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Working document

**NATIONAL LAWS RELATING TO SMUGGLING OF MIGRANTS
IN COUNCIL OF EUROPE MEMBER STATES**

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Document prepared by the CDPC Secretariat with the assistance of
Mr Andreas Schloenhardt, Professor at The University of Queensland;
Professorial Research Fellow at the University of Vienna
and Mr Calogero Ferrara, Prosecutor, Tribunal of Palermo

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I BACKGROUND

In October 2015, the Secretariat of the CDPC sent a short questionnaire to Council of Europe Member States, requesting information on their national laws relating to the criminal justice response to smuggling of migrants. These questions are reproduced in Annex A of this document.

By 27 May 2016, answers from 25 Member States including Andorra, Armenia, Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Italy, Latvia, Lithuania, Malta, Moldova, Montenegro, the Netherlands, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden, and Switzerland had been received. One country, Turkey, provided a partial answer to the questionnaire. No answers had been received from Albania, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, France, Georgia, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, Monaco, Norway, Republic of Moldova, Russian Federation, San Marino, Slovenia, the former Yugoslav Republic of Macedonia, Ukraine, and the United Kingdom.

This document summarises the responses received by Member States without identifying individual responses and countries and without commenting on or analysing national laws, policies, and practices. The answers received have not been independently verified or complemented with additional information. Some answers provided were incomplete and some answers may require additional validation and research.

I.1 UN Smuggling of Migrants Protocol

The domestic laws of Council of Europe Member States relating to smuggling of migrants have been shaped by the fact that 44 of the 47 Member States have ratified 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 Figure 1 below lists the accession to and ratification of the *Smuggling of Migrants Protocol* by Council of Europe Member States.

Figure 1: Council of Europe States Parties to the UN *Protocol against the Smuggling of Migrants by Land, Sea and Air* (current as on 27 May 2016)

State Party	Signature	Ratification, Acceptance(A), Approval(AA), Accession(a), Succession(d)
Albania	12 Dec 2000	21 Aug 2002
Andorra		
Armenia	15 Nov 2001	1 Jul 2003
Austria	12 Dec 2000	30 Nov 2007
Azerbaijan	12 Dec 2000	30 Oct 2003
Belgium	12 Dec 2000	11 Aug 2004

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).

State Party	Signature	Ratification, Acceptance(A), Approval(AA), Accession(a), Succession(d)
Bosnia and Herzegovina	12 Dec 2000	24 Apr 2002
Bulgaria	13 Dec 2000	5 Dec 2001
Croatia	12 Dec 2000	24 Jan 2003
Cyprus	12 Dec 2000	6 Aug 2003
Czech Republic	10 Dec 2002	24 Sep 2013
Denmark	12 Dec 2000	8 Dec 2006
Estonia	20 Sep 2002	12 May 2004
Finland	12 Dec 2000	7 Sep 2006 A
France	12 Dec 2000	29 Oct 2002
Georgia	13 Dec 2000	5 Sep 2006
Germany	12 Dec 2000	14 Jun 2006
Greece	13 Dec 2000	11 Jan 2011
Hungary	14 Dec 2000	22 Dec 2006
Iceland	13 Dec 2000	
Ireland	13 Dec 2000	
Italy	12 Dec 2000	2 Aug 2006
Latvia	10 Dec 2002	23 Apr 2003
Liechtenstein	14 Mar 2001	20 Feb 2008
Lithuania	25 Apr 2002	12 May 2003
Luxembourg	12 Dec 2000	24 Sep 2012
The former Yugoslav Republic of Macedonia	12 Dec 2000	12 Jan 2005
Malta	14 Dec 2000	24 Sep 2003
Monaco	13 Dec 2000	5 Jun 2001
Montenegro		23 Oct 2006 d
The Netherlands	12 Dec 2000	27 Jul 2005 A
Norway	13 Dec 2000	23 Sep 2003
Poland	4 Oct 2001	26 Sep 2003
Portugal	12 Dec 2000	10 May 2004
Republic of Moldova	14 Dec 2000	16 Sep 2005
Romania	14 Dec 2000	4 Dec 2002
Russian Federation	12 Dec 2000	26 May 2004
San Marino	14 Dec 2000	20 Jul 2010
Serbia	12 Dec 2000	6 Sep 2001
Slovakia	15 Nov 2001	21 Sep 2004
Slovenia	15 Nov 2001	21 May 2004
Spain	13 Dec 2000	1 Mar 2002
Sweden	12 Dec 2000	6 Sep 2006
Switzerland	2 Apr 2002	27 Oct 2006
Turkey	13 Dec 2000	25 Mar 2003
Ukraine	15 Nov 2001	21 May 2004
United Kingdom	14 Dec 2000	9 Feb 2006

A complete record of the status of ratification of the *Smuggling of Migrants Protocol* is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en.

In summary, the criminalization requirements under the *Smuggling of Migrants Protocol* explain the physical and mental elements (*actus reus* and *mens rea*) of smuggling of migrants offences in Council of Europe Member States. There are, however, as later parts of this paper will show, also some considerable diversions from Protocol requirements in the domestic laws of some Member States. The Protocol also has been influential in expanding criminal liability for smuggling of migrants offences to attempts and other forms of inchoate liability and to participation and other forms of secondary liability. The aggravations set forth in the Protocol are only partly reflected in the laws of some States.

Protocol requirements relating to protecting the rights of smuggled migrants, border control, travel and identity documentation, smuggling of migrants by sea, and international cooperation (also in conjunction with the *UN Convention against Transnational Organized Crime*) were not part of the questionnaire sent to Council of Europe Member States and are not further addressed in this document.

I.2 European Union Directive and Framework Decision

For those Council of Europe Member States that are also Members of the European Union (EU), domestic laws relating to smuggling of migrants have also been influenced by the *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

This is particularly evident insofar as domestic laws apply to the facilitation of illegal entry as well as transit and residence and apply to entry into the respective country as well as to entry into another EU Member State. The elements of the smuggling of migrants offence under domestic laws in EU Member States also frequently do not include an element relating to the financial or material benefit which is not an element of the *Council Directive* and *Framework Decision* — and which marks an important difference to the *UN Smuggling of Migrants Protocol*.

A complete record of National Implementing Measures (NIM) communicated by EU Member States concerning *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence* is available at <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32002L0090>.

II NATIONAL SETTINGS

II.1 National policies

Based on the answers received from Member States, very few Council of Europe countries have designated national policies or action plans to prevent and suppress the smuggling of migrants (Question #9). Of those States that responded, the vast majority stated that they had no such

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.

policy documents. Several States emphasised that they had a national policy (or similar document) to combat trafficking in persons but that no comprehensive plan to fight smuggling of migrants existed. Some States also highlighted that they had strategies relating to border control, national security, or immigration management/policy in place that cover some issues relating to migrant smuggling, but do not constitute a comprehensive anti-smuggling policy. Only five Member States responded that a national policy or action plan pertaining to smuggling of migrants or to irregular migration more broadly was in place.

II.2 National laws

All 25 complete responses received from Member States stressed that national law criminalising the smuggling of migrants were in place (Question #1). In most countries, relevant offences are set out in the national *Criminal* (or *Penal*) *Code*. In seven States, the offences are part of immigration laws (rather than criminal statutes), including legislation entitled *Foreigners/Aliens Act* or *Immigration Act*. In three States, smuggling of migrant offences can be found in designated statutes relating to smuggling or facilitating illegal entry (Question #2a).

II.3 Definition of smuggling of migrants

None of the 25 Council of Europe Member States that responded have a separate definition of ‘smuggling of migrants’ in a stand-alone provision (Question #2a). In one State, the definition under Article 3(a) of the *Smuggling of Migrants Protocol* has direct application; the law in another State defines victim of smuggling of migrants without defining smuggling of migrants separately.

In almost all States, the constituent elements of migrant smuggling are set out in the offence description, discussed in the following section of this paper. It should be stressed, however, that hardly any Member State uses the term ‘smuggling of migrants’ in their domestic laws. Those Council of Europe Member States that are also Members of the European Union tend to use terminology more closely aligned with the language of the *Council Directive* and *Framework Decision* which also do not use the term ‘smuggling of migrants’ (and do not contain definitions of similar terms).

III CRIMINALISATION

III.1 Elements of the basic smuggling of migrants offence

Although all Council of Europe Member States criminalise the smuggling of migrants in their domestic laws, the way in which the physical (or material or *actus reus*) elements are cast vary greatly between States (Questions #2b and 2c). In some jurisdictions, the conduct element of the offence refers to ‘organising’ which tends to refer to the persons overseeing and arranging the smuggling venture and would not require the person to be present when the illegal border crossing takes place. In other jurisdictions, the focus is on ‘assisting’ or ‘facilitating’ the illegal entry such that the offence views smuggling as an act aiding or abetting the irregular migrant. Elsewhere, terms such as ‘transportation’ are used as conduct elements which relate more directly to the physical act of smuggling and border crossing. In one jurisdiction, the offence consists mostly of purpose or mental elements and only requires any activity or engagement as a basic physical element.

The conduct elements relate to the illegal entry of the irregular migrants, though illegal transit and exit are also included in the smuggling offences of some Member States. In some

jurisdictions, the illegal entry is limited to that State; in some, it also includes illegal entry into another Member State of the European Union; in others, it also includes illegal entry into other third (or neighbouring) States.

Among the laws reviewed, there is no consistency in the way in which the smuggled or irregular migrant and his or her (il)legal status are defined. Generally, most offences make reference to the respective immigration or ‘foreigner’ laws that set out the requirements for lawful entry into that country. Just when exactly a non-citizen and/or their entry is illegal will depend on national laws that were not further reviewed as part of the present exercise, though it would be beneficial to collect, analyse, and compare relevant national laws on this point.

The requisite mental (or fault or mens rea) elements of domestic smuggling of migrants offences were not systematically reviewed during the present exercise and not all answers received from Member States contain information on this point. From the limited information available, it appears that most States require proof of intention in relation to the conduct element of the smuggling offence, though it would be desirable to collect, analyse, and compare further information from Member States on this point.

III.2 Financial or other material benefit

The ‘financial or other material benefit’ element, which is a central feature of the definition of smuggling of migrants in the *Smuggling of Migrants Protocol* is not an element in the majority of Council of Europe Member States (Question #2d). For the most part, Member States tend to have a basic offence of migrant smuggling that requires proof of facilitation (or the like; see above) of illegal entry of a non-citizen, but does not require proof of an additional physical or mental element relating to the profit or benefit obtained, or intended to be gained, by the perpetrator. To that end, many Council of Europe Member States adopt the elements set out in the EU *Council Directive* and *Framework Decision* but depart from the requirement in the UN *Smuggling of Migrants Protocol*.

In the majority of Member States, proof of a ‘financial or other material benefit’ serves as an aggravating mental (and sometimes physical) element and thus serves to impose a higher penalty on persons engaging in migrant smuggling for that reason. The concern with this approach is that, in the absence of other legal exceptions, many countries criminalise the activities of persons aiding irregular migrants, including refugees and asylum seekers, for humanitarian reasons or persons aiding their family members in the migrant process without obtaining, or seeking to gain, any material advantage.

There are some variations in the ways in which this element is expressed in domestic laws, including expressions such as ‘mercenary motive’, ‘illegitimate benefit’, ‘gain’, or ‘commercial commission’.

III.3 Penalties

Although information about penalties was not specifically asked for and was not systematically collected during the present review of national laws, the information received does reveal some striking differences in the types and spectrum of penalties (including fines and imprisonment) provided in domestic laws. While in some Member States the maximum penalty for the basic offence of smuggling of migrants is two years imprisonment, it reaches up to eight years in other jurisdictions. It would be beneficial to collect, analyse, and compare further information from Member States and also draw comparisons to international law and guidelines on this point.

III.4 Extensions to criminal liability

There is little to no variation in the ways and spectrum in/within which Member States expand criminal liability for domestic smuggling of migrants offences to capture attempts to commit such crimes or participate in them (Question 3a, 3b, and 3c). The usual domestic criminal law rules relating to inchoate liability (such as attempt) and secondary liability (such as aiding, abetting, et cetera) apply to the smuggling offences as well, even if these offences are not set out in the national *Penal* or *Criminal Code*.

In a small number of jurisdictions, it appears that the smuggling of migrants offence is expressed merely as a participatory offence, such that liability of the smuggler is dependent (or derivative) upon the illegal entry (and criminal liability) of the smuggled migrant. This would raise the question of whether participation in smuggling of migrants is legally possible, especially if domestic law prohibits double secondary liability (i.e. participation in participation). Similarly, in those jurisdictions where the smuggling of migrants offence explicitly includes attempts in the main offence, there may be a danger of creating double inchoate liability (i.e. attempting to attempt) if general criminal law rules are applied. It would be beneficial to collect, analyse, and compare further information from Member States on this point.

III.5 Aggravations

Council of Europe Member States criminalise an eclectic range of aggravations which provide higher penalties for situations that are seen as more heinous or dangerous than the basic offence of smuggling of migrants (Questions #3d and 3e). These aggravations include—apart from the financial or material benefit element already mentioned—situations in which government officials are bribed or otherwise facilitate irregular movements, in which perpetrators smuggle migrants repeatedly or commercially, or where criminal organisations are involved in smuggling.

From the answers provided, it appears that a slim majority of States provide aggravations for situations in which the migrants are treated extremely harshly or inhumanely by their smugglers and for situations in which the migrants are placed in or experience severe dangers, harm, or even death. These aggravations, by and large, reflect the provisions in international law on this point.

There is, however, no consistency in the types and range of aggravations recognised in the domestic laws of Council of Europe Member States, and there are some jurisdictions that have not legislated any aggravations beyond the basic smuggling offence. It would be beneficial to collect, analyse, and compare further information from Member States and also draw comparisons to international law and guidelines on this point.

III.6 Trafficking in persons

All Council of Europe Member States have introduced separate offences (and sometimes a definition) relating to trafficking in persons (Question #6). These offences almost always contain the act, means, and purpose elements set out in the UN *Trafficking in Persons Protocol* and the Council of Europe *Convention on Action against Trafficking in Human Beings*.

The offences relating to smuggling of migrants on the one hand, and trafficking in persons on the other, are, for the most part, quite distinguishable and separable in the domestic laws of

Member States. Uncertainties and overlap may arise in cases in which irregular migrants experience degrading treatment and exploitation as such cases could fall under both trafficking and smuggling. The penalties for these offences and the protection afforded to victims of trafficking vis-à-vis smuggled migrants are, however, considerably different. It is for this reason, that it would be beneficial to collect, analyse, and compare further information from Member States and also draw comparisons to international law and guidelines on this point.

IV INVESTIGATION AND CONFISCATION

IV.1 Special investigative techniques

The majority of answers received from Member States suggest that most jurisdictions permit a range of special investigative techniques to be used in the context of smuggling of migrants investigations (Question #4). The questionnaire sent to Member States asked specifically about the availability and permissibility of telecommunications interception, undercover operations, and financial investigations (Questions #4a, 4b, and 4c); these questions were answered in the affirmative by most States. In some jurisdictions, these measure are only available for the investigation of aggravated smuggling of migrants offences. The special investigative techniques are usually set out in general *Codes of Criminal Procedure* or similar legislation and are not unique (or limited to) smuggling of migrants offences. Some Member States elaborated on a range of other special investigative techniques (Questions #4e), such as front store operations, secret surveillance, and controlled delivery permissible under their domestic laws.

The question relating to mechanisms for the protection of witnesses (of smuggling of migrants) (Question #4d) was not answered consistently and several answers require additional information and/or validation from Member States. About half of the answers received refer to witness protection mechanisms available under general *Codes of Criminal Procedure* or similar legislation. It would be desirable to examine this point further and, in particular, enquire about the extent of the protection, if any, provided and the types of witnesses covered by relevant laws. Particularly interesting in this context is the question whether smuggled migrants, too, may receive protection if they testify against their smugglers, especially in situation in which the migrants have no legal status in the host country.

IV.2 Confiscation and seizure

Confiscation and seizure of property, equipment, and instrumentalities used to commit or otherwise associated with smuggling of migrants is permissible under the laws of all Member States that responded to this question (Question #5). Usually, *Penal or Criminal Codes* and/or *Code of Criminal Procedure* provide the legal basis. The same goes for confiscation and seizure of proceeds of crime which is permissible under the domestic laws of all responding States.

V INTERNATIONAL COOPERATION

V.1 Bases of international cooperation; other agreements

Council of Europe Member States use a combination of bilateral treaties, multilateral treaties, letters rogatory, and other mechanisms to cooperate with each other on criminal justice matters pertaining to smuggling of migrants.

The answers received by Member States to the question about the bases of international cooperation (Question #11) are extremely diverse and go into different levels of detail which make a comparison of national practice and the drawing of observations impossible.

Answers to Question #7 on the existence of other international, regional, and bilateral agreements are similarly mixed. Most answers refer to their ratification of the UN *Smuggling of Migrants Protocol* and, where applicable, the implementation of the EU *Council Directive and Framework Decision*. Some States listed a range of bilateral agreements pertaining to law enforcement, immigration, and criminal justice matters, though it is not possible to assess the scope of these agreements and their specific application to the smuggling of migrants. It would be desirable to collect more detailed information and conduct more in-depth analysis on this point, especially on relevant agreements that Council of Europe Member States may have with the main transit and source countries for the smuggling of migrants.

V.2 Effectiveness of existing frameworks

Questions relating to the effectiveness of cooperation in smuggling of migrants prosecutions (Question #12) and the effectiveness of existing Council of Europe cooperation instruments (Question #14) were consistently answered positively, with all answers making positive comments about their experience and the effectiveness of these framework. Similarly, few Member States identified any legal and practical obstacles in international cooperation (Question #13).

The very limited number of issues and concerns raised relate mostly to cooperation with non-Council of Europe States and the desire to extend existing instruments to these jurisdictions. Some Member States stressed that cooperation with source and transit countries for smuggling of migrants is problematic and requires improvement. Others called for greater synergy between Council of Europe and European Union initiatives against smuggling of migrants. Several answers suggest that cooperation should be strengthened and improved and greater and more active participation and cooperation between all Council of Europe Members States is needed. Some States also highlighted the existing discrepancies between definitions, criminalisation, and protection of migrants between Member States and criticized the lengthiness of cooperation proceedings. Some States admitted that they have little or no experience in international cooperation on matters relating to smuggling of migrants.

VI OBSERVATIONS AND CONCLUSIONS

The picture that emerges from the information received by Council of Europe Member States on their national criminal laws relating to smuggling of migrants is ambiguous.

On the one hand, all Member States that responded have smuggling of migrants offences in place and criminalise the minimum requirements set out in relevant international agreements. Council of Europe Member States also appear to have the necessary laws, powers, and ‘tools’ to use special investigative techniques in the investigation of smuggling of migrants and to confiscate and seize property, equipment, and instrumentalities associated with this crime as well as any proceed deriving from smuggling of migrants.

On the other hand, there are very grave discrepancies in the way in which smuggling of migrants is criminalised in Member States and there is no to consistency in the physical and mental elements of the offence, aggravations, and penalties. 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.

Information pertaining to international cooperation and the levels of smuggling of migrants (including data on arrests, charges, convictions, returns etc of migrant smugglers and the apprehension of smuggled migrants, Question #10) is too limited and too inconsistent to enable any conclusive observations. In the absence of further information, it is also not possible to make any observations or engage in speculations about national laws, policies, and measures against smuggling of migrants in the 21 Member States that did not yet respond to the questionnaire.

VII ANNEX A: QUESTIONNAIRE

1. Do you have any laws or legislative measures covering the issue of migrant smuggling?
 - a. Is the issue set out in general criminal law or are there specific provisions dealing with the problem?
2. Is the smuggling of migrants a criminal offence under domestic law?
 - a. Does national law include a definition of migrant smuggling?
 - b. How is this conduct defined?
 - c. What are the material elements of the crime?
 - d. Is “financial gain” an element of the definition of smuggling of migrants?

Could you please provide, if possible, the relevant texts (in English or in French)?

3. Are the following activities criminalized under national legislation:
 - a. Attempts to smuggle migrants
 - b. Participation as an accomplice in the smuggling of migrants
 - c. Acting as instigator of the smuggling of migrants
 - d. Migrant smuggling as part of a criminal organisation
 - e. Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants
4. Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as
 - a. Interceptions of telecommunication;
 - b. Undercover operations;
 - c. Financial investigations: including access to bank, financial or commercial records and/or databases;
 - d. specific form of protection for witnesses;
 - e. others; Please specify.
5. Does your domestic legislation enable seizure and/or confiscation:
 - of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?
 - of proceeds of crime derived from offences related to smuggling of migrants ?

If yes specify the main features of the legal framework.
6. Is trafficking in persons defined under national law?
 - a. If so, how does this definition differ from that of migrant smuggling?
7. In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?
8. Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.
9. Do you have a national policy or action plan to address the issue of migrant smuggling?
10. Where possible, please provide information regarding:

- a. Number of apprehended smugglers:
 - b. Number of investigations instigated against migrant smugglers:
 - c. Number of successful prosecutions of migrant smugglers:
11. In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded
- by statute?
 - by treaty or other agreement or arrangement (multilateral or bilateral)?
 - by virtue of reciprocity or comity?
 - Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?
12. In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.
13. In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:
- a. Council of Europe Member States:
 - b. Third party states:
14. Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.