

**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF LL.M II ND YR.
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Human Smuggling and Refugee Protection: Issues and Trends

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DECLARATION

I, Nikhil. G, do hereby declare that this dissertation on “Human Smuggling and Refugee Protection: Issues and Trends”, is the result of the research undertaken by me in the course of my LL.M Programme at the National Law School of India University (NLSIU), Bangalore, under the guidance and supervision of Prof (Dr.) V. Vijayakumar, former Registrar, NLSIU, Bangalore.

This work is my original work, except for such help taken from such authorities as have been referred to at the respective places for which necessary acknowledgements have been made.

I further declare that this work has not been submitted either in part or in whole, for any degree or diploma at any other University or Institution.



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CERTIFICATE

This is to certify that this Dissertation on “Human Smuggling and Refugee Protection: Issues and Trends” submitted by Nikhil. G (ID No. 280), for the Degree of Master of Laws for the Session 2007-2009, of the National Law School of India University, is the product of bona-fide research carried out under my guidance and supervision. This Dissertation or any part thereof has not been submitted elsewhere for any other degree.


(Prof. Dr. V. Vijayakumar)

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Dated: 15 .06.09

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LIST OF CASES

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CONTENTS

<i>Declaration</i>	<i>i</i>
<i>Certificate</i>	<i>ii</i>
<i>Acknowledgment</i>	<i>iii</i>
<i>List of Cases</i>	<i>iv</i>
<i>List of Statues and Documents</i>	<i>v</i>
Introduction	01
Human Smuggling and Applicability of Refugee Law	17
National Security and Claim for protection	35
Migration Management and Smuggling Protocol	52
Conclusion	68
Bibilography	73

Chapter I - Introduction

The concept of human smuggling is related to refugee movement. Refugee movement on other hand can be related to one of the most important and established rights recognised in most of the international instruments, that is the freedom of movement. Under Article 14 of the Universal Declaration of Human Rights (UDHR) of 1948, everyone has the right to seek and enjoy asylum. Also Article 13 of the Convention Relating to the Status of Refugees of 1951 states that countries should not impose penalties on individuals coming directly from a territory where their life or freedom is threatened on account of their illegal entry.

Thus when we read both of the provisions listed above together, any individual who is fleeing persecution, cross the national borders illegally to another country, the individual can be neither detained nor penalised. The state in which the individual arrives should grant the individual protection and also respect the individual's right to free movement under international law.

The political alliance and economic relations which have dominated the international scene in the half century since the end of World War II are transformed.¹ International population movements are increasing rapidly in size and complexity. The expansion, having come as a result of policies enacted in

¹ Allen Borowski et-al, Chapter 2, International Movements of People, Immigration and Refugee Policy-Australia and Canada compared, Volume 1,(University of Toronto Press, Toronto, 1994), at 24.

1980, 1986, and 1990, has stimulated a growing movement for immigration restriction.²

The restrictive admission policies initially resulted from two incidents in the late 1980s; incidents subsequently prompting illegal migration on a global scale. The first incident was the violation of human rights in China, including the massacre in Tiananmen Square in June 1989. This led to increasing numbers of Chinese refugees seeking asylum in Australia, Western Europe, and North America. The second incident was the ending of the Cold War and the change of governments in many Eastern European and Asian countries of the former Soviet bloc.³

Smuggling people from one nation to another, is a large and growing business. The penalties are far less severe than for drugs, the upfront investment much smaller, and the evidence has legs to run away. Smuggling is the term usually reserved for individuals and organizations who for a fee, move individuals unlawfully across borders.⁴

Human Smuggling as a method to cross borders is adopted by the migrants to:⁵

1. Escape from extreme poverty and unemployment;
2. Improve earnings and standard of living;

² *Ibid.*

³ Claire Brolan: *An Analysis Of The Human Smuggling Trade And The Protocol Against The Smuggling Of Migrants By Land, Air And Sea (2000) From A Refugee Protection Perspective*, 14 Int'l J. Refugee L, at 561.

⁴ Philip Martin and Mark Miller: *Smuggling and Trafficking: A Conference Report, International Migration Review*, Vol. 34, No. 3 (Autumn, 2000), at 969

⁵ *Human Smuggling, A security threat to Australia*, Australian Institute of Criminology, sourced from: http://www.aic.gov.au/conferences/other/graycar_adam/2000-08-smuggling_slides.pdf, accessed on: 22/02/2009

3. Escape from persecution, conflict or war;
4. Escape from ecological crisis or degradation;
5. Human rights abuses.

The act of human smuggling may not be treated as a human rights issue, because it is characterised merely as facilitation of illegal migration and consequently, those smuggled can be regarded as criminals or their collaborators, and States may place greater emphasis on immigration control in order to prevent their flow.⁶

Human smuggling operations take many different forms. The pattern may vary by the type and location of the smuggling⁷. For e.g. to smuggle people from Mexico to United States the smugglers are helped by family and friends to pass through the border. These practices raise important questions in the context of refugee protection, as an increasing number of refugees and asylum seekers turn to smugglers to migrate. Trafficking and smuggling also undermine the rule of law and political foundation of States, because traffickers and smugglers such as organised criminal groups resort to violence and corruption as means to advance their business.⁸

It is currently estimated that some 800,000 people are smuggled across borders every year. These figures mask the complex and various experiences of the men,

⁶ Tom Obokata: *Smuggling Of Human Beings From A Human Rights Perspective: Obligations Of Non-State And State Actors Under International Human Rights Law*, 17 Int'l J. Refugee L., at 394.

⁷ Susan F. Martin: *Best Practices to Combat Smuggling and Protect the Victims of Traffickers*, sourced from: http://migration.ucdavis.edu/cf/more.php?id=100_0_2_0, accessed on 10/11/2008.

⁸ Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, March 2005, sourced from: <http://www.migrationinformation.org/Feature/display.cfm?id=294>, accessed on: 10/11/2008.

women, and children caught up in such processes. Those who are smuggled include political refugees, those fleeing conflict and violence of various kinds, and economic migrants in search of a better life. This is by nature a secretive, illicit activity, and one that is increasingly controlled by transnational organized crime syndicates. Numerous press articles describe cases of migrants drowning in unsafe vessels or suffocating to death in overcrowded truck compartments and ships, or being victimized for revealing information about smuggling gangs.⁹

Many of those who do reach their destination find themselves locked in cycles of violence, exploitation, and abuse. These violations tend to go unreported because the victims fear arrest and deportation on one hand, and retribution by smuggling gangs on the other. The spread of human smuggling needs to be understood in the context of globalization and migration. Since 1965, the number of international migrants has doubled to some 175 million persons at the turn of the millennium¹⁰. Prospects of a better life abroad, poverty, economic marginalization, political and social unrest, and conflict are all incentives to move. In an increasingly interconnected world, movement is easier.

Smugglers are sometimes the only option left for desperate people trying to save their lives. What is known, however, is that people smuggling costs untold numbers of people their lives, while others are raped or suffer violence and traumatic experiences, some are routinely cheated out of thousands of dollars, and for others, after a painful journey, they find themselves detained and

⁹ *Ibid.*

¹⁰ *Ibid.*

deported back home.¹¹ Another aspect of human smuggling is that it is widely described as a threat to the receiving country.

Human smuggling can pose a threat to the receiving states, by effecting their:¹²

1. Internal order and stability;
2. Social harmony;
3. Economic stability;
4. International relations.

Transnational organized crime is considered as one of the major threats to human security, impeding the social, economic, political and cultural development of societies worldwide.¹³ It is a multi-faceted phenomenon and has manifested itself in different activities, among others, drug trafficking, trafficking in human beings; trafficking in firearms; smuggling of migrants; money laundering; etc.

United Nations Office on Drugs and Crimes (UNODC) describes migrant smuggling as a deadly business. According to UNODC, currently data is too scattered and incomplete to paint an accurate picture of numbers of people who are smuggled each year and the routes and methods used by those who smuggle

¹¹ *Supra* note 5.

¹² *Supra* note 5

¹³ Sourced from: <http://www.unodc.org/unodc/en/organized-crime/index.html>, access on 15/10/2008

them. UNODC, with their available evidence, gives us this following trends and pattern.¹⁴

- Criminals are increasingly providing smuggling services to irregular migrants to evade national border controls, migration regulations and visa requirements. Most irregular migrants resort to the assistance of profit-seeking smugglers. As border controls have improved, migrants are deterred from attempting to illegally cross them themselves and are diverted into the hands of smugglers.
- Migrant smuggling is a highly profitable business in which criminals enjoy low risk of detection and punishment. As a result, the crime is becoming increasingly attractive to criminals. Migrant smugglers are becoming more and more organized, establishing professional networks that transcend borders and regions.
- The modus operandi of migrant smugglers is diverse. Highly sophisticated and expensive services rely on document fraud or 'visa-smuggling'. Contrasted with these are low cost methods which often pose high risks for migrants, and have lead to a dramatic increase in loss of life in recent years.
- Migrant smugglers constantly change routes and modus operandi in response to changed circumstances often at the expense of the safety of the smuggled migrants.
- Thousands of people have lost their lives as a result of the indifferent or even deliberate actions of migrant smugglers.

¹⁴ Sourced from, <http://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html>, accessed on 27/03/09

The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish 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, their Parts and Components and Ammunition.¹⁵ The Convention commits states to introduce a range of measures, including the creation of domestic criminal offences to counter the problem; the adoption of new frameworks for mutual legal assistance; extradition; law enforcement cooperation; technical assistance and training.

A major achievement of the Protocol was that, for the first time in a global international instrument, a definition of smuggling of migrants was developed and agreed upon. The Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterize the smuggling process.¹⁶

The Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted by General Assembly deals with the growing problem of organized criminal

¹⁵Sourced from, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>, accessed on 27/03/09

¹⁶*Ibid*

groups who smuggle migrants, often at high risk to the migrants and at great profit for the offenders. The Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterize the smuggling process.

The concept of Human Smuggling should not be mixed with Trafficking in person. In accordance with Article 3 of the *Trafficking Protocol*: "*Trafficking in persons*" shall mean:

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

Under Article 3 of the *Smuggling Protocol*, smuggling is defined as:

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

There are certain differences between these two definitions. Firstly, trafficking is carried out with the use of coercion and/or deception, whereas smuggling is not, indicating that the latter can be a voluntary act on the part of those smuggled. Secondly, trafficking can entail subsequent exploitation of people, while the services of smugglers end when people reach their destination. Third, trafficking takes place both within and across national frontiers, although international movement is required for smuggling. Fourth, entry into a State can both be legal and illegal in the case of trafficking and smuggling is characterised by illegal entry. Smuggling, therefore, can be summarised as facilitation of illegal entry, and smuggled people will inevitably be regarded as illegal migrants.¹⁷

The use of coercion or deception by traffickers as well as subsequent exploitation have the effect of portraying trafficked people as victims of human rights abuses, and this reinforces a case for their protection even when they enter into a State and/or stay illegally. However, the definition of smuggling suggests that those smuggled are willing participants who violate national immigration laws and regulations.¹⁸ So in this case, States are more likely to apply enforcement measures such as arrest, detention and deportation against persons who are smuggled.

The protocols share several key features. Both require state parties to criminalize the relevant conduct of traffickers or smugglers, to establish and implement domestic law enforcement mechanisms, and to cooperate with other

¹⁷ See *Supra* note 6

¹⁸ *Ibid.*

states to strengthen international prevention and punishment of these activities. And neither protocol explicitly requires states to implement any particular immigration benefits for victims, to regularize or expand lawful access to their territory, or to address the chronic mismatch between supply and demand by increasing supply.¹⁹

The Smuggling Protocol contains rather minimal reference to the protection needs of smuggled persons. The preamble to the protocol does set out the need to provide migrants with humane treatment and full protection of their rights, and expresses concern that the smuggling of migrants can endanger the lives or security of the migrants involved.²⁰

The Smuggling Protocol, in Art. 9, also requires states to ensure the safety and humane treatment of the persons on board vessels that are searched and to implement their pre-existing, absolute obligations under international law, to protect the right to life and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 15 states that, States parties are also required to embark on a range of prevention measures, including strengthening domestic information programs to increase public awareness of the dangers facing smuggled migrants and collaborating with other states to prevent migrant recruitment by criminal gangs.

But there are no provisions regarding medical, psychological, or social recovery, which include help with housing, employment, and job training. States also are not obligated to collaborate with NGOs, or to provide temporary legal residency as in the Trafficking Protocol. UNODC helps countries use the provisions of the

¹⁹ *Ibid.*

²⁰ *Ibid.*

Convention to create domestic criminal offences to counter the problem; to adopt new frameworks for mutual legal assistance; to facilitate extradition; law enforcement cooperation; technical assistance and training.²¹

As globalization has expanded international trade, so the range of organized crime activities has broadened and diversified. The traditional hierarchical forms of organized crime groups have diminished replacing it with new transnational crimes with larger profits.

The administrative methods to control and manage migration have become increasingly complex and countries seek to retain control over entry in a situation where migration's role in national social and economic policy is becoming even more complex.²² Another major problem faced is with regard to the control of illegal migrants. Internationally, governments are experiencing major difficulties in coping with large and growing number of illegal immigrants.²³

There are three key obligations applicable to all States with regard to the crimes committed by non-state actors regardless of their status as States of origin, transit and destination.²⁴

1. Prohibit human smuggling;

²¹ *Ibid.*

²² Christine Inglis, et-al, Chapter 1, An Overview of Australian and Canadian Migration Patterns and Policies, Immigration and Refugee Policy-Australia and Canada compared, Volume 1, (University of Toronto Press, 1994), at 17.

²³ *Ibid* at 22

²⁴ *Supra* note 6

2. Investigate, prosecute and punish smugglers;
3. Protect victims of trafficking and smuggling.

Prohibition of smuggling of human beings through criminal law is one obligation imposed upon States under international human rights law. In relation to smuggling of human beings, although there are no human rights provisions applicable to the practice *per se*, an obligation to prohibit it can be established by relying on related aspects of the practice. It is now settled that the prohibition of torture is part of customary international law and *jus cogens*. Further, prohibition of slavery and forced labour may become relevant. Many smuggled people become indebted to smugglers as they are charged a high amount of money for their journey. As a consequence, many are held in debt bondage and are forced to accept any work available with minimal remuneration to repay their debts. Prohibition of slavery is a clear obligation established under human rights instruments such as the Slavery Convention 1926, the ICCPR, the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). Similar to torture, the prohibition of slavery is also part of customary international law and constitutes *jus cogens*.

Finally, many of those smuggled lose their lives during the course of their journey, and international human rights law obliges States to take measures to prevent and punish deprivation of life through criminal law. Thus, the obligation of States to prohibit trafficking and smuggling is established under international human rights law.

Another legal obligation imposed upon States is to investigate, prosecute and punish non-State actors, including traffickers and smugglers, with “due diligence.” This obligation has been established under international human rights law. The State is obliged to investigate every situation involving a violation of rights under the Convention.

If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. This obligation has been endorsed by other human rights mechanisms including the Human Rights Committee and the Special Rapporteur on Violence against Women. Some commentators go further to argue that this obligation to investigate constitutes customary international law.

In relation to smuggling, an obligation can also be implied from Article 16(2) of the Migrant Workers’ Convention which provides: Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions. A migrant worker is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” An interesting aspect of this Convention is that it applies to both documented (legal) and undocumented (illegal) migrants. This means that the scope of its application can be extended to include smuggling migrants.

In relation to other human rights instruments, the obligation to protect can be inferred from a general duty to secure, ensure, or restore rights, and to provide remedies. Article 2(3)(a) of the ICCPR for instance, provides that States are under an obligation to ensure that “any person whose rights and freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

Even though the wording may be different, a similar obligation is also established by such instruments as the CRC, ECHR, and ACHR. The obligation to protect also arises when States fail to take positive steps to prevent non-State actors from committing illegal acts.

Aims and Objective of the research:

This study would look into the concept of human smuggling in a human rights perspective analysing the rights of the states and persons who are smuggled. The study would analyse the connection of human smuggling with the refugee law and also the current status of management of human smuggling.

Hypothesis:

The researcher starts the research with the following hypothesis:

1. The concept of human smuggling falls within the scope of International Refugee law and the refugees are entitled to certain rights which are often breached by the strict migration policies of the states.

2. The concept of human smuggling overlaps with the concept of human trafficking and is perceived to be a national security concern.

Research questions:

To satisfy the aims and objectives stated by the researcher, the following research questions will be analysed:

1. Whether the concept of human smuggling falls within the scope of International Refugee Law?
2. Whether the concept of human smuggling, overlap with human trafficking?
3. How far is the illicit entry to a country, adversely affect the persons claim for protection in case of humanitarian reasons?
4. How far is the human rights of the smuggled persons are marginalized?
5. Whether human smuggling poses a threat to the national security of the receiving state?
6. What is the status of the migration management practiced especially in the case of human smuggling practiced under the Smuggling Protocol?

Chapterisation:

The second deals with human smuggling and the applicability of International Refugee law. By this the issue whether the concept of human smuggling falls within the scope of International Refugee law is addressed as well as the rights of the refugees. The third chapter addresses the issue of national security and the refugee's claim of protection. The fourth chapter speaks about the

migration management practiced by the states and the provisions in the smuggling protocol, further followed by the concluding chapter.

Research Methodology:

The research will adopt descriptive and analytical method in this study. The research is based on secondary sources of data.

Chapter II - Human Smuggling and Applicability of Refugee Law

Refugee and Refugee Law:¹

Article 38(1) of the Statute of the International Court of Justice names four sources of international law: international conventions, international custom, general principles of law, and judicial decisions and the teachings of the most highly qualified academicians of the various nations. Under Article 1A(2) of the Convention relating to the Status of Refugee 1951, a refugee is defined as:

any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The principle of non-refoulement, the cornerstone of international refugee law, forbids states from returning a refugee in any manner whatsoever to the border of a state where her life and liberty would be threatened on account of her membership in one of the five protected groups enumerated above.²

¹ See Jaya Ramji, *Legislating Away International Law: The Refugee Provisions Of The Illegal Immigration Reform And Immigrant Responsibility Act*, 37 Stan. J. Int'l L, at 119.

² See Hull, *Displaced Persons*, 13 Ga. J. Int'l L. 753, 763; Martin, *Large-Scale Migration of Asylum Seekers*, 76 Am. J. Intl L, at 598.

The refugee definition is the foundation of the 1951 Convention and, consequently, of international refugee law³. However this definition, after its coming into being, now covers fewer and fewer of the persons in need of international protection. Regardless of the gravity of the reasons an asylum seeker may invoke, he or she is not recognized as a refugee and given Convention status unless the motivating circumstances of his or her request can be linked to the specific criteria of the definition.⁴

Article 1A(2) could be read so that persecution included only human rights abuses that originate with, or are encouraged or tolerated by, governments or state like authorities. However, this approach has been seen to be too restrictive for it does not cover persons who are being persecuted by non-state entities. An expanded definition developed, which includes persecution perpetrated by non-state entities as within the 1951 Convention's definition. . It is drawn partly from the broad refugee concepts of the Organization of African Unity⁵ and the Cartagena Declaration on Refugees⁶. This inclusive approach has drawn support from states,

³ Studies of asylum and refugee law which take a broader perspective include: G. Goodwin-Gill, *The Refugee In International Law*, (Oxford, London, 1983)

⁴ Claire Brolan, *An Analysis Of The Human Smuggling Trade And The Protocol Against The Smuggling Of Migrants By Land, Air And Sea (2000) From A Refugee Protection Perspective*, 14 Int'l J. Refugee L. 564 - 565.

⁵ The Convention Governing the Specific Aspects of Refugee Problems in Africa defines a refugee in the same terms as the refugee convention, see note 9 below, and adds the following features in its Art.1.a.2: "the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality". Entry into force 20 June 1974, 1001 UNTS 45.

⁶ The Cartagena Declaration on Refugees defines refugee in par.3: "who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." 22 November 1984, annual report of the Inter-American Commission on Human Rights, OAS Doc.

organizations, authorities, and courts of law, as well having been formalized in regional refugee law instruments. However, this expanded definition has not been universally embraced, notably, by some European states. Hence it must be questioned whether these states view victims of abuses by opposition groups, local militia, or other private citizens fundamentally less in need, and therefore less entitled to, international protection than individuals persecuted by established governments.⁷

On the other hand, those states which do apply the restrictive refugee interpretation, and therefore do not recognize those persecuted by non-state entities as Convention refugees per se, simultaneously grant residence permits for humanitarian reasons. This means that persons who are not codified under the 1951 Convention may remain in their territory through the conferral of humanitarian status. Such states cite their ability to grant 'humanitarian status' under the UN Torture Convention 1984.⁸

The UN Torture Convention 1984 acts as the net catching those individuals who simply cannot return to their homeland due to the risk of torture as provided for in Article 3. Whereas Article 3 of the European Convention on Human Rights broadens the prima facie safeguard provided by the UN Torture Convention 1984 to include those persons who cannot return to their homeland due to torture, as well as

OEA/Ser.L/V/II.66/doc.10, rev.1. See also Roberta Cohen & Francis M. Deng 1998, *Masses in flight*, Brookings Institution Press, Washington DC, at 16.

⁷ *Ibid* at 565-566

⁸ *Ibid*.

'inhuman and degrading treatment'. This includes treatment often perpetrated by non-state entities. However, the problem with the broader protection net offered by the UN Torture Convention 1984, as well as the European Convention on Human Rights, is that it is dependent on government discretion to apply the provisions of the respective aforementioned Conventions and confer (usually inferior and temporary) humanitarian status. Thus 'humanitarian status' contains the insecurity of being an ad hoc mechanism used at a national level because it has not reached the level of international harmonization. This is worrying, as the destiny of the vast majority of today's asylum seekers and refugees remains entirely the responsibility of national state practice.⁹

Human smuggling is very often confused with human trafficking or trafficking in person. In reality they are two different concepts totally different from each other. In simple terms, human smuggling is concerned with procurement of illegal entry to a state to which the person is not a national of, assisted by a third party with an objective to make profit. Here the person fleeing his country gives his consent to be transported illegally to another country. Often, human smuggling is conducted in order to obtain a financial or other material benefit for the smuggler, although financial gain or material benefit are not necessarily elements of the crime.

On the other hand, trafficking in person is recruitment and transportation of a person through deception or coercion for different purposes like sexual exploitation, forced labour, camel jockeying etc. Trafficking victims are often physically and

⁹ *Ibid.*

emotionally abused. One major difference between a person trafficked and a person smuggled is that the person trafficked is treated as a victim and on the other hand a person smuggled violates law and is not treated as a victim. Although human trafficking is often an international crime that involves the crossing of borders, it is important to note that victims can be trafficked within their own countries and communities.

Generally, extreme poverty, lack of economic opportunities, civil unrest, and political uncertainty, are factors that all contribute to an environment that encourages human smuggling and trafficking in persons. It may be difficult to make a determination between smuggling and trafficking case in the initial phase. Trafficking often includes an element of smuggling, specifically, the illegal crossing of a border. In some cases the victim may believe they are being smuggled, but are really being trafficked, as they are unaware of their fate.

Though, the victims of human smuggling are not *per se* covered by refugee law, but in cases where such persons satisfy the definition of refugee as provided under refugee law¹⁰ they are entitled to all the protections as available to any other refugee including the vital right of *non refoulment*.¹¹ Further, under the principles of refugee law even if a person was not a refugee when he migrated to any country¹² he would be entitled to enforce his rights as any other refugee if after reaching his

¹⁰ Here the writer suggests that adoption of “inclusive approach” will serve the purpose of Refugee law in a better way.

¹¹ Right of non refoulment has acquired the status of customary international law and is binding upon every state, irrespective of its being party to the Convention against Torture or Refugee Convention.

¹² Due to whatsoever reason, be it economic or any other cause.

destination, due to changes in circumstances,¹³ his position satisfies the definition of refugee under the Refugee Convention. In this way there are certain situations where refugee law will be applicable to smuggled individuals as well. It is so not by virtue of their being a victim of smuggling but rather due to the reason their situation is explicitly or implicitly covered by refugee law as such.¹⁴ In the absence of practical and legal means in which to leave their country and enter another, refugees are resorting to the questionable aid of people smugglers. The reality is that smugglers are sometimes the only option left for desperate people trying to save their lives. As UNHCR reports, many refugees make use of smugglers either because they have no other means of reaching safety or because they believe it will open up more viable and durable protection methods.¹⁵

Several different international instruments express the aspect of freedom of movement known as the right to leave. The right applies to everyone and is a right to leave any country, including one's own. It is included in the following instruments:¹⁶

- Article 12 of the International Covenant on Civil and Political Rights (ICCPR);
- Article 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW);

¹³ In the country of origin. For further details refer to Karen Jacobsen, *Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes*, *International Migration Review*, Vol. 30, No. 3 (Autumn, 1996), at. 655-678

¹⁴ See Peter I. Rose, *Toward a Sociology of Exile: A Report on an Academic Symposium*, *International Migration Review*, Vol. 19, No. 4 (Winter, 1985), at 768-773

¹⁵ *Ibid.*

¹⁶ Colin Harvey, Robert P. Barnidge, Jr, *Human Rights, Free Movement, And The Right To Leave In International Law*, 19 *Int'l J. Refugee L.* at 3-4.

- Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination;
- Article 10 of the Convention on the Rights of the Child;
- Article 13 of the Universal Declaration of Human Rights;
- Article 5 of the General Assembly's Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live.

The important international Treaty Law addressing refugees¹⁷ are:

1. The Principle of Pacta Sunt Servanda: Pacta sunt servanda, the principle that "every treaty is binding upon its parties and must be performed in good faith," is a fundamental precept of international law. In the words of the International Court of Justice, "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith." Multilateral treaties are the foundation of international law, and governments conform their conduct to treaty obligations in reliance on other states' promises to do the same. The doctrine of pacta sunt servanda ensures that states cannot avoid their treaty obligations by failing to implement treaty norms in domestic law. The U.S. government has bound itself to this rule, and the International Court of Justice has enforced this norm in its case law.

¹⁷ *Supra* note 1 at 149

2. The Principle of Non-Refoulement: The principle of non-refoulement, the cornerstone of international refugee law, forbids states from returning a refugee in any manner whatsoever to the border of a state where her life and liberty would be threatened on account of her membership in one of the five protected groups enumerated above¹⁸. The concept of non-refoulement, or the duty not to return a refugee to a country in which she fears persecution, arose in the early to mid-nineteenth century. The first major international instrument to codify this notion was the 1933 Convention Relating to the International Status of Refugees. This convention, which bound member states not to remove or refuse entry to refugees except on grounds of national security or public order, was only ratified by eight nations. For the next fifteen years, refugee protection consisted of an ad hoc system of international agreements providing limited protection against refoulement.¹⁹

In the wake of the atrocities of World War II, it became clear that a more comprehensive and systematic mechanism for refugee protection was needed. In 1949 the U.N. Economic and Social Council convened an Ad Hoc Committee on Refugees and Statelessness to investigate the plight of refugees and draft a convention for their protection. This culminated in the creation of the 1951 U.N. Convention Relating to the Status of Refugees, which included a binding prohibition on refoulement.²⁰

¹⁸ *Ibid* at 120

¹⁹ *Ibid*

²⁰ *Ibis* at 121

However, the duties prescribed under the 1951 Convention were only applied to refugees fleeing events in Europe that occurred prior to 1950 (i.e., fleeing Nazi Germany and communist regimes). By the middle of the next decade, it was clear that the refugee phenomenon was not temporally or geographically limited. Refugee-producing conflicts were arising throughout the world. The 1967 U.N. Protocol Relating to the Status of Refugees was drafted to amend the 1951 Convention so that its rights and duties applied to refugees from any country without any time limitation. The duty of non-refoulement is further codified in international and regional instruments, including the Convention Against Torture and the Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa.²¹

On 14 December 1950, in passing General Assembly Resolution 428(V) and thereby adopting UNHCR's Statute, Member States of the United Nations accepted a common description of the refugee concept. The following year, with the elaboration of the 1951 Convention and subsequently of its 1967 Protocol, augmenting provisions were agreed, solidifying in international law who is and who is not to be considered a refugee and the rights to which refugees are entitled. Through the 1951 Convention, Member States thereby laid the cornerstone of international refugee law, including the most fundamental of all international refugee law obligations, as codified in Article 33 of the Convention, the prevention

²¹ *Ibid*

of refoulement.²²

As noted in the Preamble to the 1951 Convention, its purposes are, inter alia, to assure refugees the widest possible exercise of their fundamental rights and freedoms, to enhance international cooperation and to recognize the social and humanitarian nature of the problem of refugees. In 1969, in an effort to ensure the broadest possible application of these principles, the then Organization of African Unity incorporated this refugee definition and further defined refugees as including victims of 'external aggression, occupation, foreign domination or events seriously disturbing public order'. A similar definition was agreed in 1984 by those Latin American States adopting the Cartagena Declaration on Refugees. On 13 December 2001, in an unprecedented Declaration of States Parties to the 1951 Convention and/or 1967 Protocol, agreed governments explicitly reaffirmed their support for the 1951 Convention regime and their commitment to its strengthened implementation - less than two months after the devastating attacks of 11 September 2001.²³

The 1951 Convention grew out of a clear appreciation of, sympathy for and a desire to remedy the dire problems which confront refugees. The failure of the current asylum debate adequately to reflect refugee realities on the ground to take into account properly the problems of refugees, rather than only the refugee problem as such is alarming. In Chad, the human dimension of the refugee situation is palpably evident. Traumatized people, child-headed households, camps dangerously close to

²² Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths And The Promise Of Things to Come*, 18 Int'l J. Refugee L, at 523-524.

²³ *Ibid*

the border, unregistered refugees in a precarious situation at the border and on the perimeters of established camps, the sustainability of longer-term stay anywhere in the affected region seriously compromised by the harshest of environments--these are all part of this human dimension. Refugees are people, not statistics and global trends. Their protection is a human rights issue and a humanitarian necessity. It should not be relegated to a policy choice.²⁴

The 1951 Convention was drafted in recognition of this fact, with the purpose of identifying the basic rights which are jeopardized by persecution and conferring an entitlement to their protection on individuals otherwise made exceptionally vulnerable because they are temporarily deprived of national State protection. It is difficult to imagine that the right not to be sent back to persecution could be contested by any right thinking person. Similarly, non-discrimination, the right to be heard and access to fair and due process of law are tenets on which democratic societies are solidly built.²⁵

Nature of obligation of states regarding human rights²⁶ has been an issue of inquiry since a long time.²⁷ The obligation under refugee law, like other general principles regarding respect for human rights, derives its most solid guarantee under the U.N.

²⁴ *Ibid* at 525

²⁵ *Ibid*

²⁶ See Lauterpacht, H., *International Law And Human Right*, (Oxford university press, London, 1950), at 158-59. Sir H. Lauterpacht has aptly stated that, "*the question of the nature of the provisions of the Charter in the matter of human rights is of paramount importance. Once their legal nature is placed outside the realm of controversy, it is probably legitimate to assert that the duty of the State to promote the observance of and respect for human rights extends to the obligation to withhold the direct or indirect assistance of its law in support of the denial, from whomsoever emanating, of human rights and fundamental freedoms.*"²⁶

²⁷ O. Schachter, *The Obligation To Implement The Covenant In Domestic Law*, in L. Henkin, ed., *The International Bill of Rights*, (Columbia University Press, New York, 1981) at 311-31.

system.²⁸ The obligation under international human rights law is not exactly same as the obligation under international law²⁹ as the implementation of the provisions of such treaties, or the norms of customary international law³⁰ in such issues³¹, including the application by judiciary³², is usually domestic³³ and it contemplates of a vertical relationship between a state and its subjects³⁴, rather than a horizontal relationship among states³⁵. However, it does not mean that International law obligations cease to exist in such cases³⁶. State practice³⁷ coupled with *opinion juris*

²⁸ See Cassese, A., *International Law In A Divided World*, (Oxford, New York, 1988), at 149.

²⁹ For example the nature of obligation under UDHR or ICCPR or ICESCR and other international treaties governing relationship between states is altogether different. See, Skogly, Sigrun I. and Gibney, Mark, *Transnational Human Rights Obligations*, Human Rights Quarterly, Vol. 24, No. 3, 2002, at 781-798.

³⁰ See Higgins, R., *Problems And Process: International Law And How We Use It*, (Clarendon Press, Oxford, 1994). Here maintaining a difference between the customary rule and the emerging norm and have taken in to account Judge Sorensen's view, expressed in the *Anglo-Norwegian Fisheries Case*, 1951, I.C.J., 3, 247-48, that an emerging customary norm will not bind a protesting state. Being widely accepted among the States, the provisions of these instruments become the norms of customary international law, and in theory generate obligations binding even non-signatory states.

³¹ For example the draft of the new Restatement of the Foreign Relations Law of the United States, often considered of possessing a particularly authoritative status, lists some human rights as norms reflecting customary international law and torture is one among them. See Restatement Of Foreign Relations Law of the United States (Revised) Article 702. For further details refer to D' Amato, *The Concept Of Human Rights In International Law*, 82 Colum. L. Rev., 1110, 1982

³² See *Filartiga V. Pena-Lrala*, 630 F.2d 876 (2d Cir. 1980) wherein the force of customary international law was recognized by the domestic court.

³³ However this distinction obliterates in case of a rule of general international law and the right to oppose can't be maintained against a rule of general international law recognized as *jus cogens*. See Manfred Lachs's opinion in *North Sea Continental Shelf Case*, 1969, ICJ, 3, 229.

³⁴ There seems to be a consensus that certain parts of international human rights law have gained status as customary international law, and as such, are binding upon all states. See Theodor Meron, *Human Rights And Humanitarian Norms As Customary Law*, Clarendon Press, Oxford, (1989), p.80. See also Louis Sohn, *The New International Law: Protection Of The Rights Of Individuals Rather Than States*, 32 Am. Univ. L. Rev. 17 (1982).

³⁵ See Allan Ross, *State Sovereignty And Human Rights: Towards A Global Constitutional Project*, XLIII *Pol. Stud.* 61, (1995) at 62-63. See also Steiner, H. and Philip Alston, *International Human Rights In Context: Law, Politics And Morals*, Oxford University Press US, at 57 (2d ed. 2000). Allan Ross holds that "Universal Declaration offers a pragmatic challenge to the Hobbesian strand of the Westfalian legacy, which has seen their international system as a horizontal inter-state system based on the sovereign equality of states." This is because the Universal Declaration: concerns matters between the state and its own population (vertical approach) other than inter-state relations; concerns all human beings, who, in the words of Article 1 of the Declaration, "are born free and equal in dignity and rights," rather than the nationals (citizens) of a given state; is a proclamation and interpretation of universal values, rather than a negotiated compromise between the different wills (interests) of states".

³⁶ For example the obligations by virtue of a particular norm having acquired the status of peremptory norm of international law will remain in effect with respect to the conduct of states falling within that norm.

³⁷ For example, See Sadiq Reza, *Torture And Islamic Law*, 8 *Chi. J. Int'l L.* 21, at. 1

bind all states³⁸. No state can disagree that human rights must be cherished³⁹. Further, some of these rules⁴⁰ are not only binding on all states but they also impose obligation *erga omnes*⁴¹. Moreover some of them⁴² have also acquired the status of *jus cogens*⁴³ and their very compelling nature⁴⁴ has turned them in to a peremptory norm.⁴⁵ The obligation under refugee law could find support as a *jus cogens* and it is mainly due to the reason that the provision has sole object of promoting human rights. It was rightly pointed out by the delegate from Chile to the General Assembly in 1948, "*Human rights are.... not the private concern of each state, but the common heritage of mankind, a heritage which should be defended.*" Article 12 is not one of the non-derogable rights in the ICCPR. Article 12(3) permits states to restrict the right in exceptional circumstances. Non derogation from the obligation under Article 12 is explicit in the light of the Siracusa Principle⁴⁶ regarding the

³⁸ See Higgins, R., *Fundamentals Of International Law*, in Nandasiri Jasentuliyana edited, Perspectives on International Law, (Kluwer Law International, London, 1995), at 6.

³⁹ See A. Cassese, *International Law In A Divided World*, (Clarendon Press, Oxford, New York, 1988), at 148

⁴⁰ The obligation under refugee law also being one among them by virtue of its wide acceptance in terms of adherence on the basis of principle as well as practice and its aim at maintaining human dignity.

⁴¹ See ICJ, *Case Concerning The Barcelona Traction, Light And Power Company Limited* (Second Phase), Reports 1970, p.32, paras 33-4. Even a unilateral statement could have the force of *erga omnes*. See Nuclear Tests Case (Australia vs. France), 1974, ICJ, 253,269.

⁴² See, the declaration of the Chilean delegate (Mr. Cruz Ocampo) in GAOR, III, Part I, Committee VI, p.723 (meeting of 2 December 1948). Peremptory human rights norms, as projections of the individual and collective conscience, materialize as powerful collective beliefs. As such, they inherently possess an extraordinary force of social attraction that has an almost magical character and this character is reflected through the non derogation of the obligation under ICCPR

⁴³ See Vienna Convention on the Law of Treaties, Art. 53. U.N. Doc. A/Conf. 39/27 (1969).

⁴⁴ See Ian Brownlie, *Principles Of Public International Law* (5th edn.) (Oxford, Clarendon Press, 1998), p. 513. He observes that, the major distinguishing feature of such rules [of *jus cogens*] is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.

⁴⁵ A peremptory norm of general international law is defined as a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See , Alexander Orakhelashvili, *Peremptory Norms In International Law* 8, Vaughan Lowe ed., (Oxford University Press, London, 2006).

⁴⁶ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights were formulated by a group of experts in international law convened by the

limitation⁴⁷ and restriction clauses⁴⁸ of the International Covenant on Civil and Political Rights⁴⁹ and the exceptions⁵⁰. Principle 69 of the Siracusa principle specifically recognizes this characteristic of the whole Convention⁵¹. Further it is a well-accepted principle of interpretation that treaties are not to be construed in a way which would restrict to a large extent the obligations⁵² undertaken by the parties.⁵³ These limitations are the standard ones to be found in other such provisions. Restrictions on the right to leave must be 'provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant'. In addition to these limitations, General Comment No. 27 requires restrictions on the right to leave to be proportionate, appropriate under the circumstances, and the 'least intrusive instrument amongst those which might achieve the desired result'.⁵⁴

International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, Urban Morgan Institute for Human Rights, and International Institute of Higher Studies in Criminal Sciences, in Siracusa, Sicily from 30 April to 4 May 1984.

⁴⁷ See Joan F Hartman, Working Paper for the Committee of Experts on the Article 4 Derogation Provision, Human Rights Quarterly, Vol. 7, No. 1 (Feb., 1985), pp. 89-131. See also Erica-Irene Daes, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights," U.N. Doc. E/CN.4/Sub. 2/1432/Rev. 2, 1983.

⁴⁸ The principles were an outcome of the importance that the Commission on Human Rights has attached to the implementation of the ICCPR, particularly to its provisions from which no derogation is permissible.

⁴⁹ However, these principles could be referred to with respect to other comparable instruments on International Human Rights and it refers to torture as the same finds a mention in Art 6 of ICCPR.

⁵⁰ See Nicole Questiaux, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency," U.N. Doc. E/CN.4/Sub. 2/1982/15, 27 July 1982.

⁵¹ Principle 69 provides that, "*No State, including those that are not parties to the Covenant, may suspend or violate, even in times of public emergency: Freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation.*"

⁵² Principle 65 of the Siracusa Principles calls for the interpretation of all provisions of human rights treaties with a view to securing and not evading the effective protection of human right. See O'Donnell, *Commentary By The Rapporteur On Derogation*, 7 Human Rights Quarterly, 23, 30 (1985). For the full text of the Siracusa Principle see 7 Hum. Rts. Q. 3 (1985).

⁵³ See Wemhoff Case, Eur. Ct. H.R., publ., Series A, Vol. 7, at 23 (1968); See also Delcourt Case, Eur. Ct. H.R., publ., Series A., Vol. 11, at 14-15 (1970).

⁵⁴ *Ibid.*

The duties of states under International Treaty Law⁵⁵ are mainly:

1. The Duty of Non-Refoulement: The duty not to refoule refugees is treaty-based. It was established by the Refugee Convention, and is reinforced in the Convention Against Torture. The principle of *pacta sunt servanda*, at the heart of treaty law, asserts that states must honor international commitments that they have made publicly, formally, and voluntarily. Thus the United States should ensure that its domestic legislation complies with the duty of non-refoulement in order to uphold its commitments to the Refugee Convention and the Convention Against Torture.

2. The Duty Not to Penalize Refugees Who Enter Illegally: Article 31 of the Refugee Convention obligates member states not to impose penalties on refugees who, coming directly from the state in which they fear persecution, enter or remain in the territory of a signatory state without authorization. This protection only applies, however, to refugees who present themselves promptly to the authorities and "show good cause" for their illegal entry.

Article 31 is a vital provision of the Refugee Convention, addressing the unique situation of refugees that often necessitates such illegal entry. By definition, refugees are people fleeing persecution in their home state. As such, they must often leave their homes at a moment's notice and are thus unable to gather the requisite travel documents. Even those refugees with adequate time to plan their departure are often unable to obtain necessary visas or other documentation. Applying for

⁵⁵ Supra note 1 at 120

such papers might alert the persecuting government to the refugee's intent to leave, allowing officials to prevent the refugee from escaping. For these and many other reasons, genuine refugees are often unable to obtain proper authorization to enter another state, and are forced to enter illegally to save themselves from persecution. Paradoxically, those asylum seekers without papers or with improper papers are likely to need protection the most. While states may perceive that the duty not to penalize illegal entrants presents a threat to state sovereignty, they have, in the interest of protecting vulnerable refugees, already ceded this right by acceding to the Refugee Convention. Further, states have the right to determine whether an asylum seeker's claim is "manifestly unfounded," as well as to detain refugees who are a threat to public order or are likely to abscond. By using these tools to prevent fraudulent claims and risks to national security, a state can protect itself and legitimate asylum seekers at the same time.

Even though the Refugee Convention clearly defines the standard of prohibiting penalties for illegal entry, some states fail to comply with it. Court law has long held that if the common practice does not meet the prudent standard, this "universal disregard" for the proper standard of care "will not excuse" the failure to comply with the standard. In the case at hand, the Refugee Convention explicitly states that member states cannot punish asylum seekers and refugees for illegal entry. It follows that states which fail to comply with this standard are violating the law, not that the standard has become less stringent.

The Rights of Refugees under International Treaty Law⁵⁶ are as listed:

1. The Right to Freedom from Arbitrary Detention: The right to freedom from arbitrary detention is a treaty-based right. It is clearly enumerated in the International Covenant on Civil and Political Rights, and can be inferred from the right to freedom of movement established in the Refugee Convention. While the non-self-executing status of the ICCPR denies refugees redress under domestic law for violations of the convention, such violations are nevertheless contrary to the international legal obligations of the United States and are out of step with contemporary state practices. Thus, the United States should ensure that its domestic legislation and practices are in compliance with its duties under international treaty law. ICCPR Article 9 enumerates the right to freedom from arbitrary arrest or detention and ICCPR Article 2 extends this right to "all individuals within its territory, regardless of whether the individuals are legally present in the country.

2. The Right to Due Process and Judicial Review: Under the Refugee Convention and the ICCPR, Refugees have a treaty-based right to due process of law and judicial review. Refugees legally present in a member state have a right to due process of law in any expulsion decisions. All refugees have a right to due process in determining the lawfulness of detention; they also have a right to a fair and public hearing by a competent tribunal without undue delay.

⁵⁶ *Ibid* at 142

The ICCPR also provides minimum guarantees of procedure for those charged with a criminal offense.

Like the ICCPR, the Refugee Convention enumerates the right to due process in expulsion cases of refugees lawfully in a country. This due process right extends to refugees who enter a country without authorization but present themselves promptly to the authorities and "show good cause" for their illegal entry. Any expulsion of refugees who fall into these two categories must be done pursuant to a decision reached in conformity with due process of law. Absent exceptional circumstances, a refugee has a right to review by and representation before a competent authority and must be allowed to submit evidence to contest the expulsion. Both of these treaties fail to define "due process," although the ICCPR provides us with minimum guarantees that must be applied in criminal cases. These include the right to prompt information concerning the nature and cause of the charge against a defendant in a language that she understands; adequate time and resources to prepare a defense and communicate with counsel whom she chooses; trial without undue delay; trial in her presence and a right to defend herself or to defense through legal assistance of her choosing and to free legal assistance if necessary; to examine witnesses against her and to obtain witnesses in her defense; free assistance of an interpreter; the right not to incriminate herself; and the right to judicial review.

Chapter III - National Security and Claim for protection

Since the end of the cold war, the transitional organised crimes have emerged as a highly lucrative industry making billions of profits. The modus operandi of this industry is across borders and has become a global problem. The illicit activities of this industry include human trafficking, arms and drug trafficking, human smuggling and other organised crimes.

The national security of a state is always under threat by the very nature of the activities involved in the concept of transitional organised crimes. Many politicians and governing states see refugees and asylum seekers in negative terms, as a threat to social system or employment, or even as a threat of insurgency and terrorism.

After the September 11 incident, the latter concern has been exacerbated. Even before the September 11 attack, many of the industrialized states were rushing to legislate against human smuggling, showing it as a threat to national security. The terrorist attacks have accelerated the move towards more restrictive asylum and refugee policies. The terrorist attacks reinforced the understanding of the connections between human displacement and international security. This was because of the findings that the origins of unchecked fundamentalists of Taliban and their links to Al-Qaida, lay in the long term refugee camps of Pakistan.¹

¹Edward Newman, *Refugees, international security, and human vulnerability: Introduction and survey*, in Edward Newman and Joanne van Selm, *Refugee and Forced Displacement, International Security, Human Vulnerability and the State*, (Manas Publications, New Delhi, 2004), at 9.

These concerns have been magnified by the Bali bombings in October 2002 to the attacks on the London public transport system in July 2005. With increasing frequency, links have been made in the public mind between international terrorism and asylum systems. The belief that the latter may be used as channels by terrorists persists, even though none of the 11 September hijackers or the Bali or London bombers was a refugee or an asylum seeker. In the London attacks, for instance, three of the four bombers who died were born in the United Kingdom and all had grown up there. Two of the men suspected of an attempted bombing in London two weeks after the first fatal attacks reportedly arrived as child asylum seekers in the UK many years before and subsequently became radicalized there as young adults, pointing to a problem of integration rather than weakness in the asylum system.²

Human smuggling is a part of the larger concept called irregular immigration. Irregular immigration and National Security are connected in many ways. An increase in irregular migration will, in turn motivate the receiving states to further tighten their immigration procedures. Quite often, states are determined to exercise their sovereign right of controlling immigration.

The smuggling operation exposes the persons who resort to smuggling to certain vulnerabilities. It can be mainly classified as economic and social vulnerabilities.

Economic vulnerability is the high price charged by smugglers.

² Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths And The Promise Of Things to Come*, 18 Int'l J. Refugee L. 509, at 519.

For example, Iranians paid between US\$ 4,000 and US\$ 6,000 to be smuggled to Netherlands. This would have indebted the asylum seekers or their families and this may result in spending their first years in poverty as they send home any income. Social vulnerability can be identified when the asylum seekers arrive in a country where they did not plan to migrate.³

This attitude of the states to control immigration in turn results in rising hindrances to persons claim for protection from persecution and thus violates their human right to seek protection. Security issues of a state have broadened from the traditional military and nuclear threat. It was during 1990's that the scope of insecurities widened to other factors also like the factors effecting environment, health risks and uncontrolled migration.⁴

Migration becomes very easily a deep political issue. Illegal immigration is often perceived as a danger for the integrity of the state and the nation, and thus a challenge to the principle of their sovereignty⁵. So in order to preserve their sovereignty, the states exercise their immigration control policies with a reason to protect their people against the illegal immigrants.

³ Khalid Koser, *Reconciling control and compassion? Human smuggling and the right to asylum*, in Edward Newman and Joanne van Selm, *Refugee and Forced Displacement, International Security, Human Vulnerability and the State*, (Manas Publications, New Delhi, 2004), at 183.

⁴ *Ibid.*

⁵ Raimo Väyrynen, *Illegal Immigration, Human Trafficking, and Organized Crime*, Discussion Paper No. 2003/72, United Nations University and World Institute of Development Economics Research, October 2003, sourced from: <http://website1.wider.unu.edu/publications/dps/dps2003/dp2003-072.pdf> , accessed on 12/04/2009.

The issue can be analysed in different levels. Like for example, illegal immigration is assumed to be a threat to national security. Another assumption is that illegal immigration is can pose economic and cultural threat. And lastly a major concern is the link between illegal immigration and terrorism.

In the context of human smuggling, it is also important to look in the reasons which lead to human smuggling. It can be divided into two. One is people who resort to smugglers to flee their country in fear of persecution and other, who flee their land in desire of a better life. Again it is difficult to identify those who migrate illegally foe economic reasons and those who resort to human smuggling to flee their country in fear of persecution.

According to the Australian Institute of Criminology, in one of their published report on human smuggling,⁶ the effect of human smuggling on national security are as listed under:

Firstly, illegal entrants are not scrutinized against immigration's character requirements. Thus "undesirables" or persons posing threats to national security are not screened out offshore, but may enter the country undetected, or if they arrive by boat with no identification papers, their identity is very difficult to ascertain and thus their threat to security is unknown.

⁶ Adam Graycar and Rebecca Tailby, *People Smuggling: National Security Implications*, Australian Defence College, Canberra, August 14, 2000, sourced from: http://www.aic.gov.au/conferences/other/graycar_adam/2000-08-smuggling.pdf, accessed on 12/04/2009.

Secondly, people smuggled may come from countries whose political and cultural climate are very different to a receiving state, eg. ethnic tension, violence, religious or political fundamentalism. Insurgency action may be the norm in source countries. It is possible that in some cases, the illegal immigrants may find it difficult to adapt to our cultural and political climate and may continue with their own cultural and political practices which may be inappropriate in receiving state and may pose concern in terms of local security and ethnic tension.

Thirdly, there are some rumors of terrorists or persons of concern posing as refugees to enter a country illegally and unidentified.

Fourthly, one of the most serious threats to Australia's security stems from the increasing involvement of criminal syndicates in smuggling people to Australia. The flexibility and opportunistic nature of such criminal organisations is such that they tend to branch into other criminal markets once established in one.

In this context the concern of the state can be looked at two major perspectives.⁷

- i. Realistic;
- ii. Critical Security.

⁷ Aninia Nadig, *Human Smuggling, National Security, and Refugee Protection*, 15 J. Refugee Stud. 1, at 10.

According to realist perspective, all states seek to preserve their political autonomy and their territorial integrity first. Realism emphasizes the constraints of the real world and the need of pragmatism and prudence. Applied to international politics, realism sees a conflict-ridden world of states concerned with their security and pursuing power as the means to assure their survival.⁸

Realist theory in International Relations is based on the following general assumptions.⁹

- a. States are the principal actors in an otherwise anarchic international system.
- b. Each state is unitary, which means that national disputes are of no importance on an international level.

The states define their interests in terms of power and constantly assess their strength relative to that of others. What emerges from there is the balance of power that is sole basis of regularity, order and stability in international politics¹⁰. Because of the absence of an authority higher than the state, states are forced to rely on self-help in order to defend themselves and achieve their national security goals. The balance of power among states is the only principle which can create international stability in an otherwise anarchic international field.¹¹

⁸ A. Stein, *Realism/ Neorealism*, Neil J. Smelser and Paul B. Baltes (ed.), *International Encyclopedia of the Social and Behavioral Sciences*, Volume no. 19, (Elsevier, Oxford, 2001), at 12812.

⁹ *Supra*, note 6, at 12.

¹⁰ *Supra*, note 8.

¹¹ *Supra*, note 6, at 12.

Realism is used as a tool by the states in matters concerning to national security. Since human smuggling is treated as a threat to national security, the application of realistic theory is practiced by the receiving state. For example, in the United States, where a realist discourse on national security and national interest is prominent, foreign policy-makers and scholars of International Relations traditionally work very closely together in matters of security concern.¹²

There are instances which bring to picture the realistic approach practiced by states in countering human smuggling. The Dutch Strategy against Alien Smuggling is described to be a realist document, giving top priority to Dutch interests. It declared the necessity of a legal approach, combined with preventive measures. The strategy plan intended to increase the penalty for human smuggling from one year to four years, and to create co-ordination points enhancing co-operation between the various institutions involved in combating human smuggling. Nowhere in the document is it mentioned that among the smuggled persons are refugees who need protection. Instead, the Strategy paper emphasizes the criminal character of the phenomenon of human smuggling, which requires stricter legal remedies.¹³

In some cases, national armies were mobilized to fight off large numbers of people attempting to cross a border illegally. After 1989, Italy and Austria sent their armies to defend the borders against expected immigration waves from the former Soviet Union. In 1997, Swiss soldiers temporarily supported the border police to enforce

¹² *Ibid.*

¹³ *Ibid.*, at 9.

the southern borders with Italy from where a wave of Albanians was expected to make their way into the country during the troubles in Albania. Other national measures such as pre-boarding checks, stricter visa requirements, enforced border control, as well as the introduction of the notion of safe third country, are all expressions of the urge of the receiving state to protect itself from irregular immigrants.¹⁴

The critical security theory poses questions that were not raised in any meaningful sense by the realist approach to security in the 1960's and 1970's by posing three basic questions:¹⁵

- i. What is security?
- ii. Who is being secured by the prevailing order and who or what are they being secured against?
- iii. With whose security should we be concerning ourselves and through which strategies should this security be attained?

Critical theory examines how the current distribution of power came in due course of time and what are the possibilities are for change. By critical security theory it means to be critical to realistic theory.

¹⁴ *Ibid.*

¹⁵ Michael Sheehan, *Community, Anarchy and Critical Security*, Paper for the ECPR Joint Sessions workshop *Redefining Security*, Mannheim (March 1999), Scottish Centre for International Security, University of Aberdeen, at 4, sourced from: www.anarchist-studies-network.org.uk/documents/ECPR.doc, accessed on 12/03/09.

States are no longer considered autonomous and isolated entity, confronting each other in an anarchic international system. The very concept of the state, and with it the concept of security, are reconstructed.

According to critical security theorists, security must involve the concept of identity and its connections to community and culture.¹⁶ Because of the emphasis on the connections to community and culture, the concept of migration can be included with the theory.

Human smuggling from a realist perspective is treated as the threat perceived to come from outside and the receiving state has to protect itself from unwanted immigrants and asylum seekers. The critical security approach, on the other hand, raises the question of what it is that needs to be secured and why. Furthermore, the critical security approach allows us to examine, on one hand, how the political elite use the topic of irregular migration for their own political agenda and, on the other hand, how the entire society participates actively in constructing a social reality and also offers a solid theoretical background for the explanation of both national and international policies in migration matters because it makes possible a broader, society-based explanation for policy measures and actions of state representatives in asylum and migration matters.¹⁷

¹⁶Supra note 6 at 15.

¹⁷ Ibid at 18.

The arguments in favour of immigration control commonly presuppose.¹⁸

1. the existence of a community whose interests are represented by controlling immigration;
2. internal distributions of one or more social goods that would be affected negatively by uncontrolled immigration.

The most important social goods have been racial homogeneity, common culture, internal and external security, limited natural resources and economic welfare.¹⁹ Immigration whether legal or illegal is seen as a threat in relation to the said social goods and is reflected in the policy making of the states.

One characteristic of immigrants that is traditionally viewed as a risk to external security is that, as alien citizens, they may remain loyal to another state. This argument views immigrants, just because of their nominal citizenship, as a representative of states and government.²⁰

Even in countries of immigration, illegal immigration will usually be considered undesirable. Politically it is unacceptable because it reveals a country as being

¹⁸Rainer Baubock, *Legitimate Immigration Control*, in Howard Ddelman (ed.), *Legitimate and Illegitimate Discrimination: New Issues in Migration*, (York Lanes Press, Toronto 1995), at 4.

¹⁹ *Ibid* at, 6.

²⁰ *Ibid* at, 11.

unable to control its borders, and in a country of immigration the government would wish to demonstrate to the public that they are in control of the program, in terms of both overall numbers and selection. Socially, illegal immigration is unacceptable because it tends to create a tight society in which those with no legal status are discriminated against and deprive themselves and their families of particular services for fear of apprehension.²¹

The states attempts to control illegal immigration by exercising control over entry. For example, to facilitate this policy, Australia introduced a universal visa system, forcing all the applicants for entry through a screening procedure²². Another measure for example is making use of carrier sanctions. Canada imposes financial penalties on airlines which embark people without proper documentation onto flights destined to Canada.

Australia is one of the countries which depict the realistic approach when it comes to immigration. An illegal immigrant who is detained is given the option to leave voluntarily and as a last resort, in clearly designated circumstances the government may compel the person to leave.²³

Responding to abuse or misuse of the asylum option, containing irregular movement and the lucrative trade of people smuggling and maintaining the civilian

²¹ David Cox and Patrick Glenn, *Illegal Immigration and Refugee Claims*, in, *Immigration and Refugee Policy, Australia and Canada Compared*, Howard Adelman *et al* (ed.), Volume 1, (University of Toronto Press, Toronto, 1994), at 284.

²² *Ibid*, at 286.

²³ *Ibid*, at 288.

character of asylum have been issues for states in different parts of the world.²⁴ The states are encountering saturation with regard to the space to be provided to immigrants which also results in the quality of protection made available.

While the immediate causes of immigration are frequently serious human rights violations or armed conflict, these causes may well overlap with, or be aggravated by, others such as economic marginalization, poverty, environmental degradation, population pressures and poor governance.²⁵

The entry strategies employed by smugglers can be categorised into three heads.²⁶

1. Clandestine entry;
2. Entry with false documentation;
3. Entry without documentation.

Though the above categorization was in accordance with the 32 smuggled asylum seekers in the Netherlands, this can be also related to the nomenclature of smugglers.

The smugglers are also acquainted with the immigration laws and asylum procedures of the country (destination), by which they provide information to people smuggled on how to remain in the country after arrival. For example, the absence of passport

²⁴ *Supra*, note 1 at 513.

²⁵ *Ibid.*

²⁶ *Supra*, note 2 at 188.

hinders personal identification, the identification of the country of origin and the identification of the transit country. This strategy offsets the possibility of immediate deportation.²⁷ Another strategy is wilfully destroying or disposing documentation in order to mislead the authorities of the country of arrival.

From a humanitarian perspective, illegal entry is of concern for a number of reasons. It is a global problem. It takes place by land, sea and air. In recent years, particular concern has accompanied such movement in the Pacific and the Mediterranean regions, with people using the water way for illegal entry, being intercepted, or denied landing and losing their lives in significant numbers as a result. Clearly such onward movement is a reflection of the inadequacy of available protection for refugees including exposure to further human rights violations. This stems at least in part from the disproportionate asylum burdens falling on host countries least able to assume them. Irregular secondary movements of people feed the human smuggling industry, contribute to a growth in illegal or irregular entry, encourage ever tighter border control mechanisms and can lead, as a result, to diminished possibilities for refugees to find adequate protection. Overall, such onward movement can have a destabilizing effect on structured international efforts to provide appropriate solutions for refugees.²⁸

The Convention relating to the Status of Refugees of 1951 (CSR), declares that no state shall impose penalties upon refugees illegally within a foreign country who

²⁷ *Ibid*, at 189.

²⁸ *Supra*, note 1 at 531.

have come directly from a territory where their lives or freedom were threatened, provided they present themselves without delay to the authorities and show good cause for their illegal entry and presence. The CSR entitles such refugees to provisional stay and facilities necessary to enable them to obtain admission into another country. This protection only applies, however, to refugees who present themselves promptly to the authorities and show good cause for their illegal entry.²⁹

The CSR does not grant an individual an automatic right of asylum. What the 1951 Convention guarantees is merely a right of temporary residence, which is far less than a right of asylum. Of potentially greater benefit are the Convention's provisions on refoulement, which could limit the state's freedom to return refugees immediately to their country of origin. For instance, the CSR limits the right of a state to expel refugees within its territories by restricting the circumstances and manner in which an expulsion order may be executed. Unfortunately, these restrictions apply only to the expulsion of legal, not illegal, refugees.³⁰

In this context there is a need to make a distinction between refugee and migrant as it becomes increasingly overlapping and confusing. This is also important in another level because as the distinction overlaps, so does the difference between protections guaranteed to a refugee and migration control.

²⁹ Jaya Ramji, *Legislating Away International Law: The Refugee Provisions Of The Illegal Immigration Reform And Immigrant Responsibility Act*, 37 *Stan. J. Int'l L.* 117, at 125.

³⁰ Paul Kuruk, *Asylum And The Non-Refoulement Of Refugees: The Case Of The Missing Shipload Of Liberian Refugees*, 35 *Stan. J. Int'l L.* 313, at 326.

Confusing refugees with ordinary migrants is a danger to refugee protection. It fails to take into account the fundamental distinctions between those who are forced to flee because of a failure of national protection and those who migrate for economic or social betterment. Refugees are seen as little more than a sub-group of irregular migrants and the control of their movement is likely to take precedence over meeting their protection needs, with asylum laws often being but a part of more general immigration restriction legislation in many countries.³¹

Refoulement, the return of a refugee to a territory where his or her life or freedom would be threatened, is but one, potentially grave, consequence. The confusion is not only dangerous; it is also legally unsound. The right to seek and to enjoy asylum is firmly embodied in international human rights law, in particular in Article 14 of the 1948 Universal Declaration of Human Rights.³²

Refugees lack the protection of their own governments and benefit from an internationally endorsed protection framework to ensure their proper treatment. Refugees can also benefit from the services of a UN agency UNHCR, which was specifically created to ensure their protection and assistance. In this sense, refugees have a distinct legal personality and a particular internationally recognized regime to address their needs. Migrants are not a legally recognized group which can be equated to that of refugees. In important areas, there are no rules or guidelines to regulate inter-state cooperation on migration. There is also no global body charged

³¹ *Supra*, note 1 at 515.

³² *Ibid.*

with this concern. The phenomenon of migration is so multifaceted and affects issues of concern to several international organizations including those concerned with development, health, labour, human rights and controlling transnational crime, that no single dedicated body has responsibility for migration.³³

Every state has its own policy on the number of people that can be accommodated in a year. This is also a part of their population policy. The legal way to get accommodated into the quota of another country is by applying for refugee status. Illegal immigrants and spontaneous arrivals are also referred to as 'queue jumpers'.

There is also an argument that spontaneous arrivals are not queue jumpers and resettled refugees are not the only genuine refugees. The international protection regime does not establish a hierarchy where certain groups of refugees have greater priority over others. In particular, the mode of flight or entry into the country of refuge should not be a consideration which decides who is more deserving of international protection³⁴

One reason for this argument is the interpretation that resettled refugees are the only genuine refugees and that spontaneous arrivals are, at best, queue jumpers or, worse, abusers of the system. Resettlement is only one available tool of international protection within the whole governance structure for refugees.

³³ *Ibid.*

³⁴ *Ibid.*, at 523.

It must continue to function as a complement to other protection and asylum efforts and not in effect become a substitute for the right to seek asylum.³⁵

Asylum and resettlement are two distinct and separate possibilities. It is therefore critical to the integrity of the international protection system that resettlement processing and national asylum systems work in tandem, not against each other. Increasing resettlement as the rationale for further restrictions on the admission of individual asylum seekers arriving independently is making a wrong and dangerous equation.³⁶

The assumption that illegal entry will cause security concern is the primary reason that states put forward for stringent security measures and exercising their control over irregular migration. Despite of the fact that at times because of the political situation in a country where the government is inefficient to protect its own people, the only way out for the people will be to resort to illegal immigration. And if the state in which they arrive treat them as a threat and think of other measures such as detaining or deporting, violates their human rights. This also rules out the chances of their claim for protection and further getting a status of a refugee.

³⁵ *Ibid.*

³⁶ *Ibid.*

Chapter IV - Migration Management and Smuggling Protocol

In the European Union the estimated number of persons smuggled into the territory has increased from about 50 000 entries in 1993 to more than 400 000 entries in 1999. These figures are only estimates, based on doubling the number of persons caught at border control. In the United States, annually more than 500 000 migrants enter the country legally. Additionally, a large number of people enter illegally. For example, the U.S. Coast Guard made over 4000 migrant interdictions at sea in 2001. This figure only includes undocumented migrants travelling by sea and does not include illegal entry across the land border or at airports. Most of the migrants entering illegally come from the south of the U.S., including from Caribbean countries. There also seems to be an increase in the number of migrants to the U.S. from Asia, especially from China. When control of illegal migration becomes harsher, it opens up the way for organised smuggling of migrants. When border controls are tightened, the previously simple illegal practice of crossing a border becomes a complex criminal activity, involving professional smugglers. This is the case, for example, across the U.S.-Mexican border where the migrant smuggling business is thriving. The paradox related to the smuggling of migrants is that the more measures there are to prevent illegal entry, the more the arrangement of illegal entry becomes organised. Under current circumstances with tightened border control measures and tightened sanctions on illegal residence, there does not

necessarily exist many ways for migrants interested in residence or labour to enter without the involvement of smuggling organisations.¹

Management of migration is an important aspect of policy making in any state. Governments experience major difficulties in coping up with large and growing number of illegal immigrants seeking escape from the effects of political disruption and war or to find better economic opportunities.² To counter the issue of illegal migration and to control the quantity of immigrants, every state has got their own migration management policies. In today's world, each and every state highlights the practice of migration management, connecting it with national security. By effective management of migration, the states try to ensure that the non-citizens who claim for protection do not pose a security threat to their country. By this practice the states achieve the desired result of restricting entry of non-citizens in their country.

In one of the cases before the Canadian Federal court³, an application for judicial review of a decision of the Convention Refugee Determination Division (CRDD), which found the applicant not to be a convention refugee was rejected. The applicant was 14 when she was apprehended by Immigration officials; she had been

¹Natalia Ollus, Protocol Against The Smuggling Of Migrants By Land, Air And Sea, Supplementing The United Nations Convention Against Transnational Organized Crime: A Tool For Criminal Justice Personne, at 32, available at http://www.oas.org/juridico/MLA/en/Treaties/en_Prot_Smug_Migr_Land_Air_Sea_Suppl_UN_Conve_Trans_Orga_Cri_Tool_Crim_Jus_Pers_2000.pdf, accessed on 21/03/09.

² Christine Inglis et al, *An Overview of Australian and Canadian Migration Patterns and Policies*, in, Howard Adelman et al (ed.), *Immigration and Refugee Policy, Australia and Canada Compared*, Volume 1, (University of Toronto Press, Toronto, 1994), at 22.

³ *Zheng v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 580; 2002 FCT 448, Canada: Federal Court, 19 April 2002, Sourced from: <http://www.unhcr.org/refworld/docid/4039fba64.html>, accessed on 11/03/09

smuggled into Canada from China in 1999, along with 20 other young persons. She argued that the CRDD did not properly assess whether she was in danger of imprisonment and persecution if she were returned to China, and that it failed to address the issue of whether being illegally trafficked, as a minor, was persecution in and of itself. The CRDD's decision took into account the Convention on the Rights of the Child, and assessed the claimant's case accordingly. Similarly, the CRDD assessed the risk of persecution upon return to China, including imprisonment, and determined that such imprisonment, if it did occur, would not amount to persecution under the Convention. The CRDD had not made any errors of law, and there was sufficient evidence to support its decision.

Again the review petition was dismissed in another case.⁴ This was an application for judicial review of a decision by the Refugee Protection Division (RPD) finding that the applicant was neither a Convention refugee under section 96 of the Immigration and Refugee Protection Act, nor a person in need of protection under section 97 of the Act. The applicant is a citizen of China who claims to fear persecution by reason of his perceived religious beliefs. He left China without a passport and an exit visa with the help of stowaway agents (also referred to as snakeheads). He arrived in Vancouver in April 2001 on a boat operated by the snakeheads. In an addendum to his Personal Information Form (PIF) he disclosed a fear of the snakeheads because they blame him for the discovery of their boat by the Canadian police. He claimed to need protection against them because the Chinese authorities could not give him such protection. The RPD made a negative credibility

⁴ *Li v. Canada (Minister of Citizenship and Immigration)* (F.C.), 2003 FC 1514, (2003), [2004] 3 F.C.R. 501, Sourced from: <http://reports.fja.gc.ca/eng/2003/2003fc1514/2003fc1514.html>

finding based on omissions and inconsistencies between the port of entry notes, the applicant's PIF and his testimony. It also expressly found that the applicant would be protected against the snakeheads by the Chinese government. The main issue raised by the applicant was that the RPD erred by applying the wrong standard to his claim under subsection 97(1) of the Act. The application was dismissed.

This practice has got an adverse effect, in respect to the protection of immigrants. The focus of governments has, though, centered more heavily on one aspect, that is, the better management and control of the movement of migrants, rather than on defining and protecting migrants rights.⁵ This tendency of the states towards better control of migration and their exercise of power to detain and deport the migrants if they had resorted to smugglers to help them cross the borders can be analysed in the comparison of migration management policies of US, Canada and Australia.

There are two important clauses in the migration management in US with respect to illegal immigrants. Those are the expedited removal clause and credible fear clause. The expedited removal process begins at the border, where non-citizens whose documents are improper or appear fraudulent are sent to a secondary inspection interview. During this secondary inspection, if the immigration officer finds that the applicant for admission does not possess valid documentation, has made false statements concerning her admission, has made misrepresentations to government

⁵ Feller, Erika, *Asylum, Migration and Refugee Protection: Realities, Myths And The Promise Of Things to Come*, 18 Int'l J. Refugee L. 509, at 516.

officials now or in the past, or presents fraudulent documentation, the applicant is subject to expedited removal. Expedited removal is a euphemism for speedy deportation without a full hearing.⁶

The regulations in the IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act) require that immigration officers conducting secondary inspections read a statement to all applicants emphasizing the importance of expressing a fear of persecution upon return to their home country. The immigration officer is obliged to inform the applicant of the charges against her, and to give her an opportunity to respond to these charges in a sworn statement. Finally, the regulations allow for interpretation services if necessary to enable the immigration officer to communicate with the applicant. Applicants are automatically detained, and parole is only permitted at the discretion of the Attorney General, in cases of medical emergency, or for a legitimate law enforcement objective. The applicant is also not entitled to a hearing before an Immigration Judge in standard removal proceedings or to an appeal of the expedited removal order to the Board of Immigration Appeals. If the applicant for admission indicates a fear of persecution, she is referred to an asylum officer for a credible fear interview. At this stage, the applicant is allowed to consult with an attorney or representative, as long as such consultation comes at no cost to the government. The representative may attend the interview, although the asylum officer retains discretion to limit the number of

⁶ Jaya Ramji, *Legislating Away International Law: The Refugee Provisions Of The Illegal Immigration Reform And Immigrant Responsibility Act*, 37 Stan. J. Int'l L. 117 at 133

people present at the interview. The asylum officer is required to arrange for an interpreter if necessary. The applicant may also request an officer and an interpreter of a specific gender. At the end of the interview, the asylum officer must review her written summary of the interview with the applicant, and allow the applicant to correct any errors. A supervisory asylum officer then reviews this written record before a final decision is taken. If the asylum officer finds that the applicant has a credible fear of persecution, the applicant is detained pending her asylum application and subsequent hearing before an immigration judge. If the applicant is found not to have a credible fear of persecution, the asylum officer must present the applicant with a written notice of the decision and ask her whether she wants to have an immigration judge review the denial of status. The applicant is subject to mandatory detention during this process. If the immigration judge agrees with the denial of credible fear, the applicant is returned to the INS (Immigration and Naturalization Services) for removal or deportation. There is no appeal to any court or administrative body from such a decision. If the immigration judge finds that the applicant has a credible fear of persecution, the applicant remains in detention and is allowed to file an asylum application before the immigration judge.⁷

In Australian approach, if a person enters illegally, they must attempt within 28 day period of grace to regularize their situation or "be shown little sympathy except in very clear defined circumstances. If they don't act, they are subjected to Deportation Order which cannot be revoked while the person is in Australia and has got limited appeal rights. Canada allows the illegal entrant to present a case, present

⁷ *Ibid* at 136

witnesses, have legal aid in case of deportation cases.⁸ Both the countries although have certain differences, they also share similarities in some ways. The differences are seen partly as changing views of preferred immigrants which depends on both ethnicity and skill. In early nineteenth century embryonic restrictions on Asian immigrants were developed as a part of the policy of White Australia policy of Federation. Canada also developed its white Canada policy but it was principally designed to satisfy electorate in the west coast.⁹

The Australian government penalizes asylum seekers who arrive uninvited, that is, those who make spontaneous secondary movements. The measures they take to penalize them are also intended to deter future arrivals. They include interception and forcible return to Indonesia; interception and transfer to detention in the Pacific nations of Nauru and Papua New Guinea; mandatory detention within Australia; and temporary protection visas, with restrictions on the rights afforded recipients. Two Indonesian boats, *suspected illegal entry vessels* - "SIEV 5" and "SIEV 7," were intercepted and boarded by the Australian navy in October 2001, then escorted into Australian territorial waters and held in the lagoon at Ashmore Island for nearly seven days. Both boats and their asylum-seeking passengers were subsequently returned to Indonesian waters, using force and deception.¹⁰

⁸ David Cox and Patrick Glenn, *Illegal Immigration and Refugee Claims*, in, *Immigration and Refugee Policy, Australia and Canada Compared*, Howard Adelman et al (ed.), Volume 1, University of Toronto Press, Toronto (1994), at 290

⁹ *Supra* note 2 at 13

¹⁰ Human Rights Watch, *Measures Used By Australia To Deter "Uninvited" Refugees*, available at: http://www.hrw.org/legacy/reports/2002/australia/australia1202-06.htm#P655_155039, accessed on 12/04/2009.

Another incident is the M. V. Tampa incident. On August 15, 2001 an Australian Coastwatch plane spotted an Indonesian ferry with an SCS painted on its roof and reported the ferry's position to Indonesian authorities. The Norwegian cargo ship M.V. Tampa altered course after being alerted by Australian Search and Rescue in Canberra and picked up 438, mainly Afghani and Sri Lankan passengers from the sinking ferry one day later. However, the boatpeople demanded to be taken to Australia. Indonesia indicated that it was likely to accept the asylum seekers while the Australian authorities made it clear that, under no circumstances, would Australia allow these people to enter its territory. Despite the unambiguous rejection of these people by the Australian Government, the Captain proceeded to enter Australian waters and demand that the asylum seekers be alighted to Christmas Island. The captain's insistence was based on the belief that some asylum seekers were ill and others would become violent and endanger his crew if they were taken to Indonesia.¹¹

The expedited removal process sacrifices the rights of refugees. The expedited removal process violates the rights of refugees because of the means that they had adopted. The fundamental problem with this process is its lack of safeguards to prevent refoulement, allowing the return of genuine refugees to countries in which they have a well-founded fear of persecution.

¹¹Connie Fowler, *Karsten Klepsuik, John Howard and the Tampa Crisis: Good Luck or Good management*, Vol. 7 2003, Celsius Centre for Scandinavian Studies, available at: <http://diemperdidi.info/nordicnotes/vol7/articles/thetampacrisis.html>, accessed on 2/03/2009

While each individual aspect of the process may not, in and of itself, be contrary to international law, the aggregate of all of these procedures creates a system that is likely to result in the deportation of legitimate asylum seekers.¹²

The duty of non-refoulement is breached by the act of secondary inspection by the US. While the United States has a legitimate interest in controlling its borders, it also has an obligation to protect refugees. The program of rapid decisions regarding entry, made by untrained border officials, ignores the unique needs of refugees, which the United States has a duty to safeguard. The secondary inspection process is likely to target genuine refugees since the very nature of the refugee condition magnifies the likelihood that a genuine refugee will possess invalid or fraudulent documentation.¹³

The credible fear standard also provides inadequate protection against the possibility of refoulement. This standard was created in an effort to separate genuine asylum applications from fraudulent claims in an efficient manner. To prevent abuse of the protection system, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has suggested the standard of manifestly unfounded or abusive applications. The credible fear process requires a standard of proof higher than that recommended by the UNCHR and utilized by other countries. It also shifts the burden of proof from the government to the asylum

¹² *Supra* note 4 at 136

¹³ *Ibid* at 137

seeker, i.e., the government must prove that an application is manifestly unfounded, while the asylum seeker must establish that she has a credible fear of persecution.¹⁴

The implications of the exercise of the expedited removal and credible fear standard can be analysed as under:¹⁵

1.The credible fear standard requires the asylum applicant to demonstrate a significant possibility of her ability to establish eligibility for asylum. This standard is more difficult to meet than the manifestly unfounded test, under which the government must prove that the asylum seeker's claim is abusive and has no relation to the criteria for granting asylum. Denmark, Germany, the Netherlands, Portugal, South Africa, and Switzerland all use the lower manifestly unfounded standard with the burden of proof resting on the government, as suggested by the UNHCR, to screen out frivolous asylum applications.

2.Second, asylum seekers are not afforded full review, and have insufficient time (twenty-four hours to seven days) to prepare their case. At the appeal in front of the immigration judge, the judge only reviews the credible fear determination, and does not conduct a full hearing.

3.Numerous facets of the expedited removal procedure violate asylum seekers' right to due process. The ICCPR¹⁶ sets out minimum guarantees of due process in criminal cases. These include the following: adequate time and resources to prepare

¹⁴ *Ibid* at 139

¹⁵ *Ibid*

¹⁶ Art. 14 of the ICCPR.

a defense and communication with counsel of choice; trial in her presence and a right to defend herself or to seek defense through legal assistance of her choice; free legal assistance if necessary; examination of witnesses against her and the right to obtain witnesses for her defense; free assistance of an interpreter; and the right to judicial review.

4. The secondary inspection proceedings allow neither adequate time nor resources for an asylum seeker to prepare a defense or to contact counsel. The credible fear interview also provides inadequate time to compose a case and for counsel to adequately represent the asylum seeker.

5. The expedited removal process violates international legal rights and duties. While abuse of the asylum processing system is a legitimate concern, the ramifications of refoulement are so severe that adequate safeguards must be created to protect genuine refugees.

The United Nations Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, covers the illegal migration taking place through sea, land or air. The aim of the Protocol is to prevent illegal migration and to punish the procurers. The Protocol, however, does not aim at limiting the free movement of people, nor does it regulate the legal entry of people. The Protocol does not either aim at criminalising the illegal migrants for being the object of smuggling.

The main aims of the Protocol are¹⁷ to prevent and combat the smuggling of migrants through;

- hindering the smuggling of migrants through commercial carriers;
- guaranteeing the quality and security of travel and identity documents;
- providing information to the public to prevent potential migrants of falling victim to organized criminal groups.

It also aims to increase co-operation among States in:

- preventing smuggling by sea;
- improving exchange of information;
- verifying travel documents;
- training officials;
- providing technical assistance, and
- enhancing the underlying socio-economic causes of migration.

Article 2¹⁸ informs that the Smuggling Protocol's purpose is threefold:

- i. it is to prevent and combat the smuggling of migrants;
- ii. to promote co-operation between states; and
- iii. to protect the rights of smuggled migrants.

¹⁷ Supra note 1 at 42

¹⁸ Article 2 reads as: *Statement of purpose: The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States parties to that end, while protecting the rights of smuggled migrants*

Article 7¹⁹, reflecting the first stated purpose of the Smuggling Protocol in Article 2, calls for states to co-operate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea. The Protocol does not aim to punish or criminalize persons who are being smuggled as specified in Article 5²⁰ nor does it intend to criminalize migration itself. The Protocol encourages states to adopt legislative and other measures to protect the smuggled migrant in circumstances where the criminal offence of smuggling has endangered or is likely to endanger the life or safety of that migrant, or in circumstances that entail inhuman or degrading treatment of the smuggled migrant. Mention of degrading and inhumane treatment is done in Article 6(3)(a) and (b)²¹ and reiterated in Article 16.²²

¹⁹ Art. 7. Cooperation: States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

²⁰ Art. 5. Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

²¹ Art. 6. 3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

²² Art. 16. Protection and assistance measures: 1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the

rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

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

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

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

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

Refugees also resort to smugglers to flee situations of persecution. Thus, if one of the purposes of the Protocol is to protect the rights of smuggled migrants, then it must also explicitly affirm the protection of refugee rights. Although the latter point was questionably omitted from Article 2, it was nonetheless provided for in Article 19²³, the Saving Clause.²⁴

What is particular about Article 19(1) is that it is unequivocal in its assertion that the Smuggling Protocol is without prejudice to state's obligations under the 1951 Convention. Further still, Article 19(1) leaves in no doubt the obligations of states who are signatory to the Smuggling Protocol but not to the 1951 Refugee Convention. This occurs by way of the non-refoulement principle. The non-refoulement principle, which is the cornerstone of the 1951 Convention, is also a principle of international law and arguably a jus cogens norm. Thus all states regardless of whether they are or are not parties to the 1951 Convention are obliged to respect and honour this legal principle, as embodied in Article 19(1), that a state simply cannot return a person to an area where their life or freedom would be threatened.²⁵

²³ Art. 19. Saving clause: 1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of nonrefoulement as contained therein. 2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

²⁴ Claire Brolan, *An Analysis Of The Human Smuggling Trade And The Protocol Against The Smuggling Of Migrants By Land, Air And Sea (2000) From A Refugee Protection Perspective*, 14 Int'l J. Refugee L. 561 at 590.

²⁵ *Ibid* at 591

In addition, the NGO Joint Submission presented to the Ad-Hoc Committee on The Elaboration of the Convention Against Transnational Organized Crime at its Eighth Session the inclusion of the non-refoulement principle for a different reason. The NGO Joint Submission argued that the inclusion of this principle ensures that a person's illegal entrance into a state does not and should not adversely affect their asylum claim if it did, an individual could possibly face refoulement, which is in breach of the 1951 Convention and principles of international law.²⁶

Article 15(1)²⁷ also calls for state parties to implement information programs to increase public awareness of the serious risks involved in smuggling. Since refugees may also use people smugglers and the notion of criminality is frequently transferred in the public mind to refugees, it would be appropriate to take positive measures to rebut these misconceptions. In Article 15, therefore, the Protocol's drafters could have made reference to measures to increase public awareness that some refugees may have no other option but to use people smugglers in order to escape persecution. This would have been particularly appropriate in light of the M.V. Tampa incident where, in the aftermath of 'keeping the refugees out', the Australian prime minister's public popularity rose to 77 per cent.²⁸

²⁶ *Ibid* at 592

²⁷ Art. 15(1) reads: *Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.*

²⁸ *Supra* note 22 at 59.

The Smuggling Protocol also seeks to ensure, by way of Article 6, that all signatory states adopt legislative and other measures to establish migrant smuggling as a criminal offence. In so doing, the Protocol aims to achieve a sense of harmonization in states parties' domestic law towards smugglers and smuggled migrants alike. This is a positive step for two reasons. First, without such a comprehensive united approach, states will simply continue to apply piecemeal legislation and act inconsistently, perhaps making one state more attractive to the smuggler than the other (which would unfairly burden the attractive state). Secondly, the present dubious and indiscriminate measures applied by some states toward smuggled 'migrants' may well also adversely affect asylum seekers. Therefore, the harmonization of laws regarding smuggled migrants, including the stringent following of Article 19's Saving Clause fostering refugee rights, will hopefully increase the protection of refugees in a standard and positive manner.²⁹

²⁹*Ibid* at 594

Conclusion

One of the major concerns relating to the act of smuggling of human beings is that of the impact on the receiving states national security. This concern is reflected in their policies relating to migration. States are more restrictive in nature towards the whole concept of migration. It is not possible for any country to curb smuggling of human beings across borders on its own. It demands corporation between states to effectively tackle this lucrative business. This resulted in the drafting of the smuggling protocol which specifically deals with human smuggling.

The preamble of the smuggling protocol mentions that, in order to combat human smuggling requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels cooperation.

The former United Nations Secretary General Kofi Annan has noted¹:

The gravest violations come at the hands of smugglers and traffickers. Smuggling occurs with the complicity of migrants, usually because they can see no legal route to migrate. Trafficking is a modern form of slavery in which migrants are coerced and exploited. All too often, people who initially collaborate with smugglers later find themselves in the hands of traffickers.

¹ As stated in Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths And The Promise Of Things to Come*, 18 Int'l J. Refugee L, at 522.

In this dissertation as the name suggests, focus is on refugees who resort to smugglers to cross the borders and their protection and their rights. Since refugees along with economic migrants take this path, these two groups become increasingly confusing. This confusion is also dangerous because this often results in treatment at par with economic migrants which results in detention and deportation.

Also the states exploits public fear, stereotyping refugees as economically motivated, a burden and a danger to public health and a social threat. This in turn fuels racist attitude and xenophobia towards the seekers for protection in general. This connected issue goes back to the Convention relating to the Status of Refugees, 1951, where there is no mention about all persons who needs protection. And also the root of the above issues is the difficulty in differentiating a refugee and an economic migrant.²

People fearing persecution by States of origin on account of race, religion, nationality, membership to a particular social group or political opinion who flee qualifies as refugees. A wide variety of civil and political rights such as the rights to life, liberty and security, and freedom from torture, are violated as a result of these incidents. Smugglers are often resorted because of the strict immigration laws and the non willingness of states to exceed the quota, or the number of people accepted to a state. As it may be sometimes impossible for a person who faces persecution to

² Claire Brolan , *An Analysis Of The Human Smuggling Trade And The Protocol Against The Smuggling Of Migrants By Land, Air And Sea* (2000) *From A Refugee Protection Perspective*, 14 Int'l J. Refugee L. 595

apply through the legal channel, the only option left with them will be through illegal means or smugglers.

Human smuggling is also of serious consequences. The journey itself is dangerous. Many of those smuggled are forced to travel in overcrowded trucks and shipping containers for long periods of time. Because of these conditions, many people suffer from exhaustion, dehydration and malnutrition. Torture, inhuman or other degrading treatments are also part of the whole process of smuggling.

The process of smuggling may give away to human trafficking once they are reached to their destination. This is when human rights abuses against them continue even after they reach their destination. For example, many of those smuggled are susceptible to exploitation, because they are indebted to smugglers. As a consequence, many are held in debt bondage and are forced to accept any work available with minimal remuneration to repay their debts. It is apparent that slavery and forced labour are pertinent, and smuggling can be transformed into trafficking under these circumstances.

All restrictive and preventive policy approaches can be related to the realistic theory, which puts national security as a top priority. Because it is state-centred, realism cannot include all three levels of analysis and all the actors involved in human smuggling. Critical security theory overcomes a number of realism's shortcomings. It acknowledges that state and society are in fact inseparable in the

sense that society is always the basis for the state. It is now possible to recognize that security is not a rigid fact, but a social construct, open to changes and to influences. Only by recognizing this can the receiving society begin to actively shape its own perception of threat and security.³ This would mean that the attitude of the state should change from the realistic framework.

The smuggling protocol does not criminalize migrants themselves. It also includes a saving clause demanding refugee protection. The Protocol also encourages state parties to educate their public about the criminal trade and the reasons why migrants resort to it, whilst also educating immigration officials on how they should humanely deal with migrants and ensure the protection of their rights. Educating public is important because it makes them see those who resorted to smugglers to escape persecution, in a better way. This should be analysed in the light of the increase in the xenophobic mentality of people towards illegal immigrants, which may include refugees too.

In cases where a refugee is detained and later deported for the reason that he is a illegal immigrant, violates his rights. The rights of refugees physically present in state territory includes the right not to be refouled; freedom from arbitrary detention and penalization for illegal entry; physical security; the basic necessities of life; family unity; free access to the courts etc. Article 31 of the Refugee Convention obligates member states not to impose penalties on refugees who, coming directly

³ Aninia Nadig, *Human Smuggling, National Security, and Refugee Protection*, 15 J. Refugee Stud. 1, at 22.

from the state in which they fear persecution, enter or remain in the territory of a signatory state without authorization. Another important principle that should be strictly followed by the states is the principle of non refoulement. Article 33 (1) of the Convention Relating to the Status of Refugees provides that no state shall expel a refugee in the frontiers where his life is threatened.

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