The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air

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1. Introduction

This chapter will examine the basic legal framework on immigration control at sea stipulated by the Protocol against Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), attached to the United Nations Convention against Transnational Organised Crime (Organised Crime Convention). The need to deal with the smuggling of migrants was recognised by the international community in the late 1990s. In 1997, in response to the growing problem of illegal migrants arriving by sea, Italy proposed a draft Convention to Combat Illegal Migrant by Sea during the 76th session of the Legal Committee of the International Maritime Organisation. This initiative by the IMO ran parallel to the ongoing discussions being held within the United Nations system to combat transnational organised crime. Around the same time, Austria suggested the adoption of a new treaty to deal with migrant smuggling to the UN Secretary-General, while Argentina proposed the drafting of a new convention against trafficking of minors before the 7th session of the United Nations Commission on Crime Prevention and Criminal Justice. These combined efforts eventually led to the creation of an Ad Hoc Committee by the United Nations General

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Assembly to elaborate upon the international instruments against transnational organised crime and the trafficking/smuggling of migrants.\(^5\) Through a series of sessions between January 1999 and July 2000, the Ad Hoc Committee finalised these instruments, which were formally adopted by the UN General Assembly in November 2000.

What follows is an examination of the key parts of the Smuggling Protocol which relate to immigration control at sea. The Chapter starts by looking at the definition of smuggling of human beings. It then will highlight general obligations imposed by the Smuggling Protocol as regards the legal framework to deal with smuggling of migrants at sea. The main conclusion reached is that, while the Smuggling Protocol is an important step forward to deal with smuggling, problems including the principle of sovereignty and a lack of due regard for the human rights of smuggled migrants may undermine its effectiveness.

2. **The definition of smuggling**

The terms ‘smuggling’ and ‘trafficking’ of human beings have been used interchangeably without a clear distinction in the past. However, with the adoption of the Organised Crime Convention, the Smuggling Protocol, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol),\(^6\) it is now clear that there are a number of differences. Under Article 3 of the Smuggling Protocol, smuggling means:

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

According to Article 3 of the Trafficking Protocol:

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

There are four key differences between smuggling and trafficking. Firstly, trafficking is carried out with the use of coercion and/or deception, whereas smuggling

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\(^6\) *Supra.*