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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

**PRELIMINARY SUMMARY OF THE REPLIES TO THE QUESTIONNAIRE
CONCERNING SMUGGLING OF MIGRANTS**

Document prepared by the CDPC Secretariat
Directorate General I – Human Rights and Rule of Law

Introduction

At the last Plenary Session of the European Committee on Crime Problems (hereafter CDPC) (Strasbourg, 2-5 June 2015), the Maltese delegation presented its proposal entitled “Criminality and Migration” for a new activity concerning the issue of smuggling of migrants. This proposal was strongly supported by other delegations. On the whole, the Committee welcomed the proposal.

The CDPC decided “to examine the proposal by Malta to include in future CDPC activities the question of the criminal law aspect related to the issue of smuggling of migrants and to add to the terms of reference of the CDPC an activity on this matter”. This resulted in the inclusion in its terms of reference for 2016-2017 of a specific task: “studying where the CDPC can provide added value to a criminal law response to the phenomenon of organised smuggling of migrants”.

Following this decision, a group of experts was set up. It met for the first time in July 2015 together with the Chairman of the CDPC and its Secretary. Following the second meeting of this group (Paris, 15-16 September 2015), a draft discussion paper “Criminality and migration” was drafted. This document aims to give an overview of the current international legal framework in criminal matters dealing with the smuggling of migrants and identify possible shortcomings and improvements that the Council of Europe could bring to this legal landscape.

The Bureau of the CDPC examined the document at its last meeting (Prague, 1-2 October 2015) and decided “to invite the experts to draft a questionnaire to be sent to all CDPC delegations focusing on the two aspects specifically linked to criminal law matters that are still not entirely covered in the draft Discussion Paper: 1) the assessment of possibilities for improving international co-operation in criminal matters between the countries involved and the identification of possible gaps and proposing possible solutions; and 2) a general analysis of relevant national legislation and its concrete application” (item 3) on the Agenda). The Bureau also decided “that, on the basis of the answers to the questionnaire received, the draft Discussion Paper should be finalised by the experts and presented at the next CDPC plenary meeting for examination and discussion”.

The questionnaire has been sent to all CDPC delegations. At the present time, the CDPC Secretariat has received 19 replies. Given the low number of replies received and given that some replies were sent to the Secretariat after the given deadline, the experts have not been able to take the replies into account in order to review the draft discussion paper before/ until the Plenary Meeting.

However, the replies received by the Secretariat seem to be heading in the same direction. This document aims at presenting a brief summary and at drawing some intermediary conclusions of the member States replies. The group of experts will then improve the draft discussion paper “Criminality and migration”, as required by the CDPC Bureau.

Summary of the replies

I) Criminalisation of smuggling of migrants

According to the different replies received, smuggling of migrants is criminalised in the States that have answered the questionnaire. This might be due to the fact that the same States have ratified the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organized Crime. In its Article 3, this text defines smuggling of migrants as “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.”

It appears that this definition has inspired national legislations. However, not all States have included the notion of “financial benefit” in their definition. Thus, some States consider that this condition does not need to be fulfilled in order to characterise the offence. Nevertheless, they do consider it to be an aggravating circumstance of the offence.

The criminalisation of the smuggling of migrants is sometimes a separate offence in the Criminal Code and sometimes included in migration laws.

II) Attempt, complicity and aggravating circumstances

All States criminalise attempt, complicity, acting as instigator of the smuggling of migrants, and migrant smuggling as part of a criminal organisation.

As far as the circumstances that endanger or are likely to endanger the lives or safety of smuggled migrants are concerned, these are criminalised by the vast majority of States, while the others consider them rather as an aggravating circumstance.

III) Special investigative techniques and seizure and confiscation

The vast majority of States have answered in the affirmative concerning the use of special investigative techniques (interception of communications, undercover operations and financial investigations) in cases of the smuggling of migrants.

Furthermore, specific forms of protection for witnesses exist.

Lastly, we note that national legislations allow seizure and confiscation of property, equipment or other instruments/tools used in or destined for use in offences related to the smuggling of migrants and the proceeds of crime derived from the offence.

IV) Trafficking in persons

All the States that answered the questionnaire criminalise trafficking in persons. In this context, all of them make a difference between the two offences (smuggling and trafficking). In the majority of them, this distinction is based on the fact that trafficking in persons is aimed at a well-defined objective, which is not the case when dealing with the smuggling of migrants. This well-defined objective could be, for instance, forced labour or sexual exploitation. At the same time, the “financial benefit” condition has not to be fulfilled in order for trafficking in persons to take place. Lastly, States agree on the fact that the cross-border aspect is stronger in the framework of smuggling of migrants than in trafficking in persons. Trafficking in persons does not

necessarily imply crossing a border and is independent of whether the person is legally or illegally on the territory.

V) National action plans

From the national policy point of view, half of the States affirm that they have drafted policies or action plans to address the issue of migrant smuggling.

VI) International co-operation

At international level, States note that the traditional Council of Europe co-operation instruments in criminal matters are sufficiently effective to deal with international co-operation.

Despite this observation, States agree that the general framework of international co-operation is not exempt from gaps and problems, in particular given the increasing number of cases following the massive influx of migrants in Europe. In this respect, it should be underlined that the increase of cases may vary from one State to another and, especially, that the number of convictions seems to be low in relation to the estimated number of migrant smugglers.

In particular, a number of States underline obstacles in implementing the existing texts on international co-operation. Several States regret a lack of information and communication and call for a simplification of procedures. They also deplore the length of procedures. Above all, several States note that international co-operation is relatively effective within the European Union but is more difficult to achieve with non EU member States, even when they are Council of Europe member States. Lastly, co-operation in this matter is almost inexistent with third countries of origin or of transit.

Conclusion

As said in the introduction, the number of replies received does not allow us to provide a comprehensive overview of the criminal law aspects of the smuggling of migrants at a pan- European level.

The practical implementation of the existing international instruments does not have a clearly measurable impact on reducing the overall level of smuggling of migrants.

According to the data provided, the numbers of prosecutions and convictions have not increased in the same way in the different States. Furthermore, the number of convictions appears to be low in comparison to the estimated scale of smuggling of migrants and convictions tend to sanction “low-level” smugglers.

The following factors could explain the low rate of convictions:

- Smuggling of migrants is a low risk activity but with high returns;
- Migrant smugglers often are in third countries and it is difficult for law enforcement agencies of the destination or transit countries to detect them, to identify them and to apprehend them;
- Identification of, proceedings concerning and conviction of smugglers are expensive and have not always been a priority;
- The levels of co-operation with third States in order to collect intelligence and evidence have been inadequate and insufficient.

Exchange of information and co-operation between the States' competent authorities still seem to be insufficient, even if exchanges of information on intercepted migrants and possible smugglers have to be considered as crucial. They contribute to the identification of the smugglers and their methods, which is essential to initiate criminal proceedings.

Moreover, co-operation with third States, mainly with States of origin, has to be considered as insufficient and ineffective.

Additional replies are needed in order to consider the issue from a wider perspective and to then draw a more detailed conclusion.