

Noela N. Barasa

Student Number: 3207305

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Kenya's Implementation of the Smuggling Protocol in Response to the Irregular Movement of Migrants from Ethiopia and Somalia

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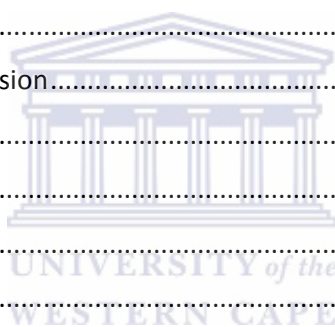
Supervisor: Professor Lovell Fernandez

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Declaration

I declare that **Kenya's Implementation of the Smuggling Protocol in Response to the Irregular Movement of Migrants from Ethiopia and Somalia** is my own work, that it has not been submitted before any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Noela N. Barasa



Signed:.....

Date:.....

Professor Lovell Fernandez

Signed:.....

Date:.....

Key words

Asylum Seeker

Economic Migrant

Influx

Irregular migrant

Kenya

Refugee

Smuggled Migrant

Smuggler

Smuggling protocol

Transnational organized crime



List of Abbreviations

AU	African Union
EPLF	Ethiopian People Liberation Front
EU	European Union
GOK	Government of Kenya
HRW	Human Rights Watch
IGAD	Intergovernmental Authority for Development
IOM	International Organization for Migration
RCP	Regional Consultative Process
SG	Secretary General
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
USA	United States of America



1.0 Chapter 1

1.1 Background

The southward movement of migrants from Ethiopia and Somalia, to Kenya as a transit or destination country, has taken a multilayered and multi-causal dimension over the last 20 years. Often, migrants who are part of this movement have in mind South Africa as their final destination. The movement has evolved, from one involving refugees and asylum seekers, categorised as forced migrants, to one which, in the 21st Century, has been typified as a mixed migration movement. Mixed movements are, according to the International Organization for Migration (IOM), 'complex population movements including refugees, asylum seekers, economic migrants and other migrants'.¹

The movement of Ethiopians and Somalis commenced in the mid-20th Century and was exacerbated by the fall of the Mengistu government in Ethiopia, and the Siad Barre regime in Somalia, in 1991.² Influxes are dependent on the prevailing social, political, and climatic conditions in the regions of Ethiopia and Somalia. In Somalia, the early 1990s were characterised by displacement as a result of civil war. In 1991, the fall of the Siad Barre regime resulted in anarchy and violence. Somalis began to troop to Kenya in this period where key resources were controlled by warlords.

¹Perruchod and Redpath-Cross (2011:63).

²Lindley (2010:3).

In 1992 the registered Somali refugee population in Kenya had risen to 285 000. By 1995, the international community had largely withdrawn from Somalia. In September 2011, the Somali refugee population had surpassed the half million mark.³ This was accelerated by political violence and an acute drought in the Horn of Africa.

In 2007, the border between Kenya and Somalia was officially closed.⁴ However, the entire 700 km of the border is open and porous, allowing migrants to enter at their pleasure.⁵ Reports abound of harassment by Kenyan police, extortion, arbitrary arrest and the detention of Somali asylum seekers, refugees and Ethiopian migrants.⁶ The migrants are arrested, detained and charged with being unlawfully present in Kenya.⁷ Summary proceedings involve a plea of guilty, one year's imprisonment in lieu of a fine, and a repatriation order.

In *Khali Abdiaziz Mohammad and Three Others v Republic*, the appellants were charged with being unlawfully present in Kenya, contrary to section 13 (2) (c) of the Immigration Act Cap 172 Laws of Kenya (now repealed).⁸ The trial magistrate, in rejecting mitigating factors pleaded, highlighted the breach of peace, security and sovereignty as a result of the appellants' irregular crossing, at a time when the Kenya-Somalia border remained closed.⁹

A vicious cycle of recidivism ensues, with deported migrants, re-attempting the journey back to Kenya, assisted by smugglers and transnational organized criminal networks.¹⁰ The use of

³ UNHCR Country Operations Kenya (2012:1).

⁴ *BBC News* (2007:1).

⁵ Horwood (2009:55).

⁶ HRW (2010:4); Abdi A (2011:1).

⁷ HRW (2010:5).

⁸ Immigration Act.

⁹ *Khali Abdiaziz Mohammad and Three Others v Republic* [2007].

¹⁰ UNHCR/IOM (2010:18)a.

smugglers decreases the risk of detection by police, but the unofficial routes utilised consist of rough terrain, and a hazardous wilderness which render the migrant susceptible to the whims of the smuggler.¹¹ Smugglers rarely take into consideration basic survival necessities, such as food for the migrants, during the journey. At times, they subject the migrants to physical abuse, or may even abandon them in the course of the journey when they fear detection.

The smuggling enterprise consists of a chain of people accountable to a boss, the chief smuggler. The chief smuggler, a key actor in the irregular movement, is often well-known to the community, the smuggled migrant, and/or the financier of the transaction, and is easily identifiable by relevant authorities, albeit, with little or no consequence.¹² Although difficult to estimate in scale, migrant smuggling has grown today into a multimillion dollar enterprise, involving transnational organized criminal elements.¹³ Within this context, the *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air*, commonly referred to as the Smuggling Protocol, supplementing the *United Nations Convention against Transnational Organized Crime*, came into force in 2004.

The international legislative framework requires (a) the decriminalization of the smuggled migrant, whose movement is facilitated by an organized criminal group; and (b) the criminalization of facilitators and profiteers of the movement. The smuggling of migrants signals the existence of criminal elements within the community, complicity in corrupt practice of state and non-state actors, irregular movement and exploitation of a desperate population of migrants from the countries of origin.

¹¹Horwood (2009:69).

¹²Horwood (2009:8).

¹³Heckmann (2007:1).

This paper aims to assess Kenya's progress in the implementation of the Smuggling Protocol in light of the substantial influx of irregular migrants from Ethiopia and Somalia. It analyzes the organised crime and the revised immigration legislative regime, following the adoption of a new constitutional dispensation in 2010. In addition, the paper assesses the deleterious effects of the smuggling enterprise on both countries of origin and destination. Finally, it recommends measures that need to be adopted to increase the protection of the growing numbers of migrants willing to make the hazardous journey southwards, from Ethiopia and Somalia.

1.2 Significance of the Study

The paper aims at reviewing the implementation of the *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air*, following Kenya's accession to it in 2005. Central to the review will be an exploration of the Kenyan criminal justice system's response to the phenomenon of smuggling. This will involve an analysis of the pertinent penal law provisions, relevant case law, and a profile of the perpetrators concerned. These aspects will be evaluated against the standards enunciated in the Smuggling Protocol. The paper mainly explores the mixed migration flows from Ethiopia and Somalia to Kenya, and, where relevant, to countries along the Eastern migration corridor Southwards. It examines the socio-economic and political climate of the countries of origin, as well as the far-reaching effects of the criminality of migrant smuggling.

Different and uneven criteria have been used by the Kenyan law enforcement authorities when considering admission for Ethiopian and Somali migrants and their subsequent access to the asylum process. The situation is compounded by Somalis' *prima facie* refugee status and

Ethiopia's bilateral agreement with Kenya, allowing each other's citizens free passage. Despite this status quo, Ethiopian and Somali migrants are subjected to regular arrest, detention and deportation.

The government and policymakers responsible for addressing irregular movement are primarily concerned with peace and security, border control and management, and safeguarding their prerogative to set immigration limits. The legislative, policy, and procedural paradigm to address the irregular movement of migrants from Ethiopia and Somalia to Kenya, within the mixed migration imperative, has proved inadequate and challenging to law enforcement officials, including the Kenyan police, the Department of Refugee Affairs (DRA), and the Immigration Service.

A legislative and policy review is thus required. This need arises in light of Kenya's accession to the Smuggling Protocol and increased irregular flows. The paper will explore Kenya's implementation of the Smuggling Protocol as a means of curtailing the irregular movement of migrants, and curbing its deleterious effects. It will also attempt to assess how state security measures can be co-ordinated to deal with the problem at hand more systematically. The need for a mutually inclusive approach in dealing with mixed migration movements was given currency in the following words, expressed at a regional conference on refugee protection and mixed migration: 'Border control and security issues for states and protection of migrants have been dealt with as mutually exclusive imperatives, which is not necessarily tenable for mixed migration movements and human mobility patterns in the region'.¹⁴

¹⁴ UNHCR/IOM (2010:12)a.

1.3 Research Hypothesis

The study is based on the assumption that effective implementation of the Smuggling Protocol will lead to a reduction of the irregular movement of migrants from Ethiopia and Somalia and an enhancement of the protection of migrants who are part of these mixed flows. This reduction necessarily means that the existing criminal networks need to be disabled. The theoretical assumptions here are that the brand of criminality under discussion is caused by circumstances, the addressing of which is indispensable for dealing with the problem more comprehensively.

1.4 Research Questions

Kenya acceded to the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the *United Nations Convention against Transnational Organized Crime* in 2005. In August 2010, Kenya welcomed a new constitutional dispensation, necessitating a substantial reform of several laws, including the law on immigration.¹⁵ As a result, the *Kenya Citizenship and Immigration Service Act* and the *Kenya Citizens and Foreign Nationals Management Service Act* were passed in 2011.¹⁶ The *Proceeds of Crime and Anti Money Laundering Act 2009*, and the *Prevention of Organized Crimes Act No.6 of 2010* also have a bearing on the issue of migrant smuggling.

¹⁵ Constitution of Kenya Fifth Schedule.

¹⁶ These pieces of legislation repealed the post- independence *Immigration Act Cap 172* Laws of Kenya, last amended in 1972.

Within this context the study seeks to answer the following questions:

- i. To what extent has Kenya included recommendations from the smuggling protocol, in its legislative framework?
- ii. To what extent can Kenya's effective implementation of the smuggling protocol curtail irregular flows, and enhance protection for migrants who are part of the mixed migration movement from Ethiopia and Somalia?

1.5 Scope of the Study

The paper will confine itself to the irregular movement of migrants from Somalia and Ethiopia to Kenya, as facilitated by organized criminal groups. It will explore the existent substantive criminal law provisions and sanctions suitability in addressing the smuggling of migrants, particularly in regard to the implementation of the Smuggling Protocol in Kenya. It will propose ways to curtail the irregular migration flows and the concomitant abuse of migrants' rights, and investigate the possible benefits that such proposed measures could have for the two countries of origin, and Kenya, as the destination.

1.6 Research Methodology

This is a desktop study. The principal primary sources are international instruments, national laws, national case law, reports by international bodies, international protocols and promulgated rules. The secondary sources consist of books, chapters in books, journal articles, electronic sources, proceedings of conferences and media reports.

1.7 Overview

Chapter 1 is a broad overview of the study. It highlights the background to the irregular movement of Ethiopians and Somalis into Kenya and looks at the context within which migrants are smuggled. Chapter 2 explains the basic concepts and terminology used in this paper, and it goes on to investigate the modalities of human smuggling and deleterious effects it has on the countries of origin and destination. This chapter also examines the causal factors of migrant smuggling and, to a limited extent, existing interventions to address the irregular movement of people across national borders. Chapter 3 analyzes Kenya's law on immigration against the international legal framework, and Chapter 4, which concludes the paper, recommends ways of coming to grips with the problem of migrant smuggling, particularly in respect of the decriminalisation of the smuggled migrant, protection of the migrants' rights, and prosecution of smugglers.



2.0 Chapter 2

2.1 Terminology and Conceptual Framework

A Smuggling of Migrants

The smuggling of migrants can be defined as ‘the intentional organization or facilitation of the movement of persons across international borders, in violation of laws or regulations, for the purpose of financial or other gain to the smuggler’.¹⁷ The agreed-upon international definition is contained in Article 3 (a) of the Smuggling Protocol. It states as follows:

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

Article 3 (b) defines illegal entry as ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State’.

The definition raises a few questions. First, who are the parties involved in the smuggling process? Second, can a person subjected to smuggling be described as a victim of a crime, or would it be more accurate to label such a migrant a criminal? A smuggler is involved directly or indirectly in the smuggling of migrants. A smuggler is ‘an intermediary who moves a person by agreement with that person, in order to transport him/her in an unauthorized manner across

¹⁷ IOM (2012:1).

an internationally recognized state border'.¹⁸ The person aided by the smuggler to enter a country illegally is a smuggled migrant.¹⁹

The smuggled migrant is a migrant often desperate to escape his/her current situation as a result of conflict, persecution, or lack of opportunity. The demand for migration far exceeds possibilities to cross borders legally.²⁰ The smuggler responds to the increased demand for migration by exploiting migrants vulnerabilities for profit: 'A smuggled migrant is not considered a victim because he consents to being smuggled, and in certain instances, willingly seeks out the services of the smuggler'.²¹

However, survivors of the smuggling process have detailed horrific accounts of their ordeals during the smuggling process. Smuggled migrants have been crammed into small windowless spaces filled with faeces and vomit, deprived of food and water, and witnessed their deceased companions' bodies discarded at sea or in the wilderness. In this regard, smuggled migrants can become victims of a crime as a result of the smuggling process, and in some cases they have been exploited by human traffickers.²²

Ironically, most smugglers do not consider their activities criminal.²³ They view themselves as providers of a humanitarian service, assisting persecuted populations escape to safety.

Smuggled migrants on the other hand, do not view themselves as victims of a crime, despite the abuse experienced during and as a result of the smuggling process. Migrant smuggling has

¹⁸ Perruchod and Redpath-Cross (2011:91).

¹⁹ McGuirl (2011:2).

²⁰ McAdam (2012:3).

²¹ David (2012:19).

²² David (2012:20).

²³ Bouteillet-Paquet (2011:8).

been described as a complex crime that keeps evolving for the purposes of evading detection.²⁴

B Smuggling of Migrants versus Trafficking in Persons

Smuggling of migrants and trafficking in persons are distinct concepts but exhibit significant overlap. In some instances, what begins as a case of migrant smuggling ends with the smuggled migrant becoming a victim of trafficking. In practice, it has been difficult to distinguish between the two concepts. Trafficking in Persons is defined in the *Protocol to Prevent, Suppress and Punishing the Trafficking in Persons especially Women and Children* (Trafficking Protocol) in Article 3 (a). The definition is quite lengthy but can be examined through its three constituent elements: the activity, the means and purpose.

The activity involves the recruitment, transportation, transfer, harbouring or receipt of a person. The means include the use of force, threat of force or coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or giving or receiving of payments. The means used negate any consent that may have been given to the activity.²⁵ The purpose is always exploitation. Article 3 (a) highlights the various forms of exploitation to include the exploitation of the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. For the offence of trafficking to be committed any one of the items or circumstances listed in the three constituent elements must be present.

For example, a young woman from Ethiopia is deceived about an employment opportunity at a hotel in Nairobi. When she arrives in the city she is directed to a household of ten where she

²⁴ McAdam (2012.3).

²⁵ Trafficking Protocol Article 3 (b).

works 18 hours a day as a domestic worker, with little or no pay. When she complains about the conditions, she is threatened with arrest and deportation for her irregular status in the country.

In the scenario just sketched, all the constituent elements of trafficking in persons have been fulfilled. The young lady was recruited through deception and subjected to servitude. Further, her participation in the scheme is secured by threats. Items or circumstances within the activity, means and purpose constitute the *actus reus* of the offence.

The means mentioned above do not have to be proved where the victim of trafficking is a child.²⁶ It is enough to prove that the activity took place for the purpose of exploitation.

Trafficking in persons may be established as a strict liability offence. In jurisdictions that require *mens rea* as the subjective element of the offence, it must be proved that the perpetrator committed the material act with intention to exploit the victim, and knowledge of the unlawfulness of the conduct.²⁷ The actual exploitation does not need to take place, it is sufficient to demonstrate that exploitation was the intended purpose.

C The Similarities and differences between Smuggling and Trafficking

Criminals may traffic and smuggle persons in the same movement, utilising similar routes and transportation methods.²⁸ Smuggled migrants are more often than not willing to submit themselves to the smuggling process. Trafficked victims, on the other hand, do not give consent

²⁶ Trafficking Protocol Article 3 (c).

²⁷ McGuirl (2011:6).

²⁸ McGuril (2011:8).

to their being trafficked, and where they do, it is rendered meaningless by the deception of the trafficker.

i) Trans-nationality

The smuggling of migrants must involve an element of trans-national movement. The migrant must cross a legally recognised border in violation of the destination country's requirements for admission. Trafficking in persons occurs not only where a victim or victims are moved within a country, but also where they cross an international border. Victims of trafficking may be bought and sold to different traffickers and moved regularly from one country to another.²⁹ Such crossing may be regular or irregular. Unlike smuggling, the offence of trafficking does not require a transnational element and is concerned with the intended exploitation of the victim.³⁰

ii) Consent

The trafficked person does not consent to the trafficking process and where he does consent, such consent is vitiated by the means set out in Article 3 (b) of the Trafficking Protocol. The smuggled migrant, on the other hand, actively seeks out the smuggler, and pays for his services to facilitate his irregular movement to his desired country of destination. However, due to the sometimes hazardous conditions that smuggled migrants face they may withdraw their consent during the journey.

²⁹ McGuirl (2011:7).

³⁰ McGuirl (2011:11).

iii) Exploitation

The human trafficker and smuggler both engage in the illegal conduct for profit. The smuggler and the migrant enter into an agreement that ends upon illegal entry or crossing into the destination country. The consideration is a sum agreed upon which is paid by the migrant to the smuggler to facilitate illegal crossing. The relationship between the two presumably ends with the illegal entry into the country of destination.

In contrast, the trafficker deceives his victims with the intention to exploit them. The victim does not consent to the intended exploitation and the relationship between the trafficker and his victims may go on long after the beginning of the trafficking process. It is important to note that a smuggled migrant may end up a victim of trafficking, and this happens where the smuggler or a third party exploits his irregular status for benefit.

D Irregular Migration

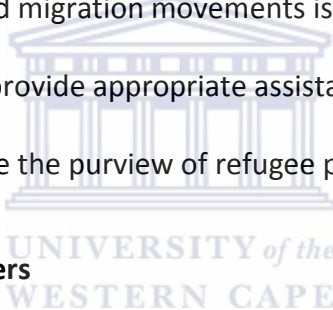
There is no clearly accepted universal definition of irregular migration, but IOM has defined it as 'movement that takes place outside the regulatory norms of the sending, transit and receiving countries'.³¹ Human trafficking and smuggling occur within the rubric of irregular migration. An irregular migrant is 'a person who, owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country'.³²

³¹ Perruchod and Redpath-Cross(2011:54).

³² Perruchod and Redpath-Cross (2011:54).

E Mixed Migration

The IOM defines mixed flows as ‘Complex migratory population movements that include refugees, asylum-seekers, economic migrants and other migrants, as opposed to migratory population movements that consist entirely of one category of migrants’.³³ The United Nations High Commissioner for Refugees (UNHCR) describes mixed migration as ‘people travelling in an irregular manner along similar routes, using similar means of travel but for different reasons’.³⁴ Victims of trafficking are sometimes part of this movement. Human smuggling is at the centre of mixed migration movements and is aided by corruption during the border crossing process.³⁵ The challenge in dealing with mixed migration movements is to identify migrants with a legitimate claim to asylum and to provide appropriate assistance to other migrants who are similarly vulnerable, but fall outside the purview of refugee protection.



F Refugees and asylum seekers

A refugee is defined in the 1951 Refugee Convention and its 1967 Protocol as ‘somebody who owing to a well founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group, or political opinion is unable or unwilling to return to their country of origin’.³⁶ An asylum seeker is a person who is awaiting status determination for refugee protection.

Towards the end of the 20th Century the movement of refugees and asylum seekers was characterised as forced migration. Forced migration refers to the involuntary or coerced

³³ Perruchod and Redpath-Cross (2011:63).

³⁴ UNHCR (2011:1).

³⁵ UNHCR/IOM(2010:3).

³⁶ Refugee Convention Article 1 A (2) (1951).

movements of people or groups of people as a result of conflict and environmental factors. It includes groups that may not fit within the defined limits of a refugee, such as persons displaced by natural disasters and those who have not yet crossed an internationally recognised border. The IOM defines forced migration 'as a migratory movement in which a level of coercion exists, including threats to life and livelihood whether arising from natural or manmade causes'.³⁷

G Organized and Transnational Crime

The United Nations Convention against Transnational Organized Crime (UNTOC) defines an organized criminal group in Article 2 (a) as follows:

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

Organised crime and transnational crime have so far evaded satisfactory definition. 'Crimes such as robbery and burglary may require organising but criminologists would not necessarily regard them as organised crime'.³⁸ The problem with the definitions proposed by Interpol, the United Nations (UN) and the European Commission (EU) is that they fail to recognise the loosely structured and fluid nature of most organised crime syndicates. Interpol defines organised crime as '[a]ny group of criminals that have a corporate structure, whose primary objective is to obtain money and power through illegal activities, often surviving on fear and corruption'.

³⁷ Perruchod & Redpath-Cross (2011:39).

³⁸ Wright (2007:2).

Smuggling networks in the East African region do not exhibit a corporate structure; they are more loosely-structured and constantly assume new formations, as required, to achieve desired criminal objectives. Transnational organised criminal groups do not operate only at national level, for they are inherently of a transnational character, plying their criminal trade across international borders. Transnational crime gives cross-border criminal activities a more concrete label and has resulted in a better understanding and classification of such activities.³⁹

2.2 History of the Southward Movement of Somalis and Ethiopians

Since the 1970s, the Horn of Africa, which is made up of Somalia, Ethiopia, Eritrea, Djibouti and Sudan, has been known internationally as a region whence refugees emanate. Involuntary movements in the region have been attributed to the overthrow of the Ethiopian Imperial government in 1974, Eritrea's struggle for independence, the 1977-8 invasion of Ethiopia by Somalia and the civil conflict in Somalia and Sudan. Environmental factors, famine and poverty have also contributed to involuntary movements. In order to gain political mileage, Government, in some instances, has also contributed to irregular movements.

A Somalia

Prior to being colonised, the Somali republic was largely democratic and egalitarian. In 1960, for the first time, the independent Republic of Somalia, organized itself along the precepts of western democratic ideals.⁴⁰ British Somaliland and the Italian administered South amalgamated to form the Republic of Somalia. The newly formed Republic did not last. Its

³⁹ Reichel (2005:7).

⁴⁰ Gundel (2002:256).

failure can be attributed to failed attempts at Pan-Somalism, and by its inability to provide adequate civic amenities. Pan-Somalism proposed unification of the present day Somalia, with the Ogaden region of Ethiopia, present day Djibouti and Northern Kenya, as well as the right to self-determination of the Somali people living outside Somalia. Other contributing factors were the bloated bureaucracy which could not be sustained by a disproportionately weak domestic economy, divisive politics and corruption.

In 1969, the last democratic election held in the Republic of Somalia led to the formation of a *de facto* one party state. Public dissatisfaction with this unfolding of events led to the assassination of the President and a military takeover. Siad Bare, previously commander of the army, became the President. The State took on a socialist orientation, and in 1977, following a renewed attempt at Pan-Somalism, Somalia attacked Ethiopia. The conflict, in which Somalia was defeated, spawned the first movement of Ogaden refugees fleeing from Ethiopia to Somalia.⁴¹

Clan polarization, endemic war, famine, starvation, and growing inequality in contravention of the Somali egalitarian ideal led to the collapse of the state in January 1991. Large flows of people, estimated at 1 million, followed, to surrounding countries and destinations outside Africa. Mohamed Farah Aided, who took over from the military overthrow of Siad Barre, died in Mogadishu in 1996, succumbing to wounds sustained during fighting in the capital.

⁴¹ Gundel (2002:257).

Today, the anarchy and polarisation that has characterised the post-independent State of Somalia more or less continues.⁴² Numerous attempts have been made to re-establish social and political cohesion, but with mixed success. A failed United Nations (UN) peacekeeping mission, backed by United States of America (USA) marines, was withdrawn in 1995. A fourteenth attempt to establish a central system of government resulted in the election of Abdullahi Yusuf as President in 2004. This transitional parliament was inaugurated in Kenya.

The transitional parliament met for the first time in Baidoa, Somalia in 2006. Successive years have been characterised by heavy fighting between the transitional government and Islamists wrestling for government control. This state of affairs, which has been aggravated by periodic spells of severe drought, has resulted in a deepening humanitarian crisis. An African Union (AU) Peace Keeping mission backed by the United Nations (UN) arrived in Mogadishu in December 2007. At the end of 2008, President Yusuf resigned following a vote of no confidence in his government. He was replaced by the moderate Sheikh Sharif, who was elected by parliament.

Towards the end of 2011, and going into 2012, an AU peace keeping mission supported the government's forces to wrestle major cities from the al Qaeda-linked Islamist group, al Shabaab. In August 2012, the first parliament in more than twenty years was sworn in, in Mogadishu, and Hassan Sheik Mahmoud was elected President. This was the first democratically elected government in Somalia since 1967.⁴³

⁴² Foreign Policy, 'Failed State Index' Somalia tops the top failed state index, available at http://www.foreignpolicy.com/failed_states_index_2012_interactive accessed 19th April 2012.

⁴³ BBC Somalia Profile available at <http://www.bbc.co.uk/news/world-africa-14094632> (accessed 19 June 2012).

The Somali community is primarily pastoralist in nature, with an agriculturally based economy. Their nomadic, pastoralist nature can be attributed to the people's search for work and study opportunities elsewhere. This has been the case since the 1920s, and most recently their movement has been attributed to compromised human security. The fall of the Siad Barre regime, followed by the humanitarian crisis caused by the civil war and famine during the repressive years of the warlord Farah Mohamed Aideed guerrilla insurgency, begun in earnest, and accelerated mass movements from Somalia.

More affluent Somalis moved to North America, Europe and the Gulf States, while the less affluent ones moved to Kenya and surrounding countries in the East African region.⁴⁴ Conflict, poverty, drought and food security have escalated the movement in recent years.

High profile visits to Mogadishu, Somalia by the Turkish Prime Minister, and the Secretary General (SG) of the UN Ban Ki moon in 2011, may be indicative of the changing fortunes of the country. In addition the AU peace keeping mission has more or less assisted Somali forces disable al Shaabab in 2012. Kenya recently decided to move its consular office to Somalia from Nairobi, where it was located for security reasons, to Mogadishu the capital of Somalia. To be very optimistic, the election of a President in Mogadishu in 2012 may signal the beginning of a very long road to peace in Somalia.

B Ethiopia

Ethiopia, a poor country in the Horn of Africa, with a population of 83 million, is plagued by various challenges, including catastrophic famines leading to food insecurity, overpopulation,

⁴⁴ Gundel (2002:264).

drought, political instability and ethnic conflict.⁴⁵ Unemployment is estimated at 48% for the urban population of men aged between 15 and 30 years.⁴⁶

Ethiopia was traditionally ruled by emperors until the fall of Haile Selassie in 1974. The country then came under the socialist rule of the Derg regime. During this time civil liberties were repressed and movement outside Ethiopia was restricted. The regime, subsequently led by Haile Miriam Mengistu, was overthrown in 1991 by a coalition consisting of different ethnic groups, the Ethiopians People Liberation Front (EPLF). The flow of Ethiopians in earnest started in 1991 but has increased in recent years.⁴⁷

Between 1991 and the year 2000 Ethiopia separated from Eritrea, adopted a constitution, conducted the country's first elections and signed a peace agreement with Eritrea to end a bitter conflict.⁴⁸ The country also suffered catastrophic famines in the mid-1970s through to the 1980s. In earlier times, migration was primarily dictated by political persecution and conflict, but the reasons of movement have lately shifted to economic ones.⁴⁹

Prime Minister Meles Zenawi, who died in 2012, ruled with an iron fist, repressing media, political and academic freedom. High unemployment rates in urban areas constitute a push factor for international migration. Young men perpetually dream of a better life outside of the confines of Ethiopia, but limited opportunities exist to migrate legally. Studies have shown that Ethiopian migrants typically spend 1-3 years in Kenya before migrating west.⁵⁰ The growth of an

⁴⁵ Fransen & Kuschminder (2009:4).

⁴⁶ Fransen & Kuschminder (2009:5).

⁴⁷ Horwood (2009:32).

⁴⁸ Fransen & Kuschminder (2009:6).

⁴⁹ Fransen & Kuschminder (2009:10).

⁵⁰ Fransen & Kuschminder (2009:17).

economically active population, coupled with conflict, environmental degradation, and economic decline, have increased labour and forced migration from Ethiopia to countries within the East African Region and beyond.

2.3 Situation of Smuggled Migrants in Kenya

Kenya hosts the largest population of Somali refugees, and is well documented as a regional hub for the smuggling of migrants and the obtaining of false documentation.⁵¹ Prison facilities in Moyale, Isiolo and Marsabit are reportedly overcrowded because of the high number of migrant arrests. Refugee protection and assistance is jointly coordinated by UNHCR and the DRA.

Until recently, migrant smuggling within the organised crime context had not been defined by the Kenyan legislature. In 2011, the Kenya Citizenship Act adopted a definition similar to the one contained in the Smuggling Protocol. Policy makers, civil society and the media often refer to the smuggling and trafficking of migrants interchangeably, failing to recognise the mutual exclusivity of the terms.

The exact number of persons smuggled from Somalia and Ethiopia into Kenya is unknown due to the clandestine nature of the movement. A provincial police officer in the coastal province of Kenya estimates that about 140 trafficked people or smuggled migrants are arrested every week, which brings the annual total to 7280 arrests.⁵² An immigration officer reported that between 70 and 100 irregular migrants are deported every month.⁵³ The Kenyan media

⁵¹Abdi (2011:1)a.

⁵²Kihare 2012:1).

⁵³Horwood (2009:122).

frequently report on stranded Ethiopians in remote areas and harboured migrants in various locations in Nairobi.

Migrants who have served their sentence for being illegally present in Kenya are not deported immediately, but may continue to languish in Kenyan prisons for some time.⁵⁴ Data collection, which is an indispensable tool used to gauge the number of smuggled people, and which should serve as a basis for determining an appropriate response to the smuggling of migrants, is still far from satisfactory.

2.4 Smuggling of Migrants within the Organised Crime Context in East Africa

At the onset, it is important to note that the smuggling networks present in the Horn of Africa and in East Africa which facilitate the movement of migrants to Kenya and further south, have an informal structure. The networks consist of opportunistic individuals, in contrast to the hierarchical structured groups, as is the case with large organised crime syndicates which operate in the West. An IOM report on the movement of migrants from Somalia and Ethiopia to Kenya, and further south has compared the facilitator's *modus operandi* to that of courier service providers, with slight variations.⁵⁵

Taxi, bus and truck drivers, as well as bush guides and those who enter into contracts and accompany migrants on illegal crossings, are all considered smugglers because they derive benefit from the movement. The typical smuggler is an 18 to 40 year old male of Ethiopian or

⁵⁴Munyamwezi (2012:2).

⁵⁵ Horwood (2009:58).

Somali origin.⁵⁶ A young Ethiopian woman based outside of Nairobi, and known by immigration officials, has also gained notoriety for being part of the smugglers' movement.⁵⁷

The IOM study found that the linchpin managers in the smuggling chain are Somalis who are situated in the major cities in East Africa and at key transit points such as ports, refugee camps or border areas. The managers work with the chief smugglers. They typically sub-contract transportation, bush guide or facilitator services from the local pool of opportunistic criminals. The smuggling managers located at different points of the journey are central to the smuggling chain and are paid to move a group of people from one point to another by the chief smuggler, who is at the top of the chain and not necessarily based in a similar city.

The managers are very flexible, work independently, and make their services available to local and chief smugglers across the border. Somali smugglers generally work with fellow clansmen throughout the network, and four Ethiopian brothers were identified as having spread themselves out along the southern route, defending each other's interests and ensuring control of their network.⁵⁸ Immigration and police officers interviewed in the IOM study revealed that the smuggling manager's mobile phone is his main tool of trade, as it contains a list local transporters, compromised government officials, managers and chief smugglers in other locations.

The IOM study compared the human smuggling model in Eastern African to the Mexican one, which has been described as the supermarket model. Comparatively, both models are relatively

⁵⁶ Horwood (2009:57).

⁵⁷ Horwood (2009:57).

⁵⁸ Horwood (2009:59).

low cost, exhibit high rates of failure at border crossings, repeated attempts, are run by multiple actors who act independently or are loosely affiliated to one another, and do not have a strong hierarchy or a violent organisational discipline. Their business is based on the capitalistic ideal of maximizing profit, and they compete fiercely with each other.

The smugglers are aware that they are operating unlawfully and know full well what the consequences will be when they are caught, but they also know that where a bribe fails, the worst thing that can happen to them is their having to pay a modest fine or facing possible deportation. Smuggled migrants are driven to Nairobi in lorries fitted with fake bottoms, and they pay between \$600 and \$700 to transport two men without papers to Nairobi.⁵⁹ A self confessed Somali smuggler interviewed at a prison in Mombasa said that Somalis are always on the run to safety, with Kenya being one of their primary destinations.⁶⁰ He said that he charges \$120 per migrant smuggled and carries up to 120 migrants per trip when business is booming. The smuggler owns a boat that brings migrants to the shores of Kenya's coastal province.

The large Ethiopian and Somali Diaspora community pay a large sum of the smuggling expenses through the Hawala system, which is an informal way of transferring money from one place to another without it having to cross borders. Nairobi is a key location for receipt of the payment.⁶¹ As such, there is no paper trail that connects smugglers to the illicit business. The Somalis are predominantly financed by the Diaspora while a significant number of Ethiopians are financed through the sale of private family assets. Among both communities, however, the decision to move is often a collective one, viewed as an economic investment by relatives and

⁵⁹ Horwood (2009:119).

⁶⁰ Benyawa (2010:1).

⁶¹ Horwood (2009:111).

clan members.⁶² The Western Union Money transfer system and Mpesa, a mobile cash transfer system, is also used in Kenya. Nairobi is the headquarters of the Hawala system and the place where most of the fees are paid for undertaking the smuggling journey.

2.5 Modalities of the movement

Human smuggling from Ethiopia and Somalia generally occurs within the dynamic of mixed migration movements. The migrants within these movements constitute refugees, asylum seekers, economic migrants, and in some instances, victims of trafficking. Some of the migrants are destined for Kenya, in search of protection and for economic reasons, but many of them use Kenya as a rest stop, while their documentation is processed and arrangements are made to re-finance their onward journey.⁶³ Smuggled migrants from Addis Ababa in Ethiopia make contact with major smuggling organisers in Nairobi.⁶⁴ Research and press reports have noted that most of the migrants have in mind South Africa as their final destination.

The movement is organised by smugglers in violation of the laws of both transit and destination countries. There is evidence that young men in rural areas in Ethiopia are actively targeted by smugglers, who entice them with a better life.⁶⁵ 'Smugglers run well-organized, dynamic operations that involve a constantly changing network of collaborators, including recruitment agents, truck drivers and transporters, boat owners, providers of forged and stolen documents, border guards, immigration and refugee officials, members of the police and military'.⁶⁶

⁶² Horwood (2009:112).

⁶³ Long and Crisp (2011:7).

⁶⁴ Horwood (2011:50).

⁶⁵ Long and Crisp (2011:7).

⁶⁶ Long and Crisp (2011:20).

It has been estimated that up to 50 Somali smuggling groups control the irregular migratory route to Southern Africa.⁶⁷ Alleged corruption and complicity of national officials appear to be driving the smuggling of migrants and exacerbate a situation where public officials abuse their position for private gain.⁶⁸ Public officials, particularly in the North Eastern Province of Kenya bordering Somalia, have been implicated in corruption as a result of their intermediary role between government offices and migrants in transit.

A Kenyan police officer interviewed for the IOM study stated that the extent of public officials' collusion with smugglers implies that they play an integral part in the illegal and abusive enterprise.⁶⁹ On the Somali side of the Kenya-Somali border, at Doble, a network of smugglers offer young men a more attractive option than the Daadab refugee camp.⁷⁰

Most Somalis do not have a recognised valid passport that would allow them to engage in regular means of travel. They travel from Mogadishu and Kismayo by boat to Mombasa, Kenya.⁷¹ Vessels from Kismayo bring dried fish and human cargo to the old port in Mombasa, Kilifi, Lamu and to unregulated ports along the North Coast. Migrants are transported in small overloaded boats exposed to the elements. From Mombasa, they often wait long periods for promised transport or a guide. Some of them are transported to Shimoni, from where they are transported to Tanzania by boat a few hours away en-route to South Africa. Bribes smooth things over with the authorities at Shimoni. Immigration officers claim they are ill-equipped to

⁶⁷ Long and Crisp (2011:20).

⁶⁸ Horwood (2009:9).

⁶⁹ Horwood (2009:9).

⁷⁰ Horwood (2009:34).

⁷¹ Horwood (2009:45).

intercept the movement along the 110km coastline from Likoni to Vanga, which has an estimated 176 illegal entry points.

Somalis are also smuggled with the assistance of brokers directly from Mogadishu to Nairobi, or via Nairobi to South Africa. They enter Kenya by four wheel drive vehicles or lorry via Dhobley, close to Kenya's Liboi border with Somalia. The migrants who opt for this passage most often have a legitimate asylum claim and use the services of smugglers as the only means of accessing protection. The largest community of Somalis in Kenya, after Daadab refugee camp, reside in Eastleigh in Nairobi where a large network of smugglers and their agents are also unsurprisingly present.

Ethiopia has a bilateral agreement with Kenya to allow each other's citizens free passage.

Despite this, Ethiopians travelling by bus, truck or on foot are required to pay bribes to Moyale border immigration officers through brokers, regardless of the status of their documentation.⁷²

The bribe is between \$250 and \$450 for a travel stamp. The profits from this activity are shared among government officials in Moyale and the provincial headquarters in Garissa. There are Ethiopian migrants who travel through the bush to avoid paying the corrupt passage fee. On being intercepted, these migrants are heavily extorted because the loot does not have to be shared among as many actors. Further payments from smuggled migrants are required at road blocks on the journey towards Nairobi.

Ethiopians travel from Moyale and Addis Ababa, Ethiopia, by road, through Moyale, Kenya, to Nairobi, and may proceed to the Mombasa or Namanga borders with Tanzania for their

⁷² Horwood (2009:51).

onward journey South. Moyale is a major nexus for smuggling and sixty per cent of the town's income is said to derive from the business: As noted in the *East Africa Standard*:

'They sneak Ethiopians into Kenya at the Moyale border and transport them to Nairobi via Isiolo. But the final destination is always in South Africa or Europe. Ethiopians get into Kenya through Moyale, Dukana and Forolle in North Horr, Bute in Wajir North and Takaba in Mandera West. However, most of them connect to Isiolo from Moyale using cattle tracks passing through Merti to avoid arrest. This is a big business and it is very difficult to fight the cartels, some that operate in Ethiopia and South Africa. But we are liaising with the Immigration Department to see how we can beat them'.⁷³

In December 2010, the town of Isiolo recorded more than 300 arrests of Ethiopian and Somali migrants. Stricter surveillance in Garissa has made smugglers turn to the Isiolo route to prevent detection. Mandera, the farthest corner in North Eastern Kenya, is also a gateway for many Ethiopians and Somalis coming into Kenya. Similar accounts of bribery, extortion and complicity of public officials in the smuggling of migrants through Moyale abound. A tribal chief interviewed in the IOM study confirmed that human trafficking is a big business in Mandera, to the extent that its interception could trigger a clan war.⁷⁴

2.6 Linking the causal factors to the movement

The most obvious reason for Somalis leaving their country is violence brought about by the political situation. In 2011, increased fighting between government forces and two Islamist groups, Hisbul Islam and al Shabaab, coupled with a crippling drought situation, gave rise to an unprecedented movement of Somalis from the Southern and Central region into Kenya and surrounding countries.

⁷³ Abdi (2011:2)b.

⁷⁴ Horwood (2009:101).

Somalis also move to escape personal persecution as a result of their political affiliation, clan membership and gender. Their departure is also prompted by their desire to evade forced conscription into the army and because they need to gain access to basic commodities such as food, medical services, healthcare and more viable livelihoods.⁷⁵ The IOM study revealed that war and insecurity was the number one reason for the exodus from Somalia, followed by unemployment and poverty.⁷⁶

Ethiopia has not experienced the level of violence present in Somalia. However, political oppression and economic stagnation have impelled a mass exodus from the Southern part of the country. The Oromo people in the South and South East of the country have felt the unwelcome winds of political oppression and economic marginalization, which have driven them to leave the country.⁷⁷ Avoiding recruitment and desertion from the army has also forced many young men to leave Ethiopia.



However, at the centre of these departures remains the search for a better life encouraged by the perceived prosperity of neighbours whose sons have already made the movement.⁷⁸ In the IOM study, over half of the respondents stated that they left their homes for reasons of unemployment.⁷⁹ Respondents also cited the pursuit of greener pastures due to poverty, insecurity and war.

⁷⁵ Long and Crisp (2011:7).

⁷⁶ Horwood (2009:37).

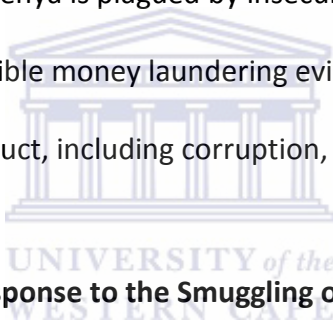
⁷⁷ Horwood (2009:33).

⁷⁸ Abdi (2011:3)b.

⁷⁹ Horwood (2009:36).

2.7 Deleterious effects on the countries of origin and destination

Human smuggling signals the existence of corrupt networks of government and private citizens involved in bribery and extortion. It is much more broadly linked to issues of good governance, state transparency and accountability.⁸⁰ Human smuggling is a profitable, illicit business whose proceeds are untaxed and may be used to fund other criminal activities. The Hawala system has been found to be used to transmit most of the illicit proceeds from smuggling activities, thus ensuring no paper trail. Hundreds of migrants continue to die due to suffocation as a result of the perilous journey. The youth, being a valuable human resource for any country, is wasted in the case of Somalia and Ethiopia. Kenya is plagued by insecurity, a surging population that it is unable to sustain, corruption, possible money laundering evident in its booming real estate industry, and related criminal conduct, including corruption, piracy and terrorism.



2.8 East and Horn of Africa Response to the Smuggling of Migrants.

The East African Community Common Market Protocol signed by the respective countries' heads of state entered into force on 1 July 2010. The Protocol envisages free movement among citizens in the East African region. Sudan is exploring prospects of joining the community and perhaps Ethiopia and Somalia will be party in the future, dependent on prevailing circumstances in those countries. The Inter-governmental Authority on Development (IGAD) Regional Consultative Process (RCP) on Migration held its first meeting in 2010 and a subsequent meeting in 2012 in Addis Ababa. The IGAD-RCP was established to facilitate regional dialogue and policy issues amongst IGAD member states. It provides a platform for the

⁸⁰ Long and Crisp (2011:20).

respective member countries to discuss and agree upon mechanisms to address the smuggling of migrants. Both Ethiopia and Somalia are IGAD member states. In 2010 a Regional Conference on Refugee Protection and International Migration: Mixed Movements and Irregular Migration from the East and Horn of Africa to Southern Africa was held, to encourage constructive discussion among states and other stakeholders on the problem regarding the mixed movement of people southwards. Participants from Ethiopia and Somalia were in attendance. Migrants' rights, enhanced legal migration alternatives and border migration were discussed. An action plan was adopted, addressing legislation, capacity building, outreach, cooperation, data collection and operations.⁸¹ A follow-up conference was scheduled for 2012, but is yet to take place. A joint commission meeting for technical cooperation between Kenya and Tanzania agreed to enhance cooperation to control smugglers and to curb irregular migration.⁸²



2.9 Conclusion

Smuggling of migrants to Kenya from Ethiopia and Somalia is part of the mixed migration movement. Kenya is a major transit hub for this movement. Many migrants have South Africa in mind as their final destination. Smugglers facilitating the movement of migrants to Kenya and beyond operate in a fluid manner, subject to the currents of demand and supply. Their main aim is to maximize profit, which in turn fans fierce competition among smugglers. The welfare of the migrant is of little priority to the smuggling business. Migrants suffer abuse along the journey, including starvation, severe beatings, extortion, blackmail and the rape of women and

⁸¹ UNHCR (2010:1)b.

⁸² Tanzania Daily News (2012:1).

children. The Kenyan leg of the journey is the least harsh compared to further strips down south.



3.0 Chapter 3

3.1 International and National Legislative Framework

A Introduction

Smuggled migrants are comprised of economic migrants; asylum seekers or refugees; irregular and legal migrants; and in some instances victims of trafficking and other crimes. Human smugglers constitute a complex network of interrelated actors who run a business like enterprise, as well as, opportunistic individuals in the right place at the right time. A legislative response to the smuggling of migrants should encompass prevention, protection, prosecution and cooperation. This response should be guided by human rights standards, refugee and humanitarian law. The primary international legal instruments and customary law principles propagating these tenets will be discussed below as far as they relate to the treatment of smuggled migrants.

The Protocol against the Smuggling of Migrants by Land Sea and Air (Smuggling Protocol), supplementing the United Nations Convention against Transnational Organized Crime (UNTOC), was agreed upon, as a comprehensive instrument to address the smuggling of migrants. At the centre of the instrument is the decriminalization of the smuggled migrant and criminalization of financiers and profiteers of the smuggling process. The Smuggling Protocol provisions, read together with UNTOC, in so far as they relate to the smuggling of migrants, are thematically addressed below, as a precursor to accessing Kenya's implementation of the Smuggling Protocol.

3.2 The International Legislative Framework

Broadly, UNTOC addresses trafficking of women and children; the smuggling of migrants; and the manufacture and traffic in illicit firearms.⁸³ The purpose of UNTOC is to promote cooperation, prevention, and to combat transnational organized crime.⁸⁴ These objectives are aimed at addressing conduct criminalised pursuant to Article 3. The criminalised conduct includes: participation in an organized criminal group; laundering of the proceeds of crime; corruption; obstruction of justice; and serious crime. Article 2 of UNTOC defines a serious crime as an offence which carries a penalty of 4 or more years of imprisonment. The criminalised conduct must be of a transnational nature, and must involve an organized criminal group.⁸⁵ The criminalised conduct under UNTOC is implicit in the smuggling of migrants.

The Smuggling Protocol must be read together with UNTOC.⁸⁶ In this regard, ratification of the Protocol is conditional upon the acquiescence of a States Party to UNTOC.⁸⁷ The Smuggling Protocol was necessitated by the need for a comprehensive instrument to address the smuggling of migrants in light of the involvement of increasingly organized components. Its purpose is to prevent and combat the smuggling of persons; protect the rights of migrants; promote cooperation and information exchange; and to address the root causes of smuggling.⁸⁸

The Smuggling protocol has been criticized for placing little emphasis in responding to the root causes of smuggling. It alludes to root causes in the preamble and Article 15.3, which addresses

⁸³ UN (2000:1).

⁸⁴ UNTOC Article 1.

⁸⁵ UNTOC Article 3(2) outlines the limits of a transnational offence, whereas Article 2 defines an organized criminal group.

⁸⁶ UNTOC Article 37 (4), Smuggling Protocol Article 1.

⁸⁷ UNTOC Article 37 (2).

⁸⁸ Smuggling Protocol Article 2.

development programmes and cooperation.⁸⁹ The smuggling protocol is a law enforcement instrument as opposed to a human rights instrument. Despite its focus on prosecution and criminalization of various facets of smuggling, the United Nations Office on Drugs and Crime (UNODC) takes the position that the instrument provides mandatory provisions for the protection of smuggled migrants. The preamble to the Smuggling protocol and its Articles 2, 4, 14(1), 14 (2), 16 and 19 provide for the protection of smuggled migrants.⁹⁰ UNODC encourages countries to adopt a human rights based approach when implementing the Smuggling Protocol.⁹¹

A Prevention

States Parties to UNTOC are advised to adopt appropriate legislative and administrative measures to prevent transnational organized crime.⁹² Part III of the Smuggling Protocol provides for prevention, cooperation and other measures. The measures should address public awareness, enhanced border control, documentation integrity, and development programmes.

i) Public awareness

Public awareness is aimed at addressing the existence, causes, gravity and threat of transnational organized crime.⁹³ It is envisaged that such measures will deter migrants from submitting themselves to the smuggling process. Effective public awareness requires a substantial amount of resources. Such resources are seldom made readily available by the

⁸⁹ Gallagher (2001:996).

⁹⁰ McAdam (2012:20).

⁹¹ McAdam (2012: 21).

⁹² UNTOC Article 31.

⁹³ UNTOC Article 31 (5).

Governments in Kenya, Somalia and Ethiopia. The efficacy of awareness raising campaigns is also difficult to gauge particularly where it targets vulnerable populations that lack alternatives.

ii) **Border Control Measures**

Article 11 of the Smuggling Protocol requires States to enhance border protection measures to prevent and detect smuggling. The Kenya-Somalia and Kenya-Ethiopia border are both vast expanses of porous terrain. A recent initiative to curb irregular migration has been the introduction of a mobile truck unit by the Kenya Immigration Department to better police the Kenya-Somalia border.

iii) **Document Integrity**

The integrity of travel documents should be of such calibre as not to be easily misused, altered, or duplicated.⁹⁴ The Smuggling Protocol recommends the prohibition of commercial carriers from engaging in the smuggling of migrants. Carriers are responsible for confirming the integrity of travel documentation. Carriers should be penalised where passengers are in contravention of entry requirements. The most applicable sanction is a fine. In extreme situations States can consider withdrawing the licence of the carrier. Entry requirements should be restricted for smugglers. States Parties are required to clarify questions on document integrity without delay in suspected cases of smuggling.⁹⁵ It should be noted that the *modus operandi* of smuggling from the Horn, South, does not rely on travel documentation. Commercial carriers are also being utilised less due to a perceived heightened risk of detection.

⁹⁴ Smuggling Protocol Article 12.

⁹⁵ Smuggling Protocol Article 13.

iv) Development Programmes

The socio-economic circumstances of the countries of origin Ethiopia and Somalia constitute a major push factor for migrants. Article 15 (3) requires States Parties to put in place appropriate development programmes to address the root causes of irregular migration. Improving the social economic circumstances of migrants would eradicate a major push factor. However, the effects of such measures where possible to implement, are unlikely to be immediately felt. Cooperation, both financial and technical, is integral in actualising such development programmes.

B Protection and Assistance

i) Witness Protection

Smuggled migrants are privy to valuable information pertaining to the smuggling process, the individuals involved, routes utilised and corrupt state and non state apparatus facilitating the movement. As a result, they can be subject to reprisals by their smugglers, particularly where they choose to cooperate with law enforcement as envisaged under Article 26 of UNTOC. Article 24 and 25 of UNTOC provides for the protection of victims and witnesses. Article 16(2) and (3) of the Smuggling Protocol provides for the protection of smuggled migrants from violence and assistance where the life of the migrant is at risk.

ii) Human Rights

Smuggled migrants are human beings first. Appropriate measures should be put in place by States Parties to the Smuggling Protocol for protection and assistance of smuggled migrants. Their fundamental rights and freedoms are guaranteed in the Preamble of the Smuggling

Protocol. The Smuggling Protocol reiterates the right to life, and the right not to be subjected to torture, inhumane or degrading treatment.⁹⁶ Detention, the most common response in Kenya for smuggled migrants, should be a last resort.⁹⁷ Where detained, migrants should be allowed access to their respective countries consulate services.⁹⁸ Women and children are vulnerable to sexual and physical abuse during the smuggling process. The Smuggling protocol recommends States Parties make special provision for assistance to this vulnerable group. Provision is also made with regard to entry onto vessels on the high seas. The integrity, life and cargo aboard the vessel must be preserved.⁹⁹

iii) Assisted Voluntary Return

Ideally, the return of smuggled migrants should be voluntary. Voluntary return for smuggled migrants is mostly untenable because legal avenues do not exist to regularise their stay. The Smuggling protocol does not make it mandatory for States Parties to facilitate return. State Parties participation in return includes verification of nationality of smuggled persons, and issuance of documentation to facilitate return.¹⁰⁰ Return should be effected in an orderly and dignified manner. The Smuggling protocol contains minimum standards and States Parties should actualise return for smuggled migrants more effectively through negotiated bilateral agreements.

iv) Refugees and Asylum seekers

Refugees and Asylum seekers benefit from international protection pursuant to the 1951 Refugee Convention, its 1967 Protocol and the now customary law principle of non-

⁹⁶ Smuggling Protocol Article 16 (1).

⁹⁷ David (2010:75).

⁹⁸ Smuggling Protocol Article 16 (4), Vienna Convention Article 36.

⁹⁹ Smuggling Protocol Article 9 and Part II.

¹⁰⁰ Smuggling Protocol Article 18.

refoulement.¹⁰¹ In recognition of their right to international protection they are excluded from the provisions of the Smuggling Protocol.¹⁰² They should not be discriminated against for being part of the mixed migration movement.

C Prosecution and law enforcement

Criminalization of organised criminal activity, money laundering, corruption and obstruction of justice are required by UNTOC to promote uniformity in the laws of States Parties and enhance cross border cooperation.¹⁰³ According to the Financial Action Task Force (FATF)

Recommendations 2012 migrant smuggling is a predicate offence.¹⁰⁴ Corruption facilitates smuggling, and obstruction of justice may undermine efforts to prosecute smugglers.¹⁰⁵

Offences at the domestic level may be established independently of the involvement of an organized criminal group. Criminal, civil or administrative liability including monetary sanctions should be imposed for both natural and legal persons.¹⁰⁶ An effective response to the smuggling of migrants requires cooperation among law enforcement agencies across States Parties.¹⁰⁷

The Smuggling Protocol criminalises the smuggling of migrants.¹⁰⁸ It provides for the prevention of smuggling, protection of smuggled migrants and cooperation among States Parties to effectively address migrant smuggling. The smuggled migrant should not be criminalised for

¹⁰¹ Refugee Convention Article 33 (1).

¹⁰² Smuggling Protocol Article 19.

¹⁰³ UNTOC Article 34 (2).

¹⁰⁴ FATF (2012:111).

¹⁰⁵ McAdam (2012:23-4).

¹⁰⁶ UNTOC Article 10.

¹⁰⁷ UNTOC Art 26.

¹⁰⁸ Smuggling Protocol Article 6.

being part of the smuggling conduct.¹⁰⁹ However, countries maintain their sovereign right to prosecute illegal entry.

i) Offences

The Smuggling protocol requires the criminalisation of the offences listed in the table below.

The conduct of migrant smuggling or activities aimed at facilitating the process of migrant smuggling should be established as offences in States Parties domestic legislation. Attempting, assisting as an accomplice and organising or directing the commission of the offences listed below should also be criminalised. Aggravating circumstances should be established for all offences in circumstances that endanger the life and safety of migrants or entail inhuman or degrading treatment, including the exploitation of migrants.

	Offence	Attempt	Accomplice	Organisers and Persons giving Direction
1.	Smuggling of Migrants	yes	yes	yes
2.	Producing a fraudulent travel or identity documents	yes	yes	yes
3.	Procuring, providing, or possessing a fraudulent travel or identity document	yes	yes	yes
4.	Enabling illegal residency	yes	yes	yes

¹⁰⁹ Smuggling Protocol Article 5.

The United Nations Office on Drugs and Crime (UNODC) has suggested additional offences to Article 6 of the Smuggling Protocol in as far as they conform to the legal system of a State Party.¹¹⁰ Two considerations should be borne in mind by the relevant authority before preferring a charge for the suggested offences. First, the relevant authority should be able to prove the offence and not merely burden the charge. Secondly, care must be taken not to deviate too far from the primary offence. The offences are divided into five categories: transport, document, immigration, crimes of dishonesty and other offences. They include: misrepresenting cargo or identity at the border, handling stolen property (passports), fraud or forgery, harbouring an immigration offender, money laundering, abuse of office, murder, assault, trafficking in persons, and sexual offences amongst others.

D Elements of the Crime

Generally, there must be facilitation or assistance as well as profit from such facilitation or assistance for the offence of migrant smuggling to be proved.

i) Material Elements

- The presence of a material or financial benefit.
- Procurement of Illegal entry or stay.
- The crossing of an international border.

¹¹⁰ Price and McAdam (2010:6-7).

ii) Intention

The smuggling of migrants must be committed with the intention to obtain a financial or material benefit.¹¹¹ Persons who deal with migrants other than for profit should not be held liable for the offence of migrant smuggling.

E Jurisdiction

A complimentary jurisdiction regime exists between UNTOC and the Smuggling Protocol. Article 15 (1) (a) and (b) of UNTOC reflect the territoriality principle, and Article 15 (2) (a) and (b) provide for the nationality principle. A State Party has an obligation to extradite or prosecute. States Parties are required to adopt legislation that will facilitate prosecution of perpetrators present on their territory who have committed any of the offences in UNTOC. Where parallel investigations are being conducted by one or two States Parties Article 15 (5) requires competent authorities within those States Parties to coordinate their investigative efforts.

F International and Regional Cooperation

UNTOC is an instrument of cooperation. It seeks to promote uniformity in enumerated offences among States Parties. Article 27 provides for cooperation among States Parties law enforcement authorities, and cooperation among law enforcement and related agencies within a State Party. Cooperation is envisaged in the confiscation of the proceeds of crime, extradition with or without an extradition treaty, transfer of sentenced persons, and mutual legal assistance.¹¹² States Parties are required to cooperate with developing countries and countries

¹¹¹ Price & McAdam (2010:9).

¹¹² UNTOC Article 13, 16, 17, and 18.

with economies in transition, to enhance their financial, material and technical capacity to combat transnational organized crime.¹¹³

Part II, Article 7 of the Smuggling Protocol addresses the smuggling of migrants by sea, and provides for cooperation among States Parties to prevent and suppress the smuggling of migrants pursuant to the international law of the sea. States Parties particularly those with common borders or who are located on migrant smuggling routes are encouraged to share information amongst themselves for purposes of achieving the objectives of the Smuggling Protocol. Information exchanged may include routes, carriers, identity and modalities of organized criminal groups. The exchange of information can also include legislative practices and technical information to assist law enforcement address migrant smuggling. A State Party can classify information shared as confidential. Article 11(6) of the Smuggling Protocol requires States Parties to consider the establishment and maintenance of direct channels of communication among border control agencies.

Cooperation is envisaged in training of immigration officers and other relevant officials to prevent and combat the smuggling of migrants.¹¹⁴ The objective of training and technical assistance: is to promote the humane treatment of migrants; improve detection mechanisms and intelligence gathering on the modalities of the crime; enhance fraudulent identity document detection; and improve the security and quality of travel documents. A critical omission in the Smuggling Protocol is capacity building in the identification of smuggled

¹¹³ UNTOC Article 30.

¹¹⁴ Smuggling Protocol Article 14.

migrants, despite such recommendation during negotiations.¹¹⁵ States Parties are required to consider entering into bilateral, regional, and operational agreements as a means of enhancing the provisions of the Smuggling Protocol.¹¹⁶

G Shortcomings of the Smuggling Protocol

Before embarking into Kenya's implementation of the Smuggling Protocol, it is important to note down some of the instrument's shortcomings.¹¹⁷ The Protocol is an international cooperation agreement to address the organized context of smuggling as opposed to a human rights treaty, advocating for the rights of smuggled persons. The protection mechanisms, especially as they relate to children, are insufficient. Mechanisms to identify smuggled migrants are not elaborated, and assisted return for smuggled migrants is not guaranteed by the State Party whose nationality they hold.

Lack of mechanisms to identify smuggled migrants is obviously problematic for numerous reasons. First, the State Party which has custody of the smuggled migrants is unable to elicit important information from the migrant on the intricacies of the criminal activity. Secondly, the Trafficking Protocol creates weightier obligations with regard to the protection of victims of trafficking than the Smuggling Protocol does for smuggled migrants. It can be argued, that it would be more advantageous for a State Party to classify a victim of trafficking as a smuggled migrant as a means of evading necessary protection and assistance modalities required for trafficked victims.

¹¹⁵ Gallagher (2001: 996-1004).

¹¹⁶ Smuggling Protocol Article 17.

¹¹⁷ Gallagher (2001: 996-1004).

The Smuggling Protocol also fails to recognize the important overlap and distinction between trafficked and smuggled persons.¹¹⁸ Smuggled migrants can, and often times, end up victims of trafficking. Trafficked persons under the Trafficking Protocol are recognized as victims while the status of smuggled migrants is not so clearly defined. Article 5 of the Smuggling Protocol recommends that smuggled migrants should not be criminalised for merely being part of the smuggling conduct. Article 6 (4) of the Smuggling Protocol however, allows States Parties to prosecute migrants for contravening legally established entry requirements. So far States Parties focus has been on prosecuting the smuggled migrant. Some States Parties assist migrants based on their consent to cooperate with law enforcement. Lack of cooperation means prosecution for illegal entry while cooperation allows exemption from prosecution. Article 5 and 6(4) places the smuggled migrant in a disadvantageous position whereby he has to cooperate with law enforcement or face prosecution for illegal entry.

On a positive note, Article 19 excludes refugees and asylum seekers from the provisions of the Protocol. Often times this category of migrants has to rely on smugglers for their conveyance to safety. Article 19 is in line with Article 33 (1) of the Refugee Convention.

3.3 National Legislative Framework on Migrant Smuggling

A Introduction

The presence of smuggled migrants within a country in large numbers arouses discomfort in both governments and citizens. Governments look to their compromised national security

¹¹⁸ McAdam (2012:16).

systems, while citizens grapple over service delivery issues, and perceived loss of employment and business opportunities. Of primary concern to any government and citizen is that the infiltration of smuggled migrants into the country is indicative of the proliferation of organized criminal elements.

Ideally, human smuggling should not be addressed under a States Parties immigration law but within the context of the organised crime regime. The Smuggling protocol addresses migrant smuggling occurring within an organized criminal context. An individual migrant crossing into Kenya from Ethiopia, on his own, after deliberately avoiding immigration officials, is not subject to the Protocol but may be liable for illegal entry under Kenya's immigration laws.

UNTOC and the Smuggling Protocol must be read together. In this regard, efforts to assess Kenya's implementation of the Smuggling protocol must consider domestic measures put in place to give efficacy to UNTOC. Consequentially, the present modalities within Kenya's jurisdiction for the treatment of smuggled migrants will be assessed in tandem with immigration laws, which currently provide the bulk of the legislative framework governing the movement.

3.4 Kenya's Procedural and Legislative Response

The *modus operandi* to address the smuggling of migrants thus far has been effected quite summarily. Migrants intercepted during the smuggling process are arraigned before subordinate courts by immigration officers with prosecutorial powers. They are then charged with being 'unlawfully present' in Kenya. The accused then plead guilty to the offence, and are fined or sentenced to a jail term not exceeding twelve months in lieu of a fine. This sentence is

accompanied by a deportation order. The Kenyan Penal Code, read together with the Immigration Act, provides the impetus for the deportation order.¹¹⁹ The relevant provision states that where a person is convicted of an offence punishable by imprisonment for a period not exceeding twelve months, a court may order that the person be removed from Kenya, immediately or on completion of any sentence of imprisonment.

The Kenyan police have been criticised for their notoriety in arresting arriving Somalis and charging them or threatening to charge them with being unlawfully present in Kenya.¹²⁰ Threats by police are aimed at extorting bribes from the migrants. Police stationed in the vicinity of the Liboi border area extort money from thousands of Somali asylum seekers who cross the border in vehicles with the help of smugglers.¹²¹

In the unreported case of *R v Hussein Galgalo and Two others*¹²², the accused persons of Somali origin were charged with being unlawfully present in Kenya contrary to Section 13 (2) of the Immigration Act. They were found guilty and subsequently sentenced to 6 months' imprisonment and were thereafter subject to repatriation. A judicial review of the decision set aside the conviction on the ground that the plea was improperly administered and the accused persons were not availed an interpreter during court proceedings. The case is however illustrative of the treatment of smuggled migrants in Kenya where intercepted by law enforcement.

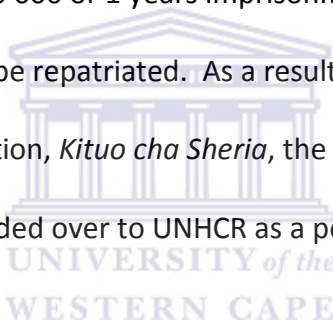
¹¹⁹ Penal Code Section 26 A.

¹²⁰ HRW (2010:5).

¹²¹ HRW (2010:23).

¹²² Criminal Case No. 811 Of 2010.

Until the recent enactment of the Kenya Citizenship Act No.12 of 2011, law enforcement officials were in a quandary as to which appropriate offences to prefer on the facilitators and profiteers of human smuggling. Currently, the treatment of smuggled migrants is still reminiscent of the now repealed Immigration Act. In the *Mohamed Sirajesh Mohamed* case,¹²³ the accused, a man of Somali origin, was found without travel documents following the interception of a public transport vehicle at a road block about 60 kilometres from Nairobi. The accused was charged in the Senior Resident Magistrates' Court at Kajiado on 7 November 2011 with offences under section 53 (1) and (2) of the Citizenship Act. He pleaded guilty and on this plea was liable to a fine of Kshs 200 000 or 1 years imprisonment in lieu of the fine. The court issued an additional order that he be repatriated. As a result of the intervention of the UNHCR, acting through a legal aid organisation, *Kituo cha Sheria*, the repatriation order was substituted by an order that Mohamed be handed over to UNHCR as a person of concern.



3.5 Organised crime regime

1) Prevention of Organized Crimes Act No.6 of 2010

The Prevention of Organized Crime Act (Act No.6) is a national law aimed at the prevention and punishment of organized crime and the recovery of proceeds of organized crime. Act No.6 came into force on 23 November 2010 and domesticates UNTOC. It criminalizes organised criminal activities and the obstruction of justice. It also provides for tracing, confiscation, seizure and forfeiture of property. Act No.6 defines an organized criminal group in a similar

¹²³ Criminal revision no 334 of 2011.

manner to UNTOC. However, a serious crime under Act No. 6 is any offence punishable by a prison term of at least 6 months pursuant to the Laws of Kenya, as opposed to 4 years as provided by UNTOC.¹²⁴

An additional proviso to the serious crime definition under Act No. 6 is dual criminality. Where criminal conduct committed in a foreign jurisdiction is also criminalized under the Laws of Kenya, such conduct shall constitute a serious crime. A serious crime under Section 2 of Act No.6 is a felony. However, the Penal Code Cap 63 classifies an offence punishable by 6 months or less a misdemeanour, creating a conflict.

i) Offences

Participation in an organised criminal activity is proscribed. Death as a result of such organised activity is an aggravated circumstance to the offence.¹²⁵ The penalty is imprisonment for a term not exceeding fifteen years, or a fine not exceeding Kshs 5 million or both, and life imprisonment respectively. A person engages in organised criminal activity in the following circumstances:¹²⁶

- Where he/she is a member of organised criminal group;
- Where he/she recruits members;
- Where he/she acts in concert with other persons in the commission of a serious offence for profit; or

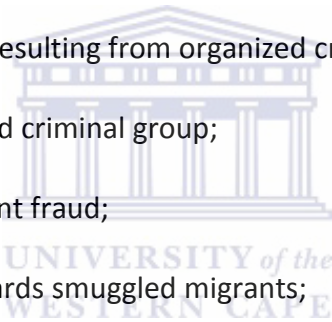
¹²⁴ UNTOC Article 2 and Act No.6 Section 2.

¹²⁵ Act No.6 Section 4 (1) and (2).

¹²⁶ Act No.6 Section 3.

- Where he/she uses his membership to direct commission of a serious offence, threatens violence or retaliation in connection with the organized criminal group amongst other activities.

The Act was passed to stem increased kidnapping and extortion of ransom, drug trafficking, to curb the criminal activities of the al Qaeda linked terrorist group al Shabaab, and to address the criminal activities of the outlawed Mungiki sect.¹²⁷ The provisions in Section 3 read together with Section 4 can be utilized to address the smuggling of migrants. Similarities between offences in the Act No.6 and Article 6 of the Smuggling protocol include:

- 
- Aggravated circumstances resulting from organized criminal activity;
 - Membership of an organized criminal group;
 - Conduct related to document fraud;
 - Retaliation or violence towards smuggled migrants;
 - Attempts, aiding and abetting.

The penalty for attempts, aiding and abetting is a fine not exceeding Kshs 1 million and/or imprisonment not exceeding fourteen years. The Court in determining whether a person is a member of an organised criminal group should consider the person's own admission, the reasonable circumstances pointing to membership, visible affiliation with an organized criminal group, and receipt of financial or material benefit from such group.¹²⁸

¹²⁷ Hansard (2010: 27-9)a.

¹²⁸ Act No.6 Section 7.

Act No.6 is quite narrow in comparison to UNTOC which it seeks to domesticate. The Act does not provide for the protection of victims as proposed during debate after the bill's second reading.¹²⁹ The law's connection to trafficking in persons as an organised crime was recognised, but no similar correlation was drawn to the smuggling of migrants. During debate, it was further noted that the provisions of UNTOC were not adequately addressed by the debated draft. Never the less, the draft was more or less passed in that form. As such, it leaves gaps in crafting an appropriate response to the progressively sophisticated mechanisms and modalities of organized crime, including the smuggling of migrants, which it does not directly consider.¹³⁰

2) Proceeds of Crime and Anti Money Laundering Act 2009

Kenya passed the Proceeds of Crime Act in June 2009 to provide for the offence of money laundering and to include measures for combating the offence, as well as identification, tracing, freezing, seizure and confiscation of proceeds of crime and connected purposes.¹³¹ Like the serious crime definition under Act No.6, the definition of the offence includes conduct amounting to a crime in a foreign jurisdiction. The Proceeds of Crime Act adopts the all crimes approach with regard to predicate offences.¹³² This approach was supported by the Minister for Finance, Mr. Kimunya during the second reading of the bill as follows:

'Mr. Speaker, Sir, traditionally, money laundering was associated with disguising money acquired from the proceeds of drug trafficking. But this is increasingly being viewed as limited, since money acquired dubiously can also be laundered. It is, therefore, prudent not to link money laundering to a particular crime, but to acknowledge that as long as there is evidence of an attempt to de-link money acquired illegally from the crime from which it was earned and, subsequently, integrate the money into the economy as genuine money, then money laundering has occurred.'¹³³

¹²⁹ Hansard (2010:30)a.

¹³⁰ Hansard (2010:29-30)a.

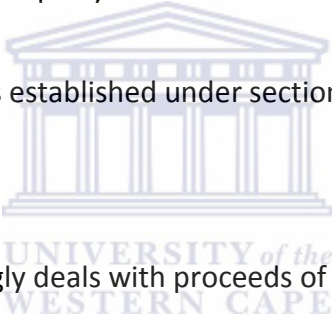
¹³¹ Proceeds of Crime Act.

¹³² Proceed of Crime Act Section2.

¹³³ Hansard (2010:9)b.

In addition to drug trafficking the Minister highlighted smuggling and prostitution rings as examples of offences where large illegal proceeds are generated and laundered to enable criminals enjoy their benefits.¹³⁴ In this regard, where a smuggling related offence is committed under Act No. 6 then it follows that the proceeds of this offence, where they are disguised or there is an attempt to disguise them, should fall under the Proceeds of Crime Act. Section 2 defines proceeds of crime as any property or economic advantage realized in connection with an offence, including property that is successfully converted or transformed, as well as, economic gains realized from that property from the time the offence was committed.

The offence of money laundering is established under section 3, 4 and 7. In summary, the offence is applicable:

- 
- To any person who knowingly deals with proceeds of crime in order to conceal their nature, source, location, disposition movement or ownership;
 - Enables a person who commits an offence to avoid prosecution;
 - Removes or diminishes any property realized from the commission of an offence;
 - Where a person knowingly acquires, uses, or has possession of property that constitutes whole or part of the proceeds of an offence; and
 - Where a monetary instrument is transmitted and received with intention of committing an offence.

¹³⁴ Hansard (2010:10)b.

Penalties are provided in Section 16. Natural persons are liable to imprisonment for a term not exceeding 14 years, and/or a fine not exceeding Kshs 5 million. Where the value of the property laundered exceeds the value of the fine, the amount fined shall be commensurate with the value of the property. In the case of corporate bodies, they shall be liable to a fine not exceeding Kshs 25 million or the value of the property laundered, whichever is higher.

The Proceeds of Crime Act is not without controversy. It is linked to the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001, Act 3 of the dreaded American US Patriot Act, which contains radical measures to combat the financing of terrorism.¹³⁵ During debate, the bill was criticized for being contextually misplaced in a country whose economy is primarily cash-based, with little data or consumer protection safeguards.¹³⁶

3) Mutual Legal Assistance Act 2011

The Mutual Legal Assistance Act governs requests made for mutual legal assistance by Kenya's law enforcement agencies, prosecution service or judicial authorities to analogous authorities in foreign jurisdictions and vice versa.¹³⁷ The Act governs situations in which a relevant agreement for mutual legal assistance exists, as well as situations where no such agreement is in place. The Act does not preclude agreements or arrangements in respect of cooperation between Kenya, other States and international entities on legal assistance, and allows broader assistance than may be provided for in an agreement.¹³⁸ Specific requests for assistance directed to Kenya may relate to examination and attendance of witnesses, service of

¹³⁵ Hansard (2010:18).

¹³⁶ Hansard (2010:20).

¹³⁷ Mutual Legal Assistance Act Section 3 & 7.

¹³⁸ Mutual Legal Assistance Act Section 4.

documents, provision or production of records, and lending of exhibits among others.¹³⁹

Broadly speaking, it may constitute a basis for cooperation in information gathering and investigation of the transnational organized movement of migrants from the Horn of Africa and beyond.

3.6 Immigration and Penal regime

1) Immigration Act Cap 172 Laws of Kenya

The Immigration Act¹⁴⁰ constituted the substantive and procedural regime applied to smuggled migrants. The Act came into effect in 1967, shortly after independence, and as such, could not have captured the human mobility and security situation that exists in the Horn of Africa today. The statutes falling within the organised crime regime were all drafted after 2010. The domestic legislative regime relating to asylum seekers and refugees is also relatively new and awaits revision in light of a new constitutional framework. The protection of migrants within the forced migration discourse is a creature of the 21st Century, and not fully appreciated by law enforcement officials and relevant actors.

Mass irregular influxes of Ethiopians and Somalis have until recently been dealt with under the rather archaic Immigration Act of 1967. The immigration offences were enumerated under section 13 of Cap 172. Entry document fraud, forgery, tampering, illegal stay and harbouring were prohibited conduct. The penalty was a fine not exceeding Kshs 100 000, and/or 3 years

¹³⁹ Mutual Legal Assistance Act Part IV.

¹⁴⁰ Immigration Act Cap 172 (Now Repealed by Act No.12 of 2011).

imprisonment.¹⁴¹ Section 13 (2) criminalised obstruction of an immigration officer, and unlawful entry or residence or harbouring, for which a fine of Kshs 20,000 accrued, and/or imprisonment for a term of 1 year.

Obstruction of an immigration officer did not exclude the right against self incrimination.

Smuggled migrants were dealt with under the terms of section 13 (2) (c). They were routinely rounded up, and charged with being unlawfully present in Kenya. In most instances a fine was paid and an order of deportation attached to the judgement. The migrants were then dropped at the border of their respective country and left to their own devices. In most instances they would re-attempt the journey to Kenya.

2) The Kenyan Citizenship Act No.12 of 2011

Human smuggling is defined in Section 2 of the Citizenship Act. The Citizenship Act adopts a similar definition to the Smuggling Protocol save that human smuggling under the Citizenship Act applies to illegal entry, as well as, exit. Trafficking in persons is also defined in section 2 through cross reference with the Counter Trafficking in Persons Act No. 8 of 2010, which adopted the definition in the Trafficking Protocol. According to the Citizenship Act a smuggled migrant is a victim of a crime. Internationally, the smuggled migrant is not recognised as a victim because he consents to being smuggled. However the harsh realities of the smuggling process often leave the migrant a victim of one crime or another. A smuggled migrant who is employed irregularly is exempt from prosecution if he is willing to assist in the prosecution of

¹⁴¹ Immigration Act Section 13 (1) (a-i).

his smuggler.¹⁴² The Citizenship Act does not decriminalise the smuggled migrant as required by Article 5 of the Smuggling Protocol.

A Prosecution

i) Offences

General offences, offences related to documents, and fines are provided for under section 53, 54 and 55 of the Citizenship Act. The general offences broadly relate to:

- Misleading, obstructing, exercising undue influence, or impersonating an immigration officer;
- Illegal entry or presence in Kenya;
- Facilitating illegal entry or exit;
- Harboursing;
- Contravening the conditions of a work permit;
- Engaging in employment or business in contravention of employment regulations ascribed to foreigners;
- Engaging in the smuggling of migrants;

A person who commits any of the above offences is liable to a fine not exceeding Kshs 500 000 and/or imprisonment for a term not exceeding 3 years.¹⁴³ Document related offences encompass falsifying, defacing, counterfeiting, illegally parting with possession, or illegal

¹⁴² Citizenship Act Section 53 (4).

¹⁴³ Citizenship Act Section 53 (2).

confiscation of a passport, travel related document or residence permit.¹⁴⁴ The penalty is a fine not exceeding Kshs 5 million and/or imprisonment not exceeding 5 years.¹⁴⁵ Foreign nationals who have exceeded their stay are subject to a fine not exceeding Kshs 50 000.¹⁴⁶ The Citizenship Act provides a general penalty of Kshs 1 million and/or imprisonment for a term not exceeding 5 years where no specific penalty is ascribed to an offence.¹⁴⁷

ii) Powers of an Immigration Officer

Immigration officers have powers of investigation and prosecution in subordinate courts pursuant to any offence or suspected offence under the Citizenship Act, and have similar powers and immunities as those conferred by law to a police officer.¹⁴⁸ An immigration officer has the power to confiscate or suspend the passport or travel document of a person engaged in drug trafficking, money laundering, trafficking in persons, human smuggling and other transnational crimes.¹⁴⁹ A passport or travel document may also be confiscated or suspended where the holder is involved in passport or document fraud, forgery or transnational crimes.¹⁵⁰ An immigration officer is given discretion to grant temporary entry, transit or residence to prohibited immigrants.¹⁵¹ Entry may be denied to a person who fails to produce a valid or

¹⁴⁴ Citizenship Act Section 54.

¹⁴⁵ Citizenship Section 54(2).

¹⁴⁶ Citizenship Act Section 55.

¹⁴⁷ Citizenship Act Section 60.

¹⁴⁸ Citizenship Act Section 48 (2) and 52.

¹⁴⁹ Citizenship Act Section 31 (1) (c).

¹⁵⁰ Citizenship Act 31 (1) (f).

¹⁵¹ Citizenship Act 33(6)

acceptable passport or travel document to an immigration officer, with the exception of refugees.¹⁵²

iii) Prohibited Persons

The description of a prohibited immigrant in the Citizenship Act captures persons who are involved or suspected to be involved in conduct of a transnational nature. Pursuant to section 33 a prohibited immigrant is a foreign national:

- Who commits or is suspected of committing an offence under an international treaty or convention ratified by Kenya;
- Who engages in human trafficking, sexual offences and sex crimes;
- Who engages in trafficking or smuggling into and out of Kenya for the purposes of engaging in sexual offences;
- Who is suspected of being engaged or facilitating trafficking;
- Who engages in any activity detrimental to the security of Kenya or another State.
- Who is involved in terrorism;
- Who is engaged in money laundering;
- Who knowingly and for profit aids, procures or encourages persons who are not citizens to enter Kenya illegally;
- Who is seeking to enter Kenya Illegally; or
- Whose refugee status has been revoked pursuant to the Refugees Act of 2006.¹⁵³

¹⁵² Citizenship Act Section 33 (3).

¹⁵³ Refugees Act Section 21.

iv) Removal and Deportation

The power to remove persons unlawfully present in Kenya is provided in section 43. The Cabinet Minister can make an order for any persons whose presence is declared to be unlawful to be removed from Kenya. The person against whom such an order has been made shall be returned to his place of origin, place of habitual or permanent residence, place of nationality or citizenship or a place where he requests to be taken to, provided that the place consents to his admission.¹⁵⁴ A deportation order should be effected 90 days from the day it was issued and may not be extended by a court of law for more than 30 days.¹⁵⁵

B Prevention

i) Duties and Liabilities of Carriers

A carrier 'includes any ship, boat, aircraft, wagon, truck, or any other vessel of conveyance'.¹⁵⁶ The duties and liabilities of carriers are established under Section 44 of the Citizenship Act. The owner or agent of a carrier, conveying passengers to and from Kenya, is required to furnish the immigration officer at the first port of entry or exit with a list of passengers.¹⁵⁷ Failure to furnish such a list results in a surcharge not exceeding Kshs 200 000 and in default, detention of the carrier at the owner's cost.¹⁵⁸ The carrier may also be charged with removal of a prohibited immigrant and expenses incurred by the government in relation to such immigrant's

¹⁵⁴ Citizenship Act Section 43 (2) (a).

¹⁵⁵ Citizenship Act Section 49 (6).

¹⁵⁶ Citizenship Act Section 2.

¹⁵⁷ Citizenship Act Section 44 (1).

¹⁵⁸ Citizenship Act Section 44 (3) (a).

transportation, maintenance and upkeep.¹⁵⁹ A surcharge of Kshs 1 million or detention of the carrier also accrues for passengers without valid or forged travel documents.¹⁶⁰ The provision is aimed at deterring carriers from engaging in the smuggling or trafficking of migrants. A person in charge of a carrier may arrest and place under custody passengers who do not have the necessary travel documents and an immigration officer has the power to enforce this measure.¹⁶¹

ii) Harboursing

Measures aimed at preventing the harboursing of irregular migrants are provided in Section 47. Persons or facilities offering accommodation have a duty to ensure customers produce identity documents pertaining to their citizenship prior to admission. Further, facilities and persons offering accommodation are required to maintain a record of foreign nationals in the prescribed form. Failure to comply will render businesses or persons offering accommodation criminally liable for the offence of harboursing unless the contrary can be proved.¹⁶² The provision is in conflict with the common law presumption of innocence in seeking to deter the smuggling of migrants.

¹⁵⁹ Citizenship Act Section 44 3 (b) and (c).

¹⁶⁰ Citizenship Act Section 44 (3) (d) and (e).

¹⁶¹ Citizenship Act Section 44 (4) and (7).

¹⁶² Citizenship Act Section 47 (3) and (4).

C Protection

i) Asylum seekers

Migrants facing persecution have a right to enter Kenya to seek asylum. Section 34 (1) of the Citizenship Act acknowledges this right. Asylum seekers do not have to possess a valid pass or permit for legal entry into Kenya. Additionally, refugees and asylum seekers are exempted from producing valid passports or travel documents when entering or leaving Kenya pursuant to section 48 (1) (c) of the Citizenship Act.

ii) Holding facilities

Reception centres and holding facilities are integral to the protection of migrant's rights. Migrants are able to access shelter, emergency medical assistance and other basic necessities at such facilities. Currently, reception facilities do not exist at border areas where migrants can seek assistance or relevant information to direct them to appropriate assistance. Section 50 of the Citizenship Act provides for holding facilities at ports of entry and exit and any other immigration areas for deportees. Such facilities are set aside for persons whose citizenship is not established, deportees in transit, and persons denied entry and awaiting return, who are not under carrier liability. At such facilities, smuggled migrants can receive assistance, as well as, establish contact with law enforcement for the prosecution of their smugglers. A deported migrant may be kept in police custody, prison or an immigration holding facility until his departure from Kenya.¹⁶³

¹⁶³ Citizenship Act Section 43 (2) (b).

3.7 Conclusion

The Citizenship Act defines the offence of human smuggling and other related organised criminal offences. The Citizenship Act also makes provision to deter and criminalise carriers from engaging in the smuggling of migrants as recommended by the Smuggling Protocol. However, the smuggled migrant is not exempted from criminal prosecution as required by Article 5 of the Smuggling protocol. Numerous document-related offences, harbouring, and interfering with the duties of an immigration officer, either through misrepresentation or exerting undue influence, are also enumerated under the Citizenship Act. Many of the offences can be utilised to prosecute smugglers. The Citizenship Act recognizes the right of entry for refugees and asylum seekers, and provides for holding facilities for persons of concern to immigration officers. Such facilities can provide temporary shelter and other basic needs to smuggled migrants who have suffered abuse during their journey.

The Citizenship Act constitutes the first attempt by the Kenyan legislature to capture the human smuggling offence, which was previously not provided for under domestic law. However, including smuggling and related offences in the domestic immigration legislative regime is not recommended internationally as a best practice. The offence of smuggling should be dealt with separately under the organised crime framework of a State Party. The possible complicity of immigration and law enforcement officers, which occurs in many cases of smuggling, is also not directly considered in the Act.

In summary, the Citizenship Act does not adequately provide for the protection of smuggled migrants, the prevention of smuggling, or cooperation among relevant actors and States,

essential, in combating and addressing the smuggling of migrants. However all the statutes discussed under this Chapter can be utilised by law enforcement authorities to prosecute various facets of the offence human smuggling.



4.0 Chapter 4

4.1 Recommendations and Conclusion

The tide of migration from the Horn of Africa southwards is nowhere near dissipation. It is likely to continue, mutating to avoid detection. Moreover, opportunistic criminals will continue to scuffle for the spoils of the irregular movement. An isolated response by Ethiopia, Somalia and Kenya would be too narrow and simplistic for such a complex migratory phenomenon.

However, given the centrality of Kenya to this movement, a coalition of interventions among these three countries may actually hold the key to stemming the movement southwards. At the very least a coordinated response among the three countries may succeed in ceiling corruption loopholes, or harnessing some sort of economic gain from the movement for the countries involved.



4.2 Prevention

The first strategy adopted needs to be aimed at preventing the movement. A logical approach would be to begin by addressing the root causes of the irregular movement. Root causes cannot, however, be addressed in isolation of the countries of origin. Governments in these countries have to include interventions in their long-term development plans and make commensurate budgetary allocations towards such interventions. For Somalia, such development programmes may not be immediately feasible. For Ethiopia, with its established, albeit authoritarian government, such programmes can immediately begin to be actualised.

Kenya, as a country of transit and destination, in collaboration with the countries of origin, should try to isolate the economic advantage deeply embedded in this movement. Ethiopia and Somalia both possess a large pool of human resources by virtue of their youthful and energetic populations. Keeping the youthful population economically engaged, in lieu of strained economic circumstances, is not a problem unique to Ethiopia and Somalia. Kenya, South Africa and most developing countries are privy to this dilemma.

Kenya has implemented a '*Kazi kwa Vijana*' (work for young people) and a youth labour export programme. The programmes are aimed at providing youth with work opportunities locally and abroad. The youth labour export programme seeks to identify foreign labour markets that can benefit from the large skilled and unskilled human resource present in Kenya. South Africa is implementing an expanded public works programme to increase access to the labour market, particularly for the youth. There is no reason why Ethiopia cannot follow suit, expanding legitimate avenues for migration for those who so desire. Expanded opportunities to migrate would require access to valid travel documentation for youth in Somalia, a possibility not yet completely feasible in that jurisdiction. Overtime however, such strategies may become applicable to Somalia.

Kenya stands to benefit, and is already arguably benefiting, from the savvy business acumen of the Somali community. Enhanced engagement with this potential economic resource should encourage the establishment of legitimate business practice and enterprises.

The second point of intervention for Kenya would be to eliminate the real or imaginary bottlenecks that block entry into Kenya for Ethiopians and Somalis. This would entail tackling

corruption at the points of entry. Public information campaigns may prove a useful resource in this regard. The Kenya-Somali border, by its very geographic nature, is porous despite official closure by the Kenyan government in 2007. Inadequate resources have been cited as a major impediment in the effective policing of this border. However, the Government of Kenya (GOK) simply has to remunerate law enforcement officers better. That immigration officers earn in the ambit of \$200 is unrealistic. A new wage bill can obviously never rival what is made in corrupt proceeds. However, having been cited numerous times as a motivation for the corrupt practices of law enforcement officials the situation requires urgent redress by the GOK.

Lastly the age-old adage, “knowledge is power”, remains valid. Humanitarian interventions aimed at providing Ethiopian and Somali migrants with crucial information, especially with regard to the right to seek asylum in Kenya, would benefit them enormously. Informing the migrants of their rights necessarily entails the corollary obligation on the part of the Kenyan state to ensure that those very rights are safeguarded. It is indeed ludicrous that migrants from Ethiopia have free passage to Kenya, but are still compelled to pay large amounts in bribes for visitor’s stamps. The information campaign would need to be accompanied by a legislative review on the entry and stay in Kenya of Ethiopian migrants. Such a review should not necessarily result in the curtailing of entry, for this might have just the opposite effect. Perhaps, free entry should be expanded to include the right to freedom of movement and to gain access to economic opportunities for Ethiopians in Kenya. For instance Kenya is nearing the end of negotiation for a bilateral agreement with Ethiopia to allow Kenyan traders free movement in

their country.¹⁶⁴ This is a commendable starting point and if commensurate can expand the legal migration options for Ethiopians.

Public information campaigns must be geared towards dispelling myths and prejudices associated with migration. For instance, in the 1980s and 1990s, the USA was very seductive for aspirant Kenyan emigrants, but this is no longer the case, as potential migrants have since come to learn of the trying conditions under which African migrants in the USA have to live. Perhaps this change of mind has to do with the fact that Kenya has become much more democratic in recent years, with more opportunities opening up in the economy. Not to derogate from the fact that development can off course also be credited for this shift, information on the quality of life from the large Kenyan Diaspora community in the USA has no doubt dampened the desire to migrate to America. In this regard, information on the dangers of such irregular movement must be made known to migrants, and their expectations of a better life in countries on the Eastern migration corridor southward, effectively managed.

4.3 Prosecution

The decriminalisation of the smuggled migrant and the criminalisation of facilitators and profiteers of this movement cannot be overstated. Thus far, Kenya has dedicated the bulk of its resources and time to the prosecution and deportation of the smuggled migrant, as opposed to organisers, facilitators and profiteers of the movement. Presently, law enforcement officers can no longer claim a restrictive legislative framework. The smuggling of migrants is now defined in the Kenya Citizens and Immigration Act and is also criminalised. The Prevention of Organised

¹⁶⁴ Mumo (2012:1).

Crime Act and Prevention of Money Laundering Act can also be used creatively to prosecute conduct related to the smuggling of migrants.

The smuggled migrants themselves constitute an invaluable resource in identifying and providing supporting evidence in the criminal trials of their smugglers. Kenya should consider dealing with irregular migrants, particularly from Ethiopia and Somalia, administratively, as opposed to subjecting them to detention and prosecution. Somalis should be directed to the asylum process. Ethiopians in collaboration with their government should be granted safe passage and assisted return where necessary. Intermediate to the above interventions should be the provision of humanitarian assistance to smuggled migrants.

Impunity cannot continue to persist with regard to corrupt public officials fuelling the irregular movement. Targeting foot soldiers that collect extorted funds for prosecution or administratively for disciplinary action, including summary dismissal, may curtail the practice. In recent years the Kenya Revenue authority has tightened loopholes for corruption beginning at the lowest level. As a result revenue collection has increased. A similar model should be explored for the Kenya immigration and police service.

4.4 Protection

Irregular migrants are human beings first before they are smuggled migrants. The Smuggling Protocol is a law enforcement instrument. It clearly did not conceptualise the catastrophic humanitarian crisis present in Somalia today. The Smuggling Protocol may also be far from relatable to the economic peculiarities, coupled with political persecution, experienced by some sections of the Ethiopian population.

As already stated, the tide of the irregular movement seems destined to persist for a long time. Unfortunately, not all smuggled migrants fit within the ambit of protection guaranteed by the International Legislative Framework relevant to refugees and asylum seekers. It is acknowledged that migrants' rights are abused during the smuggling process. Additionally, what begins as a mutual agreement may end up an exploitive situation, whether or not it strictly fits within the legal confines of human trafficking.

Suggestions have been made for the creation of reception centres where migrants can receive emergency and humanitarian assistance as well as access relevant information while their status is being determined. This may become rest stops that migrants make during the smuggling process, however, the benefits of registering and preserving the human condition of such migrants outweigh such risk. Assisted voluntary return, where possible, needs to be coordinated with respective governments and relevant international actors in order to grant migrants safe passage for their return.

4.5 Cooperation

It is established that refugee protection is a shared international obligation. Transnational movements cannot also be tackled devoid of international cooperation and support. As discussed in Chapter 3, efforts have been made at the regional level to address this movement. Tanzania and Kenya are in the process of signing a bilateral agreement to control smugglers and curb illegal transit through their common borders.¹⁶⁵ The Regional Consultative initiative being

¹⁶⁵ Tanzania Daily News(2012:1).

spearheaded by UNHCR and IOM, in collaboration with relevant government departments, harbours great potential to collectively address irregular flows from Ethiopia and Somalia.

4.6 Conclusion

A supportive legislative framework may be the catalyst to stem irregular movement from the Horn of Africa southwards. However, too often, the perception of corruption, poor legislation, and poverty are related to this movement in such abstract terms, that they can only be a scapegoat - an excuse for policy makers and implementers of that policy to shun their duties and obligations, and a crutch, migrants falsely make use of to justify their actions.

The smuggling process is expensive. Money paid to facilitators can without doubt be utilised legitimately in the country of origin to improve the status of migrants and their families in a much more sustainable manner than the unknown hazards that they are likely to encounter elsewhere. Money paid to facilitators can be ploughed back creatively into the economy of Ethiopia, thus helping to churn the economy.

Kenya has no excuse for failing to chastise the corrupt conduct of public officials. Lack of political will, and the low public service wage bill can no longer be entertained, at the grave expense of security and smuggled migrants dignity. Laxity in security was heavily paid for by Kenya in its 2011-2012 war efforts in Somalia. It may be argued that the war wage bill could have been put to better use, paying and equipping security apparatus in the country. This would have better capacitated them to prevent the kidnappings that precipitated Kenya's war intervention. Migrants and citizens alike have a duty to refuse to condone public acts of corruption where relevant authorities have failed.

With regard to legislation, South Africa in redressing human trafficking has put in place commendable measures to address human trafficking without specific legislation on the issue. Kenya, Uganda and Tanzania have rushed to legislate against human trafficking but their practical response, nowhere near rivals, measures put in place in South Africa. The Department of Foreign Affairs in South Africa has provided financial support to IOM to implement capacity building, awareness raising and victim assistance programmes for victims of trafficking. This is not in any way to disparage the primacy of effective legislative measures to redress the contemporary challenges of the 21st Century. However, Kenya must simply maintain a commitment to practically address the irregular flows from its neighbours, prosecute criminal elements facilitating these flows, and protect the rights of migrants caught in the cross fire. The country, dealing with a very large refugee population, would benefit immeasurably from increased international support in shouldering this burden.

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