



Sri Lankan Law Relating to Human Smuggling: A Critical Analysis with Reference to International Legal Framework

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Abstract

Human smuggling has been identified as a transnational crime. The United Nations Convention on the Transnational organized Crime (UNTOC) and the Protocol against the smuggling of migrants (HS Protocol) are the main legal instruments in dealing with human smuggling. The UNTOC aims to criminalize the transnational organized crimes and the HS protocol aims to penalize human smuggling and protect the rights of the smuggled migrants. Both instruments obliged the states to take appropriate measures in punishing offenders and extending their cooperation to other states to attain the objectives of the said treaties. While certain states have adopted specific laws to combat human smuggling in line with these instruments, some states do the same under the immigration laws. It is against this backdrop; the objective of the paper is to assess how far the Immigrants and Emigrants Act No 20 of 1948 of Sri Lanka (IME Act) is able to tackle human smuggling as compared with international legal instruments. This paper uses normative research. Descriptive, interpretive, analytical and comparative methodology had been adopted in this paper. The study reveals that compared with international law the IME Act does not cover some of the key components of the protocol. Therefore, the author suggests that Sri Lanka needs to adopt comprehensive legal provisions in line with international legal framework.

Keywords: *Immigrants and Emigrants Act No 20 of 1948 Sri Lanka, human smuggling, domestic legal framework, Human Smuggling protocol, UNTOC*

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Introduction

Human smuggling is an illegal movement of people from one state to another. This movement is facilitated by organised criminal groups (OCGs). In this process, there are two concerned parties; one is smugglers (OCGs) who facilitate or organize the journey and the other being the smuggled migrant/s who obtain the paid services from the smugglers. The UNCTOC and the HS protocol denotes this movement as transnational organized crime. This transnational movement is carried out across the national boundaries of various states. Those states are indicated as 'source country', 'transit country' and 'destination country'¹.

The UNCTOC was adopted by the UN in 2000 with the aim to criminalize the transnational organized crimes and extend the international cooperation among the states to eradicate the Transnational Organized Crime (TOC)². The HS protocol was adopted to penalize the human smugglers and protect the smuggled migrants³. As supplementary measures, legislative guides on UNCTOC and interpretative notes and model laws on human smuggling also have been developed to provide necessary guidance to states. In addition, other soft law instruments, international human rights conventions, and convention relating to status of refugees are also used to fill the gap in the UNCTOC and the HS protocol.

The UNCTOC defines the term organised group and details out the national and transnational obligations of the states in relation to various actions pertaining to eradicating TOCs. As per Article 01 of the convention, international cooperation is the fundamental element for successful implementation of the convention. The States' co-operation

¹ Source country means, the country from which the migrants originate, transit means, a country or countries through which smugglers take the migrants to the intended destination. Destination means, the desired station which the migrants want to enter.

² Article 1 statement of the purpose—The purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively and cooperation among the states with regard to identification, arrest, investigation and prosecution'

³ Article 2 of the statement of purpose-. The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

depends on the applicability of common legal standards.

Therefore, the UNCTOC requires the States to criminalize, inter alia, participation in an organized group⁴ (Article 5), the laundering of the proceeds of crime⁵ (Article 6), and corruption⁶ (Article 8). States parties are additionally obliged to adopt measures for the prosecution of offenders⁷ (Articles 10 and 11), and for the confiscation and seizure of, inter alia, the proceeds of such crimes⁸ (Articles 12 to 14). This paper however, is limited to provisions in the UNCTOC that are directly relevant to penalizing human smuggling.

The HS protocol defines human smuggling⁹, lists out the connected crimes¹⁰, and sets out several obligations of states parties. A separate section is dedicated to human smuggling by sea. The protocol also makes reference to the rights of smuggled migrants. Both UNCTOC and the HS protocol require the states parties to take appropriate legal and other measures to achieve the stated objectives of these instruments.

Sources reveals that the TOC is a threat to Sri Lankan national security and has been increasing in SL¹¹ Sri Lanka has been a source and transit location¹² for drug trafficking, human trafficking, human smuggling and money laundering. Sri Lanka 2020 Crime & Safety Report states that there has been an increase in organized criminal activity. Further, some sources indicate that the current laws relating to organised crimes are outdated and there is dire need for new law¹³.

⁴ Article 5 of the UNCTOC

⁵ Article 6 of the UNCTOC

⁶ Article 8 of the UNCTOC

⁷ Article 10 and 11 of the UNCTOC

⁸ Article 12 and 14 of the UNCTOC

⁹ Article 3(a) of the HS protocol - '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'

¹⁰ Article 6 of the HS Protocol

¹¹ Mitchell Sutton and Serge De Silva-Ranasingha, 'Transnational Crime in Sri Lanka: Future Considerations for International Cooperation' (Canberra: Australian Strategic Policy Institute, October 2016), 9.

¹² Ibid.,

¹³ Ibid.,

Although few initiatives have been taken to pass a law on organised crime in 2007 and 2017, nothing had been fruitful. Sri Lanka is a party to the UNCTOC, but it is yet to ratify the smuggling protocol. Irrespective of the fact whether a state has become a party to treaty there is no harm to make laws in line with the international instruments. For instance, Pakistan is yet to ratify both UNCTOC and the Protocol. However, with the assistance of UNODC it had enacted an Anti-human smuggling Act in 2018 in line with the international law.

With this background, the primary objective of the paper is to assess to what extent the domestic law penalizes migrant smuggling as compared with the international law. The secondary objective of the article is to find out the gaps in the law and suggest suitable amendments. The researcher recognizes that it is necessary to have a clear understanding about international law to make appropriate suggestions to Sri Lanka. Therefore, the first section of the paper, outlines the international law relating to human smuggling particularly the UNCTOC and the Protocol. Section two of the paper discusses the Sri Lankan legal framework on organized crime and human smuggling and highlights the gaps in the law. Section three concludes the study with key recommendations.

Research methods and Materials

Descriptive, interpretive, analytical and comparative methodology had been adopted in this study. UNCTOC, the protocol, legislative guide on the UNCTOC had been used as primary data. Immigrants and Emigrants Act No 20 of 1948, journal articles, thesis, newspaper articles, and small-scale studies have been used as secondary data.

Section 1

International legal framework on Human Smuggling

The UNCTOC was adopted in 2000 and entered into force on 29th September, 2003. States have raised major concerns over human trafficking and human smuggling. As a result, two distinct protocols were

adopted to address human trafficking and human smuggling. Countries had to ratify the UNCTOC itself before they become parties to any of the protocols.

As per Article 37(4)¹⁴ of the UNCTOC Provisions and the HS Protocol should be read together. This point had been further asserted by Anne T. Gallagher. According to her, the UNCTOC and the Protocols are connected treaties and the protocol and the UNCTOC should be interpreted together and the provisions of the UNCTOC that apply mutatis mutandis to the protocols¹⁵. Based on this point, the major provisions of the UNCTOC and the HS protocol are discussed together.

Purpose of the UNCTOC and the HS Protocol.

The objective of the UNCTOC is stated in Article 01 as “The purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively and cooperation among the states with regard to identification, arrest, investigation and prosecution.”

The objective of the HS protocol is stated in Article 2 as “The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.” It is clear from these provisions that states’ cooperation is essential in the criminal justice administration process to in order to prevent human smuggling. Moreover, the HS protocol also requires the States to extend their cooperation to protect the rights of smuggled migrants. Combined reading of both articles shows that states’ cooperation is essential in combating transnational crime including human smuggling. In order to give effect to the objectives of both instruments, States have to take various legal administrative, institutional measures.

¹⁴ Article 37(4) of the UNCTOC—any protocol to this convention shall be interpreted together with this convention taking into account the purpose of that protocol’

¹⁵ Anne T. Gallagher, International Law on Migrant Smuggling (Cambridge University press 2014) 35

The term Transnational crime

The UNCTOC does not give a legal definition to the term TOC. However, reference has been made in three places in the Convention.

Para 1,2,8,9 and 10, Article 01 of the UNCTOC and Article 3 para 2 refer to the term transnational. Article 3 para 2 clearly explains the transnational nature of the crime as “For the purpose of paragraph 1 of this article, an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State”. Examination of these provisions asserts that despite the fact that the convention failed to define the term TOC, the major aim of the UNCTOC is to combat transnational organized crime and it requires states’ cooperation in combatting the crime.

Organized Criminal Group

Article 2 defines the term OCG and other related terms. For the purposes of this convention, “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”. At the negotiation of final provisions of the UNCTOC, two distinct views were expressed by the participants. One set of States insisted on a definition to get the support of the states to rectify the convention the UNODC. They were also of the view that the absence of a definition would lead the international community to interfere in domestic matters in spite of the TOC not being an ordinary crime. Another group of states stated that there is no need for a definition. Finally, a definition was included in the convention. The definition also includes important terms such

as serious crime and structured group. these terms are also defined in the Convention. Accordingly, Art. 2 (b) of the UNCTOC defines serious crime as ‘an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’. There is no clear idea on what basis the amount of punishment is decided because in certain countries, even crimes against property are punished with four years of maximum imprisonment¹⁶. In Canada, serious offence means ‘an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by the regulations’. Section 15 G of the Crimes Act, 1914 of Australia defines that ‘a serious commonwealth offence is punishable on conviction by imprisonment for a period of 3 years or more’. Hence, States adopted their own definitions on ‘serious crime’. The term ‘structured group’ is defined in a negative manner in the UNCTOC i.e. ‘A structured group shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure’. Certain states have defined the term ‘structured’ but some have not.

Definition of Smuggling of Migrants

Article 3(a) of the HS protocol defines human smuggling as; ‘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’. The important elements of the definition are procurement (actus reus), financial and other material benefits. According to the Oxford dictionary procuring means “persuade or cause (someone) to do something”. The actus rea is procuring in the protocol, Article 3(b) defines ‘illegal entry’ referred to in 3 (a) as “crossing borders without complying with the necessary requirements for legal entry into the receiving State;”. According to the Protocol, financial benefit is the core element to prove the crime

¹⁶ Section 304 of the Brazilian Penal Code

and is used in defining the criminal offences contained in article 6 of the Protocol; it is also used in Article 2 (a) of the UNCTOC as part of the definition of OCG. The inclusion of financial motivation serves two purposes.

First, it does not punish group of persons who facilitate illegal entry for humanitarian purposes, and the second is it bears the deception that all border crossings are clearly lawful or unlawful. Further Article 5 of the HS Protocol states that people who have helped on humanitarian ground will not be punished.

The interpretative notes to the UNCTOC explain the phrase 'in order to obtain, directly or indirectly, a financial or other material benefit' the notes want the states to construe it broadly to include additional benefits such as sexual gratification¹⁷. Some countries require the financial benefit and others not. The Immigration and Naturalization Act of the US penalizes human smuggling. Anyhow, financial benefit is not a feature in this provision. Another example is Netherlands. Example Art. 97 A, Netherlands' Penal Code criminalizes human smuggling¹⁸ and it entails financial benefit as one of the elements to establish the crime of human smuggling. The above discussion on the definition of human smuggling demonstrates that states have freedom to define the crime as they wish.

Offences connected to human smuggling

Article 6 of the HS protocol defines the scope of criminalization, including: the smuggling of migrants; producing, procuring, providing or possessing a fraudulent travel or identity document for the purpose of smuggling

¹⁷ UNODC, United Nations. *Travex préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols* (UNODC, 2006) 455 <https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf> accessed 10 October 2022

¹⁸ A person who, for motives of pecuniary gain, assists another person in gaining entry to the Netherlands or in remaining in the Netherlands or in gaining entry to or in remaining in any state whose obligation it is to exercise border control also on behalf of the Netherlands, or who, for motives of pecuniary gain, supplies that person with the opportunity, means or information for that purpose, where he knows or has serious reason to suspect that person's gaining entry or remaining is unlawful, is liable to a term of imprisonment of no more than four years or a fine of the fifth category."

of migrants; enabling a person to remain illegally.¹⁹ This provision has added offences related to human smuggling. Hence, states' parties must criminalize the offence listed in Article 6 of the protocol.

Section 11

Domestic Legal Framework Governing Organized crime and Human Smuggling Sri Lanka (SL) has ratified the UNCTOC in 2006. As per the convention, the primary obligation of a State party is to take legal measures to address TOCs. It applies to SL too. According to the UNCTCO states are not required to define the TOCs but rather, oblige them to penalize various TOCs mentioned in the convention. Article 5 necessitates the state to take legislative and other measures to criminalize participation in criminal organizations. Although the transnational element is an important aspect in the convention, States are given freedom to make laws in respect of corruption, money laundering and obstruction of justice. However, this freedom is not applicable in the crime of participating in criminal organization. In Sri Lanka TOCs specified in the UNCTOC have been dealt with under various laws.²⁰ Sri Lanka does not recognize them as TOCs nor recognize them as serious crimes committed by OCGs as per the UNCTOC.

Legal framework on Human Smuggling

With the aim of regulating the movement of people to and from Sri Lanka, the IME Act was enacted by the House of Representatives. This Act was later amended by Act No. 16 of 1955, Act No. 68 of 196, 16 of 1993, 42 of 1998 and 31 of 2006. The primary objective of the IME Act is regulating the unauthorized arrival and departure. This Act is not applicable to certain categories of people. Similarly, certain persons are not allowed to enter into the country. As per the Act, valid travel documents and visa endorsement are legally required for entry and departures.

¹⁹ Article 6 of the HS Protocol

²⁰ Prevention of Money laundering Act 2006 and Computer Crimes Act 2007, Bribery Act

However, this pre-requisite does not apply to passengers in transit. The Act specifies approved ports of departure and entry both by sea and air. With this backdrop the following discussion will focus on to what extent the Immigrants and Emigrants Act penalizes people smuggling activities in Sri Lanka

Organizing irregular Departures and Bringing non-citizens to Sri Lanka

Section 45A and 45C were added by the legislature in 2006. Both facilitating irregular entry into the country and organizing irregular departure are administered by these two provisions. These two offences are facilitated by individuals and organized criminal groups through air and sea. Further, these two sections are read together with Section 45 of the Act. Section 45 of the Act includes a range of offences²¹ that relate to facilitation of irregular entry and departure. With this brief outline the foregoing discussion will analyze these offences in detail. It will also provide a comparative analysis with the provisions of the UNCTOC and the HS Protocol.

Section 45 (C) penalizes a person who organizes the irregular departure from SL. Section 45C states that ‘Any person, who-(a) organizes one or more persons to leave Sri Lanka in contravention of any of the provisions of this Act; or (b) attempts or does any act preparatory to, or aids and abets another person to, so organize under paragraph (a), shall be guilty of an offence’ Any person who found guilty for this crime has to serve imprisonment for a term not less than one year and not more than five years. The term/ phrases. “any person,” “organize” in ‘contravention of the act’ are important in this section. According to section 45C ‘any person’ who facilitates the journey will be guilty of offence. This section does not make any reference to OCG in the UNCTOC²² Nevertheless, one can argue that ‘any person’ can include both the OCG and individuals. Hence section 45C is broader than UNCTOC and it punishes an individual

²¹ 45 (1) (c) and 45 (1) (d) of the Act of the Immigrants and Emigrants Act No 20 of 1948

²² Article 2(a) of the UNCTOC

who organizes the irregular departure. However, it is worthy to note that the UNCTOC and the HS protocol do not intend to recognize the facilitation of irregular entry into another by state by individuals²³. Additionally, section 45C states that any person who organizes the journey contrary to the provisions of the Act is guilty of an offence. The term 'organizes' is broader and it includes a range of actions.

They include the recruitment of people for providing employment abroad, inducing people by making false promises to provide jobs overseas, soliciting pecuniary benefits from persons whether or not any such benefit was realized; the transportation of persons by sea, land or any other manner without obtaining valid travel documents and receiving and harboring persons whether in SL or in a foreign country²⁴. According to this provision anyone who commits one of such acts will be punished with imprisonment for a term not less than one year and not more than five years. While section 45 C specifies various acts as actus reus, Article 3 (a) of the HS protocol only refers to the term 'procuring'²⁵. Hence, in terms of actus reus Section 45 C is broader than the HS protocol. Further, as per Article 3(a) of the protocol gaining financial or other material benefit is considered as criminal intention and is an essential element in the definition of human smuggling. However, under the IME Act there is no such requirement. As per the negotiation, the reason to include financial benefit as an element is not to punish the person who helped on humanitarian grounds. It is worthy to note that absence of this element in the IME Act leads to punish any who help their relative or friends on sympathetic or humanitarian grounds.

The other important phrase in section 45 C is "in contravention of the Act".

²³ As per article 2 (a) of the UNCTOC and Article 3 (a) of the HS Protocol Irregular entry is facilitated by an OCG is called as transnational crime

²⁴ Section 45 C of the Immigrants and Emigrants Act no 20 of 1948

²⁵ "procuring" illegal entry in to another country. - According to the Oxford dictionary procuring means "persuade or cause (someone) to do something".

This means, any person who leaves the country should leave without violating the provisions of the Act. The foremost requirement to leave the country is to possess valid travel documents. Human smugglers who undertake to transport the migrants generally arrange the travel documents. When a human smuggler or smugglers enable the journey, they do so by manufacturing or altering or falsifying travel documents. According to the IME Act, these acts are punishable under Sec. 45 (1) (c) and 45 (1) (d) of the Act²⁶. Further, when the smuggled migrants are deported to Sri Lanka, they will also be charged under Section 45 for acting in contravention of the IME Act to depart the country. As regards this point, Article 6 of the HS protocol defines the scope of criminalization, including: the smuggling of migrants; producing, procuring, providing or possessing a fraudulent travel document.

Bringing non-citizens to Sri Lanka

Bringing non-citizens in contravening the provisions of the IME Act is an offence under Sec.45 A (1)²⁷. Further, this section penalizes the acts of concealing, harbouring, transporting and employing non-citizens contrary to the Act. In addition, for falsification of travel documents to bring in such persons will also amount to an offence under Sec. 45 (1) c of the aforesaid Act. A migrant who enters with the help of another person, will be charged under the Sec. 45(1) (a) and will be removed by the Minister after legal proceedings. As per these provisions both person or persons who facilitate the journey and the persons who enter SL with the help of such facilitation will be punished in accordance with the Act. However, the HS protocol does not intend to punish the smuggled migrants. At the same time, it does not prohibit states to punish those who violated immigration laws of those states.

²⁶ Any one who found guilty under these provisions will be subject to punishment of one-year imprisonment and 50,000 fine.

²⁷ 'any person who brings persons into SL and or conceal and harbor any other person in any place whatsoever or transport any other persons knowing that is a contravention of this Act or of any other regulation made under this Act, employs any other person knowing that such other person has entered Sri Lanka or is remaining in SL in contravention of any provision of this Act or of any order or regulation made under the Act shall be guilty of an offence and shall on conviction be liable to rigorous imprisonment for a term of not less than two years and of not more than five years.'

Hence states have freedom to make laws to punish smuggled migrants who violate the immigration laws.

The HS protocol refers to aggravated circumstances²⁸. The States parties are expected to include aggravated offences in the domestic law. However, Section 45 A and 45 C do not refer to any aggravated offences. This situation may be taken into account while framing charges against the perpetrators. Further, Section 45 C and 45 A (c) are non-bailable offences and only the High court has the power to grant bail under the Bail Act 1997. Concealing and harboring are bailable offences for which the magistrate is empowered to grant bail.

Summary of the Analysis

The above discussion reveals that there is no specific legislation in SL to cover both transnational organized crime and human smuggling. Corruption, bribery, human trafficking and drug trafficking are dealt with under different laws. Human smuggling is not defined and not treated as a transnational organized serious crime. At present, the IME Act, Sections 45 A and 45 C cover the essence of the crime. As per the preamble, the objective of the IME Act is to regulate immigration and emigration and not to penalize human smuggling. Hence, theoretically, this Act does not aim to handle human smuggling. The above two provisions namely Sections 45 A and 45 C punish any person who brings in any person to SL and transports any person from SL. Hence, it does not refer to crimes that are committed by the OCG. Compared to Section 45 C section, 45 A penalizes only the acts of harboring and concealing here as, 45 C penalizes many acts. Therefore, 45C is broad enough in terms of actus reus. The motive of the crime is absent in both these provisions. Soliciting benefits by committing the offences under 45 C is one of acts that is considered to be an activity coming under the meaning of 'organize' defined in 45 C. In relation to the punishment, the Act complies with UNCTOC; i.e.

²⁸ threat to life, unseaworthy condition, possibility of death, inhuman degrading treatment, labour and sexual Exploitation are considered as aggravated circumstances under the protocol

The maximum punishment is five years for committing offences under Section 45 C and 45 A. In respect to the punishment for falsifying and possessing of fraudulent documents, the IME Act conforms to the Article 6 of the Protocol. Section 45 of the IME Act that punishes migrants who violate the provisions of the Section 111.

Conclusion

In conclusion the paper highlights that in comparison with HS protocol there is no definition of human smuggling irrespective of the fact that people get the support of the smugglers to enter and leave Sri Lanka. Although Amendment No. 31 of 2006 brought two important Sections namely 45A and 45C in order to punish organizing irregular migration, these Sections do not mention the terms 'human smuggling', 'organized crime' and 'serious crime'. In addition, 45C (facilitating the movement from Sri Lanka) is considered as a more severe crime than 45A (bringing people into Sri Lanka) because in relation to offences enumerated in Section 45C, only the High Court has the jurisdiction to grant bail whereas for offences committed under 45A a Magistrate is empowered to grant bail. The above amendment was made through compulsion by the destination states. Punishment for the offences under Section 45A and 45C is minimum 2 years and maximum five years which comply with the UNCTOC and the Protocol. Financial and other material benefits are not a pre-requisite as in the Protocol Article 3(a) of the Protocol. Given this point, it is clear that the person who organizes the movement of people for humanitarian purposes is also sanctioned. Based on the comparative study, the author recommends that Sri Lanka needs to think of adopting a separate law or add a separate part in the IME Act to address human smuggling. The offence should be recognized as a transnational organized serious crime under the domestic law. Further, financial and other material should be included in the definition to differentiate the facilitation of irregular departure by organized criminal group for business purpose and facilitation on humanitarian grounds. The Act also should include aggravated circumstances and the punishment should be

included for each one of the aggravated offences. Moreover, as per one of the objectives of the HS protocol the rights of the smuggled migrants are also spelt out in the Act so that the state authorities will guarantee the rights of innocent migrants.