating the implementation of Article 8, including the obtaining of the consent of the flag State, the Protocol obligates States to designate an authority to respond to requests for consent expeditiously.<sup>219</sup> The related question is whether or not the requesting State could intercept a vessel if the State receiving the request through its designated authority does not reply to the request for consent, neither with an approval nor with a rejection.

It is regrettable that the Protocol does not address this question at all. However, it is possible to further illuminate this issue through the other rules of international law that may be applicable. State practice and international agreements addressing this issue might fill this gap in the Migrant Smuggling Protocol.

In regard to State practice, the US adopts a certain practice to overcome the assumption of non-response by the State receiving the request. On 2 October 1996, the US Coast Guard intercepted the vessel *M/V XING DA*, which was carrying 83 illegal Chinese migrants on board.<sup>220</sup> The vessel was without a flag and was under the leadership of the Snakeheads. When the *M/V XING DA* was contacted by radio by the Coast Guard, the master of the vessel claimed that the vessel was registered in the People's Republic of China. Immediately, the Coast Guard requested the Chinese

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<sup>217</sup> Article 8 (4) of the Protocol.

<sup>218</sup> Article 8 (5) of the Protocol.

<sup>219</sup> Article 8 (4) and (6) of the Protocol.

<sup>220</sup> Captain W Palmer, 'Guarding the Coast: Alien Migrant Interdiction Operations at Sea' (1997) 72 Intl LS 157, 171.

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government to confirm the registration and grant permission to take any necessary measures against the *M/V XING DA*. The delayed response by the Chinese government meant that the vessel was regarded as a stateless vessel and became subject to the full jurisdiction of the US. It would thus appear that the US government interprets a delay in response by the claimed registered State as meaning the vessel is not registered in that State, and that it is in fact a stateless vessel. However, this practice has not identified the period of delay that would permit the intercepting State to exercise the procedures of boarding and searching. Therefore, this approach adopted by the US government might not solve the problem at hand.

Alternatively, Article 16(3) of the Agreement concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area stipulates that in cases where no response from the State receiving the request has been received within four hours following the receipt of the request to confirm nationality, the requesting State is entitled to take the appropriate measures against the vessel.<sup>221</sup> The same approach can also be found in the agreement between the US and the Republic of Liberia concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea. Article 4(3)(d) of the agreement stipulates only two hours as the period for responding to the request of a State. If, following the end of this period, there has been no response from the State receiving the request, the requesting State is authorised to board and search the vessel.<sup>222</sup> What can be concluded from these agreements is that

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<sup>221</sup> See Agreement Concerning Co-Operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (2003) Art 16(3).

<sup>222</sup> Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (adopted 11 February 2004 and entered into force 9 December 2004) Article 4(3)(d).

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the absence of a response within the specific period from the State receiving the request results in there being implied consent on the part of that State.

This solution can be adopted in relation to migrant smuggling, given the silence of the Protocol and its *travaux préparatoires* on this point. The State making a request to intercept must not be at the mercy of the flag State until such time as it receives a response from the flag State. In particular, the lives of people who are on board a vessel may be exposed to risk during the period of waiting. An example is the case of the vessel *M/V XING DA*, where during the wait for a response from the Chinese government and under incitement by the Snakeheads, the migrants tried to sink the vessel by setting fires and breaking the hull.<sup>223</sup> In such cases, the requesting State might find itself responsible under the Protocol for violating the rights of the smuggled migrants because of the delay in boarding of the smuggling vessel and in saving the lives of the smuggled migrants on board.<sup>224</sup> For example, Article 8(5) of the Protocol authorises States to take necessary measures against a vessel without the express authorisation of the flag State when there is imminent danger to the lives of persons who are on the board the vessel. On this basis, interception can be one of the necessary measures that a State must adopt without the express consent of the flag State to save the lives of the individuals who are on board. Moreover, Article 9(1)(a) of the Protocol obligates a State to ensure the safety of the persons on board a vessel when that State takes measures against the vessel pursuant to Article 8 of the Protocol. Another relevant provision in this regard is Article 16(3) concerning affording appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of smuggling.

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<sup>223</sup> Palmer (n220) 172.

<sup>224</sup> Zagaris (n153) 126.

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Importantly, the weakness in this solution in the aforementioned agreements on drugs and weapons is the length of the waiting period. A period of four hours, or even of two hours, is too long when applied to migrant smuggling. It simply must be taken into consideration that the object of smuggling here is not drugs and weapons but human beings. Thus, a period of two or four hours might not be compatible with the aim of protecting smuggled migrants, who may be in need of urgent medical assistance. A waiting period of four hours could seriously endanger the lives of the smuggled migrants on board, as the case of the *M/V XING DA* illustrates. Hence, any period of waiting following a request to the flag State must be as short as possible.

### 4.2.2. Right of assistance

A State party has a right under Article 8(1) of the Protocol to request the assistance of other States to suppress the use of its own flagged vessels, vessels flying the flag of other States parties, vessels without nationality, or vessels deemed to be without nationality in the activities of migrant smuggling on the high seas, provided there are reasonable grounds for suspicion that such vessels are being used to smuggle migrants. The measures of assistance must be rendered by the State receiving the request to the extent possible and within its means.<sup>225</sup>

McClellan states that paragraph 1 of Article 8 leaves a number of questions unanswered.<sup>226</sup> One issue is that the measures of assistance referred to in this article are not identified.<sup>227</sup> The language of this article is derived from Article 17(2) of the 1988 Convention on illicit drug trafficking and from paragraph 11 of the Interim Measures

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<sup>225</sup> See Article 8 (1) of the Protocol.

<sup>226</sup> David McClellan, *Transnational Organised Crime: A Commentary the UN Convention and Its Protocols* (Oxford University Press 2007) 405.

<sup>227</sup> Mallia (n152) 122.

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for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea.<sup>228</sup> These original sources of Article 8(1) of the Protocol likewise do not define the measures of assistance clearly.<sup>229</sup>

In such a context, the commentary on Article 17 of the 1988 Convention on illicit drug trafficking states that measures of assistance might include searching for the suspect vessel in drugs trafficking, preventing these vessels from unloading or transshipping their cargo, and facilitating the presence of law enforcement officials of the flag State on board the pursuing vessel.<sup>230</sup> By analogy, it is possible to apply these measures in the context of Article 8(1) of the Migrant Smuggling Protocol. The discovering State may request another State to assist it in searching for a vessel suspected of engaging in migrant smuggling on the high seas or to prevent the smuggled migrants from disembarking.

Nevertheless, Article 8(1) of the Protocol concerning the right of assistance remains problematic for another reason, which is related to its wording. The phrases ‘within their means’ and ‘the extent possible’, which limit the scope of the article, render the implementation of this article subject to the will of the State receiving the request. This could be one of the reasons that drove Obokata to say that there is a sort of inconsistency in the Migrant Smuggling Protocol, particularly in regard to the maritime measures.<sup>231</sup> Although the requesting State may expect that a number of assistance measures will be provided under Article 8(1) of the Protocol, the State receiving the request under the same article might not render the measure of assistance demanded by

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<sup>228</sup> *Travaux préparatoires* of the Protocol (n23) 497.

<sup>229</sup> Mallia (n152) 122.

<sup>230</sup> Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (United Nations 1988) 340.

<sup>231</sup> Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea’ (n73) 163.

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the requesting State under the plea that it does not have the capacity to do so. For instance, the Spanish Coast Guard in the *Marine I* case requested assistance from the Senegalese authorities to search and rescue the vessel, the *Marine I*, which was carrying 369 migrants of African and Asian origin within the Senegalese ‘Search and Rescue’ zone.<sup>232</sup> The Senegalese authorities claimed not to have the means to assist and thus requested that Spain deal with the vessel.<sup>233</sup>

It can be said that the right of assistance under Article 8(1) of the Protocol is limited and subject to the assessment of the State receiving the request. However, it must be recognised that it is difficult to carry out effective maritime patrols in what may be a vast search and rescue area on the high seas, a burden that some States may indeed not be able to bear.<sup>234</sup> A requesting State or a State receiving a request can genuinely experience this limitation when it comes to the right of assistance.

Consequently, Robinson argues that this burden, which arises from the right of assistance and the obligation of cooperation in the maritime measures that aim to combat migrant smuggling on the high seas, can be eased through bilateral agreements.<sup>235</sup> The author provides as examples to support this the bilateral agreements between the Caribbean States (which do not have substantial naval or maritime law enforcement capabilities) and the US.<sup>236</sup> In fact, such bilateral or regional agreements can address the obstacles in relation to the right of assistance in Article 8(1) of the Protocol. Through such agreements, the contracting States are able to reach a common

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<sup>232</sup> Kees Wouters and Maarten D. Heijer, ‘Case Comment: The *Marine I* case: A Comment’ (2009) 22 Intl JRL 1.

<sup>233</sup> Ibid.

<sup>234</sup> McAdam and others, ‘Issue Paper: Smuggling of Migrants by Sea’ (n149) 37.

<sup>235</sup> Lieutenant C Robinson, ‘Smuggled Masses: The Need for a Maritime Alien Smuggling Law Enforcement Act’ (2010) 2010 Army Law 20. See also, McAdam and others, ‘Issue Paper: Smuggling of Migrants by Sea’ (n149) 37.

<sup>236</sup> Robinson (235) 27.

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understanding of the assistance measures that are needed to suppress the use of vessels in the smuggling of migrants. Also, the contracting States can overcome the issue of material resources by establishing a joint mechanism to finance the operations directed toward this purpose.

Nevertheless, these bilateral or regional agreements must operate in tandem with the Migrant Smuggling Protocol.<sup>237</sup> Parties to the Protocol must establish agreements that are complementary to the Migrant Smuggling Protocol and not parallel agreements in the context of the right of assistance. Parallel agreements can undermine the international consensus, as embodied in the provisions of the Protocol.<sup>238</sup> This understanding is in line with Article 17 of the Protocol, which calls upon States to enter into bilateral or regional agreements for the purpose of enhancing the provisions of the Protocol,<sup>239</sup> and not of bypassing or replacing the Protocol.

It can be concluded that the right of assistance under Article 8(1) of the Protocol in suppressing vessels engaged in the activities of migrant smuggling will remain of limited value given the current wording of this article. This will only change if States enter into supplementary agreements to overcome the barriers aforementioned. In such cases, Article 17 of the Protocol could provide a legal basis for these agreements.

### **Conclusion**

The substantive framework of the obligations in the Protocol contains a number of lacunae because of the flexible, open-ended and vague terms used to formulate these

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<sup>237</sup> Schloenhardt and Dale (n3) 152.

<sup>238</sup> *Ibid*, 153.

<sup>239</sup> See Article 17 (b) of the Protocol.

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obligations. Moreover, the responsibility of States for these obligations cannot be established readily in light of this wording.

First, in regard to the obligation of criminalisation, the phrase ‘as may be necessary’ used in Article 6(1) of the Protocol raises the question of whether States can rely on general legislation and codes rather than on specific legislation to criminalise the smuggling of migrants in order to meet this obligation. The offences relating to fraudulent documents used to enable migrant smuggling in Article 6(1)(b) of the Protocol, have been worded narrowly. Moreover, it is unclear whether or not Article 6(1)(c) of the Protocol concerning the offence of enabling illegal residence covers activities relating to the employment of illegal migrants.

Second, regarding the obligation of prevention, Article 11(1) on border controls does not provide for any measures or techniques for prevention; these measures are left to the discretion of States through the use of the phrase ‘to the extent possible’. Paragraph 3 of the same article, which sets out the obligations of carriers, is limited in application. For instance, airport authorities are not required to prevent the activities of migrant smuggling that take place in airport halls and facilities. What can be said generally is that in contrast to the activities of migrant smuggling by sea, the activities of migrant smuggling by air have not received any attention with respect to prevention measures. Moreover, by using the words ‘within available means’ Article 12 on security and control of documents confers upon States considerable scope to evade implementation of the measures in the article.

Third, the obligation of non-commission is not mentioned explicitly within the provisions of the Protocol, although such an obligation can be deduced from the obligations of criminalisation and prevention contained therein. As long as States are

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required under the provisions of the Protocol to criminalise and to prevent the activities of migrant smuggling, they are also obligated not to commit those activities through their agents. Fourth, cooperation in the field of information in Article 10 of the Protocol lacks a mechanism to put this article into practical effect.

In the context of State responsibility for these obligations, it is difficult to establish the element of breach in light of the flexible, open-ended and vague wording in regard to the obligations of States. Thus, States affected by migrant smuggling will find it difficult to establish the responsibility of another State because of this deficiency. However, the failure of security firms authorised by a State to prevent migrant smuggling will be attributed to that State if the requirements of attribution in Articles 5 or 8 of ARSIWA are met. Furthermore, a breach of the obligation of non-commission is attributed to a State when the smuggling of migrants is committed through the official capacity of an agent of that State, or by a person or group of persons acting on the instructions of, or under the direction and control of, that State.

The Migrant Smuggling Protocol has a legal framework of rights for enabling States to take measures to combat the activities of migrant smuggling by sea. Nevertheless, there are a number of gaps in this framework. In relation to the right of interception, particularly the content of this right, Article 8(2)(c) does not define the nature or scope the term ‘appropriate measures’, and whether or not enforcement measures can be adopted by an intercepting State in any given situation. Furthermore, there are no criteria within Article 8 of the Protocol which can be used to build reasonable grounds for suspicion that a vessel is engaged in the activities of migrant smuggling, despite this being a precondition of the right of interception. Lastly, a State party that requests the consent of the flag State to intercept its vessels suspected of

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migrant smuggling at sea, pursuant to Article 8(2) of the Protocol, may have to wait an indefinite time for a response. This is because the Protocol does not provide a specific time after which the requesting State can intercept a vessel when that State does not receive any response from the State receiving the request.

With respect to the right of assistance, Article 8(1) of the Protocol has failed to define the measures of assistance that can be requested of a State. However, even if the measures of assistance were identified in this article, the State receiving the request can refuse to render these measures by reference to a lack of capacity to render such measures, as Article 8(1) of the Protocol states that the measures of assistance should be rendered within the means of the State. Supplemental agreements between States pursuant to Article 17 of the Protocol could provide a solution to this issue.

The principal theme of the following chapter is the evaluation of the rights of smuggled migrants in the Protocol.

## 5. The position of smuggled migrants in light of the provisions of the Protocol

Get closer to the breathing holes. These were my brother's last words.  
He died next to me, from heat, exhaustion and slow suffocation.

—A rescued migrant<sup>1</sup>

This chapter explores the legal position of smuggled migrants and the rights they have under the provisions of the Protocol. The first section identifies the legal character of smuggled migrants under the Protocol by critically assessing whether or not a smuggled migrant is classed as a 'victim' under the provisions of the Protocol. This issue is significant in exploring the rights of smuggled migrants. Identifying the legal character of smuggled migrants will help us to understand the extent of their rights under the Protocol. For instance, their rights would be rather limited if they are not regarded as victims under the Protocol.

The second section will examine the rights of smuggled migrants under the Migrant Smuggling Protocol. Before this discussion, this section will highlight a number of views that assess the Protocol from the perspective of human rights. The section then argues that the provisions concerning the rights of smuggled migrants must be interpreted according to the legal character of the smuggled migrants, as elucidated in the first section of this chapter.

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<sup>1</sup> UNODC, 'Tenth Anniversary of the United Nations Convention against Transnational Organised Crime'  
<[http://www.unodc.org/documents/treaties/organised\\_crime/COP5/Programme\\_Flyer\\_and\\_Posters/10-56446\\_Smuggling\\_A1\\_approv.pdf](http://www.unodc.org/documents/treaties/organised_crime/COP5/Programme_Flyer_and_Posters/10-56446_Smuggling_A1_approv.pdf)> accessed 12 April 2011.

### 5.1. Is a smuggled migrant a ‘victim’?

The Protocol does not characterise smuggled migrants as ‘victims’ of the offence of the smuggling of migrants and avoids using such language within its provisions.<sup>2</sup> Nevertheless, it will be argued in this section that the Protocol implies that smuggled migrants are ‘potential victims’.<sup>3</sup> This is because of the consequences or implications of the offence of smuggling, such as detention and deportation.<sup>4</sup> The *travaux préparatoires* of the Protocol will be the starting point in this analysis.

At the eleventh session of the Ad Hoc Committee, it was agreed that the term ‘victims’ as incorporated in the Trafficking Protocol would be inappropriate in the Migrant Smuggling Protocol.<sup>5</sup> Instead, the term ‘object’ has been used within the Migrant Smuggling Protocol to characterise smuggled migrants.<sup>6</sup> The legislative guide to the Protocol clarifies that smuggled migrants resort voluntarily to the smuggling organisations, and sometimes to the extent of complicity.<sup>7</sup> The term ‘object’ rather than ‘victim’ is considered to be more appropriate in this respect:<sup>8</sup> only the State of

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<sup>2</sup> Tom Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea under UN Protocol on the Smuggling of Migrants by Land, Sea and Air’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010) 164; Kate L Stacey, ‘On Assistance and Protection of Smuggled migrants: International Law and Australian Practice: Research Paper’ (The University of Queensland Australia, Migrant Smuggling Working Group 2012) 12.

<sup>3</sup> Francois Crepeau, ‘The Fight against Migrant Smuggling: Migration Containment over Refugee Protection’ in Black Richard and others, *the Refugee Convention at 50* (Oxford University Press 2001) 175; Johanne Vernier, ‘French Criminal and Administrative Law Concerning Smuggling of Migrants and Trafficking in Human Beings: Punishing Trafficked People for their Protection?’ In Elspeth Guild and Paul Minderhoud, *Immigration and Criminal Law in the European Union* (Martinus Nijhoff Publishers 2006) 15. See also, Twelfth UN Congress on Crime Prevention and Criminal Justice, ‘Criminal Justice Responses to the Smuggling of Migrants and Trafficking in Persons: Links to Transnational Organised Crime: Working Paper Prepared by the Secretariat’ A/CONF.213/7 (5 February 2010) para 24.

<sup>4</sup> Ibid.

<sup>5</sup> *Travaux préparatoires* of the Negotiations for the Elaborations of the United Convention against Organised Transnational Crime and the Protocols Thereto (United Nations 2006) 461.

<sup>6</sup> See Articles 4, 5, 14, 16, 18 and 19 of the Protocol.

<sup>7</sup> See Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto (United Nations 2004) para30.

<sup>8</sup> UNODC, ‘Model Law against the Smuggling of Migrants’ (United Nations 2010) 19-20.

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destination is considered to be victim of the offence of the smuggling of migrants.<sup>9</sup> There is another view that holds that the smuggling of migrants is a victimless crime.<sup>10</sup> Indeed, it is more accurate to recognise that the offence of the smuggling of migrants referred to in Article 6(1)(a) of the Protocol is not committed against the smuggled migrants themselves. Rather, it is committed against a State whose State sovereignty and immigration laws have been violated.<sup>11</sup> The material elements of the offence of the smuggling of migrants, such as the act of ‘illegal entry’, are directed toward the relevant State and not toward any smuggled migrant. What is more, the act of smuggling meets the objective of the smuggled migrant.<sup>12</sup> Therefore, the smuggled migrants are clearly not ‘victims’ of the offence of the smuggling per se.<sup>13</sup>

Nevertheless, smuggled migrants may be prone to other violations that might occur because of the process of migrant smuggling or its implications.<sup>14</sup> It has been reported that smuggled migrants sometimes suffer from severe psychological and/or physical abuse and trauma during their journey.<sup>15</sup> Loss of life due to drowning, suffocation and dehydration have been reported, and there are even reports of deaths as

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<sup>9</sup> Brian Iselin and Melanie Adams, ‘Distinguishing between Human Trafficking and People Smuggling’ (UNODC - Regional Centre for East Asia and the Pacific 10 April 2003) 3; Katarina Gembicka and others, ‘Baseline Research on Smuggling of Migrants in, from and through central Asia’ (IOM 2006) 11.

<sup>10</sup> Andreas Schloenhardt, ‘Trafficking in Migrants: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region’ (2001) 29 Intl JSL 344.

<sup>11</sup> Maggy Lee, ‘Human trade and the criminalization of irregular migration’ (2005) 33 Intl JSL 1.

<sup>12</sup> Katja S Ziegler, ‘Criminal Victims/Witnesses of Crimes: The Criminal Offences of Smuggling and Trafficking of Human Beings in Germany, Discretionary Residence Rights, and Other Ways of Protecting Victims’ (2006) 6 GLJ 605. See also, Samuel V Jones, ‘Human Trafficking Victim Identification: Should Consent Matter?’ (2012) 45 Indiana L Rev 483.

<sup>13</sup> Twelfth UN Congress on Crime Prevention and Criminal Justice (n3) para25.

<sup>14</sup> UNODC, ‘Model Law against the Smuggling of Migrants’ (n8) 20. See also, generally, Tom Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17 Intl JRL394.

<sup>15</sup> UNESCO, ‘Report of the Special Rapporteur on Migrants: Mission to the Border between Mexico and the United States of America’ UN Doc E/CN.4/2003/85/Add.3 (30 October 2002) para 4; Council of Europe: Commissioner for Human Rights, ‘Issue paper on the Human Rights of Irregular Migrants in Europe’ (17 December 2007).

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a result of violence by smugglers.<sup>16</sup> It can thus be said that ‘smugglers and the activity of smuggling have the potential to seriously endanger the life and health of those who are smuggled.’<sup>17</sup> In the context of the implications of the smuggling process, there have also been reports of cases where smuggled migrants are held in jails instead of detention centres, where the conditions are very poor and the migrants are subjected to violence, robbery and extortion.<sup>18</sup> What is more, those migrants are ultimately deported to their countries of origin or elsewhere, where they may face persecution and torture.<sup>19</sup> That said, it has to be acknowledged that not every smuggled migrant is prone to such abuses.<sup>20</sup> The violations mentioned do not happen in all cases as an intrinsic part of the smuggling process. The smuggling of migrants can sometimes be accomplished without any risk to or violation of the rights of smuggled migrants.

Consequently, it can be said that smuggled migrants are ‘potential victims’— a legal concept that can be evinced from a number of the provisions in the Protocol. For example, the parties to the Protocol are obligated to take into account aggravating circumstances when punishing smugglers for violations that endanger the lives or safety of smuggled migrants.<sup>21</sup> In addition, Articles 2 and 16 of the Protocol include a framework for the protection of smuggled migrants. Finally, Article 15(2) of the Protocol calls on States to cooperate in the field of public information so as to prevent potential migrants from falling ‘victim’ to organised criminal groups. Such provisions

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<sup>16</sup> Ibid.

<sup>17</sup> Twelfth UN Congress on Crime Prevention and Criminal Justice (n3) para25.

<sup>18</sup> UNGA, ‘Report of the Special Rapporteur on the human rights of migrants Jorge Bustamante: mission to the United States of America’ UN Doc A/HRC/7/12/Add.2 (5 March 2008); UNGA, ‘Report of the Special Rapporteur on the human rights of migrants’ UN Doc A/64/213 (3 August 2009); UNESC, ‘Report of the Special Rapporteur on Migrants’ E/CN.4/2003/85 (30 December 2002) para 58.

<sup>19</sup> Ibid.

<sup>20</sup> Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective’ (n14) 402. See also, Rebecca Napier-Moore, ‘Human Rights in Migrant Smuggling’ (Global Alliance against Traffic in Women 2011) 8.

<sup>21</sup> See Article 6 (3) (a) of the Protocol.

thus implicitly recognise that smuggled migrants are ‘potential victims’ of violations resulting from the smuggling process or its implications.

### **5.2. The rights of smuggled migrants under the Protocol**

Since smuggled migrants are implicitly regarded as ‘potential victims’ within the Migrant Smuggling Protocol, as shown above, it will be argued that under the Protocol they have a number of rights that address the violations resulting from the smuggling process or its implications, such as detention and deportation. Before examining these rights in detail, it is important to recognise the views of others about the nature and extent of the rights of smuggled migrants under the Migrant Smuggling Protocol.

There is no consensus in the academic literature on the nature and extent of the rights of smuggled migrants within the Protocol. Broadly speaking, there are two conflicting views. On the one hand, Gallagher, Koser and Obokata point out that the Protocol contains minimal or limited reference to the protection needs of smuggled migrants.<sup>22</sup> This view suggests that the Protocol is deficient from the perspective of the rights of smuggled migrants. However, this view seems somewhat exaggerated in its criticism,<sup>23</sup> as it will be argued later on that there are in fact a number of rights within the Protocol that need to be inferred. In other words, they exist within the Protocol implicitly. Since human rights are often couched in general and broad language, these

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<sup>22</sup> Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 HRQ 975, 1003-04; Khalid Koser, 'Strengthening Policy Responses to Migrant Smuggling And Human Trafficking: Discussion paper prepared for the Civil Society Days of the Global Forum on Migration and Development' (Manila 2008) 2; Obokata, 'Smuggling of Human Beings from a Human Rights Perspective (n14) 397-98.

<sup>23</sup> That said, these critical views must not be ignored entirely, because as the following sub-sections of this chapter will show, the framework of protection for smuggled migrants in the Protocol has practical difficulties in terms of implementation. In that respect, the various critiques of the Protocol are useful.

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rights inevitably need to be interpreted in practice.<sup>24</sup> This rule applies equally to the rights in the Migrant Smuggling Protocol. Thus, the rights of smuggled migrants should not be limited or restricted by those rights that have been mentioned explicitly in the Protocol. The interpretative notes to Article 16 confirm this view. They state that listing certain rights in the Protocol – such as the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment – should not be interpreted as excluding or derogating from any other rights that are not specifically listed.<sup>25</sup> In the same context, Article 19(1) of the Protocol states that nothing in the Protocol shall affect the obligations and responsibilities of States under international law, including human rights law.

On the other hand, there is a view that has commended the Protocol for protecting human rights. For example, Mallia states that through the provisions of the Protocol it can be noticed that there is a firm intention to protect the rights of smuggled migrants.<sup>26</sup> Dixon also argues that Article 16(3) of the Protocol grants to smuggled migrants the necessary rights to protect their lives and dignity, including the right to safe transport.<sup>27</sup> This view, which implies that the Protocol has a full framework for the protection of migrants, is arguably misguided. The reason for this is that the fundamental rights in the Protocol and other provisions that can be used to infer additional rights should not be interpreted broadly. This argument takes its cue from the attitude of the drafters of the Protocol, who apparently lacked the will to include any

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<sup>24</sup> Johannes Knorz, 'The Theory and interpretation of Human Rights in Australia and Germany: A Comparative Analysis' (1997) 1997 Aus Intl LJ 34, 37.

<sup>25</sup> *Travaux préparatoires* of the Protocol (n5) 541.

<sup>26</sup> Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers 2010)118.

<sup>27</sup> Rosalind Dixon, 'Human Smuggling: the Rights of Smuggled and Trafficked Migrants under International Human Rights Law' (International Council on Human Rights Policy 2005).

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explicit protection for smuggled migrants.<sup>28</sup> During the codification history of the Protocol, many States were hesitant to support any provision that would generate an obligation on the part of States to take positive measures in relation to the protection and assistance of smuggled migrants.<sup>29</sup> As mentioned earlier, these States observe that the smuggled migrants are not themselves victims of the offence of migrant smuggling.<sup>30</sup> Consequently, there were no references to protection or assistance for smuggled migrants in the original draft versions of the Migrant Smuggling Protocol.<sup>31</sup> The current provisions on protection are incorporated within the existing text of the Protocol as a result of pressure by an ‘Inter-Agency Group’, comprising UNHCR, IOM, and UNICEF.<sup>32</sup> The drafters of the Protocol were only interested in crime control, rather than the protection of smuggled migrants.<sup>33</sup> A senior member of one of the leading delegations expresses this clearly:

[T]his is not like torture. It’s not even about human rights. We governments are not the villains here. Traffickers are just criminals. We can’t be responsible for what they are doing. In fact, if it wasn’t that we needed the cooperation of other countries to catch them, I wouldn’t even be here.<sup>34</sup>

Any attempt to identify the actual rights of smuggled migrants in the Migrant Smuggling Protocol must take into account the legal character of smuggled migrants as

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<sup>28</sup> Crepeau (n3).

<sup>29</sup> *Travaux Préparatoires* of the Protocol (n5) 538.

<sup>30</sup> See (n5).

<sup>31</sup> See, UNGA Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, ‘Draft elements for an international legal instrument against illegal trafficking and transport of migrants’ UN Doc A/AC.254/4/Add.1(15 December 1998).

<sup>32</sup> Gallagher, ‘Human Rights and the New UN Protocols’ (n22); Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea’ (n2).

<sup>33</sup> Jarrod Jolly, ‘Fighting Crime or a Fight for Rights? Assessing the Human Rights Value of the UN Protocols on Trafficking in Persons and Migrant Smuggling’ (2011) 4 QLS Rev 103,116; Erick Gjerdingen, ‘Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as ‘Exploitation’ and Smuggling as ‘Choice’ Along the Thai-Burmese Border’ (2009) 26 Arizona J Intl & CL 716.

<sup>34</sup> Anne Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 2.

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‘potential victims’ under the Protocol. The provisions of the Protocol regarding the rights of smuggled migrants must be interpreted in such a way that the necessary rights for addressing violations resulting from the smuggling process or its implications can be established. On this basis, the following subsections argue that smuggled migrants have under the Protocol rights related to non-prosecution (to be discussed in section 5.2.1), rights related to life and dignity (5.2.2), rights related to detention (5.2.3) and rights related to return (5.2.4).

However, it will be argued also in the following subsections that the protection of the rights of smuggled migrants, which is one of the Protocol’s explicit purposes under Article 2, cannot in fact be achieved by the level of protection afforded by the Protocol. This is because the aforementioned necessary rights of smuggled migrants are not comprehensive in the Protocol.<sup>35</sup> These necessary rights require, as mentioned above, a degree of interpretation of the relevant provisions of the Protocol and the relevant human rights instruments. It is to be expected that not all the States parties to the Protocol will protect smuggled migrants’ rights given the vagueness and need for complex interpretation of the Protocol and the relevant human rights instruments. In particular, there is a widespread view among States that smuggled migrants are not victims<sup>36</sup> and are not deserving of protection.

### **5.2.1. Rights related to non-prosecution**

It will be argued in this subsection that Article 5 of the Protocol concerning non-prosecution of smuggled migrants seems ineffective and only insures against express

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<sup>35</sup> Pia Oberoi and others ‘Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence’ (International Council on Human Rights Policy 2010)71 and 73. See also, Jolly (n33) 116.

<sup>36</sup> *Travaux préparatoires* of the Protocol (n5) 461.

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criminal prosecution of smuggled migrants,<sup>37</sup> in particular for offences of illegal entry and leaving. In order to pursue this argument, the subsection will begin by considering the meaning of Article 5 of the Protocol regarding non-prosecution of smuggled migrants. Then, the subsection will discuss how Article 6(4) of the Protocol can be seen as undermining Article 5 of the Protocol. However, it will be argued, finally, that smuggled migrants must not under Article 5 of the Protocol be prosecuted for illegal leaving because they have the right to leave their own State.

Before this discussion, it is important to note that the relevance of the right of smuggled migrants not to be prosecuted for illegal leaving is linked to the need for protection in the event that the State of origin imposes constraints on leaving its territory through regular channels.<sup>38</sup> In such cases, migrants are naturally forced to resort to alternatives<sup>39</sup> such as the services of smugglers. The right in question is in line with the legal character of the smuggled migrants as being ‘potential victims’ of smuggling organisations.<sup>40</sup> The potential victims in this context can be migrants who are apprehended before leaving a State illegally with the assistance of smugglers, as well as smuggled migrants who are returned to their State of origin because they have not been accepted as refugees or who are, in essence, economic migrants.

Article 5 of the Migrant Smuggling Protocol stipulates that smuggled migrants should not be prosecuted for being the object of smuggling. Smuggled migrants have the right not to be prosecuted for the offences related to migrant smuggling in Article 6

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<sup>37</sup> Hadley Hickson and Andreas Schloenhardt, ‘Non-Criminalisation of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air: Research Paper’ (University of Queensland 2012) 7.

<sup>38</sup> Pablo C Cernadas, ‘European Migration Control in the African Territory: the Omission of the Extraterritorial Character of Human Rights Obligations’ (2009) 6 Intl JHR 178.

<sup>39</sup> Ibid.

<sup>40</sup> See chapter 5 section 5.1.

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of the Protocol even if they are the object of these offences.<sup>41</sup> Moreover, the legislative guide to the Protocol stipulates that such immunity is to include migration-related offences, such as the offences of illegal entry, leaving and residence.<sup>42</sup> In other words, smuggled migrants also have the right under Article 5 not to be prosecuted for the offences of illegal entry and leaving. On this basis, the views of Hickson and Schloenhardt, which maintain that the scope of Article 5 is limited to non-prosecution for the offences in Article 6 of the Protocol,<sup>43</sup> are not precise.

Accordingly, it may be supposed that, under Article 5 of the Protocol smuggled migrants are not punishable for the offences in Article 6 of the Protocol, nor for illegal entry or leaving. However, Article 5 of the Protocol cannot protect smuggled migrants effectively from prosecution for the offences of illegal entry and leaving under domestic law. Article 6(4) of the Protocol undermines the immunity of smuggled migrants laid down in Article 5 of the Protocol in this regard because it allows States under their domestic laws to prosecute smuggled migrants for conduct that does indeed constitute a migration-related offence,<sup>44</sup> such as the offences of illegal entry and leaving.

State practice supports this view. The report of the Secretariat of the Conference of the Parties to UNCTOC acknowledges that most States impose criminal or administrative sanctions on smuggled migrants and that only a handful of States, such as El Salvador, Mexico, New Zealand and the Former Yugoslav Republic of

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<sup>41</sup> David McClean, *Transnational Organised Crime: A Commentary the UN Convention and Its Protocols* (Oxford University Press 2007) 389.

<sup>42</sup> Legislative Guides for the Convention and protocols (n7) para 28.

<sup>43</sup> Hickson and Schloenhardt (n37) 6.

<sup>44</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants: Note by the Secretariat' CTOC/COP/WG.7/2012/2 (21 March 2012) para 12.

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Macedonia, refrain from doing so.<sup>45</sup> For instance, illegal entry into the UK is punishable by a fine and/or imprisonment of up to six months.<sup>46</sup> Italy imposes a penalty of between 5,000 and 10,000 Euros on illegal entry into its territory.<sup>47</sup> Illegal leaving is also subject to prosecution and sanction.<sup>48</sup> A number of States, such as Morocco, Senegal and Mauritania, which are countries of origin for many illegal migrants who make their way to Spain, have been pressured by Spain to criminalise illegal leaving from their territories.<sup>49</sup> For instance, Article 50 of the Moroccan Immigration Law No. 02-03, adopted in 2003, imposes fines and imprisonment from one to six months for persons who leave Moroccan territory illegally.<sup>50</sup> Similarly, the Special Rapporteur on the human rights of migrants was informed that Law No. 02 (2005) on trafficking in persons and organised clandestine migration in Senegal was being used by law enforcement officials to arrest and prosecute not only smugglers but also migrants who attempted to leave the country illegally and make their way to Europe.<sup>51</sup>

In effect, State practice punishing illegal entry is accepted by Article 6(4) of the Protocol. There is no rule in the Migrant Smuggling Protocol or elsewhere in international law prohibiting a State from regulating entry into its territory, a right

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<sup>45</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the first reporting cycle: Report of the Secretariat' UN Doc CTOC/COP/2005/4/Rev.2 (8 August 2008) para 27.

<sup>46</sup> S24 Immigration Act 1971 as amended by the Asylum and Immigration Act 1996 <<http://www.legislation.gov.uk/ukpga/1971/77/section/3A>> accessed 31 Oct 2012.

<sup>47</sup> See Law No. 94/2009 (15 July 2009) Art 1.16 <<http://www.amnesty.org/en/library/asset/EUR30/008/2009>> accessed 31 Oct 2012.

<sup>48</sup> UNGA 'Report of the Special Rapporteur on the human rights of migrants' UN A/65/222 (3 August 2010) para 45.

<sup>49</sup> Cernadas (n38).

<sup>50</sup> Law No. 02-03 on the entry and residence of foreigners in the Kingdom of Morocco and illegal immigration <[http://www.sgg.gov.ma/profession\\_reglemente\\_pdf/Dahir\\_immigration\\_ar.pdf](http://www.sgg.gov.ma/profession_reglemente_pdf/Dahir_immigration_ar.pdf)> accessed 5 January 2013.

<sup>51</sup> UNGA 'Report of the Special Rapporteur on the human rights of migrants Jorge Bustamante: mission to Senegal' UN A/HRC/17/33/Add.2 (23 February 2011) para 66.

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flowing from State sovereignty that is well established in international law.<sup>52</sup> This rule has also been confirmed during the drafting of Article 16 concerning the rights of smuggled migrants. It has been said that respect for the basic rights of migrants should not prejudice or otherwise restrict the sovereign right of all States to decide who should or should not enter their territories.<sup>53</sup> Thus, Article 6(4) of the Protocol reflects State sovereignty and allows States to prosecute smuggled migrants for illegal entry.<sup>54</sup> On the whole then, it would be better to say that Article 5 of the Protocol cannot provide protection for smuggled migrants against prosecution for illegal entry unless those migrants have been accepted as refugees.<sup>55</sup> The legal basis of non-prosecution in this case is the protection of refugees referred to in Article 19(1) of the Protocol and not Article 5 of the Protocol.

By contrast, the State practice of prosecuting illegal leaving is not sanctioned by Article 6(4) of the Protocol and cannot be accepted in the context. To put it another way, the aforementioned domestic laws that prosecute smuggled migrants for illegal leaving represent a violation of Article 5 of the Protocol concerning non-prosecution of smuggled migrants. It will be argued below that smuggled migrants have the right to leave their own State, and therefore they must not be prosecuted for illegal leaving.

Article 16(1) and Article 19(1) of the Protocol obligate parties to the Protocol to pay due regard to the human rights of individuals. The right to leave is a case in point.<sup>56</sup>

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<sup>52</sup> Brian Opeskin, 'The Influence of International Law on The International Movement of Persons: Research Paper' (United Nations Development Programme - Human Development Reports 2009) para31.

<sup>53</sup> *Travaux préparatoires* of the Protocol (n5) 537.

<sup>54</sup> UNODC, 'In-Depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 1. Understanding Migrant Smuggling and Related Conduct' (United Nations 2011)16.

<sup>55</sup> See chapter 5 section 5.2.2.3.

<sup>56</sup> See Universal Declaration of Human Rights (adopted by General Assembly Resolution 217 A(III) of 10 December 1948 ) (UDHR) Article 13(2); International Covenant on Civil and Political Right (adopted 19 December 1966 and entered into force on 23 March 1976) 999 UNTS 171 (ICCPR) Article 12(2);

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It would be better to say that smuggled migrants as human beings enjoy the right to leave a State as laid down in human rights law. For further clarification, the Human Rights Committee (HRC) in General Comment 15 has decided that the rights in the ICCPR must be guaranteed without discrimination between citizens and aliens.<sup>57</sup> For instance, Article 12(2) of the ICCPR concerning the right to leave is a good illustration of these rights, and it is framed with considerable flexibility and generality. The literal interpretation of the term ‘everyone’ in the article indicates that any individual – whether a citizen, a national of another State, or a stateless individual – is entitled to the right to leave a territory. As Chetail points out, the legal status of an individual in the context of the right to leave is of no concern.<sup>58</sup> Moreover, the Special Rapporteur on the human rights of migrants states that the human rights in the UDHR and the international human rights treaties extend to all migrants, including those who are in a non-documented or irregular situation.<sup>59</sup> The right to leave is one of these rights.

Thus, smuggled migrants are entitled to leave any country, including their own. On this basis, smuggled migrants ought not to be prosecuted if they exercised this right illegally by resorting to the assistance of smugglers. Article 6(4) of the Protocol cannot be interpreted as allowing this. The HRC in General Comment No. 27 regarding

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International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 and entered into force on 4 January 1969) 660 UNTS 195 (ICERD) Article 5(d) (ii); Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos 11 and 14) (adopted on 4 November 1950 and entered into force on 3 September 1953) (ECHR) Article 2(2); American Convention on Human Rights (adopted 22 November 1969 and entered into force 18 July 1978 ) 1144 UNTS 123 (AMCHR) Article 22(2); African Charter on Human and Peoples' Rights (adopted 27 June 1981 and entered into force on 21 October 1986) 21 ILM 58 (AfCHPR) Article 12(2).

<sup>57</sup> United Nations Human Rights Committee (UNHRC) ‘General Comment 15 on the position of aliens under the International Covenant on Civil and Political Rights’ (Twenty-seventh session, 1986) UN Doc HRI/GEN/1/Rev.1 at 18 (1994) para 2.

<sup>58</sup> Vincent Chetail, ‘Freedom of Movement and Transnational Migration: A Human Rights Perspective’ in T A Aleinikoff and V Chetail (eds), *Migration and International Legal Norms* (T.M.C Asser Press 2003) 54.

<sup>59</sup> UNGA ‘Report of the Special Rapporteur on the human rights of migrants’ UN A/65/222 (n48) para 30.

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freedom of movement states that the restrictions permitted by Article 12(3) of the ICCPR must not impair the essence of the right to leave.<sup>60</sup> Similarly, the illegal exercising of the right to leave does not make the right non-existent but merely limits it. Harvey and Barnidge make this point clear in the context of migrant smuggling by stating that in spite of a migrant's attempt to be smuggled, the right to leave is still a fundamental human right.<sup>61</sup> This means that the right to leave must not be entirely undermined by States to the extent of imposing a punishment in the case of illegal exercising of the right. For instance, it can be said that the requirement to possess a valid passport in order to leave a country might be acceptable and not inconsistent with the right to leave, but the procedure is unacceptable and conflicts with the right to leave when it also includes a sanction for non-compliance with the requirement to possess a valid passport, which limits that basic right.<sup>62</sup> Accordingly, the parties to the Protocol must not prosecute migrants who facilitate departure from their territories via the use of fraudulent documents.<sup>63</sup>

It can thus be inferred that smuggled migrants must not be prosecuted for exercising their right to leave even if this was carried out illegally. Non-prosecution for illegal leaving falls within the framework of immunity provided by Article 5 of the Protocol. Consequently, the domestic laws that prosecute smuggled migrants for illegal leaving using the assistance of smugglers represent a violation of this article.

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<sup>60</sup> UN HRC 'General Comment No. 27: Freedom of movement (Art.12)' UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 13.

<sup>61</sup> Colin Harvey and Robert P Barnidge, 'The right to leave one's own country under international law' (Global Commission on International Migration 2005) para 3.6.

<sup>62</sup> A C J de Rouw, 'Some Aspects of the Right to Leave and to Return with Special Reference to Dutch Law and Practice' (1981) 12 NY Intl L 45, 59.

<sup>63</sup> Harvey and Barnidge (n61) para 4.2.

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Importantly, while it is true that smuggled migrants must not be prosecuted for illegal leaving that is facilitated by smugglers, this does not mean that this action is permitted by international law.<sup>64</sup> Since the right to leave is not absolute,<sup>65</sup> States are entitled to prevent smuggled migrants from illegal leaving facilitated by smugglers. The measures of border control in the Migrant Smuggling Protocol allow, if not require, States to prevent individuals from leaving the country through unauthorised or irregular means,<sup>66</sup> such as by turning to smuggling organisations. This view can be found in the contextual interpretation of Articles (8), (11) and (12) concerning the measures of prevention in the Protocol. Furthermore, the States that are party to the Protocol and the ICCPR at the same time have the authority to limit the right to leave when it is necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in this Covenant.<sup>67</sup> Among these justifications, measures to prevent illegal leaving through smuggling activities can be based on the need to protect public order or national security.<sup>68</sup> For instance, immigration laws have little credibility if migrant smugglers are allowed to circumvent the policies in place to determine who enters or leaves the country, for what purposes and for what period of time.<sup>69</sup> In other words, illegal leaving through migrant smuggling may undermine the immigration laws of a State that reflect public order and State sovereignty.

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<sup>64</sup> Harvey and Barnidge (n61) para 3.5.

<sup>65</sup> Chetail (n58) 55; Opeskin (n52) para 46.

<sup>66</sup> Harvey and Barnidge (61) para 3.1.

<sup>67</sup> Article 12 of the ICCPR.

<sup>68</sup> Iselin and Adams (n9) 3.

<sup>69</sup> Khalid Koser and others, 'World Migration Report 2010 the Future of Migration: Building Capacities for Change' (IOM 2010) 30.

### 5.2.2. Rights related to the life and dignity of smuggled migrants

The most direct impact of migrant smuggling on human rights is the sheer number of deaths and injuries incurred as a consequence of these activities. It has been reported that at least 18,567 irregular migrants died along European maritime borders between 1988 and 2012.<sup>70</sup> The cases of death as a result of migrant smuggling by land are significant too. The activities of migrant smuggling through the Sahara between Sudan, Chad, Niger and Mali and between Libya and Algeria have resulted in the reported deaths of 1,703 irregular migrants since 1996.<sup>71</sup> Furthermore, it has been reported that smuggled migrants frequently suffer from severe psychological and/or physical abuse—including cases of torture and sexual abuse during their journey.<sup>72</sup> Finally, smuggled migrants are forced to return to their countries of origin, where they may be subjected to torture and other cruel, inhuman or degrading treatment or punishment.<sup>73</sup> The main question is then whether or not the Protocol puts in place a legal framework that is sufficient to protect smuggled migrants from these violations that result from the smuggling process.

It will be argued that Article 16 of the Protocol constitutes the basis of certain rights that address the violations mentioned. The right to rescue at sea, the right to physical and psychological care, and the right to non-refoulement are good illustrations of these rights, and they will be examined in turn in further detail in the subsections that follow.

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<sup>70</sup> See 'Fortress Europe' < <http://fortresseurope.blogspot.co.uk/2006/01/fortress-europe.html#uds-search-results>> accessed 14 November 2012.

<sup>71</sup> Ibid.

<sup>72</sup> Daphné Paquet, 'Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications' (UNDOC 2010)104. See also, UNESC, 'Report of the Special Rapporteur on Migrants: Mission to Philippines' E/CN.4/2003/85/Add.4 (1 November 2002) paras 15 and 16.

<sup>73</sup> UNGA, 'Report of the Special Rapporteur on the human rights of migrants' UN A/65/222 (n48) para7.

### 5.2.2.1. Right to be rescued at sea

It has been reported that smugglers often use boats that are unseaworthy, overloaded with migrants and in imminent danger of sinking.<sup>74</sup> Also, smugglers send migrants on sea journeys in bad weather conditions, and vessels sometimes run aground.<sup>75</sup> It may therefore be asked whether smuggled migrants have a right to be rescued at sea under the Protocol.

There is no doubt that the threat to human life in the case of migrant smuggling at sea stems from smugglers, but States are still obligated to protect the lives of smuggled migrants at sea. Human rights law addresses States and therefore they are obligated to take appropriate steps to safeguard the right to life,<sup>76</sup> such as rescue at sea. The International Framework for Action to Implement the Smuggling of Migrants Protocol has also confirmed this view. It states that the obligation of States to rescue smuggled migrants whose lives are endangered is an example of the obligation to protect their right to life,<sup>77</sup> even if the threat to their lives results from non-State actors. Rescue at sea thus, *prima facie* does not seem to be a human right because it is formulated as an obligation imposed on States under the international law of the sea.<sup>78</sup>

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<sup>74</sup> Marika McAdam and others, 'Issue Paper: Smuggling of Migrants by Sea' (UNDOC 2011) 40.

<sup>75</sup> *Ibid.*

<sup>76</sup> *LCB v the United Kingdom* App no 23413/94 (ECtHR 9 June 1998) para 36.

<sup>77</sup> Marika McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (UNDOC 2011) para 114.

<sup>78</sup> Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 *BJ Intl L* 1, 3. See, for example, United Nations Convention on the Law of the Sea (adopted on 10 December 1982 and entered into force on 14 November 1994) 1833 UNTS 3 (UNCLOS) Article 98 (1) (b); International Convention on Maritime Search and Rescue (adopted on 27 April 1979 and entered into force on 22 June 1985) 1405 UNTS 97 (SAR) Annex, Chapter 2, para. 2.1.1; International Convention for the Safety of Life at Sea (adopted on 1 November 1974 and entered into force on 25 May 1980) 1184 UNTS 2 (SOLAS) Regulation 10 of chapter v; International Convention on Salvage (adopted on 28 April 1989 and entered into force on 14 July 1996) 1953 UNTS 193 (Salvage Convention) Article 10 (2).

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However, it is undeniably ‘a humanitarian necessity, regardless of who the people are or what their reasons are for moving’.<sup>79</sup> Concerns about human beings, which lie at the core of human rights law, underpin the legal framework of rescue at sea.<sup>80</sup> Therefore, rescue at sea arguably is itself a human right that can be derived from the right to life.<sup>81</sup> A right of a human being to be rescued and not to lose his or her life at sea is synonymous with the right to life in human rights law. Hence, the right of smuggled migrants to be rescued at sea can be deduced from the right to life laid down in Article 16 (1) and (3) of the Protocol. Furthermore, the right of smuggled migrants to be rescued at sea can be inferred from Article 8(5) of the Protocol. The phrase ‘to relieve imminent danger to the lives of persons’ in this article suggests implicitly that smuggled migrants have the right to be rescued at sea. Accordingly, the parties to the Protocol are entitled to adopt rescue measures that ensure this right without the express authorisation of the flag State.<sup>82</sup>

In practice, however, the right of smuggled migrants to be rescued at sea is undermined by the weaknesses in the international law regarding rescue at sea. Indeed, the stark statistics on the deaths at sea of smuggled migrants<sup>83</sup> point to weaknesses that complicate rescue at sea regardless of whether it is regarded an inter-State obligation or a human right. In other words, reasons why an inter-State obligation to rescue at sea are not implemented effectively are identical with those affecting the implementation of an

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<sup>79</sup> UNGA, ‘The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees: Report of the Office of the United Nations High Commissioner for Refugees A/AC.259/17 (11 April 2008 ) para 9.

<sup>80</sup> Treves (n78) 3.

<sup>81</sup> Seline Trevisanut, ‘Law of the Sea Symposium: Search and Rescue Operations at Sea – Who is in Charge? Who is Responsible?’ < <http://opiniojuris.org/2013/05/28/law-of-the-sea-symposium-search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible/>> accessed 9 August 2013. See also, Sophie C Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 Sri Lanka J Intl L 85.

<sup>82</sup> See Article 8 (5) of the Protocol.

<sup>83</sup> See (n70).

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individual right to be rescued. Consequently, this study highlights these weaknesses in light of the right of smuggled migrants to be rescued at sea. The discretionary authority of the shipmaster and the problems around the place of disembarkation are major examples of these weaknesses, and will be examined in turn.

### **5.2.2.1.1. The discretionary authority of a shipmaster**

Although rescue at sea is well established in the international law of the sea as an inter-State obligation and also in the Migrant Smuggling Protocol as a human right, as mentioned above, the obligation to rescue vessels used for smuggling migrants is often ignored or delayed by the discovering parties.<sup>84</sup> In other words, the right of the smuggled migrant to be rescued at sea is in practice not appropriately protected by parties to the Protocol. At best, the rescue may be limited to providing water and food in order to prevent loss of life, without engaging in any actual rescue.<sup>85</sup> For instance, a boat carrying 72 passengers, including several women and young children, ran into trouble and was losing fuel in late March 2011 after leaving Tripoli in Libya for the Italian island of Lampedusa. The migrants used the boat's satellite phone to call Zerai, an Eritrean priest in Rome who runs the refugee rights organisation Habeshia, who in turn contacted the Italian coastguard. The latter assured Zerai that the alarm had been raised and all relevant authorities had been alerted to the situation. The Maltese and Italian authorities denied that they had had any involvement with the boat. A military helicopter marked with the word 'Army' appeared above the boat, dropped bottles of water and packets of biscuits down to the boat and gestured to passengers that they should hold their position until a rescue boat arrived to help. The helicopter then flew

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<sup>84</sup> Julian M Lehmann, 'Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants' (2011) 3 *Goe J Intl L* 733, 765.

<sup>85</sup> Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *Intl JRL* 174,177.

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off and no rescue boat ever arrived. The French ship *Charles de Gaulle*, which was operating in the Mediterranean on those dates to implement the resolutions of the Security Council against Gaddafi's regime in Libya, denied being the helicopter carrier. On 10 April, the boat washed up on a beach near the Libyan town of Zlitan near Misrata; only 11 migrants were still alive, while 61 people, including children, had died from thirst and hunger after their vessel was left to drift in open waters for 16 days.<sup>86</sup> This case reveals that the vessels which were close at hand or had knowledge of the distressed vessel ignored the right of the smuggled migrants to be rescued at sea.

Indeed, it will be argued below that although the right to rescue at sea is established within the Migrant Smuggling Protocol, international law grants discretionary authority to the captain of vessel that discovers the migrants' vessel to undertake or ignore the rescue of vessels, including vessels used for smuggling migrants. To put it differently, rescue at sea 'can be ignored with relative impunity'.<sup>87</sup> The shipmaster who decides not to protect the right of smuggled migrants to be rescued at sea can justify his action with one of the following reasons, all authorised by international law.

First, the captain of the vessel has a duty under international law to ensure the safety of his own vessel.<sup>88</sup> Consequently, the captain may ignore rescue at sea as long as this action aims to ensure the safety of his own vessel and the persons on board, such as crew and passengers. This follows from Article 98(1) of the UNCLOS and 10(1) of the Salvage Convention, which provide that the duty of a shipmaster to render assistance to

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<sup>86</sup> Jack Shenker, 'Aircraft carrier left us to die, say migrants' *The Guardian* (London, 8 May 2011).

<sup>87</sup> Martin Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea' (2003) 12 *Pacific Rim L & PJ* 109, 111.

<sup>88</sup> Jessica E Tauman, 'Rescued At Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis' (2002) 11 *Pacific Rim L & PJ* 461.

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or rescue persons in danger or distress at sea may be limited if there is a serious danger to his own vessel, the crew or the passengers. Furthermore, Regulation 33(1) of Chapter V of the SOLAS Convention implies this duty on the part of the captain of the vessel. It refers to the procedures to be followed when a ship that receives a distress alert is unable to provide assistance to persons in distress at sea.<sup>89</sup> The phrase ‘unable’ in the regulation indicates that there are circumstances that must be considered by the shipmaster before he decides to respond to the distress alert of a vessel at sea, including a vessel being used to smuggle migrants. Accordingly, the shipmaster must weigh the duty to ensure the safety of his vessel and the persons on board against the right of the smuggled migrants to be rescued at sea. The emerging question is whether international law has standards that must be followed by a shipmaster during this weighing process, or whether the decision falls completely within the discretion of the shipmaster.

According to Zimmermann, the duty to ensure the safety of a ship and the persons on board can outweigh the right to rescue at sea when there are circumstances that would cause grave and imminent danger for the rescuing ship or the persons on board.<sup>90</sup> However, he does not provide a firm framework or criteria that can be used to weigh the responsibilities of the shipmaster during the process of rescue: the circumstances that might constitute grave and imminent danger for the rescue ship and the persons on board are not defined by the author. In this context, the UNHCR suggests more specific criteria, for instance that the obligation to rescue might be limited ‘when

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<sup>89</sup> SOLAS Convention (n78) Chapter V- Regulation 33 (1).

<sup>90</sup> Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 824 – 25.

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the number of persons rescued outnumbers those legally permitted to be aboard and exceeds the availability of lifejackets and other essential safety equipment.’<sup>91</sup>

Nonetheless, such circumstances and others still fall within the discretion of the shipmaster. For instance, in the case of the Norwegian ship *MV Tampa*, Captain Arne Rinnan rescued passengers from an Indonesian ferry, the *KM Palapa 1*, on 26 August 2001 in the Indian Ocean.<sup>92</sup> Although the ship *MV Tampa*, as a cargo ship, was not authorised to carry more than 12 passengers, the Norwegian captain rescued and loaded 440 migrants on board.<sup>93</sup> This case underscores how the assessment of the conflicting duties of a shipmaster is at the shipmaster’s own discretion and conscience, and is not regulated by substantive rules in international law. The literal interpretation of the provisions concerned in the international law of rescue at sea confirms this view. For instance, the literal interpretation of the phrase ‘so far as he can do’ in Article 98(1) of the UNCLOS and Article 10(1) of the Salvage Convention indicate that the shipmaster is the only person who can decide whether circumstances allow or oblige him to undertake a rescue at sea. Consequently, the shipmaster is able – should he wish to – to exaggerate the circumstances in order to avoid implementing the right of the smuggled migrants to be rescued at sea.

Second, a vessel or persons on board must be ‘in distress’ at sea in order to be entitled to rescue at sea.<sup>94</sup> On this basis, a shipmaster may try to avoid rescuing vessels which are used to smuggle migrants at sea by stating a belief that such vessels or the migrants they are carrying are not ‘in distress’. Since smugglers often use unseaworthy

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<sup>91</sup> UNHCR, ‘Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea’ (18 March 2002) para 6.

<sup>92</sup> Tauman (n88) 462.

<sup>93</sup> Ibid.

<sup>94</sup> See UNCLOS (n78) Article 98 (1) (b); SAR Convention (n78) Annex, Chapter 1, para. 1.3.2; SOLAS Convention (n78) Regulations 7, 8 and 33 - Chapter V.

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vessels in their operations,<sup>95</sup> it may be asked whether these vessels are always in distress or whether additional conditions must be present. In this context, it is necessary to examine the meaning of the concept of 'in distress' so as to be able to determine whether or not the unseaworthy vessels of migrant smuggling fall within this concept.

A 'distress phase' has been defined as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.<sup>96</sup> In fact, the SAR Convention uses some rather vague terms, such as 'grave and imminent danger', to interpret the term 'distress'. The extent of danger in this definition is not defined.<sup>97</sup> The terms 'grave' and 'imminent' are not suitable to define the required level of the danger that renders a vessel as one that is 'in distress'. For instance, it is unclear whether unseaworthy vessels carrying smuggled migrants can be considered to be in 'grave and imminent danger', thereby qualifying as being 'in distress', or whether such vessels must already be on the rocks, for example.

Zimmermann has suggested that the level of danger in the definition of the term 'in distress' must be serious 'grave' and temporally 'imminent'.<sup>98</sup> These conditions are met when a vessel is about to sink, is incapacitated as a result of a broken engine or insufficient petrol, or is sailing in bad weather conditions.<sup>99</sup> A medical emergency with respect to the smuggled migrants that cannot be resolved using the available means on board, or running out of water and food, may place those migrants in grave and

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<sup>95</sup> McAdam and others, 'Issue Paper: Smuggling of Migrants by Sea' (n74) 33.

<sup>96</sup> See the SAR Convention (n78) Annex, Chapter 1, para. 1.3.11.

<sup>97</sup> Zimmermann (n90) 821.

<sup>98</sup> Ibid, 822.

<sup>99</sup> Ibid.

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imminent danger, and therefore these situations amount to distress.<sup>100</sup> Consequently, unseaworthy vessels or smuggled migrants are not considered to be ‘in distress’ without additional factors, such as those mentioned above.<sup>101</sup> Indeed, these different factors set out the actual level of danger that qualifies a vessel used to smuggle migrants as being in distress, particularly since they are supported by State practice. For instance, Captain Arne Rinnan of the *MV Tampa* stated that the rickety wooden ferryboat was in ‘immediate danger’ because it was loaded with 440 migrants, had already taken a substantial amount of water on board, and was about to sink.<sup>102</sup>

However, the factors of imminent danger suggested by Zimmermann still fall within the discretionary authority of the captain of the vessel. This argument takes its cue from the fact that vessels that were not in distress have been ‘rescued’, whereas vessels which were genuinely in distress have been ignored.<sup>103</sup> A shipmaster who chooses not to rescue a vessel that is undertaking migrant smuggling and is in distress may argue that the vessel was not in distress according to his understanding of the term ‘in distress’, which is defined ambiguously in international law.

### 5.2.2.1.2. Place of disembarkation

Uncertainties about the place of disembarkation are another weakness in the international law of rescue at sea<sup>104</sup> that undermine the right of smuggled migrants to be rescued at sea. The refusal of the States concerned to allow the rescued persons to

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<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Tauman (n88) 464.

<sup>103</sup> Moreno-Lax (n85). See, for example, the case of the vessel that has been ignored by the Maltese authorities, Italian authorities and the NATO forces (n86).

<sup>104</sup> Efthymios Papastavridis, ‘Rescuing Migrants at Sea: The Responsibility of States under International Law’ (2011) 2 < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1934352](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352)> accessed 15 November 2012.

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disembark in their territories is one of reasons why shipmasters are reluctant to rescue smuggled migrants at sea.<sup>105</sup> For example, the Maltese authorities refused in 2005 to allow 26 migrants rescued by the Spanish tug *Monfalco* to disembark, and declared that Libya was responsible for disembarkation because the incident took place 27 miles inside Libya's search and rescue zone and 17 miles outside Malta's search and rescue zone.<sup>106</sup> Also, in the case of the *MV Tampa*, the Australian authorities refused to allow the rescued migrants to disembark and the vessel thus remained at sea.<sup>107</sup> The main question then is whether international law determines the place of disembarkation.

Davies states that the flag State of the rescuing vessel is obligated under Article 98(1) of UNCLOS to enforce the measures of rescue,<sup>108</sup> but does not mention whether the place of disembarkation must also be in the territory of the flag State. However, even if this view implies that the flag State must fulfil the measures of rescue completely, including that of disembarkation, this view can be criticised. The place of disembarkation is not mentioned at all within the text of Article 98 of UNCLOS. Furthermore, rescue at sea as in this article is an obligation of conduct rather than of result,<sup>109</sup> and thus does not obligate the flag State to allow the rescued migrants to disembark in its territory.

Barnes observes that the gap regarding the place of disembarkation has been closed by imposing an obligation on States to cooperate and coordinate to accomplish

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<sup>105</sup> McAdam and others, 'Issue Paper: Smuggling of Migrants by Sea' (n74).

<sup>106</sup> 'Migration News Sheet' (Migration Policy Group Brussels, July 2007) <[http://www.migpolgroup.com/publications\\_detail.php?id=95](http://www.migpolgroup.com/publications_detail.php?id=95)> accessed 3 October 2011.

<sup>107</sup> Frederick J Kenney and Vasilios Tasikas, 'The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea' (2003) 12 Pacific Rim L & PJ 143; Tauman (n88).

<sup>108</sup> Davies (n87).

<sup>109</sup> Guy S Goodwin and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 282-284.

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the rescue operation.<sup>110</sup> This view lacks precision, however, because such cooperation and coordination is not always effective or successful. Although this obligation has already been established by Chapter 3 of the SAR Convention, the relevant States in the cases of rescue might not agree on the place of disembarkation. For instance, 154 persons aboard two boats were rescued on 16 April 2009 by *MV Pinar E*, a Turkish vessel.<sup>111</sup> The Italian authorities refused to allow the migrants to disembark in their territories and argued that Malta was responsible since it was the State of the search and rescue region.<sup>112</sup> However, the Maltese authorities refused the rescue vessel access to its ports and insisted that the rescued persons should disembark in Italy, where the next port was located.<sup>113</sup> This dispute reveals the failure of the provisions on cooperation and coordination in the SAR Convention in determining a place of disembarkation for rescued persons, despite Malta and Italy both being parties to the SAR Convention.<sup>114</sup> Moreover, the place of disembarkation in this case was not based on the provisions of cooperation and coordination outlined in the SAR Convention and was eventually appointed by an external party, when the President of the European Commission intervened and identified Italy as the place of disembarkation.<sup>115</sup>

Alternatively, on the basis of the amendments concerning the place of disembarkation adopted in May 2004 by the Maritime Safety Committee (MSC) to the

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<sup>110</sup> Richard Barnes, 'The international Law of the Sea and Migration Control' in Ryan and Mitsilegas (n2) 144.

<sup>111</sup> Ibid, 142; Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 Intl JM & CL 523.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Trevisanut 'Search and Rescue Operations in the Mediterranean' (n111) 524.

<sup>115</sup> Barnes (n110) 142.

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SOLAS and SAR conventions,<sup>116</sup> Moreno-Lax claims that a State in whose search and rescue region persons or vessels in distress are found is obligated to provide or ensure a place of safety.<sup>117</sup> In other words, the amendment imposes an obligation of result upon that State.<sup>118</sup> Thus, the author implies that the place of safety outlined in the amendment should be in the territory of the State of the search and rescue region. However, this view can be criticised from two angles. First, the literal interpretation of the relevant amendment shows that a State responsible for the search and rescue region is only obligated to ensure that coordination and cooperation with other governments leads to the finding of a place of safety for the rescued persons. This means that the State of the search and rescue region is not obligated to allow the rescued persons to disembark in its own territory.<sup>119</sup> Second, the European Commission criticised the absence of a rule in the law of the sea that defines a specific port of disembarkation. The Commission argued that this issue is left to the arrangements of the search and rescue region's State together with other governments, which means that a resolution that must be decided afresh every time.<sup>120</sup> This criticism reveals how there is no obligation imposed on the State of the search and rescue region to allow rescued persons – including smuggled migrants – to disembark in its territory. It can be concluded then that the MSC

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<sup>116</sup> The concerned amendment states that the State party 'Responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a 'place of safety'. See, Amendments to the International Convention for the Safety of Life at Sea, 1974 (Resolution MSC. 153(78), adopted 20 May 2004) Annex 3, Regulation 33 - 4.1.1; Amendments to the International Convention on Maritime Search and Rescue (Resolution MSC.155 (78), adopted on 20 May 2004) Chapter Three – 3.1.9.

<sup>117</sup> Moreno-Lax (n85).

<sup>118</sup> *Ibid.*

<sup>119</sup> Trevisanut 'Search and Rescue Operations in the Mediterranean' (n111).

<sup>120</sup> Commission of the European Communities, 'Commission Staff Working document: Study on the international law instruments in relation to illegal immigration by sea' (Council of the European Union Brussels, 23 May 2007) para 4.

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amendments to the SAR and SOLAS conventions have failed to define the place of disembarkation.

In sum, it can be said that the law of the sea through UNCLOS, the SAR Convention and the SOLAS Convention does not include an explicit obligation by which a certain State is obligated to allow rescued persons to disembark in its territory.<sup>121</sup>

However, the place of disembarkation can be better identified through reference to State practice. The Executive Committee of the UN High Commissioner for Refugees in its conclusion No. 23 on the international protection of refugees, adopted in 1981, states that ‘in accordance with established international practice ... persons rescued at sea should normally be disembarked at the next port of call.’<sup>122</sup> Furthermore, the UNHCR’s favoured approach in the context of refugees is the next port of call.<sup>123</sup> Lastly, a number of rescuing vessels chose the next port of call as the first option for a place of disembarkation. For instance, in August 2009, a ship carrying over 70 migrants had run out of fuel and remained adrift for 20 days. A patrol boat belonging to Malta provided them with fuel and directed them to the Italian island of Lampedusa, the next port of call.<sup>124</sup> A British ship rescued 150 Vietnamese and disembarked them in the next

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<sup>121</sup> James Z Pugash, ‘The Dilemma of the Sea Refugee: Rescue without Refuge’ (1977) 18 Harv Intl LJ 577, 578. See also, Zimmermann (n90) 825; Cecilia Bailliet, ‘The Tampa Case and its Impact on Burden Sharing at Sea’ (2003) 25 HRQ 741.

<sup>122</sup> UNHCR, ‘Conclusion No. 23 on Problems Related to the Rescue of Asylum-Seekers in Distress at Sea’ (21 October 1981) para 3.

<sup>123</sup> UNHCR, ‘Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea’ (n91) para12.

<sup>124</sup> Migration Policy Group, ‘Migration News Sheet’ (Brussels, Sep 2009) <<http://www.migpolgroup.com>> accessed 3 October 2011.

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port of call in Australia.<sup>125</sup> It can thus be concluded that the next port of call represents the place of disembarkation according to State practice.<sup>126</sup>

Importantly, the next port of call as a place of disembarkation must be compatible with the other rules of international law concerning the place of disembarkation. The standard of ‘a place of safety’ within the MSC amendments to the SAR and SOLAS conventions is a case in point.<sup>127</sup> Of course, this raises the question of the extent to which the next port of call may be regarded as a place of safety. This depends on the meaning of the phrase ‘a place of safety’.

In the absence of any clarification or interpretation of the phrase ‘a place of safety’ by the MSC,<sup>128</sup> the IMO Guidelines on the Treatment of Persons Rescued at Sea attempted to clarify a number of ambiguous or uncertain issues in amendments to maritime conventions, including the phrase ‘a place of safety’.<sup>129</sup> Nevertheless, the IMO Guidelines do not properly define ‘a place of safety’, although they establish a number of standards that help elucidate the term. For example, a place of safety is the place where the rescue operations are terminated and where basic human needs, such as food, shelter and medical assistance, can be provided.<sup>130</sup> In the context of these standards, it can be argued that the next port of call can indeed be a place of safety. It is a place at which to terminate the rescue operations because it is the nearest physical location to

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<sup>125</sup> Bailliet (n121) 758; See also, the *MV Pinar E* case (n111).

<sup>126</sup> Barbara Miltner, ‘Irregular Maritime Migration: Refugees Protection Issues in Rescue and Interception’ (2007) 30 F Intl LG 75, 88. See also, Bailliet (n121) 755; Barnes (n110) 144.

<sup>127</sup> See (n116).

<sup>128</sup> Moreno-Lax (n85).

<sup>129</sup> Miltner (n126).

<sup>130</sup> IOM, ‘Guidelines on the Treatment of Persons Rescued at Sea (Resolution MSC. 167(78) Annex 34, adopted by the Maritime Safety Committee on 20 May 2004) para 6.12.

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the vessel.<sup>131</sup> Moreover, the next port of call is the most appropriate place for providing the rescued persons with medical assistance, food, and shelter.<sup>132</sup>

Notwithstanding this, the next port of call must also meet the other standards of a place of safety in the IMO Guidelines. The place of disembarkation must not carry any threat to the life of the survivors.<sup>133</sup> For instance, although Libya is the next port of call for many vessels in the Mediterranean Sea, the infighting that occurred between the rebels and Gaddafi's forces following the revolution of 17 February 2011 in Libya made the country ineligible as a place of safety according to the standards in the IMO Guidelines. Therefore, disembarkation in the port of Tripoli or Misrata in Libya would have endangered the lives of the rescued persons. In such cases, the discretionary authority of a shipmaster might play an important role in identifying the place of disembarkation.<sup>134</sup> A coastal State, transit State or the flag State of the rescuing vessel should clearly be considered by the shipmaster as alternative options to the next port of call.

### 5.2.2.2. Right to physical and psychological care

This right means that persons are entitled to receive material, medical and psychological care,<sup>135</sup> and it therefore has particular resonance in the context of migrant smuggling.<sup>136</sup>

This is because smuggled migrants may be intercepted by authorities after they have

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<sup>131</sup> Bailliet (n121).

<sup>132</sup> Kees Wouters and Maarten D. Heijer, 'Case Comment: the Marine I case: a comment' (2009) 22 Intl JRL 1.

<sup>133</sup> IOM, 'Guidelines on the Treatment of Persons Rescued at Sea' (n130) para 6.12.

<sup>134</sup> The discretionary authority of a shipmaster to determine the time and place of disembarkation is recommended in Expert Roundtable in Lisbon in March 2002. See UNHCR, 'Rescue-at-Sea Specific Aspects relating to the Protection of Asylum-Seekers and Refugees' (11 April 2002) paras 5-6.

<sup>135</sup> Gallagher, *The International Law on Human Trafficking* (n34) 305-306.

<sup>136</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n77) para 119.

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been locked in shipping containers without adequate air or food, or after they have undertaken long and dangerous journeys.<sup>137</sup> For instance, 56 illegal migrants were discovered inside a refrigerated trailer in May 2006 by the deputies of a Texas sheriff.<sup>138</sup> The 43 men, 11 women and two children were close to death after spending approximately six hours inside the refrigerated trailer.<sup>139</sup> Smuggled migrants are also exposed to the possibility of physical violence and abuse during the smuggling process, deliberately or inadvertently.<sup>140</sup> An example is the case of Mahary Abraham, an Eritrean migrant who was found handcuffed to his bed in the hospital in the Egyptian town of El Arish and awaiting his transfer to an Egyptian detention centre after he was beaten and tortured for two months by Bedouin smugglers, who demanded additional money from his family to smuggle him into Israel.<sup>141</sup> In light of these cases, it can be said that smuggled migrants, when apprehended or intercepted by the authorities, are sometimes in urgent need of shelter, food, and basic medical and psychological care.<sup>142</sup> Hence, this subsection will examine whether or not smuggled migrants have the right to physical and psychological care under the provisions of the Migrant Smuggling Protocol.

Schloenhardt opines that the physical dignity of smuggled migrants has not been taken into account by the Ad Hoc Committee of the Protocol.<sup>143</sup> Gallagher develops his

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<sup>137</sup> Ibid.

<sup>138</sup> 'A Line in the Sand: Confronting the Threat at the Southwest Border' (House Committee on Homeland Security: Subcommittee on Investigations, United States 2006) 17-18.

<sup>139</sup> Ibid.

<sup>140</sup> UNGA 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante' UN A/HRC/7/12 (25 February 2008) para 51.

<sup>141</sup> Fred Pleitgen and Mohamed F Fahmy, 'Death in the desert: Tribesmen exploit battle to reach Israel' (CNN, 3 November 2011) < <http://edition.cnn.com/2011/11/02/world> > accessed 10 December 2011.

<sup>142</sup> Stacey (n2).

<sup>143</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 358.

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argument by stating that smuggled migrants are not entitled to any of the special protections that States parties to the Trafficking Protocol ‘are encouraged to grant trafficked persons in relation to their personal safety and physical and psychological well-being.’<sup>144</sup>

This view can however be countered on several grounds, as it will be argued that the right to physical and psychological care can be found within the provisions of the Migrant Smuggling Protocol. First, it is apparent that Gallagher and Schloenhardt established their views on the basis of the traditional view on smuggled migrants. They suggest that the right to physical and psychological care afforded to trafficked persons by the Trafficking Protocol<sup>145</sup> is predicated on the unequivocal violations and abuses resulting from the trafficking process, particularly as this process is often achieved without the consent of the trafficked persons.<sup>146</sup> By contrast, smuggled migrants actively seek out smugglers and pay them in return for taking them across borders and thus, as this line of reasoning goes, the violations and abuses that may occur in the context of the smuggling process are founded upon the consent of the smuggled migrants.<sup>147</sup> Therefore, Gallagher concludes that smuggled migrants are less in need of protection under the Protocol.<sup>148</sup> This traditional view about smuggled migrants is open to challenge. Smuggled migrants often receive erroneous information from smugglers about the routes, transportation methods and circumstances of the smuggling journey,

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<sup>144</sup> Gallagher, *The International Law on Human Trafficking* (n34) 279.

<sup>145</sup> See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (adopted on 15 November 2000 and entered into force on 25 December 2003) 40 ILM 335 (the Trafficking Protocol) Article 6 (3).

<sup>146</sup> Paquet (n72) 6.

<sup>147</sup> See UNGA ‘Report of the Special Rapporteur on the human rights of migrants’ UN A/65/222 (n48) para 58; see also, Gembicka and others (n9) 12.

<sup>148</sup> Anne Gallagher, ‘Trafficking, Smuggling and Human Rights: Tricks and Treaties’ <<http://www.fmreview.org/sites/fmr/files/.pdf>> accessed 5 August 2012. See also, Oberoi and others (n35) 72.

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and during the journey they may be subjected to cruel and inhumane treatment or reckless endangerment, which then nullifies the initial consent of the smuggled migrants.<sup>149</sup> In other words, smuggled migrants are often susceptible to violations that they may not have foreseen at the time of agreeing to be smuggled.<sup>150</sup> Therefore, by analogy, smuggled migrants are equally entitled to the right to medical and psychological care as trafficked persons as long as exploitation, abuses and organised crime are present in the migrant smuggling episode, as they are in the trafficking in persons.<sup>151</sup> However, even if smuggled migrants are partly responsible for the lack of medical and psychological care made available to them because they consented to be smuggled, this argument surely breaks down when the smuggled migrants are children. This is because the consent of smuggled children is irrelevant in cases of migrant smuggling.<sup>152</sup> The phenomenon of children being sent by their parents into Europe via smuggling networks, for the purpose of safety, adoption, labour, or family resettlement, is widespread.<sup>153</sup> For instance, in 2001 a total of 461 unaccompanied children came to Sweden, and the number in 2002 was 550.<sup>154</sup> These children are brought into Sweden by smuggling rings whose concern is money rather than the safety and physical dignity of their customers.<sup>155</sup> It is expected that such smuggled children are in need of medical

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<sup>149</sup> Australian Government Australian Institute of Criminology, 'People Smuggling versus Trafficking in Persons: What is Difference?'(2008).

<sup>150</sup> UNGA 'Report of the Special Rapporteur on the human rights of migrants' UN A/65/222 (n48) para 53.

<sup>151</sup> Md Shahidul Haque, 'Ambiguities and Confusions in the Migration-Trafficking Nexus: A Development Challenge' in Karen Beeks & Delila Amir (eds), *Trafficking and the Global Sex Industry* (Lexington Books 2006) 10. See also, Jones (n12).

<sup>152</sup> Dora Kostakopoulou, 'Trafficking and Smuggling in Human Beings: the British Perspective' in Guild and Minderhoud (n3) 350.

<sup>153</sup> Jacqueline Bhabha, 'Lone Travellers: Rights, Criminalisation, and Transnational Migration of Unaccompanied children' (2000) 7 U Chi L Sch Roundtable 271-275; Raimo Väyrynen, 'Illegal Immigration, Human Trafficking, and Organised Crime: Discussion Paper No. 2003/72' (United Nations University, World Institute for Development Economics Research 2003) 6.

<sup>154</sup> Väyrynen (n153) 6-7.

<sup>155</sup> *Ibid*, 7.

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and psychological care when they are apprehended or intercepted by the authorities, as in the case of the Texas sheriff's deputies.<sup>156</sup> In such cases, the smuggled children must always be entitled to the right to physical and psychological care regardless of whether they consented to be smuggled or not.

Second, although the right to physical and psychological care is not mentioned explicitly within Article 16 of the Migrant Smuggling Protocol, an approach advocating a limited reading of this article was rejected earlier.<sup>157</sup> Article 16 of the Protocol must not be restricted to the rights that are mentioned explicitly; there are also other implied rights within this article.<sup>158</sup> The right to physical and psychological care is a case in point. On the basis of the object and purpose of an international rule as a means of interpretation,<sup>159</sup> this right is one of the rights that aim to preserve and protect the right to life in Article 16(1) of the Protocol.<sup>160</sup> This view is confirmed by the Model Law against the Smuggling of Migrants, which states that while the right to access emergency medical care is not explicitly defined within Article 16 of the Protocol it can in fact be extrapolated from the references to the right to life in both the ICCPR<sup>161</sup> and the Protocol.<sup>162</sup>

Third, the right to physical and psychological care has been ensured by a number of parties to the Protocol. In the report of the Conference of the Parties, which analyses the replies to a questionnaire distributed by the Secretariat, several States

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<sup>156</sup> See (n139).

<sup>157</sup> See pp140-41.

<sup>158</sup> Ibid.

<sup>159</sup> Vienna Convention on the Law of the Treaties (adopted on 23 May 1969 and entered into force on 27 January 1980) 1155 UNTS 331 (VCLT) Article 31 (1).

<sup>160</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n77) 28.

<sup>161</sup> UNODC, 'Model Law against the Smuggling of Migrants' (n8) 66.

<sup>162</sup> See Article 16 (1) of the Protocol.

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(including Belgium, Bulgaria, Italy, Romania and Turkey) declared that they provide medical and humanitarian assistance for smuggled migrants.<sup>163</sup> Accordingly, the evidence seems to indicate that smuggled migrants do have a right to physical and psychological care under the Migrant Smuggling Protocol.

A possible weakness of this argument, however, is that the implied reference to the right to physical and psychological care within the Protocol might undermine its efficiency in practice. The absence of an explicit recognition of rights makes its application, particularly in relation to aliens, unlikely<sup>164</sup> (including in relation to the right to physical and psychological care). Although the right has been protected by a number of States,<sup>165</sup> there are also a number of parties to the Protocol, such as Cameroon, the Central African Republic, Chad, Mauritius, Myanmar and Nigeria, which have not adopted any specific measures to provide medical and humanitarian assistance in response to the right to physical and psychological care.<sup>166</sup> Furthermore, the Special Rapporteur on the human rights of migrants noticed during its mission to Mexico that there are common complaints about a lack of hygienic conditions, medical care and food, as well as of poor treatment by the authorities.<sup>167</sup> This report reveals that the right to physical and psychological care has been ignored by this State despite its

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<sup>163</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime: consolidated information received from States for the second reporting cycle: Report of the Secretariat' UN Doc C/TOC/COP/2006/7/Rev.1 (18 August 2008) para 7.

<sup>164</sup> Bimal Ghosh, 'Migrants' Access to Human Rights: Road Strewn with Stones' (The International Council On Human Rights Policy - Sixth Annual Assembly, Guadalajara, 17-18 January 2003) para 8.

<sup>165</sup> See (n163).

<sup>166</sup> Ibid, para 6.

<sup>167</sup> UNGA, 'Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante: mission to the Mexico' UN Doc A/HRC/11/7/Add.2 (24 March 2009) paras 42, 52 and 77.

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ratification of the Protocol.<sup>168</sup> Thus, it may be argued that the implied framework of the right within the Protocol has negative effects in practice. It is doubtful that the right to physical and psychological care is ensured by all the parties to the Protocol.

### **5.2.2.3. Right to non-refoulement**

Article 19(1) of the Migrant Smuggling Protocol states that ‘Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including ... the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.’ Smuggled migrants have the right to non-refoulement which limits the measures of interception and deportation in Articles 8 and 18 of the Migrant Smuggling Protocol.<sup>169</sup>

That said, Brolan argues that since refugees resort to the assistance of smugglers as economic migrants, States must be able to differentiate between them in the context of the right to non-refoulement.<sup>170</sup> The author restricts the right to non-refoulement to smuggled migrants who are refugees according to the meaning of the 1951 Refugee Convention.

Nevertheless, this subsection will argue against this view by making the case that smuggled migrants who are not purely refugees do have the right to non-

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<sup>168</sup> See the United Nations – Treaty Collection < <http://treaties.un.org/Pages/ViewDetails>> accessed 18 November 2012.

<sup>169</sup> UNHCR, ‘Conclusion on Protection Safeguards in Interception Measures’ No. 97 (LIV) - 2003(10 October 2003); Catherine Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’ (2004) 67 *Modern L Rev* 588.

<sup>170</sup> Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’ (2002) 14 *Intl JRL* 561.

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refoulement under the Migrant Smuggling Protocol.<sup>171</sup> In other words, the right to non-refoulement laid down in the Protocol is not limited only to the cases in Article 33(1) of the 1951 Convention. The right to non-refoulement applies in other cases that are not mentioned in the Refugee Convention. This argument is supported, first, by Article 19 of the Migrant Smuggling Protocol, which refers to the 1951 Refugee Convention, and, second, by Article 16 of the Protocol, which includes the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Turning first to Article 19 of the Protocol, this article refers to the right to non-refoulement with respect to the 1951 Refugee Convention. This article covers smuggled migrants who are not pure refugees, such as those who flee from States where political instability and economic failure or persecution and poverty are inextricably linked.<sup>172</sup> For example, 1,220 Zimbabwean migrants applied for asylum in the UK in 2000 for reasons related to the climate of fear engendered by President Mugabe and his Zanu-PF party, the declining economy, and rising unemployment.<sup>173</sup> In such cases, a smuggled migrant can be an economic migrant and a refugee according to the meaning of the 1951 Refugee Convention referred to in Article 19 of the Protocol, and thus the smuggled migrant in this case has the right of non-refoulement as laid down in that article. However, Foster claims that mixed motives often lead to a dismissal of the right to non-refoulement.<sup>174</sup> In other words, the economic position of the State of an asylum

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<sup>171</sup> Obokata, 'Smuggling of Human Beings from a Human Rights Perspective' (n14).

<sup>172</sup> Adrienne Millbank, 'The Problem with the 1951 Refugee Convention' Research Paper (5 September 2000) <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP05](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05)> accessed 22 November 2012.

<sup>173</sup> Brolan (n170) 568.

<sup>174</sup> Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) 249.

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seeker is often used to assume purely economic motives.<sup>175</sup> This approach can be criticised because the socio-economic motivations for flight are not a bar to being a refugee within the meaning of the 1951 Convention if their underlying cause is persecution or if the motives are mixed.<sup>176</sup> The UNHCR has confirmed this view when stating that it is not necessary that the well-founded fear of persecution on the basis of one or more of the Refugee Convention grounds is the sole or dominant cause in the context of granting refugee status.<sup>177</sup> The economic motives that might also be present will thus not affect a claim to refugee status. Accordingly, smuggled migrants who enter a destination State for socio-economic motivations as well as a well-founded fear of persecution have the right to non-refoulement within the meaning of the 1951 Convention in Article 19 of the Migrant Smuggling Protocol.

Second, smuggled migrants who are not refugees according to the 1951 Refugee Convention have the right to non-refoulement in order to protect the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment in Article 16 (1) of the Protocol.<sup>178</sup> The right to non-refoulement in this case is established outside the 1951 Refugee Convention. This conclusion has been confirmed by the UN guidelines on the implementation of the Migrant Smuggling Protocol. For example, the International Framework for Action to Implement the Smuggling of Migrants Protocol states the following:

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<sup>175</sup> Jennifer A Klinck, 'Recognizing Socio-Economic Refugees in South Africa: a Principled and Rights-Based Approach to Section 3(b) of the Refugees Act' (2009) 21 Intl JRL 653.

<sup>176</sup> Lehmann (n84) 735.

<sup>177</sup> UNHCR, 'Guidelines on International Protection: the application of Article I A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to the Victims of trafficking and persons at risk of being Trafficked' UN Doc HCR/GIP/06/07 (7 April 2006) para 29.

<sup>178</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n77) para 114. See also, Obokata, 'Smuggling of Human Beings from a Human Rights Perspective' (n14) 410.

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States are obliged to adopt and implement legislation and other mechanisms to ensure that smuggled persons who are refugees or are in danger of being exposed to torture or cruel or inhuman treatment are not subjected to refoulement, and ensure that any other measures taken to implement the Smuggling of Migrants Protocol do not jeopardize this principle.<sup>179</sup>

In a similar vein, a right to non-refoulement outside the Refugee Convention has also been established in the context of the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment through Article 7 of the ICCPR and Article 3 of the ECHR.<sup>180</sup> Importantly, the right to non-refoulement based on Article 7 of the ICCPR and Article 3 of the ECHR is wider than the right to non-refoulement in Article 33 (1) of the 1951 Refugee Convention.<sup>181</sup> This is because the former statements of the right, unlike the statement found in the latter, are not restricted to specific cases regarding refugees but are linked to a violation of the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment such as would cover several cases.<sup>182</sup> Zimmermann has expressed a similar view when stating that the right to non-refoulement based on Article 7 of the ICCPR and Article 3 of the ECHR is applicable to all individuals and not only to refugees according to the meaning of the Refugee Convention.<sup>183</sup> Consequently, smuggled migrant who are subjected to torture or other cruel, inhuman or degrading treatment or punishment in the

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<sup>179</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n77) para149. See also, Marika McAdam, 'Toolkit to Combat Smuggling of Migrants: Tool 1' (UNDOC 2010); UNODC, 'In-Depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Introduction' (n54).

<sup>180</sup> Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 *Syracuse J Intl L& C* 145, 224.

<sup>181</sup> *Ibid.*, 225; Zimmermann (n90) 1351 and 1354.

<sup>182</sup> Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (n180) 225.

<sup>183</sup> *Ibid.*

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States of origin are entitled under Article 7 of the ICCPR or Article 3 of the ECHR to non-refoulement.

For further clarification, Article 7 of the ICCPR has been interpreted to preclude the deportation of individuals to another country where they might be exposed to a danger of torture or cruel, inhuman or degrading treatment or punishment.<sup>184</sup> This ground was used, for instance, in the case of *C. v. Australia*. The HRC in this case stated that ‘deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.’<sup>185</sup> By analogy, a smuggled migrant who suffers from an illness because of prolonged detention by the destination State has the right under Article 7 of the ICCPR to non-refoulement for the purpose of obtaining the needed treatment.

Article 3 of the ECHR has been interpreted as prohibiting the deportation of an individual in circumstances where that individual faces a real risk of torture or inhuman or degrading treatment or punishment in his or her State of origin.<sup>186</sup> For instance, the ECtHR affirmed that deportation to the State of origin constitutes a violation of Article 3 of the ECHR in cases of civil wars,<sup>187</sup> the punishments of death penalty and stoning,<sup>188</sup> suffering from HIV/Aids,<sup>189</sup> and cooperation with the authorities in the

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<sup>184</sup> UNHRC ‘CCPR General Comment No. 20: Article 7(Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992) para 9.

<sup>185</sup> *C v Australia*, Communication No. 900/1999 UN Doc CCPR/C/76/D/900/1999 (2002) para 8.5.

<sup>186</sup> Gallagher, *The International Law on Human Trafficking* (n34) 347.

<sup>187</sup> *Ahmed v Austria* App no 25964/94 (ECtHR 15 November 1996).

<sup>188</sup> *Soering v the UK* App no 1/1989 (ECtHR 7 July 1989); *Jabari v Turkey* App no 40035/98 (ECtHR 11 July 2000).

<sup>189</sup> *D v the UK* App no 146/1996 (ECtHR 2 May 1997).

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destination State in criminal matters.<sup>190</sup> There is no doubt that a number of the applicants in these cases were smuggled migrants. What is more, potential smuggled migrants who are in the same circumstances as in those cases may well be entitled to the right to non-refoulement.

However, the most relevant case in the context of migrant smuggling is the prohibition on refoulement in certain situations where the fear of torture or other cruel, inhuman or degrading treatment or punishment arises from non-State actors, and the original State is unable to provide appropriate or effective protection,<sup>191</sup> as in the case of cooperation in criminal matters. For example, in *HLR v. France*, the applicant, who was a cocaine trafficker, challenged his deportation to Colombia because he might be subjected to revenge as a consequence of his providing information about drug traffickers to the authorities.<sup>192</sup> Although the applicant failed to convince the ECtHR, the court held that a breach of Article 3 of the ECHR through deportation of the applicant may occur when the risk emanates from persons who are not public officials and the State authorities cannot provide appropriate protection.<sup>193</sup> On this basis, smuggled migrants who decide to cooperate with law enforcement authorities to bring their smugglers to justice have the right to non-refoulement. In practice, smuggled migrants or their relatives are prone to retaliation by smugglers in the State of origin in the case of cooperation with enforcement authorities.<sup>194</sup> For example, in an interview held at Heathrow airport, smuggled migrants informed police officers from the Smuggling Unit that they did not want to accuse their smugglers because they lived in

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<sup>190</sup> *HLR v France* App no 24573/94 (ECtHR 29 April 1997).

<sup>191</sup> Obokata, 'Smuggling of Human Beings from a Human Rights Perspective' (n14) 409-410.

<sup>192</sup> *HLR v France* (n190).

<sup>193</sup> *Ibid.*

<sup>194</sup> Obokata, 'Smuggling of Human Beings from a Human Rights Perspective (n14) 410 -11.

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fear of them.<sup>195</sup> Consequently, the right to non-refoulement grants smuggled migrants the trust to cooperate with law enforcement authorities, because they realise that they will not be deported immediately to their State of origin, where there is danger of retaliation as a result of such cooperation.<sup>196</sup> Nonetheless, smuggled migrants in the case of cooperation in criminal matters must show that the alleged risks in the case of deportation are real and that the authorities in the State of origin are incapable of affording them appropriate protection.<sup>197</sup>

Lastly, the right to non-refoulement outside the Refugee Convention is mentioned explicitly in Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This article requires States parties not to expel, return or extradite a person to another State where that person might be subject to torture. The right to non-refoulement in Article 3(1) of CAT is also wider than the right in the Refugee Convention from the perspective of *ratione personae*.<sup>198</sup> In contrast to Article 33(1) of the Refugee Convention, which employs the term ‘refugee’, Article 3(1) of CAT uses the term ‘person’. As a result, the right to non-refoulement is not restricted to a specific category but is instead applicable to any person who meets the substantive grounds in the article. For this reason, Article 3(1) of CAT can cover smuggled migrants who are not refugees within the meaning of the Refugee Convention.<sup>199</sup> The weakness of this basis, however, is that the prohibition on

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<sup>195</sup> Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU* (Ashgate Publishing Limited 2010) 149.

<sup>196</sup> *ibid.*

<sup>197</sup> *HLR v France* (n190). The applicant in this case failed to provide the court such evidences.

<sup>198</sup> Zimmermann (n90) 1352.

<sup>199</sup> Jacqueline Bhabha, ‘Human Smuggling, Migration and Human rights’ (the International Council on Human Rights Policy 2005) 14.

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refoulement in this article depends on the discretion of the contracting governments.<sup>200</sup> In particular, the form of violation that might threaten the life of an individual has been restricted in this article to ‘torture’, which is a high threshold to satisfy.<sup>201</sup>

It can be concluded then that the right to non-refoulement applies not only in relation specifically to the Refugee Convention but also where the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment needs to be protected.<sup>202</sup> Smuggled migrants who enjoy this right in Article 16(1) of the Protocol are entitled to the right to non-refoulement where their lives are at risk or where they are exposed to torture or cruel, inhuman, or degrading treatment or punishment.

Notwithstanding this, although the right to non-refoulement outside the Refugee Convention has been construed through Article 7 of the ICCPR and Article 3 of the ECHR as a customary prohibition of torture and cruel, inhuman and degrading treatment or punishment,<sup>203</sup> it is unlikely that such an interpretation extends readily in practice to the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment in Article 16(1) of the Migrant Smuggling Protocol. The right to non-refoulement outside the Refugee Convention has been deduced from Article 7 of the ICCPR and Article 3 of the ECHR as a result of a number of judicial interpretations and practices, or through the explicit inclusion as in Article 3 of CAT. In other words, the right to non-refoulement outside the Refugee Convention is likely to be related only to these articles themselves. Moreover, the guides concerning implementation of the

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<sup>200</sup> Millbank (n172).

<sup>201</sup> Goodwin and McAdam (n109) 305.

<sup>202</sup> Cernadas (n38) 183.

<sup>203</sup> Papastavridis, ‘Interception of Human Beings on the High Seas’ (n180).

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Protocol, which refer to the right to non-refoulement outside the Refugee Convention,<sup>204</sup> are soft law and not obligated to parties to the Protocol.

Consequently, it can be said that States that are parties to the Protocol and not parties to the ICCPR, ECHR or CAT are not required to ensure the right to non-refoulement outside the Refugee Convention to smuggled migrants who deserve this protection. The only way to establish the right to non-refoulement within the Protocol is interpretation of Article 16(1) on the basis of approach of objective and purpose in Article 33(1) of the VCLT. Article 16(1) of the Protocol, which includes the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, needs to be interpreted by parties to the Protocol in order to conclude the right to non-refoulement outside the Refugee Convention. It can thus be concluded that in the context of the return of the smuggled migrants ‘without undue or unreasonable delay’,<sup>205</sup> not much protection is offered to the individual in the Protocol itself to prevent such an outcome.<sup>206</sup>

### 5.2.3. Rights related to detention

The right to liberty and the prohibition on arbitrary detention can be found in Article 9(1) of the ICCPR, and similar provisions can be found in other human rights treaties.<sup>207</sup> International law, however, recognises that States have the authority to limit this right.<sup>208</sup> To be more specific, ‘there is no prohibition under international law against

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<sup>204</sup> See (n179).

<sup>205</sup> Article 18 (1) of the Protocol.

<sup>206</sup> Crepeau (n3) 180. See also, Mary A Young, ‘The Smuggling and Trafficking of Refugee and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organised Crime?’ (2004) 27 *Suf TL Rev* 101, 123-24.

<sup>207</sup> Article 5 of ECHR, Article 6 of AfCHPR and Article 7 of AMCHR.

<sup>208</sup> Gallagher, *The International Law on Human Trafficking* (n34) 292.

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detention'.<sup>209</sup> For example, the Migrant Smuggling Protocol through Article 16(5) does not rule out the possibility of the detention of smuggled migrants by parties to the Protocol.<sup>210</sup> This paragraph obligates the parties to comply with their obligations under the Vienna Convention on Consular Relations, particularly concerning notification to and communication with consular officers in the case of detention.<sup>211</sup> The immigration laws of many States include measures to detain unauthorised migrants for illegal entry,<sup>212</sup> or pending deportation.<sup>213</sup>

Apart from Article 16(5), the Migrant Smuggling Protocol does not include any provisions that define the conditions under which smuggled migrants can be detained.<sup>214</sup> Nevertheless, the detention of smuggled migrants under the migration laws of States must be assessed under international human rights law, which will determine the level of arbitrariness involved.<sup>215</sup> This link is expressed by Article 19(1) of the Migrant Smuggling Protocol. According to this article, any measure in the Protocol (including the detention of smuggled migrants) must not affect the other rights, obligations and responsibilities of States and individuals under international law, including international human rights law.<sup>216</sup> Article 9 of the ICCPR and Article 5 of the ECHR are a good illustration of the international standards of human rights law that are relevant in the

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<sup>209</sup> Shyla Vohra, 'Detention of irregular Migrants and Asylum Seekers' in Ryszard Cholewinski and others, *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C. Asser Press 2007) 49.

<sup>210</sup> Vernier (n3) 13.

<sup>211</sup> See, Article 16(5) of the Protocol.

<sup>212</sup> See chapter 5 section 5.2.1.

<sup>213</sup> For example, INA 8 USC 1231 (a)(2)(USA) <[http://www.law.cornell.edu/uscode/text/8/1182#a\\_2](http://www.law.cornell.edu/uscode/text/8/1182#a_2)> accessed 12 January 2012; Part 4 (62) of the Nationality, Immigration and Asylum Act 2002 (UK) <<http://www.legislation.gov.uk/ukpga/2002/41/section/62>> accessed 12 January 2012.

<sup>214</sup> Moreno-Lax (n85).

<sup>215</sup> Vohra (n209) 50.

<sup>216</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n77) para 124.

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case of the detention of smuggled migrants.<sup>217</sup> It would thus be more accurate to say that smuggled migrants enjoy the rights regarding detention in human rights law.

In practice, smuggled migrants are often detained in prisons, shelters, camps, police lock-ups or immigration facilities.<sup>218</sup> In these cases, it is not difficult to determine the arbitrariness of detention under Article 9 of the ICCPR or Article 5 of the ECHR. A case of administrative custody of smuggled migrants aboard a vessel at sea for a certain time is more problematic to assess. For instance, on 4 February 2007, a Spanish maritime rescue tug rescued a vessel named *Marine I*, which was holding 369 migrants on board.<sup>219</sup> The rescued migrants were kept aboard the *Marine I* for eight days until the Spanish government reached an agreement as to the place of disembarkation, which was determined as the Mauritanian port of Nouadhibou.<sup>220</sup> Furthermore, in the case of *Cap Anamur* in 2004, the rescued migrants were kept aboard the vessel for 11 days awaiting permission to dock in an Italian harbour.<sup>221</sup> The final example is the *Tampa* case, mentioned previously,<sup>222</sup> in which the rescued migrants remained aboard the vessel for eight days under the custody of the Australian authorities.<sup>223</sup> In contrast to the traditional places of detention,<sup>224</sup> where a deprivation of liberty is evident, it is uncertain whether the administrative custody of smuggled migrants aboard vessels amounts to detention,<sup>225</sup> and therefore whether it is subject to Article 9 of the ICCPR or Article 5 of

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<sup>217</sup> Ibid.

<sup>218</sup> Sarah Joseph, 'Human Rights Committee: Recent Cases' (2003) 3 HRLR 91.

<sup>219</sup> Wouters and Heijer (n132).

<sup>220</sup> Ibid, 14.

<sup>221</sup> Papastavridis, 'Rescuing Migrants at Sea: The Responsibility of States under International Law' (n104) 3.

<sup>222</sup> See (n92); Kenney and Tasikas (n107).

<sup>223</sup> Kenney and Tasikas (n107) 147.

<sup>224</sup> See (n218).

<sup>225</sup> Wouters and Heijer (n132) 14 -15.

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the ECHR. For example, there was a dispute in the *Tampa case* – as will be detailed below – on whether the Australian authorities’ actions toward the rescued migrants amounted to a deprivation of liberty or only a restriction on freedom of movement.

This subsection will illustrate that the administrative custody of smuggled migrants aboard a vessel does amount to detention, and is therefore subject to the international standards of human rights that regulate the measure of detention in general. It will be argued that such detention can sometimes be regarded as arbitrary, because it might not meet a number of these standards. This argument will be pursued in the following way. The first subsection (5.2.3.1) will discuss whether or not the administrative custody of smuggled migrants aboard a vessel falls within the legal concept of a deprivation of liberty or detention. Then, the standards of human rights regarding detention that might make this detention arbitrary will be examined in the second subsection (5.2.3.2).

### **5.2.3.1. Administrative custody aboard a vessel at sea within the legal concept of a deprivation of liberty**

With respect to the legal nature of the administrative custody of smuggled migrants aboard a vessel, Wouters and Heijer claim that the degree of physical constraint over the migrants is not the decisive consideration for determining whether the detention of migrants at sea represents a deprivation of liberty—but, the duration of the restriction on their liberty is also a key aspect.<sup>226</sup> This view has been built on the decision of the ECtHR in the case of *Amuur v. France*.<sup>227</sup> In that case,<sup>228</sup> four Somali siblings arrived at Paris-Orly Airport from Damascus on 9 March 1992. The airport and border police

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<sup>226</sup> Ibid, 7.

<sup>227</sup> Ibid.

<sup>228</sup> *Amuur v France* App no17/1995 (ECtHR 25 June 1996).

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prevented them from entering French territory on the grounds that their passports had been falsified. They were kept at the airport's Espace lounge for 20 days, until the Minister of the Interior refused them leave to enter as asylum seekers. The siblings alleged that this action constituted a deprivation of liberty, and that Article 5(1) of ECHR was therefore applicable to their case. The French government responded that the applicants' stay in the transit zone was not comparable to detention. The court held that holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty and that as a result Article 5(1) was indeed applicable to the case.<sup>229</sup> In the context of its reasoning for the decision, the court decided that the type of detention, duration and manner of implementation must together be taken into account in order to decide whether there is a deprivation or restriction of liberty. Moreover, the court observed that 'Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty ... into a deprivation of liberty.'<sup>230</sup> According to this reasoning, the ECtHR requires that the duration of detention must be excessive in the case of a deprivation of liberty. The court, however, changed its approach, where it did not stipulate an excessive duration of detention in *Austin and others v. UK*, ruling instead that a few hours alone are sufficient to determine a deprivation of liberty.<sup>231</sup> In this case, the court initially considered that the containment of the applicants within a cordon at Oxford Circus in central London on 1 May 2001 from 2pm to 9.30pm did indeed amount to a deprivation of liberty.<sup>232</sup>

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<sup>229</sup> Ibid, para 49.

<sup>230</sup> Ibid, para 43.

<sup>231</sup> *Austin and others v UK* App nos. 39692/09, 40713/09 and 41008/09 (ECtHR 15 March 2012).

<sup>232</sup> Ibid, para 64.

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It seems that the ECtHR does not have a consistent approach in terms of whether the duration of detention must be excessive or not. Nevertheless, the duration of detention does not fall within the legal concept of the deprivation of liberty, and therefore detention could happen even if its duration was for one day only, provided that the right to liberty was confined during that day. This view has been established on the basis of the definition of deprivation of liberty in the UN Rules for the Protection of Juveniles Deprived of their Liberty, which does not refer at all to the duration of detention.<sup>233</sup> Nowak also excludes the duration of detention as an element of the deprivation of liberty. The author states that the reference to detention or deprivation of liberty in Article 9 of the ICCPR applies to a restriction on the freedom of bodily movement or an interference with personal liberty through the forceful detention of a person at a certain, narrowly bounded location, such as a prison or other detention facilities.<sup>234</sup> Furthermore, the uneven approach of the ECtHR in terms of the duration of detention – which was shown above – raises doubts about whether this element plays an important role in the determination of a deprivation of liberty. In particular, the ECtHR in *Austin and others v UK* held in the conclusion that there is not a deprivation of liberty because of the ‘type’ and ‘manner of implementation’ of the measure in question.<sup>235</sup> The court significantly relied on these elements, and not the duration of detention, in order to determine a deprivation of liberty. Lastly, the HRC used the duration of detention, as will be illustrated in the following subsection, to decide whether the detention was reasonable or not. This means that detention is determined by the HRC in the early stages of a case, and through other elements.

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<sup>233</sup> See United Nations Rules for the Protection of Juveniles Deprived of their Liberty UNGA Res 45/113 (14 December 1990) Annex, 11 (b).

<sup>234</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein 1993) 160.

<sup>235</sup> *Austin and others v UK* (n231).

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It can be concluded that the duration of detention is likely to be irrelevant in determining whether or not administrative custody of the smuggled migrants aboard a vessel at sea constitutes detention. Forcing of a person to stay in ‘a place’ without his or her consent is the key element in this.<sup>236</sup> In *Austin and others v. UK*, and *Amuur v. France*, the ECtHR implicitly indicated to this element through the phrase ‘effects and manner of implementation of the measure in question’.<sup>237</sup> Here, it can be asked whether or not administrative custody aboard a vessel at sea amounts to detention, particularly from the perspective of the place of detention. Indeed, Nowak adopts a narrow standard for the place of detention, which must be a confined space, such as a prison.<sup>238</sup> According to Nowak’s standard then, a vessel at sea cannot be a place of detention.

Nonetheless, Nowak’s standard can be rejected as a vessel at sea, a house, an aircraft, a road vehicle or a train can all be places of detention for migrants and asylum seekers<sup>239</sup> on the basis of two arguments. The definition of deprivation of liberty in the UN Rules for the Protection of Juveniles Deprived of their Liberty states that detention occurs in ‘public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority’.<sup>240</sup> This suggests that detention might happen anywhere, provided that the right to liberty is confined by the order of a judicial, administrative or other authority.

Moreover, judicial practice confirms this approach. For instance, in the *Amuur v. France* case mentioned above, the court ruled that there was a deprivation of liberty

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<sup>236</sup> See Nowak (n234) 166; *Storck v Germany* App no. 61603/00 (ECtHR 16 June 2005); *HM v Switzerland* App no. 39187/98 (ECHR, 26 February 2002) paras 40-48.

<sup>237</sup> See *Austin and others v UK* (231) para 57; *Amuur v France* (n228) para 42.

<sup>238</sup> Nowak (n234) 160.

<sup>239</sup> Andi Pacurar, ‘Smuggling, Detention and Expulsion of Irregular Migrants: a Study on International Legal Norms, Standards and Practices’ (2003) 5 EJ Migration & L 259, 269.

<sup>240</sup> See United Nations Rules for the Protection of Juveniles Deprived of their Liberty (n233).

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although the applicants were detained in the transit zone of Paris-Orly Airport and the Hôtel Arcade.<sup>241</sup> Similarly, the ECtHR found that there was a deprivation of liberty in the *Guzzardi* case, even though the applicant was ordered to stay on a small unfenced island, was permitted to work on the island, and was not prevented from having his wife and child live with him.<sup>242</sup> By analogy, a vessel can amount to a place of detention, particularly as it is more restrictive than the places of detention seen in the cases of *Amuur* and *Guzzardi*. The smuggled migrants are often crammed together below deck in the vessel at sea, surrounded by deep water on all sides, and sometimes receive food by means of ropes, as in the case of *Marine I*.<sup>243</sup> Also, the detained migrants' vessel might be controlled by the vessels of the detaining authorities, and sometimes by a number of members of the armed forces on board the migrants' vessel acting in order to prevent migrants from leaving the vessel, as was seen in the *Tampa* case.<sup>244</sup> These circumstances, especially when taken together, undoubtedly render a vessel a place of detention. Finally, the decision of the ECtHR in the case *Medvedyev et al. v. France* is the most convincing in this regard. In this case,<sup>245</sup> the crew of the *Winner*, a Cambodian freighter, were arrested on the high seas by the French authorities and charged with a series of drug-related crimes. After the crew had been sentenced to imprisonment for between three and 20 years, they brought the case before the ECtHR and claimed the arbitrary deprivation of their liberty on the basis of Article 5 of the ECHR. The applicants argued that they had been detained for 13 days on the French frigate *Le He'naff* without any legal guarantees. In response, the French government submitted

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<sup>241</sup> *Amuur v France* (n228).

<sup>242</sup> *Guzzardi v Italy* App no 7367/76 (ECtHR 6 November 1980).

<sup>243</sup> *Wouters and Heijer* (n132) 14.

<sup>244</sup> *Bailliet* (n121) 743.

<sup>245</sup> *Medvedyev Et Al v France* App no 3394/03 (ECtHR 29 March 2010).

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that prior to its boarding of the *Winner*, the freedom to come and go as it applies on board a ship had equally restrictive limits, and therefore the adopted measure could not amount to a deprivation of liberty. On this point, the court decided that although it was true that the applicants' movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship, this was a de facto restriction on their freedom to come and go. The members of the crew were placed under the control of French special forces and confined to their cabins during the voyage, and therefore the argument made by the government that the adopted measure restricted only the freedom of movement was not accepted. The court concluded that the situation on board the *Winner* after it was boarded, because of the restrictions that were implemented, amounted in practice to a deprivation of liberty, and that as a result Article 5(1) of the ECHR applied to this case. It can be concluded from these judicial decisions that a vessel can indeed be a place of detention as long as there is boarding and control by the intercepting authorities and the liberty of the persons on board is restricted. Therefore, the administrative custody of the smuggled migrants aboard a vessel at sea falls within the legal concept of deprivation of liberty or detention as outlined in Article 9 of the ICCPR and Article 5 of ECHR.

A related question arises from a scenario wherein the intended destination State grants the detained migrants on board a vessel at sea the choice to go anywhere except its territory. This issue was raised in the Federal Court of Australia on the occasion of the *Tampa* case. When the applicants claimed that they were detained arbitrarily aboard the *Tampa*, the State argued that it had prevented the rescued people from going to their preferred place of destination 'but they were free to proceed to any other destination.'<sup>246</sup> The court ruled that detention had occurred as a result of the refusal of the captain of the

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<sup>246</sup> *Ruddock v Vadarlis* (2001) FCA 1329 (Federal Court of Australia) para 67.

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*Tampa* to take his ship out of Australian waters while the rescued people were on board.<sup>247</sup> It also declared that that by refusing to leave Australian territory, the captain and the smuggled migrants ‘decided to shut the door of a room, and to keep it shut.’<sup>248</sup> The court concluded that the rescued migrants were detained as a result of the act of the captain and the smuggled migrants themselves, and not by the act of the Commonwealth.<sup>249</sup>

The decision of the Federal Court in Australia can be accepted, because the prohibition of migrants from accessing a certain place while granting the choice to leave does not constitute a deprivation of liberty, although it might constitute a restriction on the freedom of movement. This view takes its cue from the ECtHR, which held in *Amuur v. France* that ‘the mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty.’<sup>250</sup> Moreover, as the court noted in *Guzzardi v. Italy*, ‘the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance.’<sup>251</sup> The cases of restriction on freedom of movement cannot be characterised as a deprivation of liberty within the meaning of Article 9 of the ICCPR because they are not so severe.<sup>252</sup> Nevertheless, it can be asked whether restriction on freedom of movement could shift into a deprivation of liberty if the rescued migrants in the *Tampa* case did not find a place to disembark and continued navigation at high seas. As matter of fact, the Australian authorities suggested the

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<sup>247</sup> Ibid, para 85.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> *Amuur v France* (n228) para 48.

<sup>251</sup> *Guzzardi v Italy* (n242) para 93.

<sup>252</sup> *Celepli v Sweden*, Communication No 456/1991 UN Doc CCPR/C/51/D/456/1991(1994) para 4.5.

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*Tampa* head to Indonesia, which was in fact unwilling to receive those migrants.<sup>253</sup> However, New Zealand, Nauru and Papua New Guinea agreed to receive the rescued migrants for disembarkation and processing.<sup>254</sup> Consequently, the case still constitutes restriction on freedom of movement as long as Australia had given the choice for those migrants to leave, and there were States offered to receive them. On the contrary, if these States had also refused to receive the rescued migrants, the scenario would be different and the case could then be described as involving a deprivation of liberty and not restriction on freedom of movement. The reason for this is that those migrants who are refused by the States mentioned above, including Australia, are thus forced to stay in a place (aboard *Tampa* at sea ) without their consent— and this is the main element of detention as mentioned earlier. This view is compatible with the ECtHR that states that the possibility of leaving offered by a destination State is theoretical if no other State offers a level of protection that is comparable to that which asylum seekers expected in the State where they are seeking asylum.<sup>255</sup>

Having examined in the first subsection whether the administrative custody of smuggled migrants aboard a vessel at sea falls within the legal concept of a deprivation of liberty or detention, it can be concluded that boarding a vessel smuggling migrants at sea, placing that vessel under the control of the intercepting State and preventing the smuggled migrants from leaving the vessel interferes with the smuggled migrants' right to liberty. Such an action can amount to a detention unless the detaining authorities grant those migrants the freedom of choice to go anywhere except a specific destination State.

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<sup>253</sup> Bailliet (n121) 742.

<sup>254</sup> Ibid,743.

<sup>255</sup> *Amuur v France* (n228) para 48.

### 5.2.3.2. The arbitrariness of detention of smuggled migrants at sea

As long as the administrative custody of smuggled migrants aboard a vessel amounts to detention, it is subject under Article 19(1) of the Protocol to the international standards of human rights that regulate the measure of detention in general.<sup>256</sup> For instance, the detention of smuggled migrants must not be arbitrary.<sup>257</sup> This means that this detention must be appropriate, reasonable, proportionate and justifiable.<sup>258</sup> In this context, it can be asked whether the detention of smuggled migrants aboard a vessel at sea can meet these standards and is therefore non-arbitrary or vice versa. This question would be answered in light of the following standards concerning detention.

First, Article 9(1) of the ICCPR states that cases of detention must be justified by being grounded in law, although the article does not provide any examples of the grounds upon which detention can be based. In *A v. Australia*, the HRC observed that detention for a given period of time must be based on a justification, such as an investigation, the likelihood of absconding, and the lack of cooperation.<sup>259</sup> As the Committee ruled in this case, ‘Without such factors detention may be considered arbitrary, even if entry was illegal.’<sup>260</sup> However, in the absence of specific grounds as is seen in Article 9(1) of the ICCPR, a State party is able to advance any ground under its domestic law to justify the detention of smuggled migrants aboard a vessel at sea. For example, the State party can justify this detention on this basis of finding a place of

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<sup>256</sup> See (n217). For more clarification on how the international standards of detention apply to the smuggled migrants, see generally, Pacurar (n239).

<sup>257</sup> Rebecca Napier-Moore, ‘Human Rights in Migrant Smuggling’ (Global Alliance against Traffic in Women 2011) 16.

<sup>258</sup> *Ibid.* See also, McAdam and others, ‘International Framework for Action to Implement the Smuggling of Migrants Protocol’ (n77) paras 122-28; Oberoi and others (n35) 111.

<sup>259</sup> *A v Australia* (1997) 4 BHRC 210, Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993, para 9.4.

<sup>260</sup> *Ibid.*

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disembarkation or preparation to deportation or prosecution. Unlike Article 9(1) of the ICCPR, Article 5 (1) of the ECHR includes exhaustively certain grounds under which the liberty of a person can be deprived.<sup>261</sup> Consequently, the detention of smuggled migrants must be justified on the basis of one of these grounds. For example, if a vessel crossed the territorial sea of a State, this State can detain the smuggled migrants aboard the vessel on the basis of Article 5(1)(c) of the ECHR. This ground applies in situations where an individual is detained in connection with the offence of illegal border crossing.<sup>262</sup> Another scenario is that a vessel is heading toward the territorial sea of a State, as in the case of *Hirsi Jamaa and others v. Italy*.<sup>263</sup> In this case, the smuggled migrants were Somali nationals and some Eritrean nationals who were part of a group of individuals who left Libya aboard three vessels bound for the island of Lampedusa in Italy. Those smuggled migrants were intercepted by the Italian authorities on the high seas, and detained on Italian military vessels that transferred them to Libya. Detention in such cases can be justified on the basis of Article 5(1) (f) of ECHR.<sup>264</sup> This ground allows detention so as to prevent a person entering a State illegally.<sup>265</sup> The final scenario is that a State might intercept or rescue a migrant-smuggling vessel on the high seas. In this case, the State might detain the smuggled migrants aboard this vessel for the purpose of finding a place of disembarkation, as in the *Marine I* case.<sup>266</sup> In this case, after the Spanish authorities rescued *Marine I* on the high seas, they detained 369 migrants on board, and started negotiation with the Senegalese and Mauritanian

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<sup>261</sup> Robin White and Clare Ovey, *The European Convention on Human Rights* (Fifth edn, Oxford University Press 2010) 209.

<sup>262</sup> Nuala Mole and Catherine Meredith, 'Asylum and the European Convention on Human Rights' (Council of Europe Publishing 2010) 145.

<sup>263</sup> *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR 23 February 2012).

<sup>264</sup> Pacurar (n239) 268.

<sup>265</sup> Article 5(1) (f) of the ECHR. See also, Mole and Meredith (n262) 147.

<sup>266</sup> See (n219).

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authorities to find a place of disembarkation for those migrants. This detention is likely to be characterised as unjustified within the framework of the ECHR and therefore it is arbitrary. This is because finding a place of disembarkation does not fall within one of the grounds in Article 5(1) of the ECHR that permit a deprivation of liberty. Furthermore, such a conclusion can be based on the decision of the ECtHR in the case of *Medvedyev and Others v. France*.<sup>267</sup> In this case, the court stated that the list of exceptions to the right to liberty in Article 5 (1) is exhaustive and must be interpreted narrowly.<sup>268</sup> Consequently, the court held that a deprivation of liberty that is carried out in order to combat drug trafficking on the high seas lacks a legal basis within Article 5(1) of the ECHR and therefore is a violation of this article.<sup>269</sup>

Second, the standard of reasonableness contributes to make the measure of detention non-arbitrary,<sup>270</sup> and the detention of smuggled migrants aboard a vessel at sea can be arbitrary from the perspective of this standard. The meaning of the standard of reasonableness can be understood through the case of *C v. Australia*. In this case,<sup>271</sup> the author was detained pending deportation after his illegal arrival in Australia. The period of detention continued for two years, pending determination of his entitlement to asylum under Australian law. Throughout this period of detention, the author suffered serious mental deterioration, including extreme depression, paranoia and suicidal tendencies. Following his release on mental health grounds, the author claimed that his detention was unreasonable and then, arbitrary because of its prolonged duration despite his mental illness. The State argued that this claim was inadmissible, as the mandatory

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<sup>267</sup> See (n245).

<sup>268</sup> Ibid, para 78. See also, *Lexa v Slovakia* App no 54334/00 (ECtHR 23 September 2008) para 119.

<sup>269</sup> See *Medvedyev Et Al v France* (n245) paras 102-03.

<sup>270</sup> *Vohra* (n209) 54.

<sup>271</sup> *C v Australia* (n185).

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immigration detention ensures that unauthorised arrivals do not enter Australia before their claims have been properly assessed and found to justify entry. The HRC in the context of this case observed that, although the State advanced particular reasons to justify the detention for a period of time, it failed to explain the reasons that justified the continued detention of the author in light of the passage of time and the intervening circumstances. The committee therefore held that continuance of the author's detention for over two years was arbitrary.

With this case, it can be concluded that the period of detention must be reasonable, having regard to its effects on detainees and the risks it poses for them if continued. Put differently, the standard of reasonableness renders detention arbitrary when the circumstances of the individuals who are being detained are not duly considered in the context of the period of detention. By analogy, the circumstances of the detention of smuggled migrants on an unworthy vessel for eight or 11 days, as in the cases mentioned earlier,<sup>272</sup> and in light of the poor physical and psychological conditions following a long journey at sea, may well be close to those of the asylum seeker in *C v. Australia*, whose detention continued despite his declining mental condition. Consequently, the detention of smuggled migrants aboard a vessel for a period of time could be seen as arbitrary under certain circumstances.

Third, detention of smuggled migrants aboard a vessel might be arbitrary if it does not meet a number of the procedural requirements in Article 9 of the ICCPR or Article 5 of the ECHR. For instance, detainees must be informed under Article 9(2) of the ICCPR and Article 5(2) of the ECHR of the justification for their detention.<sup>273</sup> Nevertheless, smuggled migrants are often not informed as to why they are detained or

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<sup>272</sup> See (n220), (n221) and (n223).

<sup>273</sup> Oberoi and others (n35) 112.

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they are not informed of the legal rules authorising their detention,<sup>274</sup> and therefore detention in such cases is arbitrary. For instance, in *Abdolkhani and Karimnia v. Turkey*, the ECtHR held that there was a violation of Article 5(2) of the convention because the applicants had not been informed on the offence of illegal entry used as a justification for their detention from 23 June 2008 onwards.<sup>275</sup> Another procedural requirement is the judicial review in Article 9(3) and (4) of the ICCPR or Article 5(3) and (4) of the ECHR. It might minimise the risk of arbitrary detention,<sup>276</sup> by validating whether the procedural and substantive requirements mentioned above are met or not.<sup>277</sup> For example, the ECtHR states that judicial review can impose a limit on the administrative authorities in terms of the length of detention.<sup>278</sup> This judicial review is difficult to accomplish in practice in the case of the detention of smuggled migrants aboard a vessel at sea<sup>279</sup> unless the detaining authorities allow those migrants to disembark in a certain place, where the court proceedings can then be held. Here, it can be asked whether detention of smuggled migrants aboard a vessel can be regarded as arbitrary as a result of the delay to the judicial review because of the time that elapsed during the voyage at sea. The phrase ‘without delay’ in Article 9(4) of ICCPR means that the administrative detention must be directly reviewed by a court.<sup>280</sup> Also, the word ‘promptly’ in Article

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<sup>274</sup> Mole and Meredith (n262) 143.

<sup>275</sup> *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009) paras 136-38.

<sup>276</sup> Laurent Marcoux, ‘Protection from Arbitrary Arrest and Detention under International Law’ (1982) 5 BC Intl & CL R 345, 370. It is important to indicate that the judicial review under 9 (3) of the ICCPR and Article 5(3) of the ECHR applies only in the cases of detention justified on the basis of a criminal charge, while the judicial review under Article 9 (4) of the ICCPR or Article 5(4) of the ECHR covers all the cases of detention. See, Claire Macken, ‘Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966’ (2005) 26 Adel L Rev 1, 21 and 24; Mole and Meredith (n262) 164-65; White and Ovey (n261) 236.

<sup>277</sup> ‘Guide on Article 5: Right to Liberty and Security Article 5 of the Convention’ (Council of Europe/European Court of Human Rights 2012) para 178.

<sup>278</sup> *Amuur v France* (n228) para53.

<sup>279</sup> *Wouters and Heijer* (n132) 16.

<sup>280</sup> *Nowak* (n234) 180.

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5(3) of the ECHR has been interpreted strictly,<sup>281</sup> to the extent that a detention of four days and six hours without appearance before a judge constitutes a violation of the requirement for prompt judicial review.<sup>282</sup> In cases of drug trafficking at sea, the ECtHR took into account the exceptional circumstances of the time that had elapsed during the voyage and therefore in bringing the detained traffickers before a judge.<sup>283</sup> The ECtHR reasoned their decisions in cases of drug trafficking on the basis that the detaining State cannot physically bring the applicants before a judge any sooner.<sup>284</sup> It is likely that the ECtHR in the context of a judicial review will also regard the time of voyage at sea as an exceptional circumstance in cases of migrant smuggling by sea, as has been done in cases of drug trafficking at sea.

Another issue that falls within the scope of judicial review is the authority that undertakes to enforce the measure of detention. The rules of jurisdiction concerning enforcement measures on the high seas<sup>285</sup> must be applied in the case of detention aboard a vessel. For example, if the detaining State is not the flag State, the consent of the latter must be obtained (as was mentioned in Chapter 4 of this study). In addition, Article 9(4) of the Migrant Smuggling Protocol states that any measures taken at sea shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect. This means that a review judge must validate whether the measure of detention aboard a vessel at sea was enforced by a warship or a governmental ship that carries the

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<sup>281</sup> Efthymios Papastavridis, 'European Court of Human Rights *Medvedyev Et Al V France* (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010' (2010) 59 Intl & CLQ 867, 879.

<sup>282</sup> *Brogan v United Kingdom* App no 11209/84; 11234/84; 11266/84; 11386/85 (ECtHR 29 November 1988).

<sup>283</sup> See *Rigopoulos v Spain* App no 37388/97 (ECtHR 12 January 1999); *Medvedyev Et Al v France* (n245).

<sup>284</sup> *Ibid.*

<sup>285</sup> See chapter 4 section 4.2.1.2.

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slogan or flag of an intercepting State. Detention of smuggled migrants at sea by commercial or undefined ships does not meet the requirements set out in Article 9(4) of the Protocol and therefore the judge must consider the arbitrariness of detention in such a case. However, this detention could be non-arbitrary if these commercial ships are authorised by the State to detain smuggled migrants. The Protocol does not limit exercising of maritime measures to warships and military aircraft only; such powers can be extended to other officials.<sup>286</sup> This view takes its cue from the literal interpretation of Article 9(4) of the Protocol that suggests that any ship can undertake the maritime measures set out in Article 8 of the Protocol, provided that a ship is under government service and authorised to take the measure in question.

### **5.2.4. Rights related to return**

The parties to the Protocol must have regard to a number of international standards of human rights in the context of the return of smuggled migrants.<sup>287</sup> For instance, smuggled migrants have the right to be returned to their country of origin.<sup>288</sup> In addition, the return of smuggled migrants must be carried out in a safe, humane and orderly manner.<sup>289</sup> The following subsections will highlight these standards in detail, turning first to the right to be returned (5.2.4.1) and then to the right to safe return (5.2.4.2).

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<sup>286</sup> McAdam and others, 'Issue Paper: Smuggling of Migrants by Sea' (n74) 39.

<sup>287</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n77) 33.

<sup>288</sup> See Article 18(1) and (2) of the Protocol and Article 12(4) of the ICCPR.

<sup>289</sup> Article 18 (5) of the Protocol.

### 5.2.4.1. Right to be returned

Smuggled migrants have the right to be returned to their State of origin. This right is found in paragraphs (1) and (2) of Article 18 of the Protocol and in Article 12(4) of the ICCPR. Smuggled migrants are entitled under Article 18(1) of the Protocol to be returned without undue or unreasonable delay to the State of their nationality or the State in which they have permanent residence. Furthermore, the State in which they have permanent residence is obligated under paragraph 2 of the same article to accept the return of smuggled migrants if they had such residence at the time of entry into the destination State but no longer have it at the time of their return.<sup>290</sup>

In this context, McClean claims that Article 18(1) is not mandatory for a destination State but is concerned rather with the State of origin.<sup>291</sup> This means that unless the destination State decides to return the smuggled migrants, they can be held by that State. This view can be criticised based on the rules of interpretation.

A literal interpretation of the phrase ‘Each State Party’ in paragraphs (1) and (2) of Article 18 shows that the parties to the Protocol – whether they are original, transit or destination States – are obligated to return the smuggled migrants without undue or unreasonable delay. Furthermore, McClean’s view contradicts the intention of the drafters of the Protocol. The right to return in Article 18 of the Protocol has been drafted in such a way as to combat the activities of migrant smuggling, as well as to ensure the right of smuggled migrants themselves to return to their place of origin.<sup>292</sup> Thus, the right of smuggled migrants to return in Article 18(1) and (2) of the Protocol must be ensured by States, including destination States.

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<sup>290</sup> *Travaux préparatoires* of the Protocol (n5) 552.

<sup>291</sup> McClean (n41) 433.

<sup>292</sup> *Travaux préparatoires* of the Protocol (n5) 548.

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In one case, when a train used to smuggle migrants was intercepted by law enforcement authorities, 12 migrants were found dead inside the train.<sup>293</sup> The remaining migrants were too afraid to provide any information to the police about the smugglers and requested they be returned to their country of origin.<sup>294</sup> According to the arguments above, the destination State, on the one hand, must facilitate the return of those migrants without undue or unreasonable delay as long as they have decided not to cooperate with law enforcement authorities and specifically request to be returned. Detention of those surviving migrants in shelters, prisons, or immigration detention facilities is one way in which the right to be returned in the Protocol can be interfered with or infringed. Forcing victims to remain for the duration of lengthy criminal proceedings thus constitutes an interference with the right of return.<sup>295</sup>

On the other hand, the State of origin must, according to paragraphs (1) and (2) of Article 18 of the Protocol, accept those surviving migrants in the case mentioned above without undue or unreasonable delay. The effective discharge of this obligation is likely to involve the State of origin conducting checks in order to verify whether those migrants are nationals or do indeed have a right of permanent residence;<sup>296</sup> if so, the State of origin must then ensure that the returned migrants are in possession of the documents required to travel to and re-enter its territory.<sup>297</sup>

Nonetheless, the standards of return in the Protocol specifically for smuggled migrants who are in possession of a nationality or permanent residence are not

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<sup>293</sup> UNDOC, 'In-Depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants' (n54) 10.

<sup>294</sup> Ibid.

<sup>295</sup> Gallagher, *The International Law on Human Trafficking* (n34) 345.

<sup>296</sup> Article 18 (3) of the Protocol.

<sup>297</sup> Article 18 (4) of the Protocol. See also, Gallagher, *The International Law on Human Trafficking* (n34) 345.

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applicable to smuggled migrants who are stateless persons. Implementation of these measures presents no difficulties in the case of the smuggled migrants of any given State, where this State is obligated under Article 18 of the Protocol to accept those migrants as long as they have the nationality of that State or permanent residence in its territory. In contrast, no State is bound to accept a smuggled person who is stateless and in respect of whom a return order has been issued, taking no account of his peculiar situation. A Palestinian person who arrived in Australia on a smuggling vessel without a passport or Australian visa is a case in point.<sup>298</sup> He was born and lived for most of his life in Kuwait, save for a brief period when he resided in Jordan. The applicant was taken into immigration detention in Australia, and from there applied for a visa. Upon refusal of his visa application, he asked to be returned to Kuwait or Gaza. The request to be returned to Gaza failed because there was no cooperation with the Israeli authorities. Furthermore, birth or long-term residence in Kuwait did not guarantee citizenship or the right to permanent residence for Palestinians. Accordingly, the applicant remained in detention under Section 189 of the Australian Migration Act 1958 requiring that an ‘unlawful non-citizen’ must be kept until either removal or the granting of a visa. Although the applicant was released from detention on 17 April 2003 by an interlocutory order,<sup>299</sup> he can be classified as a ‘stranded migrant’ in the Australian territory as a result of the impossibility of his return.<sup>300</sup> It can thus be said that, without any State of nationality or permanent residence, the return cannot take place when an applicant is a stateless person. This category of smuggled migrants is consequently

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<sup>298</sup> *Al-Kateb v Godwin* [2004] HCA 37 (High Court of Australia).

<sup>299</sup> *Ibid.*

<sup>300</sup> The term of the ‘stranded migrants’ have been used to describe those who are caught between the removal from the State in which they are physically present and inability to return to their State of nationality or former residence. This phrase can include rejected asylum seekers, migrant worker or economic migrants who entered into a country by assistance of smugglers. See Stefanie Grant, ‘The Legal Protection of Stranded Migrants’ in Cholewinski and others (n209) 30-31.

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prone to indefinite detention. The UNHCR reports that it is regularly ‘confronted with cases of individuals languishing in indefinite detention for years, turning often to decades, because they have no recognized legal status in any country.’<sup>301</sup> The IOM also points to this situation when stating that ‘stateless migrants are locked in a cycle of detention: detained for entering the country illegally, they have no means of leaving it upon being released, and are therefore returned to detention.’<sup>302</sup> Such problems highlight a gap in international law concerning the rights of smuggled migrants regarding return. In particular, cases of statelessness among smuggled migrants seem to be on the increase.<sup>303</sup> For instance, five stateless persons were identified aboard *SIEV 279*, a migrant-smuggling vessel that was intercepted by the Australian Maritime Safety Authority to the northeast of Christmas Island on 21 November 2011.<sup>304</sup>

However, the categories of smuggled migrants who are stateless persons can be reduced if Article 18(8) and Article 19(1) of the Protocol are considered. These articles provide other grounds for the right to be returned, which are mentioned in human rights treaties. Article 12(4) of the ICCPR is a case in point. Thus, States that are parties to both the Protocol and the ICCPR are obligated under Articles 18(8) and 19(1) of the Protocol to accept the return of smuggled migrants who do not qualify for the right to return under paragraphs (1) and (2) of Article 18 of the Protocol when these migrants meet the requirement in Article 12(4) of the ICCPR. Article 12(4) of the ICCPR is able to absorb a number of smuggled migrants who are stateless persons and to whom Article 18 of the Protocol therefore does not apply.

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<sup>301</sup> UNCHR, ‘Progress Report on UNHCR Activities in the Field of Statelessness’ EC/49/SC/CRP.15 (4 June 1999) para 15.

<sup>302</sup> IOM, ‘Stranded Migrants Facility: Briefing Note’ Doc. IC/2005/11.

<sup>303</sup> Grant (n300) 32.

<sup>304</sup> Hadley Hickson, ‘AUS-S-0279 - SIEV 279 [Australia]’ (migrant smuggling case database – migrant smuggling working group) < <https://ssl.law.uq.edu.au/som-database/#formstart> > accessed 16 Sep 2013.

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To clarify further, Article 12(4) of the ICCPR states that, ‘No one shall be arbitrarily deprived of the right to enter his own country.’ A literal interpretation of the term ‘no one’ in Article 12(4) of the ICCPR indicates that any individual, including a smuggled migrant, could be entitled to the right to enter a certain State if he or she can prove that this State is ‘his own country’. In the case of *J.M v. Jamaica*, Jamaica explained that J.M. was prevented from entering its territory because he was not a national and also failed to inform the immigration officers where he was born, where he had lived prior to leaving Jamaica, and what were the names of people who could identify him.<sup>305</sup> The HRC accepted these arguments and declared that the claimant did not provide evidence that Jamaica was ‘his own country’.<sup>306</sup> In fact, this case implies that there is another ground other than nationality or permanent residence that might entitle certain persons to enter a particular State. To be more specific, this ground is inherent in the phrase ‘his own country’ in Article 12(4) of the ICCPR. The main question is then: how can the phrase ‘his own country’ be interpreted within Article 12(4) of the ICCPR so that smuggled migrants fall within its ambit?

The ordinary meaning of the phrase ‘his own country’ denotes that nationality is not the definitive link in defining who has the right to enter a certain State under Article 12(4) of the ICCPR.<sup>307</sup> Otherwise, other individuals who are not nationals could be entitled to the right to return to the concerned State as a result of the existence of certain other links with that State. This view has been confirmed by the HRC in General Comment No. 27, which states that the phrase ‘his own country’ might include individuals who cannot be considered aliens because of ‘special ties’ with the country

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<sup>305</sup> *JM v Jamaica*, Communication No 165/1984 UN Doc CCPR/C/OP/2 at 17 (1984).

<sup>306</sup> *Ibid.*

<sup>307</sup> Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff Publishers 1987) 58.

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concerned.<sup>308</sup> This raises the following question: what are the special links that entitle a person who is not a national to the right to return to ‘his own country’ under Article 12(4) of the ICCPR?

It has been suggested that ‘his own country’ might be identified on the ground of race, language, ancestry, birth and prolonged residence.<sup>309</sup> However, this list seems excessive, as it would allow any individual who has mere common factors and not links with a particular country to return to that country. Thus, this broad interpretation does not seem workable. In the *travaux préparatoires* of the ICCPR, it was agreed that the phrase ‘his own country’ should extend to individuals who had established a ‘home’ abroad, whether by birth or long-term residence.<sup>310</sup> This interpretation seems the most consistent with the ordinary meaning of the phrase ‘his own country’, and it reflects the nature of the factual links, beyond nationality, that may connect an individual with a particular State. This interpretation has also been confirmed by judicial practice. The HRC decided in *Toala et al. v. New Zealand* that the authors had no connection with New Zealand by reason of birth or residence, and these circumstances, therefore, made it arguable that New Zealand was not their ‘own country’.<sup>311</sup> According to this interpretation, if aliens and stateless persons have such strong links with a certain State, this State can be their own country for the purposes of Article 12(4) of the ICCPR.<sup>312</sup>

It can be said that smuggled migrants who are stateless persons, because Article 18 of the Protocol is inapplicable to them, can qualify under Article 12(4) of the ICCPR

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<sup>308</sup> UNHRC ‘General Comment No. 27’ (n60) para 20.

<sup>309</sup> Muzzawi, ‘Comment on the Middle East’ in Karel Vasak and others (eds), *the Right to Leave and Return* (American Jewish Committee 1976) 343.

<sup>310</sup> Marc J Bossuyt, *Guide to the Travaux préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 261.

<sup>311</sup> *Toala et al v New Zealand*, Communication No 675/1995 UN Doc CCPR/C/70/D/675/1995 (2000) para 11.5.

<sup>312</sup> Nowak (n234) 219.

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for the right to return to the State in which they were born or have lived for a long time. However, the right of smuggled migrants to return under Article 12(4) of the ICCPR is not ensured by States that are parties to the Protocol but not to the ICCPR.

### **5.2.4.2. Right to safe return**

Gallagher states that smuggled migrants are not entitled under the Migrant Smuggling Protocol to a right to safety during the repatriation process.<sup>313</sup> This view can be criticised because the right to safe return can be established within the Protocol in more than one way. For example, Article 18 (5) of the Protocol obligates States to adopt all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the smuggled migrants. This article establishes an explicit right for the smuggled migrant that ensures their safety during the process of return to their State of origin. Moreover, Article 9(1)(a) of the Protocol, which obligates States to ensure the safety and humane treatment of the persons aboard a vessel, can be interpreted as grounds for the right to safe return. Under a literal interpretation of this article, the standards of safety and humane treatment must be ensured for the smuggled migrants as long as they are on board a vessel, and this interpretation extends to the processes of return by sea. It can be said that the smuggled migrants have the right to safe return under Article 9(1)(a), when they are returned by sea. Finally, the right to safe return can also be established under Article 16(2) of the Protocol. This article requires States to adopt appropriate measures to afford the smuggled migrants protection against any violence that may be inflicted upon them, whether by individuals or by groups. Under this article, smuggled migrants must therefore be protected against any violent treatment inflicted upon them during the return process.

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<sup>313</sup> Gallagher, *The International Law on Human Trafficking* (n34) 279.

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In theory, this last ground is somewhat weak. The term ‘public officials’ was used in an earlier version of Article 16(2), but this term was dropped because of concerns on the part of a number of delegations.<sup>314</sup> Consequently, Obokata opines that the effect of this exclusion is to ‘rule out the accountability of States when their officials violate the rights of life and dignity of the smuggled migrants.’<sup>315</sup> This argument can be extended to the process of return. As long as the term ‘public officials’ is not included within Article 16(2), smuggled migrants do not have any sort of protection against violence inflicted upon them by public officials during the return process.

Nevertheless, this protection can surely be established under Article 16(2) through interpretation of the term ‘groups’ in that article. This term can be interpreted broadly to include those officials responsible for enforcing return orders, and as a result the smuggled migrants are entitled under Article 16(2) of the Protocol to the right to protection against any violence that may be inflicted upon them by public officials during the return process. This conclusion is relevant to cases where there has been use of force during the return process. When smuggled migrants refuse to embark for the purpose of return, the force used by the enforcement authorities in order to achieve the return order must not exceed what is necessary.<sup>316</sup> In short, the use of force should not reach the degree of violence forbidden by Article 16(2) of the Protocol. For instance, violence is inflicted upon persons who refuse embarkation when the enforcement authorities use such means as handcuffing, placing helmets over the head, putting on

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<sup>314</sup> *Travaux préparatoires* of the Protocol (n5) 538.

<sup>315</sup> Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea’ (n2) 164.

<sup>316</sup> Pacurar (n239) 278.

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mouth gags, administering tranquillisers and other drugs, tying the person to a wheel chair, and beating them.<sup>317</sup>

While smuggled migrants have a right to safe return under the Protocol, the real problem at hand lies in how to put this right into force. Article 18(5) of the Protocol refers only to the pure right and does not try to define how a State is to perform the duties that correlate with this right.<sup>318</sup> The nature of the measures that States should adopt is left undefined in the Protocol, which merely uses the phrase ‘appropriate measures’ in relation.<sup>319</sup> Therefore, it can be said that the Protocol lacks a comprehensive and clear approach that ensures the safety and dignity of the smuggled migrants during the process of return. This deficiency might be the reason that drove Gallagher to conclude that the right to safe return is not mentioned in the Migrant Smuggling Protocol.<sup>320</sup>

### **Conclusion**

Smuggled migrants are not victims of the offence of the smuggling of migrants per se, but they are ‘potential victims’ of violations that might occur because of the process of migrant smuggling or its implications, such as detention and deportation. However, the Migrant Smuggling Protocol has failed to offer a clear stand-alone and comprehensive framework of rights that can address these possible violations.

On the one hand, the rights of the smuggled migrants based on the Protocol per se are questionable. The right of smuggled migrants not to be prosecuted for illegal

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<sup>317</sup> Ibid.

<sup>318</sup> Oberoi and others (n35) 140.

<sup>319</sup> Global Alliance against Traffic in Women, ‘Smuggling and Trafficking Rights and Intersections’ (2011) 26.

<sup>320</sup> See (n313).

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leaving in Article 5 of the Protocol can be undermined by Article 6(4) of the Protocol, which grants parties to the Protocol the authority to punish smuggled migrants for conduct that constitutes an offence under domestic law, with illegal leaving from a State possibly being one such domestic offence. Furthermore, smuggled migrants have implied rights under the Protocol, such as the right to be rescued at sea, the right to physical and psychological care and the right to non-refoulement outside the Refugee Convention. These rights derive from the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment in Article 16(1) of the Protocol, and therefore they require a level of interpretation in order to be established. However, it is unlikely that States will deduce these rights because they will lead to the creation of additional obligations on States in favour of smuggled migrants, who are generally ill regarded by States. Nevertheless, even if parties to the Protocol conclude that these rights exist, there remain a number of practical problems that would affect implementation of these rights in the context of migrant smuggling. For example, the international law of rescue at sea does not identify a place of disembarkation, and the Protocol has not filled this gap—a gap that is of particular relevance to cases of the migrant smuggling by sea. This weakness can undermine the right of smuggled migrants to be rescued at sea.

On the other hand, the existing rights in international human rights law that are of direct relevance to migrants and migration-related situations – such as Article 12(4) of the ICCPR regarding the right to return and Article 9 of ICCPR or Article 5 of the ECHR related to detention – are dispersed and fragmented.<sup>321</sup> This not only weakens the protection offered to migrants but also ‘tends to inhibit focused and systematic attention to migrants as a specific vulnerable social group, and makes the tasks of the relevant

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<sup>321</sup> Ghosh (n164) 3.

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advocacy bodies more difficult.<sup>322</sup> In addition, the failure of a number of parties to the Protocol to ratify the key international human rights instruments represents another constraint impeding migrants' full enjoyment of the rights in these instruments.<sup>323</sup> States that are parties to the Protocol but not to these other instruments are not obligated to ensure the rights in these instruments in relation to smuggled migrants. This conclusion accords with the interpretative notes to Article 19 of the Protocol. These explain that any State that becomes a party to the Protocol and is not a party to another international instrument would not become subject to any right, obligation or responsibility under that other instrument.<sup>324</sup> This means that 'the degree to which States Parties assist and protect the smuggled migrant will depend on the international agreements the individual State is a party to.'<sup>325</sup> Nevertheless, even States that are parties to both the Protocol and the key human rights instruments are unlikely to protect these rights in relation to smuggled migrants. As the working group of intergovernmental experts on the rights of migrants points out, States (especially destination States) are generally reluctant to apply international human rights standards to either regular or irregular migrants.<sup>326</sup>

Following the critical evaluation of the provisions of the Protocol that began with the provisions concerning the legal definition of the smuggling of migrants and ended with the provisions that aim to protect the rights of smuggled migrants, the next chapter will try to establish a proposal for a future law to combat migrant smuggling and protect the rights of smuggled migrants.

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<sup>322</sup> UNESCO, 'Report of the working group of intergovernmental experts on the human rights of migrants, submitted in accordance with Commission on Human Rights resolution 1998/16' E/CN.4/1999/80 (9 March 1999) para80.

<sup>323</sup> Ghosh (n164) 3.

<sup>324</sup> *Travaux préparatoires* of the Protocol (n5) 555.

<sup>325</sup> Stacey (n2)11.

<sup>326</sup> UNESCO, 'Report of the working group of intergovernmental experts on the human rights of migrants (n322) para77.

## 6. A future law to combat migrant smuggling

Effective responses to this trade [smuggling of migrants] will require holistic, interdisciplinary and long term approaches.<sup>1</sup>

The critical evaluation of the provisions of the Migrant Smuggling Protocol in the previous chapters of this thesis has highlighted a number of deficiencies in the Protocol. These deficiencies reveal that the Protocol is not a comprehensive instrument, in the way that Schloenhardt claims,<sup>2</sup> but is rather a small step forward<sup>3</sup> that still requires further amendment and revision so that it is able to achieve the purposes outlined in Article 2. Activities of migrant smuggling remain on the increase despite concerted efforts to combat them.<sup>4</sup> The global financial crisis that began in 2008 and the revolutions of the Arab spring might also have contributed to an increase in the pace of irregular migration.<sup>5</sup> The amendments to the Protocol proposed in this chapter are required in order to respond to the current and future challenges of migrant smuggling.

Before highlighting suggested amendments, it is important to clarify that the phrase ‘future law’ in this chapter does not mean that another convention must be established to combat the activities of migrant smuggling and to protect the rights of

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<sup>1</sup> Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 HRQ 975, 1004.

<sup>2</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 360.

<sup>3</sup> Gallagher ‘Human Rights and the New UN Protocols’ (n1)1003.

<sup>4</sup> Khalid Koser and others, ‘World Migration Report 2010 the Future of Migration: Building Capacities for Change’ (IOM 2010) 30. See also, Jessica E Tauman, ‘Rescued At Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis’ (2002) 11 Pacific Rim L & PJ 461,463.

<sup>5</sup> Khalid Koser, ‘The Impact of the Global Financial Crisis on International Migration’ (2010) 11 Whi JD & Intl R 13; Marika McAdam and others, ‘Issue Paper: Smuggling of Migrants by Sea’ (UNDOC 2011)13; Gemma Jimrénez, ‘The Migration-Security Nexus in Short: Instruments and Actions in the European Union’ (2013) 4 Amsterdam LF 36.

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smuggled migrants. Such a convention might take a long time to be drafted, ratified and brought into force, all while the activities of migrant smuggling continue to develop. Thus, it would be better to use the special amendment procedures to make any necessary changes to the existing international law on migrant smuggling. In particular, the Migrant Smuggling Protocol refers to this technique in Article 23(1), which provides that any State party to the Protocol can propose an amendment and file it with the Secretary-General of the United Nations, who will communicate the proposed amendment to the States parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the amendment. What is more, any amendment proposed by a State party to the Protocol can be adopted by a two-thirds majority vote of the States parties to the Protocol present and voting at the meeting of the Conference of the Parties if there is no consensus on the amendment.<sup>6</sup> By contrast, full consensus between States might be required to adopt an altogether new convention for combating migrant smuggling. Thus, the phrase ‘future law’ as it is used in this chapter refers to the Migrant Smuggling Protocol in its new form, following amendments that address its current deficiencies, which have been identified in the previous chapters of this thesis.

Consequently, this chapter – on the basis of Article 23(1) of the Protocol – aims to establish a roadmap or a proposal for a future law to combat migrant smuggling. In doing so, the first section (6.1) will set out the fundamental principles that must underpin any such future law. Thereafter, these fundamental principles will be applied in the second and third sections of this chapter. The second section suggests a number of amendments to the substantive content of the Migrant Smuggling Protocol (section

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<sup>6</sup> Article 23(1) of the Protocol.

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6.2), while the mechanism that ensures the effective implementation of such amended provisions is the subject of the third section of this chapter (section 6.3).

### **6.1. Features of the future law**

This subsection highlights the fundamental principles that must be considered by the future law to combat migrant smuggling. The task of explaining these features is important because the deficiencies identified in the Migrant Smuggling Protocol indicate that there is an underlying incompatibility between the provisions of the Protocol and its principal purposes. In short, the substantive rules of the Protocol are not established precisely and effectively enough to achieve the Protocol's purposes in Article 2. For this reason, in looking at the functions and wording of the future law, the following subsections are predicated on the notion of bringing the substantive provisions more in line with the purposes of the Protocol.

#### **6.1.1. Functions of the future law**

The international community has decided to use international law to combat migrant smuggling.<sup>7</sup> Eliminating these activities enhances the sovereignty and security of States,<sup>8</sup> while also promoting fundamental human rights. To fulfil these objectives, a number of functions must be pursued.

First, the future law must undertake a criminal function through a comprehensive framework that addresses the subjective and objective elements within the criminal law on the smuggling of migrants. In the context of the subjective element,

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<sup>7</sup> Gallagher 'Human Rights and the New UN Protocols' (n1) 976.

<sup>8</sup> Hadley Hickson & Andreas Schloenhardt, 'Non-Criminalisation of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air: Research Paper' (The University of Queensland, Migrant Smuggling Working Group January 2012) 4.

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as long as the future law aims to combat the activities of migrant smuggling, any actor engaging in these activities must be covered by that law. For the objective element, the existing loopholes in the criminal offences relating to migrant smuggling must be closed, so that smugglers cannot escape prosecution.<sup>9</sup> The comprehensive criminalisation of the activities of migrant smuggling must be one of the techniques to deal with the objective element. It should not always depend on interpretation of the current provisions of the Protocol to fill the gaps in this Protocol, particularly in the ambit of criminal law regarding migrant smuggling. In particular, there are States, which lack to capacity in using this process when enacting their domestic legislation in conformity with the Protocol. It can thus be said that the activities relating to migrant smuggling must be criminalised comprehensively and explicitly, by which States find no difficulty when enacting their legislation.

Second, providing adequate protection and support to smuggled migrants must be another function of the future law. Since migrant smuggling has become a human rights issue as a consequence of the violations that affect smuggled migrants, the future law has to view these activities through the lens of human rights. Otherwise, the rights of smuggled migrants must be protected as long as the activities of migrant smuggling cannot be prevented.<sup>10</sup>

Consequently, the future law must adopt specific rights and not just refer to the fundamental rights laid down in Article 16(1). There should be an independent and detailed framework of the necessary rights of smuggled migrants that addresses the violations resulting from smuggling and its implications. As Weissbrodt points out,

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<sup>9</sup> Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime* (n2) 366.

<sup>10</sup> Marika McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (UNDOC 2011) 3.

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treaty bodies should do more to adopt specific standards on how the basic human rights apply to non-citizens.<sup>11</sup> This should be achieved by adding certain rights into the ambit of the Migrant Smuggling Protocol. In particular, establishing a convention related to the rights of smuggled migrants might not find approbation by States at the stage of ratification. For example, the ICRMW, which regulates the rights of migrant workers and members of their families, is not widely ratified, with only 44 State parties.<sup>12</sup> One of the reasons for the low numbers of ratification of the ICRMW is that it provides irregular migrants with rights that are not generally found in other human rights treaties.<sup>13</sup> There is no doubt that the extent of ratification will be even more limited in the case of a convention that regulates the rights of smuggled migrants, who may be perceived to be even more of a burden to States than migrant workers. However, to include certain rights for smuggled migrants within the future law will not affect the ratifying of this law. This is because the future law also includes measures of border control, which represent a balance or an important incentive to ratify this law for States that seek cooperation on this aspect. In summary, the future law must fulfil the function of providing a number of the necessary rights for smuggled migrants, as well as pursuing its central function of combating the activities of migrant smuggling.

Third, the future law must perform a dynamic function that makes it effective in combating migrant smuggling. In doing so, it must press States to comply with their obligations while also identifying genuine obstacles that might hamper States in the course of implementing the law and trying to find solutions to these obstacles.

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<sup>11</sup> David Weissbrodt, 'The Protection of Non-Citizens in International Human Rights Law' in Ryszard Cholewinski and others, *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C. Asser Press 2007) 233.

<sup>12</sup> See United Nation Treaty Collection < <http://treaties.un.org/Pages/ViewDetails.aspx?src> > accessed 20 August 2012.

<sup>13</sup> Koser and others, 'World Migration Report 2010' (n4) 22.

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Moreover, the future law must be adaptable and thus able to address any developments in the context of migrant smuggling. This law will only be effective if it provides States with the measures and techniques for effectively curbing the activities of migrant smuggling. Smugglers are constantly improving their capabilities, particularly with advances in communication technology and globalisation.<sup>14</sup> The future law must meet these developments through innovative and forward-thinking plans and measures.

### 6.1.2. The wording of the future law

The deficiencies of the Protocol mentioned in the previous chapters, particularly in relation to the obligations of States, demonstrate a need for greater clarity in international law on migrant smuggling. To achieve such clarity, this subsection will now consider the wording and principles of drafting that need to be followed.

International law needs to be as clear as possible to minimise the opportunities for States to argue about it and to circumvent it.<sup>15</sup> The enforcement of norms in any system requires that these norms are precise, obligatory and able to be objectively interpreted.<sup>16</sup> To be more specific, States will be more motivated and better equipped to conform to international legal rules that are clear and unambiguous and that provide sufficient specificity as to the actions required to meet an identified obligation.<sup>17</sup> Accordingly, it can be suggested that the flexible and vague language that characterises some of the provisions of the Migrant Smuggling Protocol, such as ‘as

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<sup>14</sup> Ahmet İçduygu, ‘Transborder Crime between Turkey and Greece: Human Smuggling and its Regional Consequences’ (2004) 4(2) SE & BSS 311; Peter Futo and Michael Jandl (eds), ‘2006 Year Book on Illegal Migration, Human Smuggling and Trafficking in Central and Eastern Europe’ (International Centre for Migration Policy Development 2007) 5.

<sup>15</sup> Anne Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010)7.

<sup>16</sup> Claire R Kelly, ‘Enmeshment as a Theory of Compliance’ (2005) 37 New York UJ Intl L & Pol 303, 305.

<sup>17</sup> Gallagher, *The International Law on Human Trafficking* (n15) 464.

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may be necessary', 'appropriate', 'to the extent possible' and 'within available means', must be reduced as far as is realistically possible. The future law – particularly in the area of obligations – should be worded in clear, decisive and obligatory terms, by which an interpretation based on the interests of individual States should be avoided. What is more, such clear drafting undoubtedly facilitates the effective implementation of the law, thereby promoting the aim of the rules on unification and State responsibility.

In terms of the rule of unification, the international conventions in general are a valuable and effective means of promoting a beneficial uniformity in the law.<sup>18</sup> Therefore, the question of the elaboration of an international convention to combat migrant smuggling must be based on the creation of a law that ensures unification in the substantive rules for combating such activities. Such unification or common understanding of the provisions of the law will enable States to cooperate and collaborate more effectively than previously in combating migrant smuggling.<sup>19</sup> Several representatives emphasised in the United Nations Congress on Crime Prevention and Criminal Justice that the unification of definitions and crimes related to migrant smuggling in national legislation will facilitate cooperation between States, and thereby prevent smugglers from escaping prosecution.<sup>20</sup> The rule of double criminality that requires a uniform application of the obligation of criminalisation within the

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<sup>18</sup> G C Thornton, *Legislative Drafting* (Butterworth & CO 1979) 222.

<sup>19</sup> Anne Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and Treaties' <<http://www.fmreview.org/sites/fmr/files/.pdf>> accessed 5 August 2012. See also, Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective' (2002) 14 Intl JRL 561, 594; Tom Obokata, *Transnational Organised Crime in International Law* (HRT Publishing Ltd 2010) 45.

<sup>20</sup> Twelfth UN Congress on Crime Prevention and Criminal Justice, 'Draft report on Consideration of agenda items in plenary meetings and by sessional bodies and action taken by the Congress' A/CONF.213/L.2/Add.3 (16 April 2010) para 10.

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suppression conventions<sup>21</sup> can shed light on this point. This rule is needed in the context of migrant smuggling to implement the procedural rules in UNCTOC,<sup>22</sup> and which contribute to combat these activities. For instance, the procedure of extradition in Article 16 of UNCTOC can only be applied smoothly between States in the future law if these States regarded the rule of double criminality — in other words, these States criminalise the smuggling of migrants uniformly, according to the definition provided in that law.

Real and effective uniformity depends on the possibility of a uniform application of the agreed text in various countries.<sup>23</sup> Thus, such unification is related to the wording of the text of the law concerned, where ambiguous terms can reduce the capacity of the law to guide State behaviour.<sup>24</sup> Uniform law will lose its uniform character if a different meaning is given to the same rules in the various countries concerned.<sup>25</sup> Put differently, the behaviour of States in relation to the law will vary as a consequence of different interpretations of its imprecise or open-ended rules. Such an outcome can be avoided if the future law uses direct and clear terms, which thus serve to ensure a uniform interpretation by States.

In relation to State responsibility, it can be said that unclear laws are less likely to be obeyed because they are less likely to trigger effects when violated.<sup>26</sup> State

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<sup>21</sup> Neil Boister, 'A Paper on Transnational Criminal law!' (workshop on Globalisation, Criminal Law and Criminal Justice, 26 June to 28 June, London 2012) 4.

Marika McAdam, 'Toolkit to Combat Smuggling of Migrants: Tool 1' (UNDOC 2010) 8; Mike Price and others, 'Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 8 International Cooperation' (UNODC 2010) 9.

<sup>23</sup> R H Graveson, 'The International Unification of Law' (1968) 17 AJCL 4, 12.

<sup>24</sup> David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Van JTL565, 569.

<sup>25</sup> Martin Gebauer, 'Unification and Harmonization of Laws' (Max Planck Encyclopedia of international law) <<http://opil.ouplaw.com/home/EPIL>> accessed 19 March 2013.

<sup>26</sup> Jonas and Saunders (n24) 569.

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responsibility can be one of the effects that might not be invoked as a result of the vague and flexible terms of an international rule. This view finds support in the commentary on ARSIWA, which explains that State responsibility depends on the content of the primary obligation.<sup>27</sup> Thus, avoiding flexible and vague terms in the future law can reinforce the rules of State responsibility, where States have clear and direct obligations and where a breach can be established without any difficulty. Such an advantage might lead to obligations in the future law to combat migrant smuggling being applied effectively by States in order to avoid State responsibility.

### **6.2. The substantive rules of the future law**

The fundamental principles set out above should be embedded in the substantive rules of the future law. To this end, the following subsections will propose a number of amendments to the Protocol in relation to the criminal law, preventive measures, cooperative measures, the rights of States to take measures that aim to combat migrant smuggling, and the rights of smuggled migrants themselves. The rules of the European Union that are relevant would be used to make a number of amendments, particularly in regard to the scope of the preventive measures and cooperative measures. However, this kind of amendment will take the purpose of protecting the rights of smuggled migrants into account. There should be a fair balance between the measures of prevention and protecting the rights of smuggled migrants, particularly the right to non-refoulement. The EU law does not pay sufficient attention to such a balance.<sup>28</sup>

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<sup>27</sup> ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001' UN Doc A/56/10 (United Nations 2008) Article 2, para3.

<sup>28</sup> Francois Crepeau, 'The Fight against Migrant Smuggling: Migration Containment over Refugee Protection' in Black Richard and others, *The Refugee Convention at 50* (Oxford University Press 2001) 174; Mary A Young, 'The Smuggling and Trafficking of Refugee and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating

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### 6.2.1. Criminal rules in the future law

This subsection aims to propose a number of amendments to the criminal rules in the Migrant Smuggling Protocol. These amendments will cover the deficiencies previously identified in the legal definition of the smuggling of migrants, the Protocol's scope of application, and the various offences relating to migrant smuggling.

#### 6.2.1.1. The legal definition of the smuggling of migrants

Three aspects in the legal definition of the smuggling of migrants must be addressed. First, a critical evaluation of the legal definition of the smuggling of migrants in the Migrant Smuggling Protocol has shown that it is unclear whether the definition, using the term 'procurement', covers only illegal entry into a State or extends also to acts that facilitate such entry.<sup>29</sup> To address this issue, the term 'procurement' in Article 3(a) of the Protocol should be specifically defined in a paragraph that clearly states that this term covers an act that achieves illegal entry. Alternatively, the smuggling of migrants should be defined as 'a direct act that enables a person to enter the territory of a party State of which the person is not a national or permanent resident, without complying with the necessary requirements for legal entry'.

Second, the legal definition of the smuggling of migrants must not include elements that might be advantageous for smugglers or their lawyers, thereby permitting criminal liability to be avoided. The element of 'financial or other material benefit' is a

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Transnational Organised Crime?' (2004) 27 *Suf TL Rev* 101; Maarten Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Bernard Ryan and Valsamis Mitsilegas (eds) *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010); Maarten Heijer, *Europe and Extraterritorial Asylum* (HART Publishing LTD 2012) 206; Savitri Taylor, 'Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?' 93 < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1725554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1725554) > accessed 28 October 2013.

<sup>29</sup> See chapter 2 section 2.1.

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case in point. As in the Council Directive 2002/90/EC, which defines the facilitation of unauthorised entry, transit and residence,<sup>30</sup> the future law should discard this element from the definition of the smuggling of migrants and insert a paragraph that directs States to exclude from this definition the activities of those who assist migrants to cross borders for humanitarian reasons or on the basis of close family ties. This paragraph should be within Article 3 of the Protocol, and it must also be mandatory and not optional, as in the Council Directive 2002/90/EC.<sup>31</sup> Such an amendment will underline that the definition of the smuggling of migrants in the Protocol is concerned only with the acts of smuggling that have profit as their aim. In addition, discarding the element of ‘financial or other material benefit’ from the definition of the smuggling of migrants closes the door on smugglers who misuse this element in order to evade criminal liability.

Third, there is a degree of overlap between the smuggling of migrants and trafficking in persons in practice as a result of coercion, which might affect the consent of the smuggled migrants.<sup>32</sup> This overlap, which often creates a measure of confusion between these definitions, must be removed by relying on the element of exploitation in the Trafficking Protocol in order to distinguish between smuggling and trafficking instead of the element of consent. On this basis, the future law must remove such an overlap through a paragraph that enjoins that ‘the smuggling of migrants turns into trafficking in persons when the smuggled migrants are prone to exploitation as outlined in Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children’. Such a paragraph thus obligates States to apply the legal system on trafficking in persons, particularly in the course of the criminal law and

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<sup>30</sup> See chapter 2 section 2.2.

<sup>31</sup> Ibid.

<sup>32</sup> See chapter 2 section 2.3.

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in protecting the rights of the victims, even if the definition of the smuggling of migrants was dominant and applicable during the first stages of the smuggling process. A weakness in this amendment reveals itself when a State is a party to the Migrant Smuggling Protocol but not to the Trafficking Protocol. In such a case, the State will in every circumstance process a case as one of migrant smuggling, even if the element of exploitation – the principal element in trafficking in persons – is present. Otherwise, this amendment requires that the State is a party to both the Trafficking Protocol and the Migrant Smuggling Protocol.

### **6.2.1.2. Scope of application**

It has been mentioned that the concept of an organised criminal group that appears in Article 2(a) of UNCTOC, including the structured group of three persons or more, is a precondition to applying the provisions of the Migrant Smuggling Protocol.<sup>33</sup> In this context, the activities of migrant smuggling committed by actors who consist of fewer than three persons in number are unfortunately not subject to the provisions of the Protocol, particularly regarding cooperation.

A way to address this problem is to remove the element of a structured group of three or more persons from the concept of an organised criminal group in Article 2 (a) of UNCTOC, or to reduce the number of persons to two persons instead of three. However, a still better alternative is to propose an amendment to Article 4 of the Protocol on the scope of application. For instance, it is possible to limit the impact of the concept of an organised criminal group on the provisions of the Migrant Smuggling Protocol, particularly in relation to cooperation measures. To this end, the concept of an organised criminal group should be dropped from Article 4 of the Protocol regarding

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<sup>33</sup> See chapter 3 section 3.1.

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scope of application, so that the provisions of the Protocol (including the measures of cooperation) can be applicable to offences related to migrant smuggling regardless of whether an organised criminal group is involved or not. Another possibility is to exclude the concept of an organised criminal group from the measures of cooperation, as in the context of criminalisation measures.<sup>34</sup> This would be possible under Article 4 of the Protocol which refers to ‘except as otherwise stated herein’. It must be mentioned that the concept of an organised criminal group is not applicable to each provision related to cooperation. Such an amendment grants the parties of the Protocol the possibility to require cooperation even if the smuggling of migrants or one of the related offences is committed by individuals or amateur smugglers who are fewer than three persons in number.

### **6.2.1.3. Offences relating to migrant smuggling**

A number of amendments to the Protocol must be considered in the context of the offences relating to migrant smuggling in order to fulfil its criminal law function comprehensively.<sup>35</sup> The developments in migrant smuggling have produced a number of activities that are barely caught by the existing offences in Article 6 of the Migrant Smuggling Protocol. Consequently, such gaps must be filled.

For example, the offence regarding fraudulent documents must not be restricted only to travel and identity documents, as Article 6(1)(b) of the Protocol currently does. The offence concerning fraudulent documents must be worded more broadly so that any kind of documents used for the purpose of enabling migrant smuggling can fall within this offence. Fraudulent study offers and fraudulent employment contracts are good

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<sup>34</sup> Ibid.

<sup>35</sup> See chapter 6 section 6.1.1.

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illustrations of such other documents. To this end, the words ‘travel’ and ‘identity’ must be dropped from this article. By referring only to ‘documents’, the article would be sufficient to encompass all documents that are used for the purpose of enabling migrant smuggling.

Furthermore, it is necessary to explicitly criminalise the employment of illegal migrants that is sometimes linked with migrant smuggling.<sup>36</sup> The future law should criminalise these activities in a stand-alone offence within Article 6 of the Protocol, and this proposal reflects State practice in this regard. Alternatively, since employing smuggled migrants ultimately enables the smuggled migrants to reside illegally in the concerned State, the offence of illegal residence in Article 6(1)(c) of the Migrant Smuggling Protocol ought to be amended to cover such activities. For instance, the phrase ‘such as employing an illegal migrant’ ought to be added after the words ‘other illegal means’. Under this amendment, the offence of illegal employment, which enables smuggled migrants to reside illegally in a State, will be explicitly captured by this article and not be dependent on the interpretation of the phrase ‘other illegal means’ and the illegality of this act in the domestic law of States.<sup>37</sup>

### **6.2.2. The preventive framework in the future law**

Prevention measures make the smuggling process more risky and complicated for smugglers.<sup>38</sup> For this reason, the obligation of prevention must not be worded in flexible or vague terms; in essence, the measures on prevention should not be left to the discretion of States.

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<sup>36</sup> Raimo Väyrynen, ‘Illegal Immigration, Human Trafficking, and Organised Crime: Discussion Paper No. 2003/72’ (United Nations University, World Institute for Development Economics Research 2003) 5.

<sup>37</sup> See chapter 4 section 4.1.1.1.

<sup>38</sup> Andreas Schloenhardt and Jessica E Dale, ‘Twelve years on: revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air’ (2012) 67 JPL129, 145.

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The future law to combat migrant smuggling must include various definite measures for preventing the activities of migrant smuggling, as in the legal instruments of the EU, which are clear in the context of the measures designed to prevent and combat illegal migration in general.<sup>39</sup> In the context of the measures of border controls, the future law must explicitly obligate States to adopt certain measures to strengthen border control, as is the case in the EU law. For instance, the procedures of checking persons on external borders of the EU and the rules addressing a common visa system have been established under what is now Article 77 of the Treaty on the Functioning of the European Union (TFEU) in the context of the measures of border controls.<sup>40</sup> Furthermore, Chapter 2 of the Convention implementing the Schengen Agreement included a number of measures concerning border controls which have since been further developed in EU secondary legislation, in particular the Schengen Borders Code. Article 4 of the Code states that borders must only be crossed at border crossing points and during fixed opening hours.<sup>41</sup> Article 12 of the Code refers to the use of mobile units to carry out external border surveillance between crossing points.<sup>42</sup> The lack of such specific techniques and settling for general or deliquescent measures, as provided in the Migrant Smuggling Protocol, makes the obligation of prevention in the scope of border controls futile or nominal. Importantly, these updated measures within the future

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<sup>39</sup> Ryszard Cholewinski, 'The EU Acquis on Irregular Migration: Reinforcing Security at the Expense of Rights' (2000) 2 EJML 369.

<sup>40</sup> Treaty on the Functioning of the European Union, Consolidated Version [2010] OJ C 83/47. The competence was originally introduced as Article 73j (2) EC by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340 (adopted on 2 October 1997 and entered into force on 1 May 1999).

<sup>41</sup> Convention implementing the Schengen Agreement [2000] OJ L 239 (adopted on 19 June 1990 and entered into force on 1 September 1993). See also Council Decisions [1999/435/EC](#) and [1999/436/EC](#) of 20 May 1999; Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1.

<sup>42</sup> *Ibid.*, 12 (3) and (4) of the Schengen Borders Code.

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law must have room to regard the rights of smuggled migrants, such as the right to non-refoulement.

It has also been mentioned that the prevention measures in the Protocol are not all applicable to the activities of migrant smuggling by air.<sup>43</sup> Consequently, there should be specific measures that would contribute to prevention of the activities of migrant smuggling by air.<sup>44</sup> For instance, since carrier provisions generally do not apply to airport authorities, including those in the Migrant Smuggling Protocol,<sup>45</sup> it is necessary to set rules by which airport authorities can be held responsible for providing security and control at entry and exit points, particularly in international transit areas. Such rules can enhance the role of airport authorities in preventing the activities of migrant smuggling by air, as well as codifying the measure on pre-embarkation controls that have been adopted by a number of States to prevent migrant smuggling by air.<sup>46</sup> In this regard, there is no doubt that sending immigration or border officers to the airports of the States from which smuggling operations originate or through which they pass in order to intercept smuggled migrants represents an effective measure to prevent migrant smuggling by air. However, such a measure requires agreements between the concerned States that can be concluded on the basis of Article 17(a) of the Protocol. Finally, Article 14(2)(d) of the Migrant Smuggling Protocol regarding training should be amended by adding the words ‘such as, inter alia, airports’ following the words ‘conventional and non-conventional points of entry and exit’.<sup>47</sup> This amendment will obligate States to train officers so that they are able to detect smuggling processes as

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<sup>43</sup> See chapter 4 section 4.1.1.2.

<sup>44</sup> Schloenhardt and Dale (n38) 150.

<sup>45</sup> Marika McAdam and others, ‘Issue Paper: Migrant Smuggling by Air’ (UNDOC 2010)13.

<sup>46</sup> Bernard Ryan, ‘Extraterritorial Immigration Control: What Role for Legal Guarantees?’ in Ryan and Mitsilegas (n28) 14.

<sup>47</sup> Schloenhardt and Dale (n38) 150.

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they relate to airports. A part of this training must also focus on improving the ability of immigration officers and airport employees to identify smuggled migrants who are refugees or whose lives are at risk in their State of origin.

### **6.2.3. The cooperative framework in the future law**

Cooperation in relation to the Migrant Smuggling Protocol needs a mechanism to facilitate information exchange between States.<sup>48</sup> The approach of the Europol Convention is helpful in this regard. The Europol Convention includes extensive and detailed articles on cooperation between the States of the European Union in the field of information in order to combat some organised crimes, including migrant smuggling.<sup>49</sup> The European Union, through Articles 3 and 7 of the Europol Convention, empowers Europol with the responsibility to exchange, obtain, collate and analyse the information that is shared between Member States.<sup>50</sup> Moreover, Europol is responsible for notifying the competent authorities of the Member States without delay through the national units referred to in Article 4 of all necessary information concerning criminal offences that may be required by the investigating authorities.<sup>51</sup> It is noteworthy that each Member State should have under Article 4 of the Europol Convention a national unit that aims to supply and respond to requests for information by Europol. As can be seen from this approach, the route of information is controlled by Europol, thereby making information leaks to other non-competent parties or smugglers themselves unlikely. It can be concluded then that the establishment of such a mechanism within the future law is the best way to overcome the issue of lack of trust between States, which often constitutes

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<sup>48</sup> See chapter 4 section 4.1.1.4.

<sup>49</sup> The Europol Convention [1998] OJ C316, art 2(2).

<sup>50</sup> Ibid, Article 3 (1), (2).

<sup>51</sup> Ibid, Article 3 (3).

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an obstacle to cooperation in the field of information exchange to combat migrant smuggling.<sup>52</sup>

### **6.2.4. The rights of States in the future law**

Regarding the content on the right of interception, the concept of ‘appropriate measures’ in Article 8(2)(c) of the Protocol must be elaborated. As long as Article 8 of the Protocol is derived from Article 17(4)(c) of the 1988 Convention on illicit traffic in drugs, the future law must incorporate the content of the appropriate measures, shown in the 1995 Agreement on Illicit Traffic by Sea, implementing Article 17 of the 1988 Convention. The concept of appropriate measures must include measures that aim to protect and collect evidence concerning the offence of the smuggling of migrants that is discovered by the intercepting State on the high seas. Such a clarification reinforces the right of interception under Article 8 of the Protocol and contributes to the successful prosecution of smugglers engaged in migrant smuggling on the high seas. In the same context, universal jurisdiction in relation to enforcement measures over stateless vessels engaged in migrant smuggling on the high seas must be clearly established. For example, Article 8(7) states that, after boarding and searching a stateless vessel engaged in migrant smuggling, ‘If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.’ This article, as mentioned previously, arguably establishes universal jurisdiction in the scope of enforcement measures,<sup>53</sup> and therefore it would be possible to add the phrase ‘including enforcement measures’ after the phrase ‘appropriate measures’ in this article. Such an amendment would clarify to States that they can create enforcement

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<sup>52</sup> See chapter 4 section 4.1.1.4.

<sup>53</sup> See chapter 4 section 4.2.1.2.

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measures in their domestic law using universal jurisdiction, in particular when States do not have one of the ordinary criminal jurisdictions under international law over stateless vessels engaging in migrant smuggling on the high seas.

The requirement regarding ‘reasonable grounds’ in paragraphs (1), (2) and (7) of Article 8 of the Protocol as a precondition to the right of interception of vessels suspected of migrant smuggling must also be clarified. For instance, the information or intelligence concerning a vessel in question, as well as the conditions and surrounding circumstances or the attitude of the vessel at sea, ought to be incorporated within the future law as criteria to build reasonable suspicion, which thus authorises a State to intercept the vessel in question.

The future law must stipulate a certain period of time within which the State receiving the request must respond to the request to intercept. It is proposed that the requesting State should wait for a response for one hour. Thus, a failure to respond within this period, whether by way of consent or rejection, grants the requesting State the authority to intercept the vessel suspected of engaging in migrant smuggling. A period of one hour is sufficient for the flag State to confirm the registry of the vessel in question and to grant authority to take the required measures with respect to the vessel.<sup>54</sup> At the same time, this period is not excessive in that it is generally unlikely to adversely affect the medical and psychological conditions of migrants who are on board the vessel.

The right of assistance in Article 8 (1) of the Protocol is not effectively implemented by parties to the Protocol because of its current wording.<sup>55</sup> Relevant

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<sup>54</sup> Article 8 (6) of the Protocol.

<sup>55</sup> See chapter 4 section 4.2.2.

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measures of assistance under Article 8(1) are to search vessels engaging in migrant smuggling and prevent the disembarkation of the smuggled migrants from these vessels. However, in addition States should be urged to enter into bilateral agreements to generally overcome the deficiencies within the right of assistance articulated in Article 8(1) of the Protocol. Article 17 of the Protocol states that parties to the Protocol shall consider the conclusion of bilateral or regional agreements or operational arrangements for the purpose of ‘Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol’. The phrase ‘particularly in the domain of maritime measures’ should be inserted within this article after ‘effective measures’. Within these agreements, the States thus ought to clarify or agree on rules that were ambiguous in Article 8(1) concerning the right of assistance.

Alternatively, the States that are parties to the Protocol and also members of the EU have an existing strategy under Council Regulation (EC) No 2007/2004 to enhance the right of assistance and to suppress vessels engaging in the activities of migrant smuggling. The EU has established through this regulation the agency known as Frontex, which assists States in the control and surveillance of external borders.<sup>56</sup> Importantly, the obstacles to the right of assistance do not emerge in the context of the mechanism of the EU, Frontex. For instance, while the measures of assistance have been overlooked in the context of the right of assistance in Article 8(1) of the Protocol, Council Regulation (EC) No 2007/2004 defines a set of measures of assistance that can be rendered by Frontex in the area of border control.<sup>57</sup> Moreover, Frontex has an

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<sup>56</sup> Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1, Article 8 (1).

<sup>57</sup> Ibid, Articles 2, 3 and 8.

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autonomous budget to assist Member States,<sup>58</sup> while the right of assistance in the Protocol can be compromised and ignored when the requested State does not have the means to provide assistance.

As a consequence of these advantages and the remarkable success of Frontex in assisting EU Member States to combat the activities of migrant smuggling,<sup>59</sup> the future law should authorise Frontex to provide assistance to all States that are parties to the Migrant Smuggling Protocol rather than just EU members as is currently the case. In particular, Article 14 of Council Regulation (EC) No 2007/2004, which establishes Frontex, provides that Frontex can facilitate operational cooperation between Member States and third-party countries as part of the European Union's external relations policy.<sup>60</sup> However, since Frontex is a European solution to illegal migration<sup>61</sup> it might only act in this regard and does not consider other purposes in the Migrant Smuggling Protocol, such as protecting the rights of smuggled migrants. For instance, it is often the case that persons on board the vessels intercepted by Frontex are forced to return to their countries of origin, where they may be subjected to torture or inhuman or degrading treatment.<sup>62</sup> Therefore, it is necessary to emphasise the obligation to protect human rights of smuggled migrants, e.g. by incorporating a reference their rights, and

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<sup>58</sup> Ibid, para 16 of the preamble.

<sup>59</sup> For instance, the Spanish authorities requested the assistance from Frontex to suppress the fishing boats which smuggle migrants from African countries to the Canary Islands. Frontex carried out the operation 'Hera 2008' that was run from February to December 2008. During this operation, 5969 migrants from Liberia, Mauritania, Senegal and Guinea were sent back and 360 smugglers arrested. Another example is the operation 'Nautilus 2008' that was requested by Malta and Italy to combat the activities of migrant smuggling from Libya. Frontex statistics published that 15 smugglers were arrested during this operation. See Frontex < [http://www.frontex.europa.eu/newsroom/news\\_releases/art40.html](http://www.frontex.europa.eu/newsroom/news_releases/art40.html)> accessed 30 March 2011.

<sup>60</sup> 'Council Regulation (EC) No 2007/2004 (n56) Article 17.

<sup>61</sup> Jimrénez (n5) pp 45-46.

<sup>62</sup> Efthymios Papastavridis, 'Fortress Europe' and FRONTEX: Within or Without International Law?' (2010) 79 *Nordic J Intl L* 75.

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especially the right to non-refoulement, in the Frontex authorisation, which aims to assist parties to the Protocol to intercept vessels engaged in migrant smuggling.

### **6.2.5. The rights of smuggled migrants in the future law**

It has been argued in Chapter 5 of this study that smuggled migrants are not prosecuted for illegal leaving because they have the right to leave under certain human rights instruments such as Article 12 (2) of the ICCPR. However, States that are parties to the Protocol but not to the ICCPR are not obligated to pay due regard to the right not to be prosecuted for illegal leaving. To address this issue, the right of smuggled migrants not to be prosecuted for illegal leaving must be incorporated within Article 5 of the Protocol. This article must refer specifically to such a right instead of the general protection currently given in this article and that can be undermined by Article 6(4) of the Protocol. On the basis of this amendment, the laws of States that aim to prosecute smuggled migrants for illegal leaving, as discussed in Chapter 5 of this study, will unquestionably constitute a violation of Article 5 of the Protocol.

The future law must also explicitly include particular rights that can address the violations resulting from migrant smuggling and its implications. First, since migrant smuggling by sea has a serious impact on the lives of smuggled migrants, the right of smuggled migrants to be rescued at sea must be clearly codified, as well as address the weaknesses in the international law of rescue that might undermine this right. For instance, as mentioned in Chapter 5, the right to rescue at sea has often not been protected on the high seas for reasons related to the discretionary authority of the captain of the discovering vessel and the absence of a place of disembarkation in the international law of sea.

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Therefore, the law should incorporate the right to rescue without any restrictions that can be misused by the captain of the discovering vessel. One such option is an amendment to Article 8(5) of the Protocol. For example, it is possible to add the words ‘such as rescue’ after the word ‘necessary’. As a result of this amendment, smuggled migrants are explicitly entitled to the right to be rescued at sea. Furthermore, the phrase ‘imminent danger’ in the same paragraph must be defined in Article 3, entitled ‘Use of terms’. For example, the phrase can be defined as ‘the existence of a vessel or a smuggled migrant in a condition where death or physical harm could be expected normally at sea because of this condition’. Under this definition, the cases of sinking, bad weather, breakdown of a vessel’s engine, and running out of food and water would all fall within the meaning of ‘imminent danger’. Nonetheless, the consideration of normal expectations included in the definition makes the captain of the discovering vessel unlikely to evade responsibility for rescue in other similar conditions.

In regard to the place of disembarkation, the law of the sea does not establish precisely where rescued people such as smuggled migrants are to disembark.<sup>63</sup> Thus, this gap that affects the rights of migrants smuggled by sea must be filled. In this regard, the future law must reflect State practice in this context and codify the next port of call as the place of disembarkation. There should also be alternatives within the future law, such as the transit State or the flag State of the rescuing vessel when the next port of call cannot meet the standards of a place of safety found in the IMO Guidelines on the Treatment of Persons Rescued at Sea.

Another possibility would be for the future law to adopt the approach of Frontex in regard to the place of disembarkation. The Guidelines for Frontex Operations at Sea

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<sup>63</sup> See chapter 5 section 5.2.2.1.2.

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suggest that unless the place of disembarkation is specified in the plan of each mission, priority should be given to disembarkation in the country from which the migrants departed or through the territorial waters or search and rescue region in which the migrants transited.<sup>64</sup> If this is not possible, the Guidelines go on to state, disembarkation should take place in the closest place where the safety of the persons can be ensured.<sup>65</sup> This multiplicity of places encourages the captain of the vessel to undertake the rescue at sea. However, the approach of Frontex should be framed in obligatory language, giving priority to the next port of call as the place of disembarkation.

Second, the right to physical and psychological care contributes to preserving lives, to reducing the suffering and harm caused to victims, and to assisting in their recovery and rehabilitation;<sup>66</sup> therefore, it is inextricably tied to the status of the smuggled migrants being victims of violations resulting from the smuggling process. Although this right is implied in Article 16 of the Protocol,<sup>67</sup> it should be incorporated explicitly within its provisions, as is the case in the Trafficking Protocol. The explicit reference to the right enables smuggled migrants to obtain psychological and medical care from the States that are parties to the Protocol.

Third, according to the provisions of the Protocol, smuggled migrants must be returned without delay. However, smuggled refugees need not be returned according to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement in Article 19 of the Migrant Smuggling Protocol. This

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<sup>64</sup> Commission of the European Communities, 'Guidelines for Frontex operations at sea, ANNEX, (4.1) <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0658:FIN:EN:PDF>> accessed 20 March 2013.

<sup>65</sup> Ibid.

<sup>66</sup> Legistatives Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto (United Nations 2004) para 62.

<sup>67</sup> See chapter 5 section 5.2.2.2.

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protection must also be offered to smuggled migrants who fall outside the 1951 Convention but whose lives are at risk in their State of origin or the State from which they journeyed. To provide such protection, a passage should be added to Article 18 of the Protocol on the return of smuggled migrants that provides as follows: ‘Smuggled migrants shall not be returned to a State where there is a real possibility they will be exposed to torture or cruel, inhuman, or degrading treatment or punishment’. This amendment means that any decision to return a smuggled migrant must take into account whether the proposed return would violate the rights of the smuggled migrant, in particular the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Alternatively, the phrase ‘or in human rights law’ should be added to Article 19(1) of the Protocol after the word ‘therein’. The result of this amendment is that the right to non-refoulement is then not restricted merely to the Refugee Convention but extends also to human rights instruments that also refer to this right, such as Article 7 of the ICCPR, Article 3 of the ECHR, and Article 3(1) of CAT. Thus, smuggled migrants who are not refugees according to the 1951 Convention can be entitled to the right to non-refoulement provided they meet the requirements in these articles. However, the weakness in this amendment is that the right to non-refoulement outside of the Refugee Convention cannot be observed by States that are parties to the Protocol and not parties to these other international human rights instruments. Finally, carriers’ provisions in Article 11 of the Protocol must be balanced in a way that ensures the right to non-refoulement outside of the Refugee Convention. For example, there should be a paragraph in this article that obligates parties to the Protocol not to impose sanctions on carriers when they transport illegal travellers whose lives are exposed to torture or cruel, inhuman, or degrading treatment or punishment in their State of origin or the State from which they journeyed. This amendment is similar to Article 26(1) of

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the Schengen Agreement that does not oblige EU States to impose obligations on carriers in respect of persons who are entitled to protection under the Refugee Convention.<sup>68</sup> However, Article 26(1) of the Schengen Agreement seems not to be effective in practice because it depends on private carriers making their own assessment of whether an illegal traveller is entitled to this protection or not.<sup>69</sup> Therefore, genuine refugees might not obtain this protection because of a lack of expertise and training or even reluctance on the part of carriers who would bear the risk of making a wrong assessment and therefore are likely to be overly strict.<sup>70</sup> By analogy, the amendment proposed to Article 11 of the Protocol – as shown above – will face the same fate in practice. As an attempt to address this problem, parties to the Protocol must provide training to carriers officers that enable them to distinguish between economic migrants and those who need protection because their lives are at risk in their State of origin. To this end, the phrase ‘such as carrier officials’ should be added after the words ‘relevant officials’ in Article 14(1) of the Protocol concerning the training of officials in preventing migrant smuggling and respecting the rights of smuggled migrants.

There are no specific rules in international law that regulate the detention of smuggled migrants at sea.<sup>71</sup> Consequently, a comprehensive legal system must be established to regulate the particular terms and conditions under which smuggled migrants on board smuggling vessels navigating the high seas could be subject to detention. Moreover, the measure of detention should also be subject to proper procedural guarantees, such as judicial review.

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<sup>68</sup> Heijer, *Europe and Extraterritorial Asylum* (n28) 173.

<sup>69</sup> *Ibid*, 174.

<sup>70</sup> *Ibid*, 174-76.

<sup>71</sup> Kees Wouters and Maarten D Heijer, ‘Case Comment: The Marine I case: A Comment’ (2009) 22 *Intl JRL* 1, 15-16.

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In the context of the right of smuggled migrants to be returned to a specific State, the links of the place of birth and the place in which the smuggled migrants had been resident over a longer period, based on Article 12(4) of the ICCPR, must be added to Article 18 of the Protocol. Such an amendment would contribute to reducing the categories of smuggled migrants who are stateless because they cannot meet the requirements in paragraphs (1) and (2) of Article 18 of the Protocol—namely, possession of a nationality or permanent residence.

In addition, the measures implementing the right to safe return in Article 18(5) of the Migrant Smuggling Protocol must be developed further. In order to ensure compliance with human rights standards in the context of the return process, the standards set out in the Twenty Guidelines of the Council of Europe on Forced Return might help to ensure the safe return of smuggled migrants. These standards have been recommended by the UN guidelines concerning implementation of the Migrant Smuggling Protocol.<sup>72</sup> For instance, the reference to the standard of voluntary return<sup>73</sup> reduces the risk of violations of the human rights of smuggled migrants in comparison to forced return.<sup>74</sup> Clearly, resistance by smuggled migrants is avoided in the case of voluntary return, and then violations of human rights resulting from measures used to enforce the return order are also avoided. Furthermore, the fitness of the returnee to travel and the use of only properly trained escorts<sup>75</sup> must be ensured in order to protect the safety and dignity of the smuggled migrants during the return process.<sup>76</sup> Finally,

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<sup>72</sup> UNODC, ‘Model Law against the Smuggling of Migrants’ (United Nations 2010)105; McAdam and others, ‘International Framework for Action to Implement the Smuggling of Migrants Protocol’ (n10) 33-34.

<sup>73</sup> Twenty Guidelines of the Council of Europe on Forced Return (Adopted by the Committee Ministers on 4 May 2005 at the 925th meeting of the Ministers’ Deputies) guideline 1.

<sup>74</sup> UNODC, ‘Model Law against the Smuggling of Migrants’ (n72) 105.

<sup>75</sup> Twenty Guidelines of the Council of Europe on Forced Return (n73) guidelines 16-18.

<sup>76</sup> UNODC, ‘Model Law of the Smuggling of Migrants’ (n72) 106.

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force should be restricted, particularly when the involuntary return takes place.<sup>77</sup> The linkage between the rights to safety and to dignity during the process of return and the restriction on the use of force are already clearly supported by current State practice. For example, the UNHCR ExCom in conclusion no. 85 has deplored practices of return that endanger the physical safety of persons not in need of international protection.<sup>78</sup> In this regard, it has emphasised that ‘irrespective of the status of the persons concerned, returns should be undertaken in a humane manner and in full respect of their human rights and dignity and without resort to excessive force.’<sup>79</sup> Also, the Council of Europe’s Parliamentary Assembly has urged the governments of Member States to introduce into their national law specific regulations that forbid a number of practices during deportation, such as the arbitrary or disproportionate use of force, any form of restraint other than handcuffs on the wrists, and any use of poisonous gas or stun gas.<sup>80</sup>

In conclusion, these various measures for ensuring the safety and dignity of smuggled migrants during the return process must be incorporated within the rights of smuggled migrants.

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<sup>77</sup> Stefanie Grant, ‘The Legal Protection of Stranded Migrants’ in Ryszard Cholewinski and others, *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C. Asser Press 2007) 44. See also, Twenty Guidelines of the Council of Europe on Forced Return (n73) guideline 19.

<sup>78</sup> UNHCR, Conclusion on International Protection: Conclusion No. 85 (XLIX) (9 October 1998).

<sup>79</sup> Ibid, bb.

<sup>80</sup> Council of Europe: Parliamentary Assembly, ‘Recommendation 1547 (2002) 1 on the Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity’ para 13 (ix) (g).

### 6.3. Monitoring of the future law

Although the vast majority of States have ratified the Migrant Smuggling Protocol,<sup>81</sup> a significant number of them do not have dedicated action plans or strategies to put the Protocol into force.<sup>82</sup> This failure can be a result of unwillingness or inability on the part of these States. At the same time, there is no effective mechanism in the Protocol to deal with such failure.<sup>83</sup>

The future law to combat migrant smuggling therefore needs a monitoring mechanism in order to ensure the effective implementation of that law. In particular, the Secretariat of the Conference of the Parties of UNCTOC has acknowledged that it is necessary to establish an effective mechanism to review the implementation of the Migrant Smuggling Protocol, comprehensively assess progress and gaps in the capacity of States and provide information in order to take informed decisions on the provision of technical assistance.<sup>84</sup> Such a mechanism reflects the dynamic function that must be performed by the future law that was mentioned earlier.<sup>85</sup>

In doing so, it is possible to adopt the approach of one of the existing monitoring mechanisms in international law. The Working Group on Bribery in International Business Transactions, which is the monitoring body of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, provides one

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<sup>81</sup> The number of the parties in the Protocol is currently 138. See < <http://treaties.un.org/Pages/>> accessed 24 November 2013.

<sup>82</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n10) para16.

<sup>83</sup> See chapter 4 section 4.1.1.2.

<sup>84</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Possible Mechanisms to review implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: Note by the Secretariat,' UN Doc CTOC/COP/2008/3(26 Aug 2008) para 35.

<sup>85</sup> See chapter 6 section 6.1.1.

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such example mechanism.<sup>86</sup> In the context of the monitoring of the States Parties to this convention, the Working Group adopts a system of self and mutual evaluation.<sup>87</sup> The first stage of the system involves sending questionnaires to the States to evaluate whether the domestic legislation through which the parties implement the Bribery Convention meet the standards set by the Convention.<sup>88</sup> In the second stage, the Working Group pays a visit to the State party and a draft report is prepared by the secretariat and discussed with the government.<sup>89</sup> A similar such system must be adopted by the future law in order to perform a number of functions.

First, the monitoring mechanism can improve the implementation of the law by increasing the understanding of the relevant obligations and how they can be fulfilled. To this end, States would be required to report, upon the request of the monitoring mechanism, on ‘measures taken’ to give effect to the future law. The monitoring mechanism would examine these reports and would have the authority to decide that the government of a State party is not in compliance with the provisions of the law. Thereafter, the monitoring mechanism would have the following two options available to it:

1. A number of sessions could be held between the monitoring mechanism and the State to assist the latter in complying with the provisions of the future law.

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<sup>86</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997 and entered into force 15 February 1999) Article 12.

<sup>87</sup> Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Negotiating Conference on 21 November 1997) Article 12, para 34.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

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2. The monitoring mechanism would be empowered under a provision within the future law to suspend the membership of the State in question if this was deemed necessary. Compliance with international rules cannot be achieved solely through the existence of a monitoring mechanism; the monitoring body itself should have the capacity to enforce sanctions.<sup>90</sup> The procedure of suspension as a form of sanction can be a powerful tool to oblige States to comply with their obligations. In particular, States often care deeply about their reputations and about what other States think of them.<sup>91</sup> There is no doubt that the reputation of a State would be affected as a consequence of such a suspension.

Second, the response to migrant smuggling in most States is significantly hampered by limited technical resources, equipment, knowledge, expertise and training for properly investigating and prosecuting transnational crimes.<sup>92</sup> For example, Thailand has acknowledged a difficulty in controlling its national borders because of a lack of funding and personnel.<sup>93</sup> The monitoring mechanism of the future law to combat migrant smuggling must assist such States in overcoming the issue of lack of resources. Nevertheless, this function depends on the willingness of the developed countries. The monitoring mechanism should first obtain the acceptance of the developed countries to provide a measure of support for developing countries.

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<sup>90</sup> Gallagher, *The International Law on Human Trafficking* (n15) 465.

<sup>91</sup> Ibid.

<sup>92</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n10) para37.

<sup>93</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime: consolidated information received from States for the second reporting cycle: Report of the Secretariat' UN Doc CTOC/COP/2006/7/Rev.1 (18 August 2008) para25.

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Third, the dynamic nature of organised crime in general represents one of the key problems hindering efforts to combat this crime effectively.<sup>94</sup> In order to overcome this issue, a dynamic and adaptable international response is required.<sup>95</sup> Consequently, any action to combat the activities of migrant smuggling must be based on an assessment of both the situation and the existing capacities to respond to it.<sup>96</sup> Thus, the monitoring mechanism of the future law should take this into account in assessing any such measures to combat migrant smuggling. Such an assessment can determine whether or not the existing measures are able to combat new situations or developments that arise in the arena of migrant smuggling. To put it more simply, the monitoring mechanism should operate to find gaps between international rhetoric and the actual practices, strategies and means used by migrant smugglers. To close these gaps, the monitoring mechanism can suggest new measures or craft technical and other solutions that are able to combat the activities of migrant smuggling effectively.

In sum, there is a clear need for a change in the international monitoring system concerning the law combating migrant smuggling. The mechanism of monitoring within the future law must not be nominal or merely a tool to report or coordinate meetings among States, such as the Conference of the Parties of UNCTOC. Rather, the new mechanism should be established explicitly within the future law and entrusted with functions that lead to the effective implementation of that law. Moreover, it must be accorded actual powers that enable it to achieve its functions.

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<sup>94</sup> André Standing, 'Transnational Organised Crime and the Palermo Convention: A Reality Check' (International Peace Institute, December 2012)10.

<sup>95</sup> Ibid.

<sup>96</sup> McAdam and others, 'International Framework for Action to Implement the Smuggling of Migrants Protocol' (n10) para36.

### **Conclusion**

The substantive provisions of the Protocol must be able to achieve its purposes. This can be achieved through a number of amendments that represent the proposed future law on combating migrant smuggling.

First, in the context of the criminal framework of migrant smuggling, the element of action in the legal definition of the smuggling of migrants needs to be tightened and improved through an explicit reference to an act that leads to illegal entry, and also the removal of the element of benefit, which can be abused by smugglers. Furthermore, the possibility of the act of smuggling becoming one of trafficking as soon as the element of exploitation appears must be mentioned in a separate paragraph in the future law. The offences related to migrant smuggling must be established comprehensively. Finally, the scope of application of the Protocol must be expanded to capture migrant smuggling that is undertaken by a person who may not be part of an organised criminal group.

Second, in the framework of the prevention measures, the law on combating migrant smuggling must include various definite measures to prevent these activities. The measures for strengthening border controls must be incorporated explicitly and not be left to the discretion of States. Furthermore, there should be specific measures that would contribute to prevent migrant smuggling by air.

Third, in the framework of cooperative measures, the role of Europol regarding the facilitation of information exchange between the States of the European Union in relation to organised crime (including migrant smuggling) should be adopted to overcome the issue of a lack of trust between the parties to the Protocol.

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Fourth, in the field of the rights of States to take measures to combat migrant smuggling, the right of interception must be defined precisely by filling in the gaps that currently exist in the Migrant Smuggling Protocol. For instance, the concept of appropriate measures in paragraphs (2)(c) and (7) of Article 8 of the Protocol must include measures that aim to protect and collect evidence concerning the offence of the smuggling of migrants. Furthermore, following the elapse of one hour of time without a response by the flag State of a vessel suspected of migrant smuggling, the requesting State should have the right to intercept the vessel in question. The deficiencies concerning the right of assistance in Article 8(1) of the Protocol should be addressed. The future law must clearly call upon parties to the Protocol to enter into bilateral agreements between them to identify, for example, the measures of assistance.

Fifth, the human rights dimension in the Migrant Smuggling Protocol must be detailed and expanded to include rights that address violations resulting from the smuggling process and its implications. For example, the right of smuggled migrants not to be prosecuted for illegal leaving must be mentioned explicitly within Article 5 of the Protocol. Another example is the right of non-refoulement in Article 19 of the Migrant Smuggling Protocol must be expanded to include the smuggled migrants who are not refugees, but who need protection because their lives are at risk in their State of origin.

Finally, the establishment of a monitoring mechanism to ensure the effective implementation of the substantive rules would help ensure the dynamic role of the future law on combating migrant smuggling.

## 7. Conclusion

### 7.1. Research summary and findings

Since the smuggling of migrants in international law has not been addressed by earlier conventions or agreements,<sup>1</sup> the Migrant Smuggling Protocol is the only instrument directly addressing these activities. For this reason, this thesis has restricted the scope of its research specifically to this Protocol. The thesis asked whether the substantive rules of the Migrant Smuggling Protocol are capable of achieving the purposes of the Protocol as laid out in its Article 2, particularly the prevention and combating of migrant smuggling and the protection of the rights of smuggled migrants. This question has been approached using doctrinal legal research aimed at critically analysing and evaluating the Protocol's provisions through a comprehensive legal framework. The legal framework in this thesis includes a critical analysis of legal rules that define the smuggling of migrants, the legal features of the actors who engage in these activities, the obligations and rights of the parties and, finally, the rights of smuggled migrants themselves. This framework has been examined in Chapters 2–5. The amendments that address the deficiencies explored in these chapters have been proposed in Chapter 6. Chapter 1 provided an introduction to the study, while the present chapter provides a brief final conclusion to the study.

Despite the great harm and risk to the States concerned and the smuggled migrants themselves that result from migrant smuggling, as are mentioned in the Preamble of the Protocol, this study found that the legal framework or rules of the

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<sup>1</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 361.

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Protocol are weak and insufficient. As Brolan rightly points out, the Protocol ‘could amount to nothing more than a list of good intentions.’<sup>2</sup> This study finds that the Protocol is not able to combat migrant smuggling effectively and to protect the rights of smuggled migrants.<sup>3</sup>

### 7.2. The way forward

This thesis focused on the substantive rules in the Migrant Smuggling Protocol, and therefore further research could be undertaken on the procedural rules in UNCTOC that regulate transnational organised crimes, including migrant smuggling. What is important is that the Protocol provides a solid platform for such further research. Article 1(1) of the Protocol states that it supplements UNCTOC and is to be interpreted together with this convention. Moreover, it should be noted that UNCTOC ‘is not an operational agreement which directs specific crime-fighting activities.’<sup>4</sup> It represents a general framework of the procedural rules that are applicable to all transnational organised crimes.<sup>5</sup> Accordingly, focus should be directed on how the procedural rules in UNCTOC are specifically interpreted and implemented in the context of the activities of migrant smuggling, which have not received sufficient attention in studies highlighting these activities. Furthermore, the smuggling of migrants always has a transnational

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<sup>2</sup> Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’ (2002) 14 Intl JRL 561. See also, Anne Gallagher, ‘Human Rights and new UN Protocol on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 HRQ 975.

<sup>3</sup> These represent the key purposes of the Protocol in Article 2.

<sup>4</sup> André Standing, ‘Transnational Organised Crime and the Palermo Convention: A Reality Check’ (International Peace Institute, December 2012) 10.

<sup>5</sup> UNGA ESC, ‘Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime’ (12 April 1999), UN Doc A/AC. 254/13. See also, Carlos V Corach, ‘Transnational Jurisdictions: a Challenge for the 21 st Century’ (2001) 26 Intl Legal Prac 133,136.

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nature<sup>6</sup> and therefore more attention should be focused on exploring the obstacles that might arise in implementing these procedural rules in UNCTOC in relation to the offence of the smuggling of migrants. It is necessary to uncover the impact of the complex nature of the smuggling of migrants on these rules. Such future research is crucial and complementary to this thesis, because the implementation of some of the substantive rules in the Protocol depends on the procedural rules in UNCTOC. For example, the rules on criminalisation in Article 6 of the Protocol cannot be put into practice unless, for example, the rules of jurisdiction, extradition and investigation in UNCTOC<sup>7</sup> are applied in the context of migrant smuggling. Consequently, the following represent a few of the issues that ought to be critically analysed in further research.

The issue of jurisdiction is not a substantive rule that has been addressed in any of the provisions of the Protocol. However, universal jurisdiction was discussed in this thesis in the case of stateless vessels engaged in migrant smuggling on the high seas, where an intercepting State does not have ordinary criminal jurisdiction to adopt enforcement measures such as arrest and trial. In other words, the issue of universal jurisdiction has been examined in this thesis because of the urgent need to address the issue of stateless vessels, an issue that can be abused by smugglers to evade criminal liability. In further research, the issue of jurisdiction in Article 15 of UNCTOC could be examined as a principal question in the context of migrant smuggling. For example, paragraph 4 of this article states that ‘each State party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite

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<sup>6</sup> Tom Obokata, ‘Smuggling of Human Beings from A Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17 Intl JRL 394, 397.

<sup>7</sup> See Articles 15, 16, 18 and 19 of UNCTOC.

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him or her.’ Accordingly, it is worth considering whether or not this article can constitute a legal basis for universal jurisdiction in relation to the adoption of enforcement measures by a State party in whose territory a smuggler is found. A study by Clark highlighting a number of procedural rules in UNCTOC (including universal jurisdiction on the basis of Article 15(4)) is worth noting in this regard.<sup>8</sup> Another important issue is that the smuggling of migrants is often conducted across borders in such a way that more than a single State is affected. It may be asked how to define the competent State in light of the rules of jurisdiction, particularly Articles 15(5) and 21 of UNCTOC? In order to answer this question and research the issue of jurisdiction in general in the context of migrant smuggling, it would be important to review, inter alia, the work by Obokata entitled *Transnational Organised Crime in International Law* and the study by Pacurar that examines a number of criminal procedures in the context of migrant smuggling.<sup>9</sup>

Article 16 of UNCTOC sets out the procedure of extradition that is applicable to those involved in migrant smuggling. However, there are a number of limitations in this article affecting the procedure of extradition. These limitations in Article 16 must be examined when extradition relates to migrant smugglers. For example, Article 16(1) stipulates that extradition occurs when ‘the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.’ In this case, the offence of the smuggling of migrants must be punished in the requesting State as well as the State receiving the request. However, it can be asked in the context of this article whether the punishment should be equal in both States or

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<sup>8</sup> Roger S Clark, ‘The United Nations Convention against Transnational Organised Crime’ (2004) 50 *Way L Rev* 161.

<sup>9</sup> Tom Obokata, *Transnational Organised Crime in International Law* (HRT Publishing Ltd 2010); Andi Pacurar, ‘Smuggling, Detention and Expulsion of Irregular Migrants: a Study on International Legal Norms, Standards and Practices’ (2003) 5 *EJ Migration & L* 259.

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whether extradition could occur even if the smuggling of migrants was treated as a misdemeanour in one State and a felony in the other. In particular, Article 16(7) provides that the minimum penalty requirement for extradition is one of the conditions that can be considered by a State receiving the request. Another limitation is that the offence of the smuggling of migrants under Article 16(3) must be included as an extraditable offence in every current and future extradition treaty between States parties. Kemp argues that if there is no extradition treaty between States parties and the State receiving the request requires the existence of such a treaty, UNCTOC would be the legal basis for extradition under Article 16(4) in such a case.<sup>10</sup> This argument may well be correct provided that the State receiving the request at the time of deposit of its instrument of ratification, acceptance, approval of or accession to UNCTOC informs the Secretary-General of the United Nations that it will accept this convention as the legal basis for cooperation on extradition with other parties to UNCTOC.<sup>11</sup> However, what would happen if a State party that receives a request requires an extradition treaty but does not have a bilateral agreement with the State party making the request and did not inform the Secretary-General of the United Nations that it will adopt UNCTOC as the legal basis for extradition? Such cases have been pointed out in the meeting of the open-ended working group of government experts on international cooperation.<sup>12</sup> Obokata correctly argues that extradition in these cases is difficult to achieve in practice.<sup>13</sup>

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<sup>10</sup> Gerhard Kemp, 'The United Nations Convention against Transnational Organised Crime: A milestone in international criminal law' (2001) 14 S Afr J Crim Just 152, 164.

<sup>11</sup> See Article 16 (5) (a) of UNCTOC.

<sup>12</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Meeting of the open-ended working group of Government experts on international cooperation held in Vienna from 8 to 10 October 2008: Report of the Chairperson' CTOC/COP/2008/18 (18 February 2009) para 10.

<sup>13</sup> Obokata, *Transnational Organised Crime in International Law* (n9) 58.

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The Protocol places little emphasis on the rules of investigation and prosecution. Article 4 of the Protocol refers to these rules without providing any detail, unlike in regard to the issue of criminalisation, specified in Article 6 of the Protocol. Rules of investigation and prosecution have been detailed in Articles 11, 18, 19 and 20 of UNCTOC. In the context of prosecution, Article 11(1) of UNCTOC requires that offences established under the convention be liable to sanctions that take into account the gravity of the offences. This provision is flexible and open-ended, and therefore it is necessary to examine it in depth to find a clear standard that can be used to adjust sanctions for the offence of the smuggling of migrants and related offences. Inadequate or severe sanctions for these offences might impair the effectiveness of procedures of international cooperation with respect to extradition, as was mentioned above. As a consequence of the complex nature of transnational organised crimes, the procedure of investigation has been connected with other procedures, such as mutual legal assistance<sup>14</sup> and joint investigations.<sup>15</sup> Focus should be directed to find out how this investigation, based on cooperation, is implemented in the case of migrant smuggling. In her work *International Law on Human Trafficking*, Gallagher noted this issue in regard to trafficking cases.<sup>16</sup> The same approaches can by analogy be used to examine this issue critically in smuggling cases.

Finally, Schloenhardt generally observes that the current system of international law on transnational organised crime, particularly in relation to procedural criminal rules, leaves many loopholes for criminals.<sup>17</sup> Moreover, there is also a general

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<sup>14</sup> Article 18 of UNCTOC.

<sup>15</sup> Article 19 of UNCTOC.

<sup>16</sup> Anne Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010).

<sup>17</sup> Andreas Schloenhardt, 'Transnational Organised Crime and the International Criminal Court: Developments and Debates' (2005) 24 U. Queensland L.J. 93.

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reluctance on the part of States to cooperate in the context of these rules.<sup>18</sup> Consequently, Schloenhardt calls for the jurisdiction of the International Criminal Court to be extended to cover a number of transnational organised crimes, such as drug trafficking, smuggling of migrants, trafficking in persons and money laundering.<sup>19</sup> However, this solution is extremely difficult, if not impossible, to achieve in practice because of a number of practical and legal difficulties that have been elaborated by Boister.<sup>20</sup> Accordingly, the focus in any further research must be directed at identifying the advantages of establishing an international central mechanism for investigating, prosecuting and punishing transnational organised crimes, including the crime of smuggling migrants. In other words, a proposal for a Transnational Criminal Court could be one of the key objectives of such further research.

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Neil Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics' (1998) 3 J Armed Conflict L 27; Neil Boister, 'Treaty Crimes, International Criminal Court?' (2009) 12 N Crim L Rev 341.

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