Smuggling, Detention and Expulsion of Irregular Migrants
A Study on International Legal Norms, Standards and Practices

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1. Smuggling of Migrants

1.1. Introduction

Smuggling of human beings is not a new phenomenon. However it is only recently that the international legal order has come around this issue. In its effort to contain the organised crime and smuggling of human beings, the international community is faced with numerous problems, most notably the complex nature of smuggling and the necessity for practically viable instruments for enhanced international co-operation in criminal matters.

Smuggling has been long time not taken as one single crime but, rather, the law recognised a number of separate acts perpetrated by a number of people during sometimes a large number of years, over many territories.

In practice, bringing smugglers to justice was possible only either by indictment of many acts on one person, or by indictment of participation in crime proceedings, plus aggravating circumstances. The law was limited to some basic principles that did not allow the prosecution for the crime of ‘smuggling’, but for crimes today considered to amounting to or related to ‘smuggling’, such as producing illegal identity documents or procuring the illegal entry of one person, etc.

Smuggling of human beings has been identified as a form of transnational organised crime, and as the United Nations Convention on Organised Crime provided a legal qualification for it, it is, now, possible to prosecute the ‘smuggling of human beings’ as one single crime.

This has been possible by the re-thinking of some of the basic principles of criminal law.

The classical law principles required that a separation between the various acts be done in order to deal with each of the acts in separate order. The other criminal acts committed, or allegedly committed by a person, would have borne only the weight of aggravating circumstances or recurring pattern in

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recidivism. The new legal order has changed this basic principle allowing the trial of a series of crimes by qualification as one single crime.

A basic legal principle required that in each criminal proceeding should be taken in respect of only one person (physical or juridical). Particular evidence was required to be produced in order to establish a valid and undoubtedly incriminating link between two persons and to enable justice in establishing aggravating circumstances or participation. By the UN Convention on Organised Crime it is now possible to bring concomitantly two or more persons before justice for participation in the commitment of one single organised crime. The weight of evidence required in order to sentence the participators has been thus lightened.

The classical criminal law defined the forms of participation of various persons in the commitment of a criminal act as co-participation, consensual action, witnessing, accomplice, etc. All these various forms of participation brought more or less criminal liability on the different persons in question. With the changes in the international legal system they are no longer considered as aggravating circumstances, but have been reduced to participation in commitment of the organised crime, which actually means an increase in the gravity attached to them.

In most cases the appellant must produce proof of evidence before the court in submission of his case. However, in practice it has been noticed that, particularly in cases of alleged ill treatment but not only, it is extremely difficult, if at all possible, for the appellant to gather necessary evidence. Therefore, in order to serve the justice the concept of ‘inversion of order of evidence’ has been introduced.

The inversion of the order of evidence requires the respondent State authorities to produce evidence to the satisfaction of the court that all the legal procedures have been respected and that all the guarantees have been kept.

This procedure is active in some states in respect of allegations of discrimination; it has been put in place in order to facilitate the exercise of justice since the collection of evidence from the part of the appellant is often not conclusive to the violation of any right.

1.2. Definition of Smuggling

The 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 (Art. 3, Anti Smuggling Protocol).

Illegal entry shall mean the crossing of borders without complying with the necessary requirements for legal entry into the receiving State.