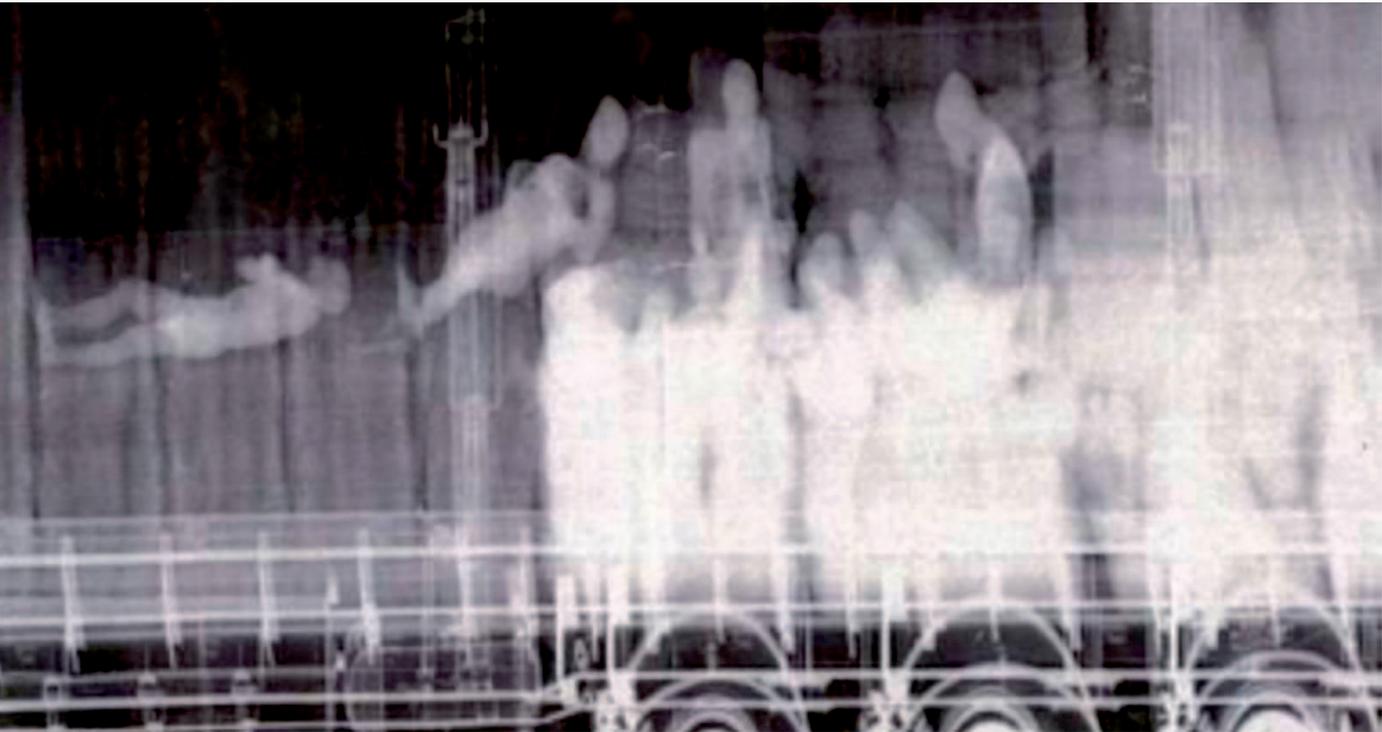




UNODC

United Nations Office on Drugs and Crime



Toolkit to Combat Smuggling of Migrants

Tool 5

Legislative framework

5



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UNITED NATIONS OFFICE ON DRUGS AND CRIME
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Toolkit to Combat Smuggling of Migrants

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Overview

Investigations carried out in different jurisdictions are subject to different legislative frameworks. Ensuring that appropriate authority is sought and legislative procedures are followed can pose an investigative challenge to law enforcers who are seeking to mount investigations efficiently or apply investigative tactics creatively.

In some jurisdictions, specific legislation against the smuggling of migrants exists, while in others the smuggling of migrants may be criminalized under the criminal code. In still others, the smuggling of migrants may not be criminalized in any legal instrument. In the last-mentioned situation, prosecutors may have to rely on alternative offences to secure the conviction of smugglers of migrants.

Tool 5 sets out the legislative framework for criminalizing the smuggling of migrants, for States wanting to give practical domestic effect to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.¹ Tool 5 is divided into sections as follows:

- 5.1 provides a snapshot of the definition of the smuggling of migrants as contained in the Smuggling of Migrants Protocol;
- 5.2 sets out the various acts that States need to criminalize in their domestic legislation in order to implement the Smuggling of Migrants Protocol, in accordance with article 6, paragraph 1 of the Protocol, and recommends some valuable resources that can support the process of criminalizing the smuggling of migrants in domestic legislation;
- 5.3 highlights what conduct is not intended to be criminalized under the Smuggling of Migrants Protocol, as a reminder to States of the need to ensure against legislation against such a conduct;
- 5.4 details some of the other offences that may be committed in the course of the smuggling of migrants and that may be brought as charges in addition to smuggling offences or in their stead where there is no specific legislation against the smuggling of migrants;
- 5.5 serves as a reminder of the need to distinguish between the offences of trafficking in persons and smuggling of migrants in domestic legislation, and reiterates the different elements that comprise the two crimes;
- 5.6 discusses the element of “transnationality”;

¹ United Nations, *Treaty Series*, vol. 2241, No. 39574.

5.7 discusses the element of “organized criminal group”. This section and section 5.6 above explain why these two elements are not essential requirements for convictions for the smuggling of migrants under domestic law;

5.8 discusses the requirement for States also to criminalize aggravating circumstances;

5.9 explains that liability attaches to legal persons;

5.10 underlines the effectiveness of criminalizing the laundering of proceeds from the smuggling of migrants in disrupting smuggling;

5.11 stresses the central place that human rights considerations occupy in legislation against the smuggling of migrants by virtue of the article 19 saving clause;

5.12 offers some practical guidance to legislators by citing a selection of domestic legislation against the smuggling of migrants from around the world.

5.1 Definition of smuggling of migrants

Article 3 of the Smuggling of Migrants Protocol reads as follows:

“Use of terms

For the purposes of this Protocol:

- (a) ‘Smuggling of migrants’ shall 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;
- (b) ‘Illegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;
- (c) ‘Fraudulent travel or identity document’ shall mean any travel or identity document:
 - (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or
 - (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
 - (iii) That is being used by a person other than the rightful holder;
- (d) ‘Vessel’ shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.”

The elements of smuggling of migrants

Article 3 of the Smuggling of Migrants Protocol defines the offence of smuggling of migrants as procuring the illegal entry of a person into a State of which that person is not a national or a permanent resident for the purpose of financial or material gain.

For more information, see Tool 1, section 8 on what constitutes the smuggling of migrants and related conduct and Tool 1, section 9 on what does not constitute the smuggling of migrants.

Recommended resources

The United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime and the text of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime are available from:

www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext

United Nations Office on Drugs and Crime. *Issue Paper: A Short Introduction to Migrant Smuggling.*

This succinct issue paper offers an overview of what smuggling of migrants and related conduct consist in and gives practical examples of smuggling of migrants.

www.unodc.org/unodc/en/human-trafficking/publications.html

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The main purpose of the Legislative Guides is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The Guides lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The Guides have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

5.2 Criminalization of smuggling of migrants (article 6, paragraph 1 of the Smuggling of Migrants Protocol)

Purpose

Article 2 of the Smuggling of Migrants Protocol establishes the basic purposes of the Protocol:

- Preventing and combating the smuggling of migrants
- Protection of the rights of smuggled migrants
- Promotion of cooperation between States parties

Criminalization of smuggling of migrants

Each State party is required to criminalize, when committed intentionally and in order to obtain a financial or other material benefit:

- Conduct constituting the smuggling of migrants (the procurement for material gain of the illegal entry of a person into a State party of which the person is not a national or permanent resident) (art. 3, subpara. (a) and art. 6, para. 1 (a))
- Producing, procuring, providing or possessing fraudulent travel or identity documents when committed for the purpose of enabling smuggling of migrants (art. 6, para. 1 (b))
- Enabling a person to remain in a country where the person is not a national or a permanent resident without complying with requirements for legally remaining by illegal means (art. 6, para. 1 (c))
- Organizing or directing any of the above offences (art. 6, para. 2 (c))
- Attempting to commit any of the above offences, subject to the basic concepts of the State party's legal system (art. 6, para. 2 (a))
- Participating as an accomplice in any of the above offences (art. 6, para. 2 (b))

Each State party is also required:

- To establish as aggravating circumstances to the above offences conduct that is likely to endanger or does endanger the migrants concerned or that subjects them to inhuman or degrading treatment (art. 6, para. 3)
- To apply numerous provisions of the Convention to this conduct (art. 1, paras. 2 and 3)

It is important to underline that only the conduct of those who profit financially or materially from the smuggling of migrants is to be criminalized. The "Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions: Addendum—Interpretative notes for the official

records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto” (A/55/383/Add.1) highlights that the activities of family members or non-governmental or religious groups that support migrants for humanitarian reasons should not be criminalized (see art. 5 and art. 6, para. 4 of the Protocol).

Article 5 clearly states that the illegal migrants themselves must not be held responsible for having been smuggled:

“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.”

It should be noted that the above requirements set the minimum standard. Domestic measures may be broader in scope or more stringent than those required by the Protocol, providing that all the obligations specified in the Protocol have been fulfilled.

The steps required to bring national legislation into compliance with these international instruments may be quite complex, depending on the current state of national law. The United Nations Office on Drugs and Crime (UNODC) has prepared Legislative Guides to inform and facilitate that process. Technical assistance may also be requested from UNODC.

Guidance for legislators from the United Nations Office on Drugs and Crime Model Law against Smuggling of Migrants

Chapter 2 of the UNODC Model Law against Smuggling of Migrants offers guidance on the criminalization of migrant smuggling:

Under article 6 of the Smuggling of Migrants Protocol, States parties are required to criminalize certain conduct. The starting point for understanding this obligation is article 3 of the Protocol, which defines “smuggling of migrants” as:

“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”

It is important to understand that the reference in this definition to “a financial or other material benefit” was included in order to emphasize that the intention was to include the activities of organized 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. As noted in the interpretative notes on the negotiation of the Protocol, it was not the intention of the Protocol to criminalize the activities of the family members or support groups such as religious or non-governmental organizations (A/55/383/Add.1, paras. 88-90).

In summary, pursuant to article 6 of the Protocol, States parties are required to criminalize the following conduct:

- Smuggling of migrants (art. 6, para. 1 (a))
- Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by illegal means (art. 6, para. 1 (c))

- Producing, procuring, providing or possessing fraudulent travel or identity documents when committed for the purpose of enabling smuggling of migrants (art. 6, para. 1 (b))
- Organizing or directing any of the above offences (art. 6, para. 2 (c))
- Attempting to commit any of the above offences, subject to the basic concepts of the State party's legal system (art. 6, para. 2 (a))
- Participating as an accomplice in any of the above offences, subject to the basic concepts of the State party's legal system (art. 6, para. 2 (b))

It is important for drafters to recall that pursuant to article 5, migrants shall not become liable to criminal prosecution under the Smuggling of Migrants Protocol for the fact of having been the object of conduct set forth in article 6 of the Protocol. It is therefore to be understood that all offence provisions developed to give effect to the Protocol should aim to target the smugglers of migrants, and not the people being smuggled.

Finally, it should also be noted that refugees often have to rely on smugglers to flee persecution, serious human rights violations or conflict. They should not be criminalized for making use of smugglers or for their illegal entry (art. 31 of the Convention relating to the Status of Refugees² and art. 19 of the Smuggling of Migrants Protocol). (UNODC *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* (forthcoming).)

Issues to consider when drafting legislation

There is no one ideal drafting option to give effect to these obligations; they could be met through national laws drafted in a variety of ways, provided the key elements of the offences are established.

For example, it is possible to draft omnibus offence provisions covering not only the smuggling of migrants but also enabling illegal residence and document-related offences. In each case, it would be up to the prosecutor to specify which elements of the offence were being prosecuted. An omnibus offence has advantages, including ensuring that the entire smuggling process is covered without leaving any gaps between the offences.

Alternatively, it would be perfectly acceptable to draft provisions for three separate offences: smuggling of migrants, enabling illegal residence and document-related offences. However, care should be taken to ensure that there are no gaps between the various forms of conduct. Also, attention may need to be paid to whether, for example, an offence related to fraudulent documents would be covered both by the provisions for the offence of smuggling of migrants and the provisions for document-related offences, or not.

States should consider whether legislative provisions should differentiate between attempted and completed offences. While the Protocol does refer to “attempting to commit an offence”, there is no requirement for national law to make such a distinction. In fact, on certain practical grounds, it may be preferable for a single provision to cover preparations for smuggling of migrants, attempts at smuggling migrants and the successful commission of the offence. For example, when a strong coastguard presence deters illegal entry into a country by sea, the modus operandi of the smugglers is to take the migrants within sight of land and then dump them into the sea in the assumption that they will either swim to shore or be

² United Nations, *Treaty Series*, vol. 189, No. 2545.

rescued by the coastguard. In these situations, the coastguard will seek to intervene proactively to prevent loss of human life. Should these situations be regarded as attempted smuggling? Arguably, no offence has been committed since no illegal entry has occurred. Therefore, arguably, it might be preferable to cover the entire smuggling process (from preparation to successful completion) under the offence provision.

However, as regulatory approaches to the concepts of preparation for and attempts at committing offences differ from State to State, this issue will need to be resolved in accordance with local drafting traditions.

In some jurisdictions, the 2008 preparation for committing an offence can be criminalized. For example in Thailand, the Anti-Trafficking in Persons Act B.E. 2551 states that whoever prepares to commit an offence under section 6 (trafficking in persons) shall be liable to one third of the punishment stipulated for such an offence. This may be a useful option to consider where consistent with national legal traditions.

Finally, while the Protocol refers to “the illegal entry of a person into a State Party”, it may be more expedient to refer to the illegal entry into any State to avoid restricting the scope of the offence to other parties to the Protocol. When deciding on this issue, it is important to recall that a number of States already have offence provisions that are drafted in this way, such as Australia and the United Kingdom of Great Britain and Northern Ireland. Without a comparable offence in source and transit countries in particular, issues may arise with regard to a lack of dual criminality to support mutual legal assistance or extradition.

Relationship to offences under the Organized Crime Convention

In addition to the basic offences required by the Protocol, it is essential to ensure that national laws adequately criminalize participation in an organized criminal group (art. 5 of the Organized Crime Convention); laundering of the proceeds of crime (art. 6); corruption (art. 8); and obstruction of justice (art. 23). In addition, measures to establish the liability of legal persons must be adopted (art. 10). UNODC is currently developing best practices and model provisions for the implementation of these articles, in the context of the development of a model law to give effect to the Convention.

To see the model criminalization articles provided in the UNODC Model Law against Smuggling of Migrants, see section 5.12 below.

Promising practices

For samples of national legislation criminalizing migrant smuggling, see section 5.12.

Recommended resources

The United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext

United Nations. *International framework for action to implement the Smuggling of Migrants Protocol*.

The Framework for Action is a technical assistance tool that aims to assist United Nations Member States in the effective implementation of the Smuggling of Migrants Protocol supplementing the Organized Crime Convention. The Framework for Action consists of a narrative section describing key challenges in the implementation of the Protocol, and a set of tables detailing measures that can be taken to support implementation.

The Framework is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

United Nations Office on Drugs and Crime. *Issue Paper: A Short Introduction to Migrant Smuggling*.

This succinct issue paper offers an overview of what smuggling of migrants and related conduct consist in and gives practical examples of smuggling of migrants.

www.unodc.org/unodc/en/human-trafficking/publications.html

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The *Legislative Guides* are available from UNODC to assist States in ratifying or implementing the Organized Crime Convention and the Protocols thereto, including the Smuggling of Migrants Protocol.

While the *Legislative Guides* are chiefly directed at policymakers and legislators in States preparing for the ratification and implementation of the Convention and its Protocols, the Guides also provide a helpful basis for bilateral technical assistance projects and other initiatives to promote the broad ratification and implementation of these important legal instruments.

The *Legislative Guides* accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options. However, as the *Guides* are primarily for the use of drafters of legislation, not all provisions of the Convention and its Protocols are addressed. The focus is on those provisions that require legislative change and/or those requiring action prior to or at the time when the Organized Crime Convention or one of its Protocols becomes applicable to the State party concerned.

The *Legislative Guides* lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address; they also provide a range of options and examples that national drafters may wish to consider as they develop legislation to implement the Convention and its Protocols. The *Guides* do not cover the provisions of the Convention and Protocols that do not contain legislative implementation obligations.

The *Legislative Guides* are available from:

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

United Nations Office on Drugs and Crime. *Model Law against Smuggling of Migrants*.

The UNODC Model Law against Smuggling of Migrants is being developed to assist States in implementing the provisions contained in the Smuggling of Migrants Protocol supplementing the Organized Crime Convention. It aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. The Model Law covers not only the criminalization of smuggling of migrants and related offences, but also the different aspects of assistance to victims as well as establishing cooperation between different State authorities and non-governmental organizations. Each provision is accompanied by a detailed commentary, providing several options for legislators, as appropriate, and legal sources and examples.

The model law is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

Bali Process Model Law to Criminalise People Smuggling.

The Bali Process is a voluntary non-binding grouping in the Asia-Pacific region. Its objectives are, inter alia, to improve regional and international cooperation to combat the smuggling of migrants and the enactment of legislation to criminalize the smuggling of migrants.

To these ends, the Bali Process offers the Model Law to Criminalise People Smuggling, available on its website at:

www.baliprocess.net/files/Legislation/Model%20law%20-%20people%20smuggling%20-%20final.pdf

For more information on Bali Process Model Laws visit:

www.baliprocess.net/index.asp?PageID=2145831427

In addition to criminalization of smuggling of migrants and related offences, the Smuggling of Migrants Protocol also requires States to take measures with respect to:

- Providing assistance and protection to smuggled migrants. For more on this, see Tool 8, section 8.1.
- Repatriation. For more on this, see Tool 7, section 7.23.
- Non-refoulement. For more on this, see Tool 8, section 8.11.
- Prevention. For more on this, see Tool 9, section 9.1.
- Cooperation and assistance requirements. For more on this, see Tool 6, sections 6.1 and 6.11.

5.3 Non-criminalization (article 5 of the Smuggling of Migrants Protocol)

The Smuggling of Migrants Protocol does not intend to criminalize:

- The activities of family members or other groups who smuggle a person (or enable or facilitate their stay) without any profit motive
- Irregular migration
- The conduct of migrants who do not smuggle others

It is imperative to remember that the Smuggling of Migrants Protocol in no way criminalizes the migrants themselves for having been smuggled, by virtue of article 5 of the Protocol, which reads:

“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.”

In other words, a person cannot be charged with the crime of smuggling solely on the grounds of having been smuggled. This does not mean that such persons cannot be prosecuted for having smuggled others, or for the commission of any other offences.

The intention of the drafters of the Smuggling of Migrants Protocol was that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to migration itself, even in cases involving entry or residence that is illegal under the laws of the State concerned (see art. 5 and art. 6, para. 4 of the Protocol).

Illegal entry may be a crime in some countries, but it is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. The procurement of the illegal entry or illegal residence of migrants by an organized criminal group (which, according to the definition used, commits crimes in order to obtain financial or other material benefit), on the other hand, has been recognized as a serious form of transnational organized crime and is therefore the primary focus of the Protocol.

The fundamental policy set out by the Protocol is that it is the smuggling of migrants and not migration itself that is the focus of the criminalization and other requirements. The Protocol takes a neutral position in relation to whether those who migrate illegally should be charged with any offences and article 5 ensures that nothing in the Protocol can be interpreted as requiring the criminalization of migrants or of conduct likely to be engaged in by migrants as opposed to members or associates of organized criminal groups.

At the same time, article 6, paragraph 4 ensures that nothing in the Protocol limits the existing rights of each State party to take

“measures against persons whose conduct constitutes an offence under its domestic law.”

Recommended resources

The United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext

United Nations Office on Drugs and Crime. *Model Law against Smuggling of Migrants.*

The UNODC Model Law against Smuggling of Migrants has been developed to assist States in implementing the provisions contained in the Smuggling of Migrants Protocol supplementing the Organized Crime Convention. It aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. The Model Law covers not only the criminalization of the smuggling of migrants and related offences, but also the different aspects of assistance to victims and the establishment of cooperation between different State authorities and non-governmental organizations. Each provision is accompanied by a detailed commentary, providing several options for legislators, as appropriate, and legal sources and examples.

Article 9 of this resource concerns the criminal liability of smuggled migrants. It provides an optional protocol that reads as follows:

“Without prejudice to the applicability of other laws establishing criminal offences, migrants shall not become liable to criminal prosecution under this law for the fact of having been the object of conduct set forth in Chapter 2 of this law.”

The model law is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants.*

The modules contained in this training manual address the concepts and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigation, covert investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions around the world. Module 7 addresses legislative issues including non-criminalization.

This publication is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The *Guides* lay out the basic requirements of the Convention

and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The *Guides* have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

United Nations. *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Sales No. E.06.V.5).

The publication of the *Travaux Préparatoires* (official records) of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto is intended to provide a better, in-depth understanding of the Convention and its Protocols. The publication tracks the progress of negotiations in the open-ended intergovernmental Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, established by the General Assembly by its resolution 53/111 of 9 December 1998 with terms of reference supplemented by the Assembly in its resolution 53/114 of 9 December 1998, and requested to submit the final text of the Convention and the Protocols thereto to the General Assembly for adoption (resolution 54/126).

www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html

5.4 Other offences related to smuggling of migrants

It is highly likely that other offences will have been committed in the course of the smuggling of migrants. Depending on national laws and policies, the investigator may need to investigate all such offences. Alternatively, he or she may seek to prove other offences where not all of the components of the crime of smuggling of migrants can be corroborated.

Beyond this, there may be no national legislation criminalizing the smuggling of migrants as such. In this case, other offences could be investigated and prosecuted instead.

The list below outlines some—but by no means all—of the offences that may be committed in the course of the smuggling of migrants. The list does not presume to be exhaustive, nor to address all different legal systems and national laws. It is meant purely to draw attention to the fact that offences are committed in addition to smuggling of migrants that require attention and may be instrumental in securing the prosecution of a smuggler of migrants.

Transport-related offences

- Transportation without declaring goods in vehicle
- Misrepresentation of cargo or identity at border

Document-related offences and crimes of dishonesty

- Document fraud or forgery
- Dishonest handling (of stolen passports for example)

Immigration-related offences

- Clandestine entry
- False statements to border officer
- Harboursing an immigration offender
- Failure to surrender to immigration bail

Crimes of dishonesty

- Money-laundering
- Theft (such as theft of passports)
- Forgery
- Deception
- Fraud

- Corruption
- Abuse of office

Other criminal offences

- Murder
- Involuntary manslaughter
- Assault
- False imprisonment or unlawful confinement
- Kidnap or abduction
- Drug offences (possession, supply or trafficking)
- Sham marriage
- Perjury (in marriage cases)
- Bigamy (in marriage cases)
- Trafficking in persons
- Participating in an organized criminal group
- Bodily harm or bodily injury
- Sexual offences
- Torture, inhuman or degrading treatment
- Weapons offences
- Endangering lives contrary to dignity
- Obstruction of justice
- Interference with witnesses

Recommended resource

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*.

The modules contained in this training manual address the concepts and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigation, covert investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions around the world. Module 7 addresses other offences which may be used in prosecuting smugglers.

This publication is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

5.5 Distinguishing between trafficking in persons and smuggling of migrants

In legislating to criminalize the smuggling of migrants, it is important to ensure that it is differentiated from trafficking in persons which should also be criminalized.

The crimes of trafficking in persons and that of smuggling of migrants are defined separately in the Protocols supplementing the Organized Crime Convention, and are dealt with in different instruments. This is because of very important differences between the crimes.

There are three key reasons for drafting distinct legislation in relation to these two serious crimes:

- The constituent elements of the offences are different.
- The response required by the authorities varies, depending on the offence.
- There are serious implications in connection with whether a person is recognized as a smuggled migrant or a victim of trafficking.

In practice, it may be difficult to distinguish between a situation of trafficking and a situation of smuggling for many reasons:

- Smuggled migrants may become victims of trafficking.
- Traffickers may also act as smugglers and use the same routes for both trafficking and smuggling.
- Conditions for smuggled persons may be so bad that it is difficult to believe that they gave their consent.

However, there are key differences between trafficking in persons and smuggling of migrants that should be reflected in legislation as shown in table 1 below.

Table 1. Key differences between trafficking in persons and smuggling of migrants

<i>Element</i>	<i>Smuggling of migrants</i>	<i>Trafficking in persons</i>
Consent	Smuggled migrants generally consent to being smuggled (though their consent may be retracted).	Trafficking victims have not consented or their consent is rendered meaningless through use of improper means (the notion of consent is irrelevant with regard to children).
Transnationality	Smuggling involves illegal border crossing and entry into another country.	Trafficking does not necessarily involve crossing a border—the entire trafficking process can occur within one State. When a border is crossed during the trafficking process, the legality or illegality of the border crossing is irrelevant.

Exploitation	The relationship between the smuggler and the migrant usually involves a commercial transaction and usually ends after the border crossing.	The relationship between traffickers and their victims involves ongoing exploitation of the victims to generate profit for the traffickers.
Source of profit	Smugglers generate profit from fees to move people.	Traffickers acquire additional profits through the exploitation of victims.

For more information on trafficking in persons see Tool 1, section 11. To learn how to distinguish between trafficking in persons and smuggling of migrants, see Tool 1, section 12.

Recommended resources

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting Migrant Smuggling*.

The modules contained in this training manual address the concepts and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigation, covert investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions around the world. Module 1 examines the differences between smuggling of migrants and trafficking in persons.

This publication is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

United Nations Office on Drugs and Crime. *Issue Paper: A Short Introduction to Migrant Smuggling*.

This succinct issue paper offers an overview of what smuggling of migrants and related conduct consist of and gives practical examples of smuggling of migrants.

www.unodc.org/unodc/en/human-trafficking/publications.html

United Nations. *Toolkit to Combat Trafficking in Persons* (Sales No. E.08.V.14).

In pursuit of the goals of preventing and combating trafficking in persons, protecting and assisting its victims and promoting international cooperation to these ends, the UNODC *Toolkit to Combat Trafficking in Persons* seeks to facilitate the sharing of knowledge and information among policymakers, law enforcers, judges, prosecutors, victim service providers and members of civil society who are working at different

levels towards these same objectives. Specifically, the *Toolkit* provides guidance, showcases promising practice and recommends resources in thematic areas from around the world. Tool 1.2 of this resource examines the difference between trafficking in persons and smuggling of migrants.

PDF version:

www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuse

Online version:

www.unodc.org/unodc/en/human-trafficking/electronic-toolkit-to-combat-trafficking-in-persons---index.html

5.6 The element of transnationality

It must be borne in mind that:

- While States parties should have to provide for some degree of transnationality and organized crime with respect to most aspects of the Protocol, their prosecutors should not have to prove either element in order to obtain a conviction for smuggling of migrants or any other offence established in accordance with the Convention or its Protocols.
- Smuggling of migrants should be criminalized under domestic legislation even where transnationality and the involvement of organized criminal groups are not present or cannot be proved.

Article 4 (Scope of application) of the Smuggling of Migrants Protocol mentions application of the Protocol to offences that “are transnational in nature”.

In considering transnationality, the nature of smuggling of migrants should also be taken into account. The general principle governing transnationality is that any element of foreign involvement would trigger application of the Convention and the relevant Protocols, even in cases where the offence or offences at hand are purely domestic. In the case of smuggling of migrants, however, without some element of cross-border movement, there would neither be migrants nor smuggling. It should be noted, however, that the same considerations do not apply to the other offences established in accordance with the provisions of the Protocol: falsification or misuse of travel or identity documents and the enabling of illegal residence would trigger application of the instruments whenever the basic requirements of articles 2 and 3 of the Convention and article 4 of the Protocol were met.

Non-inclusion of transnationality in domestic offences

- The element of transnationality is one of the criteria for applying the Convention and the Protocols (art. 3 of the Convention). At the same time, article 34, paragraph 2, provides that offences shall be established in domestic law independently of transnationality. Of course, the definition of smuggling of migrants in this Protocol provides for a crime that involves transborder smuggling. Thus, in general, domestic legislation implementing the Protocol will appropriately include an element of transborder activity. However, the specific transnationality criteria of article 3 of the Convention need not be incorporated into such domestic legislation.

Recommended resources

The United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The *Guides* lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The *Guides* have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

United Nations. *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Sales No. E.06.V.5).

The publication of the *Travaux Préparatoires* (official records) of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto is intended to provide a better, in-depth understanding of the Convention and its Protocols. The publication tracks the progress of negotiations in the open-ended intergovernmental Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, established by the General Assembly by its resolution 53/111 of 9 December 1998 with terms of reference supplemented by the Assembly in its resolution 53/114 of 9 December 1998, and requested to submit the final text of the Convention and the Protocols thereto to the General Assembly for adoption (resolution 54/126).

www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html

5.7 The element of “organized criminal group”

- As with transnationality (see section 5.6 above), the involvement of an organized criminal group need not be required for a domestic prosecution. Thus, the offences established in accordance with the Protocol should apply regardless of whether or not the perpetrators were associated with an organized criminal group and regardless of whether or not involvement with an organized crime group can be proved.
- It must also be noted that article 5 of the Organized Crime Convention requires States to criminalize participation in an organized criminal group.

Article 4 (Scope of application) of the Smuggling of Migrants Protocol mentions application of the Protocol to offences that “involve an organized criminal group”.

This reference, coupled with that in article 6 to “financial or other material benefit” is related to the question as to whether or not the Smuggling of Migrants Protocol requires States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum seekers.

Only smuggling for financial or material benefit is criminalized under the Protocol. Article 4 refers to “an organized criminal group”; the definition of that term in article 2 (a) of the Convention refers to “financial or other material benefit”, language which is specifically reproduced in article 6 of the Protocol, on criminalization.

Regarding the definition of “organized criminal group”, it should be noted that the words “in order to obtain, directly or indirectly, a financial or other material benefit” should be understood broadly, to include, for example, crimes in which the predominant motive may be sexual gratification. This would address situations in which a smuggler of migrants requests sexual favours rather than financial payment for the provision of smuggling services.

Non-inclusion of “organized criminal group” in domestic offences

It has been argued that “smuggling organizations are often little more than loose networks linking largely independent clusters of practical competencies. The coordination among such clusters is often the result of a nexus of contracts and business promises rather than the result of a structured chain of command.”³

This is not in contradiction with the United Nations Transnational Organized Crime Convention, which criminalizes participation in an “organized criminal group” in article 5.

³ Ferruccio, Pastore, Paola Monzini and Giuseppe Sciortino, “Schengen’s soft underbelly? Irregular migration and human smuggling across land and sea borders to Italy”, *International Migration* vol. 44, No. 4, p.114 ff. (September 2006).

Conversely, the involvement of an organized criminal group need not be required as an element for a domestic prosecution. Thus, the offences established in accordance with the Protocol apply regardless of whether or not the perpetrators were associated with an organized criminal group, and regardless of whether or not involvement with an organized criminal group can be proved.

Article 34, paragraph 2 of the Organized Crime Convention states that offences established by the Convention

“shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5⁴ of this Convention would require the involvement of an organized criminal group.”

Recommended resources

The United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

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www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

United Nations. *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Sales No. E.06.V.5).

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⁴ Criminalization of participation in an organized criminal group.

intergovernmental Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, established by the General Assembly by its resolution 53/111 of 9 December 1998 with terms of reference supplemented by the Assembly in its resolution 53/114 of 9 December 1998, and requested to submit the final text of the Convention and the Protocols thereto to the General Assembly for adoption (resolution 54/126).

www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html

5.8 Criminalization of aggravating circumstances, (article 6, paragraph 3)

Article 6, paragraph 3 of the Smuggling of Migrants Protocol requires States parties to adopt legislative and other measures to establish as aggravating circumstances to the offences of smuggling of migrants:

- Circumstances that endanger or are likely to endanger the lives or safety of the migrants concerned
- Inhuman or degrading treatment, including for exploitation of migrants

Examples of aggravating circumstances may include (but are not limited to):

- Abuse of a child or abuse of a position of trust or authority
- Connections with other crimes such as drug smuggling: for instance, migrants may be compelled to carry drugs when they are smuggled
- Conditions in which migrants are smuggled if, for example, the boat, bus or car was particularly hot, cold, wet, dry or crowded, or if the current at sea was particularly strong

Without adding further offences, States parties are also required to incorporate provisions into some of the offences established in accordance with the Protocol ensuring that cases where certain circumstances have been present are taken more seriously. The obligation is fully mandatory for all offences except those participating as an accomplice and organizing or directing others to commit offences, which are subject to the basic concepts of the legal system of the implementing State party (see below).

Generally, legislatures are required to establish dangerous or degrading circumstances as aggravating circumstances to smuggling offences. Depending on the legal system, this could take the form either of parallel offences, such as aggravated smuggling, or of provisions that require the courts to consider longer or more severe sentences where the aggravating conditions are present and the accused have been convicted of one or more of the basic offences established in accordance with the Protocol. The fundamental obligation is to ensure that, where the aggravating circumstances are present, offenders at least risk harsher punishments.

In most systems, subjecting offenders to a harsher punishment where the specified circumstances have existed will require that those circumstances be established as a matter of fact to a criminal standard of proof. Depending on domestic law, drafters may wish to consider making specific provisions regarding what must be proved, to what standard and at what stage of the proceedings, as well as establishing any relevant inferences or legal or evidentiary presumptions.

The most common situation that this requirement is intended to cover is the use of modes of smuggling, such as shipping containers, that are inherently dangerous to the lives of the migrants,

but legislation should be broad enough to encompass other circumstances, such as cases where fraudulent documents create danger or lead to inhuman or degrading treatment.

“Inhuman or degrading treatment” may include treatment inflicted for the purposes of some form of exploitation. It should be noted that if there is no consent or if there is consent that has been vitiated or nullified as provided for in article 3, subparagraphs (b) or (c), of the Trafficking in Persons Protocol, the presence of exploitation in what would otherwise be a smuggling case will generally make the offence of trafficking in persons applicable if the State party concerned has ratified and implemented that Protocol. The interpretative notes indicate that the reference to exploitation here is without prejudice to that Protocol (A/55/383/Add.1, para. 96).

Aggravating and mitigating factors are generally matters for prosecutors and the judiciary, with law enforcement authorities playing a key role. They are factors to be considered during trial and sentencing. Aggravating and mitigating factors as considerations for sentencing are dependent on relevant evidence gathered by the investigators within the crime investigation arena.

The presence of either aggravating or mitigating factors may have an impact on the priority consideration for commencing investigations. If an investigator is handling several cases, an aggravating factor may be what leads one investigation to be given a higher priority than another. Similarly, mitigating factors may lead to a decision not to invest resources in a particular investigation.

Some of the aggravating and mitigating factors that could influence investigations are given in table 2 below. It must be remembered that these factors and their relevance can only be determined on a case-by-case basis. They may only assist in determining if an investigation should be pursued or prioritized; the judiciary concerned will ultimately have to consider similar issues at the time of any sentencing.

Table 2. Aggravating and mitigating factors that could influence investigations

<i>Aggravating factor</i>	<i>Mitigating factor</i>
Methodology: high level of risk to those smuggled, for example people sent out unattended in a boat that is not seaworthy	Smugglers treat migrants well
Large number of migrants involved	One-off occasion (for example, young offender with no criminal record)
Poor travel conditions (lack of air, water or food, extremely hot or extremely cold temperatures, unsafe sea conditions)	Smugglers take steps to ensure safe travel conditions for migrants
High profit (for example, sole income is profit)	Low profit
Use of violence, threats or intimidation against migrants or their families. For example, hitting migrants to control them during travel	No use of violence

Table 2. Aggravating and mitigating factors that could influence investigations (continued)

<i>Aggravating factor</i>	<i>Mitigating factor</i>
Exploitation of migrants or potential for trafficking in persons	Arrangement between smuggler and migrant is upheld
Abuse of power or authority (for instance, baggage handler, airport staff, offence committed by public official)	
Minority age of migrants or use of minors in the commission of offences	
Commission of other offences (for instance, violence towards smuggled migrants, sexual assault during travel, migrants compelled to smuggle drugs or guns)	
Uncooperative with police	Cooperative with police

Where other offences are committed, investigators must remember to investigate those offences as well. The commission of an assault during a migrant smuggling venture is not simply an aggravating factor: it is an offence in its own right and should be investigated as if it had occurred separately.

Recommended resources

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting Migrant Smuggling*.

The modules contained in this training manual address the concepts and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigation, covert investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions around the world. Module 1 examines the differences between smuggling of migrants and trafficking in persons.

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United Nations Office on Drugs and Crime. *Issue Paper: A Short Introduction to Migrant Smuggling*.

This succinct issue paper offers an overview of what smuggling of migrants and related conduct consist of and gives practical examples of smuggling of migrants.

www.unodc.org/unodc/en/human-trafficking/publications.html

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The *Guides* lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The *Guides* have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

5.9 Liability of legal persons

Liability for offences must be established both for natural or biological persons and for legal persons, such as corporations, in accordance with article 10 of the Organized Crime Convention.

Requirements under the Organized Crime Convention

Article 10, paragraph 1 of the Organized Crime Convention requires that each State party adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with the Convention itself.

Therefore, the obligation to provide for the liability of legal entities is mandatory, to the extent that this is consistent with each State's legal principles, in three types of cases:

- For participation in serious crimes involving an organized criminal group
- For other offences established by States parties as required by the Convention itself
- For offences established by any protocol to which the State is, or intends to become, a party, including the Smuggling of Migrants Protocol

Article 10, paragraph 2 of the Convention provides that “subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative”. This is consistent with other international initiatives, which acknowledge and accommodate the diversity of approaches adopted by different legal systems with respect to the liability of legal entities. Thus, there is no obligation to establish criminal liability if that is inconsistent with a State's legal principles. In such cases, a form of civil or administrative liability will be sufficient to meet the requirement.

Article 10, paragraph 3 of the Convention requires that the liability of legal entities be established “without prejudice to the criminal liability of the natural persons who have committed the offences”.

The liability of the natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not be affected at all by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction both the individual and the legal entity.

Article 10, paragraph 4 of the Convention requires that States “ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions”.

This is a specific provision that complements the more general requirement of article 11, paragraph 1 that sanctions must take into account the gravity of the offence.

The investigation and prosecution of transnational organized crimes can be comparatively lengthy. Consequently, States with legal systems providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention and the Protocols are comparatively long, taking into account and in accordance with their domestic law and fundamental principles (art. 11, para. 5). While the provisions of article 11 apply to both natural and legal persons, those of article 10 apply only to legal persons.

The most frequently used sanction is a fine, which is sometimes characterized as criminal, sometimes as non-criminal and sometimes as hybrid. Other sanctions include forfeiture, confiscation, restitution or even closing down of legal entities. In addition, States may wish to consider the non-monetary sanctions available in some jurisdictions, such as withdrawal of certain privileges, suspension of certain rights, prohibition of certain activities, publication of the judgement, the appointment of a trustee and direct regulation of corporate structures.

Recommended resource

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The *Guides* lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The *Guides* have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

5.10 Criminalization of the laundering of proceeds of smuggling of migrants

In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the parent Convention.

The provisions of the Convention apply to the Protocol, *mutatis mutandis*, and among States parties to the Protocol the offences established in accordance with the Protocol are to be considered offences established in accordance with the Convention.

Application of these provisions creates an obligation upon States parties, *inter alia*, to take the measures below with respect to the offences established in accordance with the Protocol.

States parties must criminalize the laundering of the proceeds of a comprehensive range of offences in accordance with article 6 of the Convention.

A State's strategy to combat the smuggling of migrants should include rigorous confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property. However, organized criminal groups, including those involved in the smuggling of migrants, may try to avoid confiscation of their illegally gained wealth by disguising the criminal origins of their assets. Criminalizing such laundering of proceeds of the smuggling of migrants is an important part of the strategy to combat the crime.

Article 6 of the Organized Crime Convention requires that each State establish the following four offences related to money-laundering:

- Conversion or transfer of property for the purpose of concealing its illicit origin
- Concealment or disguise of the proceeds of crime
- Acquisition, possession or use of the proceeds of crime
- Indirect contribution to the commission of the offences outlined above, including participation in and conspiring or attempting to commit the offences in question.

Predicate offences

A predicate offence is an offence whose proceeds may become the subject of any of the money-laundering offences established under the Convention. Many States already have laws on money-laundering, but there are many variations in the definition of predicate offences. Some States limit the predicate offences to drug trafficking, or to drug trafficking and a few other crimes. Other States have an exhaustive list of predicate offences set forth in their legislation. Still other States define predicate offences generically as including all crimes, or all serious crimes, or all crimes subject to a defined penalty threshold.

Article 6, paragraph 2 (a), of the Organized Crime Convention requires that the provisions concerning money-laundering should be applicable to the “widest range of predicate offences”, including the offences established by the Convention itself and the Protocols to which the State has become a party, as well as all serious crime (art. 6, para. 2 (b)) as defined by the Convention.

Other measures to combat money-laundering

Article 7 of the Organized Crime Convention requires States parties to take additional measures. They shall:

- Establish a regulatory and supervisory regime for banks and non-bank financial institutions, emphasizing requirements for customer identification, record-keeping and the reporting of suspicious transactions
- Ensure that administrative, regulatory, law enforcement and other authorities have the ability to cooperate and exchange information
- Promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities
- Use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering
- Consider implementing measures to detect and monitor movements of cash and appropriate negotiable instruments across their borders, such as a requirement that individuals and businesses report substantial cross-border transfers

Recommended resources

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The *Guides* lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The *Guides* have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

An overview of the United Nations Conventions and other international standards concerning anti-money-laundering legislation is available from:

www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html

United Nations model legislation on laundering, confiscation and international cooperation in relation to the proceeds of crime is available from:

www.unodc.org/unodc/en/money-laundering/Model-Legislation.html

5.11 Human rights and anti-smuggling legislation

Article 19 of the Smuggling of Migrants Protocol adds the saving clause, which clarifies that the Protocol does nothing to undermine the human rights of migrants.

Smuggling of Migrants Protocol

Article 19. Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* and the principle of non-refoulement as contained therein.
2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

*United Nations, *Treaty Series*, vol. 606, No. 8791.

Furthermore, victims and witnesses are to be protected from potential retaliation or intimidation under the provisions of articles 24 and 25 of the Convention.

For more on human rights, see Tool 8, section 9.

Recommended resources

Platform for International Cooperation on Undocumented Migrants. *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework* (2007).

The purpose of this overview is to present a comprehensive picture of the “international migration regime” and to offer a useful tool that can be used by a wide range of actors to strengthen their knowledge of undocumented migrants’ human rights. It is divided into two parts. Part I lists instruments within the international and European human rights frameworks and clarifies why and how these instruments uphold the human rights of undocumented migrants. Part II enumerates in more detail all of the human

rights that apply to undocumented migrants within the international and European conventions and lists the relevant articles.

This publication is available from: www.picum.org/?pid=210

United Nations Office on Drugs and Crime. *Basic Training Manual on Investigating and Prosecuting Migrant Smuggling*.

The modules contained in this training manual address the concepts and categories of smuggling of migrants, the role of smuggled migrants and smugglers of migrants in the criminal justice process, investigative approaches, financial investigation, covert investigative techniques, intelligence, legislative issues, international cooperation and human rights. The modules are the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions around the world. Module 1 examines the differences between smuggling of migrants and trafficking in persons.

This publication is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

United Nations Office on Drugs and Crime. *Model Law against Smuggling of Migrants*.

The UNODC Model Law against Smuggling of Migrants is being developed to assist States in implementing the provisions contained in the Smuggling of Migrants Protocol supplementing the Organized Crime Convention. It aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. The Model Law covers not only the criminalization of smuggling of migrants and related offences, but also the different aspects of assistance to victims as well as establishing cooperation between different State authorities and non-governmental organizations. Each provision is accompanied by a detailed commentary, providing several options for legislators, as appropriate, and legal sources and examples.

The model law is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

5.12 Promising practices: legislation criminalizing smuggling of migrants

United Nations Office on Drugs and Crime Model Law against Smuggling of Migrants

Below is an excerpt from the draft UNODC Model Law against Smuggling of Migrants.

UNODC Model Law against Smuggling of Migrants

Article 5A: Smuggling of migrants

(1) Any person who intentionally, in order to obtain directly or indirectly a financial or material benefit, procures the illegal entry of a person into a Protocol State of which the person is not a national or a permanent resident, commits an offence punishable by [insert penalty].

(2) For the purposes of (1), "illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

Article 5B: Offences in relation to travel or identity documents

(1) Any person who intentionally, in order to obtain directly or indirectly a financial or other material benefit, produces, procures, provides or possesses a fraudulent travel or identity document, for the purpose of enabling the smuggling of migrants, commits an offence.

(2) For the purposes of (1), "fraudulent travel or identity document" shall mean any travel or identity document:

- (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or
- (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner;
- (iii) That is being used by a person other than the rightful holder.

Article 5C: Enabling illegal residence

Any person who intentionally, in order to obtain directly or indirectly a financial or material benefit, uses illegal means to enable a person who is not a national or a permanent resident to remain in the State without complying with the necessary requirements for legally remaining in the State, commits an offence.

Article 5D: Attempts

Any person who attempts to commit an offence under this Chapter is subject to [insert penalty].

Article 5E: Participating as an accomplice

Any person who participates as an accomplice to an offence under this Chapter is subject to [insert penalty].

Article 5F: Organizing or directing

Any person who organizes or directs another person or persons to commit an offence under this Chapter is subject to [insert penalty].

Article 5G: Smuggling of migrants and enabling illegal stay

(1) Any person who intentionally, in order to obtain directly or indirectly a financial or material benefit, engages in conduct for the purpose of procuring, facilitating or promoting the actual or intended entry into, transit across or stay in [insert name of State] or a Protocol State of another person in breach of immigration law commits an offence.

(2) For the purposes of subsection (1), "immigration law" includes a law which has effect in [insert name of State] or in any Protocol State and which controls, in respect of some or all persons who are not nationals of that State's entitlement to enter, transit across or stay in the State;

(3) A document issued by the Government of a Protocol State certifying a matter of law in that State:

- (a) shall be admissible in proceedings for an offence under this article and;
- (b) shall be conclusive as to the matter certified.

Article 5H: Offences in relation to fraudulent travel or identity documents

(1) Any person who intentionally, in order to obtain directly or indirectly a financial or other material benefit, engages in conduct for the purpose of offering, distributing, producing, procuring, providing or possessing a fraudulent travel or identity document, in circumstances where the person knows or should reasonably have known or suspected that the document is to be used for the purpose of enabling the smuggling of migrants, commits an offence punishable by [insert penalty].

Article 5I: Offences in relation to smuggling of migrants

(1) Any person who intentionally, in order to obtain directly or indirectly, a financial or other material benefit, engages in conduct for the purpose of enabling a person who is not a national or a permanent resident of [insert name of State] or of a Protocol State to enter, transit across or be in that State in breach of immigration law commits an offence.

(2) For the purpose of subsection (1), "immigration law" includes a law which has effect in [insert name of State] or the Protocol State and which controls, in respect of some or all persons who are not national of that State entitlement to enter, transit across or be in the State.

(3) A document issued by the government of a Protocol State certifying a matter of law in that State:

- (a) shall be admissible in proceedings for an offence under this article; and
- (b) shall be conclusive as to the matter certified.

(4) A person convicted under (1) is subject to a penalty of [insert penalty range to allow sufficient judicial discretion to deal appropriately with a range of conduct].

To read the commentary on the above model suggestions, refer to the UNODC Model Law against Smuggling of Migrants

This Model Law is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

Below are selected examples of national laws that criminalize the smuggling of migrants. No particular approach is offered here as the definitive correct approach; rather, the selection is offered to provide guidance to States seeking to domestically implement the requirements of the Smuggling of Migrants Protocol. The provisions listed below are excerpts; for the full law please refer to the original legislation.

Argentina

Ley de Migraciones, Ley 25.871 arts. 116-121, of 17 December 2003.

www.gema.com.ar/ley25871.html

Australia

Australia has strict anti-smuggling legislation with penalties of imprisonment for up to 20 years. The Criminal Code Act 1995 includes a variety of offences under the umbrella of people smuggling. Division 73 includes the offence of people smuggling and aggravated offences of people smuggling.

The details are as follows:

Criminal Code Act 1995 (sects. 73.1-73.3)

Division 73—People smuggling and related offences

Subdivision A—People smuggling offences

73.1 Offence of people smuggling

- (1) A person (the first person) is guilty of an offence if:
 - (a) the first person organises or facilitates the entry of another person (the other person) into a foreign country (whether or not via Australia); and
 - (b) the entry of the other person into the foreign country does not comply with the requirements under that country's law for entry into the country; and
 - (c) the other person is not a citizen or permanent resident of the foreign country; and

- (d) the first person organises or facilitates the entry:
 - (i) having obtained (whether directly or indirectly) a benefit to do so; or
 - (ii) with the intention of obtaining (whether directly or indirectly) a benefit.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) Absolute liability applies to the paragraph (1)(c) element of the offence.
- (3) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of people smuggling.

73.2 Aggravated offence of people smuggling (exploitation etc.)

(1) A person (the first person) is guilty of an offence if the first person commits the offence of people smuggling in relation to another person (the victim) and any of the following applies:

- (a) the first person commits the offence intending that the victim will be exploited after entry into the foreign country (whether by the first person or another);
- (b) in committing the offence, the first person subjects the victim to cruel, inhuman or degrading treatment;
- (c) in committing the offence, the first person's conduct:
 - (i) gives rise to a danger of death or serious harm to the victim; and
 - (ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

73.3 Aggravated offence of people smuggling (at least 5 people)

- (1) A person (the first person) is guilty of an offence if:
 - (a) the first person organises or facilitates the entry of a group of at least 5 persons (the other persons) into a foreign country (whether or not via Australia); and
 - (b) the entry of at least 5 of the other persons into the foreign country does not comply with the requirements under that country's law for entry into that country; and
 - (c) at least 5 of the other persons whose entry into the foreign country is covered by paragraph (b) are not citizens or permanent residents of the foreign country; and
 - (d) the first person organises or facilitates the entry:
 - (i) having obtained (whether directly or indirectly) a benefit to do so; or
 - (ii) with the intention of obtaining (whether directly or indirectly) a benefit.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

(2) Absolute liability applies to the paragraph (1)(c) element of the offence.

www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html

It also criminalizes the organized illegal movement of persons from or through Australia, as well as the involvement of Australian residents in such activities offshore.

The Migration Act 1958 also sets out a variety of offences related to smuggling. Specifically, sections 232A to 233A relate to the offence of smuggling, and cover for example:

- Bringing of groups of non-citizens into Australia (punishable by imprisonment for 20 years)
- Persons concerned in bringing non-citizens into Australia in contravention of the Act or harbouring illegal entrants (with a penalty of imprisonment for 10 years)
- Other offences relating to groups of non-citizens etc. (with a penalty of imprisonment for 20 years).

The Migration Act 1958 (sects. 228-233) provides for offences involving people smuggling and using fraudulent documents to enter Australia. These offences carry penalties on conviction of up to 20 years imprisonment and/or a fine. The harbouring or concealing of unlawful non-citizens in Australia is also a serious offence under the Act.

The Migration Act 1958 is available from:

www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/

Austria

Fremdenpolizeigesetz, BGBl. Nr. 100/2005 geändert durch BGBl. Nr. 135/2009, arts. 114-118:

Article 114

(1) Any person who knowingly assists in the unlawful entry or transit of an alien into or through a Member State of the European Union or neighbouring State of Austria shall be liable to a term of imprisonment not exceeding one year imposed by a court.

(2) Any person who assists in the unlawful entry or transit of an alien into or through a Member State of the European Union or neighbouring State of Austria with the intention of unlawfully enriching himself or a third party through payment made to that end shall be liable to a term of imprisonment not exceeding two years imposed by a court.

(3) Any person who, in the last five years, has been convicted of trafficking in migrants within the meaning of paragraph 2 shall be liable to a term of imprisonment not exceeding three years. This shall include any conviction by a foreign court in proceedings conducted in accordance with the principles laid down in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

(4) Any person who commits the act as referred to in paragraph 2 for business purposes (article 70 of the Criminal Code) or in such a way that the alien concerned is subjected

to painful conditions for a long period, in particular during transportation, shall be liable to a term of imprisonment of between six months and five years imposed by a court.

(5) Any person who commits the act as referred to in paragraph 2 as the member of a criminal association, or in such a way that the life of the alien to whom the criminal act relates is endangered, shall be liable to a term of imprisonment of between 1 and 10 years imposed by a court.

(6) Aliens whose unlawful entry or transit is assisted by the act shall not be penalised as parties to the offence (article 12 of the Criminal Code). Their expulsion or deportation may be delayed where and in so far as this is necessary in order to question them as to the facts of the case.

(7) Where a delay would be dangerous, the agencies responsible for maintaining public security shall be authorised temporarily to impound items which the perpetrator has with him or means of transport or containers used to commit the act in order to ensure confiscation of the enrichment (article 20 of the Criminal Code), forfeiture (article 20b of the Criminal Code) or seizure (article 26 of the Criminal Code). The cargo of the means of transport may be handed over to the holder of the vehicle registration document or his agent. The court shall be informed immediately of the measures which are taken.

(8) The courts of first instance shall be responsible for proceedings in connection with the act referred to in paragraph 1.

Article 115—Assisting unauthorised residence

(1) Any person who, with the intention of preventing the procedure for issuing or implementing measures terminating residence, facilitates an alien's unlawful residence in the territory of a Member State of the European Union shall be liable to a term of imprisonment not exceeding six months or to a fine not exceeding 360 on the scale of daily penalty units imposed by a court.

(2) Any person who, with the intention of enriching himself or a third party through payment of a more than negligible amount made to that end, facilitates an alien's unlawful residence in the territory of a Member State of the European Union shall be liable to a term of imprisonment not exceeding one year or to a fine not exceeding 360 on the scale of daily penalty units imposed by a court.

(3) Any person who commits the act for business purposes shall be liable to a term of imprisonment not exceeding three years.

(4) The alien who benefited or was intended to benefit from the assistance as referred to in paragraphs 1 or 2 shall not be penalised as a party to the offence.

(5) The courts of first instance shall be responsible for proceedings in connection with the acts referred to in paragraphs 1 and 2.

Article 116—Exploitation of an alien

(1) Any person who, with the intention of procuring for himself or a third party a regular income by taking advantage of the particular dependency of an alien who is

residing unlawfully in Austria, has no work permit, or is otherwise in a state of particular dependency, exploits that alien, shall be liable to a term of imprisonment not exceeding three years imposed by a court.

(2) Any person who, through that act, subjects an alien to deprivation, or exploits a large number of aliens, shall be liable to a term of imprisonment of between six months and five years.

(3) Where the act results in the death of an alien, the perpetrator shall be liable to a term of imprisonment of between 1 and 10 years.

Article 117—Entry into and arrangement of marriages for residence purposes

(1) An Austrian or an alien entitled to establish himself in Austria who enters into a marriage with an alien without the intention of leading a family life within the meaning of article 8 of the ECHR and is, or must have been, aware that the alien intends to rely on this marriage to obtain or retain a residence permit, to acquire Austrian nationality, or to prevent measures terminating residence, shall, where the act is not subject to a more stringent penalty under a different provision, be liable to a fine not exceeding 360 on the scale of daily penalty units imposed by a court.

(2) An Austrian or an alien entitled to establish himself in Austria who, with the intention of unlawfully enriching himself or a third party through payment made to that end, enters into a marriage with an alien without the intention of leading a family life within the meaning of article 8 of the ECHR and is, or must have been, aware that the alien intends to rely on this marriage to obtain or retain a residence permit, to acquire Austrian nationality, or to prevent measures terminating residence, shall, where the act is not subject to a more stringent penalty under a different provision, be liable to a term of imprisonment not exceeding one year or to a fine not exceeding 360 on the scale of daily penalty units imposed by a court.

(3) Any person who arranges or sets up marriages for business purposes even though he is, or must have been, aware that the persons concerned will rely on this marriage to obtain or retain a residence permit, to acquire Austrian nationality, or to prevent measures terminating residence, but does not intend to lead a family life within the meaning of article 8 of the ECHR shall, where the act is not subject to a more stringent penalty under a different provision, be liable to a term of imprisonment not exceeding three years imposed by a court.

(4) The alien who intends to rely on the marriage within the meaning of paragraph 1 shall not be penalized as a party to the offence.

(5) Any person who voluntarily cooperates in establishing the facts of the case before an authority responsible for criminal prosecution learns of his guilt shall not be penalized under paragraph 1.

Article 118—Adoption for residence purposes and arrangement of adoptions for residence purposes of sui juris aliens

(1) An Austrian or an alien entitled to establish himself in Austria who adopts a sui juris alien and submits an application for approval of that adoption to the wardship court

even though he is, or must have been, aware that the alien will rely on this adoption to obtain or retain a residence permit, to acquire Austrian nationality, or to prevent measures terminating residence, but does not intend to maintain a relationship similar to that between natural parents and children, shall, where the act is not subject to a more stringent penalty under a different provision, be liable to a fine not exceeding 360 on the scale of daily penalty units imposed by a court.

(2) An Austrian or an alien entitled to establish himself in Austria who, with the intention of unlawfully enriching himself or a third party through payment made to that end, adopts a sui juris alien even though he is, or must have been, aware that the alien will rely on this adoption to obtain or retain a residence permit, to acquire Austrian nationality, or to prevent measures terminating residence, but does not intend to maintain a relationship similar to that between natural parents and children, shall, where the act is not subject to a more stringent penalty under a different provision, be liable to a term of imprisonment not exceeding one year or to a fine not exceeding 360 on the scale of daily penalty units imposed by a court.

(3) Any person who arranges or sets up adoptions as referred to in paragraphs 1 or 2 for business purposes (article 70 of the Criminal Code) even though he is, or must have been, aware that the persons concerned will rely on this adoption to obtain or retain a residence permit, to acquire Austrian nationality, or to prevent measures terminating residence, but does not intend to maintain a relationship similar to that between natural parents and children, shall, where the act is not subject to a more stringent penalty under a different provision, be liable to a term of imprisonment not exceeding three years imposed by a court.

(4) The adopted child shall not be penalised as a party to the offence under paragraph 1.

(5) Any person who voluntarily cooperates in establishing the facts of the case before an authority responsible for criminal prosecution learns of his guilt shall not be penalized under paragraph 1.

Belgium

Article 77bis of the Belgian Law of 15 December 1980 concerning the access to the territory, the residence, the settlement and the removal of foreigners

“Helping, in one way or another, either directly or through an intermediary, a person who is not a national of a Member State of the European Union, to enter into, transit over or reside on the territory of such an aforementioned Member State, or of a State party to an international agreement on the crossing of the external borders that is binding on Belgium, in violation of the legislation of the said State, with the aim to obtaining, either directly or indirectly, a profit”.

Bosnia and Herzegovina

Criminal Code of Bosnia and Herzegovina (2003), article 189 on smuggling of persons:

“Whoever, for financial or material benefit, engages in illegal transport of other persons across the state border, or whoever enables another person to cross the border illicitly, shall be punished by imprisonment for a term between six months and five years.”

www.iccnw.org/documents/criminal-code-of-bih.pdf

Brazil

Ley 6815/80 (art. 125)

<http://lba.inpa.gov.br/lba/documentos/Lei681580.pdf>

Bulgaria

Penal Code, article 280:

Art. 280. (Amend. and suppl., SG 28/82; revoked SG 37/89; New SG 62/97)

(1) Who takes across the border of the country individuals or groups of people without permit of the respective bodies of the authority or, though by a permit but not at the places determined for that purpose, shall be punished by imprisonment of one to six years and a fine of five hundred to one thousand levs.

(2) The punishment shall be imprisonment of one to ten years, a fine of one thousand to three thousand levs and a confiscation of a part or the whole property of the perpetrator if:

1. a person who has not accomplished 16 years of age has been taken across the border;
2. the transfer has taken place without the consent of the person;
3. the person transferred across the border is not a Bulgarian citizen;
4. motor, air or other vehicle has been used;
5. the transfer has been organized by a group or organization or has been fulfilled with the participation of an official who has used his official status.

(3) In the cases of para. 2, item 4 the vehicle shall be seized in favour of the state if it has been owned by the perpetrator.

Art. 281. (Amend., SG 28/82; revoked SG 37/89)

www.mvr.bg/NR/rdonlyres/330B548F-7504-433A-BE65-5686B7D7FCBB/0/04_Penal_Code_EN.pdf

Canada

Immigration and Refugee Protection Act (2001). Below are excerpts from sections 117 to 121.

Organizing entry into Canada

117 (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

Penalties—fewer than 10 persons

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(a) on conviction on indictment

- i. for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both; or
- ii. for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

Penalty—10 persons or more

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

Offence—trafficking in persons

118. (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

Disembarking persons at sea

119. A person shall not disembark a person or group of persons at sea for the purpose of inducing, aiding or abetting them to come into Canada in contravention of this Act.

Penalties

120. A person who contravenes section 118 or 119 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

Aggravating factors

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

- (a) bodily harm or death occurred during the commission of the offence;
- (b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
- (c) the commission of the offence was for profit, whether or not any profit was realized; and
- (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

Sections 122 establishes that no persons shall, in order to contravene the Immigration and Refugee Protection Act, possess or use, import, export or deal in, a passport, visa or other document of Canadian or foreign origin. The penalty for the offence is up to 5 years' imprisonment in the case of possession of documents to contravene that Act and up to 14 years' imprisonment in the case of using documents to contravene that Act for the purpose of entering or remaining in Canada or for importing, exporting or dealing in such documents.

Section 127 makes it illegal to communicate directly or indirectly, by any means, false or misleading information with intent to induce or deter immigration to Canada. The penalty for that offence on conviction on indictment is up to 5 years' imprisonment and/or a fine not exceeding \$100,000. On summary conviction the penalty is up to 2 years' imprisonment and/or a fine not exceeding \$50,000.

www.canamglobal.com/indexacts2.html

Costa Rica

Below is an excerpt from an International Organization for Migration (IOM) press release on a new immigration law in Costa Rica.

“Migrant smugglers now face prison terms of two to six years under Costa Rica’s new immigration law, which was recently approved by the National Assembly and signed by President Oscar Arias.

“The IOM Regional Office in San José, acting on a request from the Costa Rican Government, provided technical expertise to legislators, including support on issues related to the protection of migrants, migration management, human trafficking and migrant smuggling. Several specific recommendations of IOM related to migrant smuggling and human trafficking were integrated into the final text.

“The new law, which takes effect in February 2010, now defines and recognizes migrant smuggling and human trafficking as two separate but inter-connected crimes.”

International Organization for Migration, “Costa Rica’s new immigration law provides jail terms for migrant smugglers”, 25 August 2009, available from www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAM/cache/offonce;jsessionid=B0BDE905339DA4AA3E79C1310EC4EA3B.worker01?entryId=25992

Ley de Migración y Extranjería, No. 8487, articles 245-247 (2005):

Article 245

Imprisonment of two to six years will be imposed to any person who: a) With intent to smuggle, guides or transports people in or out of the country through locations unauthorized by the General Directorate, evading the established migration posts or using fake documents. b) Who, for the purpose of trafficking in persons shelters, hides, or conceals foreign people who have entered or remain in the country irregularly.

This punishment will increase by one third if the author or accomplice is a public officer or whenever children are involved in the execution of such crimes.

Article 246

Real estate or goods such as vehicles, instruments, equipment and other objects used in committing the above crime will be seized or confiscated depending on the case. If requested, such goods may be transferred to the Ministry of the Interior and Police, which will secure them to avoid possible deterioration and destruction. The Ministry may use the goods to fulfil the purposes of the General Migration Directorate. The Ministry may also manage them or set up a trust fund for them in a bank of the National Banking System. In case of a guilty sentence, the goods used in the perpetration of the crime will be confiscated and the national registry will process the appropriate registration.

Article 247

Any foreigner who has entered the Costa Rican territory without fulfilling the conditions for its entrance and remains in the country irregularly, and has been a victim, suffered damage from or witnessed an act of trafficking in persons, irregular immigration, or sexual exploitation, will be exempt from administrative responsibility and will not be deported or expelled if he or she cooperates with the migration authorities in denouncing the authors or accomplices of such trafficking, and the police authorities in providing them with the necessary information or testifying in the trial against the perpetrators. It will be the General Directorate's prerogative to grant such benefit, or agree on the repatriation of such people.

From the Penal Code:

- Article 359. Forgery of public and authentic documents
- Article 360. Ideological forgery
- Article 363. Use of false document

Ley General de Migración y Extranjería (1987)

- Article 86 of the General Law on Migration and Alien Affairs stipulates that foreigners using false documents in the migration process will be deported.
- Article 98 stipulates that employers issuing forged contracts will be penalized with imprisonment.
- Article 118, subparagraph 2 stipulates deportation for the offence of using false documents in the migration process.
- Article 119 provides for foreigners to be deported to their country of origin or a third country that will admit them.

Croatia

From the Criminal Code:

Illegal Transfer of Persons Across the State Border

Article 177

(1) Whoever, for lucrative purposes, illicitly transfers across the state border a person or a number of persons shall be punished by a fine or by imprisonment not exceeding three years.

(2) If during the perpetration of the criminal offense referred to in paragraph 1 of this Article, the lives and the security of persons transferred across the state border are endangered or they are treated in an inhumane or humiliating way, the perpetrator shall be punished by imprisonment for six months to five years.

(3) If the criminal offense referred to in paragraph 1 of this Article is committed while the perpetrator is a member of a group or a criminal organization, the perpetrator shall be punished for one to ten years.

(4) A person who attempts to commit a criminal offense referred to in paragraph 1 of this Article shall be punished.

www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Criminal-Code.pdf

Czech Republic

From the Criminal Code, section 171a:

(1) A person who makes arrangements for another person to illegally cross the State border, or who enables another person to illegally cross the State border shall be punished by imprisonment for a term of up to one year or by a fine.

(2) The perpetrator shall be punished by imprisonment for six months to three years,

- a. If he commits the act described in paragraph 1 with the intention to cover up or to facilitate another crime
- b. If he commits such act for payment, or
- c. If he commits such act as a member of an organized group

Criminal Code, Section 176 Forging and altering an official document

(1) A person who forges an official document or substantially alters its contents with the intention that it should be used as an authentic document, or who uses such document as an authentic document, shall be punished by imprisonment for a term of up to two years or by a fine.

(2) The perpetrator shall be punished by imprisonment for one year to five years,

- a. If he commits the act described in paragraph 1 as a member or an organized group, or
- b. If he causes extensive damage to another especially serious consequence by such act

Democratic Republic of the Congo

Code Pénal Congolais (last amended November 2004)

www.unhcr.org/refworld/country,,NATLEGBOD,,COD,456d621e2,47303b9e2,0.html

Dominican Republic

Law 137-03 on smuggling of migrants and trafficking in persons includes sanctions for these crimes. Article 2 establishes a punishment of imprisonment for 10 to 15 years and a fine equivalent to no less than 150 or more than 250 times the minimum salary for the smuggling of migrants.

Article 7 establishes aggravating circumstances that are punishable by a further five years in addition to the main sentence. Article 7, subparagraph *(h)* establishes document fraud as such an aggravating circumstance.

Law No. 285-04, article 68 subparagraph *(b)* establishes that a foreigner's entry onto national territory with fraudulent or incomplete documentation is illegal. Subparagraph *(c)* establishes that the entry is illegal if genuine documentation that was fraudulently obtained is used.

Estonia

The Penal Code (2001) states:

§ 259. Illegal transportation of aliens across State border or temporary borderline of Republic of Estonia

1. Illegal transportation of an alien across the State border or temporary borderline of the Republic of Estonia is punishable by a pecuniary punishment or up to one year of imprisonment.
2. The same act, if committed:
 - 1) by a group, or
 - 2) by using violence,is punishable by a pecuniary punishment or up to 3 years' imprisonment.
3. An act provided for in subsection (1) or (2) of this section, if serious health damage is thereby caused, is punishable by 4 to 12 years' imprisonment.

www.nottingham.ac.uk/shared/shared_hrlcicju/Estonia/Penal_Code__English_.doc

European Union

Article 27 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders stipulates that the Contracting Parties should undertake "to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside in the territory of one of the Contracting Parties in breach of that Contracting Party's law on the entry and residence of aliens."

Article 27

1. The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of

one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.

2. If a Contracting Party is informed of actions as referred to in paragraph 1 which are in breach of the law of another Contracting Party, it shall inform the latter accordingly.

3. Any Contracting Party which requests another Contracting Party to prosecute, on the grounds of a breach of its own laws, actions as referred to in paragraph 1 must specify, by means of an official report or a certificate from the competent authorities, the provisions of law that have been breached.

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML)

Finland

The Penal Code of Finland states:

“Chapter 17, Offences against public order (563/1998) ...

Section 8—Arrangement of illegal immigration (563/1998)

(1) A person who

(1) brings or attempts to bring to Finland a foreigner without a valid passport, visa or residence permit,

(2) arranges or procures transport to Finland for a person referred to in subparagraph (1), or

(3) gives to another person a passport, visa or residence permit that is false, falsified or issued to someone else, for use when entering the country, shall be sentenced for arrangement of illegal immigration to a fine or to imprisonment for at most two years.

(2) An act which, when taking into account the motives of the person committing it and the circumstances pertaining to the safety of the foreigner in his/her home country or country of permanent residence, and when assessed as a whole, is to be deemed committed under vindicating circumstances, does not constitute arrangement of illegal immigration.

www.finlex.fi/pdf/saadkaan/E8890039.PDF

France

From the Code on entry and residence of aliens and on asylum:

Article L622-1

Anyone who facilitates or attempts to facilitate the illegal entry into, transit across or the illegal residence, of an alien in France, through direct or indirect help, will be punished by five years' imprisonment and a fine of €30,000.

... Anyone who facilitates or attempts to facilitate the illegal entry into, transit across or the illegal residence, of an alien, within the territory of another State party to the convention implementing the Schengen agreement will be punished with the same penalty.

The Penal Code of France refers to “inhuman acts” and “degrading acts” in two articles: Article 212-1 stipulates that “Deportation, enslavement or the massive and systematic practice of summary executions, abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organized in pursuit of a concerted plan against a section of a civil population are punished by criminal imprisonment for life.”

Article L622-5 of the Code on entry and residence of aliens and on asylum criminalizes aggravating circumstances. It provides for a penalty of 10 years’ imprisonment and a fine of €750,000 when the crime is committed by an organized group, or in circumstances that directly expose migrants to an immediate risk of death or serious bodily harm, or living conditions or conditions of transport, work or accommodation that are incompatible with human dignity. A further aggravating circumstance is the removal of an underage migrant from his or her family or traditional environment as a result of the crime.

Guatemala

The Ley de Migración, article 103 establishes incommutable imprisonment for five to eight years as the penalty for procuring or facilitating illegal entry.

Article 104 establishes incommutable imprisonment for five to eight years as the penalty for procuring or facilitating illegal transit.

Pursuant to article 108 the sanctions shall be increased by one third when the crimes are committed against a minor, in conditions or by means that jeopardize the health, integrity or life of persons, or when the crimes are committed by a public official.

www.migrantesenlinea.org/imagesFTP/4449.Ley_de_Migracion_de_Guatemala.doc

The Código Penal, Decreto No. 17-73, article 321 establishes that forging a public document or altering an authentic public document is punishable by two to six years’ imprisonment.

Honduras

Código Penal, Decreto No. 144-83, article 195

Kazakhstan

Criminal Code, Law No. 167 of 16 July 1997, article 330-2, Organization of illegal migration

Latvia

Criminal Code, 5 November 1998, article 285, unlawful conveyance of a person across a State border:

- (1) For a person who commits unlawfully conveying a person across a State border, in violation of provisions regarding border crossing, the applicable sentence is deprivation of liberty for a term not exceeding five years.

(2) For a person who commits the same acts, if commission thereof is repeated or by a State official utilising his or her official position, the applicable sentence is deprivation of liberty for a term not exceeding seven years, with or without confiscation of property.

(3) For a person who commits unlawfully conveying a large number of persons, that is, more than five persons at one time, across a State border, the applicable sentence is deprivation of liberty for a term of not less than five and not exceeding ten years, with confiscation of property.

www.unhcr.org/refworld/country,,,LEGISLATION,LVA,4562d8b62,3ae6b4ef14,0.html

Lithuania

The Criminal Code states:

Article 292. Illegal Transportation of People across the National Border

1. Any person who illegally transports a foreign national without a residence in the Republic of Lithuania across the national border of the Republic of Lithuania, or conceals a foreign national who illegally crossed the national border or transports him through the territory of Lithuania, shall be punished by detention or imprisonment for a term of up to six years.

2. Any person who organizes the illegal transportation of foreign nationals without a residence in the Republic of Lithuania across the national border of the Republic of Lithuania, or organizes the concealment of people who illegally crossed the national border or their transportation through the territory of Lithuania, shall be punished by imprisonment of 4 to 10 years.

3. A legal person shall also be liable for the acts described in this article.

Article 293. Organization of illegal trips by nationals of the Republic of Lithuania with the purpose of procuring residence or abandoning without any help

1. Any person who organizes illegal trips by nationals of the Republic of Lithuania for the purpose of seeking asylum or illegal work or residence abroad for any other reason or who falsely promises legal status abroad shall be penalized by detention or a prison term of up to seven years.

2. A legal person shall also be liable for the acts described in this article.

Malaysia

Immigration Act 1959/63, sect. 55A: Conveying a person to Malaysia contrary to this Act

<http://jpt.mohe.gov.my/RUJUKAN/akta/akta%20imigresen.pdf>

Mexico

In the Ley General de Población (1974) Article 138 establishes the sanction of 6 to 12 years' imprisonment and a fine equivalent to the minimum wage for 100 to 10,000 days in the

Federal District where the crime was committed for the offence of conveying nationals or non-nationals to other countries without the correct documentation.

Article 125 establishes that a non-national committing the crimes described in articles 115, 116, 117, 118 and 138 will be expelled.

In the Ley Federal contra la delincuencia organizada (1996), article 2 subparagraph III criminalizes the offence of the smuggling of migrants by an organized criminal group. Article 4 subparagraph II establishes the penalties for members of an organized criminal group committing the offence of smuggling of migrants, and article 5 subparagraph II establishes increased penalties when there are aggravating circumstances.

The Código Penal Federal (1931), article 366, criminalizes the smuggling of minors for financial or material benefit.

Netherlands

Criminal Code, article 197a Smuggling of human beings (since 1 January 2005):

1. Whosoever provides assistance to another person to acquire entry to the Netherlands or to transit the Netherlands, another Member State of the European Union, Iceland, Norway or any state which has acceded to the Protocol against the Smuggling of Migrants by Land, Sea and Air concluded in New York on 15 November 2000 supplementing the Convention against Transnational Organized Crime concluded on 15 November 2000 in New York, or provides that person with an opportunity or the means or information enabling him to do so, whilst cognizant of the fact or having serious reason to believe that the said entry or transit is illegal, will be guilty of the smuggling of human beings and receive a penal sentence of a maximum of four years or a pecuniary penalty of the fifth category.
2. Whosoever in pursuit of gain provides assistance to another person to acquire residence in the Netherlands or another Member State of the European Union, Iceland, Norway or any state which has acceded to the Protocol mentioned in the first paragraph, or provides that person with an opportunity or the means or information enabling him to do so, whilst cognizant of the fact or having serious reason to believe that the said residence is illegal, will be punished with a penal sentence of a maximum of four years or a pecuniary penalty of the fifth category.
3. If one of the offences described in the first and third paragraphs be committed whilst exercising any office or practising any profession, a penal sentence of a maximum of six years or a pecuniary penalty of the fifth category will be awarded and the holder may be disqualified from holding that office or practicing that profession and the judge may order his sentence to be made public.
4. If one of the offences described in the first and third paragraphs be committed by a person who makes a profession of doing so or who habitually does so, or by several persons acting in association, a penal sentence of a maximum of eight years or a pecuniary penalty of the fifth category will be awarded.
5. If one of the offences described in the first and third paragraphs results in severe bodily injuries or it is feared that a person's life may be in jeopardy, a penal sentence of a maximum of 12 years or a pecuniary penalty of the fifth category will be awarded.

6. If one of the offences described in the first and third paragraphs results in death, a penal sentence of a maximum of 15 years and a pecuniary penalty of the fifth category will be awarded.

New Zealand

From the Crimes Act 1961

98C Smuggling migrants

(1) Every one is liable to the penalty stated in subsection (3) who arranges for an unauthorised migrant to enter New Zealand or any other State, if he or she—

(a) does so for a material benefit; and

(b) either knows that the person is, or is reckless as to whether the person is, an unauthorised migrant.

(2) Every one is liable to the penalty stated in subsection (3) who arranges for an unauthorised migrant to be brought to New Zealand or any other State, if he or she—

(a) does so for a material benefit; and

(b) either knows that the person is, or is reckless as to whether the person is, an unauthorised migrant; and

(c) either—

(i) knows that the person intends to try to enter the State; or

(ii) is reckless as to whether the person intends to try to enter the State.

(3) The penalty is imprisonment for a term not exceeding 20 years, a fine not exceeding \$500,000, or both.

(4) Proceedings may be brought under subsection (1) even if the unauthorised migrant did not in fact enter the State concerned.

(5) Proceedings may be brought under subsection (2) even if the unauthorised migrant was not in fact brought to the State concerned.

Section 98C: inserted, on 18 June 2002, by section 5 of the Crimes Amendment Act 2002 (2002 No 20).

www.legislation.govt.nz/act/public/1961/0043/latest/DLM328720.html

Nicaragua

Ley No 240. Ley de control del tráfico de migrantes ilegales

Pursuant to article 22, the smuggling of migrants is punishable by four to eight years' imprisonment and a fine.

The sanction for assisting in the crime or harbouring irregular migrants is one to four years' imprisonment and a fine.

www.unhcr.org/refworld/country,,LEGISLATION,NIC,4562d94e2,3aff5134,0.html

Panama

The Código Penal, article 310-A establishes the sanction of 5 to 10 years' imprisonment for trafficking in persons and procuring illegal entry.

Law 41 of 2 October 2000 penalizes the laundering of money derived from international trafficking in persons.

www.acnur.org/biblioteca/pdf/01036.pdf

Peru

Código Penal, article 303-A

www.devida.gob.pe/documentacion/Decreto%20Legislativo%20635-CODIGO%20PENAL.doc

Portugal

Statutory Law on Foreigners (1998), article 134-A, subparagraph 2:

Anyone who promotes or facilitates, in any way, illegal entry, residence or transit of aliens across the national territory, to obtain benefit, is punished by one to four years' imprisonment.

Republic of Korea

The Immigration Control Act, article 12-2 (Ban on Provision of Ships, etc.), states:

(1) No person shall provide or arrange ships, etc., passports, or visa, boarding tickets, and other documents and goods usable for entry into or departure from the country, for the purpose of illegally allowing any foreigner to enter or depart from the country or having him illegally enter other country via the Republic of Korea.

(2) No person shall harbour or allow any foreigner who has illegally entered the Republic of Korea to flee within the country, or provide or arrange traffic means for such purposes.

[This article newly inserted by Act No. 5434, Dec. 13, 1997]

www.asianlii.org/kr/legis/laws/ica228/

Romania

An amendment to Law No. 482/2004 on modifying and completing Government Emergency Ordinance No. 194/2002 on the regime regarding aliens in Romania reads as follows:

Facilitating the illegal stay of aliens on Romanian territory

1. Intentional facilitation, through any means, of the illegal stay of aliens on Romanian territory shall represent a major offence and shall be sanctioned with prison from 6 months to 5 years.

2. An offence described in paragraph 1 committed under the following circumstances:

(a) Where two or more persons act together;

(b) Where serious injury or violence is perpetrated against the aliens shall be punishable with a prison term of 2 years to 8 years.

3. If the offence results in the death of the alien the sentence shall be a prison sentence of 3 to 15 years.

4. Attempts to commit the offence shall be penalized.

Russian Federation

From the Criminal Code: Article 322.1 (introduced in December 2004), on organization of illegal migration:

The organization of the illegal migration of non-citizens, their transit or illegal stay on the territory of the Russian Federation may be punishable with two years' imprisonment or the payment of a fixed fine.

http://zakony.com.ua/statya_3221_organizacia_nezako.html

Serbia

From the Criminal Code, article 350, Illegal Crossing of State Border and Human Trafficking

(1) Whoever without a required permission crosses or attempts to cross the border of Serbia, under arms or by use of force, shall be punished by imprisonment up to one year.

(2) Whoever enables another illegal crossing of the Serbian border or illegal sojourn or transit through Serbia to a person who is not a citizen of Serbia with intent to acquire a benefit for himself or another shall be punished by imprisonment of three months to six years.

(3) If the offence specified in paragraph 2 of this Article is committed by an organized group, by abuse of authority or in a manner endangering the lives and health of persons whose illicit crossing of the Serbian border, sojourn or transit is being facilitated or if a larger number of persons is being smuggled the perpetrator shall be punished by imprisonment from one to ten years.

(4) The means intended or used for commission of the offence specified in paragraphs 1 through 3 of this Article shall be impounded.

www.legislationline.org/download/action/download/id/901/file/576c23dc41967e427086bf4c2b45.pdf

Switzerland

Loi fédérale du 16 décembre 2005 sur les étrangers (LEtr; RS 142.20) on criminal provisions against encouraging the illegal entry, exit and stay of foreign nationals in Switzerland, article 116, available from:

www.admin.ch/ch/f/as/2007/5437.pdf

Turkey

From the Criminal Code (2004):

Section 2 Migrant Smuggling and Human Trafficking

Article 79

(1) An imprisonment for a term of three to eight years and a judicial fine of up to ten thousand days shall be imposed on those who, through illegal ways,

- (a) enable a foreigner to enter into or remain in the country
- (b) enable a Turkish citizen or foreigner to go abroad

With the purpose of obtaining material benefit either directly or indirectly

(2) Where the offences referred to in the above paragraphs are committed by perpetrators acting as an organization, the penalty to be imposed shall be increased by half.

(3) Where the offences referred to in the above paragraphs are committed by perpetrators acting as a legal entity, the relevant security measures will be taken for that legal entity.

More information is available from:

www.todayszaman.com/tz-web/detaylar.do?load=detay&link=131696

Ukraine

The Criminal Code (2001) provides that the organization of the smuggling of foreign nationals into Ukraine shall be punished by imprisonment of two to five years.

United Kingdom of Great Britain and Northern Ireland

Immigration Act 1971:

Section 25, Assisting unlawful immigration to member State

(1) A person commits an offence if he—

- (a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union,
- (b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and

(c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.

(6) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

Nationality, Immigration and Asylum Act 2002:

143 Assisting unlawful immigration, &c.

The following shall be substituted for section 25 of the Immigration Act 1971 (c. 77) (assisting illegal entry)—

25 Assisting unlawful immigration to member State

(1) A person commits an offence if he—

(a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union,

(b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and

(c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.

(2) In subsection (1) “immigration law” means a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to—

(a) enter the State,

(b) transit across the State, or

(c) be in the State.

(3) A document issued by the government of a member State certifying a matter of law in that State—

(a) shall be admissible in proceedings for an offence under this section, and

(b) shall be conclusive as to the matter certified.

(4) Subsection (1) applies to anything done—

(a) in the United Kingdom,

(b) outside the United Kingdom by an individual to whom subsection (5) applies, or

(c) outside the United Kingdom by a body incorporated under the law of a part of the United Kingdom.

- (5) This subsection applies to—
- (a) a British citizen,
 - (b) a British overseas territories citizen,
 - (c) a British National (Overseas),
 - (d) a British Overseas citizen,
 - (e) a person who is a British subject under the British Nationality Act 1981 (c. 61), and
 - (f) a British protected person within the meaning of that Act.
- (6) A person guilty of an offence under this section shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

www.opsi.gov.uk/acts/acts2002/ukpga_20020041_en_1

United States of America

Immigration and Nationality Act

Sec. 274. [8 U.S.C. 1324]

- (a) Criminal Penalties.-
 - (1) (A) Any person who-
 - (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;
 - (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
 - (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

- (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law, shall be punished as provided in subparagraph (B); or
 - (v) (I) engages in any conspiracy to commit any of the preceding acts, or
(II) aids or abets the commission of any of the preceding acts,
- (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs-
- (i) in the case of a violation of subparagraph (A)(i) or (v)(I) 2/ or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, 3/ be fined under title 18, United States Code, imprisoned not more than 10 years, or both;
 - (ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), 4/ be fined under title 18, United States Code, imprisoned not more than 5 years, or both;
 - (iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) 5/ during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18, United States Code) to, or places in jeopardy the life of, any person, be fined under title 18, United States Code, imprisoned not more than 20 years, or both; and
 - (iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, United States Code, or both.
- (C) It is not a violation of clauses (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.
- (2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs 6/ -

- (A) be fined in accordance with title 18, United States Code, or imprisoned not more than one year, or both; or
 - (B) in the case of-
 - (i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,
 - (ii) an offense done for the purpose of commercial advantage or private financial gain, or
 - (iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry, be fined under title 18, United States Code, and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.
- (3) (A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both.
- (B) An alien described in this subparagraph is an alien who-
- (i) is an unauthorized alien (as defined in section 274A(h)(3)), and
 - (ii) has been brought into the United States in violation of this subsection.
- (4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--
- (A) the offense was part of an ongoing commercial organization or enterprise;
 - (B) aliens were transported in groups of 10 or more; and
 - (C) (i) aliens were transported in a manner that endangered their lives; or
 - (ii) the aliens presented a life-threatening health risk to people in the United States.

Recommended resources

United Nations Office on Drugs and Crime. *Model Law against Smuggling of Migrants*.

The UNODC *Model Law against Smuggling of Migrants* is being developed to assist States in implementing the provisions contained in the Smuggling of Migrants Protocol supplementing the Organized Crime Convention. It aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. The *Model Law* covers not only the criminalization of smuggling of migrants and related offences, but also the different aspects of assistance to victims as well as establishing cooperation between different State authorities and non-governmental organizations. Each provision is accompanied by a detailed commentary, providing several options for legislators, as appropriate, and legal sources and examples.

The *Model Law* is currently being prepared. For more information, visit www.unodc.org or contact ahtmsu@unodc.org.

United Nations. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Sales No. E.05.V.2).

The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The *Guides* lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The *Guides* have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html



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