

Strasbourg, 28 September 2015
cdpc/docs 2015/cdpc (2015) 16

CDPC (2015) 16

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

DISCUSSION PAPER
ON “CRIMINALITY AND MIGRATION”

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

CDPC website: www.coe.int/cdpc
CDPC e-mail: dgi-cdpc@coe.int

Migrants and the CDPC

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 to be dealt with by the CDPC. This proposal, submitted in a written document, 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*”.

In his statement of 9 September 2015, the Secretary General of the Council of Europe (hereafter CoE), Mr Thorbjørn Jagland, said: “The ongoing migrant crisis is creating unprecedented challenges for European States”. He added that he had “commissioned an urgent analysis of the legal shortcomings which presently inhibit the prosecution of people-smugglers and ways to improve judicial co-operation between Europe and the South Mediterranean.”.

On 26 September 2015, following a thematic debate on “Migration challenges for Europe: need for collective action” the Committee of Ministers of the CoE “underlined the ongoing work in the European Committee on Crime Problems (CDPC) on this matter.”.

In order to address these issues, an experts group was set up composed of Mr Jesper Hjortenberg, Chair of the CDPC, Mr Calogero Ferrara, Prosecutor, Tribunal of Palermo (Italy), Mr Fabio Licata, Judge, Tribunal of Palermo (Italy), Dr. Andreas Schloenhardt, Professor of Criminal Law in the School of Law at The University of Queensland in Brisbane (Australia) and Professorial Research Fellow at the Faculty of Law, Department of Criminal Law and Criminology at the University of Vienna (Austria). They met together with the Secretary of the CDPC, Mr Carlo Chiaromonte, in The Hague on 7 July 2015 and in Paris, on 15 and 16 September 2015, and drafted this “Discussion paper”.

Current international legal framework on smuggling: analysis and comparison

The United Nations Protocol against the Smuggling of Migrants

The United Nations (hereafter UN) Protocol against the Smuggling of Migrants by Land, Sea and Air (hereafter the Protocol) is the foremost international response to a phenomenon that has emerged as one of the most significant political, social, and criminal justice issues worldwide. It supplements the UN Convention against Transnational Organized Crime.

Background

The development of the Protocol was sparked in the late 1990s by concerns over the lack of international cooperation and unanimity in the criminalisation of migrants smuggling. The development of a uniform, harmonised approach and a framework to enable international co-operation were the main motivators that led to the completion of the Protocol, which was opened for signature in Palermo, Italy in December 2000. In the 15 years since its creation, the Protocol has garnered considerable support: on 1 September 2015, it had 141 States Parties¹.

Purpose and definition

The stated purpose of the Smuggling of Migrants 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”.

Article 3(a) of the Protocol defines the term ‘smuggling of migrants’ to 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”.

Upon signing the Protocol, States agree to make the smuggling of migrants and related conduct under Article 6(1) a criminal offence. Article 6(1) sets out three offences that must be established in domestic law:

- smuggling of migrants in Article 6(1)(a);
- document fraud in Article 6(1)(b); and
- enabling of illegal stay (or harbouring) in Article 6(1)(c).

Article 6(2) encourages States Parties to criminalise attempting, participating, organising, and directing any of the offences set out in Article 6(1)(a)-(c). Article 6(3) creates an obligation to incorporate “aggravating circumstances” into the offences established pursuant to Article 6(1). The two aggravations specifically listed in Article 6(3) include “circumstances (a) that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants”.

¹See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en. The only CoE Member State that has not ratified the Protocol is Andorra.

Limitations and exemptions

The definitions and criminalisation requirements under the Protocol provide several parameters that serve to limit the application of criminal offences and exempt certain types of smuggling. These limitations stem from the overall objectives of the Protocol and its express purposes, most notably the protection of the rights of smuggled migrants.

The Protocol recognises that irregular migration, of which migrant smuggling is all but one form, is frequently connected to situations in which persons have to flee from persecution, war, torture, discrimination, and severe human rights abuses, or are forced to leave their home countries to seek asylum abroad for other reasons. For many smuggled migrants, the services offered by the smugglers represent the only way to escape threats, harm, and death. To that end, the Interpretative Notes to the Protocol stress that the intention of the drafters of the Protocol was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations.

The Protocol does not intend to criminalise persons who merely assist others in their quest to find safety and a better life abroad. Humanitarian smuggling activities may involve, for instance, providing food, medication, clothing and temporary accommodation so long as these activities serve to save or protect the life of a smuggled migrant. Activities such as rescuing smuggled migrants from a life-threatening situation also fall into that category. Other measures designed to save or restore the smuggled migrants' lives, health or physical integrity should also be viewed as humanitarian activities. Whether or not the danger to the smuggled migrants stems from another person (such as the smuggler) or from natural events (such as storms, freezing weather or extreme heat) does not matter in these circumstances. It is for this reason, that the Protocol limits the definition of smuggling migrants and the criminalisation requirement under Article 6(1) to instances in which the offender seeks to obtain, directly or indirectly, a financial or other material benefit. Any act that facilitates the illegal entry or stay of another that is not done for that purpose does not fall within the scope of the Protocol.

The financial or other material benefit element in Articles 3(a) and 6(1) of the Protocol also serves to exempt individuals from criminal liability who are involved in the smuggling of their family members. The Protocol recognises that it is not uncommon for earlier migrants to support the migration of their relatives, and that irregular migration, such as migrant smuggling, may serve as a way to reunite families or rescue family members from situations of persecution, poverty, or other hardship. The idea here is that no person should have to choose between committing a criminal offence or abandon his or her closest relative.

Article 5 of the Protocol stipulates the principle of non-criminalisation of smuggled migrants, stating that "migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol".

Measures against smuggling of migrants by sea

The prevention and suppression of the smuggling of migrants by sea is specifically addressed in Articles 7-9 of the Protocol.

International co-operation

Several articles in the Protocol make provisions for international co-operation. Article 10 encourages States Parties to exchange information and Article 13 obliges States to verify the legitimacy of documents at the behest of another State. The Protocol also encourages States Parties to enhance border controls, document security, training of law enforcement and border officials, and the implementation of public information programmes. Articles 14(3) and 15(3) specify that States shall consider providing technical and financial assistance to other States.

Protection of the rights of smuggled migrants

The stated purpose of protecting the rights of smuggled migrants is reflected in several provisions relating to assistance and protection. Under Article 9(1), States Parties are obliged to “ensure the safety and humane treatment of the persons on board” suspected smuggling vessels. Article 16 sets out a number of “protection and assistance measures” that afford smuggled migrants some basic guarantees of protection and aid. Article 19 of the Protocol contains a saving clause which obliges State Parties to give deference to the “other rights, obligations and responsibilities of States and individuals under international law,” and to apply the Protocol in a way “that is not discriminatory to persons on the ground that they are the object of” migrant smuggling. The Protocol also sets out a framework for receiving States for the repatriation of smuggled migrants.

European Directive and Framework Decision

Context and overview

The European Union (hereafter EU) has developed several measures relating to the criminalisation of migrants smuggling. These form part of a greater set of measures designed to develop common policies on asylum and immigration across EU Member States and ensure the free movement of people whilst combating immigration-related crime and misuse and abuse of asylum systems.

On 28 November 2002, the Council of the EU adopted Directive 2002/90/EC “defining the facilitation of unauthorised entry, transit and residence”, followed by the Framework Decision 2002/946/JHA “on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence”. These two documents set out the requirements for the criminalisation of smuggling of migrants in EU Member States. Council Directive 2002/90/EC serves to provide the definition of facilitation of unauthorised entry, transit and residence and the cases of exemption and Framework Decision 2002/946/JHA sets out the “minimum rules for penalties, liability of legal persons and jurisdiction” of the offences under the Council Directive.

The measures established by these documents are less comprehensive than that under the Smuggling of Migrants Protocol. In 2006, the EU Council passed a decision whereby the Smuggling of Migrants Protocol also applies to the European Union (insofar as they fall within its mandate).

Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence

The stated purpose of Council Directive 2002/90/EC is “to provide a definition of the facilitation of illegal immigration”. Whilst the Directive effectively sets out the framework for the criminalisation of the smuggling of migrants, the term “smuggling of migrants” is not used anywhere in the Directive.

The Directive contains no specific reference to the smuggling of migrants. Instead, it is concerned with the criminalisation of any conduct that facilitates illegal immigration, not only those types of conduct that amount to smuggling of migrants. It only contains a set of minimum criminalisation requirements and does not articulate any measures relating to enforcement, the protection of smuggled migrants, and also does not address the non-criminalisation of smuggled migrants.

Of the seven Articles contained in the Council Directive, only Articles 1 and 2 set out substantive matters. These include the basic offence of facilitating illegal immigrants in Article 1(1), and, in Article 2, extensions of criminal liability to inchoate and secondary offending. Article 1(2) of the Directive also provides a discretionary exemption from criminalisation for instances of humanitarian smuggling. Article 3 states that the penalties for these offences must be effective, proportionate, and dissuasive.

Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

Framework Decision 2002/946/JHA complements Council Directive 2002/90/EC by setting penalties and other sanctions for the offences set out in Articles 1 and 2 of the Council Directive. Article 1 of the Framework Decision envisages higher penalties for two situations: (1) if the offence under Article 1(1)(a) of the Council Directive is committed for financial gain and endanger the lives of the smuggled migrants, and (2) if the offence is committed for financial gain and are part of the activities of a criminal organisation. The Framework Decision extends criminal liability for the offence under Article 1(1) of the Directive to legal persons and sets out a range of sanctions for legal persons. The Framework Decision also addresses matters relating to jurisdiction and extradition and recognises States’ obligations under international refugee law.

Similar to Council Directive 2002/90/EC, the Framework Decision is not exclusively concerned with smuggling of migrants and does not use that term. The Framework Decision has broader application and its Preamble specifically notes that it “supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings, and the sexual exploitation of children.”

Trafficking in human beings and smuggling of migrants

The discussion held during the Plenary Session of the CDPC also focused on the distinction between smuggling of migrants and trafficking in human beings.

Definitions

Although the UN Protocol against the Smuggling of Migrants provides a universally accepted definition of smuggling of migrants, confusion between smuggling of migrants with the issue of trafficking in persons (and other forms of irregular migration) persists in some countries. Yet, in order to prevent and combat both crimes effectively it is important to draw a clear distinction between the two concepts. It is for this reason that smuggling of migrants and trafficking in persons are addressed by separate international legal instruments with widely different requirements and consequences. Accordingly, the distinction between the two concepts in domestic systems is imperative. The following table illustrates the key differences found in the Smuggling of Migrants Protocol and the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children.

	Trafficking in persons (adults)	Trafficking in persons (children)	Smuggling of migrants
Material elements	<ul style="list-style-type: none"> • Act • Means • Exploitative purpose 	<ul style="list-style-type: none"> • Act • Exploitative purpose 	<ul style="list-style-type: none"> • Act: Procurement of illegal entry of a person • Purpose: For financial or other material benefit. Relationship usually ends after the border crossing.
Consent of the trafficked or smuggled person	Irrelevant once the means are established	Irrelevant. Means do not need to be established.	Smuggled person generally consents to the smuggling (though consent may be retracted or misinformed).
Victim's age	Over 18	Below 18	Irrelevant
Transnationality	Not required	Not required	Required. Smuggling involves illegal border crossing and entry into another country, or border crossing and illegal stay
Involvement of an organized criminal group	Not required	Not required	Not required
Mental element	Intention	Intention	Intention

Despite internationally agreed definitions of smuggling in migrants and trafficking in persons, in practice there remains a degree of overlap between the two concepts. Four principal points have been identified to clarify the difference between smuggling of migrants and trafficking in persons.

Differences

The first point of difference relates to the purpose of the criminal enterprise. “The primary source of profit and thus also the primary purpose of trafficking in persons is exploitation”. In the case of migrant smuggling there is typically “no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country.” Rather, migrant smugglers seek payment in advance or upon arrival from the smuggled migrant.

Secondly, the two concepts have differing requirements relating to transnationality and the legality/illegality of the trafficked/smuggled person’s entry into another State. For the smuggling of migrants, there must be “illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” Alternatively, migrant smuggling may arise by enabling a person to remain illegally in a country that he or she has entered (legally or illegally). There is thus both a cross-border element as well as a requirement of illegal entry or illegal stay. Trafficking in persons, in contrast, may involve illegal or legal entry into a country and does not require the crossing of a border. There is no requirement that trafficking in persons occurs transnationally; it can also occur completely within one country.

The third difference between the two concepts is the issue of consent, which is considered to be irrelevant by the Trafficking in Persons Protocol. This Protocol is based on the understanding that victims of trafficking have either never consented - for instance if they have been abducted or sold - or, if they have given an initial consent, their initial consent has become void through the means the traffickers have used to gain control over the victim, such as deception or violence.

Although the Smuggling of Migrants Protocol does not address the issue, in practice, smuggling of migrants involves an agreement whereby a person may pay or give some other benefit to a smuggler in order to facilitate that person’s irregular migration. It has been recognised that smuggled migrants might retract their initial consent during a smuggling operation but be forced to continue on the journey. Retracting consent, however, does not automatically denote an instance of trafficking. Other elements of the trafficking definition, such as the purpose of exploitation, would still need to be satisfied.

The most important point of difference between the way in which smuggling of migrants and trafficking in persons are conceptualised in international law and in most domestic systems are the different purposes each offence serve.

The offence of trafficking in persons seeks to protect the rights, integrity, and freedoms of the trafficked persons and punish people who force, threaten, deceive, or otherwise abuse them for exploitative purposes. Because the definition of trafficking does not involve an element of transnationality, this offence does not purport to protect national interests such as border control and national security.

In contrast, the way in which smuggling of migrants is criminalised emphasises the fact that the offence serves to protect national sovereignty and public and government interests to control borders and manage the flow of people across them. The protection of the smuggled migrants and their rights and liberties are, at best, only a secondary goal of the Smuggling of Migrants Protocol. It is for this reason that smuggled migrants are not referred to as victims

of crime in the Protocol. This also explains why provisions relating to the safety of smuggled migrants and to any assistance and protection they may require are only rudimentarily developed and are, by and large, not mandatory provisions.

Current situation of smuggling of migrants

The regulation and management of international migration and the prevention and suppression of smuggling of migrants pose complex legal challenges. This complexity stems not only from the fact that migration is a phenomenon deeply intertwined with political, socio-economic, and demographic factors - which render this issue particularly controversial - but also because the various normative sources in this field, including international, European, and domestic law, often overlap or conflict.

Moreover, the levels and complexities of international migration have grown considerably over the last decade and further increases have been predicted for many years to come. The developments put further pressure on the balance between the need to protect the human rights of migrants on the one hand, and considerations of national security, sovereignty, and efforts to combat trafficking in persons and organized crime on the other.

For these reasons, smuggling of migrants is a concern to all countries, whether as countries of origin, transit, or destination - or any combination thereof. Furthermore, these circumstances have made the smuggling of migrants a lucrative business for individual offenders and criminal organizations. In many cases, the migrant smugglers show little regard to the vulnerabilities and desperation of smuggled migrants and exploit their desperation and use smuggling methods that place their lives in jeopardy.

There is ample evidence to show that the smuggling of migrants, especially to European nations, is a phenomenon that has grown in significance and scale and that a myriad of routes and methods are used to smuggle migrants. Figures from Austria, for instance, shown in the table below, demonstrate that over the last five years the number of smuggled migrants and migrant smugglers apprehended in Austria has risen to levels not seen since the early 2000s.

	Smuggled migrants	Migrant smugglers
2014	20,768	511
2013	12,323	352
2012	12,426	235
2011	9,812	288
2010	6,779	327
2009	10,428	438
2008	8,892	410
2007	9,987	682
2006	12,270	817
2005	20,894	713
2004	15,630	964
2003	18,533	1,025

Of particular concern are those instances in which smugglers, wittingly or unwittingly, place smuggled migrants in situations of danger for their lives, health and safety. In some cases, the smuggling of migrants involves particularly inhumane and degrading treatment and there are many reported instances in which smuggled migrants have been forced or coerced to join dangerous smuggling ventures, especially maritime ventures involving unseaworthy vessels. In addition to being far away from their home communities smuggled migrants find it difficult to assert their rights if they are in the transit or destination country illegally. They are more vulnerable to abuse, exploitation and trafficking as well as susceptible to involvement in criminal activities.

Smugglers of migrants are driven by profit and the complexity and level of organisation of a journey depends on the intended destination and the amount a migrant is willing or able to pay. Smuggling networks have been reported to manage complex operations covering source, transit and destination countries. It should be noted however that the majority of operations take place on an ad hoc and less sophisticated basis.

The significant increase in irregular migration to and across Europe in recent months, and the many cases in which migrants drowned at sea or suffocated in containers and trucks are also indicative of the complexities of law enforcement investigations, prosecutions, and judicial processes relating to smuggled migrants. Balancing the need to protect the rights of smuggled migrants with the need to combat migrant smuggling and bring migrant smugglers to justice poses particular challenges and also demonstrates the importance of co-operation between and coordination of the main stakeholders at national and international levels.

Gaps and weaknesses in international law against the Smuggling of Migrants

United Nations Protocol against the Smuggling of Migrants

Definitions and distinctions

The Smuggling of Migrants Protocol achieved a considerable feat in gaining international consensus on a definition of “smuggling of migrants”. The legal definition outlined in Articles 3 and 6 of the Protocol creates tangible parameters for determining the illegality of this crime type. Some commentators have criticized this definition for establishing an artificial dichotomy between the experiences of victims of trafficking from/and smuggled migrants. A more nuanced approach to the conceptualization of smuggling of migrants and trafficking in persons would acknowledge a single continuum on which they are both more realistically placed.

Sanctions and aggravations

Critically, the Protocol provides no guidance on possible sanctions for offenders. It remains uncertain whether Article 11(1) of the Convention against Transnational Organized Crime, which provides that States Parties are required to adopt sanctions within their domestic law that take into account and are proportionate to the gravity of the offences, can be applied to the Protocol offences though it “may well have been the intention of the negotiators”. As a

result, there is great disparity between the penalties different countries impose on the smuggling of migrants and related offences.

The severity of sentences is of particular importance in aggravated instances of smuggling of migrants. Article 6(3) of the Smuggling of Migrants Protocol creates a mandatory obligation to establish circumstances of aggravation for situations that endanger, or are likely to endanger, the lives or the safety of smuggled migrants; and for instances that entail inhuman or degrading treatment, including for exploitation, of such migrants. There is, however, no further guidance on the level of punishment appropriate for these aggravated cases.

Protection of the rights of smuggled migrants

The protection provisions under the Smuggling of Migrants Protocol have been labelled a 'deficiency' of the Protocol by virtue of the fact they do not afford much more than minimum core human rights. Indeed, these rights are so fundamental that few countries should need to legislate them. It should also be noted that Article 19 does not impose any extraneous obligations on States who are not parties to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Recalling the initial motivations for elaborating the Protocol, this serves to further promote the fact that the Protocol does not promote a guise of human rights priorities but rather primarily focuses on criminalisation and effective law enforcement.

The Protocol places little emphasis on encouraging co-operation of smuggled migrants with regards to the process of detection, investigation, and prosecution of smugglers. All smuggled migrants are likely to possess valuable intelligence and evidence about the methods, routes and modes of smugglers. Currently, the robust law enforcement controls endorsed by the Protocol may serve merely to drive smugglers into more sophisticated and covert organisational structures. In addition to considerable human rights concerns, law enforcement practices which simply focus on fulfilling the obligations for the repatriation process under Article 18 and do not afford smuggled migrants a period to be adequately debriefed from the experience, compromise the potential to gather valuable intelligence. To this end, it may be worthwhile exploring the benefits of implementing witness protection schemes either by way of temporary or permanent residency permits to smuggled migrants and/or generally elaborating the protection for smuggled migrants as a way of securing the cooperation of witnesses.

Smuggling of migrants by land and air

An additional consideration is the application of the Protocol to the smuggling of migrant by land and/or air. While explicitly referred to in the Protocol's title and in its preamble, there does not seem to be a clear articulation of the measures States Parties should adopt to prevent and suppress the smuggling of migrants by land and air (as there is for smuggling of migrants by sea). It is arguable that the general provisions listed in Chapter III - prevention, cooperation, and other measures - encapsulate methods that suffice for smuggling by all types of transportation. Routes used to smuggle by land and air are, however, often particularly irregular and labyrinthine and may require specific responses. Accordingly it seems even more pertinent that the Protocol should ameliorate, amplify or refine some provisions to provide an adequate and nuanced framework to target smuggling by land and

air. Moreover, in order to strengthen the law enforcement capacity of the Protocol as a whole, it is necessary to ameliorate the provisions regarding information-sharing and strengthen responses at both national and international levels to stay abreast with the “constantly adapted smuggling routes and methods”.

Compliance and monitoring

Concerns have been frequently raised regarding the extent to which States Parties use their legislative discretion to surpass the threshold prescribed by the Protocol. As David McClean observes, “the principles of international law set out in the Protocol are sometimes at the mercy of short-term political demands” and specifically, “immigration policy”. States’ directives regarding the administrative sanctions used in border and immigration control, such as detention of smuggled migrants, the fortification of borders with fences, and efforts to turn around, tow back, or destroy migrant smuggling vessels, illustrate the political quagmire within which some of the Protocol’s provisions operate. In this context, the Legislative Guides for the implementation of the Protocol also remind States Parties that “offences that go beyond the scope of the requirements of the Protocol would not be covered by the Convention such as to trigger the various requirements of the Convention and Protocol for international cooperation”.

Considering one of the primary pillars upon which the Protocol rests is the recognition of the integral role of international co-operation to combat migrant smuggling, the implications of this are potentially dire. In light of this concern, it is also relevant to note that there is no body or control organ with enforcement or quasi-judicial powers tasked with overseeing the implementation and interpretation of the Protocol. Moreover, in the event of the interpretation or application of a provision, the Protocol’s jurisdictional clause, Article 20(2), provides to adjudicate intra-country disputes, it outlines measures for recourse to pacific settlement via arbitration and if this fails, jurisdiction is conferred on the International Court of Justice. In practice, the court’s jurisdiction is, however, rarely, if ever, enlivened. The lack of a control organ, while not a shortcoming for the Protocol itself, speaks to the difficulty of ensuring that the Protocol’s provisions are implemented in the spirit within which the Protocol was conceived. This lends support to acknowledging the importance of ensuring that a checks and balances regime is in place.

EU Council Directive and Framework Decision

The EU Council Directive and the Framework Decision share many similarities with the purposes, scope, design, and application of the UN Protocol on Smuggling of Migrants but there also several significant differences which impact on the way in which EU Member States have designed, applied, and interpreted the smuggling of migrants offences under their domestic laws.

These differences stem, for the most part, from the overall purpose of the European measures: that is to criminalize the facilitation of illegal immigration. The criminal offences under the Council Directive, their extensions, relevant penalties, and exemptions from liability are not limited to the smuggling of migrants but apply to any kind of facilitation of illegal immigration. Moreover, these measures are not limited to illegal entry; they also apply to illegal transit. Whilst not further discussed here, the Council Directive and Framework

decision also contain no provisions relating to the protection of smuggled migrants (or other “illegal immigrants”).

Definition and concept

Neither the Council Directive nor the Framework Decision contain a definition of the term ‘smuggling of migrants’ and neither document uses this term. Instead, the title of the Council Directive and also of the Framework Decision speaks of “the facilitation of unauthorised entry, transit and residence”. Although the stated purpose of the Council Directive “is to provide a definition of the facilitation of illegal immigration”, the Directive does not contain any definition section nor does it explain any of the terms used. The basic offence relating to facilitating illegal immigration under Article 1(1)(a) of the Directive establishes the basic concept of the subject matter, which shares some similarities with the definition of smuggling of migrants in the UN Protocol.

A fundamental difference between the Council Directive and the Smuggling of Migrants Protocol is the lack of any reference to the purpose of obtaining a financial or other material benefit in EU law. This is a central feature of the definition of smuggling of migrants in the Protocol which emphasizes the profit oriented nature of this crime and excludes situations that are not motivated by profit from criminal liability. Article 1(1)(a) of the Council Directive, however, captures any situation in which the illegal entry (or transit) of the smuggled migrants is facilitated. To that end, the application of the Council Directive is much broader than the Smuggling of Migrants Protocol.

This is explained by the overall purpose of the Directive, which, as mentioned earlier, is to combat the facilitation of illegal immigration in all its forms; the application of the Directive is not limited to smuggling of migrants. Unlike the Smuggling of Migrants Protocol, the Directive is not preoccupied with criminalising persons who seek to benefit materially from the illegal immigration of others. The Directive pursues two similar, yet subtly different purposes:

- (1) the criminalisation of any facilitation of illegal immigration; and
- (2) the prevention of the exploitation of human beings, which makes the Directive relevant for the phenomenon of trafficking in persons, which is outside the scope of the Smuggling of Migrants Protocol.

The absence of the ‘financial or material benefit’ shifts the focus of the European instruments away from the issue of organised crime, which is central to the Smuggling of Migrants Protocol and, in particular, the Convention against Transnational Organized Crime, which the Protocol supplements. The concern of the European instruments is with the protection of the external of the borders of the EU, not with organised criminal groups and individuals who seek to take benefit from the plight of people willing or forced to migrate irregularly.

Exemptions from and limitations of criminalisation

The way in which the Council Directive provides for exemptions for humanitarian smuggling of migrants also differs from the Smuggling of Migrants Protocol. Whereas the Protocol is very clear about its intention not to criminalise persons who engage in the smuggling of migrants for humanitarian purposes and for no financial gain, Article 1(2) of the Council Directive leaves this matter to the discretion of Member States. Article 1(2) of the Council

Directive allows Member States to exempt from liability those cases of facilitating illegal entry that were committed for humanitarian purposes. This exemption, which is not a mandatory provision, is of particular relevance in situations in which the accused assists refugees and other asylum seekers who are fleeing from situations of persecution, discrimination, war, other human rights violations or humanitarian disasters.

The European Council Directive and the Framework Decision provide no specific exemption for situations in which an accused is involved in the smuggling of his or her own family members. This marks an important departure from the criminalisation requirements under the Smuggling of Migrants Protocol which seek to exempt the smuggling of family members from criminal liability. This is primarily achieved by requiring proof of a purpose to obtain a financial or material benefit, which could not be established if the smugglers assists as a mere favour to others.

Neither the Council Directive, nor the Framework Decision contain a specific clause calling on Member States not to criminalise smuggled migrants for being the object of the offences set out in Article 1(1)(a) and (b) of the Council Directive.

Feasibility and possible outcome of Council of Europe initiatives in the criminal law field

The assessment of the above mentioned international legal instruments and some practical experiences at national level have demonstrated the existence of shortcomings in the fight against the smuggling of migrants.

Furthermore, the crimes involving smuggling of migrants are on the rise in many countries around the World. Therefore, the current approach on smuggling of migrants in several CoE and non CoE countries, both at legislative and investigative/judicial level, appears rather ineffective to fight against the criminal organisations in charge of this illegal business.

In this respect, very recently the Director of Europol has stated that the current migrant crisis in Europe is “a magnet to criminals”. He also indicated that only in 2015, approximately 30000 suspects were identified and 1500 new investigations were started.

On this background, it appears clear that new actions must be undertaken from practical (more effective implementation of existing tools) and legal points of view (considering filling gaps in existing texts).

The group of experts has already started working on these issues, in particular:

- To take stock of the existing legal instruments in this field;
- To prepare a legal analysis of the existing international instruments in order to assess whether the legal framework, from the criminal law perspective, is adequate to meet the current needs to efficiently combat smuggling of migrants and whether there is room for improvement. Particular attention is paid to the practical difficulties which occur when applying the existing legal texts;

- This assessment will allow to identify possible gaps in the existing instruments (in particular, the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime) and lead to an understanding of why these instruments may not work as they should;
- An assessment of possibilities of improving international co-operation in criminal matters between the countries involved and identifying possible gaps in this area and proposing possible solutions;
- A general analysis of relevant national legislations and their concrete application.

This document already contains some preliminary stock-takings and assessments in particular with regard to the most relevant existing international instruments dealing with smuggling of migrants.

Conclusions

The key to an effective and comprehensive response to the smuggling of migrants lies in strengthened international co-operation to remove areas of impunity for smugglers along smuggling routes and to turn migrant smuggling from a “low risk, high return” to a “high risk, low return” business.

Many aspects of the (criminal) elements that constitute the offence of “smuggling of migrants” are committed outside the borders of the Council of Europe member States, especially in countries of origin and transit. While there are links between networks and individuals within and outside Council of Europe members States, any strategy to prevent and suppress the smuggling of migrant effectively should begin with efforts in the source and transit countries. It is for this reason that efforts to harmonise criminal offences relating to smuggling of migrants, improve law enforcement capabilities, and enhance international co-operation must be stepped up.

As a final result, after this preparatory analysis and subject to the decision by the CDPC, the CDPC could consider the possibility of drafting of a new regional convention, based on the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime. The added value of such an instrument would be that it could focus on concrete measures to strengthen the international co-operation between Council of Europe member States and the other States that are affected by this phenomenon. In this regard, it would be of utmost importance to involve other stakeholders in this activity, such as the League of Arab States, United Nations and the European Union.