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## **REFUGEE RIGHTS AND THE UN PROTOCOLS ON HUMAN TRAFFICKING AND SMUGGLING**

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### **ABSTRACT**

The UN protocols on human trafficking and smuggling nitpick from the international protection which refugee conventions have offered to asylum-seekers. This, however, is anathema to the general appellate position of international law in matters of human rights violations. The Protocol's primary goal is to achieve border control rights for states and also promote, in some way, the human rights of migrants, but it has loopholes which are exploited by states outside the context of its intent. States often deny international protection to refugees using procedures that pronominally encourage the closure of the border to all levels of migrants. This work contends that in the process of assisting states migration policies, the protocols encroach on international protection regimes which often do not query the means to escape persecution. It brings to focus the municipal nature of migration policy and its peril elements when only the state has a subjective right of interpretation. The protocols, in the view of this work, appear to be obstacles to a fair assessment of migration claims. Of particular importance are the claims of asylum-seekers who often use the same modes of the entrance that the human trafficking and smuggling protocols have come to criminalise. This work maintains that states are to respect the peremptory framework of refugee admission and consider the fact that refugees, in their bid to flee persecution, also enlist the services of concern to the protocols. States are enjoined to imbue within their immigration system, experts who can detect push from pull factors. The UNHCR has to make a re-presentation to the UN to show how rabidly border closures to smugglers also are shutting out asylum-seekers. This work is a contextual analysis of the collateral damage which occurs in the protection of the state's right to border control and migration policy.

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## INTRODUCTION

The current refugee and immigration crises in most European cities are compelling of some interventions. The Islamic State of Iraq and Syria (ISIS) induced refugee crises and the influx of economically despondent migrants from the African States have raised a concern for an intrepid definition of the issues and concepts at the heart of population movement across European cities and capitals. The major goal of migrations and refugee experts is to clear conceptual debacles of interrelated concepts and often wrongly misused of terms and interchangeable applications of some of these concepts without paying attention to defined parameters. Here, the definition of terms like, human trafficking, smuggling and refugee are attempted to tease out the concern of this paper. The primary concern of the paper is to analyse the content of the March 2000 Convention against Transnational Organised Crime in Vienna which developed within it, two protocols to tackle and address the issues of human trafficking and smuggling. The Protocol's primary goal is to achieve border control rights for states and also promote, in some way, the human rights of migrants. This paper contends that in the process of assisting states' migration policies, the protocols have encroached on other conventions and particularly on international protection regimes. The objectives of these protocols are also set in a manner that states will identify more with the smuggling protocol than the trafficking protocol – between the two protocols, one survives at the expense of the other, because states are quick to leverage on the content of the human smuggling protocol which substantially nitpicks and quibbles the trafficking protocol to irrelevance.

One major challenge to migration laws and migrants destinations is how to identify and give contents to the person who is seeking admission beyond his national frontiers. International law governing migrants and refugee movement require that a state will need to identify first the status of persons seeking admission before deciding the legal content and the procedural details to consider in this respect. The officials in charge of status determination of every state need to be mindful of clearly defined legal delineation and the properties which a state needs for measurement of the claims in the process of status determination of all persons seeking admission.

This work describes the characteristics elements of three migration terms, namely: human trafficking, human smuggling and refugees. The definitions and descriptions employ here are restrictive to express the coordinates of all the variable points. This method will also accommodate sampling of variables to explain in a sufficient style, the differences and de-similarities of these terms. When stocks are taken, all these terms are not similar at all. In a single migration influx, a state is often confronted with human trafficking, human smuggling and indeed refugees, all seeking admission under the cover of the international protection system. Depending on the tools available at the disposal of receiving state, separating these categories is intensely difficult. Whether from Africa or troubled Islamic states or elsewhere, receiving states are confronted with immigrants who fall to either or all of the terms mentioned above.

States of origins of migrants are not often concerned about the movement of people out of their territories; this is because most of them are already failing. Citizens are driven out as a result of either murderous policy or unbridled fiscal recklessness. Emigrations from such states are therefore a tool of shedding of burden. Available statistics have shown that majority of states in the developing world are yet to enact laws to tackle illegal migrations, therefore leaving the states of destinations either at the mercy of illegal migrants or with the option of hard migration control.

**The data 1 below shows this:**

## Human trafficking

17 countries not fully complying with minimum standards to eliminate human trafficking, according to a new report by the US State Department



Source: US Department of State Trafficking in Persons Report 2012

AFP

Ordinarily, it should not pose any conceptual threat to identify who is a refugee or humans that are trafficked and smuggled because they all appear to have definitudes and the precision as to what they are. However, so often, we have seen refugees who are smuggled and cases of human smuggling that shares the same details with human trafficking. The dilemma of most receiving states has been partly the determination of the status of the persons seeking admission and subsequently to know which of the international treaties apply to the case being treated.

### **Definitions**

Each year, most states (especially in Europe) are confronted with population influx across international borders in such a staggering proportion which makes it appear that both legal and illegal trans-border movement is on an equal scale. While the embassies are busy with their consular functions relating to their solemn immigration checks, people still cross the frontiers of states illegally whether as trafficked persons or smuggled or as refugees. Refugees have enjoyed international protection since the emergence of the 1951 Geneva Conventions on the rights of refugees and the 1967 Protocol of Refugee Rights. Scholars like Goodwill and McAdam (2007), and Hathaway (2005) have written extensively in favour of the transition of the refugee conventions into customary international law. The implication is that refugee rights are carved away and distinct from human rights and even humanitarian rights, therein refers to as *ius specialis* (Lawal, 2016). The restrictive application of the refugee convention is to act as a shield against other international conventions which have very contiguous concerns as the refugee convention.

In the light of the above, the Convention Against Transnational Organised Crime in Vienna between 25 February – 3 March, 2000 and more specifically the protocol concerning migrant smuggling and trafficking in person appears to have given little attention to the fact that increasing numbers of asylum-seekers and those who are refugees are being conveyed by means covered by the 2000 protocol (Erica, 2016). Of fundamental interest is that the Protocol was designed with inputs from the United Nations High Commissioner for Human Rights (HCHR), International Organisation for Migration (IOM), United Nations High commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF). Of course, the primary goal of these agencies is to ensure that these instruments do not conflict with or undermine existing international legal stand-

ards in relations to their individual specific calls. It is not clear how much influence they brought to bear on the convention which clearly transgressed on their primary goals individually. Notwithstanding the presence of these specialised agencies, in the drafting period, there are still areas of conflicts which the protocol did not address. For instance, there are indications that the protocols are capable of eroding the conventional interests of both the HCHR and the UNHCR (Goodey, 2000).

In November 2000, the UN General Assembly adopted two new international protocols on human smuggling and trafficking (Ad- Hoc Committee 2000). These protocols followed a growing concern for the humanitarian crisis, which followed the exposure of women and children to danger and other vices. At the heart of the debate which led to the drafting of the Protocol, was how to balance human right of illegal migrants and state's obligation towards the protection of its sovereignty (Massey et al, 2004: 373-388).

### **Human Trafficking**

The protocol frames human trafficking around coercion and the belief that victims are to be protected rather than being punished. Consequently, the HCHR, IOM, UNICEF and UNHCR allowed the passage of definition of trafficking which broadly is the recruitment, transportation, transfer or harbouring or receipt of any person of any purpose or in any form, including the recruitment, transportation, transfer or harbouring, or receipt of any person by the deception, coercion or abuse of power for the purposes of slavery, forced labour, (including bonded labour or debt bondage) and servitude (Protocol to Prevent, Suppress and Punish Trafficking in Persons). The definition also admits within its competence, trafficking to include contemporary forms of slavery such as forced prostitution. Given this definition, it may appear easy to identify a trafficked person, but the definition is more psychological when one considers the attribution of deception in the whole gamut. Any migrant is susceptible to deception including a smuggled person and a refugee.

The purpose of the trafficking protocol is to prevent and combat trafficking in persons, especially women and children. The protocol fundamentally established the extension of support and protection to victims of trafficking especially when it is assumed that human trafficking has no consent of the victims. Also, Laczko, (2005: 6-16) has explained that the issue of consent by victims of human trafficking is totally nonexistent because more often than not if consent is obtained,

it is under a very deceptive framework. He concludes that, since human trafficking is essentially coercive, deceptive and fundamentally abusive, it suggests that, by human nature, there no consent. However, it is not clear why deception is at the core of this definition because the major tool in migration is distrust, to the extent that even a refugee is not sure of his destination until he arrives there. A refugee is abused and deceived more often than trafficked persons and he is also more desperate. So deception is likely in any migration transaction and is not peculiar to human tracking alone.

### **Trafficking In Children**

HCHR, IOM, UNHCR and UNICEF support a separate definition of trafficking in children. This definition should include reference to the recruitment, transportation, transfer or harbouring or receipt of any child or the giving of any payment or benefits to achieve the consent of a person having control over a child for the purposes specified in the previous paragraph as well as for the purpose of using, procuring or offering a child for sexual exploitation including the production of pornography or for pornographic services. In addition, in the context of the Protocol and in accordance with the Convention on the Rights of the Child, 'child' should refer to any person under the age of 18 years. In relation to the terms 'child prostitution' and 'pornography' reference could usefully be made to the definitions contained in ILO Convention 182 (Protocol to Prevent, Suppress and Punish Trafficking in Persons).

There are sociological classifications that are necessary at this point. There is a gender dimension to the concept of human trafficking; the assumption is that females are usually victims of trafficking and in most cases are deceived into it, while males are smuggled and generally with their consent. Again, the role of law is very essential to the identification and declaration of a trafficking status on an individual. An individual, who claims to be a victim of human trafficking only at the point of arrest and application of penal sanctions, may have exploited the strength of the protocol to escape comprehensive legal action to be taken against him/her. In the course of this research, it was discovered<sup>1</sup> that the innocence of some of the victims of trafficking is actually results of failed transnational human migration transactions. There is evidence that some victims of trafficking had actually agreed to be smuggled but when faced with the law, they claim to have been trafficked without their consent.



The part that may not be contested is the trafficking of children. In a recent interview,<sup>2</sup> it was discovered that some children are actually trafficked in the Akwa Ibom State of Nigeria to some capital cities in Nigeria and outside the country. The network involves payment of money to achieve the consent of a person having control over a child for the purpose specified under the concern of the protocol relating to trafficking. This incidence triggered a socio-cultural organization known as Mhoho mkpara Ibibio (Group of Ibibio Youths) in the Akwa Ibom state of Nigeria, to take very drastic action to stem the tide of the situation.

The protocol which defines human trafficking places emphasis on cooperation between countries. At the centre of this cooperation is the belief that a trafficked person is a victim of a circumstance beyond his/her control. Therefore, certain measures are required by states to further assist the victims of trafficking. The protocol requires states parties to:

- Criminalise trafficking and related conduct as well as improve appropriate penalties.

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1. This much was gathered during interaction with deportees at the Muritala International Airport Lagos at the office of OC Deportation. Most of the deportees claimed that they were deceived into embarking on the failed journey and they claimed that the journey was without their consent. Although further inquiry showed that this was far from the truth.

2. Mrs Brooks gave this account in an interview with her on the issue of child trafficking in Akwa Ibom (her state of origin) state of Nigeria.

- Facilitate and accept the return of their trafficked nationals and permanent residents with due regard for their safety.
- Provide or strengthen training for law enforcement, immigration and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims.
- Strengthen border controls is necessary to detect and prevent trafficking.
- Take legislative or other appropriate measures to prevent commercial transport being used in the trafficking process and to penalize such involvement.
- Take steps to ensure the integrity of travel documents issued on their behalf and to prevent their fraudulent use (Protocol to Prevent, Suppress and Punish Trafficking in Persons).

## **The Smuggling of Protocol**

What is the smuggling of migrants? International law has assisted, to a large extent, in taking concepts out of subjective analysis and interpretation. The protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention against Transnational Organised Crimes, Article 3(a) has declared smuggling to be:

The procurement, in order to obtain, directly or indirectly, a financial or another material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident.

The basic attributes of the smuggling protocol are to ensure that the act is criminalised and it is taken away from the purview of the humanitarian act. That appears to be the reason why the issue of financial gain, gains the centre of the definition of smuggling under international law. The payment for the service nullifies any humanitarian presumptions. However, centralizing economic gains or goal as the adroit of smuggling is congenially deficient because even refugees in desperate need to leave a troubled state, often pay for such service. Of greatest concern is the strength which the protocol gives to state parties to intercept vessels, at sea, suspected of carrying smuggled migrants (Gallagher 2001).

Scholars (Gallagher 2001 and Laczko 2005) have identified three basic conditions for smuggling to take place. These are:

- There are persons interested in (or lured into) international migrations, be it for economic or other reasons.
- There are no legal ways of migrating, hence, migrants contact or are contacted by.
- One or more persons who organise the movement of those migrants for profit.

The scourge of human smuggling is universal especially when one considers both its commercial and economic benefits on states and individuals. Economic migrants flood the territories of more prosperous nations because of the belief that life could be better there, more often migrants from developing countries seek greener pastures in more economically stable states. The commercial or economic basis of migration is at the centre of human smuggling and this begins when fees are charged (to smugglers) on the basis of economic desires of individual who embarks on such trip. According to a report by the United Nations, an estimated \$6.6 Million was made in 2010 by human smugglers bringing in



illegal migrants to the United States. The revenue was generated by migrants paying anywhere between \$150 to \$100,000. The fees charged by the smugglers were dependent on the immigrants' country of origin. Charges covered everything needed for the journey, such as hotel stays, bribes and taxes to be paid to the drug cartels. The United States Border Control apprehended 57,000 unaccompanied minors trying to illegally enter the United States between October 2013 and June 2014 and it was discovered that huge sums of money were invested in what has the termed migration industry (Associated Press, July 21, 2014).

Human smuggling in Europe is even more perilous. Fishing boats have been used to transport humans from North Africa to Italy. The migrants first must pay between \$1,000 to \$2,500 to reserve a spot on the boat. That fee is simply to have a spot on the boat. The migrant must then pay for all charges and expenses while on the boat. According to the trafficker, a life jacket costs \$200. Bottles of water and cans of tuna cost up to \$100. The "first class" section of the boat, which is located on the top deck, unlike the ship's hull, costs \$200 to \$300. Blankets and raincoats cost \$200. Pregnant women must pay \$150 for catheters because many consider the urine of pregnant women to be poisonous. Use of the satellite phone for a few minutes costs \$300. And children who are making the journey without parents are charged \$1,500. Between January and June 2014, security forces in Italy estimated that over 43,000 people have reached the Italian shores, an increase of 835 per cent from the same period in 2017. In a single weekend at the end of May, a total of 3,162 migrants from Syria and North Africa were seized on 11 fishing boats off the coast of Sicily (Nadeau, 2018).

Even before the political crisis in Iraq and Syria, states in the European Union had complained about the influx of smuggled persons. By 1993, a total of 50,000 of smuggled persons were recorded and by 1999, this had jumped to about 400,000. The present estimates can only be imagined if the huge contributing factors of the crises in Iraq and Syria are to be added to the present scourge. The European Union had reported a total of two million and one hundred and ten (2,110,000) as smuggled persons recorded as at the middle of 2018 (Cowell and Bilefsky, 2017).

Smuggling, although, illegal is a major means of getting migrants to their destinations. Little wonder why it draws the attention of international law and necessitated its own protocol. Smuggling thrives in the face of stringent immigration control at the borders of states (Report of the Regional Ministerial Conference

2002). The more measures there are to prevent illegal entry, the more the arrangements of illegal entry become organised and more smuggling institutions emerged with diversity and, creating more elaborate and intricate designs to achieve their goals. Cases of smuggling are global and become steeper with incidences of economic despondency and rampaging political crisis. In Africa, slightly more prosperous states have witnessed the smuggling of persons from more less economically stable states. However, the various porous border control system of most African states makes smuggling unnecessary. The emergence of cases of insurgents (e.g. Boko Haram, Al Shabab, Tuaregs in Nigeria, Somalia and Mali respectively) which ravaged some states, have made border control in these regions a matter of security priority. Strictly speaking, however, human smuggling is not as prevalent in African border areas as human trafficking, this is because of the incapacity of the government to identify their borderlines and control movements at their frontiers. There are more unrecognised borders in African states than the ones officially identified.

### **Who is a Refugee?**

The convention of 1951 was established in the Diaspora period following World War II; it was marked out to take care mainly of European refugees and to deal with the event, which originated prior to 1951. It defines a refugee as any person who (UN Refugee Convention 1951):

As a result of event occurring before 1, January 1951 and 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 former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it

In the course of 1960, however, legal efforts were made to abolish the restriction on time in the application of the 1951 definition, and in 1967, a protocol amending the provision of the convention was adopted. Thereafter, the term "refugee" as defined in 1951 also became applicable to refugee situations occurring after 1951.

### **The Substantive Analysis**

The establishment of a protocol specific for human trafficking and smuggling should be a major achievement in international law and a relief in refugee and migration jurisprudence. The protocol, more than anything else, provides a common understanding of the terms and clearly resolves the definitional debates often encountered in the discourse relating to human trafficking and smuggling. At least, states now have a substantial legal framework with which to address, cooperate and collaborate amongst each other in relation to the subject. The protocols' wish is that law should regulate the issues of human trafficking and smuggling rather than the resort to a subjective framework often associated with status determination procedure.

However, the protocol appears to have lost decisiveness. It is torn between protection of states right to territorial control and the essentials of international protection law. The protocol, in an attempt to balance states interest and human right, has achieved little for neither. Little or nothing is done to assist the propensity of law enforcement of states, which happens to be its primary objective. And its concern for international protection law is generally ambivalent. This limbo ultimately gives those involved in the practice, an ample opportunity to work without hindrance. The protocol's failures to identify the parameters and differences that exist between trafficked persons, smuggled migrants and refugees have left a legal lacuna that is susceptible to both institutional and individual abuses. According to the Canadian Refugee Council (20 February 2000):

If authorities have no means of determining among the intercepted or arrested who is being trafficked, how do they propose to grant them the measures of protection they are committing themselves to?

The protocol appears to have created more problems for state parties, than resolving them and thereby diminishing the relevance of its enlistment in the discourse. The sympathy which the protocol has for trafficked persons has increased substantially, states' responsibilities to give protection to a trafficked person. This, of course, is accompanied by both financial and administrative burdens. The first concern here is that state naturally would seek to limit the number of persons it has protection obligation over. The same state is already combusting in the face of international protection law which proffers protection of refugees and which forbids the sending back of asylum-seekers. The protocol

represents in the view of the state, a cumulative addition to protection treaties that international law expects compliance.

In addition to this, is the irrecoverable damage the protocol has done to one of the regimes of the protocol at the expense of the other. It appears the protocol has made human trafficking a discount of the protocol on human smuggling, thus allowing states to discount their obligations towards human trafficking. To assume that a trafficked person deserves protection and a smuggled migrant requires punishment is to create a compulsory confluence for parallel vestiges for states parties since their authorities are responsible for the process of identifying and differentiating between the two (trafficked and smuggled). The protocol provides leverage to identify all irregular migrants as having being smuggled rather than trafficked. This, for states, is the most convenient method to avoid the protection responsibility that comes with the declaration of trafficked persons (Andreas, 2000).

Andreas, (2000) has shown that states normally resent any treaty that acts as a limitation to their ability to repatriate or turn back migrants. To such states, what the protocol appears to have given with the right hand, it is taking back with the left. This view is often a product of the collision between states and UN High Commission for Human Rights. The High Commissioner has mentioned that (UN Doc. A/AC.254/16, para. 20):

Safe and, as far as possible, voluntary reform must be at the care of any credible protection strategy of trafficked persons. A failure to proceed to safe voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of trafficked persons. When trafficking occurs in the context of organized crime, such an endorsement presents an unacceptable safety risk to victims.

International law, through the promotion of the protocol, appears in the view of most states, as tampering with states right to border control. Where the protocol does not serve the interest of state parties is when it raises concern for the protection of human rights. Such concern actually is a limitation of states' measures to control their borders. While state parties are not to be presumed as revealing in the face of human right abuses, the guarantees which the protocol grant migrants, especially as it regards to trafficked person, is both a substantial strain on national finance and administration and creating legal barriers to immigration controls (UN Doc. A/AC.254/16, para. 20).

### **Border Control, Human Rights and State Sovereignty**

The rise of far-right political ideology and the political doctrine, that supports conservative rights and powers of the common people, represent institutional suffocation of international law. Most politics are using the local electorate to undermine the influence of international law. However, the far-right ideologues need not push for the demise of international law with such fervency whenever immigration issues become elaborate political value allocations. This is because international law seems to have resolved immigration issues in favour of the state's sovereignty (Pécoud, and Guchteneire, 2014). In fact, international law has done little to defend the notion that the movement of people across state borders is part of human rights. In other words, there is no human right to move freely across international borders and there is no law which prohibits measures to contain human movement across frontiers of states (Pécoud, and Guchteneire, 2014).

The general assumption of the right to human mobility is contained in the Universal Declaration of Human Rights (Article 13-2) which grants that: "Everyone has the right to leave any country including his own and to return to his country". This right is generic consequent upon its roots and historical basis. The proclamation was originally an attempt to pave way for victims of totalitarian regimes in Europe during and after WWII to escape and move further away from their persecution. The right is, therefore, a right of emigration, and it does not in a strict sense, cover immigration freedom (Pécoud, and Guchteneire, 2014). The right-based mobility approach to immigration studies, therefore, is conceptually problematic since international law has not expressly granted the right but instead grants the right of restriction of mobility to states as a mark of sovereignty (Pécoud, and Guchteneire, 2014).

While, from the sums above, mobility to another state is not a human right, migrants of all shades have human rights that international law has an obligation to protect. The measures which a state chooses to adopt to check irregular migration may contain flagrant abuses of human rights. The major and very critical abuse of human right in migrations occurs when officials are ill-equipped to handle status determination effectively. The cost of error of improper status determination process is only equivalent to the consequences of having an ill-trained pilot to handle an airplane.

The protocol on human trafficking and smuggling has been substantially helpful in making a differentiation between the two concepts. However, the application of tight border control by states has hardly assisted the effort of the protocol. Strict border control triggers, so often, the acts of human trafficking and smuggling. The natural reaction of states to the influx of illegal migrants is to call for more control and application of stricter measures (Thomas, and Lowri, 2005). This leads to a self-perpetuating process that simultaneously fuels human rights violations. In most cases, these measures lead to a tragic end when migrants lose their lives.

Since the protocol came into force, there has been a consistent collision between it and human rights, that it attempts to protect. Very often, the issue of migration contends with the security of a nation and states are fundamentally committed to securing their territories. In the process, the issues of the right consistently push into abeyance. Also since the beginning of the Iraqi and Syrian crises, issue of human rights has played a little role when states are confronted with migrants who may be carrying with them the bitterness of war into a state that is totally not an actor in their state of despondency (Lawal, 2017).

The protocol on human trafficking and smuggling has made concrete contributions to migration discourse: it enjoins states to criminalise the acts; it tries to promote human rights of migrants and finally promotes states' right to border control. States are however more concerned about criminalising the act of smuggling and the protection of their border from illegal migrants than the protection of human rights which applies only to the trafficked person. The implication of this is the state of limbo that human rights are subjected to. Two, migration scholars, Meneses (2003) and Koser (2001), have both wondered about the relationship between border controls, migration policies and human rights and they query who actually is guilty of human right abuses: the human smugglers or states' migration policies? Koser (2001) had argued that except a state deliberately pursues policies targeted at abuses of migrant, then, a state cannot be said to abuse the human rights of migrants. This argument locates the cynical and inhuman methods of trafficking and smuggling as the basis of that conclusion. It further maintains that both smugglers and the smuggled are aware of the human rights abuses inherent in the process before embarking on it. Meneses (2003) too, is very critical of the assumption which underlies the right to human mobility; his argument is basically that the right to leave does not contain a right to be admitted. Therefore, it is often very complex to establish that states are ac-



tually guilty of human rights violations in the process of migration control because the state has the right to forbid migrants from entering its territory even though there is an established human right which permits people to leave a country.

### **The Protocols and the Refugee Rights**

This paper recognises the strong connections between a refugee, human trafficking and human smuggling, and it is doubtful if the protocols intend these concepts to be treated in a single file. The interconnectedness of the trends and the unifying factors among them is that they are all migrants. What the protocols query is the mode of movement but not the freedom of mobility, but no particular mode of movement of a migrant is exclusive to any branch of migration. This makes the application of the protocols very subjective and making its flexibility, breeding grounds for legal escape when a state is faced with litigations whether on human right abuses during border control or arbitrary status determination process. Refugees are often being transported across borders by smugglers and by traffickers especially when the state of origin is involved in internal political turmoil. This is especially so because central authorities in refugee-producing states are usually in denials that they have lost political control. The upsurge of refugee is clear evidence that the state in question is in crisis and thus lacks the ability to provide protection to her citizens. To cover up, central authorities block legitimate routes of escape for citizens and this produces the engagement of the services of smugglers who understand alternatives and illegal routes (Van-Selm, 2005).

There have been instances where political asylum-seekers engaged the services of human traffickers and smugglers to escape persecution in their home country. This was the case in Nigeria when the military maximum ruler Gen. Sani Abacha descended on the members of National Democratic Coalition (NADECO) because the organisation engaged the dictator on the struggle to actualize the mandate of Chief M.K.O Abiola as President of Nigeria. Current similar political crises have seen an increasing number of refugees being transported across borders by smugglers and even by professional traffickers. However, the UNHCR has firmly ostracized asylum seekers who engage the services of smugglers, from her protection obligation. It maintains that (UN. Doc. E/CN.4/Sub.2/2001/26, July 2001):

An asylum seeker who resorts to a human smuggler seriously compromises his or her claims in the eyes of many states... leading to imputation of double criminality, not only do refugees flout national boundaries but they also consort with criminal trafficking gangs to do so.

The UNHCR's position is intentional neglect of the various channels open to a refugee in a matter of movement across state borders. Refugees have had to resort to the services of smugglers not as a matter of choice because naturally, a refugee has no such moral attribute to reject the services of smugglers when he is desperate to get out, and even when faced with certain death. Thus, criminalising their attempt to escape persecution amounts to limiting their chances of mitigating their imperilment. Again, the UNHCR may have contradicted its statute, since the 1951 Refugee Convention has not in any case, questioned the means through which a refugee gains access to state frontiers. And in addition to this, is the peremptory nature of the principle of non-refoulement which enjoins states not to send refugee back as long as they have entered into a state and this should be done immediately (Lawal, 2016).

However, the UNHCR's position is originally to protect the asylum system from smugglers who might want to explore the shield of international protection of refugees. Its major concern at the drafting of the human trafficking protocol is the protection of refugees by discouraging the pursuit of desperate measures which might jeopardise their asylum application before the legal system of a state. This, in the main, raises the concern of the UNHCR about the illegality of entrance. At the centre of the protocol is the fear that states might use this provision as an alibi to deny basic human and humanitarian rights already granted by international law. It is not clear, however, how the UNHCR has assisted the protocol in identifying the very lean demarcation between a refugee and a smuggled person, and this serves well the protocols as lethal in undermining the already precarious refugee protection regime.

The protocols' fundamental flaw is the insensitiveness to the desperate state of migration when there is a conflict or war in a state. Evidence has shown that key migrants routes and centres for human smuggling are often areas ravaged by wars. For instance, migrants used the Lampedusa, Tripoli, Zlitan, Misrata and Benghazi routes to escape from the political conflicts in Tunisia, Libya and Iraq to places in Malta, Italy and other European countries. Criminalising human smuggling in these areas is, in plain text, one; a derogation of the peremptory

nature of the principle of non-refoulement and two, it is a query of a mode of the mobility of refugee whose life is in danger.

In contrast, there are clear cases of human smuggling which enjoy no modifying caveat or value to the asylum system. In this case, the protocols cannot be said to have prejudiced international protection law because any human mobility done through smuggling and which has no persecutory cogency to compel flight, is indeed human smuggling. For instance, the migrants' routes from China and Vietnam to the United States and Europe are most dedicated to human smuggling. Again, the type of fee being charged in these routes cannot be easily paid by a refugee who is already in a state of economic despondency. This explanation is necessary to prevent the misinterpretation of the thesis of this work.

Where the protocol proves to be gravely damaging to the interest of refugees lies in the fact that international law has not recognised any right whatsoever attached to immigration, and as such all states are seen to be acting legitimately when taking actions to control immigration. This is the reason why most applicants (especially asylum-seekers) lose their appeals in courts. Even for an established asylum case, enforcement of right is often put in abeyance when the state is able to trigger its border control right. States have constantly disagreed with the refugee convention which gives legality to the protection of refugees. When it is established that refugees have come with legal burden, states have cleverly and often refused to accept asylum applications on refugee grounds. It is indeed sharp migration practice that all asylum-seekers are classified migrants to avoid the legal debacles associated with the asylum system. The protocols appear to merely give legitimacy to state measures to control her border and fail to push for the protection of human rights (Van-Selm, 2005).

Dowty (1987) had argued that whereas international law grants the right of emigration as a fundamental exit option, this does not imply that other states must unlimitedly welcome foreigners. However, Dummet (1992) is of the view that the right of emigration is already violated if such right is not complemented by the right to be admitted. These diverging views on international mobility take place in a context where migration is commonly understood, in security terms, as a "problem" and many countries feel the need to protect against this "problem." In recent years, terrorism-related concerns have further fuelled this trend and put border control in the spotlight. In this context, irregular migration is perceived as a central phenomenon reflecting the porosity of borders and calling for greater surveillance. Controlling immigration has consequently become an im-

portant field of policy in which several evolutions have taken place in recent years. Regardless of the position of international law on immigration, the current challenges justify the restriction of movement across state borders.

## CONCLUSION

The human trafficking and smuggling protocols are a defence of states' right to border control but this has laid the foundation for contemporary practices where states appear to query whether there is a human right to mobility. As it is often the case, migration policies have implications on migrants and for institutions in charge of border control. The municipal nature of migration policy is already a death-knell for migrants and large international law has served in appellate position by promoting international protection regimes, especially when conflict occurs with a municipal policy on migration. Now the protocols appear to put international law as accomplice and obstacles to a fair assessment of migration claims. Of particular importance are the claims of asylum-seekers who have often used the same modes of the entrance that the human trafficking and smuggling protocols have come to criminalise. These protocols have made no solid contribution to international protection law because of the obvious neglect to make clearer and firm pronouncement on the right of asylum. The protocols although produce very fair delineation between human trafficking and human smuggling, its restraint design and victim approach to trafficking have limited the acceptance of its use in migration trends of a state. For states, a trafficked person has come with some legal burden and a call to the obligation under the draft of the protocol. When these facts are compared to what treatment the protocol required to be served to smuggle person, states are quick to come to the determination that they have admitted smuggled rather than trafficked persons. This is essentially so because there is more emphasis on punishment than protection for the smuggled persons. This convenience, and by the act of the protocols, nullifies any benefit accruals to trafficked person as states constantly deny such declaration.

The major failure of the protocol is that it is not providential to the already lethargic state of international law by promoting states' readiness to demur from their international protection obligations. Again, states often ensconced themselves within the protection offered by the protocols to set up machinery and measure to deny refugees the chance of escaping from persecution, especially when they can (often they do) trigger the clause of means of entrance. Refugees

are returned so quickly when receiving states are able to claim that they are smuggled, such claim will nullify the application of the principle of non-refoulement which prevents refugees from being returned to the persecutory state.

## RECOMMENDATION

States are to respect the peremptory framework of refugee admission into their territories and consider the fact that refugees, in their bid to flee persecution, also enlist the services of concern to the protocols. States are enjoined to imbue within their immigration system, experts who can detect push from pull factors. The UNHCR will have to make a re-presentation to show how rabidly border closures to smugglers also are shutting out asylum seekers.

## REFERENCES

*Ad- Hoc Committee on the Elaboration of a Convention Against Transnational Organised Crime*, ( 21 February B 3 March 2000). Eighth Session, Vienna.

Alan C. and Bilefsky D. (May 30, 2017) *European Agency Reports Surge in Illegal Migration, Fueling a Debate*. New York Times.

Andreas, P. (2000). *Border Games. Policing the U.S.-Mexico Divide*. Ithaca: Cornell University Press.

Anne Gallagher (2001). *Human Rights and the new UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis*, Human Rights Quarterly, Vol 23.

Associated Press. (July 21, 2014) *Migration Spotlights Mexican 'Coyote' Smugglers*, ABC News.

Barbie Latza Nadeau. (June 5, 2018) "Confessions of a Human Trafficker Who Smuggled Desperate Migrants Into Europe," Daily Beast.

Canadian Council for Refugees (20 February 2000). '*Migrant Smuggling and Trafficking in Persons*', available from <http://www.web.net/~ccr/traffick.htm> (accessed April 2017).

Dowty, A. (1987). *Closed Borders. The Contemporary Assault on Freedom of Movement*. New Haven: Yale University Press.

Dummett, A. (1992). *The Transnational Migration of People Seen from within a Natural Law Tradition*. In *Free Movement. Ethical Issues in the*

*Transnational Migration of People and of Money*, eds. Brian Barry and Robert E. Goodin, 169-180. New York: Harvester Wheatsheaf.

Erica F. (2016). *The Convention at 50: the Way Ahead for Refugee Protection*, Forced Migration Review, issue 10, 6-7.

Goodey, Jo (2000). *Keeping 'Undesirables' at Bay: The EU's Response to Organised Crime and Its Victims*. Paper presented at the American Society of Criminology meeting, San Francisco, 15-18 November 2000.

Goodwin-Gill G., McAdam J.(2007). *The refugee in international law*. Oxford: Oxford University Press.

Hathaway: J.G (2005) *The rights of refugees under international law*. London: CU's Cambridge.

Koser, K. (2001). *The Smuggling of Asylum Seekers into Western Europe: Contradictions, Conundrums, and Dilemmas*. In *Global Human Smuggling. Comparative Perspectives*, eds.David Kyle and Rey Koslowski, 58-73. Baltimore: The John Hopkins University Press.

Laczko, F. 2005. *Data and Research on Human Trafficking*. International Migration 43 (1-2): 6-16.

Lawal O. (2016). *The principle of non-refoulement and the challenges of refugee laws in South Africa and Nigeria*. PhD Dissertation submitted at the Department of Political Science, University of Ibadan.

Lawal O. (2017) *When Refugee Breaks Domestic Law under the Cover of International Protection Laws*. IOSR Journal Of Humanities And Social Science (IOSR- JHSS) Volume 22, Issue 7, Ver. 3 (July. 2017) ISSN: 2279-0837, p- ISSN: 2279- 0845. www.iosrjournals.org DOI: 10.9790/0837-22007035563 www.iosrjournals.org 48 (Australia/India) P55-63

Massey, S. and Edward-Taylor J. (2004). *Back to the Future: Immigration research, Immigration Policy, and Globalisation in the Twenty-first Century*. In *International Migration. Prospects and Policies in a Global Market*, eds. Douglas S. Massey and J. Edward Taylor, 373-388. Oxford: Oxford University Press.

Meneses, G. A. (2003) *Human Rights and Undocumented Migration along the Mexican-U.S. Border*. UCLA Law Review 51: 267-281.

Pécoud, A, and Guchteneire, P. (2014). *Migration, Human Rights and the United Nations: An Investigation into the Low Ratification Record of the UN Migrant Workers Convention*. Geneva: Global Commission on International Migration, Global Perspectives no. 3.



*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, Article 3(a).*

*Report of the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime. (26-28 February 2002) Bali, Indonesia,*

Thomas R. and Lowri A. (2005). *Biometrics, International Migrants and Human Rights*. Geneva: Global Commission on International Migration, Global Perspectives no. 17.

UN Doc. A/AC.254/16, para. 20.

UN. Doc. E/CN.4/Sub.2/2001/26, July 2001, para 25.

Van-Selm, J. (2005). *European Refugee Policy: Is There Such a Thing? New Issues in Refugee Research*. Working Paper No. 115, UNHCR, Geneva, Switzerland.

