

IRREGULAR MIGRATION TO EUROPE: A CASE STUDY OF THE GAMBIA AND SENEGAL

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE LL.M. IN
HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA

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21 October 2024.

ABSTRACT

The smuggling of migrants from The Gambia and Senegal to Europe has become a pressing issue, reflecting broader patterns of irregular migration driven by economic, social, and political factors. This phenomenon involves complex networks that exploit vulnerable individuals seeking better opportunities abroad. Migrants often undertake perilous journeys through diverse routes, facing significant risks including violence, exploitation, and even death.

The porous land borders between The Gambia and Senegal facilitate the movement of people, complicating efforts to combat smuggling. Despite international legal frameworks such as the Protocol Against the Smuggling of Migrants, enforcement remains challenging due to limited resources, inadequate border management systems, and the lack of a robust monitoring mechanism to assess the implementation of the Protocol.

Effective responses require comprehensive strategies that enhance border control, improve cooperation between states, and address the root causes of migration. Establishing mechanisms for monitoring implementation, fostering community engagement, and providing support for vulnerable migrants are essential steps. By addressing these challenges, both The Gambia and Senegal can better manage migration flows and protect the rights of individuals caught in smuggling networks while contributing to broader regional and international efforts to combat this issue.

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DECLARATION

I, **FATOU GAYE**, student number **u24093794** declare as follows:

1. I understand what plagiarism entails and I am aware of the University's policy in this regard.
2. The dissertation is my own original work and where someone else's work has been used, due acknowledgement has been given and reference made according to the requirements of the Faculty of Law.

Signature.....

Date: 21 October 2024

DEDICATION

To my late father and brother, may Allah grant you the highest Jannah.

ACKNOWLEDGEMENT

I want to express my heartfelt gratitude to the Centre for Human Rights at the University of Pretoria for their invaluable support and guidance throughout my master's journey.

I am especially thankful to my esteemed supervisors, Professor Magnus Killander from the Centre for Human Rights and Dr Papa Fara Diallo from the School of Political Science at the University of Gaston Berger. Their insightful guidance and expertise have brought this work to fruition.

To my family and friends, you have been my unwavering support system, providing the strength I needed at every turn. A special thanks to my dear mum—your love and presence have filled my life with joy and motivation.

To the Class of HDRA 2024, I am profoundly thankful for the support and solace you provided during the most difficult moments of my journey.

I also want to thank all my friends and everyone I've encountered along the way whose simple acts of kindness have enhanced my experience.

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR - African Charter on Human and Peoples' Rights

AU - African Union

CAT – Convention Against Torture)

CILEC – Interministerial Committee for the Fight Against Irregular Migration

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECOWAS – Economic Community of West African States

EU – European Union

EUTF – European Union Trust Fund

GCM – Global Compact for Safe, Orderly and Regular Migration

GID – Gambia Immigration Department

HRC – Human Rights Committee

ICCPR- International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICRMW – International Convention on the Rights of All Migrant Workers and Members of Their Families

IOM- International Organisation for Migration

MMU – Migration Management Unit

NAATIP- National Agency Against Trafficking in Persons

NNPE- National Agency for the Promotion of Employment

OHCHR – Office of the High Commissioner for Human Rights

SDGs - Sustainable Development Goals

SAR- International Convention on Maritime Search and Rescue

SNLMI - National Strategy to Combat Irregular Migration

UDHR – Universal Declaration of Human Rights

UNCLOS – United Nations Convention on Transnational Organised Crime

UNHCR – United Nations High Commissioner for Refugee

Chapter 1: Background to the study

1.1 Introduction

African migrants have historically been drawn to Europe due to its close geographical proximity and the allure of safety, economic opportunities, and a higher standard of living. The term "migrant" encompasses diverse groups of individuals with varying motivations, including economic migrants, refugees, asylum seekers, and displaced persons.¹ When migration happens outside the legal and regulatory frameworks of the countries involved, whether they are the country of origin, transit, or destination, it is considered irregular.² Since it is becoming increasingly difficult for Africans to arrive and work in Europe legally, tens of thousands of Africans attempt to circumvent border controls and enter as irregular migrants every year. Organised criminal networks have stepped in to profit from this clandestine activity. Europol reports that approximately 90% of irregular migration to Europe is facilitated by smugglers or criminal organizations. These groups offer services including transportation, fake identification, bribery of border officials, and assistance with settling in.³

In recent years, The Gambia and Senegal have been deeply affected by irregular migration, with a growing number of youth embarking on the dangerous 'backway' journey in search of better livelihoods and employment abroad. Gambian and Senegalese irregular migrants use different routes, but the most common route is the Western Mediterranean route, which connects Morocco to Spain and two Spanish enclaves of Melilla and Ceuta, which both share land borders with Morocco or through the Canary Islands which are located in the Atlantic Ocean and about 100 km West of Morocco at the nearest point.⁴ Another common route is the overland route through North Africa, where migrants enter the Maghreb from Agadez in Niger. From Agadez, migration routes split towards the Sebha oasis in Libya and Tamanrasset in southern Algeria. From southern Libya, migrants travel to Tripoli and other coastal cities or Tunisia. From the coast, migrants take boats to Malta or the Italian islands of Lampedusa,

¹ UN Migration 'Making migration work for all' < [Who is a Migrant? | International Organization for Migration \(iom.int\)](https://www.iom.int)> (accessed 1 September 2024).

² As above.

³ EU policies 'Understanding EU action against migrant smuggling' < [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659450/EPRS_BRI\(2021\)659450_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659450/EPRS_BRI(2021)659450_EN.pdf)> (accessed 1 September 2024).

⁴ Council of the European Union Migration flows on the Western routes available at < <https://www.consilium.europa.eu/en/policies/eu-migration-policy/western-routes/#:~:text=The%20Western%20Mediterranean%20route%20refers%20to%20irregular%20arrivals,became%20the%20most%20frequently%20used%20route%20into%20Europe.>> (accessed 27 September 2024).

Pantelleria, and Sicily.⁵ Between 2015 and 2017, the number of Gambians utilising the Central Mediterranean Route to Europe steadily rose, with 30,000 irregular migrants making the journey. This surge underscores the growing urgency of addressing the issue and its implications.⁶

The mode of transportation involves travelling in rickety fishing vessels and navigating through the hazardous Sahara terrain in unsuitable road trucks ill-suited for the long journey. The journey begins at the seashores of The Gambia, particularly from the well-known fishing coasts of Tanji, Bakau, and Barra.⁷ These locations serve as significant departure points for migrants. From there, migrants head towards the Senegalese fishing towns of Mbour and St. Louis, renowned for their reliable departure points towards the Canary Islands.⁸ Migrants also travel through Mauritania and Morocco to find their way to Spain.

The Gambia ratified the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crimes in 2003 (the Smuggling Protocol).⁹ However, The Gambia has not yet domesticated it, unlike the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol), which it has incorporated into the Trafficking in Persons Act, 2007. The domestication of the Palermo Protocol is a crucial step in addressing the issue of irregular migration, notably trafficking.

Senegal also ratified the Palermo Protocol in 2003 and domesticated it in 2005 as Act No 2005-06. Which covers both trafficking in persons and smuggling of migrants. However, Senegalese law provides severe penalties for actors involved in trafficking and the organisation of irregular migration. According to article 3 of Law No. 2005-06 illegal migration organised by land, sea

⁵ C Karagueuzian and A Chouchane Taking Africa's Irregular Migrants into Account: Trends, Challenges and Policy Options Africa Economic Brief available <[Economic Brief - Vol 5 Issue 1 - Taking Africas Irregular Migrants into Account Trends Challenges and Policy Options - 12 2014.pdf \(afdb.org\)](#)> (accessed 5 July 2024).

⁶ IOM Gambia 'Interim Country Strategy 2022-2023' <[https://gambia.iom.int/sites/g/files/tmzbd11631/files/documents/IOM%20The%20Gambia%20Interim%20Country%20Strategy%202022-2023.pdf](#)> (accessed 12 August 2024).

⁷ O.E. Awosusi, O.O. Olagbaju, L.E Ogbuleke. (2021). Human Trafficking and Tales of "Backway" Returnees in the Gambia. In: Hoffman, A.D., Abidde, S.O. (eds) Human Trafficking in Africa. Springer, Cham. [https://doi.org/10.1007/978-3-030-82163-0_11](#) (accessed 5 July 2024).

⁸ As above.

⁹ United Nations Treaty Collection [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en](#) (accessed 5 May 2024).

or air shall be punishable by five to ten years imprisonment and a fine of 1,000,000 to 5,000,000 and the national territory serves as a zone of origin, transit or destination.¹⁰

This comprehensive research initiative is dedicated to uncovering any inadequacies within the Smuggling Protocol and other national laws and policies in The Gambia and Senegal. The primary objective is to evaluate the effectiveness of these regulations in addressing the pervasive issue of smuggling migrants from The Gambia and Senegal to Europe. The potential impact of this research is far-reaching, as it has the capacity to yield in-depth analysis and recommendations aimed at effectively combating this challenge, ultimately contributing to a safer and more regulated migration process.

1.2 Problem Statement

The Government of The Gambia adopted a Migration Policy 2020-2030, which provides a roadmap for the government on migration management governance and other related issues, including strategies for preventing the smuggling of migrants and the protection of returnees.¹¹ However, the lack of a specific regulatory and legal framework to address the issue is what is triggering the illegal trade of smuggling of migrants. The policy indicates three main strategies to combat the smuggling of migrants: adopting a legal framework that will seek to interdict smugglers and protect the migrants and enhance regional and international cooperation on information, intelligence, and data exchange to counter migrant smuggling.¹²

However, aside from the general policy on migration, there is no specific policy to address the issue, nor is there a particular law criminalising the smuggling of migrants, unlike trafficking in persons, which has specific legislation referred to as the Trafficking in Persons Act, 2007 and it establishes an agency under the Ministry of Justice to handle such issues.

In Senegal, the government has approved the National Strategy to Combat Irregular Migration in Senegal 2023-2033.¹³ This plan aims to prevent irregular migration, manage borders, crack down on traffickers, support migrants, and help them reintegrate successfully.¹⁴ Senegal's

¹⁰ Law No. 2005-06 of 10 May 2005 on the fight against trafficking in persons and similar practices and the protection of victims.

¹¹ National Migration Policy of The Gambia <[National Migration Policy - MoFA \(diaspora.gm\)](#)> (accessed 5 May 2024).

¹² As above.

¹³ Clingendael 'Fighting for a future: political unrest and migration in Senegal' <https://www.clingendael.org/sites/default/files/202405/Clingendael_Alert_Senegal_immigration_final.pdf> (accessed 31 August 2024).

¹⁴ n 10 above.

approach to migration is broader and more focused than The Gambia's. However, both countries face significant challenges in implementing their plans and rely on external donors for funding.

1.3 Purpose of the Study

The study seeks to critically assess and enhance the legal frameworks governing migrant smuggling in The Gambia and Senegal. By identifying gaps and proposing actionable solutions, the research aims to contribute to more effective prevention and protection measures that would deter nationals from these countries from embarking into this dangerous journey.

The research will also endeavour to undertake a comprehensive analysis of irregular migration by scrutinising the Smuggling Protocol on how it balances the fight against smuggling with the protection of migrants' rights. This is crucial, as migrants may face criminalisation or victimisation due to their status. The study helps clarify the legal definitions and frameworks surrounding migrant smuggling as set out in the Smuggling Protocol. This includes the obligations of states to prevent and combat smuggling, protect the rights of migrants, and promote international cooperation.

1.4 Research Question

The main question of the research is whether the deficiencies in the Smuggling Protocol are the primary reason for the lack of adequate laws and policies to combat the smuggling of migrants in The Gambia and Senegal. This is the main driving force that motivates people to take part in this journey. The following sub-questions would help in answering the question:

- i. What gaps and shortcomings in the Smuggling Protocol as an international human rights instrument hinder its ability to effectively combat the smuggling of migrants from a human rights standpoint?
- ii. What are the gaps in national laws and policies in The Gambia and Senegal that effectively address the smuggling of migrants from these countries to Europe?
- iii. Is there effective international cooperation between states to address migration management issues such as smuggling of migrants?

1.5 Research Objectives

The main objective of the study is to critically analyse the Smuggling Protocol and assess whether it is comprehensive enough to protect the rights of migrants from a human rights perspective. The supporting objectives are as follows:

- i. Examine and analyse whether it sufficiently addresses the issue of smuggling of migrants from a human rights perspective
- ii. Examining the inadequacies in laws, policies, and other regulatory frameworks in The Gambia and Senegal.
- iii. Providing possible recommendations in addressing the deficiencies in the smuggling protocol and to countries of origin (especially The Gambia and Senegal) and destinations on how to better tackle irregular migration.

1.6 Literature Review

Irregular migration, characterised by the movement of individuals outside the regulatory norms of the country of origin or destination, is a significant issue in West Africa. The Gambia and Senegal, two neighbouring countries in this region, exhibit unique migration patterns and challenges. This literature review synthesises research on irregular migration in these countries, highlighting factors driving migration, its impacts, and policy responses.

According to Flahaux and De Haas, Africa is commonly perceived as a continent marked by significant migration and displacement caused by poverty, violent conflict, and environmental challenges.¹⁵ The perceptions about migration are often based on stereotypes rather than on well-researched empirical evidence. The article discusses the evolution and causes of migration within, to, and from Africa after the colonial period. This may be linked to the establishment of states and the creation of barriers to free movement following decolonization, as well as the increase of nationalism and tensions between state tensions.¹⁶ In recent years, the implementation of stringent visa regulations has also posed a significant obstacle to individuals seeking to migrate.

¹⁵ ML Flahaux and H De Haas 'African migration: trends, patterns, drivers' <<https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-015-0015-6>> (accessed 5 May 2024).

¹⁶ As above.

The reasons why people engage in irregular migration are numerous and complex. However, the primary motivation for this clandestine journey is the pursuit of better economic opportunities. High unemployment and underemployment among the youth have led to a deep sense of hopelessness and vulnerability, driving many to seek opportunities overseas, often through illegal migration to Europe.

The desire to migrate can be deeply rooted in culture and may be seen as a traditional part of growing up. When people are unable to fulfill this tradition due to being unable to move, it can lead to widespread frustration and a feeling of being stuck, which is locally known as nerves syndrome.¹⁷ Those making decisions about how to keep Gambians at home would benefit greatly from acknowledging and understanding the deep cultural, societal, and personal contexts within which individuals aspire to migrate. Awareness programmes and initiatives such as “Say No Way to Back Way”, are unlikely to have an impact in discouraging the youth from migrating to Europe.¹⁸ The European Union usually funds programmes in partnership with the International Organisation for Migration to combat irregular migration in the Gambia. From 2017 to 2022, the Gambia benefitted from the European Union Emergency Trust Fund.¹⁹ The desire to travel is often deeply intertwined with the idea of achieving status and embracing adulthood. When this connection is strong, the motivations to explore new places and experiences become more powerful than any efforts to confine oneself to familiar surroundings. Rather, Suso argues that even if there are systems in place to support the youth, they will still embark on the journey to Europe for economic growth²⁰ However, the counterargument is that this is not always the case, as assumptions indicate that the youth mostly migrate because of the weak systems and lack of better economic opportunities to stay in The Gambia. This point of argument will be further buttressed in the research paper.

In The Gambia, there is currently no regulatory framework that governs the smuggling of migrants. When the Migration Management Unit intercepts migrants' boats, they are typically warned about the dangers of the journey, but there are no specific penalties or punishments attached to this action. In cases where a boat capsizes, and the owner is caught, they are usually

¹⁷ CTS Suso ‘Involuntary Immobility and the Unfulfilled Rite of Passage: Implications for Migration Management in the Gambia, West Africa’ <<https://onlinelibrary.wiley.com/doi/full/10.1111/imig.12675>> (accessed 5 May 2024).

¹⁸ As above.

¹⁹ Gambia, EU, IOM Launch Joint Initiative for Migrant Protection and Reintegration <<https://www.iom.int/news/gambia-eu-iom-launch-joint-initiative-migrant-protection-and-reintegration>> (accessed 14 August 2023).

²⁰ n 17 above

charged and prosecuted for manslaughter under section 186 of The Gambia's Criminal Code and other charges such as conspiracy. This research paper aims to highlight the shortcomings of charging smugglers under section 186 of The Gambia's Criminal Code and would propose having specific legislation that regulates the smuggling of migrants.

1.7 Methodology

The research methodology for this study will be based on a doctrinal approach, focusing on desk research of available literature, including articles, laws, policies, and relevant journals. This approach will thoroughly examine and analyse existing legal and academic materials to gain comprehensive insights into the subject under study.

1.8 Structure or Chapter Overview

This research is organised into five chapters. The first chapter serves as an introduction, providing the background and context for the study. It includes the problem statement, scope and limitations, research questions and objectives, and a comprehensive review of relevant literature and theoretical frameworks.

The second chapter will analyse the various international human rights instruments and national laws and policies governing migrant smuggling in The Gambia and Senegal and evaluate whether the lack of a specific law criminalising the smuggling of migrants is the main driving force encouraging smugglers to continue the unscrupulous trade or business. The chapter will also assess the impact of the repeal of Nigerien Law 2015-36, which sought to criminalise the smuggling of migrants, to determine if it has further exacerbated the problem.

Chapter three will analyse the Smuggling Protocol and assess whether it has sufficiently protected the rights of smuggled migrants.

In chapter four, a comprehensive analysis will be presented, delving into the various human rights violations or abuses experienced by migrants at different stages of their journey, encompassing the points of the journey and how these violations are protected by a regime of international human rights instruments.

Chapter five will conclude and provide recommendations for all the relevant actors, including the international community, states, national human rights Commissions, CSOs, the media, and the local community, to apply a human rights-based approach to addressing the issue.

1.9 Limitations of the study

The lack of recent data on the smuggling of migrants from The Gambia and Senegal to Europe hampers research on this topic. This may be because the issue is sensitive and discreet. Another limitation is that conducting empirical research was impossible due to time constraints and the lengthy process required to obtain ethical clearance. The language barrier also poses a significant limitation to the study as it examines an anglophone and a francophone country. As a French-speaking nation, Senegal presents a considerable amount of key literature in the French language. While it is feasible to utilise digital tools to translate this literature into English, the persistent concern remains that the translated information may be distorted or lose some of its original meaning.

CHAPTER TWO:

Analysis of the legal frameworks on the smuggling of migrants

2.1 Introduction

Studying the legal frameworks concerning migrant smuggling entails delving into the complex network of international, regional, and national laws and agreements established to prevent, address, and penalise the facilitation of this illegal activity. This involves examining the specific legal provisions, enforcement mechanisms, and collaborative efforts across various jurisdictions to combat migrant smuggling. In this vein, this chapter will provide an overview of the international, regional and national legal frameworks that regulate the smuggling of migrants.

2.2 International Legal Frameworks

As part of member states at the various international human rights bodies, The Gambia and Senegal are bound by the laws and principles that dictate the promotion and protection of human rights, including the rights of migrants. While some of these international instruments do not explicitly provide provisions for the rights of migrants, they advance the principles under which the rights of migrants are respected, such as the principles of equality, dignity and non-discrimination.

Smuggled migrants frequently find themselves in vulnerable situations in many transit and destination countries due to their lack of official permission to be present in these territories. Nevertheless, they are entitled to a range of rights under international human rights law, which should be upheld without discrimination regarding their migration status. However, it is important to note that, in practice, these rights are not always fully realized domestically, and states do not always meet their international obligations.

Sustainable Development Goals

The Sustainable Development Goals (SDGs),²¹ adopted by all United Nations Member States in 2015, serve as a universal framework for fostering peace and prosperity for people and the planet. The 17 SDGs entail an urgent call for action from all nations in a collaborative global

²¹ United Nations Department of Economic Affairs <https://sdgs.un.org/goals> (accessed 25 August 2024).

effort.²² These goals acknowledge that eradicating poverty and addressing other forms of deprivation must be accompanied by initiatives to improve healthcare and education, decrease inequality, and boost economic growth.

Goal 10 aims to reduce inequalities within and among countries and emphasises lowering disparities.²³ Addressing migrant smuggling is crucial to this goal because it often exploits vulnerable individuals seeking better opportunities and safety. Migrant smuggling is also linked to Goal 16,²⁴ which is about peace, justice, and strong institutions, emphasising the need for effective, accountable, and transparent institutions. Smuggling networks often operate in environments where the rule of law and governance are weak, and tackling this issue requires strengthening legal frameworks and enforcement mechanisms to protect migrants and address the root causes of smuggling.

Global Compact for Safe, Orderly, and Regular Migration

The Global Compact for Safe, Orderly, and Regular Migration (GCM)²⁵ represents the inaugural intergovernmental agreement under the guidance of the United Nations to address all facets of international migration comprehensively. It is not legally binding. The GCM outlines 23 objectives for state action, accompanied by specific commitments to tackle contemporary migration challenges. The commitments and actions outlined in the GCM provide a framework for states to meet their human rights obligations in shaping migration governance policies. This framework aims to reduce the risks and vulnerabilities faced by migrants at different stages of their journey and to create an environment that actively empowers all migrants to integrate into society.²⁶ It aims to strengthen the transnational response to the smuggling of migrants and emphasises the need to enhance international cooperation, strengthen legal frameworks, and improve information sharing among countries to combat migrant smuggling effectively.²⁷ The goal is to disrupt smuggling networks and protect migrants from exploitation and abuse by criminal organisations.

²² As above.

²³ n 19 above, Goal 10.

²⁴ Goal 16.a aims to Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, particularly in developing countries, to prevent violence and combat terrorism and crime.

²⁵ Global Compact for Safe, Orderly and Regular Migration available <<https://documents.un.org/doc/undoc/gen/n18/451/99/pdf/n1845199.pdf>> (accessed 25 August 2024).

²⁶ As above.

²⁷ GMC, objective 9.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), the first document to indicate human rights, provides that all human beings are born free and equal in dignity and rights.²⁸ This article lays the foundation for respecting and recognising all human beings, including migrants, and it involves understanding how this is fundamental to migrant smuggling. The intersection between this principle and the smuggling of migrants can be understood through the human rights lens. The smuggling of migrants involves the illegal transportation of individuals across borders, often under dangerous and exploitative conditions. This activity directly undermines dignity and rights as migrants are exposed to several violations such as exploitation and abuse, denial of rights and lack of legal protection.

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is another core treaty outlining the range of economic, social, and cultural rights everyone is entitled to.²⁹ It contains several principles and rights, one of which is the principle of non-discrimination, which underscores that the rights contained in the covenant should be available to all individuals without discrimination.³⁰ Smuggled migrants usually face discrimination and marginalisation, especially at transit and destination points. Addressing smuggling is part of upholding their rights to equality and non-discrimination. Overall, addressing the smuggling of migrants aligns with the principles of ICESCR by ensuring that all individuals, regardless of their migration status, can enjoy economic, social, and cultural rights.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a crucial human rights treaty that protects the civil and political rights of all individuals,³¹ including smuggled migrants. It requires states to ensure that everyone within their territories has their rights respected, protected, and fulfilled. These rights include the right to life, freedom from torture, freedom from arbitrary arrest, and the right to liberty. The ICCPR also emphasises non-

²⁸ UDHR, art 1.

³⁰ ICESCR, art 2.

³¹ The International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations in 1966, is a key international treaty that protects a wide range of civil and political rights.

discrimination and obligates state parties to take positive measures to eliminate discrimination.³² Regardless of nationality, all individuals, including migrants, are entitled to these rights within a state's territory or jurisdiction.

United Nations Convention on the Rights of All Migrant Workers and Members of their Families

The United Nations Convention on the Rights of All Migrant Workers and Members of their Families (ICRMW) is an international treaty that protects the rights of migrant workers and their families. It emphasizes the link between migration and human rights. States that ratify or accede to the Convention undertake to apply its provisions by adopting necessary measures and ensuring that migrant workers whose rights have been violated may seek an adequate remedy.

Without legal status, migrant workers in irregular situations may become targets of exploitation and forced to accept any job and any working and living conditions. The CRMW aims to stop irregular recruitment, smuggling, and trafficking of migrant workers and discourage employment of migrant workers in irregular situations. However, only 59 states have ratified the convention, with the majority being countries of origin for many migrant workers."

United Nations Convention Against Transnational Organised Crime

In addition to the conventions, another important UN convention referred to as the United Nations Convention Against Transnational Organised Crime (UNTOC),³³ Also known as the Palermo Convention, the Convention is a key international legal instrument to address and combat transnational organised crime. The convention's main objective is to address various forms of transnational organised crime that cross national borders and challenge the capacities of individual states to combat them effectively.³⁴ It provides a framework for international cooperation in fighting organised crime, including measures for mutual legal assistance, law enforcement cooperation, and the adoption of effective national laws.³⁵

The Convention is supported by three protocols that aim to address specific activities and expressions of organized crime. These include the Protocol to Prevent, Suppress and Punish

³² ICCPR, art 2.

³³ It was adopted by the UN General Assembly on November 15, 2000, in Palermo, Italy, and entered into force on September 29, 2003.

³⁴ UNTOC art 1.

³⁵ n 35 above, arts 2 & 18.

Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms and Their Parts, Components, and Ammunition. The first two protocols are particularly relevant to this research, which focuses on migrant smuggling but also consider trafficking, as these two crimes are often used interchangeably despite having distinct criminal elements.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is a significant international agreement aimed at preventing, combating, and penalising human trafficking. It provides a framework for countries to coordinate efforts to address this heinous crime and protect the rights of trafficking victims. The United Nations adopted this protocol in November 2000 as part of the UNTOC. This protocol emphasises the importance of international cooperation in addressing human trafficking and calls for measures to address the root causes of trafficking, provide support to victims, and prosecute those involved in this criminal activity.

Protocol Against the Smuggling of Migrants by Land, Sea and Air

The main international legal instrument that addresses the smuggling of migrants is the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol). Its purpose is to prevent and combat smuggling and to promote cooperation to that end while protecting the rights of smuggled migrants.³⁶ The Smuggling Protocol defines smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident”.³⁷ In other words, migrant smuggling is a transnational organised crime, the perpetrator of which facilitates another person’s illegal border crossing, for profit. It is essential to state that the Smuggling Protocol is not a stand-alone instrument but must be read with the UNTOC. Specifically, article 1 of the Protocol states that it aims to supplement the UNTOC and should be interpreted in line with the UNTOC’s objectives. This connection reinforces that the Protocol is part of a broader legal framework for addressing

³⁶ As above, art 2.

³⁷ Smuggling Protocol, art 3(a).

transnational organised crimes.³⁸ The relationship between the instruments underscores that the Smuggling Protocol targets transnational organised criminals who smuggle migrants for profit. It does not target migrants or people who facilitate their illegal entry for reasons other than financial or material benefit. Indeed, the Smuggling Protocol only applies where an organised crime group has some degree of transnationality and involvement.³⁹

The Protocol does not criminalise smuggled migrants for being smuggled. The Smuggling Protocol focuses on organised criminals who profit from smuggling others. It does not concern itself with the legal or illegal conduct of migrants and does not provide a basis for criminalising people for being smuggled. Article 5 explicitly states that migrants who are the targets of smuggling offences are not subject to criminal prosecution under the Protocol for being the object of such conduct. However, the Protocol allows states to take measures to punish other conduct that may be considered an offence under their domestic law. Therefore, while migrants cannot be criminalized under the Protocol for being smuggled, they can still be held liable for other offences in domestic law, such as illegal entry and illegal residence as stipulated in article 6(4).

The protection of smuggled migrants at sea is also governed by the United Nations Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Convention on Maritime Search and Rescue (SAR Convention). The duty to rescue individuals in distress at sea is well recognised. However, in practice, disagreements over where rescued migrants should be taken have led to some individuals being left in peril, in contravention of the duty to rescue as laid out in treaty and customary international law.

2.3 Regional Frameworks

In addition to the international legal frameworks, several regional legal frameworks also deal with irregular migration, whether explicitly or impliedly.

2.3.1 European Union

The European Convention on Human Rights (ECHR) is an international treaty that outlines fundamental rights and freedoms for individuals in the member states of the Council of Europe. Its primary purpose is to protect and promote human rights, democracy, and the rule of law. The ECHR provides a robust framework for safeguarding civil and political rights, such as the

³⁸ Article 37(4) of the UNTOC also made references to offences in the Smuggling Protocol.

³⁹ Smuggling Protocol, art 4.

right to life, freedom of expression, and the prohibition of torture. It also covers economic, social, and cultural rights, including the right to education and the right to a fair trial. Enforcement of the ECHR is carried out by the European Court of Human Rights, which adjudicates cases involving alleged violations of the convention and ensures that member states fulfill their obligations.

The Dublin Regulation

The Dublin Regulation, established by the EU, determines which state is responsible for processing asylum claims from individuals arriving in Europe. Effective January 1, 2014, it sets out the criteria for identifying the Member State responsible for evaluating requests for international protection. According to the regulation, each asylum application must be examined by only one member state, typically the country of initial entry into the EU. Once the state of first arrival is established, the authorities in the country where the application was made request the competent state to take responsibility and facilitate the transfer of the individual.

The designated competent member state is required to consider the protection request submitted in another state. For example, if an undocumented national from a third country arrives in Italy but submits their asylum claim in Germany, they must be transferred back to Italy for their case to be evaluated by Italian authorities.

EU Action Plan Against Smuggling of Migrants

The European Commission also developed the EU Action Plan Against Migrant Smuggling in 2015. This action plan was later reviewed and updated as the Renewed EU Action Plan Against Migrant Smuggling (2021-2025).⁴⁰ The updated action plan promotes the execution of the New Pact on Migration and Asylum, emphasizing the prevention of loss of life, the reduction of unsafe and irregular migration, and the facilitation of orderly migration management. It aims to create a sustainable EU migration and asylum policy.⁴¹ Additionally, it aims to disrupt criminal enterprises, aligning with the objectives of the EU Security Union Strategy and the EU Strategies for Tackling Organized Crime (2021-2025) and Combating Trafficking in Human Beings (2021-2025), ensuring comprehensive synergy in their implementation.

⁴⁰ Renewed EU Action Plan Against Migrant Smuggling (2021-2025).

⁴¹ Pact on Migration and Asylum: A common EU system to manage migration available <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> (accessed 5 October 2024).

2.3.2 Africa

Within the African context, the AU has developed some frameworks and plan of action to address irregular migration within the region.

African Charter on Human and Peoples' Rights

At the regional level, the African Union (AU) has developed many human rights instruments to act as legal frameworks to assist states in promoting and protecting human rights within the African continent. In this regard, the Organisation of African Unity (African Union) adopted the African Charter on Human and Peoples' Rights, which came into effect on 21 October 1986.⁴² The Charter contains civil, political, economic, social and cultural rights, including individual and group rights.⁴³ The Charter also includes an article on the right to development, a unique provision not found in other regional human rights instruments. It acknowledges the right to development and the importance of improving living conditions.⁴⁴ Addressing the root causes of migration, such as poverty, conflict, and lack of opportunities, is crucial in reducing the vulnerability of individuals to smuggling networks. By promoting economic development and stability, states can help reduce the push factors that drive people to seek unsafe migration routes. The Charter emphasises the right to life, personal security, and dignity.⁴⁵ Migrant smuggling often violates these rights, as smugglers exploit vulnerable individuals, subjecting them to dangerous conditions and abuse. The Charter's principles call for the protection of all individuals, regardless of their legal status, and highlight the need for measures to safeguard migrants from such exploitation. It places obligations on African states to uphold and promote human rights. This includes taking measures to prevent human rights abuses and addressing issues related to migrant smuggling. States are expected to strengthen their legal and institutional frameworks to combat smuggling networks and protect migrants from exploitation and abuse.

AU Agenda 2063

Like the SDGs, the AU also adopted the AU Agenda 2063, a strategic document aiming to guide the continent's development over the next 50 years. It represents a vision for Africa's

⁴² African Charter on Human and Peoples' Rights available <<https://au.int/sites/default/files/treaties/36390-treaty-0011 - african charter on human and peoples rights e.pdf>> (accessed 20 August 2024).

⁴⁴ ACHPR, art 22.

⁴⁵ n 44 above, arts 4 & 6.

future, focusing on several aspirations, including inclusive growth, economic transformation, and integration, while addressing the key challenges facing the continent.⁴⁶ While Agenda 2063 does not specifically target migrant smuggling, its goals related to economic development, regional integration, good governance and security are interconnected with efforts to combat smuggling.⁴⁷ By addressing the broader issues that contribute to migrants and smuggling, Agenda 2063 helps create a more stable and prosperous environment, which can indirectly reduce the prevalence of migrant smuggling.

Africa Guiding Principles on the Human Rights of All Migrants, Refugees, and Asylum Seekers

The AU has also developed soft laws and policies to guide states in respecting the rights of migrants. In this regard, the African Commission on 23 October 2023 adopted the Africa Guiding Principles on the Human Rights of All Migrants, Refugees, and Asylum Seekers, which provides a set of principles developed to guide the treatment and protection of migrants, refugees, and asylum seekers within the African continent. These principles aim to uphold human rights and ensure the dignity and safety of these vulnerable groups. They represent a significant step toward addressing the challenges faced by migrants, refugees, and asylum seekers in Africa, providing a framework for member states to align their policies and practices with human rights standards.

Migration Policy Framework and Plan of Action

The Migration Policy Framework and Plan of Action represent a comprehensive approach to managing migration in Africa, addressing both the benefits and challenges associated with movement across borders.⁴⁸ By providing a structured and coherent strategy, they aim to enhance regional integration, protect the rights of migrants, and leverage migration for sustainable development.

These documents reflect the AU's commitment to addressing migration in a way that promotes human rights, economic growth, and regional stability. They provide a crucial foundation for member states to develop effective migration policies and practices that align with continental and global standards.

⁴⁶ AU Agenda 2063 <<https://au.int/en/agenda2063/aspirations>> (accessed 4 September 2024).

⁴⁷ As above.

⁴⁸ Migration Policy Framework for Africa and Plan of Action (2018 – 2030) available <[Migration Policy Framework for Africa and Plan of Action \(2018 – 2030\)](#)> (accessed 4 September 2024).

2.4 Sub-regional frameworks

The ECOWAS Revised Treaty on the Movement of Persons is part of the broader Revised Treaty of the Economic Community of West African States (ECOWAS), which was adopted to facilitate regional integration and cooperation among West African countries.⁴⁹ The treaty is designed to promote the free movement of persons, goods, and services across member states. This allows citizens of ECOWAS countries to travel, reside, and work in other member states without the need for visas, thereby fostering greater economic and social integration.⁵⁰ It also aims to promote regional integration by enabling easier cross-border movement, the treaty supports the broader goals of regional integration. This includes the establishment of a common market, increased trade, and shared economic policies, which are crucial for economic growth and stability in the region. However, the treaty is also faced with implementation challenges such as bureaucratic hurdles, lack of awareness among citizens, and varying levels of commitment among member states. Efforts are ongoing to address these issues and enhance the effectiveness of the treaty.

Overall, the ECOWAS Revised Treaty on the Movement of Persons is a vital step toward achieving a more integrated and cooperative West African region. It reflects the aspirations of ECOWAS member states to create a united community that promotes economic growth, cultural exchange, and social development, ultimately contributing to peace and stability in the region.

2.5 National Laws

In addition to the laws and policies at the international and regional levels, specific local regulations and measures pertain to irregular migration, either through direct enforcement or indirect impact.

2.5.1 The Gambia

In The Gambia, laws relating to the smuggling of migrants encompass various legal instruments that address both the criminalisation of smuggling activities and the protection of migrants. Although The Gambia does not have a specific comprehensive law solely dedicated

⁴⁹ Economic Community of West African States (ECOWAS) Revised Treaty available <[Revised-treaty-1.pdf](#)> (accessed 28 July 2024).

⁵⁰ ECOWAS Revised Treaty, art 3.

to migrant smuggling, several legal frameworks and regulations can intersect with and address aspects of migrant smuggling.

The 1997 Constitution of The Gambia establishes the legal and institutional framework for governance and protecting rights within the country.⁵¹ Although the Constitution does not explicitly address migrant smuggling, Chapter Seven guarantees the fundamental rights and freedoms of all individuals, including those within its jurisdiction. This includes the right to personal liberty, protection from inhuman treatment, and the right to fair trial.⁵² These rights are relevant to migrants who may be affected by smuggling, as they should be protected from exploitation and abuse. Ensuring that these rights are upheld is crucial in addressing and mitigating the impact of migrant smuggling. For instance, protecting migrants from abuse by smugglers and ensuring they are treated humanely aligns with the Constitution's commitment to fundamental rights.

The Immigration Act of 1965⁵³ is the prevailing statutory framework governing immigration policies and procedures within The Gambia. This legislation provides an exhaustive set of provisions aimed at overseeing immigration processes, mitigating unauthorised migration, and orchestrating the residency of non-citizens within the nation. The Act encompasses a spectrum of facets, including entry and residence permit regulations, deportation mechanisms, and the implementation of enforcement measures.⁵⁴ Its overarching objective is to cultivate a more systematic and all-encompassing approach to managing immigration within the Gambian jurisdiction. The legislation delineates detailed stipulations for addressing unlawful migration, fortifying border security, and supervising the presence of foreign individuals in the country. governs immigration issues in The Gambia. However, the act is outdated and fails to address some of the country's current realities, especially in the context of irregular migration. In September 2023, the legal framework underwent a comprehensive review process, and there is currently a bill pending for enactment at the level of the National Assembly.⁵⁵ The review of the bill was funded by the Geneva Centre for Security Sector Governance (DCAF) in partnership with the Swiss Confederation as part of the security sector reform.⁵⁶

⁵¹ 1997 Constitution of The Republic of The Gambia.

⁵² As above, sections 19,21 & 24.

⁵³ Immigration Act 1965 Laws of The Gambia.

⁵⁴ As above, sections 5 and 15.

⁵⁵ A Jaw '57-year-old Immigration Act set for reform' *The Point Newspaper* (Banjul) 29 September 2022.

The Trafficking in Persons Act was enacted in 2007⁵⁷ and later amended in 2010. This legislation criminalises all forms of trafficking, including sex and labour trafficking, prescribing severe penalties, including 50 years to life imprisonment and fines ranging from 50,000 to 500,000 Dalasis.⁵⁸ The Act aims to prevent, suppress and punish trafficking activities while also focusing on the rehabilitation and reintegration of victims. The National Agency Against Trafficking in Persons⁵⁹ under the Ministry of Justice is the primary body responsible for implementing the law, investigating trafficking cases and promoting strategies to combat trafficking.⁶⁰ The agency has made giant strides in the fight against trafficking by developing the National Referral Mechanism (NRM) with the support of International Organisation for Migration (IOM) and National Action Plan. The agency also has an interministerial taskforce meeting quarterly to discuss challenges and strategies for fighting trafficking. The agency also submits an annual report to the US State Department on the situation of trafficking in The Gambia. In 2023, The Gambia was classified under Tier 2 which means that there is

The Criminal Code of The Gambia is another important piece of law applied in the fight against the smuggling of migrants. It does not explicitly delineate all forms of smuggling. Instead, it addresses activities commonly associated with smuggling through provisions related to forgery, conspiracy, and aiding offences. Section of the Criminal Code is important because law enforcement apply it to charge smugglers and accomplices in instances where the voyage has caused the death of smugglers within Gambian waters.

The Gambia is in the process of enacting the Smuggling of Migrants Bill, currently under review at the Ministry of Interior. While awaiting the passage of this bill, the country utilises the Trafficking in Persons Act and the Criminal Code to address cases of smuggling. However, there is a concern that smugglers are being prosecuted under charges that overlap with those outlined in the Smuggling Protocol. In the event of boats capsizing during the journey on Gambian waters, the boat owners and accomplices are charged under the Criminal Code for conspiracy and manslaughter.

The existing migration policy in The Gambia lacks comprehensive strategies to address the issue of migrant smuggling effectively. The policy aims to establish a strong regulatory framework to reduce and eliminate migrant smuggling and enhance the capabilities of

⁵⁷ Trafficking in Persons Act 2007.

⁵⁸ As above, section 28 (4).

⁵⁹ As above, section 3(1).

⁶⁰ n 54 above, section 14.

institutions responsible for dealing with irregular migration. The drafting of the policy should have been consultative so that it would capture the views and concerns of relevant stakeholders in order to have a robust policy that will serve as a guide in assisting the state to combat smuggling. Emphasising the necessity of political will in creating laws, policies, and institutions dedicated to combating migrant smuggling is essential. While formulating laws and policies is important, ensuring their implementation remains a challenge in The Gambia, attributed to the inefficiency of law enforcement officers, lack of expertise and modern technology, corruption, and inadequate budgetary allocation for institutions to effectively carry out their mandate. For instance, the Migration Management Unit (MMU) under The Gambia Immigration Department is the office tasked with combating the smuggling of migrants. This unit is not well equipped and does not have the requisite staff with the expertise to fight the smuggling of migrants. It is therefore important for the MMU to be expanded and given the necessary tools and funding to carry out their work effectively especially when the bill enters into force, similar to the National Agency Against Trafficking in Persons.

The second objective of the policy is to identify drivers and pull factors of irregular migration from The Gambia and its link with smuggling to design appropriate measures to address the challenge. In this regard, the realisation of this objective is far-fetched. This is because the majority of the youth who embark on this journey do so due to a lack of employment opportunities, poverty and education. The Government of The Gambia, in partnership with its development partners, has launched several projects to enhance youth employment. These initiatives include the Youth Empowerment Project, Tekki Fii Project, and the Skills for Youth Empowerment. It is important to note that these projects are funded by international partners and have a limited timeframe. Therefore, it is crucial for the government of The Gambia to take ownership of providing long-term incentives and sustainable projects that promote youth empowerment through employment, education, and other forms of social protection that could deter Gambian youth from leaving The Gambia irregularly.

2.5.2 Senegal

Like The Gambia, Senegal has no single law dedicated exclusively to migrant smuggling. The legal framework, including laws on immigration, the penal code, trafficking law, and international agreements, provides mechanisms for tackling smuggling activities and addressing related issues. National action plans and the role of law enforcement further support efforts to combat migrant smuggling and protect affected individuals.

The Senegalese Penal Code includes provisions related to various crimes that can intersect with migrant smuggling, such as fraud, exploitation and other offences that might be involved in smuggling activities.⁶¹ Article 322 of the Penal Code criminalises human trafficking and related offenses, which can include migrant smuggling. It sets out penalties for those involved in trafficking or exploiting individuals. Article 323 further addresses the various forms of illegal migration and smuggling activities, including the provision of false documents and other illicit means of facilitating migration.

The Senegalese Immigration Code plays a key role in governing the processes related to the entry, stay, and exit of foreigners within the country.⁶² It encompasses specific provisions that address illegal immigration, unauthorized border crossings, and activities associated with smuggling. These regulations are designed to ensure the fair and lawful treatment of individuals entering or residing in Senegal while also safeguarding against illicit immigration practices and border-related offences.⁶³

In accordance with its international obligations, Senegal adopted Act No. 2005-06 of 10 May 2005 on combating trafficking in persons and similar practices and protecting victims. This act criminalises trafficking and irregular migration and clearly defines acts of trafficking, the associated penalties, and the rights of victims.

This law is one of the first steps in a legal framework that aims to harmonise efforts to combat it and to respect international commitments. It provides for prison sentences for acts of trafficking, which is a strong signal against traffickers. Senegalese law provides for severe penalties for actors involved in trafficking and the organisation of irregular migration. According to article 3 of Law No. 2005-06, illegal migration organised by land, sea or air is punishable by five to ten years imprisonment and a fine of 1,000,000 to 5,000,000 CFA and that the national territory serves as a zone of origin, transit or destination. These penalties are intended to deter traffickers and increase the perception of risks associated with these criminal activities. When a tragic shipwreck occurs, Senegalese legislation also allows the organisers and financiers of these crossings to be held accountable. This underscores the importance of

⁶¹ Loi de Base No 65-60 du 21 Juillet 1965 partant code.

⁶² Law No 71-10 of 25 January 1971 governing the conditions of admission and residence of foreigners available < <https://bo.senegalservices.sn/texte/papiers/loi-regissant-les-conditions-dadmission-et-de-sejour-des-etrangers#:~:text=Loi%20n%C2%B0%2071-10%20du%2025%20janvier%201971%20r%C3%A9gissant%20les%20conditions> > (accessed 28 September 2024).

⁶³ Law No. 67-29 of 1967

accountability not only of the migrants themselves but also of the networks that exploit their vulnerability.

Law No. 2005-01 pertains to the fight against trafficking in persons and establishes measures to combat trafficking, including aspects related to the smuggling of migrants. It was further updated by Law No. 2018-22, which aims to strengthen Senegal's legal framework against human trafficking and smuggling, aligning it with international standards. The effective implementation of these sanctions is highly dependent on the ability of judicial authorities to investigate and prosecute the culprits.

Despite these measures in place, constraints in applying these sanctions are observed. Corruption in law enforcement and other judicial institutions can hinder the identification and prosecution of traffickers. Measures must, therefore, be implemented to strengthen the transparency and integrity of trafficking-related investigations. Victims of trafficking and irregular migration must be treated with dignity and respect. Steps must be taken to ensure their protection throughout the judicial process.

In addition to the law, Senegal has a National Strategy to Combat Irregular Migration (SNLMI) aimed at drastically reducing irregular migration by 2033. The SNLMI is divided into five areas which prevention, border management, repressive measures (against conveyors), aid, assistance and protection measures, and the return and reintegration of migrants. Following the waves of irregular migration, the Interministerial Committee for the Fight against Illegal Emigration (CILEC) was created by Decree No. 2020-2393 of December 30, 2020.⁶⁴ Attached to the Office of the Minister of the Interior, the committee is responsible for establishing an inclusive national strategy against irregular migration by mobilising state services, grassroots communities and development partners.

At the institutional level, a national coordination mechanism called the National Cell for the Fight against Trafficking in Persons (CNLTP), has been set up, created by Primal Order No. 9051 of 8 October 2010. This unit will be replaced by the National Committee for the Fight against Trafficking in Persons and Smuggling of Migrants (CNLTP) with the adoption of Decree No. 2020-2064 of 27 October 2020, placing the structure under the authority of the Prime Minister.

⁶⁴ Boubacarr Dione 'Migration in Senegal, National Profile, 2018'.

However, at the administrative level, the CNLTP has always been attached to the Ministry of Justice by the various decrees on the distribution of State services. This decree aims to broaden the powers of the national coordination mechanism by formally conferring on it prevention and coordination missions in the fight against the smuggling of migrants, considered a practice assimilated to trafficking in persons by Law No. 2005-06 of 6 May 2006.

It also strengthens the status of the coordination mechanism on the issue of trafficking in persons. The implementation of all these measures aims to create a dynamic and favorable economic environment so that Senegalese youth can realise their full potential and be actors in the construction of a prosperous Senegal for all.

Local development programmes have also been launched to improve living conditions in areas of intensive emigration. The idea is to create sustainable economic opportunities in order to discourage young people from seeking their fortunes abroad. For example, with the support of international partners, the Senegalese government has developed sustainable agriculture and fisheries projects to improve family incomes and offer viable alternatives to migration. In addition, institutions such as the Action Plan for the Reintegration and Valorisation of Migrants (REVA) drawn up in 2006 in response to the waves of illegal migration of young people to Europe, and the National Agency for the Promotion of Employment (ANPE) play a key role in providing career guidance services to young people.⁶⁵ These initiatives help young people adapt their skills to the needs of the local job market, thus promoting better integration into the Senegalese economic fabric. However, these measures require constant monitoring to ensure their effectiveness. Development projects must be adapted to local realities and involve stakeholders in design and implementation.

2.6 The EU Trust Fund for Africa

The European Union Trust Fund, launched in 2015, has faced criticism for not adequately addressing irregular migration in Africa.⁶⁶ A recent report by the European Court of Auditors stated that the project spread its funds too thinly across various areas and failed to prioritize

⁶⁵Plan d'Action pour la Réinsertion et la Valorisation des Migrants available <[National Agency for Agricultural Integration and Development - SENEGEL - Senegalese Next Generation of Leaders](#)> (accessed 5 August 2024).

⁶⁶European Union Emergency Trust Fund for Africa <https://trust-fund-for-africa.europa.eu/our-mission/objective-and-governance_en> (accessed 6 September 2024).

tackling the root causes of irregular migration. The report also warned that increased revenue might trigger more migration instead of containing it.⁶⁷

2.7 The Impact of Niger's Repeal of the 2015/36 Anti-Smuggling Law

The adoption of the 2015/36 Anti-Smuggling Law was part of the EUTF project for Africa, which launched a five billion Euro initiative in 2015, allocating one billion specifically for efforts to combat migrant smuggling in Niger.⁶⁸ The EUTF for Africa is to renew EU collaboration on migration by establishing a platform for deeper political engagement and dialogue with African partner countries, pooling resources from the EU and other donors, and broadening the evidence base to gain a better understanding of the factors influencing migration.⁶⁹

Article 1 of the law outlines its objectives, which are to prevent and combat migrant smuggling, protect the rights of smuggled migrants, and promote both national and international cooperation in line with the Protocol Against the Smuggling of Migrants by Land, Sea, and Air. Penalties under this law include imprisonment for five to thirty years, fines of up to 30 million CFA francs, and confiscating vehicles used for transporting migrants.⁷⁰

Since its enactment, the law has faced significant challenges and criticism. Since August 2016, the Nigerien government has focused on facilitating the transportation of migrants from Agadez to Algeria or Libya. While the EU has acknowledged Niger's ongoing efforts to curb irregular migration and combat smugglers, local authorities have called for a more measured application of the law, viewing it as overly harsh. Although the long-term effectiveness of these measures remains to be seen, they have already had serious short-term consequences, increasing the vulnerability of migrants, adversely affecting the local economy, and fueling tensions within communities. Local authorities have frequently warned the national government about the negative effects of these measures on the population.

Increased law enforcement has significantly impacted smuggling operations, forcing smugglers to adapt by using more remote and less monitored routes to avoid detection. These routes often involve crossing into less-patrolled border areas and navigating difficult terrains, making them

⁶⁷ The European Court of Auditors expresses criticism of the EU Trust Fund for Africa aimed at addressing the root causes of irregular migration available <[The European Court of Auditors expresses criticism of the EU Trust Fund for Africa aimed at addressing the root causes of irregular migration | EMN \(emnbelgium.be\)](#)> (accessed 5 October 2024).

⁶⁸n 64 above.

⁶⁹ As above.

⁷⁰ Loi 2015/36 sur la répression de la traite des êtres humains et du trafic illicite de migrants art 1.

harder for law enforcement to oversee. Consequently, smugglers have turned to more perilous desert routes, presenting greater risks compared to previously used paths before the law's enforcement. The crackdown has led to higher costs for smuggling services due to numerous arrests and the confiscation of vehicles, which in turn increases the risk of migrants falling into debt bondage or resorting to more dangerous activities such as prostitution, pimping, and theft to finance their journeys.

The legislation infringes on personal freedoms and human rights, raising concerns about potential abuses of power by security personnel given the extensive authority granted to them. Moreover, its enforcement undermines the right to free movement as outlined in the ECOWAS Protocol on Free Movement of Persons, Residence, and Establishment, which governs the movement of people within the ECOWAS region. Article 59 specifically guarantees the rights of citizens from ECOWAS member states to enter, reside, and establish themselves in other member states, meaning the law's implementation directly contravenes this article.

In July 2023, Niger underwent a significant political change following a military coup d'état. One of the outcomes of this coup was the military authorities' decision to repeal the unpopular 2015/36 Anti-Smuggling Law, which had been in effect since mid-2016, leading to widespread protests in Agadez.⁷¹ The primary motivation for repealing the law was its adverse impact on families who depended on smuggling for their livelihoods.⁷² What had been an informal and mostly tolerated business was criminalised, carrying penalties of up to ten years in prison, leaving many uncertain about their economic futures.⁷³ This situation highlights the need to carefully consider local economic realities when implementing such regulations and underscores the necessity of providing adequate support to affected communities.

The repeal of the law has elicited mixed and sometimes conflicting reactions from various stakeholders. On one hand, the immediate positive response to the repeal in Agadez suggests potential economic and social benefits from decriminalising migration-related activities for the northern Niger population.⁷⁴ Furthermore, the repeal is expected to reduce migrant deaths in the desert, as clandestine journeys to evade military oversight will no longer be necessary.

⁷¹ R Plummer 'Niger coup: Simple guide to what's happening' *BBC News* (London) 29 July 2023.

⁷² Clingendael 'Niger's Repeal of the 2015/36 Anti-Smuggling Law' July 2024 available <[Clingendael Alert Nigers Repeal of the 2015-36 Anti-Smuggling Law.pdf](#)> (28 July 2024).

⁷³ As above.

⁷⁴ n 76 above.

Conversely, the international community, particularly Niger's Western partners, has reacted negatively to the junta's decision to repeal the law, citing concerns over an increase in irregular migrant arrivals in Europe. This highlights the complex interplay between national policies and international migration issues. The repeal will have significant implications for Niger's domestic political economy and its international commitments regarding migrant smuggling and judicial cooperation with other nations.

2.8 Conclusion

In summary, the various international legal instruments form a crucial part of the broader framework in the Protocol.⁷⁵ Collectively, they outline numerous rights that should be granted to migrants. It is also vital to emphasize that migrants enjoy a range of entitlements even if they are not nationals or citizens of the transit or destination countries where they find themselves. Additionally, it is noteworthy that very few treaties specifically identify migrants as a distinct group. Using terms like 'everyone' and 'no one' may suggest that the rights mentioned apply universally to all individuals without discrimination, regardless of their immigration status in the country where they are present.

⁷⁵ Smuggling Protocol, art 19.

CHAPTER 3: Analysis of the un smuggling protocol from a human rights perspective

3.1 Introduction

Chapter 2 has positioned the UN Smuggling Protocol as the leading international human rights instrument aimed at addressing migrant smuggling and protecting the rights of smuggled individuals. The Protocol plays a crucial role in the urgent global mission to safeguard vulnerable populations and uphold human rights. However, the persistent challenges in combating migrant smuggling and ensuring the protection of smuggled migrants stem from specific shortcomings within the Protocol itself. These shortcomings relate to the foundational principles upon which the Protocol is built, particularly the commitment to protecting the rights of the smuggled individuals at its centre.

This chapter will offer a thorough examination of some of these flaws concerning the rights of smuggled migrants. Given that the Protocol implicitly views smuggled migrants as potential victims, it will be argued that they possess rights addressing the violations arising from the smuggling process and its consequences. Before delving into an analysis of these rights, it is important to provide an overview of them and consider various perspectives on the nature and extent of the rights afforded to smuggled migrants under the Protocol.

3.2 Overview of the Rights in the Smuggling Protocol

The primary aim of the Protocol is to prevent and combat migrant smuggling while fostering cooperation among states and safeguarding the rights of smuggled migrants.⁷⁶ The offences outlined in the Protocol such as criminalisation of smuggling activities and offences relating to facilitating the illegal entry of migrants align with those established by the United Nations

⁷⁶ Smuggling Protocol, art 2.

Convention on Transnational Organized Crime (UNTOC), requiring states to harmonise their laws with both instruments.⁷⁷ The Protocol provides the most widely recognised definition of migrant smuggling, describing it as the act of facilitating the illegal entry of a person into a State Party where that person is neither a national nor a permanent resident with the intent to gain, directly or indirectly, a financial or other material benefit.

Article 6 specifies that States Parties must criminalise the intentional production, procurement, provision, or possession of fraudulent travel or identity documents aimed at enabling migrant smuggling or allowing a non-national or non-resident to remain in a state through similar means.

Migrant smuggling encompasses the act of illegally transporting individuals who are neither nationals nor permanent residents across a border. It also involves the intent to profit from such actions, targeting those who seek financial or material gain from these activities. This distinction excludes migrants themselves and individuals or organizations that may assist in the illegal entry of people for humanitarian purposes. According to the interpretative notes of the Protocol, the phrase ‘financial or other material benefit’ was included to emphasize the focus on organized criminal groups acting for profit, while simultaneously excluding those who provide aid to migrants for humanitarian reasons or due to family connections. The definition encompasses a range of motives beyond mere financial gain, such as sexual gratification or other forms of privileges or services.

3.3 Nature and scope of rights under the Protocol

There are two key opposing viewpoints regarding the protection of smuggled migrants' rights under the Smuggling Protocol. Gallagher and Obokata contend that the Protocol makes only limited references to the protection needs of smuggled migrants, implying a lack of adequate attention to their rights.⁷⁸ However, this criticism might be overstated, as some rights are implied rather than directly articulated within the Protocol.⁷⁹ Human rights are often presented in broad terms and require practical interpretation, which is also the case for the Smuggling Protocol, as suggested by its preparatory works. Therefore, the rights of smuggled migrants should not be seen as restricted to those explicitly mentioned in the Protocol. The interpretative notes to Article 16 reinforce this point, noting that including specific rights, such as the right

⁷⁷ Smuggling Protocol, arts 6 & 7.

⁷⁸ A Gallagher 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *HRQ* 975.

⁷⁹ T Obokata 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2006) *International Journal of Refugee Law*, 394–415.

to life and protection from torture or degrading treatment, does not exclude other rights that are not explicitly listed. Additionally, the Protocol specifies that it does not alter states' obligations under international law, including their commitments to human rights law.

3.4 Non-prosecution of smuggled migrants

It is essential to understand that protecting smuggled migrants from prosecution for illegal departure is linked to safeguarding their rights, particularly when their home country imposes restrictions on legal avenues for leaving.⁸⁰ In these situations, migrants may feel compelled to seek alternatives, such as hiring smugglers. This protection aligns with the legal acknowledgment of smuggled migrants as potential victims of smuggling operations. These victims may include migrants intercepted before attempting illegal departures with smugglers, as well as those who are returned to their countries after being denied refugee status or classified as economic migrants. The Protocol underscores that smuggled migrants should not face prosecution for being victims of smuggling activities.

The Protocol provides smuggled migrants with immunity from prosecution for offences connected to migrant smuggling, even when they are involved as the subjects of such offences.⁸¹ It explicitly forbids the intentional smuggling of migrants for financial gain or other benefits. This includes creating or possessing false travel or identification documents, as well as facilitating illegal stays for individuals who do not meet legal residency requirements. Additionally, article 5 of the Protocol stipulates that migrants should not be criminally prosecuted for being victims of the crimes outlined in article 6.

Additionally, the legislative guide for the Protocol highlights that the immunity granted to smuggled migrants extends to migration-related offences, such as illegal entry, departure, and residence. As a result, under article 5, migrants cannot be criminally prosecuted solely for being the targets of the activities described in article 6. This implies that the legal framework should prioritise holding smugglers accountable rather than prosecuting the migrants themselves. Therefore, smuggled migrants also have the right not to be charged for offences related to illegal entry and departure. Article 5 mainly aims to prevent the prosecution of offences described in the somewhat vague article 6. Therefore, it can be inferred that, under Article 5, smuggled migrants should not be penalised for the offences listed in article 6, nor for illegal

⁸⁰ Smuggling Protocol, art 5.

⁸¹ Smuggling Protocol, art (6).

entry or departure. However, article 5 does not provide complete protection against prosecution under domestic laws concerning illegal entry and departure. Evidence from state practices supports this view, as a report from the UNCTOC Secretariat shows that most countries impose criminal or administrative penalties on smuggled migrants, with only a few exceptions. For instance, illegal entry into the United Kingdom can lead to fines or imprisonment for up to six months,⁸² while Italy imposes fines ranging from €5,000 to €10,000 for illegal entry. Several countries, such as Morocco, Senegal, and Mauritania, which serve as departure points for many migrants heading to Spain, have criminalized illegal departure. In Morocco, Immigration Law No. 02-03, enacted in 2003, imposes fines and prison sentences of one to six months for individuals leaving the country illegally.⁸³ Similarly, the Special Rapporteur on the Human Rights of Migrants noted that Senegal's Law No. 02 (2005), concerning trafficking and clandestine migration, has been used to arrest and prosecute both smugglers and migrants attempting to leave for Europe illegally. In contrast, in The Gambia, although neither the Immigration Act nor the Criminal Code specifically addresses illegal departure, this absence suggests that leaving the country illegally is not criminalized.

The Protocol acknowledges the right of states to regulate entry into their territories, which is based on the principle of state sovereignty in international law. It also recognises the authority of states to prosecute smuggled migrants for illegal entry. However, article 5 provides some protections against prosecution for illegal entry or stay, which may apply under certain conditions, such as for refugees or individuals with valid asylum claims. The protection from prosecution is more closely tied to safeguarding refugees under article 19(1) of the Protocol rather than article 5. On the other hand, prosecuting migrants for illegal departure is not supported by the Protocol and violates article 5, which protects against prosecution. Migrants should not be penalized for leaving their home countries.

Articles 16(1) and 19(1) of the Protocol mandate that parties respect the human rights of individuals, including the right to leave a country. Human rights law further supports this right, affirming that smuggled migrants, as human beings, have the right to leave a state. The Human Rights Committee (HRC), in General Comment 15, asserted that the rights outlined in the

⁸² Asylum and Immigration Act 1966, section 5(1)(a).

⁸³ Loi No. 02-03 relative à l'entrée et du séjour des étrangers au Royaume du Maroc, à l'émigration et l'immigration irrégulières.

ICCPR must be upheld without discrimination between citizens and non-citizens.⁸⁴ The ICCPR, which addresses the right to leave, reflects this principle through its broad language.⁸⁵ The term ‘everyone’ in this article reflect that all individuals, whether citizens, foreign nationals, or stateless persons, are entitled to leave a territory. However, this right is not absolute and can be restricted for public security, health, morals, or the protection of others' rights.

The Special Rapporteur on the Human Rights of Migrants asserts that all migrants, including undocumented ones, are entitled to the rights set out in international treaties, including the right to leave any country, including their own.⁸⁶ As such, smuggled migrants should not be prosecuted for exercising this right with the assistance of smugglers. The HRC stresses that any limitations on this right must not compromise its core essence. Even if a migrant attempts to leave through smuggling, the right to depart remains essential. States should not undermine this right by imposing penalties for its illegal exercise. For example, requiring a valid passport to exit a country may be permissible, but penalizing non-compliance with this requirement restricts the fundamental right to leave. The Protocol explicitly forbids prosecuting migrants for using fraudulent documents to leave, reinforcing that smuggled migrants should not be prosecuted for illegal departure. Domestic laws that punish smuggled migrants for leaving with the help of smugglers violate the Protocol.

The Protocol underscores that while smuggled migrants should not face prosecution for leaving illegally with the help of smugglers, international law does not condone these actions. States have the authority to prevent smuggled migrants from departing illegally with the aid of smugglers. This interpretation is consistent with articles 8, 11, and 12 of the Protocol, which outline preventive measures. States that are parties to both the Protocol and the ICCPR may impose restrictions on the right to leave in order to safeguard national security, public order, public health, morals, or the rights of others, which includes taking steps to prevent illegal departures through smuggling to maintain public order and uphold state sovereignty..

3.5 Arbitrary detention of smuggled migrants

⁸⁴ CCPR General Comment No 15: The Position of Aliens Under the Covenant.

⁸⁵ ICCPR, art 12(2).

⁸⁶ Report of the Special Rapporteur on the human rights of migrants: A/77/189 available <[A/77/189: Report of the Special Rapporteur on the human rights of migrants | OHCHR](#)> (accessed 25 August 2024).

The right to liberty and the prohibition against arbitrary detention are outlined in the ICCPR, with similar provisions present in other human rights treaties.⁸⁷ International law recognizes that states can impose limitations on this right, as there is no blanket prohibition on detention. For example, the Protocol permits the detention of smuggled migrants, stipulating that parties must comply with their obligations under the Vienna Convention on Consular Relations, especially regarding the notification and communication with consular officers in cases of detention.⁸⁸ Many states have immigration laws that provide for the detention of unauthorized migrants for illegal entry or while awaiting deportation. Aside from Article 16(5), the Protocol does not define the specific conditions under which smuggled migrants may be detained.

The detention of smuggled migrants under state migration laws must be assessed in light of international human rights law, which determines the degree of arbitrariness involved. Article 19(1) of the Protocol establishes this connection, stating that any measures implemented under the Protocol, including the detention of smuggled migrants, should not violate other rights and obligations under international law, including human rights law. Instruments like the ICCPR, ECHR, and ACHPR illustrate the relevant international human rights standards concerning the detention of smuggled migrants. Therefore, it is more accurate to assert that smuggled migrants have rights related to detention under human rights law. While the Smuggling Protocol does not specify what constitutes arbitrary detention for smuggled migrants, article 19(1) remains subject to the broader international human rights standards governing detention. Detention must be appropriate, reasonable, proportionate, and justifiable to avoid being classified as arbitrary. First, the ICCPR asserts that detention must be legally justified, although it does not provide specific examples of valid grounds for detention. The European Court of Human Rights (ECtHR) has dealt with cases of arbitrary detention involving migrants, including smuggled individuals, primarily through article 5 of the European Convention on Human Rights, which protects the right to liberty and security. The Court has determined that detention must be lawful, necessary, and proportionate, and not arbitrary; authorities must present clear legal justifications for detention and adhere to proper procedures.

In the case of *C v Australia*,⁸⁹ the Human Rights Committee indicated that detention for a specific duration must be justified by factors such as ongoing investigations, the risk of absconding, or non-cooperation. It further asserted that detention could be deemed arbitrary in

⁸⁷ ICCPR, art 9(1).

⁸⁸ Smuggling Protocol, art 16(5).

⁸⁹ *C v Australia* [1997] UN Doc CCPR/C/39/D/939/2000.

the absence of such justifications, even if the entry was illegal. However, if specific grounds like those in article 9(1) of the ICCPR are lacking, a state party may rely on any justification from its domestic law to validate the detention of smuggled migrants on a vessel at sea. For example, a state might justify such detention by citing the necessity to secure a place for disembarkation or to prepare for deportation or prosecution. In contrast to article 9(1) of the ICCPR, article 5(1) of the ECHR provides an exhaustive list of grounds for deprivation of liberty. Therefore, the detention of smuggled migrants must be justified by one of these specified grounds. For instance, if a vessel enters a state's territorial waters, the state can detain the smuggled migrants aboard that vessel under article 5(1)(c) of the ECHR, which addresses illegal border crossing. Another situation arises when a vessel approaches a state's territorial sea, as seen in *Hirsi Jamaa and Others v Italy*.⁹⁰ Where Somali and Eritrean nationals departing from Libya were intercepted by Italian authorities on the high seas and subsequently detained on Italian military vessels before being transferred back to Libya, in such cases, detention can be justified under article 5(1)(f) of the ECHR, which allows detention to prevent illegal entry into a state.

A further scenario involves a state intercepting or rescuing a vessel engaged in migrant smuggling on the high seas, where the state may detain the smuggled migrants while searching for a disembarkation location. However, this detention may be deemed unjustified under the ECHR framework and therefore arbitrary, as seeking a place of disembarkation does not fit any of the permissible grounds outlined in Article 5(1). This assessment is reinforced by the ECtHR's decision in *Medvedyev and Others v France*,⁹¹ case. Where the court underscored that the exceptions to the right to liberty in Article 5(1) are exhaustive and should be interpreted narrowly. The court ruled that a deprivation of liberty aimed at combating drug trafficking on the high seas lacked a legal foundation and constituted a violation.⁹² Secondly, the standard of reasonableness is essential for ensuring that detention measures do not become arbitrary. This standard is exemplified in the case of *C v Australia*, where the individual was held for two years pending deportation after arriving illegally.⁹³ During this period, he suffered severe mental health issues, including significant depression and suicidal thoughts. After being released for health reasons, the individual argued that his extended detention was unreasonable and arbitrary. The state claimed that mandatory immigration detention was necessary to prevent

⁹⁰ *Hirsi Jamaa and Others v Italy* (Application No. 27765/09)

⁹¹ *Medvedyev and Others v France* (Application No. 3394/03).

⁹² Smuggling Protocol, art 5(1).

⁹³ *C v Australia* [1997] UN Doc CCPR/C/39/D/939/2000.

unauthorized entries until all claims were appropriately evaluated. However, the Human Rights Committee noted that while the state initially provided reasons for the detention, it failed to justify the continued detention as time passed and the individual's condition worsened. Consequently, the Committee concluded that the individual's detention for over two years was arbitrary. This case illustrates that the duration of detention must be reasonable, taking into account its impact on detainees and the dangers associated with prolonged detention. In essence, if the individual circumstances of those detained are not sufficiently considered, the detention may be deemed arbitrary. Similarly, if smuggled migrants are held on an unseaworthy vessel for extended periods such as eight or eleven days their situation could parallel that of the asylum seeker in *C v Australia*,⁹⁴ where prolonged detention occurred despite the individual's deteriorating mental health. Therefore, detaining smuggled migrants for lengthy periods under certain conditions may also be regarded as arbitrary.

Third, the detention of smuggled migrants may be considered arbitrary if it does not adhere to the procedural requirements set forth in article 9 of the ICCPR or article 5 of the ECHR. For instance, both article 9(2) of the ICCPR and article 5(2) of the ECHR mandate that detainees be informed of the reasons for their detention. However, smuggled migrants are often not provided with the justification or legal basis for their detention, which renders such detention arbitrary. In the case of *Abdolkhani and Karimnia v Turkey*,⁹⁵ the ECtHR found a violation of article 5(2) because the applicants were not informed of the charge of illegal entry that justified their detention. Another essential procedural requirement is the right to judicial review, as outlined in articles 9(3) and (4) of the ICCPR and articles 5(3) and (4) of the ECHR. Judicial review serves to mitigate the risk of arbitrary detention by ensuring compliance with procedural and substantive criteria. The ECtHR has emphasized that judicial review can limit the authority of administrative bodies regarding the length of detention. However, obtaining judicial review can be practically difficult for smuggled migrants detained on a vessel at sea, particularly if authorities do not allow them to disembark in a location where legal proceedings can take place.

3.6 Criminalisation of Smuggling of Migrants

The obligation to criminalise migrant smuggling is the foundation for all other commitments to address these activities. All necessary measures derive their legitimacy from this

⁹⁴ As above.

⁹⁵ *Abdolkhani and Karimnia v Turkey* (Application No. 30471/08).

criminalisation obligation. From an international perspective, the Protocol aims to standardize domestic laws regarding migrant smuggling among states.⁹⁶

According to article 6(1)(a), the Protocol mandates that states criminalise the act of smuggling migrants. This obligation also encompasses related offences, such as those involving fraudulent documentation as specified in article 6(1)(b) and the crime of facilitating illegal residence detailed in article 6(1)(c). Article 6(2) also requires states to criminalise attempts, participation, and organisation of migrant smuggling. Article 6(3) identifies aggravating circumstances that permit states to impose harsher penalties for offences related to migrant smuggling.

Nevertheless, the obligation to criminalise these offenses has significant shortcomings. States must first criminalise certain conducts and adopt local laws specifying these conducts.⁹⁷ For instance, the Protocol clearly outlines the act of smuggling migrants, which states must criminalise. However, several signatories to the Protocol, including Egypt, Nigeria, and Tanzania, have reported through a questionnaire that they do not have specific legislation addressing migrant smuggling, with relevant provisions scattered across various laws concerning passports, aliens, and immigration.⁹⁸ This raises concerns about whether relying on a general criminal code or separate legislative measures adequately meets the obligation outlined in article 6(1)(a) to criminalise migrant smuggling. Article 6(1) requires states to implement legislative measures to classify certain actions, including migrant smuggling, as criminal offences. The phrase ‘as may be necessary’ must be carefully interpreted to clarify a state's actions to meet this obligation. This necessity closely relates to whether a state's current laws align with international standards. Even if such laws exist, it is crucial to evaluate how well they conform to these standards. Essentially, how closely do existing laws need to align with international benchmarks to eliminate the need for new legislation? This interpretation, influenced by the European Convention on Human Rights, does not offer a definitive answer and may complicate the matter further. If the phrase ‘as may be necessary’ is viewed through the lens of the Protocol's objectives, states are required to enact laws that effectively address

⁹⁶ Smuggling Protocol, art 6.

⁹⁷ M Ali ‘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’ (2014) *Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester*.

⁹⁸ Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence available https://imumi.org/file/2024/02/Irregular_Migration_and_Smuggling_2010.pdf (accessed 10 October 2024).

migrant smuggling. Therefore, if current laws are sufficient to achieve this goal, new legislation may not be required. This interpretation is consistent with the legislative guide for implementing the Protocol, which indicates that the obligation to criminalize requires legislative measures unless existing laws are adequate. Legislators should prioritize the core objectives of the Protocol over its literal text.⁹⁹ As long as a state has effective laws whether specifically targeting the offense or part of a broader criminal code there may be no need for new legislation. Consequently, the compliance of Egypt, Nigeria, and Tanzania with the obligation to criminalize migrant smuggling depends on whether their laws effectively prosecute those involved in migrant smuggling.

Second, article 6(1)(b) obliges states to criminalize activities involving fraudulent documents when they are used specifically to facilitate migrant smuggling. However, this provision has certain limitations. According to the interpretative notes for Article 6(1)(b), the article only applies when the possession of fraudulent documents is directly linked to migrant smuggling. This means that if a migrant possesses fraudulent documents for their own use during smuggling, it would not fall under this provision. Moreover, the requirement that the offense must be tied to the purpose of migrant smuggling excludes fraudulent document activities related to other crimes like human trafficking, drug trafficking, or arms smuggling, as these are already criminalized under separate legal frameworks. Another limitation of Article 6(1)(b) is that it restricts the criminalization of activities involving fraudulent documents to travel and identity documents, such as passports and visas.¹⁰⁰ The interpretative notes for Article 3(c) clarify that travel documents are those needed for entering or leaving a state, while identity documents are used to verify a person's identity under domestic laws. This narrow focus raises concerns about whether other types of documents used in migrant smuggling are covered by article 6(1)(b). Documents that facilitate travel or verify identity but do not fit the definition provided in the article and its interpretative notes are excluded. Despite this, the limitation may not significantly affect states' ability to criminalise migrant smuggling, as many national laws define offences related to fraudulent documents more broadly, without being confined to specific document types.

Conversely, states lacking legislative experience in this area may adopt the Protocol's narrow definition when criminalising acts related to fraudulent documents, leaving gaps that perpetrators could exploit. For example, in Libya, illegal immigration offences constitutes the

⁹⁹ As above.

¹⁰⁰ Smuggling Protocol, art 6(1)(b).

preparation or possession of false travel or identity documents,¹⁰¹ which reflects a literal interpretation of article 6(1)(b). Consequently, documents like fraudulent employment contracts are excluded from criminalisation due to this strict adherence.

The Protocol allows states to prosecute smuggled migrants for illegal entry but prohibits prosecution for illegal departure; doing so would contravene the Protocol. Smuggled migrants have the right to leave, and the non-prosecution for illegal departure is covered by the immunity provisions of the Protocol. While states can prevent illegal departures facilitated by smugglers, Article 6(1)(c) also pertains to employers of illegal workers. However, facilitating illegal employment does not fall under the definition of smuggling, meaning that employers who permit illegal workers to remain in a country are not committing an offense under Article 6(1)(c). Therefore, the illegal actions specified in this article can be broadly interpreted to include individuals, such as employers, who hire illegal migrants and help them unlawfully stay in the country.

3.7 Conclusion

The Protocol needs to be really clear to avoid arguments between countries about what it means. It is important that the rules are precise, mandatory, and easy to understand. Countries are more likely to follow the rules if they are clear and leave no room for different interpretations. Therefore, it is best to avoid using uncertain and vague language in the Protocol. Instead, the rules about what countries have to do should be clearly stated and non-negotiable to prevent different countries from bending the rules to suit their own interests. Moreover, clear drafting will undoubtedly enhance the effective implementation of the law, thereby supporting the goals of unification and state accountability.

The Protocol, functioning as an international legal instrument, must be unambiguous to reduce the likelihood of states disputing or circumventing its provisions. The effective enforcement of norms within any system relies on their precision, obligatory nature, and objective interpretability. States are more inclined to adhere to international legal regulations that are clear and unequivocal, providing comprehensive details about the necessary actions to fulfil identified obligations. Therefore, it is advisable to minimise the use of vague language, such as 'may be necessary', 'appropriate', 'to the extent possible', and 'within available means', which is found in some provisions of the Protocol. Provisions pertaining to obligations should be

¹⁰¹Law No. (19) of 2010 on combatting illegal immigration, art 2(4).

expressed in clear, definitive, and obligatory terms to prevent interpretations based on individual state interests. Additionally, clear drafting will undeniably improve the effective implementation of the law, thus supporting the objectives of unification and state responsibility.

Chapter 4: Human rights violations that smuggled migrants face

4.1 Introduction

Throughout their journey, irregular migrants often experience a wide range of human rights violations and abuses, including but not limited to physical and sexual violence, exploitation, and lack of access to basic necessities. The journey of migrants from their home countries to their intended destinations is fraught with potential violations of their human rights, leaving them in a vulnerable position and in need of protection and support. These violations can occur at any point during their journey, and they are usually committed by smugglers and law enforcement authorities acting on behalf of states. Various international and regional human rights instruments have guaranteed the human rights of migrants, placing an obligation on states to ensure that these rights are protected at all stages of the migration process. Unfortunately, states have often failed to uphold these rights, particularly at transit and destination points.

4.2 Right to Life

All individuals, including irregular migrants, have the fundamental right to life, and it is the responsibility of states to ensure that no migrant, irrespective of their status, is arbitrarily deprived of the right to life.¹⁰² States are required to prosecute right to life violations, including all forms of homicide that take place at various points of the journey. The right to life of smuggled migrants is blatantly violated as thousands of migrants lose their lives each year during smuggling activities. These casualties normally happen as a result of poor weather conditions, bad roads, accidents and sometimes killing by smugglers or even other migrants along the routes¹⁰³. Smugglers often carry out their activities with little or no regard for the lives of the people whose desperation has led to a demand for smuggling services. Smugglers' operations at sea often involve night sailings to evade detection. Smugglers may also decide to sail in adverse and bad weather conditions with the explicit intention of seeking detection and rescue, with migrants even coached to sabotage their vessels to force rescue.¹⁰⁴ Both methods pose acute risks to both migrants on board and rescuers.

¹⁰² ICCPR, art 6; ICRMW, art 9.

¹⁰³ Migrant Smuggling in Focus – The Crime and UNODC's Response available <https://www.unodc.org/unodc/en/frontpage/2021/May/migrant-smuggling-in-focus--the-crime-and-unodcs-response.html> > (accessed 27 September 2024).

¹⁰⁴ C Deiana and others 'Migrants at Sea: Unintended Consequences of Search and Rescue' (2024) American Economic Journal: Economic Policy 16.

The construction of fences, walls, and other physical barriers at land borders has raised concerns regarding their effects on human rights. The Council of Europe Commissioner for Human Rights has voiced alarm over the growing use of razor-wire fences, stringent border controls, and limitations on free movement in several European nations.¹⁰⁵

4.3 Dangerous Interception Practices

According to international law, states must protect and ensure the right to life of individuals at sea within their territory or under their jurisdiction, including the duty to rescue and safeguard individuals, such as migrants lost at sea. This is mandated by the United Nations Convention on the Law of the Sea (UNCLOS) and the International Convention on Maritime Search and Rescue. Vessels are obligated to assist anyone in danger of being lost at sea and to rescue individuals in distress if they request help, as long as doing so does not pose a serious threat to the ship, crew, or passengers. UNCLOS also mandates that coastal states must collaborate with neighbouring states to enhance effective search and rescue services. Additionally, the 1979 International Convention on Maritime Search and Rescue (SAR) emphasises that individuals in distress at sea should be aided regardless of their nationality, status, or circumstances.

It is important to note that smugglers pose the greatest threat to human life in cases of human smuggling, whether by sea or land. However, states must protect the lives of smuggled migrants throughout their journey. This includes taking necessary actions to ensure the right to life, such as providing rescue operations at sea and on land. For example, in 2023, Greek authorities faced accusations of not rescuing hundreds of migrants on a vessel that sank near Pylos, resulting in one of the worst tragedies in the Mediterranean Sea. The Greek authorities argued that the incident did not occur within their territory.¹⁰⁶ In 2021, the Human Rights Committee found Italy responsible for failing to respond adequately to a distress call and dispatch a vessel to rescue over 200 migrants at sea, ultimately leading to loss of life due to the delay.

4.4 Torture, inhumane and degrading treatment

The prohibition of torture is a fundamental norm of international law, known as *jus cogens* or peremptory norm. This means that states are obliged to uphold the prohibition of torture, even

¹⁰⁵ Speech by Michael O’Flaherty Council of Europe Commissioner for Human Rights at the Joint debate of the Parliamentary Assembly of the Council of Europe on “Missing migrants, refugees, and asylum seekers – A call to clarify their fate” and “A shared European approach to address migrant smuggling” 2 October 2024 available <https://www.coe.int/en/web/commissioner/-/human-rights-and-migration-5-key-elements> (accessed 8 October 2024).

¹⁰⁶ ‘Timeline: How the migrant boat tragedy unfolded off Greece’ (*Al Jazeera* 16 June 2023).

if they have not ratified relevant treaties, such as the Convention Against Torture (CAT). The CAT states that no exceptional circumstances, including war or public emergencies, can justify torture.¹⁰⁷ Furthermore, the ICCPR and other regional human rights treaties also prohibit torture and cruel, inhuman, and degrading treatment.

Law enforcement practices also raise human rights concerns. Smuggled migrants have been exposed to torture at transit and destination points at the hands of state agents or security officials. For instance, cases of law enforcement authorities shooting directly at smuggled migrants at borders, resulting in injuries and deaths, have been reported.¹⁰⁸ The events that transpired in June 2022 at the Melilla-Morocco border shed light on the alleged mistreatment of migrants by Moroccan and Spanish officials.¹⁰⁹ Media and non-governmental organisations documented instances of excessive force used by Spanish and Moroccan police and border guards, including the deployment of tear gas, firing of rubber bullets, and throwing of rocks.¹¹⁰ The treatment of migrants in this situation represents a blatant violation of their fundamental human rights, particularly their right to dignity and respect and freedom from torture, inhumane and degrading treatment. It is tragic to see so many people lose their lives as a result of these violations at the hands of state agents who have an obligation to protect and respect the rights of everyone.

With regards to inhuman and degrading treatment, the European Court of Human Rights in the case of *MA and ZR v Cyprus*,¹¹¹ held that Cyprus had violated article 3 of the European Convention of Human Rights (ECHR) for keeping the applicants (Syrian nationals) at sea on board their wooden boat for two days without being allowed to disembark and were not provided with adequate food and water and were exposed to the heat and lack of access to hygiene facilities which the government did not dispute. The Court held that these circumstances amounted to degrading treatment.

4.5 The right to health

Migrants typically embark on their journeys in good health, but the intricacies of migration, challenging travel conditions, and limited access to healthcare can result in significant physical

¹⁰⁷ CAT, art 2(2)

¹⁰⁸ Mexican President calls for investigation of deadly migrant shooting' *Al Jazeera* (Mexico City) 3 October 2024 available

¹⁰⁹ Human Rights Watch 'Morocco/Spain: Horrific Migrant Deaths at Melilla Border' available <<https://www.hrw.org/news/2022/06/29/morocco/spain-horrific-migrant-deaths-melilla-border>> (accessed 9 September 2024).

¹¹⁰ As above.

¹¹¹ *M.A. and Z.R v Cyprus* (Application no. 39090/20).

and mental health challenges. Throughout their journeys, many migrants endure harsh circumstances, such as overcrowded boats or trucks, perilous sea crossings without proper safety measures, and strenuous treks through deserts and other treacherous landscapes. This stage of migration carries a high risk of health issues, including respiratory and gastrointestinal infections, dehydration, hypothermia, and injuries resulting from accidents and violence.¹¹² It is important to note that all migrants, irrespective of their legal status, are entitled to comprehensive health protection. The International Covenant on Economic, Social and Cultural Rights (ICESCR) upholds everyone's right to achieve the highest attainable standards of physical and mental health.¹¹³ The Committee underscores the imperative for equal access to preventive, curative, and palliative health services for all migrants, irrespective of their legal status and documentation.

Migrants encounter specific healthcare challenges while on the move, which include managing chronic conditions and addressing mental health issues stemming from traumatic experiences during their journey. The lack of adequate access to services may lead migrants to self-medicate or rely on informal medical interventions. While some countries have policies allowing migrants to access healthcare and social protection services, this access may be restricted and accompanied by a significant financial burden. Migrants often have to meet certain conditions before they can access healthcare services, such as presenting identification cards, proof of residence, and demonstrating insufficient financial means. In Portugal, migrants in an irregular situation can access the national health system after residing in the country for more than 90 days. They are required to obtain confirmation of residence and register as temporary patients at a local health centre.¹¹⁴ If their residence is less than three months, they have limited access to healthcare.¹¹⁵ Migrants must cover treatment costs but can apply for an exemption based on financial need. They may also face obstacles like distance to facilities, language barriers, and discrimination.

The right to health for irregular migrants must be implemented without discrimination. At a minimum, those in irregular situations should have a legal right to access essential healthcare

¹¹²Migration: taking rickety boats to Europe available <https://www.un.org/africarenewal/magazine/special-edition-youth-2017/migration-taking-rickety-boats-europe>> (accessed 5 October 2024).

¹¹³ ICESCR, art 12.

¹¹⁴European Website on Integration 'Annual report on migrants' integration in Portugal' 18 December 2022 available https://migrant-integration.ec.europa.eu/library-document/annual-report-migrants-integration-portugal_en (accessed 2 October 2024).

¹¹⁵ As above.

services, which should go beyond just emergency care to include visits to general practitioners and access to necessary medications. The same payment rules and exemptions that apply to nationals should also be applicable to irregular migrants.¹¹⁶

The right to health of irregular migrants should be upheld without discrimination. Migrants in an irregular situation should have legal entitlement to access necessary healthcare services, including non-emergency care, such as seeing a general practitioner or receiving essential medicines. The rules for payment of fees and exemption from payment should apply to migrants in irregular situations as they do to nationals.¹¹⁷ In Spain, the province of Catalonia introduced a free healthcare scheme for undocumented migrants to receive necessary medical attention without financial barriers.¹¹⁸ The initiative ensures that all undocumented migrants in Catalonia can access healthcare services without any financial barriers. The medical scheme covers primary care, emergency services and specialised treatments. The programme is implemented through the public healthcare system, allowing undocumented migrants to receive the same level of care as citizens.¹¹⁹ This includes access to hospitals, clinics and other healthcare facilities. The initiative includes support services such as translation and interpretation to address language and cultural barriers. This helps ensure that migrants can effectively communicate with healthcare providers and receive appropriate care.

4.6 Lack of access to decent work

While migrating, many people are forced to find work to survive and fund their further travel. They often work in the informal sector, which can be dangerous and exploitative. Due to their irregular situation, migrants usually struggle to have their labour rights protected. Industries such as agriculture, food, construction, and domestic work depend on low-skilled labour, even in higher-income countries, and often seek out migrants in irregular situations to address labour demands and shortages. Local workers and those who meet strict immigration criteria frequently decline these jobs. Protecting all workers from exploitation and abuse is a fundamental aspect of labour-related human rights. Migrants are protected against labour

¹¹⁶ Fundamental rights of refugees, asylum applicants and migrants at the European borders available <<https://fra.europa.eu/en/publication/2020/fundamental-rights-refugees-asylum-applicants-and-migrants-european-borders>> (accessed 2 October 2024).

¹¹⁷ S Angeleri 'The Right to Health Care of Irregular Migrants: Between Primary Care and Emergency Treatment. In: Irregular Migrants and the Right to Health' (2022) *Cambridge University Press*.

¹¹⁸ European Union Agency for Fundamental Rights 'Migrants in an irregular situation: access to healthcare in 10 European Union Member States' available <https://fra.europa.eu/sites/default/files/fra_uploads/1771-FRA-2011-fundamental-rights-for-irregular-migrants-healthcare_EN.pdf> (accessed 29 September 2024).

¹¹⁹ As above.

exploitation under the International Labour Organisation (ILO) conventions, the ICRMW, and other major human rights treaties. The ICRMW explicitly prohibits forced labour, slavery, and servitude.¹²⁰ The ICCPR states that no one shall be held in slavery or servitude. States are responsible for taking measures to prevent any form of forced or compulsory labour among migrant workers. This includes stopping practices such as illegal confinement and the withholding of travel documents, which are used to coerce migrants into involuntary labour. Forced labor is employed to cover smuggling fees or the costs of staying during transit, exploiting the vulnerability of migrants who need to pay these fees to continue their journey.¹²¹ Legally, it can be considered an aggravating circumstance to the offence of smuggling as part of the inhumane or degrading treatment and exploitation under the Smuggling Protocol.¹²² The Committee on the Elimination of Racial Discrimination (CERD) has pointed out that even though states may require individuals to obtain work permits, all individuals have the right to enjoy labour and employment rights, including the freedom of assembly and association, once they have entered an employment relationship. This right continues until the employment is terminated.¹²³

4.7 Inadequate living conditions

Migrants often face difficult living conditions during their journey and in the countries they are heading to. They may find themselves living in forests, fields, abandoned buildings, train stations, or other public areas without proper sanitation, safe food, or clean water. Efforts to improve these environments are often hindered, and homeless shelters may not be accessible. Those who do find accommodation often live in overcrowded, unsanitary, and unsafe conditions, while others cannot afford housing.¹²⁴ The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of every individual to an adequate standard of living, including access to enough food, clothing, and housing, as well as the continuous improvement of living conditions for themselves and their families.¹²⁵ States should take measures to prevent and penalize discrimination against migrants that threatens their right

¹²⁰ ICRMW, art 11.

¹²¹ ILO Forced Labour Convention (No 29) art 11; General Comment No 2 para 60.

¹²² Smuggling Protocol, art 6(3).

¹²³ General Recommendation No 30 on discrimination against non-citizens available <https://www.ohchr.org/en/press-releases/2009/10/committee-elimination-racial-discrimination-adopts-general-recommendation#:~:text=General%20R> (accessed 2 August 2024).

¹²⁴ Refugee and migrant health available <<https://www.who.int/news-room/questions-and-answers/item/refugee-and-migrant-health>> (accessed 5 October 2024).

¹²⁵ ICESCR, art 11(1).

to an adequate standard of living and should work to prevent the marginalization and social exclusion of migrants in irregular situations.¹²⁶

4.8 Extortion and Kidnapping

Migrants are also exposed to extortion and kidnapping. Extortion in the context of migrant smuggling often involves smugglers demanding additional payments from migrants or their families after the journey has commenced. This can occur during transit, where migrants are often detained and coerced into paying more money to continue their journey. Furthermore, upon arrival, smugglers may use threats of violence or report migrants to authorities unless they pay additional fees. In some instances, when migrants are unable to pay the ransom, they are often beaten and harassed by smugglers, which is usually recorded and sent to family members to pay the ransom. The desire for financial gain often drives kidnapping and involves the unlawful deprivation of a person's freedom and various forms of abuse. These actions could be considered as aggravated circumstances related to the offence of smuggling migrants, as they may constitute inhuman or degrading treatment as defined in the Migrants Protocol.¹²⁷

4.9 Obligation of states to prevent migrant smuggling

The responsibility to prevent migrant smuggling requires taking proactive steps to prevent future smuggling activities. By fulfilling this obligation, states can reduce the vulnerabilities associated with smuggling. States have the discretion to determine the specific nature of these measures, providing them with great flexibility. The implementation of border control measures may be significantly influenced by the location of a state on the migrant smuggling route.¹²⁸ This article is more effectively implemented by states that are often targeted by migrant smuggling. In response to the questionnaire distributed by the European Commission regarding the implementation of the Protocol, Spain mentioned that it was conducting joint patrols to enforce border controls as outlined in the Protocol.¹²⁹ On the other hand, countries from which migrants are smuggled often lack the motivation to combat smuggling activities. As a result, they may only take limited measures, using the flexible wording of the article to justify their actions.¹³⁰ For example, they may not be concerned about allowing the poorest, unskilled, or unemployed individuals to leave the country. The Protocol also necessitates that

¹²⁶ As above.

¹²⁷ Smuggling Protocol, art 16.

¹²⁸ Smuggling Protocol, art 11(1).

¹²⁹ Smuggling Protocol, art 11(1).

¹³⁰ R Miller and S Bauneiser 'Managing Migration: Is border control fundamental to anti-trafficking and anti-smuggling interventions?' (2013) *Journal of Human Trafficking*

states require commercial carriers, such as transportation companies or owners and operators of any means of transport, to confirm that all passengers have the required travel documents for entry into their destination state.¹³¹ . In line with the Protocol, commercial carriers should only ensure that passengers have travel documents but they are required to confirm the validity of these documents.¹³² documents. This limitation is deemed acceptable, as carriers generally lack the tools or expertise to confirm the authenticity of such records.

The language used in articles 11(1) and (3) about border control measures and in article 12 about security and document control measures is unclear. Article 12 says states must carry out these measures 'within available means. This flexibility is important for states lacking the expertise and resources to fulfil this article. It was included to recognize the challenges developing countries face that may be unable to afford issuing high-quality documents as required in subparagraph (a) of the article. This flexibility allows developing countries to implement article 12 according to their capacity. However, the flexible and unclear language in article 12 could be used by states to avoid implementing its measures or to justify ineffective execution, especially when preventing migrant smuggling is not a priority. These measures demand advanced technology. States can claim that they have acted "within available means," arguing either that they have met their obligations according to their capacity or that they lack the necessary capacity to implement them effectively.

This raises the question as to who is responsible for evaluating a state's ability to implement article 12 of the Protocol? How can we accurately assess this ability? These questions are difficult to address because judging a state's capacity to take the necessary preventive measures might be seen as interfering in its internal affairs. The United Nations Convention on Transnational Organized Crime (UNTOC) explicitly states that states must meet their obligations while respecting the principles of sovereignty and non-interference in the domestic matters of other states. After highlighting the lack of clarity of several articles related to preventive measures impacts their implementation by states, it is essential to stress that the provisions of the Protocol, including those concerning prevention, must be interpreted and applied in line with its objectives. The primary aim of the Protocol is to prevent and combat

¹³¹ Smuggling Protocol, art 11(3).

¹³² M Ali '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' (2014) Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester.

migrant smuggling.¹³³ Consequently, states are obligated to implement the articles on prevention following this objective. For example, under Article 11(1), states must adopt necessary border control measures to combat and prevent migrant smuggling. Specifically, as states have to secure their borders against migrant smuggling,¹³⁴ they should consider effective strategies such as pre-screening of incoming individuals, advance reporting by carriers of passengers, and the use of modern technologies, including biometrics. However, without a monitoring mechanism in place, not all states can effectively carry out these implementations. The Conference of the Parties, established under Article 32 of the UNTOC, was initially authorized solely to monitor and review the implementation of the UNTOC.¹³⁵ Thus, the responsibility for reviewing and monitoring the implementation of the Protocol falls under the authority of the Conference of the Parties.¹³⁶ However, during its first session in July 2004, the Conference of the Parties expanded its monitoring and other functions outlined in article 32 of the UNTOC to include the Protocol. While this amendment represents a notable advancement in the review of the Protocol, it has not positively affected the implementation of states' obligations in line with the Protocol's objectives.

This is due to the fact that the Conference of the Parties fundamentally lacks the authority to mandate specific actions from states. For example, the minimal response from most states regarding the questionnaires sent by the Conference of the Parties in 2005 and 2006 about the implementation of the Protocol highlights the Conference's weaknesses. Therefore, it can be concluded that the absence of a rigorous monitoring or supervisory mechanism within the Protocol is a significant deficiency that may weaken state obligations and ultimately hinder its overall effectiveness.

4.10 Conclusion

The Protocol has not established a clear and comprehensive framework of rights to address these violations. The rights of smuggled migrants under the Protocol are uncertain. Article 5 of the Protocol gives smuggled migrants the right not to be prosecuted for leaving a country illegally. Still, this right can be overruled by article 6(4), which allows countries that are part of the Protocol to punish smuggled migrants for actions that are considered illegal under their laws. Smuggled migrants also have implied rights under the Protocol, such as the right to be

¹³³ Smuggling Protocol, art 2.

¹³⁵ UNTOC, art 32.

¹³⁶ As above.

rescued at sea, the right to receive physical and psychological care, and the right not to be sent back to a country where they could be in danger, outside the rules of the Refugee Convention. These rights are based on the right to life and the right not to be tortured or treated in a cruel, inhuman or degrading way, as stated in article 16(1) of the Protocol.

However, it is unlikely that countries will accept these rights because they would create more responsibilities for countries in support of smuggled migrants, who are generally not well-regarded by countries. Even if countries that are part of the Protocol agree that these rights exist, there are practical problems that would affect the enforcement of these rights in cases of migrant smuggling. For instance, the international law of sea rescue does not specify a place to take rescued individuals, and the Protocol has not addressed this issue, which is particularly important in cases of migrant smuggling by sea. This problem can weaken the right of smuggled migrants to be rescued at sea. Rights for migrants in international human rights law are currently scattered and not well-coordinated. This makes it harder to protect migrants and makes it difficult for advocacy groups to focus on the specific needs of migrants as a vulnerable group. For example, the right to return and detention-related rights are covered in different parts of human rights law, which makes it challenging to provide comprehensive protection for migrants. The non-ratification of key international human rights instruments by some parties to the Protocol restricts the rights of migrants. States that are only party to the Protocol, and not to other instruments, are not obliged to ensure rights for smuggled migrants. Even states that are party to both the Protocol and key human rights instruments are unlikely to protect these rights for smuggled migrants. Destination states are generally reluctant to apply international human rights standards to regular or irregular migrants.¹³⁷ States have a responsibility to take strong action to address the human rights protection gap for smuggled migrants, particularly at transit points and destinations. States should ratify and implement core international human rights agreements and relevant standards of international law. This is because the rights of smuggled migrants is multifaceted and cuts across all human rights issues. Additionally, states are urged to ensure that migrants have access to safe, affordable, and regular migration pathways, as well as humanitarian assistance and protection.

¹³⁷ Non-criminalization of smuggled migrants (Notes on the interpretation of article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air) available <<https://www.acnur.org/fileadmin/Documentos/BDL/2014/9791.pdf>> (accessed 10 October 2024).

Chapter 5 : Conclusions and Recommendations

5.1 Conclusion

Efforts to combat the smuggling of migrants are of utmost importance. As this type of crime is transnational, the Smuggling Protocol stands as the primary international legal instrument that binds states in the fight against migrant smuggling. Hence, the Protocol must be comprehensive enough to effectively address the key issues hindering its implementation. It must be clear and precise to ensure effective enforcement. Vague language such as to the extent possible and as may be necessary should be minimised and obligations of states should be articulated in clear, definitive and mandatory terms to prevent individual state interests from affecting the interpretation. This will enhance effective implementation of the law and support the objectives of unification and state responsibility.

Another significant shortcoming of the Protocol is the absence of a monitoring mechanism. Currently, states lack a structured way to report on their implementation levels, creating a gap that needs to be addressed. Establishing an oversight mechanism for the Protocol would encourage states to take migrant smuggling more seriously. Additionally, it would provide a platform for states to express the challenges they face in implementing the Protocol, enabling other states to offer support and assistance.

The international community has resolved to use international law to address migrant smuggling. The eradication of these activities bolsters states' sovereignty and security and advances fundamental human rights. The following recommendations are proposed to achieve these objectives.

The Protocol should incorporate a comprehensive criminal framework. To effectively combat migrant smuggling, it must include all individuals involved in these activities. Additionally, any existing gaps in the criminal provisions concerning migrant smuggling must be addressed to prevent smugglers from evading prosecution.¹³⁸ A thorough criminalisation of migrant smuggling should be a primary strategy for tackling the fundamental aspects of the issue. It should not rely solely on interpreting current provisions to fill gaps in the Protocol, particularly regarding criminal law related to migrant smuggling.¹³⁹ Some states may struggle to implement

¹³⁸ Migrant smuggling available <<https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/migrant-smuggling>> (accessed 10 October 2024).

¹³⁹ Criminal Networks in Migrant Smuggling available <<https://www.europol.europa.eu/cms/sites/default/files/documents/Europol%20Spotlight%20Report%20-%20Criminal%20networks%20in%20migrant>> (accessed 10 October 2024).

this process effectively when aligning their domestic legislation with the Protocol. Therefore, migrant smuggling activities must be explicitly and comprehensively criminalized, facilitating the enactment of appropriate legislation by states.

Secondly, providing adequate protection and support for smuggled migrants must be a central focus. As migrant smuggling has increasingly been recognized as a human rights issue due to the violations these individuals face, future laws should approach these activities from a human rights perspective. The rights of smuggled migrants must be protected, particularly since preventing smuggling may not always be achievable. Additionally, it is vital to offer effective reintegration packages for returnees to help them readjust to society, as well as to raise awareness in local communities about the risks involved in the migration journey.

Third, the Protocol must adopt a dynamic approach to effectively combat migrant smuggling. It should urge states to fulfil their obligations while also identifying genuine challenges that may hinder implementation. Furthermore, it should seek solutions to address these obstacles

Additionally, the Protocol must be flexible enough to respond to emerging trends in migrant smuggling. Its effectiveness will depend on providing states with the tools and strategies necessary to combat smuggling effectively. As smugglers continually improve their methods, especially with advancements in communication technology and globalization, the Protocol should proactively anticipate and address these changes through innovative and forward-looking strategies.

5.2 Recommendations

Following a thorough analysis, the paper offers the following recommendations for The Gambia and Senegal as points of origin, along with specific suggestions for transit and destination countries.

5.2.1 The Gambia and Senegal

The governments of The Gambia and Senegal, as primary duty bearers, must respect, protect, and fulfil the rights of their people. They have a responsibility to prevent the smuggling of migrants and this can be achieved by aligning their laws and policies with programmes specifically designed to address the issue of irregular migration.

The countries should also endeavour to strengthen bilateral agreements to combat the smuggling of migrants effectively. This is important due to the complex nature of smuggling in these two countries and their geographical proximity. The two states must take ownership

and implement sustainable development programmes to provide viable economic opportunities, thus reducing the desire of the youthful population to leave the countries. A multi-sector approach involving community actors and strong partnerships with international organisations could create an environment more conducive to social inclusion and resilience. Both Senegal and The Gambia have the potential to initiate real change in the perception of migration and turn challenges into opportunities. The criminalisation of migrant smuggling is crucial in combating this issue, but it must be accompanied by measures to protect and support victims.

Both countries should establish specific legislation to criminalise the smuggling of migrants, as stipulated in the Protocol,¹⁴⁰ rather than relying on various fragmented laws to prosecute smugglers. The Gambia has taken a significant step by drafting a Smuggling Bill, which Senegal could consider emulating, even though the Bill has not yet been enacted into law.

A participatory approach is also essential to ensure that young people perceive these initiatives as relevant and beneficial. Finally, for these efforts to be successful, it is crucial to integrate migration perspectives into development policies. Young people need to be involved in the decision-making process and have access to credible information about local opportunities. The combination of these measures will build a future where young people see their country as a land of opportunity rather than a starting point for uncertainty.

The historically porous land borders between The Gambia and Senegal underscore the critical importance of effective border control and management in combating migrant smuggling. The Smuggling Protocol necessitates that states bolster their border controls to the fullest extent possible to prevent and detect migrant smuggling. Therefore, it is imperative to establish a robust system for verifying the validity and authenticity of identity documents. This entails training border personnel to recognise genuine documents and identify fraudulent ones, thereby deterring smugglers attempting to use fake identities.

Implementing mechanisms to track and analyse migration flows is vital for understanding patterns and identifying potential smuggling activities. This can involve data collection and sharing the two countries to better predict and respond to shifts in migration trends.

¹⁴⁰ Smuggling Protocol, art 5.

5.2.3 Countries of transit and destination

Destination countries should take measures to ensure that migrants who enter the country without proper authorisation are not criminalised for their immigration status. Instead, these countries should guarantee that migrants have access to legal recourse and protection of their human rights. Moreover, destination countries must establish robust and efficient channels that enable migrants to report any instances of mistreatment by smugglers or other violations. This is an essential step in combatting transnational organised crimes and upholding the safety and integrity of migrant communities.

It is also essential for destination countries to establish legal pathways for orderly and safe migration management. This involves removing barriers that hinder people from accessing safe and regular migration channels, such as visa restrictions. To achieve this, migration pathways should be expanded or created by providing access to mobility channels such as temporary, seasonal, or work-based visas, and long-term visas and establishing bilateral labour agreements or policies with countries of origin to regulate migration flows. There is the need to enhance the capacity of relevant institutions and equip them with modern technologies so as to better streamline their work and improve their performance. International cooperation is crucial in addressing crimes that transcend national borders. It is imperative for member states of the Council of Europe to collaborate with each other and with third countries that are the source of the majority of migratory flows. This collaboration requires further reinforcement and enhancement to effectively combat transnational crime.

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