

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

Working document

**PREVENTING AND SUPPRESSING THE SMUGGLING OF MIGRANTS
IN COUNCIL OF EUROPE MEMBER STATES –
'A WAY FORWARD'**

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I BACKGROUND

I.1 Introduction

At the Plenary Session of the European Committee on Crime Problems (CDPC), held in Strasbourg on 2–5 June 2015, the delegation of Malta presented its proposal entitled ‘Criminality and Migration’ for a new activity to be dealt with by the CDPC. This proposal was also submitted in a written document. The proposal was strongly supported by Belgium, Greece, Italy, Netherlands, Spain, and the United Kingdom. On the whole, the Committee welcomed the proposal.

The CDPC subsequently decided ‘to examine the proposal by Malta to include in future CDPC activities the question of the criminal law aspects related to the issue of smuggling of migrants and to add to the terms of reference of the CDPC an activity on this matter’. The CDPC commissioned two experts to review international and domestic laws pertaining to smuggling of migrants, examine experiences and obstacles in investigations and international cooperation, and develop recommendations for future Council of Europe activities in this field.

I.2 Review of international instruments

In international law, the smuggling of migrants is comprehensively addressed by the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air*¹ which supplements the *Convention against Transnational Organized Crime*.² The *Smuggling of Migrants Protocol* entered into force on 28 January 2004 and all Council of Europe Member States except Ireland are States Parties to the Protocol. The Protocol offers the first, universally accepted definition of ‘smuggling of migrants’, sets out criminalisation requirements, special measures to combat the smuggling of migrants by sea, measures for international cooperation, and offers a basic standard for the protection of the rights of smuggled migrants and for their return to their country of origin.

Those Council of Europe Member States that are also Members of the European Union (EU) also have an obligation to implement *Council Directive 2002/90/EC ‘defining the facilitation of unauthorised entry, transit and residence’*³ and the *Framework Decision 2002/946/JHA ‘on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence’*.⁴ These instruments, which do not use the term ‘smuggling of migrants’, provide a framework for the criminalisation and punishment of the facilitation of illegal entry,

¹ Opened for signature 12 December 2000, 2241 UNTS 507 (entered into force 28 January 2004) [hereinafter the *Smuggling of Migrants Protocol*].

² Opened for signature 15 December 2000, 2225 UNTS 209 (entry into force 29 September 2003).

³ EU Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence OJ L238/17, 5 December 2002.

⁴ EU Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L238/1, 5 December 2002.

transit, and residence in EU Member States. The *Council Directive* and *Framework Decision* also contain no provisions relating to the protection of smuggled migrants (or other ‘illegal immigrants’).

I.3 National laws relating to smuggling of migrants

A comparison of the national laws adopted by Council of Europe Member States to combat the smuggling of migrants reflects the different concepts of the UN and EU frameworks but also reveals further ambiguities.

While all Member States have offences relating to smuggling of migrants in place and criminalise the minimum requirements set out in relevant international agreements, there are very grave discrepancies in the way in which smuggling of migrants is criminalised in each State. There is, for instance, no consistency in the way in which physical (*actus reus*) and mental elements (*mens rea*) of the offence are expressed, and aggravations and penalties vary greatly between States. There appears to be minimal, if any, common understanding about what constitutes smuggling of migrants, what types of smuggling and what motives of smugglers ought to be and ought not to be criminalised, and what punishment basic and more heinous methods of smuggling warrant — and what those methods are.

In summary, the existing situation is such that Council of Europe Member States apply different concepts and criteria in their efforts to combat the smuggling of migrants. While some common denominators are identifiable there is, at present, no common understanding about what constitutes smuggling of migrants and, just as importantly, what does not. The parameters that define this phenomenon and limitations of criminal liability vary greatly between Member States which also has implications for the possibilities and scope of mutual assistance and international cooperation.

In order to prevent and combat the smuggling of migrants in Council of Europe Member States more effectively, it would be desirable to establish a process that will lead to a better, common understanding of the phenomenon, more consistent, uniform criminalisation and punishment, more effective cooperation and information exchange, and better prosecution of the smugglers. The following sections outline a range of short-term, medium-term, and long-term options designed to achieve these goals.

II GUIDING PRINCIPLES

Any future activities undertaken by the Council of Europe and the CDPC to prevent and combat the smuggling of migrants should be done with the objective to

- (1) Prevent the smuggling of migrants;
- (2) Suppress, including criminalise, the smuggling of migrants;
- (3) Promote and facilitate international cooperation; and
- (4) Protect the right of smuggled migrants.

In the development, recommendation, and adoption of any future measures by the Council of Europe, due regard should be given to existing international instruments, obligations, and responsibilities of Member States under international law, in particular the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air* supplementing the *Convention against Transnational Organized Crime*. Moreover, any future measure developed, recommended, or adopted by the Council of Europe should take due account of any other rights, obligations, and responsibilities of Member States under international human rights and

humanitarian law, in particular the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *Convention and Protocol relating to the Status of Refugees*.

II.1 Suppression, including criminalisation

The smuggling of migrants poses a significant challenge to contemporary criminal justice, international relations, national security, national immigration systems, and to the international community. It involves ‘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’.⁵ Migrant smugglers exploit differences in national laws and legal systems to their advantage. They create illegal ways of migration by using clandestine methods of transporting people and/or by supplying fraudulent documents to those willing or forced to migrate. Smuggled migrants are vulnerable to life-threatening risks and exploitation. Generating large profits for the criminals involved, migrant smuggling fuels corruption and empowers organized crime.

The criminalisation of the smuggling of migrants is an essential first step to combat this phenomenon. Criminalisation should extend to the production, procuring, supply, and possession of fraudulent travel and identity documents for the purpose of migrant smuggling and to the harbouring of smuggled migrants. This also includes criminalisation of attempts, incitement, and any participation in the smuggling of migrants. Special attention needs to be given — and higher penalties provided — to instances in which smugglers place the health and lives of smuggled migrants at risk, treat them cruelly or inhumanely, and to situations in which government officials collaborate with or operate as smugglers, or in which organised criminal groups are involved.

The comprehensive criminalisation of the smuggling of migrants needs to go hand in hand with thorough enforcement, intelligence-gathering and investigations, and fair and efficient prosecutions and other criminal justice proceedings.

II.2 International cooperation

While law enforcement is generally confined to one country, the smuggling of migrants is not. Criminal offenders are mobile, operate across borders, and also often seek to evade detection, arrest, and punishment by relocating to other jurisdictions. They avoid being caught by taking advantage of those borders and playing on the frequent reluctance of law enforcement authorities to engage in complicated and expensive transnational investigations and prosecutions. The limited capacity of any one country to address some of these threats effectively translates into an overall weakness in the international regime of criminal justice cooperation. For countries with a relatively weak criminal justice capacity, these challenges can sometimes appear insurmountable. Accordingly, many instances of migrant smuggling remain undetected and many offenders ‘on the loose’. This is why comprehensive, multi-agency, and flexible cross-border cooperation is essential to ensure the appropriate investigation and prosecution of migrant smuggling.

⁵ Article 3(a) *Smuggling of Migrants Protocol*.

II.3 Prevention

Criminalisation, law enforcement, and border controls alone cannot stop the smuggling of migrants. Increased law enforcement activities and border control measures may have the result of diverting smuggling routes elsewhere, thereby increasing the likelihood that smugglers resort to more dangerous smuggling methods or follow more risky routes, thus placing the lives of smuggled migrants in jeopardy.

It is thus important to develop measures to prevent the smuggling of migrants. This includes, inter alia, measures to deter would-be offenders from engaging in the smuggling of migrants in the first place and prevent would-be migrants from falling victim to the promises made by unscrupulous smugglers. It also includes measures to control and monitor migration to ensure that migrants carry valid travel and identity documents, and information and awareness programs informing migrants about the criminal nature and dangers associated with migrant smuggling.

II.4 Protection of the rights of smuggled migrants

The smuggling of migrants involves the movement of human beings whose life, freedom, and safety are frequently at risk. Smuggled migrants are vulnerable to exploitation, deception, threats, and violence. When apprehended by authorities, smuggled migrants may be in urgent need of shelter, food, and basic medical care. In many instances smuggled migrants are found in situations of emergency, exposed to the elements, dehydration, suffocation, and drowning. Many smugglers subject the migrants to life-threatening risks and exploitation. Thousands of people have suffocated in containers, perished in deserts, or drowned or dehydrated at sea.

For these reasons, it is important that international and domestic frameworks protect the fundamental rights and freedoms of smuggled migrants, and that any action taken against the smuggling of migrants adheres to the principles of international human rights law. This also increases the likelihood that smuggled migrants will cooperate with government authorities and assist in the prosecution of their smugglers. Regardless of their immigration status, smuggled migrants have the right to expect that their human rights and dignity will be upheld at all stages by those who intercept and identify them and those who detain them. Furthermore, it is a fundamental principle of international human rights law that all persons have a right to be recognized as a person before the law, are to be treated as equal before the law, and are entitled without any discrimination to equal protection of the law.

III SHORT-TERM MEASURES

III.1 Conference

To scope the full spectrum of measures available to the Council of Europe and to develop strategies aimed at preventing and suppressing the smuggling of migrants, it would be desirable to convene a series of conferences and meetings designed to guide and inform further developments and cooperation in this field. It would be beneficial to adopt a two-tier approach involving strategic high-level official conferences of Member States that are supplemented by smaller, technical expert meetings or working groups.

This should, on the one hand, involve annual or biannual high-level conferences comprising representatives from the justice, interior/immigration, and policing portfolios of Member States. The specific purpose of such a forum would be to exchange experiences, develop medium and

long-term strategies for cooperation, and reach some consensus on the strategic goals in the prevention and suppression of smuggling of migrants in Council of Europe Members States.

This high level conference should be supported by regular expert meetings which discuss the legal and technical issues of cooperation in this field. This would include expert representatives from Member States, academic scholars, and delegates of relevant international organisations.

III.2 Collection and analysis of national laws and other documents

Efforts to effectively prevent and suppress migrant smuggling are severely hampered by the lack of comprehensive data collection. In spite of the widespread tendency to attempt to estimate or guess the scale and characteristics of migrant smuggling and the number of smuggled migrants, there are few reliable statistics and the topic remains under-researched and poorly understood. Information and statistics about the levels and patterns of migrant smuggling are, however, essential to make informed, evidence-based policy decisions, for the proper planning legislative amendments, and for capacity building and technical assistance initiatives. Moreover, to enable mutual legal assistance and international cooperation, it is important to have access to current laws relating to the smuggling of migrants from all Council of Europe Member States.

For these reasons, it is desirable to develop a central, up-to-date collection of national laws and international instruments relating to smuggling of migrants, statistics on investigations, arrests, and prosecutions, and a library or list of resources and research on this phenomenon. Moreover, to identify gaps and weaknesses in national and international systems, it would be desirable to commission independent academic research and analysis of the national measures taken by Council of Europe Member States and their compliance with international instruments and best practice guidelines.

III.3 Cooperation with other international organisations

The smuggling of migrants is a criminal justice issue as well as a migration and human rights issue. Accordingly, several other regional and international organisations have developed experience, expertise, material, and best practice guidelines on the myriad of issues associated with this phenomenon. It is for this reason, that the Council of Europe, the CDPC in particular, and Member States engage actively and regularly with relevant organisations to share experiences, concerns, and ideas.

IV BUILDING AN ONGOING CAPACITY

IV.1 Database

To enhance communication, information exchange, and cooperation between Council of Europe Members States, it is important to maintain a centralised collection of relevant laws, offences, procedural requirements, agency mandates and responsibilities relating to smuggling of migrants. The creation of an online database and directory would be desirable to serve as source for this information which is structured and searchable by key terms with reference to primary sources including legislation, case law, and official websites. For easier access and to promote transparency, the database should be open-source, though sensitive information and some statistics could be password-protected if needed. It is important to resource the database adequately to create a full directory of information from all Member States and to ensure

ongoing maintenance and updating. UNODC's Sherlock ('Sharing of electronic resources on organised crime') may serve as useful template for such a Council of Europe database.

IV.2 Focal point for communication and information exchange

In the medium and long-term, it would be desirable to set up a focal point at the Council of Europe to serve as main contact for all matters relating to the criminal law response to smuggling of migrants, to facilitate information exchange and sharing of information, to liaise with Member States and different sections of the Council of Europe, and to maintain the database mentioned earlier. This focal point could further be tasked with collating and disseminating relevant statistics, reports and other documents, and with identifying areas for further research and development.

IV.3 Research and evaluation

The smuggling of migrants remains a phenomenon that is poorly documented and not well understood. Comprehensive data and research into the levels and patterns of migrants smuggling and analyses of relevant policies, laws, and procedural mechanisms are, for the most part, non-existent. Research and evaluation are thus crucial to enhance the current knowledge on migrant smuggling and to inform evidence-based policy making and law reform. The CDPC, whenever it considers that necessary, could commission research projects on specific legal aspects, on patterns and characteristics of smuggling of migrants, case studies, comparisons between procedural and investigative techniques and issues in Member States, profiles of migrant smugglers and smuggled migrants, the financing of migrant smuggling, cooperation between Council of Europe Member States and with non-Council Members, et cetera.

V A COUNCIL OF EUROPE LEGAL INSTRUMENT

V.1 The need for a new Convention?

In light of the high levels of smuggling of migrants into and within Council of Europe Member States and the serious discrepancies between relevant domestic laws, especially criminal offences, enforcement, and protection mechanisms, Council of Europe Member States may wish to consider the development of a new Council of Europe convention on the smuggling of migrants.

Besides the objective to prevent and suppress the smuggling of migrants more effectively whilst protecting the rights of smuggled migrants, a new Convention could assist in closing loopholes that are exploited by migrant smugglers and other criminal elements and in creating greater similarity between the domestic laws, thus enhancing the capacity of Council of Europe Member States to detect and arrest migrant smugglers and to cooperate efficiently and effectively.

The UN *Protocol against the Smuggling of Migrants by Land, Air and Sea* could serve as the starting point for further legal developments in this field. It provides a universally accepted definition of 'smuggling of migrants' and a suite of mechanisms relating to criminalisation, international cooperation, and the protection of the rights of smuggled migrants. Although most Council of Europe Member States are Parties to the Protocol, their domestic laws, as shown earlier, frequently depart from fundamental concepts and requirements of the Protocol.

Despite the many strengths of the Protocol, it merely provides a ‘lowest common denominator’ and was developed at a time when the general understanding of and research into the smuggling of migrants — and the tools most suitable to prevent and suppress this phenomenon — were in their infancy. Since that time, many years of experience and analyses of the criminology, criminal law, and criminal justice response to the smuggling of migrants have generated additional, more developed mechanisms to combat this phenomenon in more effective, sustainable, and nuanced ways. The Working Group on Smuggling of Migrants, set up by the Conference of States Parties to the United Nations Convention against Transnational Organised Crime, has acknowledged some of the shortcomings of the Protocol and discussed some of the ways in which the Protocol could be improved and re-interpreted, but changes to the Protocol remain highly unlikely for the foreseeable future.

Other international law and best practice models and the European Union Directives and Framework Decisions could offer further guidance in the possible development of a new Convention in this field and, together with scholarly research and expert opinions, help identify the shortcomings of the existing international instruments and develop new, meaningful legal frameworks and practical measures to suppress and combat the smuggling of migrants.

V.2 A possible Council of Europe Committee of Ministers’ Recommendation?

As an alternative to a new Convention, it could be considered to draft and negotiate a Recommendation of the Committee of Ministers. Such a Recommendation could set out to appeal to Council of Europe Member States to effectively criminalize, investigate and prosecute acts of smuggling of migrants. The Recommendation could refer to the UN Smuggling of Migrants Protocol and give guidance on its application by the Council of Europe Member States. In addition, such a Recommendation could identify a number of practical measures to be taken by the Council of Europe and its Member States such as those listed in sections III. and IV. above.

Drafting and negotiating such a Recommendation would have the advantage to produce quicker results than a possible new Convention, as it would take considerable time until a new Convention would be finally negotiated and actually enter into force and could thus become applicable in a relevant number of Member States. If following the adoption of such a Recommendation, subsequent analysis at some point suggests that existing legal instruments are indeed not sufficient for an effective fight against smuggling of migrants, the Council of Europe Convention could come back to the question of whether to draft a new Convention.

V.3 Proposed new content

Specifically, in relation to the criminalisation of smuggling of migrants, a new Council of Europe instrument such as a Recommendation by the Committee of Ministers or a possible future new Convention against the Smuggling of Migrants, should provide greater clarity, certainty, and guidance on the following important points:

- (1) Definition of ‘smuggling of migrants’. The current definition builds on a small number of elements, some of which lack clarity and certainty. The definition in Article 3(a) of the *Smuggling of Migrants Protocol* is presently limited to ‘illegal entry’ and does not include transit. The conduct element of ‘procurement of illegal entry’ also lacks clarity and further clarification may be needed to state what types of conduct and what forms of procuring, facilitating, transporting, enabling et cetera amount to smuggling of migrants. This clarification also serves to differentiate more clearly between smugglers and smuggled migrants and between principal offenders and participants (who are liable under Article 6(2) and (c) of the Protocol).

- (2) 'Financial or material benefit'. This element is central to the definition of smuggling of migrants in the *Smuggling of Migrants Protocol* and characterises the offence as one committed for material gain. It excludes acts done for humanitarian reasons and to aid family members, so long as these involve no material benefit for the perpetrator. As recent judicial decisions have shown, the specific boundaries of this requirement and the extent to which it requires profits beyond actual expenses remain uncertain and speculative. The events of 2015 have also shown, that many civilians aiding refugees had no certainty whether or not their activities were criminalised or not. The element is also not consistently implemented in the laws of Council of Europe Member States such that there is considerable disagreement about what constitutes smuggling of migrants.
- (3) Distinction between trafficking in persons and smuggling of migrants. There is widespread confusion between smuggling of migrants and trafficking in persons and many organisations and individuals use the two terms interchangeably or incorrectly although they refer to two different phenomena. The UN Protocols on trafficking and smuggling along with the Council of Europe *Convention on Action against Human Trafficking* and the extensive interpretative material offers some guidance to distinguish the two issues, but there is great uncertainty (a) in situations in which (smuggled) migrants are maltreated, coerced, or exploited, and (b) in situations in which (trafficked) persons consent to situations that are coercive or exploitative.
- (4) Aggravations. Article 6(3) of the *Smuggling of Migrant Protocol* presently encourages States Parties to introduce two aggravated smuggling of migrants offences for situations in which the safety of smuggled migrants is endangered or likely to be endangered or in which migrants are treated in inhumane, degrading, or exploitative ways. In practice, smuggling of migrants may involve a range of other situations that are particularly dangerous, harmful, or heinous but that are presently not recognised as aggravations in international law. These include, inter alia, smuggling of unaccompanied minors, smuggling by organised criminal groups, smuggling done or tolerated by corrupt government officials, smuggling of migrants causing death, repeated or commercial smuggling activities, et cetera.
- (5) Penalties. The *Smuggling of Migrants Protocol* provides no guidance on the types and levels of adequate sanctions and the penalties for smuggling of migrants in the domestic laws of Council of Europe Member State vary greatly. While it would not be desirable to prescribe particular penalties in an international treaty, some guidance on adequate sanctions should be offered in relation to basic and aggravated offences. The extent to which sanctions beyond imprisonment and fines may be useful to combat the smuggling of migrants and deter actual and would-be offenders should also be explored in this context.
- (6) Smuggling of migrants by air and land. The *Smuggling of Migrants Protocol* presently contains some special provisions relating to smuggling by sea. The many methods and dangers associated with smuggling by air and land are not similarly recognised and require further recognition and, in some cases, special legal provisions.