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United Nations Office on Drugs and Crime

# **Criminalisation of Smuggling of Migrants in ASEAN Member States**





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## Abbreviations and acronyms

alt	alternative
art(s)	article(s)
ASEAN	Association of Southeast Asian Nations
BND	Brunei Dollar
IDR	Indonesian Rupiah
KHR	Cambodian Riel
LAK	Lao Kip
MMK	Myanmar Kyat
MYR	Malaysian Ringgit
NGO	Non-governmental organisation
PDR	People's Democratic Republic
PHP	Philippine Pesos
s(s)	Section(s)
SGD	Singapore Dollars
THB	Thai Baht
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
VND	Vietnamese Dong

## Acknowledgments

The research was supervised by UNODC Regional Office for Southeast Asia and the Pacific.

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Research assistance: Dr Gian Ege, Senior Teaching and Research Assistant, University of Zurich, Switzerland. With further support by Messrs Colin Craig, Leiden University; and Thomas P Kent, Liam O'Shaughnessy, The University of Queensland, Brisbane, Australia.

Research for this project was carried out in locations in Bangkok, Thailand; Brisbane, Australia; Hanoi, Viet Nam; Jakarta, Indonesia; Kuala Lumpur, Malaysia; Manila, Philippines; Phnom Penh, Cambodia; Vientiane, Lao PDR; and Yangon, Myanmar.

UNODC thanks the Governments of Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam for the support provided throughout the development of the report. The preparation of this report would not have been possible without data and information reported by the Governments.

UNODC thanks the representatives of international organisations and other experts who shared their experiences and views for this report.

UNODC gratefully acknowledges the financial contribution of Global Affairs Canada that enabled the research for, and the production of, this publication.

# I Introduction and outline

## I.1 Topic

The smuggling of migrants is a major concern of all countries in Southeast Asia. Every country in the region is affected as a source, transit, or destination of migrants seeking protection or prosperity abroad. Many countries play more than one role in the complex web of irregular migration that connects the countries of Southeast Asia.

Legislation along with practical measures to criminalise the smuggling of migrants, prevent irregular migration, and protect the rights of smuggled migrants is not evenly developed in the ten countries that constitute the Association of Southeast Asian Nations (ASEAN). Some ASEAN Member States have enacted very sophisticated statutes to address the myriad of issues associated with the smuggling of migrants; others do not have basic laws to penalise those who seek to profit from facilitating the illegal entry of migrants and who prey on the vulnerabilities of those desperate to flee persecution and poverty.

The United Nations *Protocol against the Smuggling of Migrant by Land, Sea and Air*<sup>1</sup> supplementing the *Convention against Transnational Organized Crime*<sup>2</sup> provides a universal template for national laws to systematically address the complex issues associated with smuggling of migrants. In addition, ASEAN is starting to give greater attention to the causes and impact of smuggling of migrants in its Member States and is developing new initiatives to enhance cooperation and information exchange on this important issue.

This research report identifies, outlines, and examines criminal offences pertaining to the smuggling of migrants in the ten ASEAN Member States. The report gives insight into the legislative framework relating to the criminalisation of smuggling of migrants in Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic (PDR), Malaysia, the Union of Myanmar (Myanmar), the Philippines, Singapore, Thailand, and Viet Nam. Domestic offences are compared to the criminalisation requirements set out in the United Nations *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime*. Using this approach, similarities and differences to the international framework are highlighted and recommendations are developed to facilitate the accurate and comprehensive implementation of the Protocol requirements into domestic laws. Recent developments led by ASEAN to provide coordinated responses to smuggling of migrants and to facilitate cooperation and information exchange between Member States are also documented and their potential further explored. This report serves to assist ASEAN Member States in their efforts to prevent and combat the smuggling of migrants effectively, enhance international cooperation, protect the rights of smuggled migrants, and to strengthen the role of ASEAN in this field.

## I.2 Background and context

### I.2.1 Smuggling of migrants in Southeast Asia

Virtually every country in the world is affected by the smuggling of migrants, whether as a country of origin, transit or destination for smuggled migrants by profit-seeking criminals. Smuggled migrants are vulnerable to life-threatening risks and exploitation. Thousands of smuggled migrants have

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<sup>1</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>2</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

suffocated in containers, perished in deserts, or drowned at sea. Generating huge profits for the criminals involved, migrant smuggling fuels corruption and empowers organised crime.

In 2015, UNODC's Regional Office for Southeast Asia and the Pacific published an in-depth study on *Migrant Smuggling in Asia: Current Trends and Challenges*,<sup>3</sup> which was revised and updated in 2018 by the report *Migration Smuggling in Asia and the Pacific: Current Trends and Challenges, Volume II*.<sup>4</sup> These reports found that the levels and patterns of smuggling of migrants in Southeast Asia are particularly diverse and complex. Many smuggling activities and other forms of irregular migration take place within the region, particularly among the countries of the Greater Mekong subregion, and also to Malaysia and Indonesia. In short, the *Migrant Smuggling in Asia* reports found that:

- Cambodia and Lao PDR are predominantly source countries for irregular migrants who move independently or with the aid of smugglers to Thailand or Malaysia.
- Indonesia is a source country of irregular labour migrants who move to neighbouring Malaysia, Singapore, and to Hong Kong. Indonesia is also an important transit country for migrants from Afghanistan, Iran, Iraq, Pakistan, and Sri Lanka who are smuggled to Australia.
- Malaysia is an important destination country for labour migrants from other parts of Southeast Asia and Bangladesh. Malaysia is also a frequent transit point for the smuggling of migrants from Southwest Asia to Australia.
- Myanmar is predominantly a source country for refugees and irregular labour migrants who move to destinations in the region and further afield.
- Thailand is the main destination for irregular migrants from countries in the Greater Mekong subregion.
- Viet Nam is a source country for migrants who are smuggled to Europe, especially to places with existing Vietnamese communities. It is also a source for labour migrants who move to neighbouring countries.
- The Philippines is a significant source of labour migrants, some of whom use irregular avenues and smuggler to reach their destinations.
- Brunei and Singapore are destinations for labour migrants from a range of countries in Southeast Asia, though evidence of irregular migration is limited.

The *Migrant Smuggling in Asia* reports further found that many countries do not, or not yet, have specific legislation, including offences, relating to smuggling of migrants. As a result, migrant smugglers can operate with relative impunity if they do not face adequate sanctions for their actions. Even if such laws exist, enforcement often remains weak and investigations rarely lead to prosecutions and convictions. In these circumstances, the smuggling of migrants is a low risk, high profit business that many smugglers can exploit.

For these reasons, it is important to strengthen national laws and develop comprehensive national policies to prevent and combat the smuggling of migrants with due diligence given to human rights and fair process. This report seeks to contribute to achieving these goals.

## I.2.2 UN Smuggling of Migrants Protocol

In international law, the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air (the Smuggling of Migrants Protocol)*, supplementing the *Convention against Transnational Organized Crime*, provides a comprehensive, globally accepted legal framework to address the many

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<sup>3</sup> UNODC, *Migrant Smuggling in Asia: Current Trends and Challenges* (2015).

<sup>4</sup> UNODC, *Migration Smuggling in Asia and the Pacific: Current Trends and Challenges, Volume II* (2018).

and multifaceted issues associated with the smuggling of migrants. The smuggling of migrants, as defined by Article 3 of the Protocol, involves

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a country of which the person is not a national or a permanent residence.<sup>5</sup>

The purpose of the Protocol is ‘to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants’.<sup>6</sup> These objectives reflect the inherent complexity in establishing appropriate legislation that takes account of the host of complex criminal justice and human rights considerations embroiled in this issue.

Upon signing the *Smuggling of Migrants Protocol*, States Parties agree to criminalise the smuggling of migrants including participatory and ancillary conduct.<sup>7</sup> The prevention and suppression of smuggling of migrants by sea is addressed by designated provisions.<sup>8</sup> The Protocol further requires adoption of general prevention measures targeted at improving border control capabilities, information gathering, and law enforcement.<sup>9</sup> States Parties are required to adopt appropriate measures to preserve and protect the rights of smuggled migrants.<sup>10</sup> The Protocol also provides a framework for the repatriation of smuggled migrants.<sup>11</sup>

The *Smuggling of Migrants Protocol* has found worldwide support, counting 149 States Parties with 112 States ratifying the Protocol.<sup>12</sup> Of the ten ASEAN Member States, as shown in Figure 1 below, six are Parties to the Protocol; as on 4 July 2019, Brunei Darussalam, Malaysia, Singapore, and Viet Nam had not yet signed the *Smuggling of Migrants Protocol*. Thailand has signed but not ratified the Protocol.

Figure 1: UN Smuggling of Migrants Protocol; ASEAN States Parties (4 July 2019)

Participant	Signature	Ratification
Brunei Darussalam	not signed	
Cambodia	11 Nov 2001	12 Dec 2005
Indonesia	12 Dec 2000	28 Sep 2009
Lao PDR		26 Sep 2003 (accession)
Malaysia	not signed	
Myanmar		30 March 2004 (accession)
Philippines	14 Dec 2000	28 May 2002
Singapore	not signed	
Thailand	18 December 2001	
Viet Nam	not signed	

<sup>5</sup> Article 3 *Smuggling of Migrants Protocol*. The terms ‘smuggling of migrants’ and ‘migrant smuggling’ are used interchangeably throughout this report.

<sup>6</sup> Article 2 *Smuggling of Migrants Protocol*.

<sup>7</sup> Article 6 *Smuggling of Migrants Protocol*.

<sup>8</sup> Articles 7–9 *Smuggling of Migrants Protocol*.

<sup>9</sup> Articles 10–14 *Smuggling of Migrants Protocol*.

<sup>10</sup> Articles 5, 16, 19 *Smuggling of Migrants Protocol*.

<sup>11</sup> Article 18 *Smuggling of Migrants Protocol*.

<sup>12</sup> United Nations Treaty Collection, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* (2 July 2019) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en)>.

### I.2.3. Context of this research

As the ‘guardian’ of the *Smuggling of Migrants Protocol*, the *Convention against Transnational Organized Crime*, and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*,<sup>13</sup> the United Nations Office on Drugs and Crime (UNODC) promotes global adherence to these instruments and assists States in their efforts to effectively implement them. A crucial prerequisite in responding to these challenges is fostering evidence-based knowledge on these topics to raise awareness and inform adequate policy development.

The capacity of States to act effectively against the smuggling of migrants, including the collection and analysis of migrant smuggling data, is predicated on the existence and quality of legislation on this issue. In Southeast Asia, national counterparts have highlighted the challenge of trying to combat the smuggling of migrants using existing legislative frameworks.

Against this backdrop, UNODC commissioned a report to provide a thorough examination of the laws criminalising the smuggling of migrants in the ten ASEAN Member States. This includes relevant offences in criminal and immigration laws, their elements, penalties, scope, and application, interpretation by the courts and enforcement obstacles.

The research conducted for this report is particularly timely as it coincides with initiatives taken by ASEAN to examine the smuggling of migrants in Member States more closely and to provide mechanisms for regional approaches to prevent and combat this phenomenon and to enhance cooperation and information exchange between Member States.

The present analysis is conducted with a view to identifying strengths, gaps, and weaknesses and generating recommendations to address the complex challenges involved in criminalising the smuggling of migrants. The research for this project involved a mixture of desk review and interviews with national and regional counterparts.

## I.3 Purpose and goals

The main purpose of this report is to document and provide a detailed analysis of criminal offences in the domestic laws of the ten ASEAN Member States, including Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam. Moreover, the report outlines recent initiatives by ASEAN to prevent and combat the smuggling of migrants and reflects on the opportunities and challenges of regional cooperation in this field. This report serves the overall objective of establishing national and international criminal justice responses that effectively reduce the smuggling of migrants, bring perpetrators to justice, protect the rights of smuggled migrants, and promote cooperation.

The specific objectives of this report are to:

- Identify and analyse criminal offences pertaining to the smuggling of migrants in the criminal laws and immigration laws of the ten ASEAN Member States;
- Explore investigative, prosecutorial, and judicial practice in the application and interpretation of these offences and the sentencing of offenders;
- Compare criminal offences under national law against the criminalisation requirements of the UN *Smuggling of Migrants Protocol* and the *Convention against Transnational Organised Crime* and identify areas of compliance, convergence, and divergence;

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<sup>13</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].



- Examine the effectiveness of existing mechanisms and proposals to prevent and combat smuggling of migrants through regional initiatives by ASEAN;
- Identify gaps in the existing criminal justice response to smuggling of migrants; and
- Develop recommendations that adequately respond to the needs and deficiencies identified.

The findings of this report serve the following audiences and target-groups:

- Governments and legislators, by providing them with a sound understanding of their responses to the smuggling of migrants, including the strengths, weaknesses, and needs of these responses;
- International, regional, non-governmental, and other civil society organisations, by assisting them in assessing the degree to which responses provided by countries meet existing international obligations and best practice standards;
- Law enforcement agencies, prosecutorial authorities, and members of the judiciary, by assisting them in reviewing their own organisation and activities;
- Governmental and international entities, by enabling cross-border law enforcement and judicial cooperation;
- International and national entities and research institutions, by assisting them in developing in-depth and comparable analyses of countries' responses; and
- Donor countries and agencies, by enabling and improving the purposeful funding of activities to prevent and suppress the smuggling of migrants.

A roundtable consultation meeting was convened to present the initial findings of the report, identify the main challenges, and invited government representatives and practitioners to discuss obstacles and opportunities for further legislative developments and cooperation in this field. The report was originally completed on 30 June 2018. Between March and June 2019, the report was updated with new information received from some ASEAN Member States. The information presented in this version of the report is current as of 4 July 2019.

## **I.4 Structure**

This report is divided into 14 chapters (I to XIV) which reflect the international, national, and regional frameworks that have been established to criminalise the smuggling of migrants in the ten ASEAN Member States.

Following this introduction (Chapter I), Chapter II identifies and explains the criminalisation requirements set out in the *Smuggling of Migrants Protocol*. Chapter II sets out an analytical framework including questions to examine criminal offences pertaining to smuggling of migrants.

Chapters III to XII contain individual country reports using the standardised template developed in Chapter II to identify, outline, and analyse provisions pertaining to the criminalisation of smuggling of migrants in each country. Each of the ten ASEAN Member States is examined separately in alphabetical order: Chapter III Brunei Darussalam, IV Cambodia, V Indonesia, VI Lao PDR, VII Malaysia, VIII Myanmar, IX Philippines, X Singapore, XI Thailand, and XII Viet Nam.

In Chapter XIII, the report turns to the work done by ASEAN on the topic of smuggling of migrants, including recent steps to establish a work programme on this issue. Building on the work done by ASEAN on other aspects of transnational crime, especially trafficking in persons, this Chapter also reflects on the future potential of ASEAN cooperation on smuggling of migrants.

Chapter XIV summarises the main findings of this research, highlights the main challenges in the criminalisation of smuggling of migrants, and sets out a range of recommendations designed to enhance criminal laws and overall criminal justice response to this phenomenon.

## **I.5 Methodology and source material**

The principal research for this report was carried out between July 2017 and February 2018 at locations in Bangkok (Thailand), Brisbane (Australia), Hanoi (Viet Nam), Jakarta (Indonesia), Kuala Lumpur (Malaysia), Manila (Philippines), Phnom Penh (Cambodia), Vienna (Austria), Vientiane (Lao PDR), Vienna (Austria), and Yangon (Myanmar). The information presented in this report was updated on 4 July 2019.

The research was conducted through (1) collection and analysis of open-source material, including primary sources such as legislation, legislative material, reported cases and official data collections and reports, as well as secondary sources prepared by international organisations, academic scholars and other experts, non-governmental organisations (NGOs), and selected media reports from major international news outlets; and (2) information collected through semi-structured interviews with representatives of government departments, prosecution services, the judiciary, law enforcement agencies in eight of the ten target countries, and international organisations. The data and facts obtained from these methods were further complemented and validated by information received orally and in writing from representatives of international organisations and government agencies.

Research for this report involved face-to-face consultation with the following organisations, departments, and agencies:

- Anti-Trafficking in Persons Division, Royal Thai Police, Bangkok, Thailand;
- Regional Support Office, Bali Process on People Smuggling, Trafficking in Persons, and related Transnational Organised Crime, Bangkok, Thailand;
- Domestic and International Cooperation Division, Department of Immigration of Lao PDR, Vientiane, Lao PDR;
- Immigration Bureau, Royal Thai Police, Bangkok, Thailand;
- International Organisation for Migration (IOM), Cambodia Office, Phnom Penh, Cambodia;
- Global Action against Trafficking in Persons and Smuggling of Migrants (GLO.ACT), Vientiane, Lao PDR;
- Prosecution Division, Attorney-General's Chambers, Putrajaya, Malaysia;
- Social Division, Department of International Organisations, Ministry of Foreign Affairs, Bangkok, Thailand;
- Transnational Crime Division, Political & Security Directorate, ASEAN Secretariat, Jakarta, Indonesia;
- United Nations Office on Drugs and Crime (UNODC), Country Office Myanmar, Yangon, Myanmar,
- United Nations Office on Drugs and Crime (UNODC), Country Office Viet Nam, Hanoi, Viet Nam;
- United Nations Office on Drugs and Crime (UNODC), Regional Office for Southeast Asia and the Pacific, Bangkok, Thailand.

In addition, the research for this report involved correspondence and communication with the following organisations, departments, and agencies:

- UN Political and Security Affairs Division, Ministry of Foreign Affairs, Lao PDR.

### I.5.1 International framework

The starting point for the analysis of a country's criminal justice response to the smuggling of migrants is the *Smuggling of Migrants Protocol*, which sets out internationally agreed standards for the criminalisation of migrant smuggling, for international cooperation, and for the protection of the rights of smuggled migrants.

The Protocol must be seen in conjunction with its 'parent', the United Nations *Convention against Transnational Organized Crime*. The Protocol, as stressed in its Article 1, supplements the Convention and shall be interpreted together with the Convention. The provisions of the Convention apply, mutatis mutandis, to the Protocol. The offences relating to smuggling of migrants established in accordance with Article 6 of the Protocol shall be regarded as offences established in accordance with the Convention.<sup>14</sup> In order to become a Party to the Protocol, a State (or a regional economic integration organisation) must also be a Party to the Convention.<sup>15</sup>

Essential to the understanding of the provisions and obligations of the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime* are the *Travaux Préparatoires of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*.<sup>16</sup> These track the progress of the negotiations in the open-ended intergovernmental Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime that was established by the UN General Assembly on 9 December 1998.<sup>17</sup> The *Travaux Préparatoires*, published in 2006, provide a comprehensive picture of the background of the Convention and its three Protocols and, by presenting the evolution of the texts, provide an understanding of the issues confronted by the Ad Hoc Committee and the solutions it found.

The provisions of the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime* are supplemented by *Interpretative Notes* that serve to explain and clarify the interpretation and application of several provisions under the Convention and the Protocol.<sup>18</sup> These Notes were discussed by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime throughout the process of negotiation of the draft Convention and its Protocols. The *Interpretative Notes* were first published by the Ad Hoc Committee on 3 November 2000 and later included in the official records (*travaux préparatoires*) of the negotiation of the United Nations *Convention against Transnational Organized Crime* and the Protocols thereto. Notes 87 to 119 refer to specific provisions in the *Smuggling of Migrants Protocol*, Notes 2 to 61 concern provisions in the *Convention against Transnational Organized Crime*.

A further important tool to design, implement, and interpret legislation deriving from the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime* are the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*. The main purpose of the *Legislative Guides* is to assist States seeking to ratify or implement the Convention and its Protocols. While these Guides were drafted chiefly for policy makers and legislators in countries preparing for the ratification and implementation of the Convention and its Protocols, they also provide a helpful basis for technical assistance projects and other initiatives, like the present report, undertaken as part of international efforts to promote the broad ratification and implementation of the Convention and the Protocols thereto. The *Legislative Guide for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air*

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<sup>14</sup> Article 1 *Smuggling of Migrants Protocol*; Art 37(1), (4) *Convention against Transnational Organized Crime*.

<sup>15</sup> Article 37(2) *Convention against Transnational Organized Crime*.

<sup>16</sup> UNODC, *Travaux Préparatoires of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) [hereinafter *Travaux Préparatoires*].

<sup>17</sup> UN General Assembly, *Transnational Organized Crime*, UN Doc A/RES/53/111 (20 January 1999).

<sup>18</sup> UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh session; 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*, UN Doc A/55/383/Add.1 (3 November 2000) [hereinafter *Interpretative Notes*].

was first published in 2004;<sup>19</sup> a second edition was in planning but not yet underway at the time this report was taking shape. A revised second edition of the *Legislative Guide for the Implementation of the Convention against Transnational Organized Crime* was published electronically by UNODC in 2016.<sup>20</sup>

The obligations arising for States Parties from the *Smuggling of Migrants Protocol*, their interpretation and application are succinctly summarised in UNODC's *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* which has been central to the design and concept of the present report.<sup>21</sup> First published in 2011, the *Assessment Guide* provides an inventory of measures for assessing the legislative, investigative, prosecutorial, and administrative responses to smuggling of migrants by land, sea, and air, for deterring and combating such crime, and for integrating the information and experience gained from such assessment into successful national, regional, and international strategies. Of particular importance for this report is Part I of the *Assessment Guide* which sets out criteria and questions to assess a country's legal framework pertaining to smuggling of migrants.

Other sources that explain and outline the international law on smuggling of migrants and that assist in assessing national criminal laws include, inter alia, UNODC's *Toolkit to Combat the Smuggling of Migrants*,<sup>22</sup> UNODC's *Model Law against the Smuggling of Migrants*,<sup>23</sup> and a small, but growing body of academic literature that provides critical perspectives on the content and operation of the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime*.

## I.5.2 Domestic laws

The starting point for the documentation and analysis of criminal offences relating to smuggling of migrants in the ten ASEAN Member States is the text of relevant provisions in the national laws of Brunei Darussalam, Cambodia, Indonesia, the Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam. These offences can be found, for the most part, in the penal codes or immigration laws of these countries though some countries have introduced designated anti-smuggling of migrants statutes. Legislation was obtained through official websites, online publications, and databases. In some instances, official versions and translations were provided directly from the authorities of the country or from representatives of international organisations. Wherever possible, legislation was used in its original language and most current consolidated version. Where necessary and available, official translations into English language were used, though in some instances, unofficial translations had to be relied upon. For some jurisdictions, translations into English were made by professional interpreters. If current versions of relevant laws were unavailable, earlier versions had to be used. Specific information about the legislation and their currency is set out in the individual country chapters.

Authoritative explanations of the background, composition, interpretation, and application of national laws relating to smuggling of migrants were retrieved, where available, from legislative materials, including parliamentary debates and explanatory memoranda, official government sources, and case law. This material was complemented by secondary sources that give insight into and critical perspectives on the design and operation of these laws. In this context, scholarly articles, peer-reviewed publications, and reports by international organisations and NGOs were prioritised over other material, including news reports from major media outlets.

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<sup>19</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 319–396.

<sup>20</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime* (2<sup>nd</sup> ed 2016), available at <<https://www.unodc.org/cld/v3/sherloc/legislative-guide/index.html?lng=en>>.

<sup>21</sup> UNODC, *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* (2011).

<sup>22</sup> UNODC, *Toolkit to Combat the Smuggling of Migrants* (2010).

<sup>23</sup> UNODC, *Model Law against the Smuggling of Migrants* (2011).

### I.5.3 Limitations and obstacles

Despite the scale and spread of smuggling of migrants in Southeast Asia, the phenomenon remains poorly documented and not well researched. Many facets of migrant smuggling remain shrouded in mystery and reliable data on the scale and characteristics are almost non-existent. This is also true for criminal offences and other aspects of the criminal justice response to smuggling of migrants in the ten ASEAN Member States.

In some instances, it was difficult to identify and locate the most current version and accurate English language translations of relevant laws. Upon request, national authorities were able to assist, though in some cases even official contacts were unable to properly identify and provide access to current laws. Legislative material and case law was only available for some jurisdictions, which is due in part to the fact that such information is not properly catalogued or recorded in some countries or may only exist in hardcopy at local courts or libraries that could not be accessed during the course of this research.

Academic literature on smuggling of migrants offences in the ten ASEAN countries, critical analyses, and other studies on their design and operation is, for the most part, non-existing. It appears that few, if any, institutions and experts devote much time to the study of this area of law and to the criminal justice response to smuggling of migrants in Southeast Asia in general.

This report seeks to close these gaps and it is hoped that further studies on other aspects of the criminal justice response to smuggling of migrants in Southeast Asia will follow, which examine in more detail the work of law enforcement, prosecutorial, and judicial authorities, offer broader perspectives on the operation of criminal and immigration law, and that examine the mechanisms to protect the rights of smuggled migrants.



## II International frameworks and requirements

### II.1 Overview

Over the past 20 years, the international community has developed international treaties and best practice standards that serve as globally accepted benchmarks for the development of domestic laws to prevent and combat the smuggling of migrants. At the centre of these efforts stands the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air*,<sup>24</sup> a consensus agreement which serves to ‘prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants’.<sup>25</sup>

The Protocol supplements the UN *Convention against Transnational Organized Crime*<sup>26</sup> which contains extensive measures ‘to promote cooperation and combat transnational organised crime more effectively.’<sup>27</sup> The overall concept of these instruments and their content are outlined in Part I.2.2 of this report. The background, application, and interpretation of the Protocol and the Convention are further explained in a range of additional materials and interpretative tools published by UNODC, the ‘guardian’ of the *Convention against Transnational Organized Crime* and the Protocols thereto. These sources are further outlined in Part I.5.1 above.

This Chapter identifies and summarises the obligations and other provisions relating to the criminalisation of smuggling of migrants and outlines the requirements that States Parties need to meet to fulfil their obligations under the *Smuggling of Migrants Protocol*. The requirements and recommendations concerning the criminalisation of smuggling of migrants are set out with reference to relevant provisions in international law and are summarised in several sets of questions that can be used to explore and analyse smuggling of migrants offences in domestic laws. Based on this methodology, 11 individual areas have been identified as central to the criminalisation of smuggling of migrants. These include:

- Ratification of and accession to international instruments;
- Domestic laws and policies relating to smuggling of migrants;
- Terminology and definitions;
- Offence of smuggling of migrants;
- Criminalisation of document fraud relating to smuggling of migrants;
- Criminalisation of enabling illegal stay;
- Aggravations;
- Extensions to criminal liability;
- Other criminal offences relating to irregular migration;
- Non-criminalisation of smuggled migrants;
- Jurisdiction.

The following sections outline each of these areas, their foundation in international law, and their interpretation in international materials. This Chapter further develops a template outlining the key requirements which are then used to examine the domestic laws of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam in Chapters III–XII of this report.

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<sup>24</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>25</sup> Article 2 *Smuggling of Migrants Protocol*.

<sup>26</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>27</sup> Article 1 *Convention against Transnational Organized Crime*.

## II.2 Ratification of and accession to international legal instruments

In international law, the *Smuggling of Migrants Protocol* is the first and only global treaty designed to prevent and combat the smuggling of migrants, protect the rights of smuggled migrants, and promote cooperation between States.

The Protocol is not an independent treaty. Rather, complementary regimes of jurisdiction are established by the critical link between the Protocol and its 'parent', the *Convention against Transnational Organized Crime*.<sup>28</sup> Article 37(2) of the *Convention* firmly establishes that in order to become a party to the Protocol, a State must also be (or become) a State Party to the *Convention*. The *Legislative Guides* stress that 'it is not possible for a State to be subject to any obligation arising from the Protocol unless it is also subject to the obligations of the *Convention*'.<sup>29</sup> 'This ensures that, in any case that arises under the Protocol to which the States concerned are parties, all of the general provisions of the *Convention* will also be available and applicable. Many specific provisions were drafted on that basis'.<sup>30</sup>

The *Convention against Transnational Organized Crime* represents a major step forward in the fight against transnational organised crime and signifies the recognition of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organised crime, including the creation of domestic criminal offences (participation in an organised criminal group, money laundering, corruption, and obstruction of justice); the adoption of frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.

A further international instrument that may, in some circumstances, concern the exploitation of irregular migrants and the facilitation of irregular migration is the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* supplementing the *Convention against Transnational Organized Crime*.<sup>31</sup> The purposes of this Protocol are

- (a) to prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) to protect and assist the victims of such trafficking, with full respect to their human rights; and
- (c) to promote cooperation among States Parties to meet those objectives.<sup>32</sup>

While trafficking in persons and smuggling of migrants are distinct offences set out in two separate instruments in international law, some States conflate the two issues or use trafficking in persons-related charges for instances of smuggling of migrants if their domestic laws contain no or no adequate smuggling-related offences.<sup>33</sup>

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<sup>28</sup> Article 1(1) *Smuggling of Migrants Protocol*.

<sup>29</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 330 [14(b)].

<sup>30</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 329 [13].

<sup>31</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

<sup>32</sup> Article 2 *Trafficking in Persons Protocol*.

<sup>33</sup> See further Section II.10.1 below.



## 2 Ratification of and Accession to International Legal Instruments

### International requirements



- ➔ Articles 1(1), (2), 21 *Smuggling of Migrants Protocol*
- ➔ Article 37 *Convention against Transnational Organized Crime*
- ➔ Articles 1(1), (2), 16 *Trafficking in Persons Protocol*

The *Toolkit to Combat Smuggling of Migrants* sets out a comprehensive catalogue of other international and regional instruments that may assist countries in their efforts to prevent and suppress the smuggling of migrants.<sup>34</sup> These include international instruments concerning migration, labour, refugees, human rights, international humanitarian law, and gender and child-specific instruments. These instruments are not further discussed or used in this report.

In order to address the complexity of smuggling of migrants, it is important that States ratify the *Convention against Transnational Organized Crime* and the *Smuggling of Migrants Protocol*. Accordingly, questions about the accession to relevant treaties stand at the very beginning of any assessment of domestic criminal justice responses to smuggling of migrants.

According to Article 2(b) of the *Vienna Convention on the Law of Treaties*<sup>35</sup> “‘ratification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.’ Article 11 of the Convention further states that ‘the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.’ Signature of a treaty can mean the consent of a State to be bound by a treaty if the treaty says so or it is otherwise established that the negotiating States were in agreement about it.<sup>36</sup> In most cases, signature does not mean consent to be bound.<sup>37</sup> Article 14 of the *Vienna Convention on the Law of Treaties* sets out the criteria to express consent of a State to be bound by ratification, acceptance or approval. Signature and ratification can involve a two-step procedure or can be performed through the same instrument at the same time. The specific requirements for ratification in a particular State are governed by domestic law. ‘Acceptance’ has been created to preserve the possibility of a two-step procedure without ratification. This instrument is mostly used if the term ‘ratification’ would trigger domestic requirements of parliamentary approval. ‘Accession’ is an expression to be bound to a treaty that can take different forms but that cannot be made subject to subsequent ratification.<sup>38</sup>

If the State is a Party to *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime*, the assessment of the State’s international obligations further needs to identify any reservations that may have been filed to exclude or modify the legal effect of certain provisions of the Protocol or Convention in their application to that State. According to Article 2(d) of the *Vienna Convention on the Law of Treaties* a reservation is ‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’. With the reservation, the respective State normally tries to adapt the treaty to domestic legal circumstances in matters that are of important national interest.<sup>39</sup>

<sup>34</sup> UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 3, 9–16.

<sup>35</sup> Opened for signature 23 May 1969 [entered into force 27 January 1980] 1155 UNTS 331.

<sup>36</sup> Article 12 *Vienna Convention on the Law of Treaties*.

<sup>37</sup> Robert Kolb, *The Law of Treaties: An Introduction* (2016) 42.

<sup>38</sup> Oliver Dörr & Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2012) Art 10 [8], [10].

<sup>39</sup> Edward T Swaine, ‘Treaty Reservations’, in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (2012) 277, 278.

## 2 Assessment Questions



### Ratification of the *Convention against Transnational Organized Crime* and the *Smuggling of Migrants Protocol*

- ➔ Is the country a State Party to the *Convention against Transnational Organized Crime*?
  - ↳ If yes, since when?
  - ↳ If not, have reasons been given why?
- ➔ Is the country a State Party to the *Smuggling of Migrants Protocol*?
  - ↳ If yes, since when?
  - ↳ If not, have reasons been given why?
- ➔ Has the country filed any reservation or made any declarations towards the Convention or Protocol?
  - ↳ If yes, what reservations have been filed and why? What declarations have been made and why?
- ➔ Is the country a State Party to the *Trafficking in Persons Protocol*?
  - ↳ If yes, since when?

### II.3 Domestic laws and policies relating to smuggling of migrants

To give effect to the provisions under the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime*, it is essential that States Parties take the steps necessary to fully implement these treaties through the development of domestic laws. Article 34(1) of the Convention specifically notes that:

Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its domestic law, to ensure the implementation of its obligation under this Convention.

## 3 Domestic laws and Policies relating to the Smuggling of Migrants

### International requirements



- ➔ Article 34(1), (3) *Convention against Transnational Organized Crime*

Accordingly, an assessment of criminal justice systems needs to establish whether national legislation for countering smuggling of migrants is in place and, if it is, what such legislation encompasses. National legislation relating to smuggling of migrants may be set out in general criminal laws, immigration laws, or may be found in specific laws on smuggling of migrants.

When domestic laws on smuggling of migrants are examined, the assessment should take note that the requirements set out in the Convention and Protocol serve as minimum standards.<sup>40</sup> Accordingly, domestic measures may be broader in scope or more severe than those required by the Convention and Protocol, so long as the obligations set forth in these treaties have been fulfilled.<sup>41</sup>

In some States, the implementation of domestic laws is guided by specific national policies, action plans, or official statements relating to smuggling of migrants. In others, general policy documents relating to immigration, border control, refugees and asylum seekers, transnational crime, and international law enforcement and judicial cooperation may outline the government's position and,

<sup>40</sup> Article 34(3) *Convention against Transnational Organized Crime*.

<sup>41</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 331 [14(e)].

directly or indirectly, shape the overall approach to smuggling of migrants and the formulation of laws and law enforcement responses.<sup>42</sup> Where available, these policies and action plans should be taken into account when examining criminal offences relating to smuggling of migrants

### 3 Assessment Questions



#### National implementation of the *Smuggling of Migrants Protocol* and the *Convention against Transnational Organized Crime*

- ➔ In what domestic law or laws has the *Smuggling of Migrants Protocol* been implemented?
  - ↳ Is there a single law on smuggling of migrants or are there multiple legislative instruments covering some or all of the provisions of the *Smuggling of Migrants Protocol*?
  - ↳ Does the domestic law(s) relating to smuggling of migrants pre-date the ratification of the Protocol or has it been enacted or amended since the State became a party?
- ➔ In what domestic law or laws has the *Convention against Transnational Organized Crime* been implemented?
  - ↳ Is there a single law on organized crime or are there multiple legislative instruments?
  - ↳ Does the domestic law(s) relating to organised crime pre-date the ratification of the Convention or has it been enacted or amended since the State became a party?

#### National policy/action plan

- ➔ Does the State have a national policy or action plan outlining the response to the smuggling of migrants?
  - ↳ If yes, what is this policy documented and what does it say?
  - ↳ In the absence of any national policy or action plan, are there other documents, 'white papers', statements, regional action plans et cetera that set out individual elements of the State's approach to migrant smuggling?

## II.4 Terminology and definitions

### II.4.1 Smuggling of migrants

With the *Convention against Transnational Organized Crime* and the *Smuggling of Migrants Protocol*, the international community agreed on the first international, legally binding definition of smuggling of migrants. Article 3(a) of the *Smuggling of Migrants Protocol* provides that the term '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.

The definition of smuggling of migrants in Article 3(a) forms the basis of the offences set out in Article 6 *Smuggling of Migrants Protocol*; these are discussed in Section II.5 below.

<sup>42</sup> See also UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (2012) 9–10.

## 4 Terminology and Definitions: Smuggling of Migrants International requirements



→ Article 3(a), (b) *Smuggling of Migrants Protocol*

### II.4.2 Illegal entry

Article 3(b) of the *Smuggling of Migrants Protocol* defines ‘illegal entry’ as the crossing of borders without complying with the necessary requirements for legal entry into the receiving State. The term ‘receiving State’ is worded generally; ‘it is not limited to a State Party, nor to the State in which a prosecution is brought’.<sup>43</sup>

### II.4.3 Financial or other material benefit

The *Interpretative Notes* state that the reference to ‘a financial or other material benefit’ was included in the definition of smuggling of migrants

in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provide support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations.<sup>44</sup>

The reference to ‘other material benefit’ is relevant to the criminalisation of migrant smugglers who request advantages and favours other than financial payment for the provision of their smuggling services. The *Interpretative Notes* indicate that the term ‘benefit’ ‘should be understood broadly to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members’.<sup>45</sup> The *Model Law against the Smuggling of Migrants* further notes that the term ‘benefit’ should be conceived as broadly and inclusively as possible to include ‘non-financial inducements, such as a free train or airplane ticket, or property, such as a car.’<sup>46</sup>

## 4 Assessment Questions



### Terminology and definitions

- Does domestic law define the terms
  - ↳ smuggling of migrants?
  - ↳ illegal entry?
  - ↳ financial or other material benefit?
- What other relevant terms pertaining to smuggling of migrants are defined in domestic law?

<sup>43</sup> David McClean, *Transnational Organised Crime* (2007) 384.

<sup>44</sup> *Interpretative Notes*, 16 [88].

<sup>45</sup> *Interpretative Notes*, 2 [3].

<sup>46</sup> UNODC, *Model Law against Smuggling of Migrants* (2010) 13.

## II.5 Offence of smuggling of migrants

The core feature of international law relating to smuggling of migrants — and the central element of any national criminal justice response — is the offence of the smuggling of migrants.

Article 6(1) of the *Smuggling of Migrants Protocol* identifies three offences that must be established under domestic law, including:

- the smuggling of migrants, Article 6(1)(a);
- producing, procuring, providing or possessing a fraudulent travel or identity document for the purpose of enabling the smuggling of migrants: Article 6(1)(b); and
- enabling illegal stay: Article 6(1)(c).

These offences may be established as separate provisions or as one omnibus offence, leaving the specifications of the actual conduct alleged for the drafters of criminal charges or indictments.<sup>47</sup>

The basic offence of smuggling of migrants is discussed in the following Sections. The offences under Article 6(1)(b) and (c), aggravations, and extensions to criminal liability are explored in Sections II.6, II.7, II.8, and II.9 below.

5    Offence of smuggling of migrants  
 International requirements

→ Article 6(1)(a) *Smuggling of Migrants Protocol*

Article 6(1)(a) requires the criminalisation of ‘smuggling of migrants’, as defined in Article 3(a) of the Protocol.<sup>48</sup> Figure 2 below sets out the physical and mental elements (*actus reus* and *mens rea*) of this offence.

Figure 2: Elements of the offence of smuggling of migrants, Article 6(1)(a) *Smuggling of Migrants Protocol*

Physical elements	
<b>conduct</b>	procurement
<b>result</b>	illegal entry, Article 3(b)
<b>object</b>	a person into a State Party of which the person is not a national or a permanent resident
Mental elements	
<b>intention</b>	‘when committed intentionally’, Article 6(1) <i>château</i>
<b>purpose</b>	in order to obtain, directly or indirectly, a financial or other material benefit

<sup>47</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 343 [40].

<sup>48</sup> See further Section II.3 above.

## II.5.1 Physical elements

### Procurement

The conduct element of the offence in Article 6(1)(a) is the ‘procurement’ of illegal entry. The term procurement is not further defined and is broad enough to capture any act or omission that facilitates or enables the illegal entry of another person.<sup>49</sup>

### Illegal entry

‘Illegal entry’ is further defined in Article 3(b) of the Protocol to ‘mean crossing borders without complying with the necessary requirements for legal entry into the receiving State’. Whether or not the entry of a person into the receiving State is illegal will thus depend on the domestic laws of that State. The *Legislative Guides* make an important point about the requirement of ‘illegal entry’ in this offence, noting that ‘the drafters intended that cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence’ under Article 6(1)(c).<sup>50</sup>

### Smuggled migrant

The object of the offence, the smuggled migrant, is referred to as ‘a person into a State Party of which the person is not a national or a permanent resident’. The offence of smuggling of migrants is thus limited to foreigners who are not permanent residents of the receiving State. The term ‘smuggled migrant’ is not separately defined in the Protocol.

## II.5.2 Mental elements

### Intention to smuggle migrants

The following obligation in the *château* of Article 6(1) applies to the offences under subparagraphs (a), (b), and (c):

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.

The offence under Article 6(1)(a) is thus limited to the intentional smuggling of migrants. Depending on domestic laws and their interpretation, this may include direct intention (purpose or *dolus directus*) as well as indirect intention (*dolus indirectus*). In addition, Article 34(3) of the *Convention against Transnational Organized Crime*, with which the *Smuggling of Migrants Protocol* must be read, permits States Parties to ‘adopt more strict or severe measures’. States Parties are thus free to lower the threshold for this mental element, for example to recklessness (*dolus eventualis*) or, perhaps, negligence.

### In order to obtain a financial or other material benefit

In addition to the intention to procure illegal entry specified in the *château* of Article 6(1), the offence of smuggling of migrants under paragraph (a) involves a second mental element: the purpose of obtaining a financial or other material benefit.<sup>51</sup>

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<sup>49</sup> Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (2014) 364.

<sup>50</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 342 [34]. See Art 6(1)(c) *Smuggling of Migrants Protocol*.

<sup>51</sup> Article 3(a) *Smuggling of Migrants Protocol*; UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 341 [32].

The inclusion of this element articulates important boundaries for the criminalisation of smuggling of migrants. The *Interpretative Notes* emphasise that:

the reference to ‘a financial or other material benefit’ as an element of the definition in subparagraph (a) was included in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provide support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations.<sup>52</sup>

The *Smuggling of Migrants Protocol* recognises that irregular migration, of which smuggling of migrants is one form, is frequently connected to situations in which persons have to flee from persecution, war, torture, discrimination, and severe human rights abuses, or are forced to leave their home countries to seek asylum abroad for other reasons. For many smuggled migrants, the services offered by smugglers represent the only way to escape threats, harm, and death.<sup>53</sup>

The Protocol does not seek to criminalise persons who merely assist others in their quest to find safety and a better life abroad. Persons who act for humanitarian or altruistic reasons as a favour to others or who help refugees flee from persecution are exempted from criminal liability. Humanitarian smuggling activities may involve, for instance, providing food, medication, clothing and even temporary accommodation so long as these activities serve to save or protect the life of smuggled migrants. Activities such as rescuing smuggled migrants from a life-threatening situation would also fall into that category. Other measures designed to save or restore the smuggled migrants’ lives, health or physical integrity should also be viewed as humanitarian activities. Humanitarian aid of this kind is akin to situations of emergency or necessity in which a failure to act may result in greater harm and in which the smuggling of migrants and other acts facilitating illegal entry or enabling illegal stay of another person may be justified or justifiable. It has been argued that the same may apply if parents smuggle a child into another country to provide the child with better education opportunities.<sup>54</sup>

For these reasons, the Protocol limits the definition of smuggling migrants and the criminalisation requirement under Article 6(1)(a) to instances in which the offender seeks to obtain, directly or indirectly, a financial or other material benefit. The Protocol leaves it open for States Parties to criminalise under their domestic laws smuggling activities that are not done for profit,<sup>55</sup> but the Protocol neither provides the foundation nor the justification for such offences and these do not fall within the definition of smuggling of migrants under Article 3(a).

### II.5.3 Penalty

The *Smuggling of Migrants Protocol* does not prescribe specific penalties or sanctions for the offences set out in Article 6(1).<sup>56</sup> Article 6(4) merely notes that ‘[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.’ The *Interpretative Notes* indicate that the reference to ‘measures’ is to be interpreted broadly to include both administrative and criminal sanctions. Article 11(1) of the *Convention against Transnational Organized Crime* may be relevant in this context as it provides that States Parties are

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<sup>52</sup> *Interpretative Notes*, 16 [88], 17 [89].

<sup>53</sup> Cf UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 1: Understanding the smuggling of migrants, 29.


<sup>54</sup> Anne T Gallagher & Fiona David, *The International Law of Migrant Smuggling* (2014) 366.

<sup>55</sup> UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 4 [12].

<sup>56</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 351 [59].

required to adopt sanctions within domestic law that take into account, and are proportionate to, the gravity of the offences.<sup>57</sup>

**5 Assessment Questions**




**Smuggling of migrants offence**

- Is the smuggling of migrants a criminal offence under domestic law?
- What are the physical elements of this offence under domestic law? Does the offence include
  - ↳ a conduct element equivalent to ‘procurement’?
  - ↳ reference to illegal entry into the receiving State?
  - ↳ Who is the object of the offence?
- What are the mental elements of this offence under domestic law? Does the offence include
  - ↳ a mental element relating to the conduct?
  - ↳ the purpose of obtaining, directly or indirectly, a financial or other material benefit?
- What is the statutory penalty for the offence of smuggling of migrants?

## II.6 Offences involving fraudulent travel or identity documents

Article 6(1)(b) of the *Smuggling of Migrants Protocol* sets out two offences for (i) ‘producing a fraudulent travel or identity document’ and (ii) ‘procuring, providing or possessing such a document’.<sup>58</sup> These activities should be criminalised when they are intentionally committed for the purpose of the smuggling of migrants. The reference to ‘smuggling of migrants’ as defined in Article 3(a) means that the document fraud offences must relate to the procurement of illegal entry into a State Party where that person is not a national or a permanent resident. Drafters of national legislation could establish a separate offence in respect of Article 6(1)(b)(i) and (ii), or combine them in a single provision, leaving the specification of the actual conduct alleged for the drafters of criminal charges or indictments.<sup>59</sup>

**6 Offences involving fraudulent travel or identity documents**  
International requirements



→ Article 6(1)(b) *Smuggling of Migrants Protocol*

<sup>57</sup> Cf David McClean, *Transnational Organized Crime* (2007) 396.

<sup>58</sup> The separation of the requirements in Art 6(1)(b) into (i) and (ii) was done to facilitate the drafting of Art 6(2), which distinguishes between fully mandatory and conditional obligations to criminalise attempts, participation as an accomplice and organising or directing others to commit the offences. It has no bearing on the basic obligation to criminalise the principal conduct involved: UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 343 [40].

<sup>59</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 343 [40].



## II.6.1 Physical elements

### Producing, procuring, providing, or possessing

The conduct elements of the offences under Article 6(1)(b)(i) and (ii) include the production, procurement, provision and possession of fraudulent travel or identity documents.

The offence of producing a fraudulent travel or identity document in Article 6(1)(b)(i) relates to making or creating the fraudulent document or causing it to be created. For example, a smuggler may obtain an authentic or genuine passport, remove the photograph on the passport and substitute it with a picture of the migrant, or the smuggler may be running a criminal enterprise such as a fraudulent passport factory.<sup>60</sup>

Article 6(1)(b)(ii) criminalises a range of other conduct associated with document fraud and smuggling of migrants, such as procuring, providing or possessing fraudulent travel or identity documents. 'Procuring' means obtaining or causing a result by effort. For example, the smuggler may obtain the document for someone else. 'Providing' means giving. For example, the smuggler may give the document to the migrant or to another smuggler in the smuggling network.<sup>61</sup>

### Fraudulent travel or identity document

Article 3(c) of the *Smuggling of Migrants Protocol* defines 'fraudulent travel or identity document' to 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 authorised 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.

The *Interpretative Notes* make clear that the term 'travel document' includes any document needed to enter or leave a State by the laws of that State.<sup>62</sup> This could include the laws of any State involved in a specific case. For example, a passport issued by one State could contain a visa issued by another and either or both could be required to both leave one State and enter another, making the laws of both applicable.<sup>63</sup>

The *Interpretative Notes* further add that 'identity document' is a document used to identify persons by and in accordance with the laws of the State that issued or is purported to have issued it.<sup>64</sup> It should be noted that Article 13 of the *Smuggling of Migrants Protocol* requires States Parties to verify within a reasonable time the legitimacy and validity of documents issued by or purported to have been issued by them.<sup>65</sup>

The *Smuggling of Migrants Protocol* seeks to ensure that States comprehensively penalise any form of travel and identity document fraud pertaining to smuggling of migrants. To that end, the *Interpretative Notes* further remark that

the words 'falsely made or altered' should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents.

<sup>60</sup> UNODC, *In-depth Training Manual on Investigating and Prosecuting Smuggling of Migrants* (2011) Module 1, 8.

<sup>61</sup> UNODC, *In-depth Training Manual on Investigating and Prosecuting Smuggling of Migrants* (2011) Module 1, 8.

<sup>62</sup> *Interpretative Notes*, 16 [89].

<sup>63</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 345 [42(g)].

<sup>64</sup> *Interpretative Notes*, 16 [89].

<sup>65</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 345 [42(g)].

They should also indicate that the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.<sup>66</sup>

The *Legislative Guides* offer further guidance on the types of documents and the types of conduct that ought to be criminalised. The Guides notes that the definition of the term ‘fraudulent travel or identity document’ adds several further factual elements that must be taken into consideration when formulating the offence or offences:

(a) The document can either be ‘falsely made’ from nothing or it can be a genuine document that has been ‘altered in some material way’;

(b) ‘Falsely made’ should include both documents that are forged or fabricated from nothing and documents that consist of genuine document forms, but information that is not accurate and put onto the form by someone not authorised to do so or who is not authorised to issue the document in question;

(c) Whether a document is ‘falsely made’ or ‘improperly issued’ will depend in some cases on how national law treats cases where an official acts illegally or without authorisation. If a consular official issues a travel document beyond his or her powers, systems that would treat this as non-issuance would consider the document as having been made by someone not authorised to do so, falling under subparagraph (i). Systems that considered the basic issuance to have occurred would see the same document as having been ‘improperly issued’ under subparagraph (ii). What is important is that drafters of national legislation consider the approach taken by national law and ensure that all of the possible scenarios result in documents that are treated as ‘fraudulent’ and that there are no gaps;

(d) Documents that have been altered must have been changed in some way that is material to the other offences established in accordance with the Protocol, such as changing the identity or photograph of the holder or the dates for which it was valid. If the document is ‘altered’, this must have been by someone not authorised to do so;

(e) ‘Fraudulent’ documents also include documents that are genuine, but improperly issued through misrepresentation, corruption or duress. Here also the approach of drafters will depend to some degree on how domestic law treats cases where an official acts illegally or without authority;

(f) Finally, ‘fraudulent’ documents include papers that are formally valid and have been validly issued, but are being used by someone other than the person to or for whom they were issued, whether the document in question has been altered (e.g. by changing a photograph) or not.<sup>67</sup>

The purpose of these complex explanations is to ensure that States comprehensively proscribe and criminalise any form of travel and identity document fraud, ranging from creating new documents, altering existing documents, to using another person’s document, and obtaining documents fraudulently, corruptly or coercively.

## II.6.2 Mental elements

Intention to produce, procure, provide, or possess

The *châpeau* of Article 6(1), which applies to the offences under subparagraphs (a), (b), and (c), refers to the ‘intentional commission’ of these offences.<sup>68</sup> The offences under Article 6(1)(b)(i) and (ii) are thus limited to intentional conduct, which, depending on domestic laws and their interpretation, includes direct intention as well as indirect intention.<sup>69</sup> In addition, Article 34(3) of the *Convention against Transnational Organized Crime*, with which the *Smuggling of Migrants Protocol* must be read,

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<sup>66</sup> *Interpretative Notes*, 16 [90].

<sup>67</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 344–345 [42].

<sup>68</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 344 [41]; see also Section II.5 above.

<sup>69</sup> See further Section II.5.2 above.

enables States Parties to ‘adopt more strict or severe measures’. States Parties are thus free to lower the threshold for this mental element.

#### Purpose of enabling the smuggling of migrants

Article 6(1)(b) calls on States Parties to implement specific offences relating to the smuggling of migrants; it does not envisage the creation of general document fraud offences. For this reason, the subparagraph specifically requires that the conduct elements are ‘committed for the purpose of enabling the smuggling of migrants’. This reference to ‘smuggling of migrants’ means that the document fraud offences must relate to the procurement of illegal entry into a State Party where that person is not a national or a permanent resident.<sup>70</sup>

The *Legislative Guides* remark that

this is an additional safeguard against criminalising those who smuggle themselves, but, taken literally, it also excludes those who commit the document offences for the purpose of enabling illegal residence as opposed to procuring illegal entry. It should be noted, however, that legislatures implementing the Protocol can apply the document offences to both of the principal offences if they wish, in accordance with article 34, paragraph 3, of the Convention. Apart from expanding the application of the legislation to additional conduct associated with smuggling of migrants, such an approach would have the advantage of reducing litigation on the issue of whether illicit entry or illicit residence was involved in specific cases, since the criminal liability would be the same in either case.<sup>71</sup>

In order to obtain a financial or other material benefit

The purpose of obtaining a financial or other material benefit, which is part of the definition of smuggling of migrants in Article 3(a), is a further mental element of the offences under Article 6(1)(b)(i) and (ii).<sup>72</sup>

### II.6.3 Penalty

The *Smuggling of Migrants Protocol* does not prescribe specific penalties or sanctions for the offences set out in Article 6(1).<sup>73</sup> Article 6(4) merely notes that ‘[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.’ The *Interpretative Notes* indicate that the reference to ‘measures’ is to be interpreted broadly to include both administrative and criminal sanctions. Article 11(1) of the *Convention against Transnational Organized Crime* may be relevant in this context as it provides that States Parties are required to adopt sanctions within domestic law that take into account, and are proportionate to, the gravity of the offences.<sup>74</sup>

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<sup>70</sup> Article 3(a) *Smuggling of Migrants Protocol*.

<sup>71</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 344 [41].

<sup>72</sup> See Section II.5.2 above.

<sup>73</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 351 [59].

<sup>74</sup> Cf David McClean, *Transnational Organized Crime* (2007) 396.



### Offences involving fraudulent travel or identity documents

- ➔ Does domestic law contain specific offences involving fraudulent documents for the purpose of smuggling of migrants?
- ➔ What are the physical elements of this offence under domestic law?
  - ↳ Does the offence include conduct elements relating to producing, procuring, providing, and possession?
  - ↳ How are fraudulent travel or identity documents defined in these offences? Are the types of documents envisaged by the *Smuggling of Migrants Protocol* covered?
- ➔ What are the mental elements of this offence under domestic law? Does the offence
  - ↳ include a mental element relating to the conduct?
  - ↳ refer to the purpose of enabling the smuggling of migrants?
  - ↳ include the purpose of obtaining, directly or indirectly, a financial or other material benefit?
- ➔ What is the statutory penalty for this offence?

## II.7 Offence of enabling illegal stay

Article 6(1)(c) of the *Smuggling of Migrants Protocol* creates an offence for

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 the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

This offence primarily seeks to criminalise the harbouring and concealing of persons who have no legal status in the host country in order to avoid their apprehension by law enforcement, immigration or other authorities. The *Legislative Guides* add that the intent of this particular offence is

to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors' permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorisations to enter.<sup>75</sup>



- ➔ Article 6(1)(c) *Smuggling of Migrants Protocol*

### II.7.1 Physical elements

Enabling to remain in the State concerned without complying with the necessary requirements for legally remaining in the State

The conduct element of the offence under Article 6(1)(c) is cast widely to include any act that 'enables' the other person to remain in the host State unlawfully. The conduct required to be criminalised

<sup>75</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 343 [36].

consists simply of committing any act that amounts to enabling illegal stay, where the resident or residents in question lack the necessary legal status or authorisations.<sup>76</sup>

A person who is not a national or permanent resident

The object of the offence is any person who is not a national or permanent resident. Here, the offence under Article 6(1)(c) adopts the same expression as the one used in Article 3(a) to refer to the object of smuggling of migrants.<sup>77</sup>

Means mentioned in Article 6(1)(b) or any other means

The ‘means mentioned in subparagraph (b)’ refers to offences involving fraudulent documents in Article 6(1)(b).<sup>78</sup> This element of Article 6(1)(c) is cast widely to also capture enabling illegal stay by ‘any other illegal means’ as defined under domestic law.<sup>79</sup>

## II.7.2 Mental elements

Intention to enable

The *château* of Article 6(1), which applies to the offences under subparagraphs (a), (b), and (c), refers to the ‘intentional commission’ of these offences.<sup>80</sup> As with other offences in Article 6(1) there must be an ‘intention to commit whatever act is alleged as having enabled illegal residence’.<sup>81</sup> The offence under Article 6(1)(c) is limited to intentional conduct, which, depending on domestic laws and their interpretation, includes direct intention as well as indirect intention.<sup>82</sup> In addition, Article 34(3) of the *Convention against Transnational Organized Crime*, with which the *Smuggling of Migrants Protocol* must be read, enables States Parties to ‘adopt more strict or severe measures’. States Parties are thus free to lower the threshold for this mental element.

In order to obtain a financial or other material benefit

The purpose of obtaining a financial or other material benefit, which is part of the definition of smuggling of migrants in Article 3(a),<sup>83</sup> is a further mental element of the offences under Article 6(1)(c).<sup>84</sup>

## II.7.3 Penalty

The *Smuggling of Migrants Protocol* does not prescribe specific penalties or sanctions for the offences set out in Article 6(1).<sup>85</sup> Article 6(4) merely notes that ‘[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.’ The *Interpretative Notes* indicate that the reference to ‘measures’ is to be interpreted broadly to include both administrative and criminal sanctions. Article 11(1) of the *Convention against*

<sup>76</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 343 [37].

<sup>77</sup> See Section II.5.1 above.

<sup>78</sup> See Section II.6 above.

<sup>79</sup> *Interpretative Notes*, 17 [94]; *Legislative Guides*, 343.

<sup>80</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 344 [41]. See also Section II.5 above.

<sup>81</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 343 [38].

<sup>82</sup> See further Section II.5.2 above.

<sup>83</sup> See further Section II.4.3 above.

<sup>84</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 343 [38]. See further Section II.5.2 above.

<sup>85</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 351 [59].

*Transnational Organized Crime* may be relevant in this context as it provides that States Parties are required to adopt sanctions within domestic law that take into account, and are proportionate to, the gravity of the offences.<sup>86</sup>

7    **Assessment Questions**

**Offence of enabling residence**

- ➔ Does domestic criminal law contain specific offences relating to the enabling of illegal stay or harbouring of persons who are not citizens, not permanent residents and who are in the country unlawfully?
- ➔ What are the physical elements of this offence under domestic law?
  - ↳ Does the offence include the enabling of a non-national or non-permanent residence to remain in the State concerned without complying with the necessary requirements for legally remaining in that State?
  - ↳ What is the means element of this offence?
- ➔ What are the mental elements of this offence under domestic law? Does the offence include
  - ↳ a mental element relating to the conduct?
  - ↳ include the purpose of obtaining, directly or indirectly, a financial or other material benefit?
- ➔ What is the statutory penalty for this offence?

## II.8    Aggravating circumstances

Article 6(3) of the *Smuggling of Migrants Protocol* creates obligations to incorporate ‘aggravating circumstances’ into the offences established by the Protocol. Specifically, this requires the criminalisation of circumstances

- (a) that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or
- (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants.<sup>87</sup>

These aggravating circumstances need to be connected to the smuggling of migrants offence under Article 6(1)(a), the offence of producing a fraudulent travel or identity document to enable the smuggling of migrants under Article 6(1)(b)(i), and the offence of enabling illegal stay under Article 6(1)(c). This can be achieved by creating parallel offences, such as an aggravated smuggling of migrants offence, or by inserting provisions that require courts to consider more severe penalties where there has been an aggravating circumstance.<sup>88</sup>

8    **Aggravating circumstances**  
**International requirements**

- ➔ Article 6(3) *Smuggling of Migrants Protocol*

<sup>86</sup> Cf David McClean, *Transnational Organized Crime* (2007) 396.

<sup>87</sup> Article 6(3) *Smuggling of Migrants Protocol*.

<sup>88</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 346 [46].

### II.8.1 Endangering the lives or safety of smuggled migrants

The aggravation in Article 6(3)(a) of the *Smuggling of Migrants Protocol* relates to circumstances ‘that endanger, or are likely to endanger, the lives or safety of the migrants concerned’.<sup>89</sup> This aggravation concerns the physical integrity and the lives of smuggled migrants by calling on States Parties to provide higher penalties for instances that involve particularly dangerous methods of smuggling or circumstances that put the health of smuggled migrants at risk or their lives in jeopardy.

The *Legislative Guides* note that ‘the most common occurrence to which this requirement is directed is the use of modes of smuggling, such as shipping containers, that are inherently dangerous to the lives of the migrants’. The Guides call on States Parties to ensure ‘that legislation should be broad enough to encompass other circumstances, such as cases where fraudulent documents create danger’.<sup>90</sup> The *Toolkit to Combat Smuggling of Migrants* lists several other examples for situations that may endanger the lives or safety of smuggled migrants such as, ‘conditions in which migrants are smuggled if, for example, the boat, bus or car was particularly cold, wet, dry or crowded, or if the current at sea was particularly strong’ or if the smuggled migrants sent out are left unattended in a boat that is not unseaworthy.<sup>91</sup>

The *Model Law against the Smuggling of Migrants* also suggests the introduction of a separate aggravation for instances in which ‘the offence involves serious injury or death of the smuggled migrant or another person, including death as a result of suicide’.<sup>92</sup>

### II.8.2 Inhuman or degrading treatment of smuggled migrants

The aggravation in Article 6(3)(b) relates to the way in which smugglers treat migrants. Specific reference is made to the exploitation of smuggled migrants.<sup>93</sup> The term ‘inhuman or degrading treatment’ is not further defined in the *Smuggling of Migrants Protocol* but is generally understood to cover acts that cause physical or mental suffering.<sup>94</sup> Examples of such treatment include the ‘abuse of a child or a position of trust or authority’, ‘use of violence, threats or intimidation against migrants or their families [such as] hitting migrants to control them during travel’, or the use of minors in the commission of offences.<sup>95</sup>

The *Model Law against the Smuggling of Migrants* further proposes the introduction of a separate aggravation for instances in which the offender takes advantage of or abuses a ‘particular vulnerability or dependency of the smuggled migrant for financial or other material gain.’<sup>96</sup> The *Model Law* provides the following two examples to illustrate the application of this aggravation:

Migrants, abandoned in the desert and with no other option, accept the services of a smuggler who happens to be passing by, but have to pay him or her three times the normally agreed price when departing from the nearest city.

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<sup>89</sup> See also UNODC, *Model Law against the Smuggling of Migrants* (2010) 41 [Art 6(a)].

<sup>90</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 346 [48]; see also UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 24–25.

<sup>91</sup> UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 24–26; see also UNODC, *Model Law against the Smuggling of Migrants* (2010) 41.

<sup>92</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 45 [Art 6(c)].

<sup>93</sup> The UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) (at 346 [48]) note that this may also include ‘cases where fraudulent documents [...] lead to inhuman or degrading treatment.’

<sup>94</sup> See further UNODC, *Model Law against the Smuggling of Migrants* (2010) 42–44.

<sup>95</sup> UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 24–25.

<sup>96</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 46 [Art 6(d)].

An agent, as part of the smuggling ‘package of services’, arranges for the migrants to rent a rundown house that he owns in a transit city for a very inflated amount of rent, and to buy packages of food that he provides at greatly inflated prices, while the migrants wait for their net connection.<sup>97</sup>

The *Interpretative Notes* acknowledge that the aggravation under Article 6(3)(b) overlaps with the concept and offences relating to trafficking in persons under Articles 3(a) and 5 of the *Trafficking in Persons Protocol*.<sup>98</sup> The *Legislative Guides* further note that in cases of migrant smuggling in which

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 trafficking offence applicable if the State Party concerned has ratified and implemented that Protocol.<sup>99</sup>

The *Model Law* proposes the introduction of an aggravating circumstance for cases in which ‘the offender used or threatened to use any form of violence against the smuggled migrant or their family.’<sup>100</sup> It further recognises that a situation of smuggling of migrants may turn into one of trafficking in persons if the smugglers control or confiscate the travel or identity documents of the smuggled migrants and suggests a particular circumstance of aggravation if ‘the offender confiscates, destroys or attempts to destroy the travel or identity documents of the smuggled migrant.’<sup>101</sup>

### II.8.3 Other aggravations

Article 34(3) of the *Convention against Transnational Organized Crime* enables States Parties to create aggravations beyond those set out in the Protocol. The Working Group on the Smuggling of Migrants, which has been set up by the Conference of States Parties to the Convention against Transnational Organized Crime also noted that it is good practice ‘for States to consider aggravating circumstances that go beyond those set out in the *Smuggling of Migrants Protocol*.’<sup>102</sup>

The *Model Law against the Smuggling of Migrants* and the *Toolkit to Combat Smuggling of Migrants* set out a range of aggravating circumstances that legislators may wish to consider. Some of these aggravating circumstances relate to instances in which smuggled migrants are used to support the activities of migrant smugglers. This may also include the ‘abuse of a child or abuse of a position of trust or authority’, the smuggling of (unaccompanied) minors, and the use of minors in the commission of offences.<sup>103</sup> Aggravations for the smuggling of migrants with special vulnerabilities, such as pregnant migrants or persons with intellectual or physical disabilities, are also worth considering.<sup>104</sup>

Other suggestions for aggravations relate to the scale of the smuggling operations, such as the smuggling of large numbers of migrants and the size of the profits incurred.<sup>105</sup> The *Model Law* also

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<sup>97</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 46.

<sup>98</sup> *Interpretative Notes*, 17 [96] [emphasis added].

<sup>99</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 347 [49]; see also UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 25; UNODC, *Model Law against the Smuggling of Migrants* (2010) 43–44.

<sup>100</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 50 [Art 6(o)].

<sup>101</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 50 [Art 6(p)].

<sup>102</sup> UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 3 [10] [emphasis added]; see also UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012*, UN Doc CTOC/COP/WG.7/2012/6 (27 June 2012) 3 [15].

<sup>103</sup> UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 24, 26; UNODC, *Model Law against the Smuggling of Migrants* (2010) 49 [Art 6(k), (l)].

<sup>104</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 49 [Art 6(m), (n)].

<sup>105</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 47 [Art 6(h)]; UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 25.




proposes aggravations for repeat offenders and for the use of ‘drugs, medications or weapons in the commission of the offence’.<sup>106</sup>

It has also been suggested to implement aggravating circumstances for public officials who become involved in the smuggling of migrants or abuse their position in the commission of the offence, for example ‘by issuing false documents or allowing people through checkpoints without conducting a proper check’.<sup>107</sup>

The smuggling of migrants offences may also be aggravated if they are combined with another offence, for example where smuggled migrants are compelled to commit other offences when they are smuggled, or where the migrant smugglers commit offences against the migrants, such as assaults, sexual abuse, et cetera.<sup>108</sup> It should be noted that the commission of a separate offence during the course of a smuggling operation, such as an assault, rape, homicide, et cetera, should not be treated simply as an aggravating factor to the smuggling of migrants offence. These offences require separate investigation and prosecution under relevant domestic laws.

**8 Assessment Questions**



**Aggravating offences/elements**

- ➔ Are circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants recognised as aggravating offences/aggravating elements under domestic law?
- ➔ Are circumstances that entail inhuman or degrading treatment or the exploitation of smuggled migrants recognised as an aggravating offence/aggravating element under domestic law?
- ➔ What, if any, additional aggravating circumstances are recognised for offences relating to smuggling of migrants under domestic law?
- ➔ What is the statutory penalty for aggravated offences?

## II.9 Extensions to criminal liability

It is important that the criminalisation of migrant smuggling is not limited to completed offences, but also extends to those who consciously try to smuggle migrants but fail, and to those who participate as aides or facilitators. Equally important is the criminalisation of organisers and directors who oversee migrant smuggling ventures and who instruct others to smuggle migrants but who are themselves not be involved in the physical commission of the crime.

For these reasons, the *Smuggling of Migrants Protocol* mandates several extensions to criminal liability for the offences under Article 6(1). These extensions are set out in Article 6(2) and include:

- Attempting to commit offences under Article 6(1);
- Participating as an accomplice in offences under Article 6(1)(a), (b)(i), and (c), and, subject to basic concepts of the legal system, in offences under Article 6(1)(b)(ii);
- Organising and directing other persons to commit offences under Article 6(1).

Articles 5 and 10 of the *Convention against Transnational Organized Crime* further extend criminal liability to corporations (legal persons), and to persons who participate in an organised criminal group.

<sup>106</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 46 [Art 6(e), (g)].

<sup>107</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 47 [Art 6(i), (j)].

<sup>108</sup> UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 24–26.

## 9 Extensions to Criminal Liability

### International requirements



- ➔ Article 6(2) *Smuggling of Migrants Protocol*
- ➔ Articles 5, 10 *Convention against Transnational Organized Crime*

### II.9.1 Attempts

Article 6(2)(a) of the *Smuggling of Migrants Protocol* requires States Parties to extend criminal liability for the smuggling of migrants, for offences involving fraudulent travel or identity documents, and for offences relating to enabling illegal stay to attempts to commit any of these offences. It has been noted that '[t]he issue of "attempt" is of particular importance in the context of migrant smuggling for the reason that efforts to smuggle migrants that come to the attention of national authorities will often be cut short prior to completion'.<sup>109</sup>

The *Legislative Guides* emphasise that Article 6(2)(a) is not a mandatory provision. This is explained by the fact that

not all legal systems make provision for the criminalisation of cases in which an unsuccessful attempt has been made to commit the offence. Of those States that do criminalise attempts, most require that some fairly substantial course of conduct be established before there can be a conviction. In some cases, one or more positive acts must be established, while in others prosecutors must establish that the accused has done everything possible to complete the offence, which failed for other reasons. The fact that the offence subsequently turns out to have been impossible (e.g. cases where the person being smuggled was deceased, non-existent or a law enforcement officer) is generally not considered a defence in cases of attempt.<sup>110</sup>

The *Interpretative Notes* further add that attempts should be 'understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law'.<sup>111</sup>

The *Legislative Guides* note that the option of prosecuting cases of attempt can be an effective measure, in particular with respect to crimes that are committed over relatively long periods and are sometimes interrupted by law enforcement or other authorities before completion. The Guides further suggest that where it is not possible to criminalise attempts, drafters and legislators may wish to consider other means of reinforcing the offence provisions, such as criminalising individual elements of the offences that could still be prosecuted when the offence established in accordance with the Protocol was not complete. One example of this could be offences such as transporting or concealing migrants for the purpose of smuggling them, which could be prosecuted even where the smuggling was not completed or unsuccessful.<sup>112</sup>

<sup>109</sup> Anne Gallagher & Fiona David, *The International Law of Migrant Smuggling* (2014) 370.

<sup>110</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 347 [51].

<sup>111</sup> *Interpretative Notes*, 17 [95].

<sup>112</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 348 [51].

## 9.1 Assessment Questions



### Extensions to criminal liability: attempts

- ➔ Does domestic law criminalise attempts to
  - ↳ smuggle migrants?
  - ↳ produce, procure, provide, or possess fraudulent travel or identity documents for the purpose of enabling the smuggling of migrants?
  - ↳ enable the illegal stay of a non-national or non-permanent resident?
- ➔ Does domestic law criminalise other preparatory or preliminary activities relating to smuggling of migrants?

## II.9.2 Participation as an accomplice, organising and directing others

Article 6(2)(b) requires States Parties to adopt such legislative and other measures as may be necessary to criminalise

participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article.

This requirement is qualified for the offences under Article 6(1)(b)(ii), procuring, providing, or possessing a fraudulent travel or identity document for the purpose of enabling the smuggling of migrants. This reflects the fact that some national legal systems may have difficulties 'in accommodating some aspects of the proposed offence, notably that of "possessing" a fraudulent document.'<sup>113</sup> The *Legislative Guides* note that in some jurisdictions it is not settled 'whether one could be made an accomplice to offence such as possession'.<sup>114</sup> For this reason, the extension of criminal liability to participants and accomplices in relation to Article 6(1)(b)(ii) is conditional on the basic concepts of national criminal law systems.

Article 6(2)(c) creates a further obligation for States Parties to adopt such legislative and other measures as may be necessary to criminalise the organisation or direction of other persons to commit an offence established in accordance with Article 6(1).

<sup>113</sup> David McClean, *Transnational Organized Crime* (2007) 395.

<sup>114</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 348 [52].

## 9.2 Assessment Questions



Extensions to criminal liability: participation as an accomplice, organising and directing other

- ➔ Does domestic law criminalise participation as an accomplice in
  - ↳ smuggling of migrants?
  - ↳ producing, procuring, providing, or possessing fraudulent travel or identity documents for the purpose of enabling the smuggling of migrants?
  - ↳ enabling the illegal stay of a non-national or non-permanent resident?
- ➔ Does domestic law criminalise organising or directing persons to
  - ↳ smuggle migrants?
  - ↳ produce, procure, provide, or possess fraudulent travel or identity documents for the purpose of enabling the smuggling of migrants?
  - ↳ enable the illegal stay of a non-national or non-permanent resident?

### II.9.3 Participation in an organised criminal group

A further extension to criminal liability for offences relating to smuggling of migrants arises through Article 5 of the *Convention against Transnational Organized Crime*. This Article creates criminal liability for persons who intentionally participate in, or contribute to, criminal activities of an organised criminal group. This offence seeks to prevent and disrupt organised crime by holding those criminally liable who associate for the purpose of criminal offending, even if they have not (yet) committed any offence.<sup>115</sup>

Article 2(a) of the Convention defines 'organised criminal group' to mean

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The term 'structured group' is further defined in Article 2(c) of the Convention to mean

a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its member, continuity of its membership or a developed structure.

The offence of participation in an organised criminal group under Article 5(1)(a) of the Convention may be implemented in one of two ways (or both), either

- i. as an offence based on an agreement between people to commit serious crime for the purpose of obtaining a financial or other material benefit; or
- ii. as an offence based on active participation in activities of an organised criminal group.

Articles 1 and 4 of the *Smuggling of Migrants Protocol* establish the nexus between the criminalisation of smuggling of migrants and Articles 2 and 5 of the Convention. Article 4 of the Protocol states that 'this Protocol shall apply, except as otherwise stated herein, to the prevention, investigation, and prosecution of the offences established in accordance with this Protocol, where the offence [...] involves an organised criminal group [...]'. Article 1 of the Protocol further notes that the Protocol and the Convention shall be interpreted together, that the Convention provisions apply, mutatis mutandis, to the Protocol, and that the offences established under Article 6 of the Protocol are to be regarded as offences established in accordance with the Convention. The *Interpretative Notes* further remark that 'the offences set forth in Article 6 should be seen as being part of the activities of organised

<sup>115</sup> See further UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime* (2<sup>nd</sup> ed 2016) [71]–[107].

criminal groups. In this Article, the Protocol follows the precedent of the Convention (Article 34(2)).<sup>116</sup>

This nexus between the smuggling of migrants and organised criminal groups is not a mandatory requirement in the criminalisation of migrant smuggling. Moreover, Article 34(2) of the Convention expressly requires that liability for domestic offences, including the smuggling of migrants, must not be limited to instances involving organised criminal groups.<sup>117</sup>

The *Model Law against the Smuggling of Migrants* recommends that States Parties to the Protocol enact an aggravation for circumstances in which ‘the offence was committed as part of the activity of an organised criminal group’.<sup>118</sup> This aggravation recognises that the smuggling of migrants involving organised criminal groups poses greater challenges to law enforcement and is likely to involve greater numbers of smuggled migrants and may involve greater dangers for them.

### 9.3 Assessment Questions



#### Extensions to criminal liability: participation in an organised criminal group

- Does domestic law criminalise participation in an organised criminal group?
- Does domestic law define the term ‘organised criminal group’ (or an equivalent term)?
- Does domestic law contain any special offences or aggravating circumstances concerning the smuggling of migrants involving organised criminal groups?

## II.10 Other criminal offences relating to irregular migration

While the main focus of this report is on offences relating to smuggling of migrants, it is necessary to look beyond provisions criminalising migrant smuggling and facilitating illegal entry. Some States do not have specific offences for such conduct or, even if they have such offences, may use other provisions to prosecute cases that are factually situations of smuggling.

Of particular importance is the offence of trafficking in persons, which can be found in most jurisdictions worldwide and which is frequently used to prosecute cases involving the exploitation of foreign nationals, including smuggled migrants.<sup>119</sup> In addition to some States have further offences criminalising specific types of exploitation of foreigners, migrant workers et cetera.<sup>120</sup>

The illegal entry of a person who is not a national and not a permanent resident of the destination country is a key element of the definition of smuggling of migrants in international law. While the *Smuggling of Migrants Protocol* is concerned with those who procure the illegal entry for profit, and not with the irregular migrants, many States penalise the migrants’ illegal entry in their domestic laws and prioritise prosecuting irregular migrants over the investigation and prosecution of smugglers.<sup>121</sup>

### II.10.1 Trafficking in persons

Although the *Smuggling of Migrants Protocol* provides a universally accepted definition of smuggling of migrants, confusion between smuggling of migrants and trafficking in persons persists. In many

<sup>116</sup> *Interpretative Notes*, 17 [92].

<sup>117</sup> See further UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 5: Legislative Framework, 21–22.

<sup>118</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 46 [Art 6(f)].

<sup>119</sup> See Section II.10.1 below.

<sup>120</sup> See Section II.10.2 below.

<sup>121</sup> See Section II.10.3 below.

cases, smuggled migrants and victims of trafficking are both moved from one place to another by organised criminal groups for the purpose of generating illicit profits.<sup>122</sup> For this reason, some jurisdictions, especially those without specific smuggling of migrants laws, use (or attempt to use) provisions relating to trafficking in order to prosecute cases that are more adequately described as smuggling of migrants.

In international law, smuggling and trafficking are defined separately and dealt with in separate instruments primarily because of differences between smuggled migrants and trafficked persons, who are victims of the crime of trafficking and, in many cases, of other crimes as well.<sup>123</sup> Accordingly, relevant international instruments have different requirements concerning the criminalisation of smugglers and traffickers and the protection of smuggled migrants and victims of trafficking. In order to prevent and combat both crimes effectively, it is important to draw a clear distinction between the two concepts.

Article 3(a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*<sup>124</sup> defines 'trafficking in persons' to

mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

## 10.1 Concepts and Definitions: Trafficking in Persons International requirements



➔ Article 3(a) *Trafficking in Persons Protocol*

The main point of difference between the ways in which smuggling of migrants and trafficking in persons are conceptualised is the purpose of each offence. Trafficking in persons is designed as an offence against the person. The offence seeks to protect the rights, integrity, and freedoms of trafficked persons and punish those who force, threaten, deceive, or otherwise abuse victims of trafficking for exploitative purposes. Because the definition of trafficking does not involve an element of transnationality, this offence does not purport to protect national interests such as border control and national security.

In contrast, smuggling of migrants is conceptualised in a way to emphasise the fact that this offence serves to protect national sovereignty and the ability of States to control borders and manage the flow of people across them. The protection of smuggled migrants and their rights and liberties is only a secondary goal of the Protocol. It is for this reason that the Protocol does not refer to smuggled migrants as victims.

A further point of difference between smuggling and trafficking relates to the intention of perpetrators. '[T]he primary source of profit and thus also the primary purpose of trafficking in persons is exploitation'.<sup>125</sup> In the case of smuggling of migrants, there is typically 'no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country'.<sup>126</sup> Rather, migrant smugglers seek payment in advance or upon arrival from the smuggled

<sup>122</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 340 [29].

<sup>123</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 340 [29].

<sup>124</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

<sup>125</sup> UNODC, *A short introduction to smuggling of migrants*, Issue Paper (2010) 10.

<sup>126</sup> UNODC, *A short introduction to smuggling of migrants*, Issue Paper (2010) 10.

migrant. In many cases, this distinction is not an easy one to draw. For example, a person may agree to be smuggled, unaware that on arrival he or she will be forced to work in poor or restrictive conditions for the smuggler in order to pay off a 'debt' for the service. This situation would be considered an instance of trafficking because of the exploitation of the smuggled person and the means of deception used.

Smuggling and trafficking have different requirements relating to transnationality and the legality/illegality of the person's entry into another State. For smuggling of migrants, there must be 'illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.<sup>127</sup> Alternatively, smuggling may arise by enabling a person to remain illegally in a country that he or she has entered (legally or illegally).<sup>128</sup> Smuggling thus involves a cross-border element and the additional requirement of illegal entry or illegal stay. Trafficking in persons, in contrast, may involve legal or illegal entry into a country and there is no requirement that trafficking in persons occurs transnationally; it may also occur completely within one country.

A critical difference between the two offences is the issue of consent, which is considered to be irrelevant by the *Trafficking in Persons Protocol*.<sup>129</sup> This Protocol is based on the understanding that

[v]ictims of trafficking have either never consented — for instance if they have been abducted or sold — or, if they have given an initial consent, their initial consent has become void through the means the traffickers have used to gain control over the victim, such as deception or violence.<sup>130</sup>

Although the *Smuggling of Migrants Protocol* does not expressly address the issue of consent, smuggling of migrants generally involves an agreement whereby a smuggled person freely pays or gives another benefit to a smuggler in order to facilitate his or her illegal entry. In some cases, smuggled migrants may retract their initial consent during a smuggling operation but be forced to continue on the journey.<sup>131</sup> Retracting consent does not automatically denote an instance of trafficking. Other elements of the trafficking definition, such as the purpose of exploitation, would still need to be satisfied.

Figure 3 illustrates the key differences between the two definitions.

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<sup>127</sup> Article 3(a) *Smuggling of Migrants Protocol*.

<sup>128</sup> Article 6(1)(c) *Smuggling of Migrants Protocol*.

<sup>129</sup> Article 3(b) *Trafficking in Persons Protocol*.

<sup>130</sup> UNODC, *A short introduction to smuggling of migrants*, Issue Paper (2010) 10.

<sup>131</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 340–341 [30]; UNODC, *A short introduction to smuggling of migrants*, Issue Paper (2010) 10.

Figure 3: Definitions of ‘trafficking in persons’ and ‘smuggling of migrants’ compared

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

### 10.1 Assessment Questions



#### Other offences: trafficking in persons

- ➔ Does domestic law criminalise trafficking in persons?
- ➔ What are the elements of this offence?
- ➔ What elements differentiate the offences of trafficking in persons and smuggling of migrants in domestic law?
- ➔ What is the statutory penalty for trafficking in persons?
- ➔ What are the aggravating circumstances, if any, of trafficking in persons?

### II.10.2 Exploitation of non-citizens

The domestic laws of some States contain specific offences for the exploitation of non-citizens. These offences may be broader or more specific than the trafficking in persons offence or may exist in the absence of any trafficking in persons offences. In some States, such offences criminalise particular types of exploitation, such as ‘exploitation of foreign workers’, or ‘transnational prostitution trade’, or the like.

In some jurisdictions, special offences exist to criminalise the illegal recruitment of workers or other provisions that serve to protect people from falling victim to brokers and other agents who fraudulently or deceptively recruit labourer. These offences are of particular importance in those countries where smuggling of migrants and trafficking in persons involve labour migrants.

While not directly linked to smuggling of migrants (as defined in Article 3(a) of the *Smuggling of Migrants Protocol*), such provisions are nevertheless important insofar as they may criminalise specific forms of facilitating illegal entry or instances in which smuggled migrants are exploited.



## 10.2 Assessment Questions



### Other offences: exploitation of non-citizens

- Does domestic law contain specific offences relating to exploitation of non-citizens (beyond any trafficking in persons offence)?
- What types of exploitation are criminalised?
- What are the other elements of these offences?
- What is the statutory penalty for these offences?

### II.10.3 Illegal entry

The immigration laws of most States prohibit uncontrolled, clandestine or other forms of irregular entry into the State's territory. Many States provide fines and/or terms of imprisonment for migrants who enter their territory illegally.

While illegal entry is a key ingredient of the definition of smuggling of migrants in the *Smuggling of Migrants Protocol*, international law does not concern itself with the offence of illegal entry; its sole focus is the criminalisation of smugglers. The Protocol takes a neutral position on the question of whether those who migrate illegally should be the subject of any offences.<sup>132</sup> Article 6(4) states that '[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under domestic law'.

In the domestic law of some States, the offence of smuggling of migrants is based on, or closely related to, offences relating to illegal immigration. Some States focus most of their law enforcement efforts on investigating and prosecuting those who migrate illegally rather than on those who smuggle migrants. For these reasons, the offence of illegal entry should be included in any assessment of domestic laws relating to smuggling of migrants.

## 10.3 Assessment Questions



### Other offences: illegal entry

- Does domestic law criminalise illegal entry (by migrants)?
- What are the elements of this offence?
- How does the offence of illegal entry relate to any provisions concerning the smuggling of migrants?
- What is the statutory penalty for illegal entry?

## II.11 Non-criminalisation of smuggled migrants

Article 5 of the *Smuggling of Migrants Protocol* states that:

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

<sup>132</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 347 [50].

## 11 Non-Criminalisation of Smuggled Migrants

### International requirements



#### → Article 5 *Smuggling of Migrants Protocol*

The basic effect of this provision is to shield smuggled migrants from criminal prosecution arising from the fact of having been smuggled. Article 5 reflects the cardinal principle that irregular migration is not a criminal offence and that smuggled migrants should not be punished for using the services migrant smugglers offer, unlawful as these services may be. On this point, the *Legislative Guides* stress that it

is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organised criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned [...].<sup>133</sup>

Through Article 5, the Protocol recognises that smuggled migrants are often unable to comply with relevant domestic legal and regulatory requirements relating to immigration and emigration. The *Toolkit to Combat Smuggling of Migrants* notes ‘that refugees often have to rely on smugglers to flee persecution, serious human rights violations or conflict. They should not be criminalised for making use of smugglers or for their illegal entry’.<sup>134</sup>

In this context, reference is also made to Article 31 of the *Convention relating to the Status of Refugees*<sup>135</sup> which imposes a clear obligation on States Parties to refrain from penalising the unauthorised entry or presence of refugees and from applying unnecessary restrictions to their movements. In a similar fashion, Article 5 of the *Smuggling of Migrants Protocol* serves to protect smuggled migrants from criminalisation merely for seeking or gaining illegal entry assisted by migrant smugglers. The fact that a smuggled migrant is a refugee does, however, not change the smuggler’s liability.<sup>136</sup>

Consequently, smuggled migrants should not be held criminally liable for being the object of smuggling of migrants (Article 6(1)(a)), of offences involving fraudulent documents (Article 6(1)(b)), and of offence relating to enabling illegal stay (Article 6(1)(c)). The *Interpretative Notes* add that the offence of procuring, providing or possessing a fraudulent travel or identity document under Article 6(1)(b)(ii) ‘would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, migrants who possess fraudulent documents to enable their own smuggling would not be included.’<sup>137</sup>

Article 5 does not grant blanket immunity and smuggled migrants may face criminal prosecution for offences unrelated to their smuggling and/or may be removed or deported to another State.<sup>138</sup> Smuggled migrants may be prosecuted if they commit criminal acts while they are smuggled.<sup>139</sup> They are also not shielded by Article 5 if they otherwise fulfil the elements of a Protocol offence.<sup>140</sup>

<sup>133</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 340 [28].

<sup>134</sup> UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 1: Understanding the smuggling of migrants, 29.

<sup>135</sup> Opened for signature 28 July 1951, 189 UNTS 150 (entry into force 22 April 1954) [hereinafter *Refugee Convention*].

<sup>136</sup> Anne T Gallagher & Fiona David, *The International Law of Migrant Smuggling* (2014) 361.

<sup>137</sup> *Interpretative Notes*, 17 [93].

<sup>138</sup> See also Art 18 *Smuggling of Migrants Protocol*; Section 1.7 above.

<sup>139</sup> See David McClean, *Transnational Organized Crime* (2007) 389.

<sup>140</sup> Anne T Gallagher & Fiona David, *The International Law of Migrant Smuggling* (2014) 359.

Article 5 does not limit a State's ability to control and regulate migration, and to process smuggled migrants according to domestic laws and procedures.<sup>141</sup> The *Legislative Guides* note that:

The Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences: Article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalisation of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organised 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.<sup>142</sup>

## 11 Assessment Questions



### Non-criminalisation of smuggled migrants

- Does domestic law contain provisions or procedures to ensure smuggled migrants are not liable to criminal prosecution for the fact of having been the object of migrant smuggling?

## II.12 Jurisdiction

One of the principal obstacles in combating the smuggling of migrants is the ability of offenders to evade prosecution by moving between jurisdictions or by committing offences across borders or in more than one country. To effectively combat the smuggling of migrants, and in light of its transnational nature, it is vital that States establish jurisdiction over offences that occurs across or even beyond their national borders.<sup>143</sup>

The frameworks established by the *Convention against Transnational Organized Crime* and the *Smuggling of Migrants Protocol* seek to close jurisdictional loopholes and reduce or eliminate safe havens for fugitives, and to facilitate cooperation between States Parties in instances where more than one country may have jurisdiction over the offender or his/her criminal activity. Article 15 of the *Convention against Transnational Organized Crime* addresses the jurisdiction to prosecute and punish crimes under the Convention. Article 15 contains mandatory requirements in paragraphs (1), (3), and (5). The obligations under Article 15 apply equally to the offences established under the Protocol.

## 12 Jurisdiction

### International requirements



- Article 15 *Convention against Transnational Organized Crime*

Article 15(1) requires States Parties to establish jurisdiction if offences are committed

- (a) in their territory (including their territorial sea), or
- (b) on board aircraft or vessels registered under their laws.

Article 15(3) establishes the principle 'to extradite or prosecute' (*aut dedere aut judicare*) by requiring States Parties to establish jurisdiction in instances where they cannot extradite a person solely on grounds of nationality.

<sup>141</sup> UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 4 [12].

<sup>142</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 347 [50].

<sup>143</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 20.

Article 15(5) requires States Parties to consult with each other in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdiction. The *Legislative Guides* further emphasise that:

[I]n many cases, the successful investigation and prosecution of serious offenders will hinge upon the swift coordination of efforts among concerned national authorities and coordination between States Parties can ensure that time-sensitive evidence is not lost.<sup>144</sup>

In some cases, this coordination will result in one State Party deferring to the investigation or prosecution of another. In other cases, the States concerned may be able to advance their respective interests through the sharing of information they have gathered. In yet other cases, States may each agree to pursue certain actors or offences, leaving other actors or related conduct to the other interested States.<sup>145</sup>

Article 15(2), (4), and (6) of the *Convention against Transnational Organized Crime* contain supplementary, optional measures in relation to jurisdiction. Article 15(2) invites States Parties to consider the establishment of jurisdiction in a number of additional situations, including cases

- (a) where their nationals are victimised,
- (b) where the offence is committed by a national of that State Party or by a stateless person residing in its territory, and
- (c) where the offence is linked to serious crimes and money laundering planned to be committed in its territory.

Article 15(4) allows for the establishment of jurisdiction over persons whom the requested State does not extradite for reasons other than nationality.<sup>146</sup>

Article 15(6) adds that the bases for jurisdiction listed in Article 15 are not exhaustive and that States Parties can establish additional bases of jurisdiction without prejudice to norms of general international law and in accordance with the principles of their domestic law. The *In-Depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* contains a list of 'considerations in determining jurisdiction' which may facilitate the decision about which jurisdiction a trial should be held in.<sup>147</sup>

## 12 Assessment Questions



### Jurisdiction

- ➔ Does domestic law have jurisdiction if an offence relating to smuggling of migrants is committed within the national territory, including the territorial sea?
- ➔ Does domestic law have jurisdiction if an offence relating to smuggling of migrants is committed on board a vessel or aircraft registered under that State's law/flag?
- ➔ Does domestic law have jurisdiction if the offender is a national of that State or a stateless person having his or her habitual residence in the territory of that State?
- ➔ Does domestic law have jurisdiction if the offence is committed outside the national boundaries of that State with a view to committing an offence within the territory of the State?
- ➔ In what other cases does domestic law have jurisdiction?

<sup>144</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime* (2<sup>nd</sup> ed 2016) [264].

<sup>145</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime* (2<sup>nd</sup> ed 2016) [263].

<sup>146</sup> As per Art 15(3) *Convention against Transnational Organized Crime*.

<sup>147</sup> UNODC, *In-depth Training Manual on Investigating and Prosecuting Smuggling of Migrants* (2011) Module 14, 3.

### III Brunei Darussalam

#### III.1 Overview

Brunei Darussalam is a destination for labour migrants from South and Southeast Asia. Immigration into the small, affluent country is tightly controlled and information on irregular migration to Brunei Darussalam is very scarce. From the limited sources available, it appears that smuggling of migrants does not affect the country on any considerable scale though there are reports of individual cases.

Brunei Darussalam has acceded to United Nations (UN) *Convention against Transnational Organized Crime*<sup>148</sup> but has not signed the *Protocol against the Smuggling of Migrants by Land, Sea and Air*.<sup>149</sup> Nevertheless, Brunei Darussalam has comprehensive laws criminalising the smuggling of migrants as well as trafficking in persons that were enacted in a designated statute in 2004. In general, the offences set out in the *Trafficking and Smuggling of Persons Order 2004* closely follow and, in some instances, exceed the requirements of the *Smuggling of Migrants Protocol*. In addition, Brunei's *Immigration Act* contains a range of offences that may be applicable to both migrant smugglers and smuggled migrants.

#### III.2 Ratification of and accession to international legal instruments

Brunei Darussalam acceded to the UN *Convention against Transnational Organized Crime* on 25 March 2008.

The country is not a Party to the *Smuggling of Migrants Protocol* or the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>150</sup>

#### III.3 Domestic laws and policies relating to smuggling of migrants

##### III.3.1 Trafficking and Smuggling of Persons Order 2004

Although Brunei Darussalam has not signed the *Smuggling of Migrants Protocol*, the country has enacted legislation that reflects many of the key elements of the Protocol's criminalisation requirements. On 20 December 2004, His Majesty the Sultan and Yang Di-Pertuan (Head of State) of Brunei Darussalam made the 'Order to criminalise people trafficking and people smuggling and for the purposes connected herewith'.<sup>151</sup> This Order is referred to by its short title, the *Trafficking and Smuggling of Persons Order 2004*.<sup>152</sup>

The *Trafficking and Smuggling of Persons Order 2004* sets out six offences relating to smuggling of migrants and trafficking in persons<sup>153</sup> as well as aggravated 'people smuggling offences'.<sup>154</sup> A further offence applies to commercial carriers bringing undocumented trafficked or smuggled persons into

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<sup>148</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>149</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>150</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

<sup>151</sup> Section 1(2) *Trafficking and Smuggling of Persons Order 2004*.

<sup>152</sup> Section 1(1) *Trafficking and Smuggling of Persons Order 2004*.

<sup>153</sup> Sections 4–6, 11 *Trafficking and Smuggling of Persons Order 2004*.

<sup>154</sup> Section 9 *Trafficking and Smuggling of Persons Order 2004*.

any receiving country.<sup>155</sup> Criminal liability for these offences is extended to attempts, abetment, conspiracy, and to legal persons.<sup>156</sup> Offences under Order are non-bailable and prosecutions for offences under the Order require prior consent by the Public Prosecutor.<sup>157</sup>

The Order further provides powers of arrest, investigation and search for police, immigration, and customs officials.<sup>158</sup> Section 19 of the Order establishes a special Trafficking and Smuggling of Persons Fund used to cover the expenses for the repatriation of trafficked persons and smuggled migrants, to finance awareness and information campaigns on trafficking and smuggling, and to reward persons assisting in the prevention or suppression of these phenomena.

### III.3.2 General laws

The *Penal Code* of Brunei Darussalam sets out general principles of criminal law, sentencing, and specific offences. The *Penal Code* is based on the *Indian Penal Code 1860* and was imported to Brunei by decree of the British colonial government in the late 19<sup>th</sup> Century,<sup>159</sup> before being given its current legislative form in 1951.<sup>160</sup> References to the Code in this report relate to the 2016 revised edition.

General laws relating to immigration are set out in Brunei's *Immigration Act* which was enacted in 1956 and entered into force on 1 July 1958.<sup>161</sup> References to the Act in this report are based on the 2014 revised edition. Sections 55 and 55A of the *Immigration Act 1956* set out a catalogue of offences for violations of the Act that may affect smugglers, irregular migrants, and those supporting them.

Brunei has implemented the *Convention against Transnational Organized Crime* through its *Penal Code* and *Societies Act 2005* which was most recently revised in 2010 and replaced the *Societies Act* of 1948.<sup>162</sup>

## III.4 Terminology and definitions

### III.4.1 Smuggling of migrants

The *Trafficking and Smuggling of Persons Order 2004* of Brunei Darussalam uses the term 'people smuggling' which is synonymous with the smuggling of migrants. 'People smuggling' is defined in s 2 of the order to mean

arranging or assisting a person's unlawful entry into any receiving country including Brunei Darussalam, of which the person is not a citizen or permanent resident of the receiving country, knowing or having reason to suspect that the person's entry is unlawful, in order to obtain a financial or other material benefit.

This definition mirrors that of 'smuggling of migrants' in Article 3(a) of the *Smuggling of Migrants Protocol*. The conduct element of 'people smuggling' involves any 'arranging or assisting' of another person's unlawful entry. The object of people smuggling can be any person 'who is not a citizen or permanent resident of the receiving country', including Brunei Darussalam. People smuggling is thus not limited to the smuggling of persons into Brunei Darussalam; it also captures smuggling to any

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<sup>155</sup> Section 12 *Trafficking and Smuggling of Persons Order 2004*.

<sup>156</sup> Sections 13, 14 *Trafficking and Smuggling of Persons Order 2004*.

<sup>157</sup> Sections 17, 18 *Trafficking and Smuggling of Persons Order 2004*.

<sup>158</sup> Sections 15, 16 *Trafficking and Smuggling of Persons Order 2004*.

<sup>159</sup> C F C Macaskie, 'Law and Legislation of the State of North Borneo' (1921) 3(3) *Journal of Comparative Legislation and International Law* 200, 202.

<sup>160</sup> No 16 of 1951.

<sup>161</sup> No 23 of 1956.

<sup>162</sup> No 1 of 2005.

other country. The term ‘receiving country’ is further defined in s 2 of the *Trafficking and Smuggling of Persons Order 2004* to mean

any country or territory into which a trafficked person or smuggled person is brought or is arranged to be brought as part of an act of people trafficking or people smuggling.

The definition of people smuggling further includes the purpose element of ‘in order to obtain a financial or other material benefit’ and involves a further element concerning the smuggler’s knowledge or ‘reason to suspect’ that the other person’s entry is unlawful.

The definition of people smuggling in s 2 of the *Trafficking and Smuggling of Persons Order 2004* is the basis of the offence of people smuggling under s 7, the aggravations under s 9, and the offences involving fraudulent documents under s 11 of the Order.

#### III.4.2 Smuggled person

The term ‘smuggled person’, which is not used in the *Smuggling of Migrants Protocol*, is defined separately in s 2 of the *Trafficking and Smuggling of Persons Order 2004* to mean

any person who is a victim or object of an act of people smuggling, regardless of whether that person participated in people smuggling.

‘Smuggled person’ is an element of the offence of enabling illegal stay in s 8, the aggravated people smuggling offences in s 9, and the provision on liability of commercial carriers in s 12 of the *Trafficking and Smuggling of Persons Order 2004*.

#### III.4.3 Unlawful entry

The definition of ‘unlawful entry’ in s 2 of the *Trafficking and Smuggling of Persons Order 2004* is largely identical to that of ‘illegal entry’ under Article 3(b) of the *Smuggling of Migrants Protocol*. Under s 2 ‘unlawful entry’ shall mean

crossing borders without complying with the necessary requirements for lawful entry into the receiving country.

The words ‘crossing borders’ have been interpreted in light of their natural ordinary meaning as encompassing the entire border crossing process.<sup>163</sup> Therefore, unlawful entry does not necessarily require the successful crossing of a border.

#### III.4.4 Financial or other material benefit

The ‘financial or other material benefit’ is the purpose element of the definition of people smuggling in s 2 of the *Trafficking and Smuggling of Persons Order 2004*. The term is further defined in s 2 to include

any type of financial or non-financial inducement, gratification, payment, bribe, reward, advantage or service.

This definition mirrors the requirements in the *Smuggling of Migrants Protocol* to expand this element to purposes that go beyond monetary payments.

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<sup>163</sup> *Public Prosecutor v Esmidiade bin Bujang and Sanawadi bin Sanaddin* (Unreported, Court of Appeal of Brunei Darussalam, Mortimer P, Leonard and Burrell JJ A, 28 May 2015) 5.

### III.5 Offence of smuggling of migrants

‘People smuggling’, the term used in Bruneian law to refer to smuggling of migrants, is an offence under s 7(1) of the *Trafficking and Smuggling of Persons Order 2004*:

Any person who engages in people smuggling, regardless of whether the smuggled person arrives in the receiving country, shall be guilty of an offence and liable on conviction to a fine not exceeding BND 1,000,000, imprisonment for a term not exceeding 30 years and whipping.

Section 7(1) turns the definition of people smuggling in s 2 of the Order into a criminal offence. It does not create any additional elements beyond those set out in s 2 and merely adds the clarification that it does not matter ‘whether the smuggled person arrives in the receiving country’. The offence under s 7(1) demonstrates a very high degree of compliance with the requirements under Article 6(1)(a) of the *Smuggling of Migrants Protocol*.

Figure 4: Elements of the offence of people smuggling, s 7(1) Trafficking and Smuggling of Persons Order 2004 (Brunei)

Physical elements	
<b>conduct</b>	arranging or assisting, s 2
<b>result</b>	unlawful entry, s 2; but: regardless of whether the smuggled person arrives in the receiving country
<b>object</b>	a person is not a citizen or permanent resident of the receiving country, s 2
Mental elements	
<b>intention re. conduct</b>	not required
<b>purpose</b>	in order to obtain a financial or other material benefit, s 2
<b>knowledge/ recklessness</b>	knowledge or reason to suspect that the person’s entry is unlawful, s 2

#### III.5.1 Physical elements

The physical elements of the offence under s 7(1) of the *Trafficking and Smuggling of Persons Order 2004* require proof that the accused ‘engaged in people smuggling’, which, based on the definition of people smuggling in s 2 means arranging or assisting another person’s unlawful entry into a receiving country, including Brunei Darussalam, of which the person is not citizen or a permanent resident.

The conduct element of the offence is cast widely to include any ‘arranging or assisting’, i.e. any conduct that enables the other person’s unlawful entry. This is not limited to transporting the person but may also include other aid such as guiding the smuggled migrants or furnishing them with information or documents to reach and cross international borders. People smuggling within the meaning of s 2 includes unlawful entry into Brunei Darussalam or any other receiving country. This would include the smuggling of migrants from Brunei Darussalam into another country and, subject to other jurisdictional requirements,<sup>164</sup> people smuggling activities between any other two countries.

Section 7(1) expressly states that the offence of people smuggling is not a result crime. This means, that for this offence it matters not ‘whether the smuggled migrant arrives in the receiving country’. The crossing of an international border is thus not an element of the offence; the offence can be made out before the smuggled migrant reaches the intended destination. This broadens the scope of application of the offence — and raises questions about the scope of liability for attempts.

<sup>164</sup> See Section III.12 below.



### III.5.2 Mental elements

The mental elements of s 7(1) are twofold: first, it is required that the accused 'knows or has reason to suspect' that the smuggled person's entry is unlawful. Second, the accused has to engage in people smuggling for the purpose of obtaining a financial or other material benefit. Section 7 contains no additional mental element for the conduct element of 'arranging or assisting' and the general principles of Bruneian criminal law set out in the *Penal Code* do not articulate a presumption that would imply intention in this situation. It thus appears that strict liability applies to this element.

The first element means that the accused must have some awareness that the person may be crossing the border without complying with the necessary legal requirements of the receiving State. The accused may have positive knowledge of this circumstance, though it suffices to show that he or she 'has reason to suspect' that the other person's entry may be unlawful. Section 7(2) adds that proof of this mental element can be inferred from proof of the physical elements. This permits the use of circumstantial evidence in criminal proceedings to establish mental elements:

Where in any proceeding for an offence under subsection (1), it is proved that the defendant arranged or assisted the unlawful entry of any person into any receiving country (including Brunei Darussalam) of which that person was not a citizen or a permanent resident, it shall be presumed, until the contrary is proved, that the defendant did so knowing that such person's entry was unlawful and in order to obtain a financial or other material benefit.

The second mental element refers to the accused's purpose to obtain a financial or other material benefit. This, as mentioned earlier, is not limited to the desire to gain money but may also include other forms of gratification or advantage.<sup>165</sup> As with the first mental element, s 7(2) permits using proof of the physical elements to infer that the accused acted in order to obtain a financial or other material benefit. The effect of s 7(2) is that it reverses the burden of proof for the mental elements and places the onus on the defendant to demonstrate that he or she did not know that the smuggled person's entry was unlawful and that he or she did not seek to obtain a financial or other material benefit.<sup>166</sup> To avoid a conviction the accused must demonstrate their innocence on the balance of probabilities.<sup>167</sup>

### III.5.3 Penalty

The statutory penalty for the offence of people smuggling under s 7(1) of the *Trafficking and Smuggling of Persons Order 2004* involves imprisonment for a term of up to 30 years, a fine of up to BND 1,000,000, and whipping. Sentencing to a fine is mandatory under this provision.<sup>168</sup>

### III.5.4 Further offences

Liability of commercial carriers, s 12 *Trafficking and Smuggling of Persons Order 2004*

Section 12(1) of the *Trafficking and Smuggling of Persons Order 2004* contains a unique offence for commercial carriers who bring a trafficked person or a smuggled person into a receiving country. 'Commercial carriers' are defined in s 2 of the Order to 'include any person or the owner, operator, master of any means of transport who engages in the transportation of goods or people for commercial gain'. This offence is thus aimed at airlines, shipping companies, bus companies and

<sup>165</sup> See the definition of 'financial or other material benefit' in s 2 *Trafficking and Smuggling of Persons Order 2004*.

<sup>166</sup> See also s 8(3) *Trafficking and Smuggling of Persons Order 2004*.

<sup>167</sup> *Shahrizan bin Mudanin and Santony bin Anjin v Public Prosecutor* (Unreported, Court of Appeal of Brunei Darussalam, Mortimer P, Leonard and Burrell JJ A, 26 November 2015) 3.

<sup>168</sup> *Public Prosecutor v Iberi Sebal* (Unreported, Court of Appeal of Brunei Darussalam, Mortimer P, Leonard and Burrell JJ A, 12 November 2015) 5.

others who transport smuggled migrants. It complements conventional provisions concerning carrier liability for transporting undocumented migrants under aviation and shipping laws.

Under s 12(1) the commercial carrier is liable to a fine not exceeding BND 100,000 if, upon entry into the receiving country, the person does not have the travel documents required for lawful entry into that country. The offence neither requires any knowledge or awareness of the unlawful status of the migrant nor any purpose to obtain a financial or other material benefit.

Commercial carriers are not liable for the offence in any of the circumstances set out in subsection (2), including situations in which the carrier had reasonable grounds to believe that the person could enter lawfully, or where the person had the required documents when he or she boarded the means of transport. Furthermore, subsection (3) states that a convicted commercial carrier shall be liable for all expenses incurred by the receiving country in respect of the person's detention, maintenance and his removal from the receiving country.

#### Offences under the Immigration Act

Section 55 of the *Immigration Act* of Brunei Darussalam contains two further offences that concern the facilitation of illegal entry of another person. These offences only concern irregular migration to Brunei Darussalam.

Under s 55(1)(b) it is an offence to 'abet any person to enter or leave Brunei Darussalam in contravention' of Brunei's immigration law. This offence may be relevant in instances in which the mental elements of smuggling of migrants, especially the purpose to obtain a financial or other material benefit' cannot be made out.

Section 55(1)(c) further criminalises any person who 'engages in the business or trade of conveying to Brunei Darussalam in or on any vessel, aircraft or vehicle any person whom he knows or has reasonable grounds for believing is a prohibited immigrant'. Section 55(5) contains the following presumption:

[If] it is proved that the defendant has conveyed any prohibited immigrant in any vehicle, vessel or aircraft, it shall be presumed, until the contrary is proved, that he is engaged in the business or trade of conveying to Brunei Darussalam in or on that vehicle, vessel or aircraft that prohibited immigrant knowing him to be, or having reasonable grounds for believing him to be, a prohibited immigrant.

The statutory penalty for these offences is imprisonment for a term of not less than two years and not more than seven years and whipping with no less than three strokes cumulatively.<sup>169</sup>

### III.6 Offences involving fraudulent travel or identity documents

Under s 11 of the *Trafficking and Smuggling of Persons Order 2004*, it is an offence to make, obtain, give or sell, or possess 'a forged travel or identity document for the purpose of facilitating people trafficking or people smuggling' as defined under the Order. This offence reflects all the constituent elements of the offence under Article 6(1)(b) of the *Smuggling of Migrants Protocol* and criminalises certain conduct involving fraudulent travel or identity documents not only for the purpose of smuggling of migrants but also for the purpose of trafficking in persons.

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<sup>169</sup> Section 55(1)(ii) *Immigration Act*.

### III.6.1 Physical elements

The conduct elements of the offence under s 11 of the *Trafficking and Smuggling of Persons Order 2004*, including making, obtaining, giving, or selling, are sufficiently broad to cover any stage of the production, circulation, use, and receipt of forged travel or identity documents. Although different vocabulary is used, they reflect the elements of producing, procuring, providing, and possessing under Article 6(1)(b)(i) and (ii) of the *Smuggling of Migrants Protocol*.

The term ‘forged travel or identity document’, the object of the offence, is defined in s 2 of the *Trafficking and Smuggling of Persons Order 2004* to mean

a travel or identity document that –

(a) has been made, or altered in a material way, by a person other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a country; or

(b) has been issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(c) is being improperly used by a person other than the rightful holder.

This definition adopts almost verbatim the language used to define ‘fraudulent travel or identity documents’ in Article 3(c) of the *Smuggling of Migrants Protocol*.

Under s 2 of the *Trafficking and Smuggling of Persons Order 2004*, ‘travel document’ is defined to

include an internationally recognised passport, a certificate of identity and any similar document, issued by an authority recognised by the receiving country.

The term ‘identity document’ is not further defined in the Order.

### III.6.2 Mental elements

The mental element under s 11 involves the ‘purpose of facilitating people trafficking or people smuggling’. In keeping with the spirit of the *Smuggling of Migrants Protocol*, the offence under s 11 is designed to capture situations where fraudulent (forged) travel or identity documents are used to enable or aid the smuggling of migrants. This offence complements the general people smuggling offence under s 7 of the *Trafficking and Smuggling of Persons Order 2004* and general offences relating to document fraud under Chapter XVIII, ss 463–476 of the *Penal Code* of Brunei Darussalam.

An additional feature of the offence under s 11 is the alternative purpose of facilitating people trafficking. Here, the *Trafficking and Smuggling of Persons Order 2004* exceeds the criminalisation requirements in the *Trafficking in Persons Protocol* by creating a specific offence for situations in which fraudulent travel or identity documents are used to facilitate trafficking in persons (or ‘people trafficking’ as defined in s 2 of the *Trafficking and Smuggling of Persons Order 2004*).

Two further mental elements of the offence under s 11 stem from the definition of ‘people smuggling’ in s 2 of the order. These include (1) ‘knowing or having reason to suspect that the person’s entry is unlawful’, and (2) the additional purpose ‘to obtain a financial or other material benefit’.<sup>170</sup>

Section 11 contains no additional mental element for the conduct elements and the general principles of Bruneian criminal law set out in the *Penal Code* do not articulate a presumption that would imply intention in this situation. It thus appears that strict liability applies to this element.

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<sup>170</sup> See further Section III.5.2 above.

### III.6.3 Penalty

The statutory penalty for offences under s 11 of the *Trafficking and Smuggling of Persons Order 2004* involves imprisonment for a term not exceeding ten years, a fine not exceeding BND 50,000, or both.

### III.6.4 Further offences

Section 55(1)(i)–(l) of the *Immigration Act* sets out several other offences that may apply to cases in which fraudulent documents, such as entry permits, re-entry permits, passes, or certificates are made, obtained, sold, passed on, or used to contravene the provisions of this Act. These offences, which are punishable by a fine of up to BND 4,000, imprisonment for up to one year, or both, may concern smugglers and smuggled migrants using these documents alike.

## III.7 Offence of enabling illegal stay

A separate offence ‘to facilitate stay of a smuggled person’ is set out in s 8 of the *Trafficking and Smuggling of Persons Order 2004*. Under s 8(1):

Any person who facilitates the continued presence of a smuggled person in a receiving country in order to obtain a financial or other material benefit shall be guilty of an offence and liable on conviction to a fine not exceeding BND 1,000,000, imprisonment for a term not exceeding 30 years and whipping.

Like other provisions of the of the *Trafficking and Smuggling of Persons Order 2004*, this offence demonstrates a high degree of compliance with the *Smuggling of Migrants Protocol*, specifically the offence of enabling illegal stay under Article 6(1)(c).

### III.7.1 Physical elements

The conduct element of the offence under s 8(1) is the ‘facilitation’ of the continued presence of a smuggled migrant. This covers a great range of acts and omissions that, for instance, enable, aid, or prolong the illegal stay of a person.

Section 8(2) further broadens the application of this element to include ‘producing, providing or procuring forged travel or identity documents in respect of the smuggled person’. Subsection (2) complements the offence relating to forged travel or identity documents under s 11<sup>171</sup> by criminalising the use of fraudulent documents to enable the illegal stay of a person in addition to the use of such documents to enable illegal entry of another person under s 11. Section 8(2) thus reflects the means element of Article 6(1)(c) of the *Smuggling of Migrants Protocol*.

The object of the offence under s 8(1) is a ‘smuggled person’ as defined in s 2 of the Order.<sup>172</sup> The requirement that the ‘continued presence’ of the smuggled person is unlawful stems from reference to the term ‘people smuggling’ in the definition of smuggled person in s 2: ‘the person is not a citizen or permanent resident of the receiving country’ and has entered that country unlawfully. From a plain reading of these provisions, it appears that the offence under s 8(1) only applies to situations in which the smuggled migrant entered the country unlawfully and does not capture cases in which the person entered lawfully and whose presence later becomes unlawful, for example, because the person overstayed the expiry of a visa or breached the visa conditions.

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<sup>171</sup> See Section III.6 above.

<sup>172</sup> See Section III.4.2 above.

### III.7.2 Mental elements

The mental elements of the offence under s 8(1) involve the purpose ‘to obtain a financial or other material benefit’ from facilitating the continued presence of the smuggled migrant. Section 8(3) contains a presumption in relation to this mental element:

Where a smuggled person is found at any premises or place, the occupier of such premises or place shall be presumed, until the contrary is proved, to have facilitated the continued presence of that person at such premises or place in order to obtain a financial or other material benefit.

The effect of s 8(3) is that the mere presence of a smuggled person at any place or premises, i.e. proof of a physical element, is sufficient to prove this mental element of the offence.<sup>173</sup> Subsection (3) reverses the burden of proof by placing the onus on the occupier of the place or premises to show that, through his or her conduct, he or she did not intend to obtain a financial or other material benefit.

Section 8(1) contains no additional mental element for the conduct element and the general principles of Bruneian criminal law set out in the *Penal Code* do not articulate a presumption that would imply intention in this situation. It thus appears that strict liability applies to this element.

### III.7.3 Penalty

The statutory penalty for the offence of facilitating the stay of a smuggled person under s 8(1) involves imprisonment for a term of up to 30 years, a fine of up to BND 1,000,000, and whipping.

### III.7.4 Further offences

Section 55(1)(d) of the *Immigration Act* sets out an offence for ‘harbouring any person who has acted in contravention’ of Brunei’s immigration law. The term ‘harbour’ is defined in s 2 of the Act to ‘include the giving of food or shelter and the act of assisting a person in any way to evade apprehension’. Section 55(6) contains a presumption for cases in which an accused has given shelter to an irregular migrant for 90 days after the expiration of the migrant’s entry pass. This offence may be relevant in cases in which an offender enables the illegal stay of another person but does not have the purpose of obtaining a financial or other material benefit required by s 8(1) of the *Trafficking and Smuggling of Persons Order 2004*. Offences under s 55(1)(d) of the *Immigration Act* are punishable

in respect of each person harboured or employed, [by] a fine of not less than BND 3,000 but not exceeding BND 6,000, imprisonment for a term not exceeding 2 years or both, and in the case of a second or subsequent offence, a fine of not less than BND 6,000 but not exceeding BND 12,000, imprisonment for a term not exceeding 4 years or both.<sup>174</sup>

## III.8 Aggravating circumstances

Section 9 of the *Trafficking and Smuggling of Persons Order 2004* sets out three ‘aggravated people smuggling offences’. These reflect, in reverse order, the aggravating circumstances articulated in Article 6(3)(a) and (b) of the *Smuggling of Migrants Protocol*.

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<sup>173</sup> See also s 7(2) *Trafficking and Smuggling of Persons Order 2004*.

<sup>174</sup> Section 55(1)(iii) *Immigration Act 1956*.

The statutory penalty of the aggravating offences under s 9 is very severe: it involves a minimum term of imprisonment of four years and a maximum of 30 years, a fine of up to BND 1,000,000, and a minimum of five strokes of whipping.

### III.8.1 Endangering the lives or safety of smuggled migrants

The offence of people smuggling is aggravated under s 9(c) if ‘the life or safety of the smuggled person is, or is likely to be, endangered’. This offence adopts the same language as Article 6(3)(a) of the *Smuggling of Migrants Protocol*. For liability under s 9(c) it matters not ‘whether the smuggled person arrives in the receiving country’. Any act endangering or likely to endanger the lives or safety of smuggled migrants prior to their arrival in the destination is thus also captured by this aggravation.

### III.8.2 Inhuman or degrading treatment of smuggled migrants

Section 9(a) and (b) set out aggravating circumstances that relate to the treatment of smuggled migrants and that correspond to those under Article 6(3)(b) of the *Smuggling of Migrants Protocol*.

The aggravation under subsection (b) concerns circumstances in which ‘the smuggled person is subjected to torture or to any other cruel, inhuman or degrading treatment’.

Under s 9(a) of the *Trafficking and Smuggling of Persons Order 2004* it is an offence to engage in people smuggling to subject, or intend to subject, the smuggled person to exploitation. The terms ‘people smuggling’, ‘smuggled migrants’, and ‘exploitation’ are defined in s 2.<sup>175</sup> The definition of exploitation adopts the same meaning as Article 3(a) of the *Trafficking in Persons Protocol* and

includes all forms a sexual exploitation (including sexual servitude and exploitation of another person's prostitution), forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs.

The aggravation under subsection (a) recognises that smuggling of migrants may in some cases involve exploitation of the smuggled migrants and demonstrates the synergy between smuggling of migrants and trafficking in persons, which has also been noted in the *Interpretative Notes and Legislative Guides to the Smuggling of Migrants Protocol*.<sup>176</sup> In instances involving exploitation (actual or intended), three offences under the *Trafficking and Smuggling of Persons Order 2004* may be relevant:

- the aggravated offences of people smuggling under s 9(a);
- the ‘offence of exploiting a trafficked person’ under s 6, especially subsection (a), which criminalises ‘engaging in the exploitation of a trafficked person’; and
- the ‘offence of people trafficking’ under s 4.

The offences under s 9(a) and ss 4 and 6 share the element of exploitation but differ in their conduct elements and in the means elements that are required to establish trafficking, but that are not an element of s 9(a).<sup>177</sup> A further difference between these offences is the object of the offence: the smuggled person in s 9(a) and the trafficked person in ss 4 and 6.<sup>178</sup> While it may be difficult to clearly separate the offences in actual cases, the relationship between them shows that trafficking in persons (people trafficking) and smuggling of migrants (people smuggling) sit along a continuum and that situations of smuggling can transcend into trafficking, thus closing potential legal loopholes.

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<sup>175</sup> See Section III.4 above.

<sup>176</sup> See Section II.8.2 above.

<sup>177</sup> See further Section III.10.1 below.

<sup>178</sup> See also Section III.10.2 below.

### III.8.3 Other aggravations

The *Trafficking and Smuggling of Persons Order 2004* contains no additional aggravating circumstances.

## III.9 Extensions to criminal liability

Questions concerning liability for inchoate and secondary offences relating to smuggling of migrants are answered by specific provisions in the *Trafficking and Smuggling of Persons Order 2004*. Moreover, s 14 specifically concerns the liability of legal persons ('bodies of persons', including companies, firms, societies et cetera, their directors, managers et cetera) for offences against this Order.<sup>179</sup>

### III.9.1 Attempts

Section 13(1) of the *Trafficking and Smuggling of Persons Order 2004* extends liability for all offences under the Order to attempts.<sup>180</sup> The penalties for attempts are the same as for the completed offence:

Whoever attempts to commit any offence punishable under this Order or any regulations made thereunder, or abets the commission of such offence, shall be punished with the punishment provided for such offence.

An attempt to commit the offence of people smuggling (s 7), the offence relating to forged travel or identity documents (s 11), the offence to facilitate stay of a smuggled person (s 8), and the aggravated people smuggling offences (s 9) can thus be criminalised.

Because of the wide scope of the offence of people smuggling in s 7, it is not immediately clear how to separate attempts to commit the offence from its completion. For liability under s 7 it does not matter 'whether the smuggled person arrives in the receiving country'. It is difficult to see which acts of preparation that are sufficiently proximate to warrant criminalisation can amount to attempts without already meeting the requirements of the completed offence under s 7. Given the wording of s 7 and the interplay with s 13(1), it appears that the legislator intended to criminalise very early stages of migrant smuggling ventures.

Section 13(2) of the *Trafficking and Smuggling of Persons Order 2004* further extends liability for any offences under the Order to conspiracies between two persons to commit an offence under the Order. The penalties for the completed offence also apply to conspiracies.

### III.9.2 Participation as an accomplice, organising and directing others

Liability for any of the offences under the *Trafficking and Smuggling of Persons Order 2004* also extends to abetting the commission of these offences: s 13(1).<sup>181</sup> The penalties for abetting are the same as for the completed offence.

Because the conduct element of the offence and the definition of people smuggling are cast very widely to cover any 'engaging', 'arranging or assisting', it may be difficult in some cases to separate

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<sup>179</sup> See also Art 10 *Convention against Transnational Organised Crime*.

<sup>180</sup> Section 13(1) *Trafficking and Smuggling of Persons Order 2004* supersedes the rule relating to 'punishment for attempting to commit offences' under s 511 *Penal Code* (Brunei).

<sup>181</sup> Section 13(1) *Trafficking and Smuggling of Persons Order 2004* supersedes the rules relating to the punishment of the abettor under ss 109–117 *Penal Code* (Brunei).

primary liability of a perpetrator from secondary liability as a participant abetting the offence committed by another.

Additional rules concerning the abetment of offences are set out in Chapter V of the *Penal Code* of Brunei Darussalam. Under s 107(a) this also includes instigating other persons which may reflect the requirement under Article 6(2)(c) of the *Smuggling of Migrants Protocol* to criminalise 'organising and directing other persons to commit' an offence relating to smuggling of migrants.

### III.9.3 Participation in an organised criminal group

The *Trafficking and Smuggling of Persons Order 2004* contains no separate provisions or aggravation concerning the involvement of organised criminal groups in the smuggling of migrants or any other offence under this Order. Liability for these offences is extended, as mentioned, to conspiracies between two or more persons to commit any offence relating to 'people smuggling' and 'people trafficking': s 13(2).

This provision complements ss 120A and 120B of the *Penal Code* of Brunei. These provisions reflect the obligation under Article 5(1)(a) of the *Convention against Transnational Organised Crime* to criminalise participation in an organised criminal group. Organised criminal groups are defined in s 29 of the *Societies Act 2005* as any society not properly registered under the Act or declared unlawful by the relevant Minister.<sup>182</sup>

## III.10 Other criminal offences relating to irregular migration

### III.10.1 Trafficking in persons

The offences relating to 'people smuggling' in Brunei Darussalam are set out in the *Trafficking and Smuggling of Persons Order 2004* together with offences relating to trafficking in persons. This Order contains three offences relating to trafficking, including the:

- offence of people trafficking, s 4;
- offence of children trafficking, s 5 (i.e. persons under the age of 18, s 2); and the
- offence of exploiting a trafficked person, s 6.

The offences under ss 4 and 5 are modelled closely on the definition of trafficking in persons and the criminalisation requirements in Articles 3(a) and 5 of the *Trafficking in Persons Protocol*.

#### Definitions

'People trafficking' is broadly defined in s 2 of the *Trafficking and Smuggling of Persons Order 2004* to 'mean the recruitment, transportation, transfer, harbouring or receipt of a person for the purpose of exploitation as further set out in ss 4 or 5'.<sup>183</sup> 'Exploitation' is defined in s 2 to

include all forms a sexual exploitation (including sexual servitude and exploitation of another person's prostitution), forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs.

Section 2 also defines the term 'trafficked person' as

any person who is the victim or object of an act of people trafficking regardless of whether that person consented or not

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<sup>182</sup> Section 29 *Societies Act 2005*.

<sup>183</sup> The terms 'harbour' and 'transit' are defined in s 2 *Trafficking and Smuggling of Persons Order 2004*.



Under s 10, consent of the trafficked person is no defence for the offences under ss 4, 5, and 6.

### Offence of trafficking in persons

The ‘offence of people trafficking’ in s 4 combines elements relating to the act, means, and purpose of trafficking as mandated by Article 3(a) of the *Trafficking in Persons Protocol*. The concepts of ‘people trafficking’ and ‘people smuggling’ are compared in Figure 5 below.

Figure 5: Concepts of ‘people trafficking’ and ‘people smuggling’, *Trafficking and Smuggling of Persons Order 2004* (Brunei)

	people trafficking, s 4 (adults)	children trafficking, s 5	people smuggling, s 7
Elements	<ul style="list-style-type: none"> <li>Act: recruiting, transporting, transferring, harbouring, or receiving</li> <li>Means: threat, force, coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments to achieve consent</li> <li>Purpose: exploitation</li> </ul>	<ul style="list-style-type: none"> <li>Act: recruiting, transporting, transferring, harbouring, or receiving</li> <li>Means: any</li> <li>Purpose: exploitation</li> </ul>	<ul style="list-style-type: none"> <li>Act: arranging or assisting a person’s unlawful entry</li> <li>Purpose: financial or other material benefit.</li> </ul>
Consent of the trafficked person	Irrelevant: ss 10, 2	Irrelevant: ss 10, 2	
Victim’s age	Over 18	Below 18: s 2	Not relevant
Transnationality	Not required	Not required	‘regardless whether the smuggled person arrives in the receiving country’

The offences relating to trafficking in persons and trafficking in children under ss 4 and 5 of the *Trafficking and Smuggling of Persons Order 2004* demonstrate a very high degree of compliance with the requirements of the *Trafficking in Persons Protocol*. Accordingly, the concepts of ‘people trafficking’ and ‘people smuggling’ are sufficiently distinguishable.

The statutory penalty for offences under s 4 involves a minimum term of imprisonment of four years and a maximum of 30 years, a fine of up to BND 1,000,000, and whipping.

The Order contains no aggravating circumstances of people trafficking.

### III.10.2 Exploitation of non-citizens

A further offence with some bearing on trafficking in persons and smuggling of migrants is the ‘offence of exploiting a trafficked person’ under s 6 of the *Trafficking and Smuggling of Persons Order 2004*:

Any person who –

- (a) engages in; or
- (b) profits from,

the exploitation of a trafficked person shall be guilty of an offence and liable on conviction to a fine not exceeding BND 1,000,000, imprisonment for a term of not less than 4 years but not exceeding 30 years and whipping.

This offence differs from the offence of people trafficking in s 4 in that it criminalises those who actually exploit trafficked persons (as defined in s 2) and those who benefit from their exploitation. Seen this way, the offence complements that under s 4 by shifting the focus from those who traffic for the purpose of exploitation to those who carry out or profit from that exploitation. It is conceivable that some cases of trafficking may be subsumed under either offence. Unlike people smuggling, the object of the offence under s 6 may be a national or non-national, and it does not matter whether the person has entered the country lawfully or not. If a perpetrator engages in the exploitation of smuggled migrants, liability under s 9(a) may arise.<sup>184</sup> The penalty for offences under s 6 is the same as that for people trafficking.

The *Penal Code* of Brunei Darussalam contains several other offences that may be relevant to the exploitation of non-citizens, labour migrants et cetera. These include:

- Section 366B: Importation of girl from foreign country;
- Section 367: Kidnapping or abducting in order to subject person to grievous hurt, slavery etc;
- Section 370: Buying or disposing of any person as slave;
- Section 371 Habitual dealing in slaves;
- Section 373A: Importing for purposes of prostitution etc; and
- Section 374: Unlawful compulsory labour.

With the exception of ss 366B, 370(a) 1<sup>st</sup> and 2<sup>nd</sup> alt, 371 1<sup>st</sup> and 2<sup>nd</sup> alt, and 373A these offences apply to victims that are nationals and non-nationals alike and do not require the crossing of an international border.

### III.1034 Unlawful recruitment of workers

Section 31 of Brunei's *Employment Agencies Order 2004* creates liability for recruitment agencies that may be relevant to the prevention of irregular migration. Under s 31 of this Order, a recruitment agency commits an offence, inter alia, when it knowingly and voluntarily deceives a person by providing false information, places or seeks to place a person in any occupation injurious to the public interest or knowingly directs any person to any place for immoral purposes. The statutory penalty for this offence is a fine for BND 5,000 and imprisonment for a term not exceeding two years.

### III.10.4 Illegal entry

The criteria concerning the entry of foreigners into Brunei Darussalam are comprehensively legislated in the *Immigration Act*. Any person attempting to enter the country unlawfully commits an offence under s 55(1)(a), which is punishable cumulatively by a fine of up to BND 4,000 and imprisonment for a term of not less than three months and not more than two years.<sup>185</sup> Under s 55(4), any person who fails to produce on demand by an immigration or police officer a permit, pass or other document or evidence showing that he or she has entered or remained in Brunei Darussalam lawfully is presumed, until the contrary is proved, that he or she has entered, re-entered, or remained in Brunei Darussalam unlawfully.

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<sup>184</sup> See Section III.8.2.

<sup>185</sup> Section 55(1)(i) *Immigration Act 1956*.

### III.11 Non-criminalisation of smuggled migrants

The *Trafficking and Smuggling of Persons Order 2004* does not expressly exempt smuggled migrants from liability for any of the offences relating to smuggling of migrants.

The construction of the offences under ss 7, 8, and 9 of the *Trafficking and Smuggling of Persons Order 2004*, however, makes it unlikely if not impossible for these offences to be used against smuggled migrants, who are the object of these offences. This is because s 2 defines the term 'smuggled person' as

any person who is a victim or object of an act of people smuggling, regardless of whether that person participated in people smuggling.

Smuggled migrants may thus also not be held criminally liable as participants in their own smuggling.

Smuggled migrants may, nevertheless, be criminally liable for offences under s 55 of the *Immigration Act*. These include offences relating to illegal entry (s 55(1)(a)), using travel or identity documents issued to another person (s 55(1)(j)), making false statements to obtain such documents (s 55(1)(k)), and using fraudulent documents (s 55(1)(l)).

Brunei Darussalam is not a State Party to the *Convention and Protocol relating to the Status of Refugees*. For these reasons, the *Immigration Act* makes no exemptions from criminal liability for refugees who enter or are smuggled into the country.

### III.12 Jurisdiction

Section 3 of the *Trafficking and Smuggling of Persons Order 2004* concerns the application of the offences under this Order. Three types of jurisdiction are addressed by s 3; all three apply 'regardless whether the conduct constituting the offence whether in whole or in part took place within or outside Brunei Darussalam'.

The first type, s 3(a), concerns cases in which Brunei Darussalam is the destination country (or receiving country) of migrant smuggling. This includes offences relating to smuggling of migrants committed within Brunei's national territory and offences committed outside the national boundaries with a view to committing an offence within the territory of Brunei Darussalam. Because it does not matter where the conduct takes place and, for the 'offence of people smuggling' under s 7, 'whether the smuggled migrant arrives in the country', this also covers offences committed in the territorial sea or elsewhere en route to Brunei Darussalam.

Section 3(b) concerns cases, where 'the receiving country is a foreign country but the [...] people smuggling starts in Brunei Darussalam or transits in Brunei Darussalam'.

Section 3(c) further extends jurisdiction to citizens and residents of Brunei who engage in people smuggling, irrespective of where the offending takes place.

In summary, the scope of s 3 meets the jurisdictional requirements of Article 15 of the *Convention against Transnational Organised Crime*.

In addition, s 177 of the *Merchant Shipping Order 2002* provides for domestic jurisdiction over offences committed on board any ship registered under Brunei's flag.<sup>186</sup> Section 49 of the *Civil Aviation Order 2006* provides similar jurisdiction over any offences committed on any aircraft

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<sup>186</sup> Section 177 *Merchant Shipping Order 2002*.

registered in Brunei.<sup>187</sup> These two extensions to domestic jurisdiction fulfil the requirements of Article 15(1)(b) of the *Convention against Transnational Organised Crime*.

### III.13 Observations

The smuggling of migrants is comprehensively criminalised in the laws of Brunei Darussalam. Even though the country is not a State Party to the *Smuggling of Migrants Protocol*, the *Trafficking and Smuggling of Persons Order 2004* closely reflects the Protocol requirements and in certain instances exceeds them.<sup>188</sup> Given this high level of conformity, it remains unclear what objections prevent Brunei from becoming a State Party to the Protocol.

Brunei Darussalam legislated on the smuggling of migrants and the trafficking of persons in a single statute. This approach may lead to difficulties in individual cases in determining under which offence a suspect should be charged. However, the offences of people smuggling and people trafficking under Bruneian law are sufficiently distinguishable. Brunei Darussalam's legislative approach also recognises that both types of offences exist on a continuum of illicit activity, as opposed to being necessarily distinct from one another in practice. This approach may close potential legal loopholes.

The legislative definition of 'people smuggling' encompasses bringing smuggled persons into either Brunei Darussalam or another 'receiving country'.<sup>189</sup> This definition criminalises the smuggling of migrants into any country, not just Brunei itself. Therefore, subject to jurisdictional limits, Brunei may investigate and prosecute instances of migrant smuggling that occur completely outside its territorial boundaries.

The penalties for smuggling of migrants offences under Brunei's legislation are severe. Questions may be asked whether these penalties are warranted, particularly given the possibility of a sentence of corporal punishment under the *Trafficking and Smuggling of Persons Order 2004*.<sup>190</sup>

Brunei Darussalam offers relatively few protections to smuggled migrants. As noted above, the construction of smuggling offences and definitions makes it unlikely, though not impossible, that a smuggled migrant would be prosecuted for having been the object of a smuggling offence. Section 19 of the *Trafficking and Smuggling of Persons Order 2004* creates a 'trafficking and smuggling of persons fund'.<sup>191</sup> The object of the fund is to facilitate repatriation of smuggled migrants and the suppression of offending.

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<sup>187</sup> Section 49 *Civil Aviation Order 2006*.

<sup>188</sup> Section 12 *Trafficking and Smuggling of Persons Order 2004*.

<sup>189</sup> Section 2 *Trafficking and Smuggling of Persons Order 2004*.

<sup>190</sup> Sections 7, 8 *Trafficking and Smuggling of Persons Order 2004*.

<sup>191</sup> Section 19 *Trafficking and Smuggling of Persons Order 2004*.

## IV Cambodia

### IV.1 Overview

Cambodia is a source country for irregular labour migrants and smuggled migrants. Thailand is the single most significant destination country for regular and irregular migration from Cambodia.<sup>192</sup> Most migration to Thailand from Cambodia is irregular, and an estimated 83 percent of the migrants who enter irregularly are smuggled.<sup>193</sup> Thailand is a transit point for some smuggled migrants from Cambodia en route to Malaysia.<sup>194</sup> Cambodia is also a destination for irregular migrants from neighbouring Viet Nam.<sup>195</sup>

Cambodia is a Party to the United Nations (UN) *Convention against Transnational Organized Crime*<sup>196</sup> the *Protocol against the Smuggling of Migrant by Land, Sea and Air*,<sup>197</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>198</sup> Relevant obligations arising from the *Smuggling of Migrants Protocol* have yet to be implemented into domestic law.

Cambodia's *Law on Immigration* sets out some offences relating to illegal entry but does not criminalise the smuggling of migrants. Discussions about how best to implement the Protocol provisions into Cambodian law have been ongoing for some time and the following sections summarise, where possible, recent proposals, using the draft of a *Law on Suppression of Human Smuggling* dated 25 March 2017. It has to be stressed that this text is a working draft only and that any legislation presented to Parliament in the future may likely adopt different language than the proposal currently in circulation.

### IV.2 Ratification of and accession to international legal instruments

Cambodia signed the *Convention against Transnational Organized Crime* on 11 November 2001 and ratified the Convention on 12 December 2005. The Convention was adopted into domestic law with the *Law Approving the Kingdom of Cambodia to be a Party to the United Nations Convention against Transnational Organized Crime*.

Cambodia signed the *Smuggling of Migrants Protocol* on 11 November 2001 and ratified the Protocol on 12 December 2005. The Protocol was approved domestically with the *Law Approving the Kingdom of Cambodia to be a Party to Protocol against the Smuggling of Migrants by Land Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime*.

Cambodia also signed the *Trafficking in Persons Protocol* on 11 November 2001 and ratified the Protocol on 2 July 2007. The Protocol was approved domestically with the *Law Approving the Kingdom of Cambodia to be a Party to the Protocol to Prevent, Suppress, and Punish Trafficking in Persons*,

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<sup>192</sup> ADB & IOM, *Facilitating Safe Labor Migration in the Greater Mekong Subregion Issues, Challenges, and Forward-Looking Interventions* (2013) 21–22; Mekong Migration Network and Asian Migrant Centre, *Migration in the Greater Mekong Subregion Resource Book* (4<sup>th</sup> ed, 2013) 92.

<sup>193</sup> UNODC, *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment* (2013) 12–13.

<sup>194</sup> Vutha Hing, Pide Lun & Dalis Phann, *Irregular migration from Cambodia*, Working Paper No 58, Cambodia Development Resource Institute (August 2011) 1.

<sup>195</sup> Mekong Migration Network and Asian Migrant Centre, *Migration in the Greater Mekong Subregion Resource Book* (4<sup>th</sup> ed, 2013) 82.

<sup>196</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>197</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>198</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

particularly *Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.*

### IV.3 Domestic laws and policies relating to smuggling of migrants

At the time of writing, the *Smuggling of Migrants Protocol* had not been implemented into domestic law in Cambodia.

Cambodia's *Law on Immigration*, passed on 26 August 1994, contains some offences relating to immigration as well as definitions and requirements of the country's immigration system. Some provisions in the *Law on Immigration* capture several legal aspects of illegal entry and facilitation of illegal entry. Nothing in this Law, however, criminalises the smuggling of migrants nor does it reflect the concepts and spirit of the *Smuggling of Migrants Protocol*.

The *Criminal Code* of 2009 sets out general principles of criminal liability and specific offences, though none of those concern the smuggling of migrants. A separate *Law on Suppression of Human Trafficking and Sexual Exploitation* was passed on 18 January 2008.

For several years, government departments and international organisations have discussed various ways how best to implement the Protocol requirements into Cambodian law. At a meeting of the Bali Process on People Smuggling, Trafficking in Persons and related Transnational Crime in 2011 the Undersecretary of State made a statement saying that Cambodia was developing an 'Anti-Smuggling of Migrants Law' with the assistance of Australia.<sup>199</sup> A *National Action Plan on the Suppression of Human Trafficking, Smuggling, Labour, and Sexual Exploitation* for the period December 2011 to December 2013 also mentions the development of a *Law on Suppression of Human Smuggling*.<sup>200</sup>

In 2013, a draft *Law on Suppression of Human Smuggling* was first presented and in subsequent years several workshops were held with the assistance of UNODC and IOM, the International Organization for Migration, to further develop the draft legislation. The draft was eventually presented to the Council of Ministers but did not proceed further at that time, partly because of a perception that the draft covered many issues already captured by Cambodia's anti-trafficking laws.

In 2016/17, IOM resumed the work on assisting the Government of Cambodia in further developing the draft law, address relevant concerns, and ensure a high degree of conformity with the UN *Smuggling of Migrants Protocol*. The latest available draft for a *Law on Suppression of Human Smuggling* is dated 25 March 2017 and has been used throughout the following sections of this chapter. This draft is presently under consideration by the Ministry of Justice. It is anticipated that further consultations to finalise the draft will take place following the national elections in 2018.

According to proposed Article 1 of the present draft, the objective of the proposed law is 'to suppress human smuggling in accordance with the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*'. The purposes of this Law, which are stated separately in proposed Article 2, are to

to prevent and combat human smuggling, protect the rights of smuggled migrants, and promote and facilitate national and international cooperation.

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<sup>199</sup> Cambodia, Undersecretary of State, Ministry of Interior, Sieng Lapresse, 'Cambodia's Approach to Trafficking in Persons' (speech delivered at the Senior Officials Meeting of the Bali Process on People Smuggling, Trafficking in Persons and related Transnational Crime, Bali, Indonesia, 10 March 2011) <<http://www.baliprocess.net/UserFiles/baliprocess/File/Bali%20Process%20SOM%20-%20Cambodia%20presentation%20on%20human%20trafficking.pdf>>.

<sup>200</sup> Cambodia, National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and sexual Exploitation in Women and Children, *National Action Plan on the Suppression of Human Trafficking, Smuggling, Labour, and Sexual Exploitation 2011–2013* (2013) 12.

Chapter Two of the draft law, if enacted, would establish a number of offences relating to smuggling of migrants, including basic and aggravated offences of ‘human smuggling’, enabling illegal residence, and offences relating to fraudulent travel or identity documents. Chapter Two would also establish liability for legal persons and create an offence of transporting smuggled persons for commercial carriers. The remaining chapters of the draft law contain provisions relating to the freezing and confiscation of assets, extradition, and mutual legal assistance.

Overall, the current text of draft law shows a high degree of loyalty to the requirements, spirit, and wording of the *Smuggling of Migrants Protocol* and its explanatory material. However, the available text of this draft is still under the development and is likely to change, should this proposal be presented to Parliament and passed into law.

## **IV.4 Terminology and definitions**

### **IV.4.1 Existing law**

Since Cambodia presently has no specific laws relating to smuggling of migrants, relevant terms, including ‘smuggling of migrants’, are neither used nor defined in Cambodian law.

### **IV.4.2 Proposed Law on Suppression of Human Smuggling**

Article 4 of the draft proposal for a *Law on Suppression of Human Smuggling*, if passed, would introduce a range of definitions of terms used in this Law. The present proposal used the term ‘human smuggling’ which is defined in Article 4 to mean

intentionally facilitating or procuring the illegal entry of another person into a State of which the person is not a citizen or permanent resident, for the purpose of receiving direct or indirect benefits.

This definition, if adopted, would closely mirror the definition of smuggling of migrants under Article 3(a) of the *Smuggling of Migrants Protocol*. The present draft of Article 4 further proposes to define the term ‘smuggled person’ to ‘mean a person who is the object of human smuggling, whether or not the person has participated in the human smuggling’.

Article 4 of the draft proposal defines ‘illegal entry’ to mean ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State’. It is further proposed to define the term ‘benefit’ used in the definition of human smuggling to include financial and non-financial benefits.

## **IV.5 Offence of smuggling of migrants**

### **IV.5.1 Existing law**

Chapter Five of Cambodia’s *Law on Immigration* sets out several offences relating to entry and immigration into Cambodia. None of these offences specifically criminalise the smuggling of migrants.

Under Article 29 2<sup>nd</sup> para. of the *Law on Immigration*, it is an offence to assist non-citizens to enter the country unlawfully or to conceal their entry. Liability for this offence is contingent upon the migrant’s unlawful, fraudulent, clandestine, or other irregular entry into Cambodia. This offence makes no reference to any purpose or material benefit element. As a result of Article 4 of the *Criminal*

*Code*, a mental element of intention is implied into Article 29.<sup>201</sup> The penalty for non-citizens entering in one of the prescribed ways and for those assisting them is imprisonment for a term of three to six months and expulsion from Cambodia. Based on the available information, it appears that prosecutions under Article 29 2<sup>nd</sup> para are not common, including in cases that would qualify as smuggling of migrants under the UN Protocol.

## IV.5.2 Proposed Law on Suppression of Human Smuggling

### IV.5.2.1 Human smuggling offence

Chapter Two of the draft for a proposed new *Law on Suppression of Human Smuggling* concerns ‘criminalisation’ and contains several offences that closely mirror those required by Article 6 of the *Smuggling of Migrants Protocol*. The ‘offence of human smuggling’ is set out in Article 7 of the present draft and adopts the language of the definition of human smuggling in proposed Article 4. The proposed offence, if enacted, would criminalise the

procuring or facilitating illegal entry of another person into the Kingdom of Cambodia or another foreign state, in which the person is not a citizen or permanent resident, for the purpose of receiving direct or indirect benefits.

This proposal reflects all of the physical and mental elements of the offence of smuggling of migrants under Article 6(1)(a) of the *Smuggling of Migrants Protocol*. It captures smuggling activities that are destined for Cambodia as well as those aimed at other destinations. As mentioned, it is proposed to define the terms ‘illegal entry’ and ‘benefit’ in Article 4 of this Law.

According to Article 4 of the *Criminal Code* there is no criminal liability under Cambodian law without the mental element of intention unless a law provides otherwise. Therefore, only intentional conduct is punishable.

The penalty for the proposed offence is imprisonment for a term between two and five years and a fine between KHR 4,000,000 and 10,000,000 million.

### IV.5.2.1 Offence of transporting smuggled migrants

Article 8 of the draft *Law on Suppression of Human Smuggling* contains an offence of transporting smuggled persons applicable to commercial transporters. Article 8(1) provides that commercial transporters are subject to a fine of between KHR 10 and 50 million if they are found to have knowingly transported a ‘smuggled person who does not have the legal travel documents or necessary documents required to legally enter the receiving country’.

Article 8(2) provides that commercial transporters shall not be prosecuted under para. (1) if one of the following circumstances is present:

- (a) There was reasonable grounds to believe the person(s) possess the required travel documents to enter the country.
- (b) There was reasonable grounds that the transported person possessed the lawful travel documents upon first boarding the transport.
- (c) There was reasonable grounds for rescuing people.
- (d) When an entry of a person into a country takes place due to circumstances which are beyond the control of the commercial transporter.

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<sup>201</sup> Article 4 *Criminal Code* provides that, unless a law provides otherwise, there is no criminal liability under Cambodian law without the mental element of intention. No such departure is made here, so the default mental element is intention. See also Article 670 *Criminal Code*.



The draft law does not define ‘commercial transporter’, but Article 4(12) defines ‘commercial carrier’ as ‘any person, including owners or operators or drivers who are involved with transportation of goods or people for commercial purposes’. It is assumed that the two terms are synonyms and that the final draft of the Law will adopt the same term in Articles 8 and 4(12).

## IV.6 Offences involving fraudulent travel or identity documents

### IV.6.1 Existing law

#### IV.6.1.1 Article 32 Law on Immigration

Article 32 of the *Law on Immigration* contains a special offence for forging and altering certain identity documents:

Anyone who scratches, erases, makes carbon copies, fakes, lends, or writes false name on the resident card, labour/working card, labour/employment contract, or uses those documents with a name different than his own, or files a fake application for these above documents, shall be subjected to imprisonment for a term of five (5) to fifteen (15) years.

This offence is limited to certain forms of producing (‘makes carbon copy, fakes, writes false name’), procuring (‘files a fake application for’), providing (‘lends’), and possessing (‘uses ... with a name different than his own’) types of identity documents. The types of documents covered by Article 32 include ‘resident card, labour/working card, labour/employment contract’ but do not capture other travel and identity documents such as passports and visas.

The offence under Article 32 of the *Law on Immigration* has a different scope compared to the offence involving fraudulent travel or identity documents set out in Article 6(1)(b) of the *Smuggling of Migrants Protocol*. The types of conduct and types of documents are more limited in the Cambodian offence and, critically, they lack any reference to the purpose of enabling the smuggling of migrants and any requirement that the offence be committed in order to obtain, directly or indirectly, a financial or other material benefit.

#### IV.6.1.2 Criminal Code

Cambodia’s *Criminal Code* sets out some general offences concerning the counterfeiting of identity or travel document. These include

- Article 629: Forgery of Public Documents;
- Article 632: Fraudulent Request for Documents;
- Article 633: False Declaration;
- Article 635: Forging Attestation;
- Article 631: Fraudulently Delivery of Documents;
- Article 634: Delivering Forged Documents;
- Article 628: Use of Forged Documents;
- Article 629: Use of Forged Public Documents;
- Article 636: Use of a Falsified or Forged Certificate.

These offences lack the specific requirements of Article 6(1)(b) of the *Smuggling of Migrants Protocol*.

## IV.6.2 Proposed Law on Suppression of Human Smuggling

Article 11 of the proposed *Law on Suppression of Human Smuggling* makes it an offence to produce, procure, provide, or possess a fraudulent travel or identity document. According to Article 4 of the proposed Law, fraudulent travel or identity documents shall mean

any document that was procured, made, or altered for the use of migration by a person unlawfully

- a. made or altered in a material way by an unauthorized person
- b. issued or obtained through misrepresentation, corruption, or duress
- c. used by a person other than the rightful holder

The present draft of Article 11 includes two different proposals for the offence.

The first, older proposal criminalises the making, obtaining, giving or possessing of fraudulent travel or identification documents when committed ‘for the purpose of facilitating human smuggling’. This alternative contains no reference to financial or other material benefit element. The proposed penalty for this offence is imprisonment for five to ten years.

The second, more recent option criminalises the offering, distributing, producing, procuring, providing or possessing of a travel or identity document when ‘the person should reasonably have suspected that the document is to be used for the purpose of smuggling migrants’. This alternative also expressly states that the offence must be committed intentionally and further requires that the offence was committed ‘for [the person’s] own benefit’. This offence evidently aligns more closely with the offence under Article 6(1)(b) of the *Smuggling of Migrants Protocol*. The present draft specifies no penalty for this offence.

## IV.7 Offence of enabling illegal stay

### IV.7.1 Existing law

No designated offences criminalising the enabling of illegal residence or harbouring of foreigners could be identified in Cambodian law in any of the available sources.

### IV.7.2 Proposed Law on Suppression of Human Smuggling

Article 9 of the proposed *Law on Suppression of Human Smuggling* establishes an offence for enabling illegal residence:

any person who intentionally and for their own benefit, uses illegal means to enable another person who is not a national or permanent resident to remain in a state/country without complying with the necessary requirements for legal residence.

This proposal reflects all of the physical and mental elements of the offence of enabling illegal stay under Article 6(1)(c) of the *Smuggling of Migrants Protocol*. It covers enabling illegal residence in Cambodia as well as in other countries. The purpose element of the proposed offence refers to the commission ‘for their own benefit’. This differs from the wording of proposed Article 7, the of smuggling of migrants, which refers to ‘the purpose of receiving direct or indirect benefits’. The term benefit is defined in proposed Article 4 of the *Law on Suppression of Human Smuggling*.<sup>202</sup>

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<sup>202</sup> See Section IV.4.2 above.

The offence in Article 9 would be punishable by imprisonment between two and five years and a fine between KHR 4,000,000 and KHR 10,000,000. Aggravated forms of the offence in Article 9, discussed below, would carry higher penalties.

## IV.8 Aggravating circumstances

Since the existing law in Cambodia does not contain offences relating to the smuggling of migrants, there are also no aggravating circumstances. These would be introduced with the *Law on Suppression of Human Smuggling*.

Article 4 of the draft Law defines ‘aggravated circumstances’ to mean

circumstances when a smuggled person is treated cruelly, degraded, or exploited, or circumstances that endanger the lives or safety of smuggled persons concerned, or when a smuggled person is a minor, disabled or pregnant, including when human smuggling is a public official, abusing their power/authority over or against a smuggled person.

Specific aggravations are also included for the offences of human smuggling and enabling illegal residence and are discussed below. For this reason, the separate definition of ‘aggravated circumstances’ is not needed; this definition is also not used anywhere in the draft law.

### IV.8.1 Endangering the Lives or Safety of Smuggled Migrants

The offences of human smuggling and enabling illegal residence in Articles 7 and 9 of the proposed *Law on Suppression of Migrant Smuggling* contain aggravations where the smuggling takes place in circumstances in which the smuggled person’s life or safety is put in danger. Both aggravations carry an increased penalty of imprisonment from 10 to 20 years. These provisions reflect the requirements of Article 6(3) of the *Smuggling of Migrants Protocol*.

### IV.8.2 Inhuman or Degrading Treatment of Smuggled Migrants

The offences of human smuggling and enabling illegal residence in Articles 7 and 9 of the proposed *Law on Suppression of Migrant Smuggling* both contain aggravations where the smuggling takes place in circumstances where the smuggled person is treated cruelly, is degraded or exploited. Both aggravations carry an increased penalty of imprisonment from 10 to 20 years. These provisions reflect the requirements of Article 6(3) of the *Smuggling of Migrants Protocol*.

### IV.8.3 Other aggravations

The offence in Article 29 of the *Law on Immigration* contains an aggravation relating to the status of the offender. Where a ‘competent official or agent of the Royal Government ... conspires or helps facilitate the commission of’ the offence in Article 29 shall be subjected to an aggravated punishment of imprisonment from six months to one year.

The offences in Articles 7 and 9 of the proposed *Law on the Suppression of Human Smuggling* contain additional aggravations if the offence is committed by an organised group and for cases in which five or more persons are smuggled. In these circumstances, the penalty is raised to imprisonment for five to ten years. The term ‘organised group’ is presently not further defined in the proposed Law, though it has been suggested that the draft legislation either adopt the definition of ‘organised criminal group’

as set out in the UN *Convention against Transnational Organized Crime* or adopt terminology similar to that used in Article 499 of the *Criminal Code*.<sup>203</sup>

A further aggravation under the proposed Law concerns cases under Articles 7 and 9 where the smuggled person is a minor or where the offence is committed by public officials abusing their power or authority over or against a smuggled person. A minor is defined in Articles 7(4)(a) and 9(4)(a) as a person under the age of 18. If either of these aggravating circumstances are present, a penalty of imprisonment between 15 and 30 years applies.

The definition of ‘aggravated circumstances’ in Article 4 of the proposed law also includes circumstances where a smuggled migrant is disabled or pregnant. None of the offences in the proposed law, however, refer to this definition or include an aggravation of this kind.

## IV.9 Extensions to criminal liability

Extensions to criminal liability for attempts, participation as an accomplice, and organising and directing others are not specially provided for in the *Law on Immigration* or draft the *Law on Suppression of Human Smuggling*. Instead, the general rules of Cambodia’s *Criminal Code* apply.

### IV.9.1 Attempts

Article 27 of the *Criminal Code* provides that attempts to commit a felony or, where provided for by law, a misdemeanour, are punishable; attempts of petty crimes are not. Felonies are defined in Article 46 to mean an offence carrying a maximum sentence of life imprisonment or imprisonment of a period of more than five years but no more than 30 years. Misdemeanours are defined in Article 47 as offences carrying a maximum sentence of imprisonment of more than six days but no more than five years.

Under Article 27 liability for attempts requires that

the perpetrator has started to commit the offence, that is, he or she has committed acts which lead directly to the commission of the offence; or the perpetrator did not stop his or her acts voluntarily, but was interrupted solely by circumstances beyond his or her control.

Article 27 further provides that ‘[a] preparatory act which does not directly lead to the commission of the offence does not constitute a commencement of execution’.

The offence under Article 29 of the *Law on Immigration* and the basic forms of the offences under Articles 7 and 9 of the proposed *Law on the Suppression of Human Smuggling* are misdemeanours. In the absence of any provision expressly providing otherwise, attempts to commit these offences are not criminalised, as required by Article 6(2)(a) of the *Smuggling of Migrants Protocol*.

The offence under Article 32 of the *Law on Immigration*, the offence under Article 11 of the proposed *Law on the Suppression of Human Smuggling* and the aggravations of the offences in proposed Articles 7 and 9 of are felonies and thus can be attempted.

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<sup>203</sup> See Section IV.9.3 below.

## IV.9.2 Participation as an accomplice, organising and directing others

### Participation as an accomplice

Article 32 of the *Law on Immigration* provides that accomplices to acts criminalised by this provision shall be subjected to the same penalty.

Article 29 of the *Criminal Code* provides that accomplices are only to be punished in relation to attempted or committed felonies or misdemeanours. Unlike Article 27 relating to attempt, there is no requirement of express provisions to extend liability to accomplices to misdemeanours. Since all of the offences in the *Law on Immigration* and the proposed *Law on Suppression of Human Smuggling* are either felonies or misdemeanours, liability as an accomplice extends to all of them.

Article 29 of the *Criminal Code* defines an accomplice as ‘any person who knowingly, by aiding or abetting, facilitates an attempt to commit a felony or misdemeanour, or its commission’. Article 29 also provides that an accomplice to a felony or misdemeanour shall be liable to the same penalties as the perpetrator.

### Organising and directing others

Article 28 of the *Criminal Code* provides that an instigator of a felony or misdemeanour shall incur the same penalties as the perpetrator of the same act. Article 28 defines an instigator as a person who:

- (1) gives instructions or order[s] to commit a felony or misdemeanour;
- (2) provokes the commission of a felony or misdemeanour by means of a gift, promise, threat, instigation, persuasion or abuse of authority or power.

Article 28 provides that an instigator may only be punished if the felony or misdemeanour was committed or attempted. Since all of the offences in the *Law on Immigration* and the proposed *Law on Suppression of Human Smuggling* are either felonies or misdemeanours, liability also extends to instigators. Article 28(1) thus reflects the requirement under Article 28(c) of the *Smuggling of Migrants Protocol*.

## IV.9.3 Participation in an organised criminal group

Presently, the offences under the *Law on Immigration* make no reference to, and contain no aggravations involving, organised criminal groups.

Articles 7 and 9 of the proposed *Law on Suppression of Human Smuggling* include an aggravation for cases in which the offences are committed by an ‘organised group’, a term that is not further defined in the draft Law.<sup>204</sup>

Cambodia criminalises participation in an organised criminal group using the conspiracy model set out in Article 5(1)(a)(i) of the *Convention against Transnational Organized Crime*.<sup>205</sup> Article 499 of the *Criminal Code* criminalises ‘participation in a group or a conspiracy’. This provision is limited to groups or conspiracies formed to commit felonies against persons as set out in Chapters 1 to 6 in Title 2 of Book 2 of the *Criminal Code* or felonies against property as set out in Book 3 of the *Criminal Code*. Commission of this offence is punishable by imprisonment of two to five years and a fine of between KHR 4,000,000 and KHR 10,000,000.

Several offences in the *Criminal Code* include commission by an ‘organised criminal enterprise’ as an aggravating element. This term is defined in Article 77 of the *Criminal Code* to mean ‘any group or conspiracy established with a view to plan or commit one or more offences’.

<sup>204</sup> See further Section IV.8.3 above.

<sup>205</sup> Andreas Schloenhardt, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (2010) 254.

## IV.10 Other criminal offences relating to irregular migration

### IV.10.1 Trafficking in persons

In 2008, Cambodia introduced offences relating to trafficking in persons with the *Law on Suppression of Human Trafficking and Sexual Exploitation* replacing the *Law on Suppression of the Kidnapping and Trafficking of Human Persons and the Exploitation of Human Persons*. The 2008 reform was made to 'consolidate and extend previous laws so as to bring Cambodia's domestic legislation in line with its obligations as a Signatory to the UN *Trafficking Protocol*.'<sup>206</sup>

The 2008 Law does not define the term 'trafficking in persons', nor does it create a general offence of trafficking in persons as envisioned by the *Trafficking in Persons Protocol*. Rather, it establishes a series of offences criminalising specific acts relating to human trafficking and sexual exploitation, several of which overlap with the concept of trafficking in persons as defined under the *Trafficking in Persons Protocol*. The offences which are most directly relevant to trafficking in persons are set out in Chapter 2 of the Law, entitled, 'Act of Selling/Buying or Exchanging a Human Being'. In Chapter 2, Articles 8–11 of the Law criminalise unlawful removal of persons and Article 12 criminalises unlawful recruitment. Articles 13–16 criminalise selling, buying or exchange a human being. Offences relating to transportation of trafficked persons are set out in Articles 17 and 18. Receipt of trafficked persons is criminalised by Articles 19 and 20. The nature of each of these offences does not lend to the prosecution of smuggling of migrants. Additionally, Chapters 3 to 6 of the Law contain offences for confinement, prostitution, child prostitution, pornography and indecency against minors that are not directly related to trafficking.

### IV.10.2 Unlawful recruitment of workers

The *Law on Suppression of Human Trafficking and Sexual Exploitation* creates a specific offence of unlawful recruiting for exploitation. This offence involves inducing, hiring or employing a person through the use of any coercive means in order to facilitate their exploitation.<sup>207</sup> The statutory penalty for unlawful recruitment is imprisonment for a term of between seven and 15 years. If the offence is committed against a minor, by a public official or by an organised group, the penalty is increased to a term of imprisonment of between 15 and 20 years.

Additional regulations of recruitment practices are provided by the Cambodian *Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies*. This Decree requires recruitment agencies to fulfil certain administrative requirements and obtain authorisation from the Ministry of Labour and Vocational Training to place Cambodian workers in positions overseas.<sup>208</sup> If an agency violates any provision of the Sub-Decree it can be punished by a written warning, the temporary suspension or the revocation of the authorisation.<sup>209</sup>

### IV.10.3 Illegal entry

Article 29 1<sup>st</sup> para. of the *Law on Immigration* criminalises illegal entry into Cambodia:

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<sup>206</sup> Mekong Migration Network and Asian Migrant Centre, *Migration in the Greater Mekong Subregion Resource Book* (4<sup>th</sup> ed, 2013) 102 [emphasis added].

<sup>207</sup> Article 12 *Law on Suppression of Human Trafficking and Sexual Exploitation*.

<sup>208</sup> Articles 6, 7 *Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies*.

<sup>209</sup> Article 39 *Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies*.

Any alien who without authorisation, enters the Kingdom of Cambodia clandestinely or by fraud or by any other illegal means whatsoever, contrary to the provisions of this Law, shall be subjected to imprisonment for three to six months prior to his being expelled out of the country.

The term 'alien' is defined in Article 2 of the *Law on Immigration* to mean any person who does not hold Cambodian nationality.

Under this offence, any non-citizen, including smuggled migrants, who does not hold a visa or other authorisation to enter Cambodia will be liable if that person arrives in the country clandestinely (i.e. by avoiding immigration and border controls and entering outside regular immigration control points), by fraud (for example, by presenting fraudulent document or making misrepresentation to immigration officials), or by any other illegal means whatsoever. The offence of facilitating and concealing the illegal entry of others outlined above builds directly on the offence concerning illegal entry.

## **IV.11 Non-criminalisation of smuggled migrants**

### **IV.11.1 Existing law**

In the absence of specific provisions, including offences, concerning the smuggling of migrants, Cambodian law presently contains no clause concerning the non-criminalisation of smuggled migrants as envisaged by Article 5 of the *Smuggling of Migrants Protocol*.

Cambodia acceded to the *Convention and Protocol relating to the Status of Refugees* on 15 October 1992. Its domestic law, including the *Law on Immigration*, contains no provisions to ensure the non-penalisation of refugees who enter the country illegally or who are smuggled to Cambodia.

In late 2009 *Sub-Decree No 224 on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia* was introduced. This Decree also contains no express provisions concerning the non-criminalisation of asylum seekers. Article 6, however, states that '[a]n applicant [for asylum] may receive temporary permission to enter the country as a non-immigrant, even though he or she does not fulfil the criteria stated in Article 8 and Article 11 of the *Law on Immigration*.' This may provide smuggled migrants who are seeking asylum in Cambodia with an avenue to avoid prosecution for illegal entry.

### **IV.11.2 Proposed law**

Article 6 of the proposed *Law on Suppression of Human Smuggling* provides that a smuggled person shall not be criminally liable for being smuggled under the provisions of that law even if the person illegally enters a country, illegally stays in a country, or receives or holds fraudulent travel or identity documents used for the purpose of their illegal entry or stay in a country.

This seeks to reflect the requirement of Article 5 of the *Smuggling of Migrants Protocol*. The wording used in the latest draft may, however, imply broader immunity for smuggled migrants.

## IV.12 Jurisdiction

### IV.12.1 Existing law

The *Law on Immigration* contains no provisions directly relating to the extent of the jurisdiction of the Act. Article 3 states that the law ‘shall be applicable to all aliens’.

The *Criminal Code* of Cambodia contains provisions on jurisdiction with general application.

Article 12 of the *Criminal Code* provides that Cambodian law extends to all criminal offences committed in the territory of Cambodia, including its air and maritime spaces. This reflects the requirements of Article 15(1)(a) of the *Convention against Transnational Organized Crime*.

Article 13 of the *Criminal Code* provides that an offence shall be deemed to have been committed in the territory of Cambodia if one of the elements of the offence took place within the territory of Cambodia. Offences which include illegal entry or illegal stay in Cambodia as one of their elements, such as Article 29 of the *Law on Immigration* are thus considered to be offences committed in the territory, irrespective of whether the physical acts of the offender took place outside of Cambodia.

Article 14 and 16 of the *Criminal Code* extend jurisdiction to offences committed on board vessels flying the Cambodian flag and aircraft registered in Cambodia, regardless of where the offence takes place. These provisions reflect the requirements of Article 15(1)(b) of the *Convention against Transnational Organized Crime*.

Article 20 of the *Criminal Code* provides that jurisdiction further extends to ‘any felony committed by a Cambodian or foreign national outside the territory of the Kingdom of Cambodia, if the victim is a Cambodian national at the time of the offence’. This reflects the optional requirement of Article 15(2)(a) of the *Convention against Transnational Organized Crime*.

Article 19 of the *Criminal Code* provides that Cambodian criminal law applies to felonies and, where if punishable under the law of the foreign country in which it was committed, misdemeanours, committed by Cambodian nationals outside the territory of Cambodia. This reflects the optional jurisdictional provision in Article 15(2)(b) of the *Smuggling of Migrants Protocol*.

Additionally, Article 17 of the *Criminal Code* establishes that Cambodian criminal law applies to acts initiated in Cambodia but committed abroad. Article 17 provides:

In criminal matters, Cambodian law is applicable to any person who, in the territory of the Kingdom of Cambodia, instigates or is an accomplice to a felony or misdemeanour committed abroad, if the following two conditions are met:

- the offence is punishable under both the Cambodian law and the foreign law; and
- the fact that the offence was committed is established by final judgement of a foreign court.

Article 22 of the *Criminal Code* also extends criminal jurisdiction to, inter alia, any felony committed outside the territory of Cambodia that is an offence against the security of the country.

### IV.12.2 Proposed Law

Articles 3 and 5 of the proposed *Law on Suppression of Human Smuggling*, if enacted, would introduce provisions relating to jurisdiction for offences pertaining to smuggling of migrants. These broadly align with those set out in the *Convention against Transnational Organized Crime*, but leave some questions concerning the geographical application of the offences unanswered.

Under Article 3 of the proposed *Law on Suppression of Human Smuggling*:

This law has the scope to cover:



1. Khmer citizens, whether the offenses are committed inside or outside the territory of the Kingdom of Cambodia or in any foreign state, or;
2. Cambodian citizens, who have been smuggled or subject of the offence: whether the offenses are committed inside or outside the territory of the Kingdom of Cambodia or in foreign states, or;
3. Any person who does not have nationality who has permanent residence in the Kingdom of Cambodia: whether the offenses have been committed inside or outside the territory of the Kingdom of Cambodia or in any foreign state
4. Non-Cambodian citizens or foreign nationals who have committed the offense in the territory of the Kingdom of Cambodia.

Article 3(4) is directed at covering the requirement in Article 15(1)(a) of the Convention. Article 3(1), (2) and (3) cover circumstances included in the optional jurisdictional requirement of Article 15(2)(b) of the *Convention against Transnational Organized Crime*.

Article 5 of the proposed *Law on Suppression of Human Smuggling* extends jurisdiction extraterritorially in the following circumstances:

1. This law applies to all persons who stay in the Kingdom of Cambodia if the two following conditions are met:
  - a. The person has participated in committing the action in a foreign state
  - b. The action committed in a foreign state is treated as offense under the provisions of this law.
2. The person defined in Paragraph 1 above shall:
  - a. Be extradited to any state with jurisdiction over the offenses or;
  - b. Be prosecuted for the committed offenses under Cambodian jurisdiction.
3. The offences, which are committed in a foreign state and/or the Kingdom of Cambodia under respective state laws and under the provisions of this law, are subject to extradition. In the absence of extradition, this person may be prosecuted under the provision of this law irrespective of whether the offense was committed in a foreign state and/or the Kingdom of Cambodia.

The present drafts of Articles 3 and 5 are not yet in their final wording and require some refinement. The committee developing the text for the proposed *Law on Suppression of Human Smuggling* has recommended the introduction of a provision that mirrors the jurisdictional requirements of the *Convention against Transnational Organized Crime* more closely. For this reason, the draft text is likely to change from its current format.

#### **IV.13 Observations**

Cambodian law presently contains no provisions that relate directly to the smuggling of migrants and the existing *Law on Immigration* only rudimentarily criminalises the facilitation of illegal entry into the country. This situation has been acknowledged by the Cambodian Government and proposals to implement the obligations arising from the *Smuggling of Migrants Protocol* have been circulating among government agencies and international organisations for some time.

Early drafts of a new *Law on Suppression of Human Smuggling* date back to 2011. With the assistance of UNODC and IOM these drafts have developed into a relatively comprehensive Law which, if passed, would introduce provisions that reflect the provisions and spirit of the *Smuggling of Migrants Protocol* and that would furnish the Government of Cambodia with meaningful tools to criminalise, investigate, and prosecute the smuggling of migrants.

At the time of writing, the final text of the draft Law was still in development and several inconsistencies and errors had yet to be addressed. Overall, the development of the draft is a very

promising development, it covers all of the key issues concerning criminalisation of smuggling of migrants envisaged by the *Smuggling of Migrants Protocol*, and demonstrates a high degree of compliance with the international model. In addition, the draft Law contains some very useful additional provisions, such as the aggravating circumstance for smuggling of migrants offences involving government officials.

As the draft Law develops further, some inconsistencies will need to be removed and a more uniform terminology adopted. The English language versions contains some expressions that need to be revisited.

It is hoped that this report provided further impetus to advance and finalise this draft Law and enact legislation to prevent and combat smuggling of migrants in Cambodia more effectively.

## V Indonesia

### V.1 Overview

Indonesia used to be a major transit point for the smuggling of migrants from Southwest and South Asia to Australia. In particular, smuggled migrants from Afghanistan, Iran, Iraq, Pakistan, and Sri Lanka frequently travelled through Malaysia to Indonesia before boarding boats destined for Australia. Indonesia is also an important source country for irregular migration to other parts of East and Southeast Asia, in particular to Malaysia.

Indonesia is a Party to the United Nations (UN) *Convention against Transnational Organized Crime*,<sup>210</sup> the *Protocol against the Smuggling of Migrant by Land, Sea and Air*,<sup>211</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>212</sup> Offences relating to the smuggling of migrants are comprehensively legislated in *Law 6 of 2011 Concerning Immigration*.

### V.2 Ratification of and accession to international legal instruments

Indonesia signed the *Convention against Transnational Organized Crime* on 12 December 2000 and ratified the Convention on 20 April 2009. A reservation pursuant to Article 35(3) of the Convention has been filed, declaring that Indonesia does not consider itself bound by Article 35(2) of the Convention concerning the settlement of disputes by way of arbitration and referral to the International Court of Justice.

Indonesia signed the *Smuggling of Migrants Protocol* on 12 December 2000 and ratified the Protocol on 28 September 2009. A reservation pursuant to Article 20(3) of the Protocol has been filed, declaring that Indonesia does not consider itself bound by Article 20(2) of the Protocol concerning the settlement of disputes by way of arbitration and referral to the International Court of Justice. Furthermore, Indonesia has conveyed its declaration to implement in strict compliance with the principles of the sovereignty and territorial integrity of a state on the provisions of Article 6(2)(c) and Article 9(1)(a) and (2) of the Protocol.

Indonesia signed the *Trafficking in Persons Protocol* on 12 December 2000 and ratified the Protocol on 28 September 2009. A reservation pursuant to Article 15(3) of this Protocol has been filed, declaring that Indonesia does not consider itself bound by Article 15(2) of the Protocol concerning the settlement of disputes by way of arbitration and referral to the International Court of Justice. Furthermore, Indonesia has declared that the provisions of Article 5(2)(c) of the Protocol are to be implemented in strict compliance with the principle of the sovereignty and territorial integrity of a state.

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<sup>210</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>211</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>212</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

## V.3 Domestic laws and policies relating to smuggling of migrants

### V.3.1 Smuggling of migrants offences

Until 2011, criminal offences relating to the smuggling of migrants in Indonesia were set out in *Law 9 of 1992 concerning Immigration*. These offences were rather fragmented and did not follow the scope and purpose of the *Smuggling of Migrants Protocol*.

Two years after ratifying the *Smuggling of Migrants Protocol*, Indonesia replaced the offences under *Law 9 of 1992* with *Law 6 of 2011 concerning Immigration*. The explanatory memorandum (*penjelasan*) to this Law states that this law was introduced in response to the demands of an increasingly globalised and inter-connected world and acknowledges the inadequacy of *Law 9 of 1992* in combating transnational organised crime. *Law 6 of 2011* makes explicit reference to Indonesia's ratification of the *Convention against Transnational Organized Crime* and the *Smuggling of Migrants Protocol* and stresses the importance of ensuring equality and respect for human rights.<sup>213</sup>

*Law 6 of 2011* established several new offences criminalising the smuggling of migrants and their related activities. Section 120(1) of *Law 6 of 2011* acts as a dedicated provision for criminalising migrant smuggling. In some instances, conduct that would normally fall within the scope of smuggling of migrants is nevertheless prosecuted under other offences.

### V.3.2 General laws

General principles of criminal law, sentencing, and specific offences are set out in the Indonesian *Penal Code*, which was implemented by the Dutch during the colonial period. The *Penal Code* provides liability for attempts to commit offences,<sup>214</sup> for being an accomplice to a crime,<sup>215</sup> and for organising or directing offences.<sup>216</sup>

New drafts of both the *Penal Code* and the *Code of Criminal Procedure* of 1981 have been developed with the intention to modernise the criminal law and replace the older codes.<sup>217</sup> The new draft codes have been debated extensively in the People's Representative Council (the House of Representatives) since 2013 but continue to face some opposition due to their perceived weakening of the powers of the Anti-Corruption Commission as well as the inclusion of archaic offences. Until this debate is resolved and the new codes are implemented, the *Penal Code* continues to operate.

Obligations under the *Convention against Transnational Organized Crime* have not been passed into law in Indonesia.

Offences concerning trafficking in persons were introduced with the *Law on the Eradication of the Criminal Act of Trafficking in Persons 2007*, two years before Indonesia ratified the *Trafficking in Persons Protocol*.

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<sup>213</sup> *Penjelasan Law 6 of 2011 Concerning Immigration*.

<sup>214</sup> Section 53 *Penal Code*.

<sup>215</sup> Section 56 *Penal Code*.

<sup>216</sup> Section 55 *Penal Code*.

<sup>217</sup> Joeni Arianto Kurniawan, 'Santet', 'adat' law and Criminal Code revision', *The Jakarta Post* (online), 1 April 2013, <<http://www.thejakartapost.com/news/2013/04/01/santet-adat-law-and-criminal-code-revision.html>>.

## V.4 Terminology and definitions

### V.4.1 Smuggling [of migrants]

Article 1(32) of *Law 6 of 2011 concerning Immigration* defines the term ‘smuggling’, which is used in relevant offences concerning the smuggling of migrants, to mean:

any act to obtain, directly or indirectly, a benefit for himself, herself or for another person, to bring a person or group of persons, whether organised or not organised, or to order others to bring a person or group of persons, either organised or not organised, who do not have the legal right to enter the territory of Indonesia or, outside Indonesia’s territory, to enter the territory of a country where the other person does not have the right to legally enter the territory, either by using legitimate documents or false documents, or without using the travel documents, either through immigration or not.

This definition shares many similarities with the definition of ‘smuggling of migrants’ in Article 3(a) of the *Smuggling of Migrants Protocol*, but also departs from that definition in some respects.

The conduct element of bringing a person or group of persons or ordering others to carry a person or group of persons who do not have the legal right to enter the receiving country corresponds with the ‘procurement of illegal entry of another person’ under the *Protocol*. The Indonesian definition captures smuggling activities where Indonesia is the destination as well as smuggling ventures destined for other countries. The Indonesian definition seeks to cover a broad range of smuggling methods that may be ‘organised or not organised’, that may involve legitimate or fraudulent documents or that do not involve travel documents at all.

The definition further contains a profit element reflective of the *Smuggling of Migrants Protocol*. This is referred to as the aim to benefit, directly or indirectly, for the perpetrator him- or herself or for others.

### V.4.2 Other definitions

Section 1 of *Law 6 of 2011 concerning Immigration* contains a long list of other definitions relevant to this Act. Terms such as ‘illegal entry’ or ‘financial or other material benefit’ that are used in the *Smuggling of Migrants Protocol* are, however, not further defined in *Law 6 of 2011*.

Relevant for the offences on smuggling of migrants are the definitions concerning travel and identity documents in s 1(14)–(18). These include definitions of the terms ‘travel documents’ and ‘immigration documents’ which may be documents issued by Indonesia, competent authorities of another country, or by the United Nations or other international organisations.

## V.5 Offence of smuggling of migrants

The main offence concerning smuggling of migrants is set out in s 120(1) of *Law 6 of 2011 concerning Immigration*. In practice, smugglers have also been prosecuted for offences such as s 114 of *Law 6 of 2011*, which involves the enabling of persons to enter into or exit from Indonesia outside designated immigration control points, and, in cases involving smuggling of migrants by sea, for offences under *Law 17 of 2008 on Shipping*.

### V.5.1 Smuggling of migrants, s 120(1) *Law 6 of 2011*

Under s 120(1) of *Law 6 of 2011* it is an offence for:

Any person doing any act to obtain, directly or indirectly, a benefit for himself, herself or for another person by bringing a person or group of persons, whether organised or not organised, or by directing others to bring a person or group persons, whether organised or not organised, who do not have the legal right to enter the territory of Indonesia or, outside Indonesia’s territory, to enter the territory of another country where the other person does not have the right to legally enter, either by using legitimate documents or false documents, or without using the travel documents, either through immigration, is liable for people smuggling and punishable with imprisonment between 5 and 15 years or a fine between IDR 500,000,000 and IDR 1,500,000,000.

The offence of smuggling of migrants, or ‘people smuggling’ as it is sometimes referred to in the literature,<sup>218</sup> essentially combines the definition of ‘smuggling’ in s 1(32) of *Law 6 of 2011* with a statutory penalty without adding further elements and without using the term ‘smuggling’. Despite the rather long offence description, the offence displays some degree of loyalty to the offence of smuggling of migrants envisaged by Article 6(1)(a) of the *Smuggling of Migrants Protocol*.

Figure 6: Elements of the offence in s 120(1) of Law 6 of 2011.

Physical elements	
<b>conduct</b>	bringing a person or group of persons, whether organized or not organized, or ordering others to bring a person or group of persons, whether organized or not organized,
<b>result</b>	...
<b>object</b>	a person or group person... who do not have the legal right to enter the territory of Indonesia or of another country
Mental elements	
<b>intention</b>	‘guilty intent’
<b>purpose</b>	obtain, directly or indirectly, a benefit for himself, herself or for another person

#### V.5.1.1 Physical elements

The physical elements of the offence in s 120(1), which are those of the definition of ‘smuggling’ in s 1(32) of the *Law No 6 of 2011*, closely reflect those of the *Smuggling of Migrants Protocol*.

The conduct element of ‘bringing of a person or group of persons’ is cast more narrowly than the Protocol’s ‘procuring’, though the Indonesian offence not only covers those who ‘bring’ other persons, i.e. the transporters themselves, but also those who ‘order others to bring a person or group of persons’. From a plain reading of the Indonesian law, the scope of the offence appears to be more limited and from the available information it is not clear, whether the offence captures, and is intended to capture, any form of facilitating the illegal entry of others.

The object of the offence, that is the smuggled migrants, includes any person who has no legal right to enter the country of destination, which may be Indonesia or any other receiving State. While the Protocol specifically refers to ‘States of which the person is not a national or a permanent resident’,<sup>219</sup> the effect and scope of application of Indonesia’s offence, which uses the phrase ‘who do not have the legal right to enter’ is virtually the same.

What is less clear, is whether or not the Indonesian offences requires an element of border crossing, in other words, whether it is required that the illegal entry into receiving States eventuates or not. The quality of the available translations does not permit a conclusive answer to the question whether the illegal entry (border crossing) is a result element of s 120(1) of *Law 6 of 2011*, or whether proof of

<sup>218</sup> The Indonesian words used in the Law 6 of 2011, — ‘penyelundupan manusia’ literally mean ‘human’ or ‘person’ smuggling. They have often been translated as ‘people smuggling’; see Melissa Crouch and Antje Missbach, *Trials of People Smugglers in Indonesia: 2007–2012*, Policy Paper 1 (Centre for Indonesian Law, Islam and Society, 2013) 4.

<sup>219</sup> Article 3(a) *Smuggling of Migrants Protocol*.

illegal entry (border crossing) is not needed. In any event, should subsection (1) be understood to only capture those ventures that cross an international border, subsection (2) would cover attempts to smuggle migrants into another country.

#### V.5.1.2 Mental elements

The offence under s 120(1) of *Law 6 of 2011* contains a purpose element that is very similar to the *Smuggling of Migrants Protocol's* 'in order to obtain a financial or other material benefit'. The phrase used in the Indonesian offence is 'to obtain, directly or indirectly, a benefit for himself, herself, or for another person'. The term 'benefit' is not further defined; a common reading of the term would suggest that it encompasses financial as well as other material benefits.

The offence in s 120(1) of *Law 6 of 2011* does not explicitly specify a mental element relating to the conduct element.

#### V.5.1.3 Penalty

The statutory penalty for offences under s 120(1) of *Law 6 of 2011 concerning Immigration* is imprisonment between 5 and 15 years or a fine between IDR 500,000,000 and 1,500,000,000.

#### V.5.1.4 Related offences

In s 133(a), *Law 6 of 2011* sets out a specific offence for immigration or other officials who let someone commit an offence under s 120. It is further required that the offence 'should be known' to the official, though it is not clear whether this requires proof of a subjective state of mind, such as recklessness, or whether his element is to be interpreted objectively (to mean negligence). This offence is punishable by imprisonment for up to five years.

### V.5.2 Entry outside designated control points, s 114(2) of *Law 6 of 2011*

Subsection (1) of s 114 makes it an offence for a person to enter Indonesia or exit Indonesia without passing through designated immigration control (points). Subsection (2) concerns the 'owner, administrator, agent, captain, pilot, or driver of conveyances' that bring migrants to Indonesia. It is an offence for persons in this category to deliberately enable migrants to disembark from the conveyance without them passing through immigration checks by immigration officials. The offence is punishable by imprisonment of two years, a fine not exceeding IDR 200,000,000, or both.

Although not directly connected to the smuggling of migrants in the conventional sense, prosecutions of migrant smugglers in Indonesia frequently involve alternative charges under s 114(2) of *Law 6 of 2011 concerning Immigration* and courts have occasionally convicted offenders under s 114 but not s 120.<sup>220</sup> This offence has been used on several occasions to convict drivers of vehicles, who were found transporting smuggled migrants through Indonesia to their departure points for maritime smuggling to Australia.<sup>221</sup> This offence has no equivalent in the *Smuggling of Migrants Protocol*.

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<sup>220</sup> See, for example, the decision of the Rangkasbitung District Court in the case of Salahudin Al-hasan bin Acan, *Pengadilan Negeri Rangkasbitung Putusan Nomor 155/Pid.Sus/2013/PN.Rkbn*.

<sup>221</sup> These have generally occurred in the District Court of Rangkasbitung; *Pengadilan Negeri Rangkasbitung Putusan Nomor 07/Pid.Sus/2013/PN.Rkb* *Pengadilan Negeri Rangkasbitung Putusan Nomor 08/Pid.Sus/2013/PN.Rkb* *Pengadilan Negeri Rangkasbitung Putusan Nomor 155/Pid.Sus/2013/PN.Rkb*.

## V.6 Offences involving fraudulent travel or identity documents

*Law 6 of 2011 concerning Immigration* contains a range of offences concerning smuggling of migrants involving fraudulent travel or identity documents. Some of these offences only apply to the person using the fraudulent document (which may also be the migrant) while others apply to those producing or providing such documents. The relatively large number of different offences in this category stems from the fact that different offences have been created for different types of document. These offences do not follow a common template and have different elements. By and large, they do not follow the model set out in Article 6(1)(b) of the *Smuggling of Migrants Protocol* also because they contain no specific reference to the definition of smuggling of migrants in s 1(32) of *Law 6 of 2011* or to the offence of smuggling of migrants in s 120(1).

Offences involving fraudulent travel or identity documents under *Law 6 of 2011* include conduct elements relating to producing,<sup>222</sup> procuring,<sup>223</sup> providing,<sup>224</sup> and possessing<sup>225</sup> various types of documents. In the offence provisions, the descriptor generally used is '*palsu atau dipalsukan*', meaning 'false or falsified'.

Relevant documents are defined in s 1 of *Law 6 of 2011* and include:

- 'travel documents of the Republic of Indonesia'. These are defined in s 1(15) to mean passports, including regular, service, diplomatic, and temporary passports of Indonesia.
- visas, which are written approvals for foreigners to travel into Indonesia. Visas are also the basis for granting residence permits.<sup>226</sup>
- entry stamps ('*tanda masuk*'). These are stamps or marks affixed to the travel documents of Indonesian citizens and foreigners to show that the entry requirements for travel into Indonesia have been met.<sup>227</sup>
- residence permits ('*izin tinggal*').<sup>228</sup>

The individual offences include:

- s 121(a): knowingly making a false or falsified visa, sign-on login, or residence permit with the intent to use it himself or herself or by another person;
- s 123(a): intentionally providing false data, a false letter, or forged or incorrect information in order to obtain a visa or residence permit for himself, herself, or for another person;
- s 126(b): using invalid Indonesian travel documents or providing one's own travel documents to another person with intention that they be used unlawfully;
- s 126(c): providing invalid or false data to obtain an Indonesian travel document;
- s 126(d): owning or unlawfully using two or more Indonesian travel documents that are similar and still valid;
- s 126(e): falsifying Indonesian travel documents or making false travel documents with the intention that they be used by himself, herself, or another person;
- s 127: intentionally and unlawfully storing false or forged Indonesian travel documents with the intention that they be used by himself, herself, or another person;
- s 128(a): intentionally and unlawfully printing, possessing, keeping, or trading blank Indonesian travel documents;
- s 128(b): knowingly and unlawfully making, possessing, storing, or trading stamps or other tools to certify Indonesian travel documents or other immigration documents;

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<sup>222</sup> Sections 121(a), 126(e), 128, 129 *Law 6 of 2011*.

<sup>223</sup> Sections 123(a), 126(c) *Law 6 of 2011*.

<sup>224</sup> Sections 126(b), 132 *Law 6 of 2011*.

<sup>225</sup> Sections 126(d), 127 *Law 6 of 2011*.

<sup>226</sup> Section 1(18) *Law 6 of 2011*.

<sup>227</sup> Section 1(19) *Law 6 of 2011*.

<sup>228</sup> Section 48 *Law 6 of 2011*.



- s 129: intentionally and unlawfully destroying, altering, adding, reducing, or eliminating, either partially or wholly, stamp information contained in Indonesian travel document or other immigration documents;
- s 131: intentionally and unlawfully possessing, storing, destroying, removing, modifying, reproducing, using, or accessing immigration data to the benefit of oneself or others.

The statutory penalty for all offences involving fraudulent travel or identity documents under *Law 6 of 2011* is a maximum term of imprisonment for five years, a fine not exceeding IDR 500,000,000, or both.

A further offence under s 132 criminalises immigration officials or other officials unlawfully giving, granting, or extending an immigration document to another person, knowing that the person is not entitled to that document. This offence has a maximum penalty of seven years imprisonment.

Section 133(a) of *Law 6 of 2011* contains a further offence for immigration or other officials who knowingly tolerate or ‘turn a blind eye’ to the commission of offences under ss 123, 126, 127, 128, 129, 131, and 132. This offence is punishable by imprisonment for up to five years.

## V.7 Offence of enabling illegal stay

Several offences under *Law 6 of 2011* concern the illegal stay of foreigners in Indonesia and several provisions criminalise others who enable or facilitate such stays. The offence resembling Article 6(1)(c) of the *Smuggling of Migrants Protocol* most closely can be found in s 124 which makes it an offence for

Any person [to] intentionally conceal, protect, give boarding, or provide livelihood or employment to foreigners knowing or reasonably suspecting that these

(a) are in Indonesia illegally [...], or

(b) do not hold a valid residence permit.

### V.7.1 Physical elements

Section 124 of *Law 6 of 2011* only criminalises some specific acts of enabling the illegal stay of foreigners, including concealing, protecting, giving boarding, or providing livelihood or employment. Although these types of conduct are more specific than the Protocol’s ‘enabling a person to remain’, they nevertheless cover a broader spectrum of activities that also extend to illegal employment of foreigners.

The term ‘foreigners’ is defined in s 1(9) to mean any person who is not a citizen of Indonesia. The offence involves two alternatives: (a) foreigners who are in Indonesia illegally (especially those who have entered the country unlawfully), and (b) foreigners who do not hold a valid residence permit (especially those whose permits have expired but they failed to leave the country).

### V.7.2 Mental elements

The mental elements of the offence under s 124 require that the accused either knows or reasonably suspects that the person who he or she conceals, protects etc. is either in Indonesia illegally or does not hold a valid residence permit. The offence thus covers both actual knowledge as well as recklessness (or gross negligence).

The main difference between s 124 of *Law 6 of 2011* and the offence under Article 6(1)(c) of the *Smuggling of Migrants Protocol* is the lack of any reference to a mental element concerning the purpose of obtaining a financial or other material benefit in the Indonesian law.

### V.7.3 Penalty

The penalty for offences under s 124 differs between the two alternatives under (a) and (b). For offences involving foreigners who are in Indonesia illegally (a), the penalty is imprisonment for two years, a maximum fine of IDR 25,000,000, or both. For offences involving foreigners who do not hold a valid residence permit (b), the penalty is imprisonment for no more than three months or a maximum fine of IDR 25,000,000.

### V.7.4 Additional offences

Section 133(a) of *Law 6 of 2011* contains a further offence for immigration or other officials who knowingly tolerate or ‘turn a blind eye’ to the commission of offences under s 124. This offence is punishable by imprisonment for up to five years.

## V.8 Aggravating circumstances

*Law 6 of 2011* of Indonesia contains no aggravating offences or circumstances relating to the smuggling of migrants. In particular, there are no aggravations or other provisions for instances in which smugglers maltreat irregular migrants or place them at risk of death or serious harm as envisaged by Article 6(3) of the *Smuggling of Migrants Protocol*. In such circumstances, liability for general offences under Indonesia’s *Penal Code* may arise.

## V.9 Extensions to criminal liability

### V.9.1 Attempts

Criminal liability for the principal offence of smuggling of migrants under s 120 of *Law 6 of 2011* is expressly extended to ‘attempts’ to smuggle migrants by subsection (2). The penalty for attempts is the same as for the completed offence.

The offences involving fraudulent travel or identity documents and the main offence relating to enabling the illegal stay of foreigners make no express mention of attempts. Instead, the general rules on attempt under the *Penal Code* of Indonesia apply, whereby attempts are punishable by one third of the penalty provided for the completed offence.<sup>229</sup>

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<sup>229</sup> Section 53(2) *Penal Code*.

## V.9.2 Participation as an accomplice, organising and directing others

### *Accomplices*

Liability as an accomplice in the offences relating to smuggling of migrants and other offences under *Law 6 of 2011* is governed by the Indonesian *Penal Code*. Section 56 of the Code defines accomplices as persons who deliberately aid in the commission of a crime, or who deliberately provide opportunity, means or information for the commission of the crime. Under Indonesian Law, accomplices are liable to two-thirds of the punishment for the completed offence.<sup>230</sup>

### *Organising and directing others*

Section 120(1) of *Law 6 of 2011* expressly criminalises persons who ‘order others’ in the offence of smuggling of migrants. This closely corresponds to the requirement under Article 6(2)(c) of the *Smuggling of Migrants Protocol*. The penalty for instructing or organising others in the smuggling of migrants is the same as for a principal offender.

Liability for organising or directing the offences related to enabling illegal stay and offences involving fraudulent travel or identity documents are governed by the general provisions of the Indonesian *Penal Code*, which also apply to offences under other statutes, including *Law 6 of 2011*.<sup>231</sup> Section 55(1) of the Code deems persons who ‘cause others to perpetrate’ an act as principals of a punishable act. Furthermore, persons who ‘intentionally provoke the execution of the act by gifts, promises, abuse of power or of respect, force, threat or deception or by providing an opportunity, means or information,’ are also considered to be principals.<sup>232</sup>

## V.9.3 Participation in an organised criminal group

Indonesian statutes, including *Law 6 of 2011*, do not contain any offences or aggravating circumstances for the smuggling of migrants by organised criminal groups.

Section 169 of the Indonesian *Penal Code* makes it an offence to participate in an association that intends to commit crimes:

- (1) Participation in an association that has intent to commit crimes or in another association prohibited by general regulations, shall be punished by a maximum imprisonment of six years
- (2) Participation in an association that has the intent to commit misdemeanours shall be punished with a maximum imprisonment of nine months or a maximum fine of three hundred Rupiahs.
- (3) In respect of the founders or directors said punishments may be enhanced with one third.

## V.10 Other criminal offences relating to irregular migration

### V.10.1 Trafficking in persons

Offences relating to trafficking in persons are set out in the Indonesia’s *Law on the Eradication of the Criminal Act of Trafficking in Persons*.<sup>233</sup> This Law was developed prior to Indonesia’s ratification of the *Trafficking in Persons Protocol* in 2009 and closely follows the requirements of the Protocol.

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<sup>230</sup> Section 57 *Penal Code*.

<sup>231</sup> Section 103 *Penal Code*.

<sup>232</sup> Section 55(1) *Penal Code*.

<sup>233</sup> Law No 21 of 2007 [hereinafter *Law on Trafficking in Persons*]

### *Definition of trafficking in persons*

Trafficking in persons is defined in Article 1(1) of the Law to mean

the recruitment, transportation, harbouring, sending, transfer, or receipt of a person by means of threat or use of force, abduction, incarceration, fraud, deception, the abuse of power or a position of vulnerability, debt bondage or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, whether committed within the country or cross-border, for the purpose of exploitation or which causes the exploitation of a person.

Exploitation is further defined in Article 1(7) to mean

an act committed with or without the consent of the victim which includes but is not limited to prostitution, forced labour or service, slavery or practices similar to slavery, repression, extortion, physical abuse, sexual abuse, abuse of the reproductive organs, or the illegal transfer or transplantation of body organs or the use of another persons' labour or ability for one's own material or immaterial profit.

These definitions closely resemble the definitions under Article 3(a) of the *Trafficking in Persons Protocol*.

### *Offence of trafficking in persons*

Article 2 of the *Law on Trafficking in Persons* sets out the offence of trafficking. It repeats the definition of trafficking, though the (mere) purpose of exploitation is criminalised under subsection (1) and situations that actually cause exploitation separately under subsection (2). The penalty for both offences is imprisonment for three to 15 years and a fine between IDR 120,000,000 and 600,000,000.

The offences established under Articles 2, 3, 4, 5 and 6 have the same penalty, that is:

A minimum period of 3 (three) years and a maximum of 15 (fifteen) years and a fine amounting to a minimum of IDR 120,000,000.00 (one hundred and twenty million rupiah) and a maximum of IDR 600,000,000.00 (six hundred million rupiah).<sup>234</sup>

Article 7 of the *Law on Trafficking in Persons* provides aggravating circumstances for cases in which the victim suffers major physical or mental harm,<sup>235</sup> or if the victim dies.<sup>236</sup>

## V.10.2 Exploitation of non-citizens

In addition to the offence of trafficking in persons in Article 2, Indonesia's *Trafficking Act* contains four further offences relating to exploitation. These offences, which may be relevant to the smuggling of migrants in some cases, include:

- intention to exploit a person brought to Indonesia or another country, Art 3;
- taking an Indonesian citizen outside the territory of Indonesia with the intention to exploit such person, Art 4;
- adopting a child with intention of exploitation, Art 5;
- sending a child within the country or to another country to be exploited, Art 6.

## V.10.3 Unlawful recruitment of workers

General regulations for the recruitment and placement of workers are provided in Indonesia's *Law 13 of 2003 concerning Manpower*. Of particular relevance in the context of irregular migration and smuggling of migrants is Indonesia's *Law 39 of 2004 concerning the Placement and Protection of*

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<sup>234</sup> Articles 2, 3, 5, 6 *Law on Trafficking in Persons*.

<sup>235</sup> Article 7(1) *Law on Trafficking in Persons*.

<sup>236</sup> Article 7(2) *Law on Trafficking in Persons*.

*Indonesian Migrant Workers*. Article 29 of this Law requires that the placement of Indonesian workers overseas is conducted with regard to their dignity and human rights. Additionally, Article 30 prohibits the placement of Indonesian workers in employment which is contrary to the values of humanity and morality. Violating this prohibition may result in the imposition of administrative sanctions, such as the revocation of a work placement agency's license.<sup>237</sup>

#### V.10.4 Illegal entry

Sections 113 and 119 of *Law 6 of 2011* contain offences for foreigners, including smuggled migrants, to enter Indonesia illegally.

Under s 113 it is an offence, punishable by imprisonment of no more than one year or a fine not exceeding IDR 100,000,000 to knowingly enter Indonesian territory (or depart from Indonesia) outside immigration inspection points.

Section 119(1) makes it an offence to enter or stay in Indonesia without any valid travel documents or visa as required by s 8 of *Law 6 of 2011*. The penalty for this offence is imprisonment for five years and a maximum fine of IDR 500,000,000.

### V.11 Non-criminalisation of smuggled migrants

Indonesia's *Law 6 of 2011 concerning Immigration* contains a provision that expressly exempts smuggled migrants as well as victims of trafficking in persons from criminal liability for certain immigration offences. Section 136(3) states that

The penal provisions referred to in sections 113, 119, 121 lit. b, 123 lit. b, and 126 lit. a and by do not apply to victims of trafficking and human smuggling.

Consequently, smuggled migrants are exempt from liability for the following offences:

- s 113: entering or exiting Indonesian territory without passing through an immigration checkpoint;
- s 119: entering Indonesia without travel documents or a visa or with forged or falsified foreign travel documents;
- s 121(b): using false or falsified visa or entry stamps;
- s 123(b): using a visa that was obtained with false or forged information;
- s 126(a) and(b): using revoked, void, false, or falsified Indonesian travel documents or those belonging to another person or delivering one's own Indonesian travel documents to another person.

The effect of s 136(3) is that smuggled migrants are not criminally liable for entering Indonesia illegally, even if they do so with fraudulent documents. In cases of smuggling of migrants, this shifts the focus on the smugglers, away from the smuggled migrants who are the object of this crime. To that end, s 136(3) of *Law 6 of 2011* reflects the objective of Article 5 of the *Smuggling of Migrants Protocol*.

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<sup>237</sup> Article 100(2) *Law 39 of 2004*.

## V.12 Jurisdiction

Questions about the jurisdiction for offences under *Law 6 of 2011* are addressed by the general rules of Indonesia's *Penal Code*. These also apply to offences under other statutes, including *Law 6 of 2011*.<sup>238</sup>

Article 2 of the *Penal Code* provides that offence under Indonesian law apply to any person who is guilty of a punishable act within Indonesia, which reflects the requirements of Article 15(1)(a) of the *Convention against Transnational Organised Crime*.

Article 3 of the *Penal Code* extends jurisdiction to persons who are guilty of a punishable act committed outside Indonesia on board an Indonesian vessel or aircraft. This corresponds with the requirement of Article 15(1)(b) of the *Convention against Transnational Organised Crime*.

Article 5 of the *Penal Code* reflects the requirements of Article 15(2)(b) of the *Convention against Transnational Organised Crime* by providing that:

(1) The Indonesian statutory offences are applicable to Indonesian nationals who commit outside Indonesia

[...]

(2) an act deemed by the Indonesian statutory penal provisions to be a crime and on which punishment is imposed by the law of the country where it has been committed.

(2) The prosecution of the crime referred to under [subpara.] (2) may also be instituted if the accused becomes a subject after the commission of the act.

Extended jurisdiction under Article 4 of the Indonesian *Penal Code* has no bearing for the offences relating to smuggling of migrants.

## V.13 Observations

Indonesia's laws criminalising the smuggling of migrants are, by any standard, comprehensive and, overall, display a considerable degree of compliance with the requirements of the *Smuggling of Migrants Protocol* to which Indonesia is a Party.

Comprehensiveness is one of the main characteristics of the Indonesian *Law 6 of 2011 concerning Immigration*. This statute is long in comparison to most other jurisdictions examined in this report and some provisions are worded in rather cumbersome ways, though this may be a result of the English language translations rather than of the statute in its original text. Some parts of *Law 6 of 2011* are, however, exceptionally complex and may be difficult to use in practice. The offences involving fraudulent travel or identity documents, for instance, are extremely numerous.

A significant departure from the Protocol can be found in the offences involving fraudulent travel or identity documents which lack any reference to the smuggling of migrants. The offence of enabling illegal stay also varies from the corresponding offence under the Protocol. The lack of any aggravating offences is a further point of differences to the Protocol requirements. The aggravating circumstances for instances of trafficking in persons may serve as a template for aggravations that could be added to the smuggling of migrants offences.

Nevertheless, by and large *Law 6 of 2011 concerning Immigration* provides a robust legal framework to act against the smuggling of migrants with penal sanctions. Two strengths and unique features of the Law include the special offences that have been designed to criminalise the involvement of government officials in the smuggling of migrants and the express non-criminalisation of smuggled

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<sup>238</sup> Section 103 *Penal Code*.

migrants. A look at Indonesian case law also demonstrates that Indonesia's laws relating to smuggling of migrants are used frequently and competently by Indonesian prosecutors and the judiciary.





## VI Lao PDR

### VI.1 Overview

The Lao People's Democratic Republic (PDR) is a source country for irregular migrants, including smuggled migrants, in Southeast Asia. Most of that migration involves Laotian nationals crossing into neighbouring Thailand, where they seek employment. These movements usually occur across the Mekong River, which separates the two countries.

Lao PDR is a Party to the *Convention against Transnational Organized Crime*,<sup>239</sup> the *Protocol against the Smuggling of Migrants by Land, Sea and Air*,<sup>240</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>241</sup> The Convention and the *Smuggling of Migrants Protocol* have not yet been implemented comprehensively into national law and offences and other provisions relating to smuggling of migrants are only marginally developed. Lao PDR has enacted a designated *Anti-Trafficking in Persons Law* and in conversations conducted with Lao government officials for the purpose of this report, it became clear that there is general willingness by the Lao Government to explore the topic of smuggling of migrants further and work with UNODC and other international organisations in the development of offences relating to smuggling of migrants that reflect Lao's obligations under the *Smuggling of Migrants Protocol*.

### VI.2 Ratification of and accession to international legal instruments

Lao PDR is a Party to the international instruments relating to smuggling of migrants, transnational organised crime, and trafficking in persons. Lao PDR acceded to the UN *Convention against Transnational Organised Crime*, the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* on 26 September 2003.

Lao PDR has filed reservations in accordance with Article 35(3) of the *Convention against Transnational Organised Crime*, Article 20(3) of the *Smuggling of Migrants Protocol*, and Article 15(3) of the *Trafficking in Persons Protocol*. In these reservations, the Lao PDR 'declares that to refer a dispute relating to interpretation and application of the present Convention [or Protocol] to arbitration or the International Court of Justice, the agreement of all parties concerned in the dispute is necessary'.

### VI.3 Domestic laws and policies relating to smuggling of migrants

Lao PDR presently has no laws, including offences, specifically addressing the smuggling of migrants.

The *Immigration Law 2014 (or Law on Immigration and Foreigner Management of the Lao PDR)*<sup>242</sup> that was passed by the National Assembly on 26 December 2014, sets out the framework for the

<sup>239</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>240</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>241</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

<sup>242</sup> No 59/NA (National Assembly). The following sections are based on a translation of the *Immigration Law 2014* that was especially produced by a professional interpreter in Vientiane, Lao PDR for the purpose of this report. Special thanks go to the UNODC Country Office Lao PDR for assisting with the translation.

‘management, supervision, and inspection’ of persons entering and exiting from Lao PDR, contains some provisions concerning illegal entry, and creates some offences for violations of this Law.<sup>243</sup> It does not, however, define or criminalise the smuggling of migrants or other forms of aiding others to enter or attempt to enter the country illegally.

Despite acceding to the *Smuggling of Migrants Protocol* nearly 15 years ago, the provisions under the Protocol have yet to be implemented into the domestic law of Lao PDR. Conversations with Lao government officials conducted for this report revealed that the lack of implementation does not reflect any deliberate decision or ill-will but is a result of the separation between and relative isolation of relevant Ministries and portfolios in the administration of the Lao PDR. The initiative to propose legislative amendments and draft legislations rests with the relevant Ministry and it is generally not the mandate of the Ministry of Foreign Affairs to instigate the development of laws that implement Lao’s international obligations. The criminalisation of smuggling of migrants and the enforcement of such offences falls into the immigration and border security portfolio which is part of the Ministry of Public Security and may also affect responsibilities of the Ministry of Labour and Social Welfare. During the course of this research and in conversations with Lao government officials conducted for the purpose it became evident that there is a growing awareness among government officials about the level and patterns of smuggling of migrants and a willingness and general interest in working with UNODC and other international organisations and experts to further examine the key components of the *Smuggling of Migrants Protocol* and develop laws, including offences, that would implement the obligations under the Protocol into domestic law.

To meet its obligations under the *Trafficking in Persons Protocol*, Lao PDR enacted a *Law on Trafficking in Persons* on 17 December 2015 which was promulgated on 28 January 2016.

From the available open-source material, it is not possible to state conclusively whether and where Lao PDR has implemented the obligations under the *Convention against Transnational Organised Crime*, including relevant offences, into domestic law.

General matters of criminal law, along with many specific offences, are set out in the *Penal Law* of Lao PDR which entered into force in 1990 and has since been amended several times. This report is based on an official translation of the *Penal Law* dated 9 November 2005.

## VI.4 Terminology and definitions

The terms ‘smuggling of migrants’, ‘illegal entry’, and other definitions set out in the *Smuggling of Migrants Protocol* are not defined in the laws of Lao PDR.

The term ‘smuggling of migrants’ appears in Article 12(2) of the *Immigration Law 2014* where it is used in the list of offences that, if committed, bar a person from entering Lao PDR. The term is, however, not further defined and, based on the available information, not used anywhere else.

The *Immigration Law 2014* defines the meaning of ‘foreigner’<sup>244</sup> and other terms relating to border controls, travel and identity documents, entry and exit, which are used in the legislation.<sup>245</sup> None of these terms relate specifically to the smuggling of migrants.

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<sup>243</sup> See Article 74 *Immigration Law 2014*.

<sup>244</sup> Article 3 1<sup>st</sup> para. *Immigration Law 2014*.

<sup>245</sup> Article 4 *Immigration Law 2014*.

## VI.5 Offence of smuggling of migrants

The smuggling of migrants is presently not a criminal offence under the law of Lao PDR. While the *Immigration Law 2014* contains some provisions, including offences, concerning the illegal entry and stay of foreigners in the country, it does not criminalise or otherwise address the facilitation of illegal entry or other kinds of irregular migration.

The prohibition on foreigners and stateless persons to ‘unlawfully give benefits to officials’ under Article 52(1) of the *Immigration Law 2014* may be relevant in those cases where smugglers who are not Laotian nationals bribe immigration or other officials to facilitate the entry or departure of persons from Lao PDR. There is, however, no information suggesting that the offence is used for this purpose in practice.

## VI.6 Offences involving fraudulent travel or identity documents

There are presently no offences criminalising the use, production, supply, possession etc of fraudulent travel and identity documents for the purpose of smuggling of migrant to (or from) Lao PDR.

A general offence for the forgery of documents and the use of forged documents can be found in s 161 of the *Penal Law*, but this offence lacks the critical link to smuggling of migrants. Similarly, the *Immigration Law 2014* prohibits and penalises the use of fraudulent documents, invalid documents, and of documents issued in the name of another person,<sup>246</sup> but it does not criminalise the producing, procuring, providing, or possessing of fraudulent travel or identity documents for the purpose of enabling smuggling of migrants as required by Article 6(1)(b) of the Protocol.

## VI.7 Offence of enabling illegal stay

The offences under the *Immigration Law 2014* are almost exclusively aimed at individual migrants who may violate any of the requirements and conditions under this Law. Those who facilitate, assist, or take advantage of irregular migrants are, for the most part, not the subject of criminal sanctions.

In this fashion, the *Immigration Law 2014* prohibits and penalises foreigners for staying in the country illegally, overstaying their visas or permits, and hiding in the Lao PDR, but the Law contains no express offence criminalising those who enable foreigners to stay in the country illegally; there is no offence equivalent to Article 6(1)(c) of the *Smuggling of Migrants Protocol*.

Article 72 of the *Immigration Law 2014* provides fines for some types of conduct that support foreigners who are in the country illegally. This includes ‘receiving or harbouring foreigners or stateless persons as labourers without employment visa, work permit, or stay permit’<sup>247</sup>, failing to declare the stay of foreigners and stateless persons,<sup>248</sup> and ‘importing foreign labour into the Lao PDR without proper management and employing them for other purposes as initially determined’.<sup>249</sup>

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<sup>246</sup> See, for example, Articles 52(2) and 72(2) *Immigration Law 2014*.

<sup>247</sup> Article 72(9) *Immigration Law 2014*.

<sup>248</sup> Article 72(10) *Immigration Law 2014*.

<sup>249</sup> Article 72(11) *Immigration Law 2014*.

## VI.8 Aggravating circumstances

The *Immigration Law 2014* and other statutes in Lao PDR contain no aggravating circumstances concerning the smuggling of migrants and do not criminalise the circumstances set out in Article 6(3) of the *Smuggling of Migrants Protocol*.

## VI.9 Extensions to criminal liability

In the absence of designated offences relating to smuggling of migrants, questions concerning the extension of criminal liability to attempts and participants do not arise. The following sections nevertheless present the general rules relating to extensions to criminal liability under the law of Lao PDR. This may assist in the future development of smuggling of migrants related offences.

### VI.9.1 Attempts

Liability for attempt is governed by the *Penal Law*, which also applies to the penal provisions under the *Immigration Law 2014*.<sup>250</sup>

Article 14 of the *Penal Law* defines ‘attempt to commit an offence’ as

the taking of intentional acts which are components of an offence but where the offence was not completed because of circumstances outside the control of the offender, making such acts not successful.

Article 14 further provides that attempts to commit an offence shall only be punished if specifically provided for in the *Penal Law*.

In addition, Article 13 of the *Penal Law* contemplates criminal liability for preparing to commit an offence. ‘Preparation to commit an offence’ is defined as ‘the preparation of materials, conditions or other factors in order to commit an intentional offence’. Article 13 provides that preparation to commit an offence is only criminalised where specifically provided for under the *Penal Law*.

### VI.9.2 Participation as an accomplice, organising and directing others

The *Penal Law* establishes criminal liability for participation in an offence; this also includes the offences under the *Immigration Law 2014*.<sup>251</sup> Article 17 of the *Penal Law* defines ‘participation in an offence’ as the intentional participation in an offence by two or more persons.

Article 17 further provides that participants in an offence may be ‘authors’, ‘implementers’, ‘inciters’ and ‘accomplices’. An author of an offence is a person who has ‘planned, organised or given instructions to commit the offence’. An implementer is a person who has directly committed offence. An inciter is a person who has ‘persuaded others to commit offences’. Accomplices are persons ‘who have intentionally assisted in the offence, or who have previously agreed to hide the offender, to hide instruments and tools of the offence, to efface traces of the offence or to conceal any proceeds from the offence’.

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<sup>250</sup> Article 74 *Immigration Law 2014*.

<sup>251</sup> Article 74 *Immigration Law 2014*.

What is not clear from Article 17 is whether all liability for participants extends to all criminal offences under the *Penal Law*. The specific offences in the *Penal Law* make explicit references to Article 17 which may indicate that it is general principle that liability for all offences extends to participants.

### VI.9.3 Participation in an organised criminal group

The *Penal Law* of Lao PDR does not contain a specific offence for participation in an organized criminal group. Under Article 41 of the *Penal Law* it is, however, an aggravating factor in sentencing if any offence is committed by an organized group. The term ‘organised group’ is not further defined in the legislation. In addition, a range of special offences under the *Penal Law* contain specific aggravations with higher penalties if the offence is committed by an organized group.<sup>252</sup> The offence of ‘human trafficking’ under Article 134 of the *Penal Law* and the offence of trafficking in persons under Article 89 of the *Anti-Trafficking in Persons Law* are also aggravated if they are performed by an organised group.

## VI.10 Other criminal offences relating to irregular migration

### VI.10.1 Trafficking in persons

Lao PDR has made several amendments to its domestic law to criminalise trafficking in persons and to protect victims of trafficking in persons. Offences relating to trafficking in persons can be found in several pieces of legislation, including the *Anti-Trafficking in Persons Law*, the *Penal Law*, and the *Law on the Development and Protection of Women*. These offences presently co-exist and share many elements and similar penalties. It is understood that at the time this report was completed, the offences relating to trafficking under the *Penal Law* were under review and that some penalties and provisions concerning the consent of the victim of trafficking may change in the near future.

#### IV.10.1.1 Anti-Trafficking in Persons Law

The *Anti-Trafficking in Persons Law* (also called the *Law on Anti-Trafficking in Persons*) was passed by the National Assembly of Lao PDR on 17 December 2015 and promulgated by the President on 28 January 2016. This Law implements the key components of the *Trafficking in Persons Protocol* into domestic law. The purpose of the Law, as stated in its Article 1 is to

define the principles, rules and measures regarding the administration, monitoring, supervision, inspection of anti-trafficking in persons activities in order for them to be systematic and effective with a view to protect the rights, interests, lives, health, dignity, freedom of the citizens and fine national traditions and customs aiming at keeping the society safe and secure, in good orders and contributing to the national development and protection.

Article 2 of the Law defines ‘trafficking in persons’ in the same manner as Article 3(a) of the *Trafficking in Persons Protocol* to mean

the recruitment, abduction, movement, transportation or transfer, harbouring or receipt of persons, by means of persuasion, recommending, deception, payment or giving benefit, inducement, incitement or abuse of power, the use of threat or other forms of coercion, debt bondage, concealed child adoption, concealed engagement, concealed marriage, pregnancy for other, forced begging, producing, showing and publishing pornographic materials or by other forms for the labour exploitation, sexual exploitation, slavery, prostitution, involuntary prostitution, removal of organs for purpose of trade and

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<sup>252</sup> See, for example, Articles 63, 72, 77, 78, 107, 108, 110, 116, 118, 121, 146 *Penal Law*.

other forms of unlawful conducts contradicting to the national fine culture and traditions or for other purposes to gain benefits.

Several terms used in this definition are further defined Article 4 of the *Anti-Trafficking in Persons Law*. The elements of trafficking in persons, which involve act, means, and purpose elements, are separated and further explained in Articles 9 to 12.

The offence of trafficking in persons which consists of the definition above is set out in Article 89 of the *Anti-Trafficking in Persons Law*:

Any person who has committed an offence of trafficking in persons shall be punished with five to fifteen years of imprisonment and shall be fined from LAK 10,000,000 to 100,000,000, and shall be subject to confiscation of property as stipulated in the Penal Law.

The offence of trafficking in persons is aggravated, and the penalty raised to imprisonment for 15 to 20 years and a fine of LAK 100,000,000 to 500,000,000, if the offence

is committed in a habitual manner, as part of organised crimes or by group of persons, where the victims are children, there are more than two victims, the victims are close relatives of the offenders, the victims are suffered from serious physical injury, becoming physically disabled or mentally disordered.

The penalty is further raised to imprisonment for life and a fine of LAK 500,000,000 to 1,000,000,000 or capital punishment 'if the victim has suffered a lifetime disability or infected with HIV/AIDS as result of trafficking in persons'.

#### IV.10.1.2 Penal Law

Article 134 of the *Penal Law* presently uses different terminology to the *Anti-Trafficking Persons in Law*. The *Penal Law* employs the term human trafficking which is defined to mean the

recruitment, moving, transfer, harbouring, or receipt of any person within or across national borders by means of deception, threats, use of force, debt bondage or any other means and using such person in forced labour, prostitution, pornography, or anything that is against the fine traditions of the nation, or removing various body organs of such person, or for other unlawful purposes.

The definition of human trafficking in Article 134 is adapted from the definition of 'trafficking in persons' in Article 3 of the *Trafficking in Persons Protocol*. Article 134 of the *Penal Law* further provides that when committed against a child under 18 years of age, any of the aforementioned acts shall be considered human trafficking even if there is no deception, threat, use of force or debt bondage. The penalty for human trafficking involves imprisonment of 15 years and a fine between LAK 10,000,000 and 100,000,000.

Article 134 contains two levels of aggravation. The first applies where one of the following circumstances applies:

- human trafficking is performed as a regular profession or in an organised group;
- the victims are children;
- there are two or more victims;
- a victim is a close relative of the offender; or
- a victim suffers serious injury or becomes an invalid or insane.

If any of these circumstances applies, the offence of human trafficking is punishable by imprisonment between 15 and 20 years and a fine between LAK 100,000,000 and 500,000,000 million. Furthermore, the offender's property may be confiscated under Article 34 of the *Penal Law*.

The second level of aggravation applies where human trafficking 'causes the victim to be a lifetime invalid, to be infected with HIV, or to die'. If any of these circumstances apply, the penalty involves

life imprisonment and a fine between LAK 500,000,000 and 1,000,000,000. The offender's property may also be confiscated.

The offence of 'trade and abduction of human beings' under Article 100 of the *Penal Law* may also be relevant in the trafficking context.

#### IV.10.1.3 Law on the Development and Protection of Women

Further offences relating to trafficking in persons can be found in the *Law on the Development and Protection of Women* of the Lao PDR. Article 134 of the *Penal Law* expressly provides that provisions under this Law apply in addition to those under the *Penal Law*.

Article 24 of the *Law on the Development and Protection of Women* defines 'trafficking in women' as

the recruitment, hiding, moving, transportation, transfer, harbouring, or receipt of women, within or across national borders, by means of deception, the giving or receiving of bribes, threats, the use of force, the use of other forms of coercion, abduction, debt bondage or by other means, for forced labour, for prostitution, for publishing pornography and what is in contradiction to fine national culture, for the removal of various body parts, or for other unlawful purposes.

Besides being limited to trafficking in women, this definition is largely similar to the definition of human trafficking in Article 134 of the *Penal Law*. Like Article 134, Article 24 of the *Law on the Development and Protection of Women* provides that the exploitative means are not necessary for the act to be committed against a child under 18 years of age.

Article 24 of the *Law on the Development and Protection of Women* provides that trafficking in women and children is an offence. Article 49 establishes the penalty for the offence of trafficking in women and children. The penalty for this offence and its aggravations mirror those of the *Penal Law*.

#### VI.10.2 Unlawful recruitment of workers

In the absence of designated smuggling of migrants offences, provisions under the *Labour Law* of Lao PDR may be relevant in cases where Laotian nationals are recruited unlawfully or deceptively for overseas employment.

The *Labour Law* includes a prohibition to provide recruitment services without prior authorisation.<sup>253</sup> Article 40 of the Law creates several obligations for recruitment agencies which include:

- liaising with the company and nation that are accepting the Laotian national;
- monitoring, protecting, and assisting Laotian nationals working overseas; and
- respecting any rights and obligations towards these individuals under the law.

Violations of obligations under the *Labour Law* can result in a range of sanctions including warnings, re-education, fines, suspension or withdrawal of business license or court proceedings.<sup>254</sup>

#### VI.10.3 Illegal entry

Article 52 of the *Immigration Law 2014* prohibits 'foreigners and stateless persons' to illegally enter the Lao PDR. By virtue of Article 74, violations of the *Immigration Law 2014* are criminal offences and

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<sup>253</sup> Article 146(2) *Labour Law*.

<sup>254</sup> Article 179 *Labour Law*.

the provisions of the *Penal Law* apply. Foreigners and stateless persons who enter Lao PDR illegally may also be deported.<sup>255</sup>

Article 52 also contains several other offences relating to irregular migration that, depending on the circumstances, may be apply to smuggled migrants. For example, foreigners and stateless persons are prohibited from exiting the country illegally, using travel documents of other persons, using counterfeit documents, staying or overstaying illegally, and to give unlawfully give benefits to officials.

### VI.11 Non-criminalisation of smuggled migrants

There are no provisions in the law of Lao PDR that shield smuggled migrants from prosecution and shift the focus of criminal liability from migrants to smugglers. The offences under the *Immigration Law 2014* aim squarely at migrants who enter or exit from Lao PDR illegally or in another irregular fashion, but they do not criminalise those involved in facilitating irregular border crossings.

Lao PDR is not a Party to the *Refugee Convention* and makes no exemptions from criminal liability for refugees who may arrive in Lao PDR illegally.

### VI.12 Jurisdiction

Article 3 of the *Penal Law* provides that the *Penal Law* and other criminal laws of Lao PDR apply to offences committed within the territory of Lao PDR. This reflects the requirement in Article 15(1)(a) of the *Convention against Transnational Organized Crime*.

Article 4 of the *Penal Law* provides that Lao nationals who commit offences outside the territory of Lao PDR shall be charged and punished in respect of these offences if they are also criminalized under the *Penal Law*. Article 4 also provides that foreigners residing in Lao PDR who commit offences outside the territory of the Lao PDR shall also be charged and punished. [

Additionally, Article 4 of the *Penal Law* provides that ‘foreign individuals’ who commit offences outside the territory of Lao PDR may be charged and punished for these offences if they are criminalized under the *Penal Law* and provided for under international conventions.

By virtue of Article 74 of the *Immigration Law 2014*, the provisions of the *Penal Law* also apply to the offences and prohibitions under the *Immigration Law*.

### VI.13 Observations

For the Government of Lao PDR, the smuggling of migrants is a challenging phenomenon. Provisions relating to the smuggling of migrants are, for the most part, non-existent in the domestic law of Lao PDR. This is despite the facts that smuggling of migrants is an important concern to the country and that Lao PDR has acceded to the *Smuggling of Migrants Protocol* some time ago.

Presently, there are no provisions, including criminal offences, relating to the smuggling of migrants or the facilitation of illegal entry anywhere in the law of Lao PDR. Criminal offences in the context of entry into and exit from Lao PDR are aimed squarely at migrants crossing or attempting to cross the

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<sup>255</sup> Article 56(2) *Immigration Law 2014*.



border irregularly. While Lao PDR has criminal offences relating to illegal immigration and trafficking in persons, those benefiting from smuggling migrants largely go unpunished.

Of particular concern is the profiteering from irregular recruiting of Lao nationals and the smuggling of labour migrants from Lao PDR to other countries, especially to Thailand, which, as earlier reports have shown, occurs on a grand scale. In those cases, that do not meet the strict requirements of the trafficking in persons offence, there is a real risk that the organisers, recruiters, and transporters who overcharge migrant workers for their services and bring them to other countries illegally can operate with impunity. The same applies to instances in which foreigners may be smuggled into Lao PDR.

Research conducted for this report revealed that lack of smuggling of migrants offence in Lao PDR and the failure to ratify the *Smuggling of Migrants Protocol* are not a sign of ill will. Peculiarly, the *Immigration Law* that was enacted in 2014 uses the term smuggling of migrants on one occasion. This is one of several indicators that there is scope and opportunity to act against smuggling of migrants and introduce relevant offences. At a meeting in June 2018, government officials from Lao PDR indicated that the *Penal Code* might be updated to include an offence relating to smuggling of migrants.

The recent enactment of comprehensive laws relating to trafficking in persons in Lao PDR is a remarkable and laudable development. It demonstrates the commitment by the Government of Lao PDR to protect persons from exploitation and the ability to respond to emerging criminal justice challenges. This development gives hope that the Government will similarly respond to calls for the introduction of dedicated anti-smuggling of migrants laws and the many promising conversations held with government officials in Lao PDR for this report show that there is willingness and readiness in the country to work with UNODC and other experts to draft and implement such laws.



## VII Malaysia

### VII.1 Overview

Malaysia is a transit point and destination for the smuggling of migrants. The country is a major destination for irregular migrant workers from South and Southeast Asian countries who are drawn to Malaysia by a high labour demand, especially in low-skilled positions, such as domestic work. The country is also an important transit point for the smuggling of migrants from Sri Lanka and South-West Asia to Indonesia and Australia.

Malaysia is a Party to the United Nations (UN) *Convention against Transnational Organized Crime*<sup>256</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*. Malaysia is not a Party to the *Protocol against the Smuggling of Migrant by Land, Sea and Air*.<sup>257</sup> Nevertheless, Malaysia has enacted comprehensive legislation criminalising the smuggling of migrants. Relevant offences are set out in the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. In addition, Malaysia's *Immigration Act 1959/63* contains several provisions which may apply to migrant smugglers and smuggled migrants.

### VII.2 Ratification of and accession to international legal instruments

Malaysia signed the UN *Convention against Transnational Organized Crime* on 26 September 2002 and ratified the Convention on 24 September 2004. A reservation pursuant to Article 35(3) has been filed, declaring that Malaysia does not consider itself bound by Article 35(2) of the Convention concerning the settlement of disputes by way of arbitration and referral to the International Court of Justice.

Malaysia is not a Party to the *Smuggling of Migrants Protocol*.

Malaysia acceded to the *Trafficking in Persons Protocol* on 26 February 2009 and filed a reservation pursuant to Article 15(3), declaring that it does not consider itself bound by Article 15(2) of the Protocol concerning the settlement of disputes by way of arbitration and referral to the International Court of Justice.

### VII.3 Domestic laws and policies relating to smuggling of migrants

#### VII.3.1 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007

Despite not having signed the *Smuggling of Migrants Protocol*, Malaysia has enacted comprehensive legislation to criminalise the smuggling of migrants (along with trafficking in persons) that closely mirrors many of the provisions in the Protocol.

The *Anti-Trafficking in Persons Act 2007* came into effect on 26 July 2007,<sup>258</sup> prior to Malaysia's accession to the *Trafficking in Persons Protocol*. On 15 November 2010, this Act was amended

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<sup>256</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>257</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>258</sup> Act No 670.

extensively to include smuggling of migrants offences and the title of the legislation was changed to the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.<sup>259</sup>

The Explanatory Statement to the amending Act notes that the smuggling of migrants offence was included to deal with

the current influx of illegal migrants from conflict countries who are seeking better life either in Malaysia or third countries and who, in particular, are using Malaysia as a transit point while they await their onward journey to possible countries.<sup>260</sup>

According to a statement by the then Minister of Home Affairs of Malaysia, Mr Hishammuddin Hussein, the 2010 amendments are based on an understanding that trafficking in persons and smuggling of migrants were, 'closely linked and interlinked, particularly in the context of exploitation of foreign labour and migrants.'<sup>261</sup>

The *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* sets out 11 offences relating to smuggling of migrants,<sup>262</sup> as well as numerous offences relating to trafficking in persons.<sup>263</sup> Criminal liability is extended to corporations and their agents and employees.<sup>264</sup> The prosecution of offences under the Act requires written consent from the Public Prosecutor.<sup>265</sup> Part IV of the Act provides powers of investigation, arrest, search and seizure and examination to 'enforcement officers',<sup>266</sup> who are defined as police, immigration, customs, Malaysian Maritime Enforcement Agency or labour officers.<sup>267</sup> Enforcement officers are indemnified against prosecution under the Act for any act, statement or omission made in good faith.<sup>268</sup>

### VII.3.2 General Laws

The *Penal Code* of Malaysia establishes specific offences and outlines general principles of criminal liability and sentencing. First enacted in 1936,<sup>269</sup> the *Penal Code* is based in large part on the *Indian Penal Code* of 1860.<sup>270</sup>

The *Immigration Act 1959/63* sets out general laws relating to immigration.<sup>271</sup> Sections 55A–56 create a range of offences which may be relevant to migrant smugglers, smuggled migrants and others involved in irregular migration processes.

The *Convention against Transnational Organized Crime* has been implemented in Malaysia through amendments to the *Penal Code*. Sections 130U–130ZC of the Code contain several offences relating to organised crime. Participation in an organised criminal group is criminalised under s 130V.<sup>272</sup> Additionally, sections 120A and 120B of the *Penal Code* create an offence of criminal conspiracy that reflects the agreement-type model of participation in an organised criminal group under Article 5(1)(a)(i) of the Convention.

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<sup>259</sup> Unless stated otherwise, references to the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* in this report relate to the reprinted text as at 15 August 2016.

<sup>260</sup> Parliament of Malaysia (2010) *Explanatory Statement to Anti-Trafficking in Persons (Amendment) Act 2010*.

<sup>261</sup> Lenore Lyons & Michele Ford, 'Trafficking Versus Smuggling: Malaysia's Anti-Trafficking in Persons Act', in Sallie Yea (ed), *Human Trafficking in Asia: Forcing Issues* (2014) 35, 38.

<sup>262</sup> Sections 26A–26K *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

<sup>263</sup> Sections 12–15A *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

<sup>264</sup> Sections 63–65 *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

<sup>265</sup> Section 41 *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

<sup>266</sup> Sections 28–34 *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

<sup>267</sup> Section 27 *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

<sup>268</sup> Section 62 *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

<sup>269</sup> *Penal Code of the Federated Malaysian States* (F.M.S. Cap. 45).

<sup>270</sup> Unless stated otherwise, references to the *Penal Code* in this report relate to the reprinted text as at 1 January 2015.

<sup>271</sup> Unless stated otherwise, references to the *Immigration Act* in this report relate to the 2006 reprint.

<sup>272</sup> See further Section VII.9.3. below.

## VII.4 Terminology and definitions

### VII.4.1 Smuggling of migrants

Section 2 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* defines 'smuggling of migrants' to mean

- (a) arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
- (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a).

This definition is an element of the offences relating to smuggling of migrants in Part III of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. It shares some of the elements of the definition in Article 3(a) of the *Smuggling of Migrants Protocol*. One point of difference lies in the lack of any reference to a financial or other material benefit in the definition under s 2 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. This is a purpose element in the definition of smuggling of migrants in Article 3(a) of the *Smuggling of Migrants Protocol* and a key feature of the concept of smuggling of migrants in international law.

### VII.4.2 Smuggled migrant

The term 'smuggled migrant', which is used in some offences under Part IIIA of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* is defined in s 2 to mean

- a person who is the object of the act of smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants.

## VII.5 Offence of smuggling of migrants

Offences relating to smuggling of migrants are set out in Part IIIA of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. These include:

- a basic offence of smuggling of migrants, s 26A;
- aggravated offences of smuggling of migrants, s 26B;<sup>273</sup>
- an offence in relation to smuggled migrants in transit, s 26C;
- an offence of profiting from the offence of smuggling of migrants, s 26D;
- an offence relating to fraudulent travel or identity documents, s 26E;<sup>274</sup>
- offences for providing facilities in support of smuggling of migrants, s 26F;<sup>275</sup>
- offences for providing services for the purposes of smuggling of migrants, s 26G;
- an offence for concealing or harbouring smuggled migrants and migrant smugglers, s 26H;<sup>276</sup>
- a supporting offence of smuggling of migrants, s 26I; and
- an offence of conveyance of smuggled migrants and for the owner etc of such conveyances, ss 26J, 26K;

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<sup>273</sup> See further Section VIII.8 below.

<sup>274</sup> See further Section VII.6 below.

<sup>275</sup> See further Section VII.7 below.

<sup>276</sup> See further Section VII.7 below.

## VII.5.1 Smuggling of migrants (for profit), ss 26A, 26D Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007

### VII.5.1.1 Offence of smuggling of migrants

Section 26A of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* sets out the basic offence of smuggling of migrants. This is the most frequently charged offence under the Act and used as a 'catch all' provision in most prosecutions. The offence is based on the definition of 'smuggling of migrants' in s 2 of the Act. Under s 26A:

Any person who carries out smuggling of migrants commits an offence and shall, on conviction be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to a fine, or to both.

#### *Physical elements*

Using the definition of smuggling of migrants in s 2 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*, the offence in s 26A broadly criminalises any arranging, facilitating or organising, directly or indirectly, of another person's unlawful entry into or through, or unlawful exit from, any country. This also extends to any kind of assistance that enables the other person's unlawful entry into, transit, or exit from any country. The object of the offence is any person who is not a citizen or permanent resident of any country. The term 'smuggled migrants', which is defined in s 2, is not used in s 26A.

#### *Mental elements*

Section 26A does not specify any mental elements. The definition of smuggling of migrants in s 2 requires that the person 'knows or has reason to believe that the [other] person's entry or exit is unlawful'. This means that the accused must have some awareness that the person he or she is smuggling does not meet the legal requirements for entry into, transit, or departure from the country. Section 26 of the *Penal Code* provides that a person has 'reason to believe' a thing if they have sufficient cause to believe it but not otherwise. What is not clear from a plain reading is whether 'reason to believe' has to be assessed subjectively from the perspective of the accused or objectively from the perspective of other, reasonable people.

The offence in s 26A departs from the criminalisation requirements in Article 6(1)(a) of the *Smuggling of Migrants Protocol* because it does not involve an element pertaining to the perpetrator's purpose to obtain a financial or other material benefit.

#### *Penalty*

The statutory penalty for offences under s 26A is imprisonment for a term of up to 15 years, a fine, or both.

### VII.5.1.2 Offence of profiting from the offence of smuggling of migrants

An offence that resembles the template of Article 6(1)(a) of the *Smuggling of Migrants Protocol* more closely can be found in s 26D of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. This section makes it an offence for any person to profit from the offence of smuggling of migrants. According to the Attorney-General's Chamber of Malaysia, this offence is not frequently used in practice. If investigation reveals that smugglers profited from their activities, charges are pursued under the *Anti-Money Laundering Act 2001* instead.

#### *Physical elements*

Section 26D of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* criminalises any person who 'profits' from the offence of smuggling of migrants. The term 'profit' is not further

defined in the Act but is commonly understood to include receiving any financial or material benefit. This element is cast as a result element meaning that it has to be shown that an accused did actually receive a profit. From a plain reading of the offence it is not clear if 'profit' means any remuneration or compensation or if it requires benefits that exceed any costs an accused may have had. The profit element resembles the 'financial or other material benefit' element of the definition of Article 3(a) of the *Smuggling of Migrants Protocol* with one important difference: whereas the Protocol employs this requirement as purpose element, the Malaysian offence requires proof of an actual profit received by the accused.

Liability for the offence under s 26D of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* requires that an 'offence of smuggling of migrants' as set out in s 26A of the Act has been committed.<sup>277</sup> There is no requirement under the Act that this offence was committed by the same accused; s 26D also covers those cases, in which one person commits the offence of smuggling of migrants under s 26A and another one profits. Also covered are those cases, in which the smuggler him- or herself profits from the smuggling of migrants.

#### *Mental elements*

From a plain reading of s 26D it appears that no specific mental elements are required by this offence. A common understanding of 'profiting' may imply proof of intention, though there is no legislative or other interpretative material suggesting that liability for offences under s 26D is limited to persons who intended to profit from an offence of smuggling of migrants.

Similarly, there appears to be no requirement that an accused under s 26D had any intention that the offence of smuggling of migrants be committed or that, as mentioned, the accused had any involvement in the planning, organisation, or commission of the underlying offence. There is also no requirement that the accused knew, was aware, or had reason to believe that the smuggled migrant's entry, transit, or exit from a country was unlawful.

It is unclear if s 26D seeks to criminalise any person who, directly or indirectly, in any way whatsoever profits from the smuggling of migrants or whether a more deliberate connection between a person accused under s 26D and the underlying offence is required. In conversations with the Attorney-General's Chamber of Malaysia, it was mentioned that the offence is applied somewhat restrictively such that, for instance, a taxi driver transporting an irregular migrant, not knowing that person's status, would normally not be charged for this offence.

#### *Penalty*

The penalty for offences under s 26D involves imprisonment for a term of not less than seven years but not exceeding fifteen years, a fine of not less than MYR 500,000 but not exceeding MYR 1,000,000, or to both, and forfeiture of the profits from the offence.

### VII.5.2 Smuggled migrants in transit, s 26C *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*

Section 26C of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* contains a unique offence which criminalizes persons assisting smuggled migrants who are transiting in Malaysia. This offence has no equivalent in the *Smuggling of Migrants Protocol*. Under s 26C:

Any person who brings in transit a smuggled migrant through Malaysia by land, sea or air or otherwise arranges or facilitates such act commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding seven years, and shall also be liable to fine, or to both.

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<sup>277</sup> See Section VII.5.1.1 above.

The conduct element of this offence is termed ‘bringing in transit’ or ‘arranging or facilitating such act’. From a plain reading of these words it is not immediately clear how ‘bringing in transit’ is to be understood: whether it requires bringing a smuggled migrant into Malaysia merely for transit purposes or whether the offence criminalises any assistance and aid rendered to smuggled migrants who are transiting in Malaysia. Either interpretation would suggest that the offence is intended to criminalise instances in which Malaysia is not the destination of the smuggling venture but merely a place of transit and that the offence is intended to cover conduct of a supporting nature and, unlike s 26A, not the act of smuggling migrants itself. This would explain the lower penalty of the offence under s 26C compared to that for offence of smuggling of migrants under s 26A. A different reading of the conduct element would create considerable overlap with the offence under s 26A, which, as mentioned earlier, criminalises the smuggling of migrants ‘through’ any country, including Malaysia. Additional legislative material or case law was not available at the time of writing to support or reject these interpretations.

The object of the offence is a ‘smuggled migrant’; a term that is further defined in s 2 of the Act.<sup>278</sup>

The offence under s 26C contains no express mental elements. In particular, and unlike s 26A, there is no requirement that the accused knew or had reason to believe that the smuggled migrants had entered or were present in Malaysia unlawfully. Furthermore, there is no mental element concerning a purpose of the accused (such as obtaining a financial or other material benefit).

### VII.5.3 Providing services and supporting smuggling of migrants, ss 26G, 26I *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*

Two further offences concerning support given to smuggled migrants or migrant smugglers can be found in s 26G and s 26I of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

#### VII.5.3.1 Providing services for purposes of smuggling of migrants

Under s 26G of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* it is an offence to ‘provide or make available financial services or facilities’ intending, knowing, or having reason to believe that these services or facilities are used, in whole or in part, ‘for the purpose of committing or facilitating the commission of an act of smuggling of migrants, or for the purpose of benefiting any person who is committing or facilitating the commission of an act of smuggling of migrants’, or that they ‘will be used by or benefit any person involved in an act of smuggling of migrants’.

This very complex offence description seeks to criminalise broadly the financing of smuggling of migrants. It concerns ‘financial services or facilities’ (terms that are not further defined in the Act) that are made available to the migrant smuggler as well as those provided to smuggled migrants. This offence has no equivalent in the *Smuggling of Migrants Protocol*.

Section 26G involves two offences under paragraphs (a) and (b) which share the same conduct elements of ‘directly or indirectly providing or making available financial services or facilities. The two offences have separate mental elements concerning the purpose and benefactor of the services or facilities provided.

In cases covered by s 26(a), the accused intends, knows, or has reason to believe that the services or facilities are used, in whole or in part, to commit or facilitate the smuggling of migrants or are used to benefit a migrant smuggler. In the first alternative, the accused may, for instance, use funds to buy a vessel to smuggle migrants. In the second alternative, the accused may pay another person to smuggle migrants. In this alternative, the accused may be the smuggled migrant himself or herself

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<sup>278</sup> See Section VII.4.2 above.



who offers money to another, or may be a parent or family member who offers money to a smuggler that their child or relative be smuggled.

In cases covered by s 26(b), the accused knows or has reason to believe that the services or facilities will be used by or will benefit, in whole or in part, any person involved in the smuggling of migrants. This covers cases in which, for instance, money is offered or given to migrant smugglers or their associates, but also cases in which money is given to smuggled migrants, who may be relatives of the accused, to enable their smuggling. Nothing in the Act suggests that the phrase ‘person involved in an act of smuggling of migrants’ does not include smuggled migrants (although such an interpretation may be desirable and conform with the non-criminalisation principle in Article 5 of the *Smuggling of Migrants Protocol*).

Offences under s 26G are punishable with imprisonment for up to ten years, a fine, or both.

#### VII.5.3.2 Supporting offence of smuggling of migrants

Under s 26I of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* any person ‘who provides material support or resources to another person and the support and resources aid the receiver or any other person to engage in conduct constituting the offence of smuggling of migrants’ is liable to an offence. This offence criminalises anybody who supports a smuggler.

The physical element of the offence is the provision of support or resources which aid another person to engage in smuggling of migrants. However, the provider is liable even if the offence of smuggling of migrants is not committed.<sup>279</sup>

The offence under s 26I contains no express mental elements. In particular—and unlike s 26G—there is no requirement that the accused knew or had reason to believe that his provision of material support or resources aided another person to engage in the smuggling of migrants. Furthermore, there is no mental element concerning a purpose of the accused (such as obtaining a financial or other material benefit).

Offences under s 26I are punishable with imprisonment for up to 15 years, a fine, or both.

#### VII.5.4 Conveyance of smuggled migrants and owner etc of such conveyances, ss 26J, 26K *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*

Sections 26J and 26K of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* create criminal liability for owners, operators or masters of conveyances that transport smuggled migrants. ‘Conveyances’ are defined in s 2 to include any ‘vehicle, vessel, ship, aircraft, or any other mode of transport whether by air, sea or land’.

Section 26J criminalises the owners, operators or masters of vessels for engaging in the conveyance of smuggled migrants. The term ‘conveyance’ is not defined in the Act or elsewhere in Malaysian criminal or immigration law. In the absence of other information, a common interpretation of ‘engaging in conveyance’ would suggest that it refers to the transportation of smuggled migrants. ‘Smuggled migrants’ is defined in s 2 of the Act. It seems that the offence under s 26J contains no mental elements. Offences under s 26J are punishable by imprisonment for a term of up to five years, a fine not exceeding MYR 250,000, or both.

Section 26K creates an obligation for the owners, operators or masters of conveyances that convey goods or people for commercial gain to ensure that all people on board have the requisite travel documents to ensure lawful entry into or travel through a receiving country. Convictions for this

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<sup>279</sup> Section 26I(2) *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

offence can be punished by imprisonment for a term of up to five years, a fine not exceeding MYR 250,000, or both, in addition to liability for the expenses of detaining and removing the smuggled migrant. Several partial defences to this offence are set out in s 26K(3). Even if these partial defences apply, the accused will still be liable for the State's expenses of detaining and removing the smuggled migrant.

#### VII.5.5 Offences under the Immigration Act

Section 55A(1) of the *Immigration Act* of Malaysia contains a further offence concerning the conveyance of a person to Malaysia contrary to the provisions of the Act. In contrast to the offence of smuggling of migrants under s 26A of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*, this offence only concerns irregular migration to Malaysia and has no application abroad. The offence contains no additional requirement that the accused knew or had reason to believe that the other person's entry was unlawful. The statutory penalty for this offence is imprisonment for a term of not less than two years and not more than five years, a fine of between MYR 10,000, and 50,000, and not more than six strokes of whipping.

Section 55A(2) extends liability for this offence to body corporates which shall be liable to a fine of between MYR 30,000, and 100,000. Under s 55A(3), where the offence has been committed by a body corporate, any person who was a director, manager, secretary, officeholder or held a similar position within the organisation shall also be guilty of an offence. Penalties for these individuals are higher than those under s 55A(1), ranging from imprisonment for a term of not less than two years to not more than ten years, a fine of between MYR 30,000, and 100,000, and not more than six strokes of whipping.

### VII.6 Offences involving fraudulent travel or identity documents

#### VIII.6.1 Fraudulent travel or identity documents, s 26E

Section 26E of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* makes it an offence to 'make, obtain, give, sell or possess a fraudulent travel or identity document for the purpose of facilitating an act of smuggling of migrants'. This offence partially reflects the elements of the offence under Article 6(1)(b) of the *Smuggling of Migrants Protocol*.

##### *Physical elements*

The conduct elements of the offence under s 26E of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* include making, obtaining, giving, selling or possessing fraudulent documents. These elements are broad enough to cover any stage of the production, circulation, use, and receipt of forged travel or identity documents. The offence also covers such conduct by public officials and is regularly used in this context. Although different vocabulary is used, they reflect the elements of producing, procuring, providing, and possessing under Article 6(1)(b)(i) and (ii) of the *Smuggling of Migrants Protocol*.

The term 'fraudulent travel or identity document', the object of the offence, is defined in s 2 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* to mean

a travel or identity document that—

- (a) has been made, or altered in a material way, by a person other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a country;

- (b) has been issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
- (c) is being improperly used by a person other than the rightful holder.

This definition adopts almost verbatim the language used to define ‘fraudulent travel or identity documents’ in Article 3(c) of the *Smuggling of Migrants Protocol*.

The terms ‘identity document’ and ‘travel document’ are not further defined in the Act.

#### *Mental elements*

The mental element of s 26E involves ‘the purpose of facilitating an act of smuggling of migrants’. The offence is thus intended to capture situations where fraudulent travel or identity documents are used to enable or aid the smuggling of migrants. This offence complements the general smuggling of migrants offence under s 26A of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*, the offence of document fraud to facilitate trafficking in persons under s 18 of the Act, and general offences relating to document fraud under Chapter XVIII, ss 463–476 of Malaysia’s *Penal Code*.

The second mental element of the offence under s 26E, stemming from the definition of ‘smuggling of migrants’ in s 2 of the Act, is that the accused knew or had reason to believe that the other person’s entry or exit was unlawful. There is no requirement in the Malaysian definition of ‘smuggling of migrants’ that an accused acted for the purpose of gaining a financial or other material benefit. A person may thus be convicted under s 26E regardless of whether he or she had the purpose of gaining a material benefit.

Section 26E contains no additional mental element for the conduct elements and the general principles of Malaysian criminal law set out in the *Penal Code* do not articulate a presumption that would imply intention in this situation. It thus appears that strict liability applies to this element.

#### *Penalty*

The statutory penalty for offences under s 26E of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* is imprisonment for a minimum term of seven years and a maximum of 15 years, a fine between MYR 50,000 and 500,000, or both.

### VII.6.4 Immigration Act offences

Section 55D of the *Immigration Act* creates an offence for making, forging, or altering a document that can be used under the Act as a visa, permit, pass, or certificate. This offence reflects the conduct element of ‘producing’ a fraudulent document as required by Article 6(1)(b)(i) of the *Smuggling of Migrants Protocol*. Section 55D does not touch upon the other elements of procuring, providing, or possessing such a document. The offence may apply to some instances of migrant smuggling, though there is no requirement that this conduct be done for that purpose. The statutory penalty for this offence is imprisonment for not less than five and no more ten years, a fine between MYR 30,000 and 100,000, and not more than six strokes of whipping.

Section 56(1)(i)-(l) of the *Immigration Act* set out several other offences that may apply to cases in which fraudulent documents, such as entry permits, re-entry permits, passes, or certificates are made, obtained, sold, passed on, or used to contravene the provisions of this Act. These offences, which are punishable by a fine of up to MYR 10,000, imprisonment for up to five years, or both, may concern smugglers and smuggled migrants using these documents alike.

## VII.7 Offence of enabling illegal stay

### VII.7.1 Concealing or harbouring smuggled migrants or migrant smugglers

Section 26H of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* creates an offence for enabling the illegal stay of smuggled migrants and also of migrant smugglers. Under s 26H(1):

Any person who conceals or harbours, or prevents, hinders or interferes with the arrest of any person knowing or having reason to believe that such person is—

- (a) a smuggled migrant; or
- (b) a person who has committed or is planning or is likely to commit an act of smuggling of migrants, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding ten years, and shall also be liable to fine, or to both.

This offence is frequently used by Malaysian prosecutors in cases in which smugglers provide shelter to smuggled migrants. The offence goes beyond the requirements of Article 6(1)(c) of the *Smuggling of Migrants Protocol* in that it also criminalises harbouring etc of migrant smugglers (though this appears to be of limited practical significance). The provision otherwise partially reflects the Protocol's requirements.

#### *Physical elements*

The conduct element of the offence under s 26H(1) involves 'concealing, harbouring, or preventing, hindering or interfering with the arrest' of a smuggled migrant or migrant smuggler. The range of conduct covered by this offence is further explained by s 26H(2) which defines 'harbouring' to include 'supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension'. This offence thus covers a great range of conduct that may enable, aid, or prolong a person's illegal stay or assist a migrant smuggler to avoid capture. Section 26H does not explicitly criminalise the use of fraudulent documents to enable the illegal stay of another person. This conduct, which is expressly mentioned in Article 6(1)(c) of the *Smuggling of Migrants Protocol*, would instead be covered by the general prohibition on assisting a person in any way to evade apprehension under s 26H(2).

The object of the offence under s 26H(1)(a) is a smuggled migrant. Under s 2 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* a 'smuggled migrant' is a person who is not a citizen or permanent resident of a state which they have been smuggled into, through or out of.<sup>280</sup> Section 26H(1)(b) extends the object element of the offence to include a person who has committed or is planning or is likely to commit an act of smuggling of migrants, i.e. the migrant smuggler. In this respect, as mentioned, the Act goes beyond the requirements of Article 6(1)(c) of the *Smuggling of Migrants Protocol*.

#### *Mental elements*

The mental element of the offence under s 26H of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* is the person's knowledge or reason to believe that the person they are harbouring is a smuggled migrant or a potential or actual migrant smuggler.

Under s 26H there is no requirement that the accused engaged in the conduct for any particular purpose. In this respect, the Malaysian law diverges from the *Smuggling of Migrants Protocol* which requires that the conduct must be done in order to obtain a financial or other material benefit.<sup>281</sup> This

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<sup>280</sup> See Section VII.4.2 above.

<sup>281</sup> Article 6(1) *Smuggling of Migrants Protocol*.

offence may therefore criminalise the actions of people or groups that conceal, harbour or otherwise assist smuggled migrants for charitable or altruistic reasons.

Section 26H contains no additional mental element for the conduct element and the general principles of Malaysian criminal law set out in the *Penal Code* do not articulate a presumption that would imply intention in this situation. It thus appears that strict liability applies to this element.

#### *Penalty*

The statutory penalty for offence under s 26H is imprisonment for a term of not less than seven years but not exceeding 15 years, a fine of between MYR 50,000, and 500,000, or both.

### VII.7.2 Providing facilities in support of smuggled migrants, s 26F

Section 26F of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* creates a special offence for owner, occupier, lessee or person in charge of any premises, room or place, or any equipment or facility that allows for recording, conferences or meetings via technology. Such persons are liable to an offence if they knowingly permit a meeting of persons to be held in the premises, room or place, or knowingly permit the equipment or facility to be used, for the purpose of committing a smuggling of migrants offence.

The conduct of the offence is the permitting of a meeting in or the use of the object of the offence by the owner, occupier, lessee or person in charge for the object. The objects in question are premises, rooms, or places as well as any equipment or facility that allows for recording, conferences or meetings via technology. The offence may only be committed by a person in one of the listed categories.

The mental element of the offence under s 26F is the knowledge that the meeting held or the use of the equipment or facility is for the purpose of committing an offence under Part IIIA of the Act. This mental element is stricter than the requirements in other smuggling offences under the Act since it is not sufficient—and there will be no liability—if the person merely has reason to believe the conduct is for the purpose of committing a smuggling of migrants offence.

The statutory penalty for offence under s 26F is imprisonment for a term not exceeding ten years, a fine, or both.

Section 26F of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* has no direct equivalent in the *Smuggling of Migrants Protocol*. Some acts captured by s 26F of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* could, however, be considered as aiding and abetting the smuggling of migrants under the Protocol.

### VII.7.3 Immigration Act offences

Section 55E of the *Immigration Act* sets out the offence of ‘permitting an illegal immigrant to enter or remain at premises’. The term ‘illegal immigrant’ is defined in s 55E(7) to include any person who is not a citizen of Malaysia and has entered or remains in the country contrary to other provisions of Malaysian immigration law.<sup>282</sup> ‘Premises’ is defined broadly to include any land, building, place, vehicle or structure.<sup>283</sup> Section 55E(3) contains a presumption for cases in which an illegal immigrant is found at a premises that the occupier knew that the person was an illegal immigrant and had permitted them to enter or remain. This presumption may be rebutted if the occupier can prove that

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<sup>282</sup> Sections 5, 6, 8, 9, 15 *Immigration Act*; Regulation 39 *Immigration Regulations 1963*.

<sup>283</sup> Section 55E(7) *Immigration Act*.

he or she took all reasonable measures, as may be prescribed by the relevant Minister,<sup>284</sup> to prevent an illegal immigrant entering or remaining at the premises.<sup>285</sup> Offenders under s 55E of the *Immigration Act* are liable to

a fine of not less than MYR 5,000, and not more than MYR 30,000, or to imprisonment for a term not exceeding twelve months or to both for each illegal immigrant found at the premises and, in the case of a second or subsequent conviction, to a fine of not less than MYR 10,000, and not more than MYR 60,000, or to imprisonment for a term not exceeding two years or to both for each illegal immigrant found at the premises.<sup>286</sup>

Section 56(1)(d) of the *Immigration Act* also criminalises the harbouring of any person who the offender knows or has reasonable grounds for believing has breached a provision of the *Immigration Act*. The term ‘harbour’ is not further defined in the *Immigration Act*. The statutory penalty for s 56(1)(d) is a fine between MYR 10,000 and 50,000, for each person harboured.<sup>287</sup> If it is proven that more than five people were harboured, a term of imprisonment of between six months and five years and not more than five strokes of whipping may also be imposed.<sup>288</sup>

## VII.8 Aggravating circumstances

Section 26B of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* sets out three ‘aggravated offences of smuggling of migrants’. These reflect the aggravating circumstances articulated in Article 6(3)(a) and (b) of the *Smuggling of Migrants Protocol*. The penalty for the aggravated offences under s 26B involves a minimum term of imprisonment of three years and a maximum of 20 years, a fine, or both. According to information provided by the Attorney-General’s Chamber of Malaysia, the aggravations are rarely used in practice. Instead, cases involving harm or threats done to migrants, offences under the *Penal Code* will be used.

### VII.8.1 Endangering the Lives or Safety of Smuggled Migrants

The offence of smuggling of migrants is aggravated under s 26B(c) if the offender’s conduct ‘gives rise to a risk of death or serious harm to the smuggled migrant’. While this provision adopts slightly different language to Article 6(1)(a) of the *Smuggling of Migrants Protocol*, it covers essentially the same circumstances as those envisaged by the Protocol.

### VII.8.2 Inhuman or Degrading Treatment of Smuggled Migrants

Section 26B(a) and (b) set out aggravating circumstances that relate to the treatment of smuggled migrants and that correspond to the those under Article 6(3)(b) of the *Smuggling of Migrants Protocol*.

Section 26B(a) creates an aggravated offence for engaging in ‘people smuggling’ with the intent ‘that the smuggled migrant will be exploited after entry into the receiving country or transit country whether by the person himself or by another person’. The term ‘exploitation’ is defined in s 2 to mean

all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.

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<sup>284</sup> Section 55E(5) *Immigration Act*.

<sup>285</sup> Section 55E(4) *Immigration Act*.

<sup>286</sup> Section 55E(2) *Immigration Act*.

<sup>287</sup> Section 56(1)(bb) *Immigration Act*.

<sup>288</sup> Section 56(1)(bb) *Immigration Act*.

This definition largely reflects the definition of ‘exploitation’ in Article 3(a) of the *Trafficking in Persons Protocol*. It goes somewhat further than the Protocol definition by including ‘any illegal activity’. While this expression extends the definition’s scope to a potentially very broad range of circumstances,<sup>289</sup> judicial authority seems to suggest that the definition requires the presence of force or violence.<sup>290</sup>

Section 26B(b) of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* creates an aggravated offence for circumstances in which a smuggled migrant is subjected to cruel, inhuman or degrading treatment.

## VII.9 Extensions to criminal liability

### VII.9.1 Attempts

The *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* does not expressly extend criminal liability to attempts to commit the offences under the Act. Instead, s 511 of the *Penal Code* provides a general rule that extends liability to attempts of any offence under the *Penal Code* or any other written law in Malaysia.

Section 511 applies to all offences punishable by imprisonment or a fine of any magnitude. This includes the offence of smuggling of migrants (s 26A), the offence relating to fraudulent travel or identity documents (s 26E), the offence of concealing or harbouring smuggled migrants or migrant smugglers (s 26H), the aggravated smuggling of migrants offences (s 26B), or any other offence under the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. An attempt to commit any of these offences is punishable ‘with such punishment as is provided for the offence’ provided that any term of imprisonment does not exceed one-half of the maximum sentence provided for the offence.<sup>291</sup>

### VII.9.2 Participation as an accomplice, organising and directing others

Liability for participation in any criminal offence under Malaysian law is regulated by s 107 of the *Penal Code*:

A person abets the doing of a thing who—

- (a) instigates any person to do that thing;
- (aa) commands any person to do that thing;
- (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
- (c) intentionally aids, by any act or illegal omission, the doing of that thing.

Sections 109–117 of the *Penal Code* create various offences of abetment depending on whether a completed offence is committed as a consequence of the abetment and on the intentions of the offending parties. Section 40(2) of the *Penal Code* clarifies that these provisions will apply in relation to the commission of offences punishable under the *Penal Code* itself and under any other legislation.

<sup>289</sup> *Ng Yu Wah v Public Prosecutor* [2012] 9 MLJ 325, 334.

<sup>290</sup> *Siti Rashidah bt Razali dan yang lain lwn Pendakwa Raya* [2011] 6 MLJ 417, 419.

<sup>291</sup> Section 511 *Penal Code*.

The definition of abetment contained in s 107(b) and (c) of the *Penal Code* cover participation as an accomplice, as required by Article 6(2)(b) of the *Smuggling of Migrants Protocol*. Section 107(a) and (aa) reflect the scope of criminalisation required by Article 6(2)(c) of the Protocol, criminalising those who direct and organise migrant smuggling offences.

Furthermore, the offences under ss 26F, 26G and 26I of the Act expressly criminalise activities which otherwise support and enable the smuggling of migrants. These provisions criminalise assisting a smuggling of migrants offence by providing material support, facilities or services. Providing facilities or services for the purpose of enabling migrant smuggling carries a penalty of up to ten years imprisonment and a fine.<sup>292</sup> The offence of providing material support or resources for this purpose has a penalty of up to 15 years imprisonment and a fine.<sup>293</sup>

### VII.9.3 Participation in an organised criminal group

The *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* contains no separate provisions or aggravation concerning the involvement of organised criminal groups in the smuggling of migrants or any other offence under this Act.

The *Penal Code* criminalises participation in an ‘organised criminal group’<sup>294</sup> and provides enhanced penalties for offences committed by such groups.<sup>295</sup> An ‘organised criminal group’ is defined in s 130U of the *Penal Code* to mean

a group of two or more persons, acting in concert with the aim of committing one or more serious offences, in order to obtain, directly or indirectly, a material benefit, power or influence.

Section 130ZC of the *Penal Code* provides that any serious offences under the *Penal Code* or under any written law committed by an organised criminal group will be punishable with imprisonment for twice the length of the maximum term otherwise available, and that offenders shall be liable to whipping. This applies to all offences relating to migrant smuggling under the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

## VII.10 Other criminal offences relating to irregular migration

### VII.10.1 Trafficking in persons

In addition to the smuggling of migrants offences, Malaysia’s *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*, as its name suggests, also contains offences relating to trafficking in persons. These include:

- trafficking in persons, s 12;
- trafficking in persons by means of threat, force, etc., s 13;
- trafficking in children, s 14;
- profiting from exploitation of a trafficked person, s 15.

‘Trafficking in persons’ is broadly defined in s 2 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* to mean

all actions involved in acquiring or maintaining the labour or services of a person [including] recruiting, conveying, transferring, harbouring, providing or receiving a person.

<sup>292</sup> Sections 26F, 26G *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act*.

<sup>293</sup> Section 26I *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act*.

<sup>294</sup> Section 130ZA *Penal Code*.

<sup>295</sup> Section 130ZC *Penal Code*.



The offences under ss 12, 13, and 14 include an element relating to the purpose of exploitation. This term is defined in s 2 to mean

all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs’.

Under s 16, consent of the trafficked person is no defence for the offences under ss 12, 13, and 14.

Sections 12 and 13 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* create distinct offences depending on the means employed to facilitate the trafficking. The means element of the offence of s 13 directly mirrors that of Article 3(a) of the *Trafficking in Persons Protocol*. Section 12 refers to the means of ‘coercion’, which is further defined in s 2 as the

- (a) threat of serious harm to or physical restraint against any person;
- (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (c) the abuse or threatened abuse of the legal process.

The statutory penalty for offences under s 12 involves a maximum term of imprisonment of 15 years and a fine. The penalty for offences under s 13 involves a minimum term of imprisonment of three years and a maximum of 20 years and a fine. The Act contains no aggravating circumstances of trafficking in persons.

#### VII.10.2 Exploitation of non-citizens

A further offence with some bearing on trafficking in persons is the ‘offence of profiting from the exploitation of a trafficked person’ under s 15 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*:

Any person who profits from the exploitation of a trafficked person commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to a fine of not less than MYR 500,000, but not exceeding MYR 1,000,000, and shall also be liable to forfeiture of the profits from the offence.

This offence differs from the offence of under s 12 in that it criminalises those who actually profit from the exploitation of trafficked persons (as defined in s 2), as opposed to those who traffic for the purpose of exploitation. It is conceivable that some cases of trafficking may be subsumed under either offence. The object of the offence under s 15 may be a national or non-national. It does not matter whether the person has entered the country lawfully or not. No equivalent provision relating to profiting from the exploitation of smuggled migrants exists in the Malaysian *Penal Code* or *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

The *Penal Code* of Malaysia contains several other offences that may be relevant to the exploitation of non-citizens, labour migrants et cetera. These include:

- Section 366B: Kidnapping or abducting a woman to compel her marriage, etc.;
- Section 367: Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.;
- Section 370: Buying or disposing in slaves;
- Section 371: Habitual dealing in slaves;
- Section 372: Exploiting any person for purposes of prostitution;
- Section 374: Unlawful compulsory labour.

### VII.10.3 Illegal entry

Foreigners entering Malaysia illegally may be subject to a number of criminal offences. Foreigners found to be entering Malaysia illegally are regularly detained, charged, and convicted to short jail sentences before being removed from Malaysia.

Section 5 of the *Immigration Act* makes it an offence to enter Malaysia outside a designated Border Control Point.

Section 6 of the Act provides that foreigners must be in possession of a valid permit or pass to enter Malaysia. The foreign person holds the burden of proving that they were in possession of such documents when they entered Malaysia.<sup>296</sup> If the foreign person enters Malaysia in violation of the rules under the *Immigration Act*, he or she can be punished with a fine of up to MYR 10,000, imprisonment for a term not exceeding five years, or both and shall be liable to up to six strokes of whipping.<sup>297</sup>

Failure to present valid travel documents upon entry into Malaysia, as required by s 2(1) of Malaysia's *Passports Act 1966*,<sup>298</sup> may result in a penalty of up to MYR 10,000 or imprisonment for a term not exceeding five years or both.<sup>299</sup>

## VII.11 Non-criminalisation of smuggled migrants

The *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* contains no express provisions concerning the non-criminalisation of smuggled migrants as envisaged by Article 5 of the *Smuggling of Migrants Protocol*.

Section 25 of the Act, on the other hand, concerns the 'immunity' of victims of trafficking in persons:

A trafficked person shall not be liable to criminal prosecution in respect of—

- (a) his illegal entry into the receiving country or transit country;
- (b) his period of unlawful residence in the receiving country or transit country; or
- (c) his procurement or possession of any fraudulent travel or identity document which he obtained, or with which he was supplied, for the purpose of entering the receiving country or transit country,

where such acts are the direct consequence of an act of trafficking in persons that is alleged to have been committed or was committed.

This provision has no equivalent in the *Trafficking in Persons Protocol* and Malaysian law, as mentioned, makes no similar concessions for smuggled migrants. In this context, it is also worth noting that s 41A of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* explicitly provides that care and protections offered to victims of trafficking do not apply to smuggled migrants. This provision has been criticised by human rights advocates as not recognising the potential harm inflicted upon smuggled migrants.<sup>300</sup>

Smuggled migrants may also be criminally liable for offences under the *Immigration Act* of Malaysia. These include offences relating to illegal entry (s 6), using travel or identity documents issued to

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<sup>296</sup> Section 6(4) *Immigration Act*.

<sup>297</sup> Section 6(3) *Immigration Act*.

<sup>298</sup> Act No 150 of 1966.

<sup>299</sup> Section 12(2) *Immigration Act*.

<sup>300</sup> Phil Robertson, *Malaysia: Letter to the Prime Minister regarding amendments to the Anti-Trafficking in Persons Act* (8 September 2010) Human Rights Watch <<https://www.hrw.org/news/2010/09/08/malaysia-letter-prime-minister-regarding-amendments-anti-trafficking-persons-act>>.

another person (s 56(1)(j)), making false statements to obtain such documents (s 56(1)(k)), and using fraudulent documents (s 56(1)(l)).

Malaysia is not a State Party to the *Convention and Protocol relating to the Status of Refugees* and its *Immigration Act* makes no express exemptions from criminal liability for refugees who enter or are smuggled into the country. Malaysia plays host to a large number of refugees from a range of countries, chief among them Rohingya refugees from Myanmar. Malaysia has adopted a practice of accepting and not returning these refugees—and not punishing them in relation to illegal entry—if they register with the United Nations High Commissioner for Refugees (UNHCR) and obtain papers from UNHCR confirming their refugee status.

## VII.12 Jurisdiction

Section 3 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* concerns the application of offences under the Act and reflects the jurisdictional requirements of Article 15(1)(a) of the *Convention against Transnational Organized Crime*. The offences of the Act apply ‘regardless of whether the conduct constituting the offence took place inside or outside Malaysia and whatever the nationality or citizenship of the offender’ if Malaysia is the receiving or transit country or the exploitation occurs in Malaysia, or if the offending behaviour commences in or transits through Malaysia before concluding elsewhere.<sup>301</sup>

The jurisdictional requirement of Article 15(1)(b) of the Convention is reflected in s 4(a) of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* which extends jurisdiction over offending which takes place on ‘the high seas on board any ship or on any aircraft registered in Malaysia’.

Section 4(b) and (c) of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* reflect the principle of active personality jurisdiction under Article 15(2)(b) of the Convention. These provisions extend the Act’s jurisdiction to any offences committed by any citizen or permanent resident of Malaysia either on the high seas or on any aircraft, or in any place outside Malaysia.

Sections 3 and 4 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* thus demonstrate a high degree of compliance with the mandatory aspects of Article 15 of the *Convention against Transnational Organised Crime* and adopt some elements of extraterritorial jurisdiction.

## VII.13 Observations

Smuggling of migrants is comprehensively criminalised under Malaysian law. The *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* provides a complex framework with a broad range of offences that cover all the relevant types of conduct involving and associated with smuggling of migrants and trafficking in persons. The legislation is very well developed and used extensively in practice by law enforcement, prosecutors, and the judiciary.

The legislative definition of ‘smuggling of migrants’ encompasses bringing smuggled persons into, through or out of Malaysia or any other country. The definition thus captures smuggling of migrants into any country, not just Malaysia. Subject to jurisdictional limits, Malaysia may thus investigate and prosecute instances of smuggling that occur completely outside its territorial boundaries.

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<sup>301</sup> Section 3 *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

The 'smuggling of migrants' offences under the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* depart from the requirements of the *Smuggling of Migrants Protocol* by omitting a profit element. The definition of 'smuggling of migrants' in s 2 contains no requirement that the perpetrator acted in order to receive a financial or other material benefit as required by the Protocol.<sup>302</sup> The Malaysian offences may thus risk criminalising the actions of people or groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs in the smuggling of asylum seekers.<sup>303</sup>

Malaysia has legislated on smuggling of migrants and trafficking of persons in a single statute. In some cases, this approach may lead to difficulties in determining under which offence a suspect should be charged. In most instances, the offences of smuggling and trafficking under Malaysian law are, however, sufficiently distinguishable. The Malaysian approach also recognises that both types of offences exist on a continuum of illicit activity, as opposed to being necessarily distinct from one another in practice. This may close potential legal loopholes.

The penalties for smuggling of migrants offences under the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* are relatively severe but do not involve corporal punishment. Offenders under relevant provisions of the *Immigration Act* and *Penal Code* can be subject to corporal punishment which may conflict with requirements set by international law.

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<sup>302</sup> Articles 3(a), 6(1) *Smuggling of Migrants Protocol*.

<sup>303</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 333 [19].

## VIII Union of Myanmar

### VIII.1 Overview

The Union of Myanmar (Myanmar) is an important source country for irregular migration and smuggled migrants in South and Southeast Asia. Years of political and ethnic tensions have led a significant number of people from Myanmar to seek protection abroad. Many other Myanmar nationals emigrate in pursuit of better economic opportunities, especially to Thailand. Irregular migration occurs by land and sea, especially to neighbouring Bangladesh and Thailand as well as to Malaysia.

Laws relating to smuggling of migrants are, for the most part, non-existent in Myanmar. Some laws relating to facilitating illegal entry and to irregular migration are quite outdated and do not capture the purposes of the UN *Protocol against the Smuggling of Migrant by Land, Sea and Air*.<sup>304</sup> Myanmar is a State Party to the Protocol but has not yet implemented its key components into domestic law. An *Anti-Trafficking in Persons Law* was passed in 2005 but was under review at the time of writing.

Debates about how to implement the *Smuggling of Migrants Protocol* are still in their infancy though the research conducted for this report shows that the Government of Myanmar is following with interest the development, implementation, and enforcement of smuggling of migrants laws in other ASEAN Member States. UNODC has extended an offer to assist the Government of Myanmar to examine the requirements of the *Smuggling of Migrants Protocol* and draft legislation that is suitable for the specific situation of this country.

### VIII.2 Ratification of and accession to international legal instruments

Myanmar is a State Party to the UN *Convention against Transnational Organized Crime*,<sup>305</sup> the *Protocol against the Smuggling of Migrant by Land, Sea and Air*, and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>306</sup> Myanmar acceded to these instruments on 30 March 2004.

The Government of Myanmar does not consider itself bound by obligations to refer disputes relating to the interpretation or application of the Convention and the Protocols to the International Court of Justice and thus filed reservations to Article 35 of the Convention, Article 20 of the *Smuggling of Migrants Protocol*, and to Article 15 of the *Trafficking in Persons Protocol*.

### VIII.3 Domestic laws and policies relating to smuggling of migrants

Although Myanmar is a Party to the *Smuggling of Migrants Protocol*, it does not have domestic laws that implement or reflect the majority of the provisions under the Protocol.

Basic offences concerning illegal immigration and the facilitation of illegal entry are set out in the *Burma Immigration (Emergency Provisions) Act 1947*, which was developed and introduced at the

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<sup>304</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>305</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>306</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

time when Myanmar transitioned from British colonial rule to independence. The Act was the subject of several small amendments in the late 1940s and 1950s, but, based on the available information, it appears that it has been left mostly unchanged since that time.

Accession to the *Convention against Transnational Organized Crime* in 2004 similarly did not result in specific laws or amendments to implement the obligations arising from the Convention. Some of the criminalisation requirements of the Convention, along with general principles of criminal law and specific offences, can be found in the *Penal Code* of Myanmar. This Code, which to this day is frequently referred to as the *Penal Code* of the Union of Burma,<sup>307</sup> came into force on 1 May 1861 and, at that time, applied to all of British India.<sup>308</sup> After the partition of the British Indian Empire, it was inherited by the successor States.

Myanmar's accession to the *Trafficking in Persons Protocol* resulted in the *Anti-Trafficking in Persons Law* which was enacted in 2005. This Law sets up a basic system for the protection of victims of trafficking, national coordination, and for the criminalisation of trafficking. In recent years, there have been several initiatives to improve Myanmar's anti-trafficking efforts by replacing or amending the *Anti-Trafficking in Persons Law 2005*. These efforts were still ongoing at the time of writing.

#### VIII.4 Terminology and definitions

Due to the lack of smuggling of migrants related laws, the concepts and terminology of the *Smuggling of Migrants Protocol* presently do not exist in Myanmar legislation.

Some basic terms concerning Myanmar's immigration laws are defined in s 2 of the *Immigration (Emergency Provisions) Act 1947*, though these mostly relate to procedural and administrative aspects and not to immigration-related offences. Terms and definitions relevant to Myanmar's criminal law are set out in ss 6–30 of the *Penal Code*.

#### VIII.5 Offence of smuggling of migrants

While Myanmar presently has no offences that penalise the smuggling of migrants, the *Immigration (Emergency Provisions) Act 1947* contains some provisions that create offences relating to facilitating illegal immigration. Two offences under s 13 of the Act concern persons involved in the illegal entry of foreigners. In a conversation held for this report with an official in Yangon, it was revealed that charges relating to facilitation of illegal entry and exit are, however, very rarely used in practice.

##### VIII.5.1 Facilitating illegal entry

Section 13(5) 1<sup>st</sup> alt, which was inserted in 1948<sup>309</sup> and substituted in 1950,<sup>310</sup> makes it an offence to assist or attempt to assist foreigners to enter Myanmar illegally:

Whoever assists or attempts to assist any person to enter the Union of [Myanmar] illegally [...] shall be punished with imprisonment for a term not exceeding two years, or with a fine, or with both.

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<sup>307</sup> See ss 2, 3 *Penal Code* (Myanmar).

<sup>308</sup> India Act XLV of 1860.

<sup>309</sup> Act No XVI of 1948.

<sup>310</sup> Act No LIII of 1950.

### *Physical elements*

The offence in s 13(5) 1<sup>st</sup> alt corresponds to the physical elements of smuggling of migrants as conceived by the *Smuggling of Migrants Protocol* insofar as it criminalises any assistance given to another person to enter Myanmar illegally. The elements of s 13(5) 1<sup>st</sup> alt seemingly differ insofar as they capture ‘any person’, which could conceivably also cover nationals or permanent residents of Myanmar. Their entry would, however, not be illegal and a reading of s 13(5) 1<sup>st</sup> alt in the broader context of this provision and the *Immigration (Emergency Provisions) Act 1947* suggests that the object of this offence has to be a foreigner.<sup>311</sup>

### *Mental elements*

The offence under s 13(5) 1<sup>st</sup> alt does not specify any mental elements, neither concerning the conduct element, nor (and unlike the 2<sup>nd</sup> alt<sup>312</sup>) concerning the status of the other person. Furthermore, the purpose to obtain a financial or other material benefit from that conduct is not an element of this offence. This marks a significant difference to the smuggling of migrants offence under the Protocol.

### *Penalty*

Offences under s 13(5) 1<sup>st</sup> alt are punishable by imprisonment for a term not exceeding two years, with a fine, or both.

## VIII.5.2 Liability of transporters

Section 13(2) creates criminal liability for ‘carriers’ who ‘knowingly bring or attempt to bring into the Union of [Myanmar] any person not authorised to enter the Union of [Myanmar]’. The term ‘carrier’ is defined in s 2(1)(a) of the Act to include ‘the owner or charterer of a conveyance, the agent of such owner or charterer and also the person in charge of the conveyance’. This offence, which must be read in conjunction with subsections (3) and (4), is evidently designed to hold transport companies such as airlines and bus operators liable for bringing persons to Myanmar who do not hold visa or have no other permit to enter the country. Offences under s 13(2) are punishable by imprisonment for up to three months, a maximum fine of MMK 200, or both for every such person brought or attempted to be brought into Myanmar.

## VIII.6 Offences involving fraudulent travel or identity documents

The *Immigration (Emergency Provisions) Act 1947* contains no specific offences for situations in which smugglers acquire, provide, sell, or use fraudulent travel or identity documents for the purposes of smuggling of migrants. A broad interpretation of the offences under s 13(5) of the Act may allow a reading that would capture situations in which one person aids another to enter Myanmar unlawfully by using fraudulent documents, but the offence lacks the constituent elements required by Article 6(1)(b) of the *Smuggling of Migrants Protocol*.

Similarly, the offence under s 13(7)(c) of the *Immigration (Emergency Provisions) Act 1947*, which concerns forgeries and alteration of immigration permits, does not specifically relate to the smuggling of migrants. General offences relating to counterfeiting and the use of fraudulent documents under the *Penal Code* make no specific reference to the smuggling of migrants or other immigration-related offences.

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<sup>311</sup> Section 2(1)(e) *Immigration (Emergency Provisions) Act 1947* defines a foreigner to ‘mean a person who is not a citizen of the Union of Myanmar’.

<sup>312</sup> See Section VIII.7 below.

## VIII.7 Offence of enabling illegal stay

Section 13(5) 2<sup>nd</sup> alt of the *Immigration (Emergency Provisions) Act 1947*, which was inserted in 1948<sup>313</sup> and substituted in 1950,<sup>314</sup> makes it an offence to knowingly or wilfully assist or attempt to assist foreigners to remain in Myanmar unlawfully:

Whoever [...] knowing that a foreigner is remaining in the Union of [Myanmar] in contravention of any of the provisions of this Act or the rules made there under wilfully assists or attempts to assist him to remain in the Union of [Myanmar] shall be punished with imprisonment for a term not exceeding two years, or with fine, or with both.

Section 13(6) of the *Immigration (Emergency Provisions) Act 1947* sets out a separate offence for situations in which one person makes false statements or suppresses information concerning the illegal presence of foreigners in Myanmar:

Whoever wilfully suppresses information or gives false information to prevent the apprehension of any foreigner who has contravened any of the provisions of this Act or the rules made thereunder shall be liable on conviction to imprisonment for a term not exceeding six months or fine or to both.

The latter offence has no direct equivalent in the *Smuggling of Migrants Protocol* and is not further discussed here.

### VIII.7.1 Physical elements

The offence under s 13(5) 2<sup>nd</sup> alt of the *Immigration (Emergency Provisions) Act 1947* captures some of the physical elements of the offence of enabling illegal stay under Article 6(1)(c) of the *Smuggling of Migrants Protocol*. It criminalises any assistance and any attempt to assist a foreigner to remain in Myanmar unlawfully. For this offence, it does not matter whether the foreigner entered the country illegally; it would also apply if, for instance, the foreigner arrived in the country on a valid visa but later overstayed the expiry of the visa or otherwise breached visa conditions. Unlike Article 6(1)(c) of the Protocol, the offence in s 13(5) 2<sup>nd</sup> alt of the *Immigration (Emergency Provisions) Act 1947* does not make any reference to the means used to enable the foreigner to remain in Myanmar, for example by providing fraudulent documents or by concealing the foreigner's whereabouts.

### VIII.7.2 Mental elements

The offence in s 13(5) 2<sup>nd</sup> alt of the *Immigration (Emergency Provisions) Act 1947* contains no reference to smuggling of migrants and does not require the perpetrator to act with the purpose of obtaining a financial or other material benefit. The sole mental element required in this offence is that the perpetrator had knowledge that the foreigner was remaining in Myanmar illegally.

### VIII.7.3 Penalty

Offences under s 13(5) 2<sup>nd</sup> alt of the *Immigration (Emergency Provisions) Act 1947* are punishable by imprisonment for a term not exceeding two years, a fine, or both.

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<sup>313</sup> Act No XVI of 1948.

<sup>314</sup> Act No LIII of 1950.



## VIII.8 Aggravating circumstances

The offences under s 13 of the *Immigration (Emergency Provisions) Act 1947* contain no aggravations relating to the dangers associated with migrant smuggling or the treatment of smuggled migrants by their smugglers. Other laws of Myanmar also contain no offences covering the aggravating circumstances envisaged by the *Smuggling of Migrants Protocol*.

## VIII.9 Extensions to criminal liability

### VIII.9.1 Attempts

The offences relating to assisting illegal entry and stay under s 13(5) of the *Immigration (Emergency Provisions) Act 1947* expressly include liability for ‘attempts to assist’. The penalty for attempts is the same as that for the completed offence.

### VIII.9.2 Participation as an accomplice, organising and directing others

From the available information, it does not appear that participation in the offences under s 13(5) of the *Immigration (Emergency Provisions) Act 1947* is conceptually possible. Depending on the interpretation of these offences, it could be conceivable that acts of assistance and aid will amount to primary liability as a perpetrator.

### VIII.9.3 Participation in an organised criminal group

Neither the offences under the *Immigration (Emergency Provisions) Act 1947* nor any other statute in Myanmar contains references to the involvement of organised criminal groups in the smuggling of migrants.

## VIII.10 Other criminal offences relating to irregular migration

### VIII.10.1 Trafficking in persons

Offences relating to trafficking in persons in Myanmar are set out in the *Anti-Trafficking in Persons Law 2005* which share many similarities with the requirements of the *Trafficking in Persons Protocol*.

The term ‘trafficking in persons’ is defined in s 3(a) of the *Anti-Trafficking in Persons Law 2005* to mean the ‘recruitment, transportation, transfer, sale, purchase, lending, hiring or harbouring or receipt of persons after committing any of the following acts for the purpose of exploitation of a person with or without his or her consent.’ Section 3(a) then lists the means by which trafficking in persons may be committed, which include

- (1) threat, use or force or other form of coercion;
- (2) abduction;
- (3) fraud;
- (4) deception;

- (5) abuse of power or of position taking advantage of the vulnerability of a person;
- (6) giving or receiving of money or benefit to obtain the consent of the person having control over another person.

‘Exploitation’ is defined further in Explanation 1) of s 3(a) to include the

receipt or agreement for receipt of money or benefit for the prostitution of one person by another, other forms of sexual exploitation, forced labour, forced service, slavery, servitude, debt-bondage or the removal and sale of organs from the body.

The *Anti-Trafficking in Persons Law 2005* contains several offences relating to trafficking, including the offence of trafficking in persons, especially women, children and youth (s 24) and the offence of trafficking in persons other than women, children and youth (s 25).

The statutory penalty for offences under s 24 involves imprisonment for a term not less than ten years and a maximum of life imprisonment, and a fine. For offence under s 25 the penalty is imprisonment for a term not less than five years and not more than ten years, and a fine. The Law also contains aggravating circumstances of trafficking in persons while participating in an organised criminal group,<sup>315</sup> and of committing a serious crime (defined in s 3(e) as one punishable by more than four years imprisonment) as the means of committing trafficking in persons.<sup>316</sup>

There has been a suggestion that *Anti-Trafficking in Persons Law 2005* is presently under review and will be rewritten in cooperation with local and foreign experts.<sup>317</sup> At the time of writing, these amendments have not come into effect and few details regarding their content are currently available.

#### VIII.10.2 Exploitation of non-citizens

The *Penal Code* of Myanmar contains several other offences that may be relevant to the exploitation of non-citizens, labour migrants and the like. These include:

- Section 366B: Importation of girl under 21 years into Myanmar;
- Section 367: Kidnapping or abducting in order to subject person to grievous hurt, slavery or unnatural lust;
- Section 370: Importing, exporting, removing, buying, selling or disposing of any person as a slave;
- Section 371: Habitual dealing in slaves;
- Section 374: Unlawfully compelling labour against a person’s will.

With the exception of s 366B, these offences apply to victims who are nationals and non-nationals and—unlike smuggling of migrants—do not require the crossing of an international border. Sections 370 and 371 both criminalise the importation or exportation of victims of slavery across international borders but they may also be completed through the buying or selling of a person within the boundaries of the State.

#### VIII.10.3 Unlawful recruitment of workers

Chapter X of the *Law Relating to Overseas Employment 1999* contains provisions that may be utilised in prosecuting particular instances relating to smuggling of migrants. This law regulates the provision of agency services to secure overseas employment for Myanmar residents and citizens, by requiring

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<sup>315</sup> Section 28 *Anti-Trafficking in Persons Law 2005*.

<sup>316</sup> Section 29 *Anti-Trafficking in Persons Law 2005*.

<sup>317</sup> The Republic of the Union of Myanmar – President Office, ‘2005 Anti-Trafficking in Persons Law will be rewritten next year’ (31 December 2014).

agents to obtain 'Service Agency Licenses' in order to place individuals in positions outside of Myanmar.<sup>318</sup>

Under section 2 a 'Service Agent' is defined as:

A person of organisation, who / which for a prescribed service fee, acts as an agent in securing employment for those who seek overseas employment.

Section 26 of the Law provides a penalty of imprisonment for a term of up to seven years or a fine for performing the functions of a service agent without a valid.<sup>319</sup> It is conceivable that migrant smugglers who assist individuals in obtaining overseas employment without a license could thus be held criminally liable in some cases.

Service agents are further responsible for ensuring the full rights and privileges of the overseas worker.<sup>320</sup> Failure to protect these rights could result in imprisonment for a term of up to one year, a fine of MMK 5,000 or both.<sup>321</sup>

#### VIII.10.4 Illegal entry

Section 13(1) of the *Immigration (Emergency Provisions) Act 1947* provides that whoever enters or attempts to enter Myanmar in contravention of any of the provisions of the Act or of any visa or permit conditions commits an offence. This offence is punishable by imprisonment for a term of not more than two years, a fine, or both.<sup>322</sup> Under s 13A, the burden of proving that entry into Myanmar was not illegal falls on the immigrant.

### VIII.11 Non-criminalisation of smuggled migrants

The *Immigration (Emergency Provisions) Act 1947* contains no provisions that exclude liability for smuggled migrants. Therefore, smuggled migrants could incur criminal charges for entering Myanmar unlawfully,<sup>323</sup> possessing fraudulent travel or identity documents,<sup>324</sup> or for any other offence under the Act.

Myanmar is not a State Party to the *Convention and Protocol relating to the Status of Refugees* and its *Immigration (Emergency Provisions) Act 1947* makes no express exemptions from criminal liability for refugees who enter or are smuggled into the country.

### VIII.12 Jurisdiction

Despite multiple attempts it was not possible during the course of the research for this report to obtain reliable and conclusive information about the geographical application of criminal offences in Myanmar.

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<sup>318</sup> Section 13 *Law Relating to Overseas Recruitment 1999*.

<sup>319</sup> Section 26 *Law Relating to Overseas Recruitment 1999*.

<sup>320</sup> Section 25(d) *Law Relating to Overseas Recruitment 1999*.

<sup>321</sup> Section 29 *Law Relating to Overseas Recruitment 1999*.

<sup>322</sup> Section 13(1) *Immigration (Emergency Provisions) Act 1947*.

<sup>323</sup> Section 13(1) *Immigration (Emergency Provisions) Act 1947*.

<sup>324</sup> Section 13(7)(a) *Immigration (Emergency Provisions) Act 1947*.

### VIII.13 Observations

Myanmar has been a State Party to the *Smuggling of Migrants Protocol* since 2004 but has yet to implement the provisions under the Protocol into domestic law. While the patterns and scale of migrant smuggling are well documented and understood — and, at times, have made headlines worldwide — efforts to address the smuggling of migrants are still in their infancy. Developing coherent policies and consistent laws that comply with Myanmar's international obligations poses a significant challenge to a country in transition and undergoing rapid change.

Presently, the concept and criminalisation of smuggling of migrants are entirely absent from Myanmar's law. While certain provisions of the *Immigration (Emergency Provisions) Act 1947* might be utilised to criminalise the smuggling of migrants, these offences do not capture the full range of conduct envisaged by the Protocol.

Because of the high level of irregular migration from Myanmar and the precarious conditions under which many migrants cross Myanmar's borders, there is an urgent need to develop a comprehensive framework to prevent and combat the smuggling of migrants and to protect the rights of smuggled migrants. During the research conducted for this report, it has become evident that there is growing awareness in Myanmar, both among government officials and in the community, that the smuggling of migrants is a pressing issue and that given the growing mobility of Myanmar's people, more needs to be done to promote and facilitate safe migration whilst reducing irregular migration in the form of smuggling and trafficking.

The implementation of the *Anti-Trafficking in Persons Law 2005* demonstrates Myanmar's willingness to criminalise behaviour in accordance with international law, in this case the *Trafficking in Persons Protocol*. This also shows that the future implementation of specific smuggling of migrants legislation is possible.

## IX The Philippines

### IX.1 Overview

The Philippines is one of the largest source countries of labour migrants worldwide and there is evidence that some of the labour migration involves irregular channels. The archipelagic coastlines of the Philippines and its neighbouring countries make smuggling by sea an easy feat, and there is some evidence of maritime smuggling activities from the Philippines to Malaysia. It appears to be more common though to smuggle migrants by air. Filipino nationals are smuggled to the Persian Gulf region by smugglers acting as irregular employment brokers who provide fraudulent travel and identity documentation to facilitate the entry of the smuggled migrants into the destination country. Transit countries for irregular movement into the Gulf region include Cambodia, Indonesia, Malaysia, Singapore, Thailand and Viet Nam.

The Philippines is a Party to the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air*,<sup>325</sup> *Convention against Transnational Organized Crime*,<sup>326</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>327</sup> Presently, offences relating to smuggling of migrants can be found in the *Immigration Act 1940*, though these provisions depart from the international requirements in several ways. A separate *Anti-Trafficking in Persons Act*, which was first introduced in 2003, criminalises trafficking in persons more comprehensively and complies more closely with international standards.

In September 2016, a Bill for an 'Anti-Smuggling of Migrants Act' was introduced into the Senate. This Bill, if passed, would introduce several new offences relating to smuggling of migrants, offences involving fraudulent documents, and offences of enabling illegal stay into Philippine law. Because more than one year has passed since the Anti-Smuggling of Migrants Bill was first introduced, it has become necessary that the Bill be re-introduced by another senator. After consulting with Philippine officials, it was, at the time of writing, expected that the Bill would be re-introduced into Parliament.

### IX.2 Ratification of and accession to international legal instruments

The Philippines is a Party to the international instruments relating to the smuggling of migrants, transnational organised crime, and trafficking in persons. It signed the UN *Convention against Transnational Organised Crime*, the *Smuggling of Migrants Protocol* and the *Trafficking in Persons Protocol* on 14 December 2000. The *Smuggling of Migrants Protocol*, the *Convention against Transnational Organised Crime*, and the *Trafficking in Persons Protocol* were concurred by the Senate of the Philippines on 24 October 2001. Under the Constitution of the Philippines, concurrence by the Senate renders a treaty valid and effective. The Philippines ratified these three instruments (without any reservations) on 28 May 2002.

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<sup>325</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>326</sup> Opened for signature 15 December 2000, 2225 UNTS 209 [hereinafter *Trafficking in Persons Protocol*].

<sup>327</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

## IX.3 Domestic laws and policies relating to smuggling of migrants

### IX.3.1 Immigration Act 1940

Offences relating to smuggling of migrants can be found in the *Immigration Act 1940*.<sup>328</sup> The *Immigration Act 1940* was first enacted on 26 August 1940 when the Philippines were governed by an administrative body known as the Commonwealth of the Philippines, which was established to transition the country from the United States-led Insular Government to full independence. Based on the available information, the *Immigration Act 1940* was last amended on 31 July 1974.

There have been several attempts over the last decade to introduce a new immigration system, including a new *Immigration Act 1940*, most recently on 30 June 2016.<sup>329</sup> None of the bills presented to the House of Representatives over this period to reform the Philippines' immigration law were enacted. It is further worth noting that recent proposals to amend the *Immigration Act 1940* did not contain proposals to introduce offences relating to the smuggling of migrants or to fundamentally change the existing offences under the *Immigration Act 1940*.

### IX.3.2 Anti-Smuggling of Migrants Bill 2016

On 19 September 2016, Senator Maria Lourdes Nancy S Binay introduced a Bill for an 'Act to institute policies to eliminate smuggling of migrants, establishing the necessary institutional mechanisms for this purpose, providing penalties for its violations and for other purposes' into the Senate.<sup>330</sup> The *Explanatory Note* to this proposal reveals that the introduction of this Bill was motivated by concerns over the '1.16 million irregular Filipino migrants scattered around the globe who are exposed to unfathomable abuse and exploitation' and over the large number of irregular migrants residing in the Philippines, estimated to be about 1.3 million. The *Explanatory Note* further acknowledges that the text of the Bill was influenced by the *Model Law against the Smuggling of Migrants*, produced by UNODC in 2011.<sup>331</sup>

The proposed *Anti-Smuggling of Migrants Act 2016* seeks to

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

It shall be a State policy to give highest priority to the enactment of measures and development of programs that will prevent and combat the smuggling of migrants, protect the rights of smuggled migrants and promote and facilitate national and international cooperation in order to meet these objectives.<sup>332</sup>

If passed, the Act would introduce offences and aggravations relating to the smuggling of migrants that closely follow the criminalisation requirements of Article 6 of the *Smuggling of Migrants Protocol*.<sup>333</sup> Definitions of relevant terms and the scope of application also mirror the provisions under the Protocol.<sup>334</sup> The Bill also contains provisions concerning the protection of smuggled migrants, including the principle of non-criminalisation<sup>335</sup> and special 'protection and assistance measures' that would give smuggled migrants access to urgent medical care<sup>336</sup> and protect them from further violence and danger.<sup>337</sup> Additionally, the Bill contains specific measures for smuggled migrants who

<sup>328</sup> Commonwealth Act No 613, *Philippines Immigration Act of 1940* [hereinafter '*Immigration Act 1940*'].

<sup>329</sup> House of Representatives Bill No 435, introduced on 30 June 2016 by Rep. Evelina G Escudero.

<sup>330</sup> Senate Bill No 1151 [hereinafter '*Anti-Smuggling of Migrants Bill 2016*'].

<sup>331</sup> UNODC, *Model Law against the Smuggling of Migrants* (2011).

<sup>332</sup> Article 2 *Anti-Smuggling of Migrants Bill 2016*.

<sup>333</sup> See arts 6–8, 10–12 *Anti-Smuggling of Migrants Bill 2016*.

<sup>334</sup> See arts 3–5 *Anti-Smuggling of Migrants Bill 2016*.

<sup>335</sup> Article 9 *Anti-Smuggling of Migrants Bill 2016*.

<sup>336</sup> Article 13 *Anti-Smuggling of Migrants Bill 2016*.

<sup>337</sup> Articles 14–16 *Anti-Smuggling of Migrants Bill 2016*.

are women or children.<sup>338</sup> Further provisions under the Bill concern prevention,<sup>339</sup> national coordination,<sup>340</sup> and cooperation regarding the smuggling of migrants by sea<sup>341</sup> and the process related to the return of smuggled migrants.<sup>342</sup>

The *Anti-Smuggling of Migrants Bill 2016* was read a first time in the Senate of the Philippines on 21 September 2016. On the same day, it was referred to the Committee on Justice and Human Rights for further consideration.

Information obtained from Philippine officials during the course of this research notes that because more than one year has passed since the Anti-Smuggling of Migrants Bill was introduced, it has become necessary for the Bill to be re-introduced by another senator. At the time of writing, the process to find a new senator for the reintroduction of the Bill was still ongoing. Nevertheless, it is widely expected that the Bill would be re-introduced and there appears to be agreement that the Bill will eventually pass. In the law-making process some amendments to the Bill are likely to occur. This report refers to the version of the *Anti-Smuggling of Migrants Bill* as of September 2016, which is the latest available version.

### IX.3.3 Other relevant laws

In 2003, the Philippines passed the *Anti-Trafficking in Persons Act* 'to institute policies to eliminate trafficking in persons, especially women and children, establishing the necessary additional mechanisms for the protection and support of trafficked persons, providing penalties for its violations, and for other purposes'.<sup>343</sup> This Act adopts the requirements of the *Trafficking in Persons Protocol*, setting out relevant definitions, criminalising 'acts of trafficking'<sup>344</sup>, 'acts that promote trafficking'<sup>345</sup>, and the 'use of trafficked persons',<sup>346</sup> as well as providing for aggravated offences<sup>347</sup> and mechanisms for national coordination and the protection of victims of trafficking.

In 2012, an *Expanded Anti-Trafficking in Persons Act* was enacted which amended and replaced some of the provisions under the 2003 Act.<sup>348</sup> Definitions and criminal offences were broadened and liability for offences relating to trafficking extended to capture attempts and accomplices. Further procedural and protection measures were also inserted at that time.

General principles of criminal liability are set out in the *Revised Penal Code* of the Philippines.<sup>349</sup> A process 'to study, assess and consolidate a simple, updated and modern criminal law to provide clarity in law enforcement and to improve the administration of justice' started in April 2011 with the establishment of a Criminal Code Committee. This resulted in a draft new *Criminal Code* which was introduced in the Senate on 27 October 2016 and read a first time on 7 November 2016.<sup>350</sup> This Bill, if passed, would repeal the *Revised Penal Code* and institute a new *Criminal Code of the Philippines*. At the time of writing, the Bill was under consideration by the Constitutional Amendments and Revision of Codes Committee and the Justice and Human Rights Committee.

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<sup>338</sup> Articles 15, 17 *Anti-Smuggling of Migrants Bill 2016*.

<sup>339</sup> Articles 19–21 *Anti-Smuggling of Migrants Bill 2016*.

<sup>340</sup> Articles 22, 23 *Anti-Smuggling of Migrants Bill 2016*.

<sup>341</sup> Articles 22–29 *Anti-Smuggling of Migrants Bill 2016*.

<sup>342</sup> Articles 30–36 *Anti-Smuggling of Migrants Bill 2016*.

<sup>343</sup> Republic Act No 9208, 26 May 2003 [hereinafter *Anti-Trafficking in Persons Act of 2003*].

<sup>344</sup> Section 4 *Anti-Trafficking in Persons Act of 2003*.

<sup>345</sup> Section 5 *Anti-Trafficking in Persons Act of 2003*.

<sup>346</sup> Section 11 *Anti-Trafficking in Persons Act of 2003*.

<sup>347</sup> Section 6 *Anti-Trafficking in Persons Act of 2003*.

<sup>348</sup> Republic Act No 10364, 23 July 2012.

<sup>349</sup> Act No 3815, 8 December 1930.

<sup>350</sup> Senate Bill No 1227.

## IX.4 Terminology and definitions

Philippine law presently does not contain any specific offences relating to smuggling of migrants and no definition of that term. The terms used in the offence relating to facilitating unlawful arrival under s 46 of the *Immigration Act 1940* are not further defined in the Act.<sup>351</sup>

The proposed *Anti-Smuggling of Migrants Act 2016* contains a range of definitions of terms that constitute the elements of the proposed criminal offences relating to smuggling of migrants. The definitions closely follow the mandatory requirements of the *Smuggling of Migrants Protocol* and include definitions of additional terms that have been taken from the UNODC *Model Law against the Smuggling of Migrants*.

### IX.4.1 Smuggling of migrants

Article 3(a) of the *Anti-Smuggling of Migrants Bill 2016* defines the term ‘smuggling of migrants’ to mean

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into the Philippines or another jurisdiction of which the person is not a national or permanent residence.

This definition adopts the same language as the definition under Article 3(a) of the *Smuggling of Migrants Protocol*. The scope of migrant smuggling under this Bill is not limited to ventures destined for the Philippines but also captures smuggling activities aimed at procuring illegal entry into ‘another jurisdiction’.

### IX.4.2 Smuggled migrant

The term ‘smuggled migrant, which has no direct equivalent in the *Smuggling of Migrants Protocol*, is defined separately in Article 3(j) of the *Anti-Smuggling of Migrants Bill 2016* to mean

any person who has been the object of conduct criminalised under Chapter II of this Act, regardless of whether the perpetrator is apprehended, prosecuted or convicted.

This definition has been suggested by the UNODC *Model Law against the Smuggling of Migrants* to define the object of the offences relating to smuggling of migrants. This definition is helpful as the offences under this Bill are not limited to the smuggling of migrants but also involve other forms of conduct.<sup>352</sup> The term ‘smuggled migrant’ is used in the aggravating circumstances set out in Article 8 of the *Anti-Smuggling of Migrants Bill 2016*, the non-criminalisation clause in Article 9, the offence for commercial carriers in Article 10, and, in particular, the protection and assistance measures under Chapter III, Articles 13 to 18.

### IX.4.3 Migrant

The term ‘migrant’ is defined in Article 3(i) for the purpose of the *Anti-Smuggling of Migrants Bill 2016* to mean

persons entering a jurisdiction, who may be required by the law of that jurisdiction, to possess the necessary travel or entry documents.

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<sup>351</sup> See further Section IX.5.1 below.

<sup>352</sup> UNODC, *Model Law against the Smuggling of Migrants* (2011) 19.



This definition makes no reference to the nationality of the migrant and can apply to citizens and non-citizens, permanent and temporary residents, stateless persons and others alike. The Bill only uses the term ‘migrant’ without the adjective ‘smuggled’ in some provisions concerning protection and assistance which speak broadly about appropriate protection and assistance afforded to migrants without distinguishing between smuggled migrants and other migrants. The word ‘migrant’ is not used in the definitions of smuggling of migrants and smuggled migrant and it appears that the word ‘migrant’ used by itself has no bearing on the offences relating to smuggling of migrants.

#### IX.4.4 Illegal entry

Article 3(f) of the *Anti-Smuggling of Migrants Bill 2016* defines ‘illegal entry’ to mean

crossing borders without complying with the necessary requirements or processes for legal entry into the receiving State.

This definition uses the same wording as Article 3(b) of the *Smuggling of Migrants Protocol*.

#### IX.4.5 Financial or other material benefit

The phrase ‘financial or other material benefit’ is defined in Article 3(d) of the *Anti-Smuggling of Migrants Bill 2016* to

include any type of monetary or non-monetary inducement, payment, bribe, reward, advantage, privilege or service, including sexual or other services.

This definition has been taken verbatim from Article 3(c) of the UNODC *Model Law against the Smuggling of Migrants*.<sup>353</sup> The phrase is defined broadly to cover financial and non-financial inducements, reflecting the recommendations made in the *Interpretative Notes*<sup>354</sup> and *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*.<sup>355</sup> The ‘financial or other material benefit’ serves as the purpose element in the offences under Article 6 of the *Anti-Smuggling of Migrants Bill 2016*.

### IX.5 Offence of smuggling of migrants

Philippine law presently contains no specific offence relating to the smuggling of migrants. An offence relating to bringing foreigners not lawfully entitled to enter the Philippines in the *Immigration Act 1940* contains some, but not all of the elements of migrant smuggling. The *Anti-Smuggling of Migrants Bill 2016*, if passed, would introduce an offence for ‘acts of smuggling of migrants’. The following Sections consider both the existing and proposed law and compare these against the requirements of the *Smuggling of Migrants Protocol*.

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<sup>353</sup> UNODC, *Model Law against the Smuggling of Migrants* (2011) 13–14.

<sup>354</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2004).

<sup>355</sup> UN General Assembly, *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 record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 (3 Nov 2000) [hereinafter *Interpretative Notes*].

### IX.5.1 Section 46 Immigration Act 1940

Sections 45–46A of the *Immigration Act 1940* set out ‘penal provisions’ for certain violations of this Act. The first alternative of s 46 contains an offence which broadly criminalises persons facilitating illegal immigration and stay:

Any individual who shall bring into or land in the Philippines [...] any alien not duly admitted by any immigration officer or not lawfully entitled to enter or reside within the Philippines under the terms of the immigration laws, or attempts, conspires with, or aids another to commit any such act, [...] shall be guilty of an offence, and upon conviction thereof, shall be fined not less than five thousand pesos but not more than ten thousand pesos, imprisoned for not less than five years but not more than ten years, and deported if he is an alien.

Figure 7: Elements of s 46 1<sup>st</sup> alt Immigration Act 1940

Physical elements	
conduct/result	bringing into or land in the Philippines
object	alien (s 50(b)) not duly admitted by any immigration officer or not lawfully entitled to enter or reside within the Philippines under the terms of the immigration laws (s 50(k)).
Mental elements	
intention	not required
purpose	not required

Section 46 1<sup>st</sup> alt primarily penalises those who transport non-citizens to the Philippines who are not authorised to enter or remain in the Philippines. The term ‘alien’ is defined in s 50(b) to mean any non-citizen. ‘Immigration laws’ refers to the *Immigration Act 1940* and any other law ‘enacted relating to the entry of aliens into the Philippines, and their exclusion, deportation, and repatriation therefrom’: s 50(k).

On the one hand, this offence is narrower than the offence of smuggling of migrants envisaged by the *Smuggling of Migrants Protocol* insofar as it only applies to those who ‘bring into or land’ irregular migrants in the Philippines and does not criminalise facilitation of illegal entry more broadly. On the other, this offence makes mere transportation of irregular migrants an offence and does not require that the perpetrator acts for the purpose of obtaining a financial or other material benefit. Further, there is no requirement that the perpetrator knows or is aware that the migrant is ‘not duly admitted by any immigration officer or not lawfully entitled to enter or reside within the Philippines under the terms of the immigration laws’.

The penalty for this offence involves imprisonment between five and ten years or a fine between PHP 5,000 and 10,000. If the perpetrator is a non-citizen, he or she may also be deported.

### IX.5.2 Article 6(1) Anti-Smuggling of Migrants Bill

Article 6 of the *Anti-Smuggling of Migrants Bill 2016* proposes the introduction of ‘basic offenses’ relating to smuggling of migrants that closely follow the requirements of Article 6 of the *Smuggling of Migrants Protocol*. Proposed Article 6(1) criminalises ‘acts of smuggling of migrants’:

Any person, natural or juridical, who, in order to obtain directly or indirectly a financial or other material benefit, procures the illegal entry of a person into the Philippines or another jurisdiction of which the person is not a national or a permanent resident, commits an offence punishable by imprisonment of six years and one day to 12 years and a fine of not less than PHP 400,000.00 but not more than PHP 1,000,000.00.

Figure 8: Elements of the offence of ‘acts of smuggling of migrants’, Article 6(1) Anti-Smuggling of Migrants Bill

Physical elements	
conduct	procurement
result	illegal entry, Article 3(f)
object	a person into the Philippines or another jurisdiction of which the person is not a national or a permanent resident
Mental elements	
intention	not explicitly required
purpose	in order to obtain, directly or indirectly, a financial or other material benefit

#### IX.5.2.1 Physical elements

The conduct element of proposed Article 6(1) of the *Anti-Smuggling of Migrants Bill 2016* is the ‘procurement’ of illegal entry. The term procurement is not further defined and is broad enough to capture any act or omission that facilitates or enables the illegal entry of another person.

‘Illegal entry’ is further defined in Article 3(f) of the Bill using the same words as the *Smuggling of Migrants Protocol*. Whether or not the entry of a person into the receiving State (which may be the Philippines or another jurisdiction, as the case may be) is illegal will thus depend on the domestic laws of that State.

The object of the offence is referred to as ‘a person into a State Party of which the person is not a national or a permanent resident’.

#### IX.5.2.2 Mental elements

Proposed Article 6(1) refers to the accused’s purpose to obtain a financial or other material benefit. This term is defined in proposed Article 3(d) and is not limited to monetary benefits but may also include other forms of gratification or advantage.<sup>356</sup>

Proposed Article 6(1) contains no additional mental element for the conduct element of ‘procuring’. It appears that, unless a requirement is implied into the provision, strict liability would apply to the element of ‘procuring’. The general principles of Philippine criminal law set out in the *Revised Penal Code* are not applicable to acts criminalised by other legislation.<sup>357</sup> The proposed new *Criminal Code*, if passed, will limit the criminal liability under the proposed *Criminal Code* and any other criminal laws to intentional conduct, unless liability for negligent conduct is specifically provided for by law.<sup>358</sup>

#### IX.5.2.3 Penalty

Offences under proposed Article 6(1) are ‘punishable by imprisonment of six years and one day to 12 years and a fine of not less than PHP 400,000.00 but not more than PHP 1,000,000.00’. Penalties of imprisonment between five years and one day and six years as well as fines between PHP 200,000 and 400,000 apply to attempts to commit the offence. Accomplices and accessories may be punished by imprisonment of between three years and one day and five years as well as a fine of between PHP 100,000 and 300,000.

<sup>356</sup> See Section IX.4.5 above.

<sup>357</sup> Article 10 *Revised Penal Code*.

<sup>358</sup> Article 8 *Senate Bill No 1227*.

Proposed Article 6(1) further provides that if the person liable for this offence is a foreigner, they shall be deported after service of sentence, unless they are undergoing investigation or trial or serving sentence for another crime. Thereafter, they shall be barred entry to the country, except upon approval on meritorious grounds by the President of the Philippines or by another officer to whom the President has delegated this specific function.

## IX.6 Offences involving fraudulent travel or identity documents

### IX.6.1 Immigration Act 1940

The *Immigration Act 1940* contains no specific offences for situations in which smugglers acquire, provide, sell, or use fraudulent travel or identity documents for the purposes of smuggling of migrants. A broad interpretation of the offences under s 46 of the Act<sup>359</sup> may allow a reading of that section that captures situations in which one person aids another to enter the Philippines unlawfully by using fraudulent documents, but the offence lacks the constituent elements required by Article 6(1)(b) of the *Smuggling of Migrants Protocol*.

### IX.6.2 Article 6(2) Anti-Smuggling of Migrants Bill 2016

Article 6(2) of the *Anti-Smuggling of Migrants Bill 2016* proposes the introduction of ‘offences in relation to travel or identity documents and immigration stamp’ that closely follow the requirements of Article 6(1)(b) of the *Smuggling of Migrants Protocol*;

Any person who, in order to obtain directly or indirectly a financial or other material benefit, produces, procures, provides or possesses a fraudulent travel or identity document or arrival or departure immigration stamp for the purpose of enabling the smuggling of migrants, commits an offence punishable by imprisonment of four years and one day to six years and a fine of not less than PHP 300,000.000 but not more than PHP 500,000.00.

#### IX.6.2.1 Physical elements

The conduct element of Article 6(2) of the *Anti-Smuggling of Migrants Bill 2016* includes production, procurement, providing, and possession.

These alternative types of conduct relate to fraudulent travel or identity documents or to arrival or departure immigration stamps. Fraudulent travel or identity documents are defined in Article 3(e) of the Bill to 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;
- (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.

This definition is identical to the wording of Article 3(c) of the *Smuggling of Migrants Protocol*. ‘Arrival and departure immigration stamps’ are not further defined in the Bill.

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<sup>359</sup> See Section IX.5.1 above.

### IX.6.2.2 Mental elements

The offence under Article 6(2) of the *Anti-Smuggling of Migrants Bill 2016* requires proof that the person acted ‘in order to obtain directly or indirectly a financial or other material benefit’. This phrase is defined in Article 3(d) of the Bill.<sup>360</sup>

Proposed Article 6(2) contains no additional mental element for the conduct elements. It appears that unless a requirement is implied into the provision, strict liability would apply to the element of ‘procuring’. The general principles of Philippine criminal law set out in the *Revised Penal Code* are not applicable to acts criminalised by other legislation.<sup>361</sup> The proposed new *Criminal Code*, if passed, will limit the criminal liability under the proposed *Criminal Code* and any other criminal laws to intentional conduct, unless liability for negligent conduct is specifically provided for by law.<sup>362</sup>

### IX.6.2.3 Penalty

Offences under proposed Article 6(2) are punishable by imprisonment of four years and one day to six years and a fine between PHP 300,000 and 500,000. Penalties of imprisonment between three years and one day and four years as well as fines of between PHP 100,000 and 300,000 apply to attempts to commit the offence as well as to accomplices. Accessories may be punished by imprisonment of between two years and one day and three years and a fine of between PHP 100,000 and 300,000.

## IX.6.3 Liability of commercial carriers

Liability of commercial carriers for the smuggling of migrants is set out in Article 10 of the *Anti-Smuggling of Migrants Bill 2016*. The Article provides two offences:

1. Any commercial carrier that fails to verify that every smuggled migrant possesses the identity and/or travel documents required to enter the destination State and any transit State, shall be liable to a fine of not less than PHP 100,000.00 but not more than PHP 300,000.00.
2. Any commercial carrier that fails to notify the competent authorities that a person has attempted to or has travelled on that carrier without the identity and travel documents required to enter the destination State or any transit State with knowledge or in reckless disregard of the fact that the person was a smuggled migrant, in addition to any other penalty provided by existing laws, shall be liable to a fine of not less than PHP 50,000.00 but not more than PHP 100,000.00.

Article 10(3) of the Bill contains a number of exclusions to the offences under paragraphs (1) and (2).

## IX.7 Offence of enabling illegal stay

### IX.7.1 Section 46 Immigration Act 1940

Section 46 2<sup>nd</sup> alt of the *Immigration Act 1940* criminalises persons enabling the illegal stay of foreigners:

Any individual who shall [...] conceal, harbour, employ, or give comfort to any alien not duly admitted by any immigration officer or not lawfully entitled to enter or reside within the Philippines under the terms of the immigration laws, or attempts, conspires with, or aids another to commit any such act, [...] shall

<sup>360</sup> See Section IX.4.5 above.

<sup>361</sup> Article 10 *Revised Penal Code*.

<sup>362</sup> Article 8 *Anti-Smuggling of Migrants Bill 2016*.

be guilty of an offence, and upon conviction thereof, shall be fined not less than PHP 5,000 but not more than PHP 10,000, imprisoned for not less than five years but not more than ten years, and deported if he is an alien.

The physical elements broadly correspond with those of Article 6(1)(c) of the *Smuggling of Migrants Protocol*. It covers any type of conduct that enables the other person to remain in the Philippines unlawfully, also including their employment. Unlike Article 6(1)(c), the offence in s 46 2<sup>nd</sup> alt does not make any reference to the means used to enable the foreigner to remain in the Philippines (for example by providing fraudulent documents or by concealing the foreigner's whereabouts).

The offence departs from the requirements of the *Smuggling of Migrants Protocol* in that it contains no reference to smuggling of migrants and, in particular, does not require the perpetrator to act with the purpose of obtaining a financial or other material benefit.

### IX.7.2 Article 6(3) Anti-Smuggling of Migrants Bill 2016

Proposed Article 6(3) of the *Anti-Smuggling of Migrants Bill 2016*, if enacted, would introduce an offence for 'enabling illegal residence, harbouring or concealment' that closely follows the requirements of Article 6(1)(c) of the *Smuggling of Migrants Protocol*:

Any person who, by unlawful acts such as, but not limited to, the use of fraudulent or falsified documents, or the procurement of documents by misrepresentation, in order to obtain directly or indirectly a financial or material benefit, enables another who is not a national or a permanent resident, to remain in the jurisdiction without complying with the necessary requirements for legally remaining in the jurisdiction or any person who harbours or conceals any smuggled migrant shall be punished by imprisonment of six (6) years and one (1) day to twelve (12) years and fine of not less than PHP 400,000.00 but not more than PHP 1,000,000.00.

#### IX.7.2.1 Physical elements

The conduct element of proposed Article 6(3) involves enabling, concealing or harbouring. The object of the first alternative (enabling) is a person 'who is not a national or a permanent resident to remain in the jurisdiction without complying with the necessary requirements for legally remaining in the jurisdiction'. The two other alternatives (harbouring and concealing) refer to 'smuggled migrant' as defined in proposed Article 3(j).<sup>363</sup> This distinction appears to make no significant material difference other than the fact that a smuggled migrant would have entered the receiving country unlawfully.<sup>364</sup> For the first alternative, it does not matter whether a person arrived unlawfully or not and any act of 'enabling' illegal stay would presumably also include acts such as concealing and harbouring that person.

Proposed Article 6(3) further sets out a non-exhaustive list of illegal means used to enable the stay, concealment, or harbouring the other person. This includes any 'unlawful acts such as, but not limited to, the use of fraudulent or falsified documents, or the procurement of documents by misrepresentation'. This reflects the means element of Article 6(1)(c) of the *Smuggling of Migrants Protocol*.

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<sup>363</sup> See Section IX.4.2 above.

<sup>364</sup> See the definition of smuggling of migrants in Art 6(a) of the *Anti-Smuggling of Migrants Bill 2016*; see Section IX.4.1 above.

### IX.7.2.2 Mental elements

The offence under Article 6(3) of the *Anti-Smuggling of Migrants Bill 2016* requires proof that the person acted ‘in order to obtain directly or indirectly a financial or other material benefit’. This phrase is defined in Article 3(d) of the Bill.<sup>365</sup>

Proposed Article 6(3) contains no additional mental element for the conduct elements. It appears that, unless a requirement is implied into the provision, strict liability would apply to the element of ‘procuring’. The general principles of Philippine criminal law set out in the *Revised Penal Code* are not applicable to acts criminalised by other legislation.<sup>366</sup> The proposed new *Criminal Code*, if passed, will limit the criminal liability under the proposed *Criminal Code* and any other criminal laws to intentional conduct, unless liability for negligent conduct is specifically provided for by law.<sup>367</sup>

### IX.7.2.3 Penalty

The statutory penalty for offences under proposed Article 6(3) is the same as that under proposed Article 6(1): are imprisonment between six years and one day and 12 years and a fine of no less than PHP 400,000.00 but not more than PHP 1,000,000.00. Penalties of imprisonment between five years and one day and six years and fines between PHP 200,000 and 400,000 apply to attempts to commit the offence. Unlike proposed Article 6(1) and (2), special penalties for accomplices and accessories are not articulated under proposed Article 6(3).

## IX.8 Aggravating circumstances

The *Immigration Act 1940* contains no aggravating circumstances for any of the offence under this Act.

Article 8 of the *Anti-Smuggling of Migrants Bill 2016* contains a number of aggravations for the offences contained in Chapter II of the Bill. These reflect the aggravating circumstances articulated in Article 6(3)(a) and (b) of the *Smuggling of Migrants Protocol* as well as aggravating circumstances relating to the status of the perpetrator, the status of the smuggled migrant, and other circumstances.

If any of the aggravations in Article 8 apply, the offences are punishable by imprisonment for (up to) 12 years and one day.

### IX.8.1 Endangering the Lives or Safety of Smuggled Migrants

The offences contained in Chapter II of the *Anti-Smuggling of Migrants Bill 2016* are aggravated under Article 8(a) if the offence ‘involved circumstances that endangered or were likely to endanger the life or safety of the smuggled migrant’. This aggravation adopts the language of Article 6(1)(a) of the *Smuggling of Migrants Protocol*.

The offences contained in Chapter II are aggravated under Article 8(c) of the *Anti-Smuggling of Migrants Bill 2016* if they ‘involved serious injury or death of the smuggled migrant or another person’. Where the offending involves death or serious injury to a smuggled migrant, there would appear to be a significant degree of overlap with the aggravation in Article 8(a). The aggravation in Article 8(c)

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<sup>365</sup> See Section IX.4.5 above.

<sup>366</sup> Article 10 *Revised Penal Code*.

<sup>367</sup> Article 8 *Anti-Smuggling of Migrants Bill 2016*.

is broader in one sense as it also applies where the offending involved serious death or injury to persons other than smuggled migrants.

### IX.8.2 Inhuman or Degrading Treatment of Smuggled Migrants

Article 8(b) of the *Anti-Smuggling of Migrants Bill 2016* provides that the offences contained in Chapter II of the Bill are aggravated if they ‘involved circumstances that entail inhumane or degrading treatment of the smuggled migrants’. This corresponds to the aggravating circumstance provided for in Article 6(3)(b) of the *Smuggling of Migrants Protocol*.

Further aggravating circumstances relating to the smugglers’ treatment of the smuggled migrant or other persons are provided for in Article 8(d) and (m) of the *Anti-Smuggling of Migrants Bill 2016*. Article 8(d) establishes an aggravation where the offender ‘took advantage of the particular vulnerability or dependency of the smuggled migrant for financial or other material gain’. Article 8(m) establishes an aggravation where the offender ‘used or threatened to use any form of violence against the smuggled migrant or their family’.

### IX.8.3 Other aggravations

The *Anti-Smuggling of Migrants Bill 2016* provides a range of other aggravating circumstances.

#### IX.8.3.1 Special perpetrator

Offences under Chapter II of the *Anti-Smuggling of Migrants Bill 2016* may be aggravated by the status of the perpetrator. Under Article 8(g), an offence is aggravated if the offender is ‘a public officer who took advantage of his or her position or authority in the commission of the offense’. ‘Public officer’ is not further defined in the Bill.

Under Article 8(n), an offence is aggravated if the offender is ‘a parent, legal guardian or anyone who has the authority or control over the smuggled migrant’.

Article 8(e) provides that an offence is aggravated if the offender ‘at the time of commission of the offense, was previously convicted by final judgment of a “similar offence”’. ‘Similar offence’ is not further defined in the Bill.

Furthermore, under Article 8(f), it is an aggravating factor if the offence was committed by a ‘a group of three (3) or more persons conspiring or confederating with one another’.

#### IX.8.3.2 Special victim

The *Anti-Smuggling of Migrants Bill 2016* contains a number of aggravations which relate to the status of the victim. The offences under Chapter II are aggravated where the smuggled migrant is a child (Article 8(h)), pregnant (Article 8(i)), or a person with a disability (Article 8(j)). The offences are also aggravated where the smuggled migrant is ‘a member of a vulnerable or marginalised group, including indigenous people, as defined by law’ (Article 8(k)).

Under Article 8(f), an additional aggravation applies where the smuggling is committed ‘in large scale’. Smuggling is deemed to have been committed ‘in large scale’ ‘if it is committed against three (3) or more persons, either individually or as a group’.<sup>368</sup>

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<sup>368</sup> Article 8(f) *Anti-Smuggling of Migrants Bill 2016*.



### IX.8.3.3 Miscellaneous

Article 8(l) of the *Anti-Smuggling of Migrants Bill 2016* provides that the offences under Chapter II are aggravated if the offender ‘used a child as an accomplice or participant in the criminal conduct’.

Under Article 8(o) of the *Anti-Smuggling of Migrants Bill 2016*, an offence under Chapter II is aggravated if the offender ‘confiscated, destroyed or attempted to destroy the travel or identity documents of the smuggled migrants’.

## IX.9 Extensions to criminal liability

Questions concerning liability for inchoate and secondary offences relating to the offences under the *Immigration Act 1940* and the *Anti-Smuggling of Migrants Bill 2016* are addressed by specific provisions in these legislative instruments themselves. The general principles of Philippine criminal law set out in the *Revised Penal Code* are not applicable to acts criminalised by other legislation.<sup>369</sup>

### IX.9.1 Immigration Act 1940

Article 46 3<sup>rd</sup> alt of the *Immigration Act 1940* provides that a person who ‘attempts, conspires with, or aids another’ to commit the offences of the smuggling of migrants (Article 46 1<sup>st</sup> alt) or enabling illegal stay (Article 46 2<sup>nd</sup> alt) shall be guilty of an offence. Inchoate offences under Article 46 3<sup>rd</sup> alt carry the same penalties as the completed offences.

### IX.9.2 Anti-Smuggling of Migrants Bill 2016

#### IX.9.2.1 Attempts

Article 6(5) of the *Anti-Smuggling of Migrants Bill* extends criminal liability to any attempt to commit any act criminalised by Chapter II of the Bill. By definition, attempts occur where there are acts to initiate the commission of an offence, but the offender failed to or did not execute all of the elements of the crime, by accident or by reason of some cause other than voluntary desistance.

Special penalties are provided for attempts to commit the offence of smuggling of migrants, offences relating to travel or identity documents and immigration stamps, and enabling illegal residence, harbouring or concealment under Article 6(1), (2) and (3) respectively. Each penalty is lower than the corresponding penalty for the completed offence. The offences of attempting to smuggle migrants and attempting to enable illegal residence, harbouring or concealment under Article 6(1) and (3) are punishable by five years and one day to six years imprisonment and a fine of not less than PHP 200,000 but not more than PHP 400,000. Attempts to commit the offences relating to travel or identity documents and immigration stamps in Article 6(2) are punishable by four years and one day to six years imprisonment and a fine of not less than PHP 300,000 but not more than PHP 500,000.

#### IX.9.2.2 Participation as an accomplice, organising and directing others

Participation as an accomplice in any of the offences under Article 6 of the Bill is criminalised by Article 6(4). Article 6(4) provides that ‘[w]hoever knowingly aids, abets, cooperates in the execution

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<sup>369</sup> Article 10 *Revised Penal Code*.

of the offense by previous or simultaneous acts defined in Article 6 of this Act shall be liable as an accomplice’.

Participation as an accessory to any of the offences contained in Article 6 of the Bill is criminalised by Article 6(7) which provides:

Whoever has the knowledge of the commission of the offense, and without having participated therein, either as principal or accomplice, take part in its commission in any of the following manner [...]:

- (a) by profiting themselves or assisting the offender to profit by the effects of the offense;
- (b) by concealing or destroying the body of the offense or effects or instruments thereof, in order to prevent its discovery; or
- (c) by harbouring, concealing, or assisting in the escape of the principal of the offense, provided the accessory acts with abuse of his or her public functions or is known to be habitually guilty of some other crime.

Special penalties are provided for participating as an accomplice in or accessory to the offences in Article 6(1) and (2). Participation as an accomplice in or accessory to the offence in Article 6(1) is punishable by imprisonment between three years and one day and five years and a fine between PHP 100,000 and 300,000. Participation as an accomplice in or accessory to the offence in Article 6(2) is punishable by three years and one day to four years imprisonment and a fine between PHP 100,000 and 300,000. No special penalty is provided for participating as an accomplice in or accessory to the offence of enabling illegal residence, harbouring or concealment in Article 6(3).

Organising or directing another person to commit an offence under Chapter II of the Bill is criminalised by Article 6(4), which establishes a penalty of imprisonment of six years and one day to twelve years and a fine between PHP 400,000 and 1,000,000.

### IX.9.3 Participation in an organised criminal group

Article 8(f) of the *Anti-Migrant Smuggling Bill 2016* establishes an aggravating circumstance for the offences contained in Chapter II where the offence is committed by a ‘syndicate’. Article 8(f) provides that an offence is committed by a syndicate ‘if carried out by a group of three or more persons conspiring or confederating with one another’. This aggravation reflects two elements of the definition of ‘organised criminal group’ under Article 2 of the *Convention against Transnational Organized Crime*: that the group be composed of three or more persons and that the persons be acting in concert.

## IX.10 Other criminal offences relating to irregular migration

### IX.10.1 Trafficking in persons

Trafficking in persons is criminalised in the Philippines by the *Anti-Trafficking in Persons Act of 2003*,<sup>370</sup> as amended by the *Expanded Anti-Trafficking in Persons Act of 2012*.<sup>371</sup>

#### *Definitions*

Section 3 of the *Anti-Trafficking in Persons Act of 2003* (as amended) defines ‘trafficking in persons’ to mean:

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<sup>370</sup> Republic Act No 9208.

<sup>371</sup> Republic Act No 10364.

the recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harbouring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, servitude or the removal or sale of organs.

This definition is adapted from that in Article 3 of the *Trafficking in Persons Protocol*. In addition to the acts specified in that Article, the definition in the *Anti-Trafficking in Persons Act of 2003* also includes 'hiring', 'providing', 'offering', and 'maintaining'.

### *Offence*

Section 4 of the *Anti-Trafficking in Persons Act of 2003* criminalises a number of acts relating to trafficking in persons. Furthermore, Section 5 creates an offence for promoting trafficking in persons and Section 6 contains aggravated offences. The Act also includes extensions to liability for attempt,<sup>372</sup> aiding and abetting,<sup>373</sup> and accessories<sup>374</sup>.

## IX.10.2 Exploitation of non-citizens

The *Revised Penal Code* contains certain offences that may be relevant to the exploitation of non-citizens, labour migrants et cetera. These include:

- Article 272: Slavery;
- Article 273: Exploitation of child labour;
- Article 274: Services rendered under compulsion in payment of debt;
- Article 278: Exploitation of minors.

## IX.10.3 Illegal recruitment

A further offence relevant to the criminalisation of smuggling of migrants in the Philippines is the illegal recruitment of workers under the *Migrant Workers and Overseas Filipinos Act of 1995*. The purpose of the Act is 'to protect and uphold the dignity of overseas Filipino migrant workers'.<sup>375</sup>

Section 6 of the Act defines illegal recruitment as

any act of canvassing, enlisting, canvassing, enlisting, contracting, transporting, utilising, hiring or procuring workers and includes referring, contract services, promising or advertising for employment abroad, whether for profit or not, when undertaken by non-licensee or non-holder of authority contemplated under Article 13(f) of [...] the Labor Code of the Philippines.

Section 6 further provides that illegal recruitment shall be deemed to have been committed when certain acts are committed by a person.<sup>376</sup>

Under s 7(a) 'any person found guilty of illegal recruitment shall suffer the penalty of imprisonment of not less than six years and one day but not more than 12 years and a fine not less than PHP 200,000.00 nor more than PHP 500,000.00'. In serious cases the penalty can be life imprisonment.<sup>377</sup>

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<sup>372</sup> Article 4-A *Anti-Trafficking in Persons Act of 2003*.

<sup>373</sup> Article 4-B *Anti-Trafficking in Persons Act of 2003*.

<sup>374</sup> Article 4-C *Anti-Trafficking in Persons Act of 2003*.

<sup>375</sup> Section 1 *Migrant Workers and Overseas Filipinos Act of 1995*.

<sup>376</sup> Section 6(a)–(m) *Migrant Workers and Overseas Filipinos Act of 1995*.

<sup>377</sup> Section 7(b) *Migrant Workers and Overseas Filipinos Act of 1995*.

#### IX.10.4 Illegal entry

Section 46 4<sup>th</sup> alt of the *Immigration Act 1940* provides that

any alien who enters the Philippines without inspection and admission by the immigration officials, or obtains entry into the Philippines by wilful, false, or misleading misrepresentation or wilful, false, or misleading representation or wilful concealment of a material fact

shall be guilty of an offence. This offence, which may be applicable to smuggled migrants, is punishable by not less than five years but not more than ten years imprisonment, a fine between PHP 5,000 and 10,000 and deportation of the 'alien'.

### IX.11 Non-criminalisation of smuggled migrants

#### IX.11.1 Current law

The *Immigration Act of 1940* contains no express rules on the non-criminalisation of smuggled migrants.

The Philippines acceded to the *Convention* and the *Protocol relating to the Status of Refugees* on 21 July 1981. A refugee processing system was set up in 1998 with the *Department Order on Establishing a Procedure for Processing Applications for the Grant of Refugee Status*.<sup>378</sup> Section 3(b) this Order states that '[a]n applicant shall not be punished on account of his illegal entry or presence in the country'.

#### IX.11.2 Anti-Smuggling of Migrants Bill 2016

Article 9 of the *Anti-Smuggling of Migrants Bill 2016* provides that a smuggled person shall not be liable to criminal prosecution for being the object of conduct punished under the Bill. This reflects the non-criminalisation principle under Article 5 of the *Smuggling of Migrant Protocol*.

Article 9 does not apply to administrative, criminal or civil liability under 'other relevant laws, including the *Immigration Act 1940*, the *Passport Act 1996*,<sup>379</sup> and the *Revised Penal Code*

### IX.12 Jurisdiction

The *Immigration Act 1940* contains no provisions directly relating to the extent of jurisdiction for offence under the Act.

Proposed Article 5 of the *Anti-Smuggling of Migrants Bill 2016* concerns the application of the offences under the Bill and reflect the jurisdictional requirements of the *Convention against Transnational Organized Crime*.

Article 5(1)(a) provides that the Bill shall apply to acts committed wholly or partially within the territory of the Philippines or maritime areas over which the Philippines exercises territorial sovereignty. Article 5(1)(b) provides that the Bill shall apply to acts committed wholly or partially on

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<sup>378</sup> Department Order No 94/1998.

<sup>379</sup> Republic Act No 8239.

board a vessel flying the flag of the Philippines or an aircraft registered under the laws of the Philippines at the time of the offence. These two provisions correspond to Article 15(1) of the *Convention against Transnational Organized Crime*.

Article 5(2) of the Bill provides that the Bill also applies to offences committed outside the Philippines when the smuggled migrant is a citizen of the Philippines, the offender is a Philippine national or a permanent resident, or the offence is committed with a view to the commission of any grave offence or transnational crime within the territory of the Philippines. These provisions reflect the optional jurisdictional provisions in Article 15(2) of the *Convention against Transnational Organized Crime*.

Article 5(3) of the Bill provides that the Bill shall also apply to conduct engaged in outside of the territory of the Philippines on a vessel reasonably suspected of being engaged directly or indirectly in the smuggling of migrants by sea if one of the following apply:

- (a) the vessel is without nationality or may be assimilated to a vessel without nationality;
- (b) the vessel, although flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State concerned; or
- (c) the vessel is flying the flag or displaying the marks of registry of a Protocol State other than the Philippines.

Article 5(4) of the *Anti-Smuggling of Migrants Bill 2016* provides that the Bill 'shall also apply to conduct committed by persons who are present in the Philippines whose extradition is refused on any ground'.

## IX.13 Observations

Although the Philippines signed the *Smuggling of Migrants Protocol* as early as 2002, it has yet to introduce legislation to fully comply with the Protocol requirements. Presently, the *Immigration Act* of 1940 only marginally criminalises those who facilitate illegal entry of others and existing offences depart from the Protocol requirement on several significant points.

The law of the Philippines may be undergoing great change in the coming months and years. A new *Criminal Code* is likely to enter into operation and revised immigration laws may follow; there is ample evidence that they are urgently needed.

The introduction of a comprehensive *Anti-Smuggling of Migrants Bill* in 2016 is a further important step in bringing Philippine law up-to-date, to meet international requirement, and, importantly, to face the complex challenges of smuggling of migrants in that country. The present draft of the Bill is very highly developed and, as this previous analysis as shown, reflects the spirit and obligations of the *Smuggling of Migrants Protocol* very loyally. It is hoped that the Bill will be revived and passed into law and that this report does its part in paving the way for these important developments.



## X Singapore

### X.1 Overview

Singapore is a destination for irregular migrants from South and Southeast Asia and, to a lesser degree, a transit point for irregular migrants. The country's strong economy and employment opportunities for unskilled and low-skilled workers are the main driving forces for labour migration, both regular and irregular, temporary and permanent. A comprehensive framework regulating labour migration, combined with tight border and immigration controls, limit the opportunities for irregular migration. The smuggling of migrants mostly involves attempts to enter Singapore clandestinely concealed in cars and trucks across the land border with Malaysia, in addition to isolated incidents in which smuggled migrants attempt to enter by sea.

Singapore is not a Party to the United Nations (UN) *Protocol against the Smuggling of Migrant by Land, Sea and Air*.<sup>380</sup> Singapore has ratified the *Convention against Transnational Organized Crime*<sup>381</sup> and acceded to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>382</sup> Offences relating to immigration are set out in Singapore's *Immigration Act* which comprehensively criminalises illegal entry into the country and penalise those who facilitate illegal entry. Smuggling of migrants is not an offence under Singaporean law

### X.2 Ratification of and accession to international legal instruments

Singapore signed the *Convention against Transnational Organized Crime* on 13 December 2000 and ratified the Convention on 28 August 2007. A reservation pursuant to Article 35(3) has been filed, declaring that Singapore does not consider itself bound by Article 35(2) of the Convention concerning the settlement of disputes by way of arbitration and referral to the International Court of Justice.

Singapore is not a Signatory to the *Smuggling of Migrants Protocol*

On 28 September 2015, Singapore acceded to the *Trafficking in Persons Protocol*. Singapore filed a reservation pursuant to Article 15(3), declaring that it does not consider itself bound by Article 15(2) of the Protocol concerning the settlement of disputes by way of arbitration and referral to the International Court of Justice.

### X.3 Domestic laws and policies relating to smuggling of migrants

Although Singapore is not a State Party to the *Smuggling of Migrants Protocol*, the country's *Immigration Act*, first enacted in 1959,<sup>383</sup> contains extensive provisions concerning illegal entry of foreigners, including offences for facilitating their illegal entry and aiding or harbouring irregular migrants in any way.

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<sup>380</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>381</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>382</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

<sup>383</sup> Original enactment: M. Ordinance 12 of 1959. This Chapter uses the version of the *Immigration Act 1959* as in force on 14 September 2017.

Singaporean law does not use the term ‘smuggling of migrants’ but nevertheless captures some of the main requirements of the Protocol. Amendments made to the *Immigration Act* in 2012 further extended the criminalisation of conduct relating to the smuggling of migrants.<sup>384</sup> Statements made in Parliament suggest that these amendments were intended to combat transnational criminal syndicates which have ‘become more sophisticated in their attempts to move people or conveyances illegally in and out of’ Singapore.<sup>385</sup>

The obligations under the *Convention against Transnational Organized Crime* have been implemented with the *Organised Crime Act 2015*.<sup>386</sup> The Act sets out a range of offences for involvement in organised criminal groups and provisions concerning the investigation of organised crime, related offences, and confiscation of assets.<sup>387</sup>

Offences and other provisions concerning trafficking in persons are set out in the *Prevention of Human Trafficking Act 2014*.<sup>388</sup>

Singapore’s *Penal Code* contains general principles of criminal law and specific offences. The *Penal Code* was originally enacted in 1871<sup>389</sup> and is based on the *Indian Penal Code* of 1860 which applied to all of British India.<sup>390</sup>

#### X.4 Terminology and definitions

Singapore’s laws, including the offences in the *Immigration Act 1959*, do not use the term ‘smuggling of migrants’. Instead, the concept of smuggling of migrants is described as ‘the business or trade of conveying prohibited immigrants to or out of Singapore’. This language and the scope of relevant offences do not reflect those of the *Smuggling of Migrants Protocol*.

The term ‘illegal entry’ is not used explicitly in the *Immigration Act 1959*, but the phrase ‘entry in contravention of any provisions of this Act or the regulations’ carries the same meaning.

The object of offences relating to smuggling of migrants, as shown in the following sections, is referred to as any person entering ‘in contravention of any provisions of this Act or the regulations’ in some provisions, and as ‘prohibited immigrant’ in others. The category of prohibited immigrants is further defined in s 8 of the *Immigration Act 1959* which sets out 17 ‘prohibited classes’ of non-citizens. These include, inter alia, persons who are barred from entry into Singapore because they may constitute a risk to public health or security, because they do not have the means to support themselves, or because their entry is unlawful or they are not in possession of valid and genuine travel documents. The latter categories would capture smuggled migrants.

#### X.5 Offence of smuggling of migrants

Singapore does not have a designated offence that criminalises the smuggling of migrants in the way envisaged by the UN *Smuggling of Migrants Protocol*.

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<sup>384</sup> *Immigration (Amendment) Act 2012*, No 18 of 2012.

<sup>385</sup> Singapore, *Parliamentary Debates*, Parliament of the Republic of Singapore, 13 August 2012 (S. Iswaran, Second Minister for Home Affairs).

<sup>386</sup> No 26 of 2015.

<sup>387</sup> See further Singapore, *Parliamentary Debates*, Parliament of the Republic of Singapore, 17 August 2015, 30 (S. Iswaran, Second Minister for Home Affairs).

<sup>388</sup> No 45 of 2014.

<sup>389</sup> Ordinance 4 of 1871.

<sup>390</sup> India Act XLV of 1860.



Some of the offences relating to entry into and departure from Singapore under s 57 of the *Immigration Act 1959* contain elements resembling those under Article 6(1)(a) of the Protocol. Most relevant is s 57(1)(c) of the *Immigration Act 1959*, which makes it an offence to

engage in the business or trade of conveying to or out of Singapore in or on any vehicle, vessel, aircraft or train any person whom [the person] knows or has reasonable grounds for believing is a prohibited immigrant.

Figure 9: Elements of the offence under s 57(1)(c) Immigration Act 1959 (Singapore)

Physical elements	
<b>conduct</b>	engaging the business or trade of conveying
<b>circumstance</b>	to or out of Singapore in or any vehicle, vessel, aircraft or train
<b>object</b>	any person whom the perpetrator knows or has reasonable grounds for believing is a prohibited immigrant
Mental elements	
<b>intention</b>	not specified
<b>purpose</b>	none specified
<b>Knowledge/belief</b>	Knowledge or reasonable grounds for believing that the other person is a prohibited immigrant

### X.5.1 Physical elements

#### X.5.1.1 Engaging in the business or trade of conveying persons in or out of Singapore

The conduct criminalised by s 57(1)(c) involves essentially the transportation of persons in or out of Singapore by land, sea, or air. The offence is specifically casted for persons who operate a business or trade of this nature. This would capture any person running, or working for, legitimate businesses such as transport companies including busses, trucks, airlines, shipping companies, taxis, and chauffeured vehicles. The terms ‘vehicle’ and ‘vessel’ are further defined in s 2(1) of the *Immigration Act 1959*.

The offence under s 57(1)(c) is limited to conduct that concerns entry into or departure from Singapore; smuggling of migrants and facilitation of illegal entry to other countries are not covered by this offence. Because of the explicit reference to ‘vehicle, vessel, aircraft, or train’, the offence in s 57(1)(c) would not cover situations in which smugglers guide migrants to (or out of) Singapore on foot or where they give other instructions on how to reach Singapore unlawfully; s 57(1)(c) merely criminalises the transporter and thus differs from the concept of smuggling of migrants envisaged by the UN Protocol.

The *Immigration Act 1959* does not define the terms ‘engaging in the business or trade’ used in s 57(1)(a). In a decision dated 10 October 2012, the High Court of Singapore held that

the scope of the word ‘business’ as used in s 57(1)(c) of the Act does not connote an element of system and continuity. To be considered to have been engaged in the business of conveying prohibited immigrants, an accused person need not have engaged in more than one act of conveying prohibited immigrants nor does the act of conveying need to have been a completed one.<sup>391</sup>

The High Court further held that ‘the act of “engaging” in the business of conveying prohibited immigrants requires a level of involvement over and above being a mere conveyor of such prohibited

<sup>391</sup> *Mohd Hazwan bin Mohd Muji v Public Prosecutor* [2012] SGHC 203 (10 October 2012) [11]; The rules of aiding and abetting according to ss 107, 116 of the the *Penal Code* are not applicable; see *Public Prosecutor v Ng Yong Leng* [2009] SGHC 155 (3 July 2009).

immigrants'.<sup>392</sup> If this threshold of s 57(1)(c) of the *Immigration Act 1959* is not met, it may be possible to pursue charges for the offence under s 57(1)(aa) or (b) which concern abetting a person to enter or leave Singapore in contravention of the Act.<sup>393</sup>

Section 57(6) of the *Immigration Act 1959* appears to reverse the burden of proof in relation to the element of 'engaging in the business or trade', stating that:

Where, in any proceedings for an offence under subsection (1)(c), it is proved that the defendant has conveyed any prohibited immigrant in any vehicle, vessel, aircraft or train, it shall be presumed, until the contrary is proved, that he is engaged in the business or trade of conveying to Singapore in or on that vehicle, vessel, aircraft or train that prohibited immigrant knowing him to be, or having reasonable grounds for believing him to be, a prohibited immigrant.

In relation to this subsection, the High Court of Singapore further remarked that:

It is clear from the text of s 57(6) of the Act that a distinction is drawn between the mere act of conveying and the act of engaging in the business of conveying, in that the mere act of conveying is insufficient to constitute the act of engaging in the business of conveying. If this were not the case, i.e., if the mere act of conveying without more is sufficient to constitute the act of engaging in the business of conveying, then s 57(6) of the Act would be rendered otiose, and this could not have been Parliament's intention.<sup>394</sup>

#### X.5.1.2 Prohibited immigrant

The object of the offence, i.e. the smuggled migrant, is referred to as a 'prohibited immigrant'. Prohibited immigrants are persons who are not citizens of Singapore who fall into any of the 'prohibited classes' set out in s 8(3) of the *Immigration Act 1959*. This includes, inter alia, people who do not have the means to support themselves and their dependants in Singapore, persons suffering from certain diseases, persons who have previously been convicted and sentenced to imprisonment, prostitutes, vagrants and beggars, and persons seeking to act against the government or public officials. While the list of prohibited classes under s 8(3) is long, their combined scope is narrower than that of the *Smuggling of Migrants Protocol*, which captures any person who is not a national or permanent resident of the receiving State.

#### X.5.2 Mental elements

While the offence in s 57(1)(c) of the *Immigration Act 1959* does not explicitly require proof of a mental element for the conduct, it is difficult to conceive a situation in which a person engages in a business or trade without intention.

The main mental element of the offence under s 57(1)(c) is the defendant's (subjective) knowledge that the other person is a prohibited immigrant or the existence of (objective) reasonable grounds for believing that the other person is a prohibited immigrant. In other words, liability will arise so long as there was reason to believe or the defendant ought to have known that the other person is a prohibited immigrant. Section 57(6) of the *Immigration Act 1959* reverses the burden of proof in relation to this mental element. The effect of this subsection is that all elements of the offence are presumed to be made out if it can be shown that the defendant brought a prohibited immigrant by vehicle, vessel, aircraft, or train into Singapore. The burden to displace this presumption rests with the defendant.

Section 57(1)(c) does not expressly require proof that the defendant sought to obtain, directly or indirectly, a financial or other material benefit from his or her activities. From the available

<sup>392</sup> *Mohd Hazwan bin Mohd Muji v Public Prosecutor* [2012] SGHC 203 (10 October 2012) [29].

<sup>393</sup> *Ibid* [30]; see also *Public Prosecutor v Gabriel Kong Kum Loong* [2011] SGDC 164 (25 May 2011).

<sup>394</sup> *Mohd Hazwan bin Mohd Muji v Public Prosecutor* [2012] SGHC 203 (10 October 2012) [30].

information, including case law, it is not clear whether or not the phrase ‘engaging in a business or trade’ implies that the accused sought to make a profit from his or her activities.

### X.5.3 Penalty

The penalty for offences under s 57(1)(c) of the *Immigration Act 1959* is imprisonment for a term of not less than two years and not more than five years and, subject to ss 325(1) and 330(1) of the *Criminal Procedure Code 2010*, caning with not less than three strokes.

## X.6 Offences involving fraudulent travel or identity documents

Singapore has no offences specifically criminalising the production, procurement, provision, and possession of fraudulent travel or identity documents for the purpose of smuggling of migrants as envisaged by Article 6(1)(b) of the *Smuggling of Migrants Protocol*. Section 57 of the *Immigration Act 1959* contains several provisions that create immigration offences involving forged documents, but these are not directly connected to the smuggling of migrants.

Section 57(1)(l), for instance, makes it an offence to use or have unlawful possession of forged, unlawfully altered, or irregular entry permits, re-entry permits, passes, visas, certificates, or other immigration documents, but the offence criminalises the mere use or possession of these documents and does not require such conduct to support or to be intended to support the smuggling of migrants. In practice, the offence under s 57(1)(l) is more likely to apply to smuggled migrants using or having possession of fraudulent documents, than to smugglers or those providing these documents to smuggled migrants.

Similarly, ss 57(1)(m) and 57(1)(n) create offences for making or having unlawful possession of a range of devices and materials that may be used to produce fraudulent documents or forge documents such as passports and visas. Neither of these offences require proof of a nexus to the smuggling of migrants or to facilitating illegal entry of another person.

Section 57(1)(i), (j), and (k) set out offences for giving, selling, or parting with possession of certain travel or identity documents issued to the perpetrator, using documents issued to another person, and for making false statements to obtain certain documents. These provisions make no reference to smuggling of migrants, may apply to smugglers and smuggled migrants alike, and have no equivalent in the *Smuggling of Migrants Protocol*.

## X.7 Offence of enabling illegal stay

An offence relating to enabling the illegal stay, comparable to Article 6(1)(c) of the *Smuggling of Migrants Protocol*, can be found in s 57(1)(d) of the *Immigration Act 1959*. This section criminalises any person who harbours another

- (i) whom the defendant knows has acted in contravention of the provisions of this Act or the regulations;
- (ii) with reckless disregard as to whether he has acted in contravention of the provisions of this Act or the regulations; or
- (iii) negligently failing to ascertain as to whether he has acted in contravention of the provisions of this Act or the regulations.

### X.7.1 Physical elements

The physical elements of this offence merely consist of the conduct element of ‘harbouring’. This term defined in s 2 of the *Immigration Act 1959* to mean ‘to give food or shelter, and includes the act of assisting a person in any way to evade apprehension’. Therefore, providing almost any level of assistance to a person who is illegally staying in Singapore.

### X.7.2 Mental elements

The offence under s 57(1)(d) is characterised by its mental elements that reflect the accused’s level of awareness of the illegal status of the person harboured. Paragraphs (i), (ii), and (iii) respectively refer to knowledge, recklessness, and negligence. Under s 57(1)(d)(i) the accused must have actual knowledge that the person they are harbouring has acted in contravention of the *Immigration Act 1959* or Singapore’s immigration regulations. Section 57(1)(d)(ii) lowers this threshold to that of acting with reckless disregard as to whether the person is an immigration offender. The mental element under s 57(d)(iii) refers to the accused’s negligence to ascertain whether the person they are harbouring is an immigration offender.

The onus of proof is reversed in relation to subss. (1)(d)(ii) and (iii) where the accused has given shelter to an immigration offender.<sup>395</sup> The accused can rebut the presumption that he or she acted with reckless disregard (para (ii)) by establishing that he or she undertook two of three due diligence measures outlined in s 57(7D).<sup>396</sup> Establishing that all three of these measures were undertaken can also rebut the presumption that the accused acted negligently.<sup>397</sup> The three due diligence measures include: inspecting the other person’s permit or pass, checking the particulars of the permit or pass against their passport, and contacting the Controller of Immigration, the Controller of Work Passes or the other person’s employer to verify their identity.<sup>398</sup>

Similar to other provisions in the *Immigration Act 1959*, s 57(1)(d) is not directly connected to the smuggling of migrants and thus lacks one of the mental elements of the offence under Article 6(1)(c) of the *Smuggling of Migrants Protocol*. In particular, s 57(1)(d) does not require that the accused harbours with the purpose of obtaining a financial or other material benefit.

### X.7.3 Penalty

The statutory penalty for offences under s 57(1)(d)(i) or (ii) is imprisonment for a term between six months and two years and a fine not exceeding SGD 6,000. For offences under s 57(1)(d)(iii) the statutory penalty is imprisonment for a maximum term of 12 months, a fine not exceeding SGD 6,000, or both.

## X.8 Aggravating circumstances

In the absence of designated smuggling of migrants offences, Singaporean law contains no aggravating circumstances. Neither do the offences under the *Immigration Act 1959* concerning facilitation of illegal entry and transporting irregular migrants to (and from) Singapore set out any aggravations for instances in which smugglers maltreat irregular migrants or place them at risk of death or serious harm

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<sup>395</sup> Section 57(7) *Immigration Act 1959*.

<sup>396</sup> Section 57(7C)(a) *Immigration Act 1959*.

<sup>397</sup> Section 57(7C)(b) *Immigration Act 1959*.

<sup>398</sup> Section 57(7D) *Immigration Act 1959*.

as envisaged by Article 6(3) of the *Smuggling of Migrants Protocol*. In such circumstances, liability for general offences under Singapore's *Penal Code* may arise.

## X.9 Extensions to criminal liability

Extensions to criminal liability for the offences under the *Immigration Act 1959*, including inchoate and secondary liability are not set out in the Act itself, thus the general rules under the *Penal Code*.

### X.9.1 Attempts

Section 511 of the *Penal Code* extends liability for any offence under Singaporean law to 'attempts to commit an offence' and 'attempts to cause an offence to be committed'. Liability for attempts requires that the accused 'does any act towards the commission of the offence'. Unless provided otherwise by law, the penalty for attempts is the same as the penalty for the completed offence.

### X.9.2 Participation as an accomplice, organising and directing others

The requirements concerning liability for 'abetment' of a criminal offence are set out in ss 107–120 of the *Penal Code* of Singapore. Under s 107, a person abets the doing of a thing if he or she

- (a) instigates any person to do that thing;
- (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
- (c) intentionally aids, by any act or illegal omission, the doing of that thing.

The penalty for the abettor is the same penalty as provided in the offence, unless special provisions apply.<sup>399</sup> Sections 110–117 set out special provisions concerning liability and punishment of certain situations involving abetment.

### X.9.3 Participation in an organised criminal group

There are no provisions or aggravations concerning the involvement of organised criminal groups in any of the offences under the *Immigration Act* or any other offence under the Singaporean law.

The *Penal Code* contains no further provisions relating to organised criminal groups. Participation in an organised criminal group may be criminalised through the general conspiracy provisions under ss 120A and 120B of the *Penal Code* of Singapore.

Further offences relating to criminal organisations are set out in the *Organised Crime Act 2015*. For instance, s 5 of this Act criminalises membership in an organised criminal group. These are defined as

a group that has as its only purpose, or one of its purposes, the obtaining of a financial or other material benefit from the commission by, or the facilitation of the commission by, any person (whether or not the person is a member of the group) of — (a) any serious offence; or (b) any act outside Singapore that, if it occurred in Singapore, would constitute any serious offence'.<sup>400</sup>

<sup>399</sup> Section 109 *Penal Code* (Singapore).

<sup>400</sup> Section 2(1) *Organised Crime Act 2015*.

## X.10 Other criminal offences relating to irregular migration

### X.10.1 Trafficking in persons

The offences relating to trafficking in persons are set out in the *Prevention of Human Trafficking Act 2014* of Singapore. This Order contains offences such as ‘people trafficking’ (s 3(1)), ‘children trafficking’ (s 3(2)), and ‘exploiting a trafficked person’ (s 6). The offences are modelled closely on the definition of trafficking in persons and the criminalisation requirements of the *Trafficking in Persons Protocol*.

A definition of ‘trafficking in persons’ is integrated into the offence under s 3(1), which refers to

[a]ny person who recruits, transports, transfers, harbours or receives an individual (other than a child) by means of — (a) the threat or use of force, or any other form of coercion; (b) abduction; (c) fraud or deception; (d) the abuse of power; (e) the abuse of the position of vulnerability of the individual; or (f) the giving to, or the receipt by, another person having control over that individual of any money or other benefit to secure that other person’s consent, for the purpose of the exploitation (whether in Singapore or elsewhere) of the individual.

‘Exploitation’ is further defined in s 2 of the Act to mean

sexual exploitation, forced labour, slavery or any practice similar to slavery, servitude or the removal of an organ.

Victims of trafficking are referred to as ‘trafficked victims’, a term that is defined in s 2 to also ‘include an alleged victim of the offence’ of trafficking in persons.<sup>401</sup>

### X.10.2 Exploitation of non-citizens

A further offence concerning the exploitation of non-citizens in Singapore which may be relevant in some smuggling of migrants cases can be found in s 6 of the *Prevention of Human Trafficking Act 2014*: ‘persons who receive payments in connection with exploitation of trafficked victims’. Under this provision:

Any person who knowingly receives any payment in connection with the actual or intended exploitation in Singapore of a trafficked victim shall be guilty of an offence.

This offence complements the trafficking offence under s 3 by shifting the focus from those who traffic for the purpose of exploitation to those who profit from that exploitation.

The *Penal Code* of Singapore contains several other offences that may be relevant in the context of the exploitation of non-citizens, labour migrants et cetera. These include:

- s 367: Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.
- s 370: Buying or disposing of any person as slave;
- s 374: Unlawful compulsory labour.

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<sup>401</sup> Section 2 *Prevention of Human Trafficking Act 2014*.

### X.10.3 Unlawful recruitment of workers

Under Singapore's *Employment Agencies Act*, businesses are required to obtain a license in order to recruit workers for employment either within or outside Singapore.<sup>402</sup> Any person who contravenes these rules is liable to a fine of up to SGD 80,000 or imprisonment for a term of up to two years. This maximum sanction is increased to SGD 160,000 or four years imprisonment in the case of second conviction.<sup>403</sup> Businesses that engage the services of unlicensed employment agencies are also liable to a fine of SGD 5,000 for each individual they employ.<sup>404</sup> These offences may be relevant in the context of smuggling of migrants if persons are recruited abroad fraudulently or otherwise unlawfully to work in Singapore.

### X.10.4 Illegal entry

The criteria concerning the entry of foreigners into Singapore are comprehensively legislated in s 6 of the *Immigration Act 1959*. Irregular migrants entering Singapore may be liable under s 57(1)(a), which makes it an offence to enter Singapore unlawfully. Offences under s 57(1)(a) are punishable cumulatively by imprisonment for a term not exceeding two years and a fine not exceeding SGD 4,000.

## X.11 Non-criminalisation of smuggled migrants

Singapore's *Immigration Act 1959* contains no express provisions exempting smuggled migrants from liability for offences relating to their illegal entry. Most of the offences are aimed squarely at persons who enter, stay, or depart from the country without complying with the legal requirements; smuggled migrants are not conceived as the object (or victim) of offences committed by others.

Singapore is not a State Party to the *Convention and Protocol relating to the Status of Refugees*. The *Immigration Act 1959* makes no express exemptions from criminal liability for refugees who enter or are smuggled into the country illegally. However, s 56(1) *Immigration Act 1959* authorises the Minister to exempt certain persons from the requirements of the Act:

Notwithstanding anything in this Act, the Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in that order provide for any presumptions necessary in order to give effect thereto.

This creates a window to make exceptions, for example, for refugees who are smuggled into Singapore and for others fleeing humanitarian crises. It is not clear, however, whether s 56(1) has been used for these purposes.

## X.12 Jurisdiction

Singapore's *Immigration Act 1959* does not contain any specific provisions establishing the jurisdictional application of offences under the Act. Therefore, it is not clear in which situations Singapore has established its jurisdiction in relation to the offences under s 57 of the *Immigration Act 1959*.

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<sup>402</sup> Article 6(1)-(2) *Employment Agencies Act 1958*.

<sup>403</sup> Article 6(4) *Employment Agencies Act 1958*.

<sup>404</sup> Article 22A *Employment Agencies Act 1958*.

Section 2 of the *Penal Code* establishes Singaporean jurisdiction for breaches of *Penal Code* offences that were done within the country. The jurisdiction of the *Penal Code* is also extended to 'any person liable by law to be tried for an offence committed beyond the limits of Singapore' by s 3. It is not clear whether these provisions also apply to the *Immigration Act 1959* since nothing in the *Penal Code* suggests that these provisions apply to offences under other pieces of Singaporean legislation.

### **X.13 Observations**

While Singapore has comprehensive criminal and immigration laws that address many aspects of facilitating illegal entry into the country, Singapore is not a Signatory of the UN *Smuggling of Migrants Protocol* and does not have offences and other provisions concerning smuggling of migrants as envisaged by the Protocol. While s 57(1)(c) and other provisions of the *Immigration Act 1959* contain elements resembling those under Article 6(1)(a) of the *Smuggling of Migrants Protocol*, the concept of smuggling of migrants is largely absent from Singaporean law.

Several provisions of the Singaporean law do not distinguish between migrant smugglers and smuggled migrants. Some offences may apply to smugglers and smuggled migrants alike and, in respect of offences criminalising the mere use or possession of fraudulent documents, may be more likely to apply to smuggled migrants.

It remains questionable, whether current Singaporean law adequately penalises those who reap large profits from smuggling migrants into the country, from harbouring foreigners, or from furnishing them with fraudulent documents. Moreover, the current law risks criminalising the actions of people or groups of people who smuggle migrants for humanitarian or altruistic reasons.



## XI Thailand

### XI.1 Overview

Thailand is a major transit and destination point for smuggled migrants in Asia. For irregular migrants from Cambodia, the Lao People's Democratic Republic (PDR), and Myanmar, Thailand is a destination country where most migrants seek employment opportunities. For many other migrants from South, Southwest and Southeast Asia and, to a lesser extent, China, Thailand is a transit point en route to other destinations.

Thailand is a State Party to the United Nations (UN) *Convention against Transnational Organized Crime*<sup>405</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>406</sup> Thailand has signed the *Protocol against the Smuggling of Migrant by Land, Sea and Air*<sup>407</sup> but has yet to ratify the Protocol and implement it into domestic law. As a result, there are presently no specific offences pertaining to smuggling of migrants in Thai law. The *Immigration Act* sets out some offences relating to illegal entry and the *Criminal Code* contains offences concerning the production and use of fraudulent documents, but none of these offences are specifically related to the smuggling of migrants.

In late 2017, Thailand established a Working Group chaired by the Attorney-General's Department to develop laws against smuggling of migrants. A draft 'Prevention and Suppression of Migrant Smuggling Act' was presented on 5 April 2018. If passed, this draft would comprehensively implement the majority of obligations under *Smuggling of Migrants Protocol* into a stand-alone statute under Thai law.

### XI.2 Ratification of and accession to international legal instruments

Thailand signed the *Convention against Transnational Organized Crime* on 13 December 2000 and ratified the Convention on 17 October 2013. Thailand signed the *Trafficking in Persons Protocol* on 18 December 2001 and ratified it on 17 October 2013.

Thailand does not consider itself bound by obligations to refer disputes relating to the interpretation or application of the Convention and the Protocols to the International Court of Justice and thus filed reservations on Article 35 of the Convention, Article 20 of the *Smuggling of Migrants Protocol*, and Article 15 of the *Trafficking in Persons Protocol*.

Thailand signed the *Smuggling of Migrants Protocol* on 18 December 2001 but has not yet ratified the Protocol. In 2017, the process leading to the ratification of the Protocol was restarted. Under the leadership of the Attorney-General's Department, an inter-departmental Working Group was established, which met for the first time on 7 November 2017 to consider the process of ratification. On 5 April 2018, the Attorney-General presented a draft 'Prevention and Suppression of Migrant Smuggling Act' was presented. The introductory notes to this draft acknowledge that

existing laws cannot be enforced to effectively prosecute migrant smuggling and are not consistent with Thailand's international obligations pursuant to Thailand's signing [of] the *Protocol against the Smuggling*

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<sup>405</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>406</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

<sup>407</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

*of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.*<sup>408</sup>

‘Therefore’, the note continues, ‘it is expedient to enact this law to criminalize such offences in order to prevent and suppress migrant smuggling more effectively and in compliance with international obligations under the relevant Convention and Protocol.’<sup>409</sup> If enacted, this law would comprehensively implement the *Smuggling of Migrants Protocol* into Thai law.

### **XI.3 Domestic laws and policies relating to smuggling of migrants**

Thailand presently has no specific laws and no designated national policies concerning the smuggling of migrants. Provisions, including offences, relating to illegal entry into Thailand are set out in the *Immigration Act of 1979*, but these do not reflect the concepts and requirements of the *Smuggling of Migrants Protocol*, which has been expressly acknowledged by Thai officials: ‘[E]xisting laws cannot be enforced to effectively prosecute migrant smuggling and are not consistent with Thailand’s international obligations’.<sup>410</sup>

In November 2017, an inter-departmental Working Group chaired by the Attorney-General’s Department has been charged with the development of a definition and an offence of smuggling of migrants. A first meeting to consider the process of ratification was held on 7 November 2017. It was initially envisaged that this Working Group develop a definition and draft an offence of smuggling of migrants which were to be added to the *Immigration Act 1979*. This Working Group later resolved that it would be more appropriate to draft a separate law to criminalise the smuggling of migrants. A draft ‘Prevention and Suppression of Migrant Smuggling Act’ was presented on 5 April 2018 and made available for public consultation for a period between 18 April and 2 May 2018. Submissions received during this period were to be compiled and presented to the Council of Ministers for review. Based on verbal information received, the text of the draft has not changed and, as of 24 June 2019, the draft has yet to be enacted.

The draft ‘Prevention and Suppression of Migrant Smuggling Act’ comprises 46 sections and five chapters. Following provisions stating the title, entry into force, definitions, and control over the Act, Chapter 1 entitled ‘general provisions’, ss 5–15, sets out the main offences and their scope of application. Chapter 2, ss 19–28, sets out ‘measures for the prevention and suppression of migrant smuggling’ which are, for the most part, law enforcement powers. Chapter 3, ss 29–34, contains specific ‘measures to prevent and suppress migrant smuggling by sea’. ‘Defendant cooperation’, ss 35 and 36, is the subject of Chapter 4 which offers incentives and concessions for the cooperation of defendants with law enforcement. Chapter 5, ss 37–46, spells out relevant penalties for offences and violations of other provisions under the draft Act.

The obligations under the *Convention against Transnational Organized Crime* were passed into law with the *Prevention and Suppression of Involvement in Transnational Criminal Organisations Act of 2013*.<sup>411</sup> This Act broadly reflects the criminalisation requirements of the Convention. It sets out specific measures for the investigation of cases involving criminal organisations and for witness cooperation. In conversations held with Thai government officials, it was mentioned that the *Transnational Criminal Organisations Act* is very rarely used in practice and that a Working Group has been established to revisit the implementation of the *Convention against Transnational Organized Crime* in Thailand.

<sup>408</sup> ‘Principle and Rationale’ for the draft ‘Prevention and Suppression of Migrant Smuggling Act’ [emphasis added].

<sup>409</sup> ‘Principle and Rationale’ for the draft ‘Prevention and Suppression of Migrant Smuggling Act’.

<sup>410</sup> ‘Principle and Rationale’ for the draft ‘Prevention and Suppression of Migrant Smuggling Act’.

<sup>411</sup> The present report is based on an unofficial English translation provided by the Office of the Council of State. This translation has been modified for grammar and accuracy for the purpose of this report.

The *Trafficking in Persons Protocol* was implemented into Thai law in 2008 with the *Anti-Human Trafficking Act*.<sup>412</sup>

General principles of criminal law along with special offences are set out in the *Criminal Code* of 1956.<sup>413</sup>

## XI.4 Terminology and definitions

Thai laws, including the *Immigration Act 1979*, presently contain no specific definitions relating to the smuggling of migrants and do not use the terms defined in the *Smuggling of Migrants Protocol*. Section 4 of the *Immigration Act 1979* sets out some definitions for the purposes of this Act, but the terms defined here are not of particular significance for offences relating to smuggling of migrants or illegal entry.

The draft 'Prevention and Suppression of Migrant Smuggling Act' articulates a range of definitions in proposed s 3. The term 'smuggling of migrants' is not defined in this section or elsewhere in the draft Act, though it is used in the main offence under proposed s 5.

Relevantly, proposed s 3 defines the term 'migrant', which is used in s 5 and throughout the draft Act, to mean any 'natural person who does not have the nationality of the destination State or permission to reside under the destination State's immigration laws'. This definition captures regular and irregular migrants and applies to foreign nationals as well as Thai nationals if the latter are in the territory of another country.

## XI.5 Offence of smuggling of migrants

### XI.5.1 Existing law

Thai law presently contains no specific offences criminalising the smuggling of migrants in the manner envisaged by Article 6(1)(a) of the *Smuggling of Migrants Protocol*. This has been acknowledged in conversations held with Thai Government officials for the purpose of this report and in a written note by the Attorney-General.<sup>414</sup>

General offences relating to immigration and illegal entry into Thailand are presently set out in Chapter 8, ss 61–84 of the *Immigration Act 1979*. Some of these offences criminalise the bringing of foreigners and the facilitation of illegal entry into Thailand. In conversations held report with representatives of the Immigration Investigation Division of the Royal Thai Police it was mentioned that in 2016–17 some 40 cases involving charges relating to facilitating illegal entry were prosecuted in Thailand.

The existing offences under the *Immigration Act 1979* do not contain all of the constituent elements of the 'smuggling of migrants' as defined in Article 3(a) of the *Smuggling of Migrants Protocol*. Most of these offences, especially s 63 2<sup>nd</sup> para. and ss 65–79, concern non-compliance by commercial carriers who bring non-citizens into Thailand.

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<sup>412</sup> The present report is based on an unofficial English translation provided by the Office of the Council of State. This translation has been modified for grammar and accuracy for the purpose of this report.

<sup>413</sup> The present report is based on several unofficial English translations incorporating amendments to the Code up to *Criminal Code Amendment (No 17)* of 2003. These translations have been modified for grammar and accuracy for the purpose of this report.

<sup>414</sup> 'Principle and Rationale' for the draft 'Prevention and Suppression of Migrant Smuggling Act'.

### Section 63 Immigration Act 1979

Under s 63 1<sup>st</sup> para. it is an offence for any person to

lead or bring an alien into the Kingdom or in any way support or assist or facilitate an alien in making an entry into the Kingdom in violation to this Act [...].

Figure 10: Elements of the offence in s 63 1<sup>st</sup> para Immigration Act 1979, Thailand

Physical elements	
conduct	Leading or bringing, supporting or assisting or facilitating
result	violation of the <i>Immigration Act</i>
object	alien, s 4
Mental elements	
intention	Proof of intention required, s 59 <i>Criminal Code</i>
purpose	not required

This offence broadly criminalises the bringing of non-citizens into Thailand and the facilitation and aiding of non-citizens in their illegal entry. The term ‘alien’ is defined in s 4 of the *Immigration Act 1979* to mean ‘any natural person who is not of Thai nationality’. These physical elements correspond with those of the offence in Article 6(1)(a) of the *Smuggling of Migrants Protocol*,

Section 59 of the *Criminal Code* states that all offences require proof of intention, unless provided otherwise. This, also applies to offences under other laws.<sup>415</sup> What is missing from s 63 of the *Immigration Act 1979* is any reference to the purpose of obtaining a financial or other material benefit.

Offences under s 63 are punishable by imprisonment not exceeding ten years and a fine not exceeding THB 100,000.

In conversations held with Thai government officials for the purpose of this report, it was mentioned that in the absence of specific smuggling of migrants offences, money laundering offences and proceeds of crime legislation are sometimes used to prosecute those who profit from facilitating irregular entry into Thailand.

#### XI.5.2 Proposed s 5(1), (2) draft Prevention and Suppression of Migrant Smuggling Act

The offence of ‘migrant smuggling’ is set out in s 5 of the draft Prevention and Suppression of Migrant Smuggling Act. This provision sets out four offences; two of which, subs. (1) and (2), reflect the smuggling of migrants offence under Article 6(a) of the *Smuggling of Migrants Protocol*;

Section 5. Whoever, for the purpose of obtaining, directly or indirectly, financial gains, properties or any other material benefits, commits any of the following acts shall be guilty of migrant smuggling:

- (1) arranging for a migrant to enter the Kingdom illegally;
- (2) undertaking any actions to allow a migrant to enter another State in violation of that State’s laws, regardless of whether the migrant passes through the Kingdom or not.

The two offences criminalise smuggling of migrants (1) into the Kingdom of Thailand and (2) into another country. The elements of these offences display a high degree of compliance with the requirements of the *Smuggling of Migrants Protocol*. Importantly, criminal liability is limited to

<sup>415</sup> Section 17 *Criminal Code*.

persons acting with the purpose to obtain, directly or indirectly, a financial or other benefit as required by Articles 3(a) and 6(a) of the Protocol.

Figure 11: Elements of the offence of ‘migrant smuggling’, proposed s 5(1), (2) draft Prevention and Suppression of Migrant Smuggling Act (Thailand)

Physical elements	(1) into Thailand	(2) into another country
<b>conduct</b>	arranging	undertaking any actions
<b>result</b>	illegal entry	allowing unlawful (illegal) entry into another State
<b>object</b>	migrant	migrant
<b>Mental elements</b>		
<b>purpose</b>	obtaining, directly or indirectly, financial gains, properties or any other material benefits	obtaining, directly or indirectly, financial gains, properties or any other material benefits

Figure 11 shows that the elements of these offence require little explanation and mirror those under the Protocol. Subsection (2) exceeds the requirements under the Protocol insofar as smuggling of migrants into countries other than Thailand is criminalised. This offence may be difficult to enforce in practice but can have significance insofar as attempts to smuggle migrants from Thailand are concerned and in cases in which the destination of the smuggling venture cannot be established or has not yet been determined.

The penalty of offences under proposed s 5, stipulated in s 37 of the draft Act, is imprisonment for a term between 4 and 12 years and a fine between THB 400,000 and 1,200,000.

## XI.6 Offences involving fraudulent travel or identity documents

### XI.6.1 Existing law

The *Immigration Act 1979* of Thailand contains no specific offences for the smuggling of migrants involving fraudulent travel or identity documents.

Some instances in which such documents are produced, procured, provided, or otherwise used to facilitate illegal entry into or illegal stay in Thailand may fall under the general offences in ss 63 and 64 of the *Immigration Act 1979*, which criminalise facilitating illegal entry and enabling illegal stay in Thailand. These offences are, however, also not based on the concept of smuggling of migrants in international law and lack any reference to the purpose element concerning a financial or other material benefit.<sup>416</sup>

General offences relating to forgery and alteration of documents can be found in ss 264–269 of the *Criminal Code*. These offences are not specifically connected to the smuggling of migrants.

### XI.6.2 Proposed s 5(4) draft Prevention and Suppression of Migrant Smuggling Act

The draft Prevention and Suppression of Migrant Smuggling Act, if enacted, would introduce a specific offence criminalising the use of fraudulent documents for the purpose of smuggling of migrants. Under proposed s 5(4) a person is guilty of migrant smuggling if the persons, ‘for the purpose of obtain,

<sup>416</sup> See Section XI.5 above and Section XI.7 below.

directly or indirectly, financial gains, properties or any other material benefits’ ‘produces, manufacturing, procures, supplies, possesses, or uses a counterfeited travel document or identity document to facilitate or assist the commission of an offences under (1), (2) or (3)’.

‘Counterfeited travel documents or identity documents’ are further defined in proposed s 5 to mean any

passport, travel document or identity document which has been

- (a) entirely or partially forged by adding, deleting or changing any piece of information in a genuine passport, travel document or identity document;
- (b) issued illegitimately or on the basis of a false statement, threat, corruption, malfeasance or any other illegal mean; or
- (c) used by a person other than its rightful holder.

The penalty for offences under proposed s 5, stipulated in s 37 of the draft Act, is imprisonment for a term between 4 and 12 years and a fine between THB 400,000 and 1,200,000.

This offence follows closely the requirements under Article 6(1)(b) of the *Smuggling of Migrants Protocol*. Crucially, the offence is limited to situations in which the fraudulent travel or identity document is produced, manufactured, procured, supplied, possessed, or used specific for the purpose of facilitating the smuggling of migrants or enabling the illegal stay of a migrants<sup>417</sup> and does not create a generic document fraud offence that is not specifically related to migrant smuggling. The definition of counterfeited travel or identity documents captures a range of documents that are complete forgeries, falsified, obtained, issued or used unlawfully and reflects the language used in Article 3(c) of the *Smuggling of Migrants Protocol*.

## XI.7 Offence of enabling illegal stay

### XI.7.1 Existing law

An offence relating to enabling the illegal stay or harbouring of non-citizens can be found in s 64 of Thailand’s *Immigration Act 1979*:

Whoever, knowing of any alien entering into the Kingdom in violation to this Act, harbours, hides or in any manner assists said alien to evade arrest, shall be punished by imprisonment not exceeding five years and a fine not exceeding THB 50,000.

The physical elements reflect those of the offence under Article 6(1)(c) of the *Smuggling of Migrants Protocol*, though s 64 does not specify any particular means, such as the use of fraudulent documents, to enable the illegal stay or harbour non-citizens.

The third paragraph of s 64 provides an important discretionary exception clause for cases in which assistance is provided by family members:

If the offence under paragraph one is committed in order to assist the father, mother, child, husband or wife of the offender, the court may not punish the offender.

The offence under s 64 requires proof of knowledge of the illegal status of the non-citizen. The second paragraph of this provision allows objective circumstances to be used to establish this mental element and reverses the burden of proof:

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<sup>417</sup> Proposed s 5(3) draft Prevention and Suppression of Migrant Smuggling Act.

Whoever harbours an alien entering the Kingdom in violation to this Act, shall be presumed that he or she is aware that the alien has entered the Kingdom in violation to this Act, unless it can be proven that it is unbeknown to him or her while reasonable care has been taken.

What is missing from s 64—and what renders this offence different to the requirements set by Article 6(1)(c) of the *Smuggling of Migrants Protocol*—is any reference to a financial or other material benefit. Section 64 criminalises any assistance provided to persons residing in Thailand; it is not limited to assistance provided for material gain.

The penalty of offences under s 64 is imprisonment for a maximum of five years and a fine not exceeding THB 50,000.

#### XI.7.2 Proposed s 5(3) draft Prevention and Suppression of Migrant Smuggling Act

If enacted, proposed s 5(3) of the draft Prevention and Suppression of Migrant Smuggling Act would introduce a further offence for persons who enable the illegal stay of foreigners in Thailand. The proposed offence criminalises ‘sheltering, hiding or, in any way, assisting a migrant to remain in the Kingdom or another State illegally, despite knowing that the migrant remains in the Kingdom or the State without permission or the permission has expired or been revoked’ if the accused does so ‘for the purpose of obtain, directly or indirectly, financial gains, properties or any other material benefits’. This offence reflects the requirements under Article 6(1)(c) of the *Smuggling of Migrants Protocol*.

The conduct element of the proposed is cast widely to capture any form assistance rendered to help migrants remain in Thailand illegally. Accommodating (sheltering) and harbouring (hiding) irregular migrants are expressly mentioned. The application of the offence is limited by two mental elements, requiring proof of the purpose to obtain a financial or other benefit and of knowledge that the migrant’s stay in Thailand is illegal. The latter requirement ensures that people who recklessly, negligently or accidentally render assistance to irregular migrants are not caught by this provision.

The penalty of offences under proposed s 5, stipulated in s 37 of the draft Act, is imprisonment for a term between 4 and 12 years and a fine between THB 400,000 and 1,200,000.

### XI.8 Aggravating circumstances

Thai law presently contains no aggravated smuggling of migrants offences. Moreover, the offences relating to facilitating illegal entry and enabling illegal stay in the *Immigration Act 1979* do not have any aggravating circumstances for situations in which the lives or safety of the irregular migrants are placed in danger or in which the perpetrators treat the migrants in inhuman or degrading ways, as envisaged by the *Smuggling of Migrants Protocol*. At a meeting of the Conference of States Parties to the Convention against Transnational Organized Crime in 2008, Thailand reported that ‘its legislation on immigration did not cover any human rights aspect, nor did it identify any conduct establishing aggravating circumstances in accordance with article 6, paragraph 3, of the *Smuggling of Migrants Protocol*’.<sup>418</sup>

The draft Prevention and Suppression of Migrant Smuggling Act, if passed, will introduce several aggravations, including those envisaged by Article 6(3) of the Protocol.

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<sup>418</sup> UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, *Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the first reporting cycle, Report by the Secretariat*, UN Doc CTOC/COP/2005/4/Rev.2 (8 Aug 2008) 9 [23].

Proposed s 39 provides aggravated penalties for the offence of migrant smuggling under s 5 of the draft Act if migrants are placed ‘in a situation where their lives and safety are threatened’. This reflects the aggravation under Article 6(3)(a) of the *Smuggling of Migrants Protocol*. The aggravated penalty under proposed s 39 involves imprisonment for a term of 7 to 15 years and a fine of THB 700,000–1,500,000.

If the offence of migrant smuggling under proposed s 5 results in serious danger or life-threatening disease for the migrant, subjects the migrant to inhumane or degrading treatment, involves the exploitation of the migrant ‘for other benefits’ or torture or cruel treatment of the migrant, the penalty is raised under proposed s 40 to imprisonment between 8 and 20 years and a fine between THB 800,000 and 2,000,000. These aggravating circumstances mirror those under Article 6(3)(b) of the *Smuggling of Migrants Protocol*. If the smuggling of migrants results in a migrant’s death, proposed s 40 provides a higher penalty of 15 to 20 years imprisonment and a fine between THB 1,500,000 and 2,000,000 or life imprisonment.

The draft Prevention and Suppression of Migrant Smuggling Act sets out additional aggravations that are not directly based on the requirements of the *Smuggling of Migrants Protocol* but closely reflect the spirit of both the Protocol and the *Convention against Transnational Organized Crime*.

Proposed s 9 raises the sentence by one and a half times in cases in which a migrant smuggling offence is committed jointly by three or more persons or by a member of an organized criminal group. ‘Organized criminal groups’ are defined in proposed s 3 of the draft Act using the language of Article 2(a) of the *Convention against Transnational Organized Crime*:

‘Organized criminal group’ means a group of three or more persons formed for a period of time, acting in concert with the aim of committing serious offences, with the aim to unlawfully obtain, directly or indirectly, financial gains, properties or any other material benefits.

Proposed s 9 further states that liability for members of organized criminal groups engaged in migrant smuggling extends to all members ‘even though they have not personally committed the offence’. Moreover, proposed s 9 doubles the sentence for cases of migrant smuggling in which the joint commission or commission by a member of an organized criminal group serves ‘to illegally place a migrant under the power of another person’.

Another aggravating factor is set out in proposed s 10 which doubles the sentence in those cases where the offence of migrant smuggling is committed by a person falsely presenting himself or herself as an official exercising official functions.

Under proposed s 11, sentences are doubled if certain officials commit any offence under the draft Act in their capacity. This includes a broad range of high- and low-ranking officials, such as

a member of the House of Representatives, member of the Senate, member of a Local Administration Council, local administrator, government official, employee of a Local Administration Organization, employee of a governmental organization or agency, a director or an executive or an employee of state enterprise, an official, or a director of any organization under the Constitution.

## **XI.9 Extensions to criminal liability**

### **XI.9.1 Attempts**

Sections 80–82 of the *Criminal Code* contain several rules concerning the criminalisation of attempts in Thai criminal law. These rules apply to offences under the *Criminal Code* and also ‘in the case of offences according to other laws, provided that such laws will have been prescribed otherwise’.<sup>419</sup>

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<sup>419</sup> Section 17 *Criminal Code*.



Liability for attempt is thus extended to all offences and if an attempt can be made out, the perpetrator is liable to 'to two-thirds of the punishment as provided by the law for such offence'.<sup>420</sup> Thus any person who attempts to commit the offences of facilitating illegal entry and enabling illegal stay under ss 63 and 64 of the *Immigration Act 1979* is liable accordingly.<sup>421</sup>

Proposed s 7 of the draft Prevention and Suppression of Migrant Smuggling Act extends liability to 'preparing to commit a migrant smuggling offence'. It is not immediately clear whether this complements or supersedes the general attempt provisions under the *Criminal Code*. A plain reading would suggest that 'preparing' to commit offence requires less progression towards completion than attempting to commit an offence. The proposed penalty of 'one third of the punishment provided for' the offence would support such a reading. What remains unclear is just how much or how little an accused would have to do qualify for 'preparing to commit' an offence. Just where criminal liability begins and, more importantly, where it ends is not immediately clear.

### XI.9.2 Participation as an accomplice, organising and directing others

Sections 80–89 of the *Criminal Code* contain several rules concerning liability for participation in an offence. These rules apply to offences under the *Criminal Code* and also 'in the case of offences according to other laws, provided that such laws will have been prescribed otherwise'.<sup>422</sup> Criminal liability is thus extended to any person who participates in the commission of the offences of facilitating illegal entry and enabling illegal stay under ss 63 and 64 of the *Immigration Act 1979*.

Section 86 sets out criminal liability for whoever assists any other person committing an offence. Such persons shall 'be punished by two-thirds of the punishment as provided for such offence'. According to s 84(2) the instigator receives the same punishment as the principal if the offence is committed. Otherwise the instigator 'shall be liable to only one-third of the punishment provided for such offence'.

Proposed s 6 of the draft Prevention and Suppression of Migrant Smuggling Act, if enacted, would extend criminal liability for the offence of migrant smuggling under s 5 to several specific acts designed to assist, facilitate, or participate in the smuggling of migrants. These include:

- (1) arranging, ordering, assisting, inciting, facilitating or advising on the commission of a migrant smuggling offence;
- (2) supporting by providing property to, procuring a place for meeting or lodging for an offender of migrant smuggling;
- (3) assisting by any means in order that an offender of migrant smuggling may not be apprehended;
- (4) demanding, accepting, or agreeing to accept a property or any other benefits from an offender of migrant smuggling in order to preclude him/her from being punished;
- (5) inviting, suggesting or contacting a person to become a member of an organized criminal group for the purpose of committing a migrant smuggling offence.

The penalties for these offences are the same as those for a principal offender under proposed s 5.<sup>423</sup>

Proposed s 8 further extends criminal liability to situation in which two or more persons conspire to commit a migrant smuggling offence under proposed s 5. The penalty for such conspiracies will depend on how far the offenders have proceeded towards the commission of the offence.

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<sup>420</sup> Sections 80(2), 81(2) *Criminal Code*.

<sup>421</sup> See XI.5 and XI.7.3 above.

<sup>422</sup> Section 17 *Criminal Code*.

<sup>423</sup> See proposed s 37 draft Prevention and Suppression of Migrant Smuggling Act.

Proposed s 38 extends liability to legal persons, who are liable for a fine between THB 1,000,000 and 5,000,000 if they commit a migrant smuggling offence. If the commission of the offences is the result of an order from a managing director or manager in charge of the business operation of a legal person (or from a failure to make orders despite a duty to do so), the penalty for such a person is raised to imprisonment for 6 to 12 years and a fine between THB 600,000 and 1,200,000.

### XI.9.3 Participation in an organised criminal group

The offences under the *Immigration Act 1979* are not aggravated in situations in which migrants are smuggled to Thailand by organised criminal groups.

The *Prevention and Suppression of Involvement in Transnational Criminal Organisations Act* of 2013 creates several general offences for participation in organised crime groups. These include:

- Being a member or part of a transnational criminal organisation, s 5(1);
- Agreeing with one or more other persons to commit a serious crime relating to a transnational criminal organisation, s 5(2);
- Being involved in the activities of a transnational criminal organisations, s 5(3); and
- Organising, directing, aiding, abetting, facilitating or counselling the commission of a serious crime of a transnational criminal organisation, s 5(4).

The term ‘transnational criminal organisation’ is defined in s 3 of the Act to mean:

an organised criminal group who has committed an offence with one of the following characteristics:

- (1) an offence committed in more than one State;
- (2) an offence committed in one State but its preparation, planning, direction, support or control of the commission of the offence takes place in another State;
- (3) an offence committed in one State but involves an organised criminal group that commits an offence in more than one State;
- (4) an offence committed in one State but has substantial effects in another State.

The definition of ‘organised criminal group’ in s 3 is based on that of the *Convention against Transnational Organized Crime* to mean

a group of three or more persons, existing for a period of time and acting in concert with the aim of committing a serious offence in order to obtain, directly or indirectly, a financial, proprietorial or other material benefit.

‘Serious offences’ are defined to mean criminal offense ‘punishable by imprisonment for a maximum term of at least four years or a more serious penalty’. This includes the offences of facilitating illegal entry and enabling illegal stay under ss 63 and 64 of the *Immigration Act 1979*.

Proposed s 9 of the draft Prevention and Suppression of Migrant Smuggling Act, as mentioned, sets out aggravating factors for cases in which a migrant smuggling offence is committed jointly by three or more persons or by a member of an organized criminal group.<sup>424</sup> Proposed s 6(5) further makes it an offence to ‘invite, suggest, or contact a person to become a member of an organized criminal group for the purpose of committing a migrant smuggling offence.’

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<sup>424</sup> See Section XI.8 above.

## XI.10 Other criminal offences relating to irregular migration

### XI.10.1 Trafficking in persons

Trafficking in persons is an offence under s 6 of Thailand's *Anti-Human Trafficking Act 2008* (B.E. 2551). When this Act was introduced in 2008, it substituted the former *Measures in Prevention and Suppression of Trafficking in Women and Children Act 1997* (B.E. 2540).

The offences relating to trafficking in persons under s 6 of the *Anti-Human Trafficking Act* demonstrates a relatively high degree of compliance with the requirements of the *Trafficking in Persons Protocol*. The penalty for 'human trafficking' under s 6 of the *Anti-Human Trafficking Act* depends on the age of the victim. Generally, any person who commits an offence is liable to imprisonment for four to ten years and to a fine between THB 80,000 and 200,000. If the offence is committed against a person over 15 years but under 18 years, the offender is liable to imprisonment for a term of six to 12 years and a fine between THB 120,000—240,000. If an offence of human trafficking is committed against a person aged 15 or below, the penalty involves imprisonment for eight to 15 years and a fine between THB 160,000—300,000.

There are no aggravating circumstances for a human trafficking offence under s 6 of the *Anti-Human Trafficking Act*.

### XI.10.2 Exploitation of non-citizens

The offence of enslavement under s 312 of the Thai *Criminal Code* relates to the exploitation of non-citizens and bears some resemblance to the offence of human trafficking found under s 6 of the *Anti-Human Trafficking Act* insofar as it concerns the enslavement of persons:

Whoever brings into or sends out of the Kingdom, removes, buys, sells, disposes or restrains any persons, with the purpose of enslaving the person, or to put the person in a position similar to a slave, shall be liable to imprisonment not exceeding seven years and shall be fined not exceeding fourteen thousand Baht.

Similar to the offence of human trafficking under s 6 of the *Anti-Human Trafficking Act*, the penalty for enslavement depends on the age of the victim.<sup>425</sup>

Section 312bis of the *Criminal Code* provides aggravating circumstances for the offence under s 312 in instances in which the commission of the offence causes the victim bodily or mental harm,<sup>426</sup> grievous bodily harm,<sup>427</sup> or the death to the victim.<sup>428</sup>

### XI.10.3 Illegal entry

Section 11 of the *Immigration Act 1979* requires a person entering or exiting Thailand to do so 'through a port of entry, immigration checkpoint, terminal area, station, or locality and at the prescribed times as published in the makes it an offence to fail to comply with s 11. The offence is punishable with imprisonment not exceeding two years and a fine not exceeding THB 20,000.

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<sup>425</sup> Section 312bis *Criminal Code*.

<sup>426</sup> Section 312bis (1) *Criminal Code*.

<sup>427</sup> Section 312bis (2) *Criminal Code*.

<sup>428</sup> Section 312bis (3) *Criminal Code*.

## XI.11 Non-criminalisation of smuggled migrants

Thailand's *Immigration Act 1979* contains no express exemptions from criminal liability for persons who are smuggled into the country. Thailand is not a State Party to the *Convention and Protocol relating to the Status of Refugees* and its domestic law contains no exemptions for the non-penalisation of refugees entering Thailand illegally.

In conversations held for the purpose of this report with the Ministry of Foreign Affairs in 2017, it was acknowledged that non-criminalisation of smuggled migrants has been identified as an issue of particular concern. It is thus not surprising that proposed s 13 of the draft Prevention and Suppression of Migrant Smuggling Act contains a clear statement that 'criminal proceedings against smuggled migrants for offences under this Chapter shall be prohibited'. This reflects the obligation under Article 5 of the *Smuggling of Migrants Protocol*. Consequently, smuggled migrants cannot be held criminally liable for the offence of migrant smuggling under proposed s 5 or for participating in or preparing such an offence (ss 6 and 7). Proposed s 13 does not prohibit criminal proceeding for other offences, such as those under *Immigration Act 1979* or other statutes.

While not directly linked to the non-criminalisation of smuggled migrants, it is worth noting that proposed s 35 of the draft Act creates a window for key witnesses to voluntarily provide relevant information to the investigating or prosecuting authorities and have charges against them dropped. The power to drop all or some charges is vested in the Attorney General and will depend on the quality and usefulness of the information provided, especially insofar as it may enable the prosecution of key leaders or members of migrant smuggling networks.

## XI.12 Jurisdiction

The *Immigration Act 1979* contains no provisions directly relating to the geographical application of the Act and the jurisdiction for offences under of the Act. Specifically, the *Immigration Act 1979* is silent as to if and when its penal provisions apply to acts committed outside the territory of Thailand.

The *Criminal Code* of Thailand contains several rules concerning jurisdiction, that apply to all offences under the Code as well as other laws.<sup>429</sup>

Section 4(1) of the *Criminal Code* provides that 'whoever, committing an offence within the Kingdom, shall be punished according to law' and thus reflects the requirements of Article 15(1)(a) of the *Convention against Transnational Organised Crime*.

Section 4(2) provides that an offence committed on any Thai vessel or airplane irrespective of place, shall be deemed as being committed within the Kingdom, reflecting the requirements of Article 15(1)(b) of the *Convention against Transnational Organised Crime*.

Section 8(b) provides that an offence committed outside the Kingdom shall be punished in the Kingdom if the offender is a Thai national and if either the victim or the government of the country where the offence occurred seek prosecution. This shares some similarities with the requirements of Article 15(2)(a) of the *Convention against Transnational Organised Crime*.

Geographical jurisdiction for offence under Thai criminal law is expanded by s 5 of the *Criminal Code* which provides:

Whenever any offence is even partially committed within the Kingdom, or the consequence of the commission of which, as intended by the offender, occurs within the Kingdom, or by the nature of the commission of which, the consequence resulting therefrom should occur within the Kingdom, or it could

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<sup>429</sup> Section 17 *Criminal Code*.

be foreseen that the consequence would occur within the Kingdom, it shall be deemed that such offence is committed within the Kingdom.

In case of preparation or attempt to commit any act provided by the law to be an offence, even though it is done outside the Kingdom, if the consequence of the doing of such act, when carried through to the stage of accomplishment of the offence, will occur within the Kingdom, it shall be deemed that the preparation or attempt to commit such offence is done within the Kingdom.

Section 6 further provides that:

Any offence has been committed within the Kingdom, or has been deemed by this Code as being committed within the Kingdom, even though the act of a co-principal, a supporter or an instigator in the offence has been committed outside the Kingdom it shall be deemed that the principal, supporter or instigator has committed the offence within the Kingdom.

Proposed s 12 of the draft Prevention and Suppression of Migrant Smuggling Act contains a further provision relating to jurisdiction, stating that any person committing offences relating to migrant smuggling outside Thailand shall be liable to punishment under the Act in the country. This proposed provision needs to be read in conjunction with s 10 of the *Criminal Code* which spells out further conditions for punishment for offences under Thai law committed abroad.

### **XI.13 Observations**

Although the smuggling of migrants is a significant concern for Thailand and the country is a Party to the *Smuggling of Migrants Protocol*, offences and related provisions criminalising smuggling of migrants and protecting the rights of smuggled migrants are still lacking in Thai law. Given the high levels of irregular migration into, through, and out of the country, there is some urgency to adopt policies and laws along with practical mechanisms that reflect the spirit of the *Smuggling of Migrants Protocol*.

The Thai Government is well aware of this situation and has taken active steps to rectify the current situation and comply with the commitments made under the *Smuggling of Migrants Protocol*. In November 2017, Thai authorities convened a Working Group to develop specific provisions to define and criminalise the smuggling of migrants. In April 2018, a comprehensive draft Prevention and Suppression of Migrant Smuggling Act was presented which, if enacted, would introduce comprehensive and advanced offences and other provisions to prevent and combat the smuggling of migrants into Thai law. The analysis in this chapter has shown that the draft Act adopts the obligations under the Protocol and in some instances exceeds them. A particular strength of the proposed law are the nuanced offences and penalties, especially the many aggravations that provide higher penalties for offences endangering the lives and safety of smuggled migrants or involving organized criminal groups or officials.

It is hoped that the draft Act will swiftly pass into law thus closing a significant gap in the criminalisation of smuggling of migrants in Southeast Asia. The enact would not only serve as a symbol of Thailand's commitment to prevent and combat the smuggling of migrants but also signal to neighbouring countries that have yet to legislate on this issue that legislative change is possible and that it can be swift and effective.



## XII Viet Nam

### XII.1 Overview

Viet Nam is a source country of smuggled migrants. Smuggling of migrants from Viet Nam is directed predominantly at destinations in Eastern and Western Europe, especially cities and towns with Vietnamese communities. There is also significant irregular migration and migrant smuggling to other countries in Southeast Asia and to China.

Viet Nam is not a Signatory of the United Nations (UN) *Protocol against the Smuggling of Migrant by Land, Sea and Air*,<sup>430</sup> though the country is a State Party to the *Convention against Transnational Organised Crime*<sup>431</sup> and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.<sup>432</sup> Criminal law, including offences relating to smuggling of migrants, are comprehensively legislated in the *Criminal Code* of Viet Nam which was enacted in 2015 and entered into force on 1 January 2018. Until that time, the *Penal Code* of 1999, which also contains some offences relating to facilitating irregular migration, remained in operation.

### XII.2 Ratification of and accession to international legal instruments

Viet Nam is a State Party to the international instruments relating to transnational organised crime and trafficking in persons. It signed the UN *Convention against Transnational Organised Crime* on 13 December 2000 and ratified the Convention on 8 June 2012. Viet Nam filed a reservation pursuant to Article 35(3) of the Convention concerning the settlement of disputes, stating that it does not consider itself bound by the provisions of Article 35(2) of this Convention. Further, a declaration was filed stating that”

1. The Socialist Republic of Viet Nam declares that the provisions of the United Nations Convention against Transnational Organized Crime are non-self-executing. The implementation of provisions of this Convention shall be in accordance with constitutional principles and substantive law of the Socialist Republic of Viet Nam, on the basis of bilateral or multilateral cooperative agreements with other States and the principle of reciprocity.
2. Pursuant to principles of the Vietnamese law, the Socialist Republic of Viet Nam declares that it does not consider itself bound by the provisions with regard to the criminal liability of legal persons set forth in Article 10 of this Convention.
3. The Socialist Republic of Viet Nam, pursuant to Article 16 of this Convention, declares that it shall not take this Convention as the direct legal basis for extradition. The Socialist Republic of Viet Nam shall carry out extradition in accordance with the provisions of the Vietnamese law, on the basis of treaties on extradition and the principle of reciprocity.

On 8 June 2012, Viet Nam acceded to the *Trafficking in Persons Protocol*. Viet Nam filed a reservation pursuant to Article 15(3) of the Protocol concerning the settlement of disputes, stating that it does not consider itself bound by the provisions of Article 15(2) of this Convention.

Viet Nam is not a Party to the *Smuggling of Migrants Protocol*. An Action Plan by the Vietnamese Government on the implementation of the *Convention against Transnational Organized Crime* stipulates that Viet Nam may be considering signing the Protocol in the future, though for several

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<sup>430</sup> Opened for signature 15 December 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>431</sup> Opened for signature 15 December 2000, 2225 UNTS 209.

<sup>432</sup> Opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [hereinafter *Trafficking in Persons Protocol*].

years further steps have been delayed. In conversations held in Hanoi for the purpose of this project, it was, however, communicated that it is still the intention of Viet Nam to become a Party to the Protocol at some point in the future.

### **XII.3 Domestic laws and policies relating to smuggling of migrants**

Viet Nam has no separate statute concerning the smuggling of migrants. An offence relating to the smuggling of migrants, along with other criminal offences and general principles of criminal liability, can be found in Viet Nam's new *Criminal Code*. The *Criminal Code* was enacted in 2015 and was meant to enter into force on 1 June 2016. Legislation was later introduced to postpone the entry into force until further amendments to the Code are made. The *Criminal Code* eventually entered into force on 1 January 2018. Until such time, the *Penal Code* of 1999, which also contains some offences relating to facilitating irregular migration, remained in operation. These offences also feature in the new *Criminal Code* in addition to the offence of smuggling of migrants.

In addition, the Government of Viet Nam is likely to produce a further piece of legislation, an act relating to smuggling of migrants, in coming years, which may stipulate further details about various types of smuggling as well as prevention, cooperation, and protection measures along with provisions concerning the return of smuggled migrants. Moreover, the Council of Judges, comprising up to 17 of Viet Nam's most senior judges, is likely to produce guidelines pertaining to the interpretation of the new offences on smuggling of migrants that serve a quasi-precedential function in the Vietnamese legal system.

Obligations arising from Viet Nam's ratification of the *Convention against Transnational Organized Crime* are similarly reflected in provisions under the new *Criminal Code*.

General provisions relating to immigration are contained in *Law No 47/2014/QH13 of 16 June 2014 of the National Assembly on entry, exit, transit, and residence of foreigners in Viet Nam*.

Viet Nam's obligations under the *Trafficking in Persons Protocol* are implemented into domestic law by *Law No 66/2011/QH12 of 29 March 2011 on Preventing and Combatting Human Trafficking*.

### **XII.4 Terminology and definitions**

The terminology employed by the *Smuggling of Migrants Protocol* is not used in Viet Nam's laws. Existing and new offences do not use the term 'smuggling of migrants' and terms such as 'financial or other material benefit' or 'illegal entry' are also not defined. In general, the terms used in Viet Nam's criminal law are unique to individual provisions, and the new *Criminal Code*, just like its predecessor, the *Penal Code* of 1999, does not have a separate definition section or a 'dictionary' in which commonly used terms are defined or explained. The general part of both Codes is mostly concerned with setting out the general principles of criminal liability under Vietnamese law.

Viet Nam's principal statute concerning immigration, the *Law No 47/2014/QH13 of 16 June 2014 of the National Assembly on entry, exit, transit, and residence of foreigners in Viet Nam* has an interpretation section in Article 3 which explains a number of terms used throughout this statute, but these definitions have no immediate bearing on the offences relating to smuggling of migrants in Viet Nam's criminal law.



## XII.5 Offence of smuggling of migrants

Until the *Criminal Code* of 2015 entered into force, there were no offences criminalising the smuggling of migrants in Vietnamese law. Presently, the *Penal Code* of 1999 only criminalises the facilitation of irregular emigration (departure) as well as instances in which persons are coerced or forced to leave Viet Nam.

### XII.5.1 Facilitating irregular emigration

#### XII.5.1.1 Article 275 Penal Code of 1999

Until the end of 2017, main offence concerning the facilitation of irregular migration was contained in Article 275 of the *Penal Code* of 1999, entitled ‘organising and/or coercing other persons to flee abroad or to stay abroad illegally’. As this title suggests, this offence is not concerned with criminalising those who procure the illegal entry of foreign nationals, but instead concerns facilitating irregular departures from Viet Nam. Article 275 provides:

1. Those who organize and/or coerce other persons to flee abroad or stay abroad in cases other than those stipulated in Article 91 of this Code shall be sentenced to between two years and seven years of imprisonment.
2. If the offence is committed more than once or causes serious or very serious consequences, the offenders shall be sentenced to between five and twelve years of imprisonment.
3. If particularly serious consequences are caused, the offenders shall be sentenced to between twelve and twenty years of imprisonment.

The conduct element of the offence under Article 275(1) consists of the organising or coercing other persons to flee from Viet Nam or to stay abroad. The offence captures situations in which the migrants voluntarily or involuntarily leave Viet Nam or are prevented from returning to Viet Nam.

Not covered by this offence are ‘cases stipulated in Article 91’. This offence entitled ‘fleeing abroad or defecting to stay overseas with a view to opposing the people’s administration’ criminalises migrants who defect from Viet Nam and who live in exile intending to oppose the Vietnamese Government. Article 275(1) expressly exempts such persons from the object of the offence.

The offence under Article 275 is aggravated in cases involving repeat offenders and in cases resulting in ‘serious consequences’ or in ‘particular serious consequences’.

Article 275 has been used on several occasions to prosecute persons who organised for migrants to be smuggled abroad. In 2012, for instance, six men were sentenced to six and a half years’ imprisonment for organising three boats carrying a total of 124 smuggled migrants to depart Viet Nam for Australia between 2010 and 2011.<sup>433</sup> In 2013, four men received sentences of between one and four years imprisonment for organising two boats to carrying a total of 61 migrants to depart Viet Nam for Australia.<sup>434</sup> In 2014, three men received sentences of between three and a half and five years’ imprisonment for organising for 84 people to be smuggled from Viet Nam to Australia by boat.<sup>435</sup>

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<sup>433</sup> AFP, ‘Vietnam court jails people smugglers over Australian plot’, *ABC News* (online), 28 June 2012 <<http://www.abc.net.au/news/2012-06-28/new-document/4098944>>; AFP, ‘Ring smuggled 124 into Australia’, *Herald Sun* (online), 29 June 2012 <<http://www.heraldsun.com.au/ipad/ring-smuggled-100-into-australia/news-story/89c818f3b5c781999f7cc878111a72c8?nk=34ed9cc46b7c572474b3a2e7b38c6a1d-1509617151>>.

<sup>434</sup> ‘Vietnam jails 4 men over Aust boat trip’, *The Sydney Morning Herald* (online), 12 June 2013 <<http://news.smh.com.au/breaking-news-world/vietnam-jails-4-men-over-aust-boat-trip-20130612-2o3or.html>>; AFP, ‘Vietnam jails four people smugglers’, *ABC News* (online), 12 June 2013 <<http://www.abc.net.au/news/2013-06-12/vietnamese-smugglers/4750260>>.

<sup>435</sup> ‘Vietnam jails 3 for up to 5 yrs for sending 84 to Australia’, *Tuoi Tre News* (online), 25 July 2014 <<http://tuoitrenews.vn/society/21227/vietnam-jails-3-for-up-to-5-yrs-for-sending-84-to-australia>>.

### XII.5.1.2 Articles 349, 350 Criminal Code of 2015

The new *Criminal Code* contains two provisions that mirror the offence under Article 275 of the *Penal Code* of 1999.

New Article 350 creates an offence for ‘coercing other persons to flee abroad or to stay abroad illegally’. The offence is punishable by imprisonment between two and seven years. A further offence for ‘organising [or] intermediating for other persons to flee abroad or to stay abroad illegally’, punishable by imprisonment between one and five years, is set out in new Article 349 of the *Criminal Code*. The aggravations of this offence share some similarities with the smuggling of migrants offence under Article 6(1)(a) of the *Smuggling of Migrants Protocol* insofar as they involve aggravations concerning financial benefits gained from facilitating irregular migration. Whereas the Protocol conceives of this as a mental element, the aggravations under new Article 349(2) and (3) use profit as a physical element, such that it has to be shown that that financial benefit was actually earned, not merely intended.

Similar to the predecessor offence in Article 275 of the *Penal Code* of 1999, the new offences under Articles 349 and 350 of the *Criminal Code* of 2015 do not apply in cases where people are brought or forced out of the country or are instigated to leave Viet Nam for political reasons. For such cases, new Article 120 provides a separate offence entitled ‘organising, coercing, inciting other persons to flee abroad or defect to stay overseas with a view to opposing the people’s administration’. Persons assisting illegal emigration in such circumstances are punishable by imprisonment for five to 15 years, or 12 to 20 years in cases of a ‘particularly serious nature’. Persons making preparations for committing the offence in Article 120(1) are punishable by imprisonment for one to five years under new Article 120(3).

### XII.5.2 Smuggling of migrants

With the entry into force of the *Criminal Code*, an offence capturing most of the elements of ‘smuggling of migrants’ within the meaning of the *Smuggling of Migrants Protocol* has come into effect. Under new Article 348(1):

Persons who, due to their own benefits, organise or intermediate for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam shall be sentenced to between 1 year and 5 years of imprisonment.

This offence is aggravated in the circumstances set out subsections (2) and (3), which are further discussed in Section XII.8 below.

Figure 12: Elements of the offence of ‘organizing, intermediating for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam’, new Article 348(1) Criminal Code

Physical elements	
conduct	organising or intermediating
result	illegal entry, stay or exit
object	any person [whose entry, stay or exit is illegal]
Mental elements	
intention	not specified
purpose	due to their own benefits

#### X.5.1.1 Physical elements

The conduct element of new Article 348(1) involves the ‘organising’ or ‘intermediating’ of the illegal entry, exit or stay in Viet Nam of another person. The terms organising and intermediating are not further defined in the *Criminal Code*. It is suggested that it involves situations in which illegal entry etc. is facilitated in a professional or commercial manner. This broadly corresponds with the conduct element of ‘procuring’ in the *Smuggling of Migrants Protocol*.

Unlike the Protocol, new Article 348(1) is not limited to facilitating illegal entry, but also extends to situations where the accused ‘organises’ or ‘intermediates’ the illegal stay or exit of another person. ‘Organising or intermediating illegal stay’ may be seen as the equivalent of ‘enabling illegal stay’ under Article 6(1)(b) of the Protocol;<sup>436</sup> ‘brokering illegal exit’ has no equivalent in international law.

The object of the offence, the smuggled migrant, is not further specified in new Article 348(1); it can be any person whose entry, exit or stay in Viet Nam is illegal.

#### X.5.1.2. Mental elements

The offence under new Article 348(1) requires that the accused acts ‘due to their own benefits’. This expression is not further defined and may be a very literal translation of the Vietnamese phrase. In the absence of any information to the contrary, it can be assumed that the expression is to be understood to mean for personal gain. This interpretation would bring this element in line with the *Smuggling of Migrants Protocol’s* mental element ‘in order to obtain, directly or indirectly, a financial or other material benefit’.

The new *Criminal Code* is silent on the mental element for the conduct element of ‘organising’ or ‘intermediating’. There is no provision of the *Criminal Code* which provides that criminal offences must be committed intentionally unless otherwise provided. It is, however, difficult to conceive how ‘organising’ or ‘intermediating’ could involve anything less than intention.

#### X.5.1.3 Penalty

The offence under new Article 348(1) carries a penalty of one to five years imprisonment. Under new Article 348(4), the offender may also be liable to a fine of between VND 10,000,000 and 50,000,000 and may be prohibited from holding certain positions or doing certain jobs for one to five years.

## XII.6 Offences involving fraudulent travel or identity documents

Based on the available information, it appears that Vietnamese law does not contain specific offences criminalising the use of fraudulent travel or identity documents in connection with the smuggling of migrants. General offences pertaining to document fraud may be found in the *Criminal Code* of 2015.

*Law No. 47/2014/QH13 on entry, exit, transit and residence of foreigners in Vietnam*, which entered into force on 1 January 2015, prohibits a number of acts in relation to fraudulent documents. Article 5(6) prohibits buying, selling, leasing, lending, borrowing or falsifying entry, exit or residence permits in order for foreigners to enter, leave, transit through or reside in Viet Nam. The use of fake documents to enter, leave, transit through or reside in Viet Nam is prohibited by Article 5(3). Article 5(4) prohibits providing false information or documents in order to obtain permission for entry, exit, transit or residence in Viet Nam. Article 5(4) requires that the false information or documents be provided in order to obtain permission for entry, exit, transit or residence in Viet Nam. The

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<sup>436</sup> See further Section XII.7 below.

prohibitions are administrative offences that may be followed by sanctions; they are not criminal offences within the meaning of the *Penal Code* and the new *Criminal Code*.<sup>437</sup>

## XII.7 Offence of enabling illegal stay

The *Penal Code* of 1999 contains no offence of enabling illegal stay equivalent to that contemplated by Article 6(1)(c) of the *Smuggling of Migrants Protocol*. As mentioned above, Article 275 of the *Penal Code* contains an offence of organising and/or coercing others to stay abroad illegally. This offence is, however, limited to stay abroad from Viet Nam and does not cover illegal stay in Viet Nam. A new offence of ‘organising or intermediating illegal stay’ in Viet Nam can be found in Article 348 of the new *Criminal Code* of 2015.

### XII.7.1 Organising and/or coercing others to stay abroad illegally

#### XII.7.1.1 Article 275 Penal Code of 1999

Article 275(1) of the *Penal Code* of 1999 provides:

Those who organise and/or coerce other persons to flee abroad or stay abroad in cases other than those stipulated in Article 91 of this Code shall be sentenced to between two years and seven years of imprisonment.

As mentioned in Section XII.5.1.1 above, the conduct element of the offence in Article 275(1) consists of the organising or coercing other persons to flee from Viet Nam or to stay abroad. This offence is not concerned with criminalising those who procure the illegal stay of foreign nationals in Viet Nam, but rather concerns facilitating illegal stay abroad. Article 275(1) expressly excludes from its operation cases captured by Article 91 of the *Penal Code* of 1999, ‘fleeing abroad or defecting to stay overseas with a view to opposing the people’s administration’.

The offence in Article 275(1) is aggravated by Article 275(2) if it is ‘committed more than once or causes serious or very serious consequences’. The offence is aggravated by Article 275(3) if ‘particularly serious consequences are caused’.

#### XII.7.1.2 Articles 349, 350 Criminal Code of 2015

Articles 349 and 350 of the new *Criminal Code* of 2015 concern facilitating irregular emigration from Viet Nam. Article 349 criminalises ‘organising [or] intermediating for others to flee abroad or to stay abroad illegally’. Likewise, Article 350 concerns ‘coercing other persons to flee abroad or to stay abroad illegally’.

### XII.7.2 Brokering illegal stay in Viet Nam

Article 348(1) of the *Criminal Code* of 2015 introduces a new offence that criminalises enabling illegal stay in Viet Nam. New Article 348(1) provides:

Persons who, due to their own benefits, organise or intermediate for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam shall be sentenced to between 01 year and 5 years of imprisonment.

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<sup>437</sup> Article 2 *Penal Code* of 1999; Article 2 new *Criminal Code* of 2015.

The offence of ‘brokering illegal stay’ contained in Article 348(1) may be regarded as the equivalent of ‘enabling illegal stay’ under Article 6(1)(b) of the *Smuggling of Migrants Protocol*.<sup>438</sup> This offence is aggravated in the circumstances set out subsections (2) and (3), which are further discussed in Section XII.8 below.

Figure 13: Elements of the offence of ‘organising, intermediating for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam’, new Article 348(1) *Criminal Code of 2015*

Physical elements	
<b>conduct</b>	organising or intermediating
<b>result</b>	illegal entry, stay or exit
<b>object</b>	any person [whose entry, stay or exit is illegal]
Mental elements	
<b>intention</b>	not specified
<b>purpose</b>	due to their own benefits

#### XII.7.2.1 Physical elements

The conduct element of new Article 348(1) involves the ‘organising’ or ‘intermediating’ of the illegal entry, exit or stay in Viet Nam of another person. The terms organising and intermediating are not further defined in the *Criminal Code*. It is suggested that they refer to situations in which illegal stay etc. are facilitated in a professional or commercial manner. This broadly corresponds with the conduct element of ‘procuring’ in the *Smuggling of Migrants Protocol*.

The object of the offence, the smuggled migrant, is not further specified in new Article 348(1); it can be any person whose entry, exit or stay in Viet Nam is illegal.

#### XII.7.2.2 Mental elements

The offence under new Article 348(1) requires that the accused acts ‘due to their own benefits’. This expression is not further defined and may be a very literal translation of the Vietnamese phrase. In the absence of any information to the contrary, it can be assumed that the expression is to be understood to mean for personal gain. This interpretation would bring this element in line with the *Smuggling of Migrants Protocol’s* mental element ‘in order to obtain, directly or indirectly, a financial or other material benefit’.

The new *Criminal Code* is silent regarding the mental element for the conduct elements of organising or intermediating. There is no provision of the *Criminal Code* which provides that criminal offences must be committed intentionally unless otherwise provided. It is, however, difficult to conceive how organising or intermediating could involve anything less than intention.

#### XII.7.2.3 Penalty

The offence under new Article 348(1) carries a penalty of one to five years imprisonment. Under new Article 348(4), the offender may also be liable to a fine of between VND 10,000,000 and 50,000,000 and may be prohibited from holding certain positions or doing certain jobs for one to five years.

<sup>438</sup> See further Section XII.7 below.

## XII.8 Aggravating circumstances

Both the *Penal Code* of 1999 and the new *Criminal Code* of 2015 establish aggravating circumstances in relation to the offences of smuggling of migrants enabling illegal stay. These aggravating circumstances do not reflect those under Article 6(3)(a) and (b) of the *Smuggling of Migrants Protocol*.

### XII.8.1 Endangering the Lives or Safety of Smuggled Migrants

#### XII.8.1.1 Article 275 Penal Code of 1999

Article 275 of the *Penal Code* of 1999 does not contain specific aggravating circumstances for endangering the lives or safety of smuggled migrants. However, Article 275(2) and (3) establish two levels of aggravations relating to the consequences of the offence. Article 275(2) provides that where the offence ‘causes serious or very serious consequences’ an aggravated penalty of between five and 12 years imprisonment shall apply. Article 275(3) provides that where ‘particularly serious consequences are caused’ an aggravated penalty of between 12 and 20 years imprisonment shall apply. Whereas the aggravation contemplated by Article 6(3)(a) of the *Smuggling of Migrants Protocol* concern the objective risk to the migrants concerned, the aggravations in Article 275(2) and (3) are directed at the actual consequences of the offending. This may be the case, for instance, where the offending results in serious injury or death to a migrant or another person.

#### XII.8.1.2 Articles 348–350 Criminal Code of 2015

The new offences in Article 348 (organising, intermediating for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam), Article 349 (organising, intermediating for other persons to flee abroad or to stay abroad illegally) and Article 350 (coercing other persons to flee abroad or to stay abroad illegally) of the new *Criminal Code* of 2015 contain no aggravations relating to endangering the lives or safety of the smuggled migrants.

Articles 348(3)(c) and 349(3)(c) provide an aggravated penalty of seven to 15 years imprisonment if the respective offences result in the death of a person. An aggravated penalty of 12 to 20 years imprisonment applies if the offence in Article 350 results in the death of a person.<sup>439</sup>

### XII.8.2 Inhuman or Degrading Treatment of Smuggled Migrants

Aggravations relating to inhuman or degrading treatment of smuggled migrants are neither contained in Article 275 of the *Penal Code* of 1999 nor in the new offences under Articles 349, 349, and 350 of the *Criminal Code* of 2015. The aggravations of causing ‘serious or very serious consequences’ or ‘particularly serious consequences’ in Article 275(2) and (3) of the *Penal Code* of 1999 are, however, broad enough to capture some instances of inhuman or degrading treatment of smuggled migrants or, indeed, other persons.

### XII.8.3 Other aggravations

#### XII.8.3.1 Article 275 Penal Code of 1999

As already mentioned, Article 275(2) and (3) of the *Penal Code* of 1999 establish two levels of aggravations relating to the consequences of the offence. Article 275(2) provides that where the

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<sup>439</sup> Article 350(3)(b) *Criminal Code* of 2015.

offence 'causes serious or very serious consequences', an aggravated penalty of between five and 12 years imprisonment shall apply. Article 275(3) provides that where 'particularly serious consequences are caused' an aggravated penalty of between 12 and 20 years imprisonment shall apply. Additionally, the aggravated penalty of five to 12 years' imprisonment in Article 275(2) also applies where the offence is committed more than once.

#### XII.8.3.2 Articles 348 and 349 Criminal Code of 2015

Articles 348 and 349 of the new *Criminal Code* of 2015 establish two levels of aggravated offending for the respective basic offences contained in these provisions. Articles 348(2) and 349(2) provide that an aggravated penalty of five to ten years imprisonment applies where one of the following circumstances is present:

- the offender abuses his or her position or power to commit the offence;
- the offence has been committed more than once;
- the offence involves five to ten people;
- the offence has been committed in a professional manner;
- the illegal profit earned from the offending is between VND 100,000,000 and VND 500,000,000; or
- in the case of 'dangerous recidivism'.

In addition to establishing an aggravation for offences resulting in the death of a person, as discussed above, Articles 348(3) and 349(3) provide that an aggravated penalty of seven to 15 years imprisonment applies where the offence involves 11 or more people or if the illegal profit earned from the offending exceeds VND 500,000,000.

The aggravations concerning financial benefits gained from facilitating irregular migration in Articles 348 and 349 share some similarities with the smuggling of migrants offence under Article 6(1)(a) of the *Smuggling of Migrants Protocol*. Whereas the Protocol conceives of financial or other material benefit as a mental element, the aggravations under new Article 348(2) and (3) and new Article 349(2) and (3) use profit as a physical element, such that it has to be shown that that financial benefit was actually earned, not merely intended.

As with the basic offences in Articles 348 and 349, each of the aggravated offences in these provisions may also result in the offender being liable for a fine of between VND 10,000,000 and 50,000,000 and being prohibited from holding certain positions or doing certain jobs for one to five years under Articles 348(4) and 349(4).

#### XII.8.3.3 Article 350 Criminal Code of 2015

New Article 350 of the *Criminal Code* of 2015 contains two levels of aggravated offending. Some, but not all, of these aggravations overlap with the aggravations contained in Articles 348 and 349. Article 350(2) provides that an aggravated penalty of five to 12 years imprisonment shall apply where one of the following circumstances is present:

- the offence has been committed more than once;
- the offences involves five to ten people;
- the offence is committed in a professional manner;
- the offender commits the offence for 'despicable motives'; and
- in the case of 'dangerous recidivism'.

Article 350(3) provides that an aggravated penalty of 12 to 20 years imprisonment shall apply where the offence involves 11 or more people or the offence results in the death of a person.

## XII.9 Extensions to criminal liability

Provisions concerning inchoate and secondary liability are set out in Chapter III of the *Penal Code* of 1999 and Chapter III of the new *Criminal Code* of 2015. The provisions of the new *Criminal Code* of 2015 relating to inchoate and secondary liability largely replicate the equivalent provisions of the *Penal Code* of 1999 and generally meet the requirements of Article 6(2) of the *Smuggling of Migrants Protocol*.

Chapter III of the *Penal Code* of 1999 establishes liability for attempt of and complicity in the offence of organising or coercing others to flee abroad or to stay abroad illegally (Article 275). Chapter III of the new *Criminal Code* of 2015 establishes liability for attempt of and complicity in the offences of organising, intermediating for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam (Article 348), organising, intermediating for other persons to flee abroad or to stay abroad illegally (Article 349) and coercing other persons to flee abroad or to stay abroad illegally (Article 350).

The provisions in Chapter III of the *Penal Code* of 1999 and Chapter III of the new *Criminal Code* of 2015 establishing inchoate and secondary liability only apply to crimes. They therefore do not apply to the prohibitions relating to fraudulent travel or identity documents in *Law No. 47/2014/QH13 on entry, exit, transit and residence of foreigners in Vietnam*, which as previously mentioned, are merely administrative offences.

### XII.9.1 Attempts

#### *Penal Code of 1999*

Articles 17 and 18 of the *Penal Code* of 1999 extends criminal liability to ‘preparing the commission of a crime’ (Art 17) and to ‘incomplete commission of a crime’ (Art 18).

Preparing the commission of a crime involves ‘to search for, prepare instruments or create other conditions for committing crimes’. Criminal liability for preparation is limited to ‘very serious’ and ‘particularly serious crimes’. According to Article 8(3):

very serious crimes are crimes which cause very great harm to society and the maximum penalty bracket for such crimes is fifteen years of imprisonment; particularly serious crimes are crimes which cause exceptionally great harms to society and the maximum penalty bracket for such crimes shall be over fifteen years of imprisonment, life imprisonment or capital punishment.

This would only apply to some of the aggravations of the offence of ‘organising and/or coercing other persons to flee abroad or to stay abroad illegally’ under Article 275 of the *Penal Code* of 1999. The basic offence and some aggravations do not meet this threshold.

Liability for ‘incomplete commission of a crime’ under Article 18 of the *Penal Code* of 1999 extends to all offences. This provision resembles common law rules concerning liability for attempts most closely. An ‘incomplete crime’ is defined as ‘a crime that is not carried out to the end because of reasons beyond the offender’s control’.

#### *Criminal Code of 2015*

The new *Criminal Code* of 2015 alters the definition of ‘preparation for a crime’ in new Article 14(1) to mean ‘searching for, preparing instruments, means or creating other conditions to commit crimes; or establishing, participating in a criminal group [...]’. Under the new provision, liability for preparation is limited to a closed list of specified offences set out in subsection (2). This list does not include any of the offences relating to smuggling of migrants under Articles 348–350.



New Article 15 concerns ‘incomplete commission of a crime’ using the same language and scope of application as Article 18 of the *Penal Code* of 1999. This also extends liability to the smuggling of migrants offences.

### XII.9.2 Participation as an accomplice, organising and directing others

Article 20 of the *Penal Code* of 1999 establishes liability for participation as an accomplice which includes, inter alia, organising and directing others. Article 20 is substantially replicated in Article 17 of the new *Criminal Code* of 2015. Article 20 of the *Penal Code* of 1999 and Article 17 of the *Criminal Code* of 2015 reflect the requirements of criminalising participating as an accomplice and organising or direct others under Article 6(2)(b) and (c) of the *Smuggling of Migrants Protocol*.

Article 20(1) of the *Penal Code* of 1999 and Article 17(1) of the *Criminal Code* of 2015 provide that ‘[c]omplicity is a situation in which two or more people deliberately commit the same crime’. Article 20(2) of the *Penal Code* of 1999 and Article 17(3) of the *Criminal Code* define an accomplice as ‘an organiser, perpetrator, instigator, or abettor’. Each of these provisions further define perpetrator as ‘the person who directly commits the crime’. Organiser is defined as ‘the mastermind behind the commission of the crime’. Instigator is defined as a person who entices or encourages another person to commit a crime. Abettor is defined as ‘the person who provides spiritual or material assistance in the commission of the crime’.

Because the conduct elements of the offences of organising or coercing others to flee abroad or to stay abroad illegally (Article 275 *Penal Code* of 1999), organising, intermediating for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam (Article 348 *Criminal Code* of 2015) and organising, intermediating for other persons to flee abroad or to stay abroad illegally (Article 349 *Criminal Code*) are cast widely, it may be difficult in some cases to separate primary liability of a perpetrator from secondary liability as an organiser, instigator or abettor.

### XII.9.3 Participation in an organised criminal group

Article 20(3) of the *Penal Code* of 1999 and Article 17(2) of the new *Criminal Code* of 2015 define ‘organised crime’ as ‘a form of complicity in which the accomplices cooperate closely in committing the crime’. As mentioned earlier,<sup>440</sup> both the *Penal Code* and the *Criminal Code* provide that ‘[c]omplicity is a situation in which two or more people deliberately commit the same crime’ and define ‘accomplice’ as ‘an organiser, perpetrator, instigator, or abettor’.<sup>441</sup> Neither the *Penal Code* nor the *Criminal Code* contain a specific offence of participation in an organised criminal group.

The offences of organising, intermediating for other persons to illegally exit, enter Vietnam or illegally stay in Vietnam (Article 348 *Criminal Code* of 2015), organising, intermediating for other persons to flee abroad or to stay abroad illegally (Article 349), and coercing other persons to flee abroad or to stay abroad illegally (Article 350) are aggravated when committed in a ‘professional manner’.<sup>442</sup> Article 48(1) of the *Penal Code* of 1999 and Article 52(1) of the new *Criminal Code* of 2015 provide that where a crime is committed in an organised manner, or where a crime is committed in a professional manner, this is to be considered an aggravating factor in sentencing. Article 52(2) of the new *Criminal Code* of 2015 further provides that where a circumstance is defined as a basis for an aggravated penalty, it shall not be considered an aggravating factor in sentencing. As such, the circumstance of the offence being committed in a professional manner could not be considered an aggravating factor in sentencing where it is the basis for an aggravated penalty under Articles 348(2),

<sup>440</sup> See Section XII.9.2 above.

<sup>441</sup> Articles 20(1), (2) *Penal Code* of 1999; Articles 17(1), (3) *Criminal Code* of 2015.

<sup>442</sup> Articles 348(2)(d), 349(2)(d), 350(2)(c) *Criminal Code* of 2015.

349(2) or 350(2) of the new *Criminal Code* of 2015. Unlike commission in a professional manner, Articles 348, 349 and 350 do not establish aggravated penalties for commission in an organised manner. Commission in an organised manner may therefore be considered as an aggravated factor in sentencing for each of these offences.

Article 275 of the *Penal Code* of 1999 does not establish aggravated penalties for commission in an organized or professional manner, so these factors may duly be considered aggravating factors in sentencing under Article 48(1) of the *Penal Code*.

## **XII.10 Other criminal offences relating to irregular migration**

### **XII.10.1 Trafficking in persons**

Trafficking in persons is criminalised in Viet Nam by the *Penal Code* of 1999 and, since 1 January 2018, in the new *Criminal Code* of 2015. A number of acts relating to trafficking in persons are also prohibited by *Law No. 66/2011/QH12 on Human Trafficking Prevention and Combat*; these can trigger administrative sanctions only.

#### **XII.10.1.1 *Penal Code* of 1999**

The *Penal Code* of 1999 contains two offences relating to trafficking in persons: trafficking in women (Article 119) and trading in, fraudulently exchanging or appropriating children (Article 120).

Article 119(1) provides that '[t]hose who traffic in women shall be sentence to between two and seven years of imprisonment. Article 119(2) provides that an aggravated penalty of five to 20 years imprisonment applies where certain circumstances are present. Persons in breach of Article 119 may also be subject to a fine of between VND 5,000,000 and 50,000,000, probation for one to five years, or a residence ban of one to five years.<sup>443</sup>

Article 120(1) creates an offence for trafficking in children, providing that '[t]hose who trade in, fraudulently exchange or appropriate children in any form shall be sentenced to between three and ten years of imprisonment'. Article 120(2) provides that an aggravated sentence of ten to 20 years' imprisonment applies where certain aggravating circumstances are present. Offenders under Article 120 may also be subject to a fine of between VND 5,000,000 and 50,000,000, a ban from holding certain posts, practising certain occupations or doing certain jobs for one to five years, or probation for one to five years.<sup>444</sup>

#### **XII.10.1.2 *Criminal Code* of 2015**

The new *Criminal Code* of 2015 contains a complex set of trafficking in persons offences.

##### *Trafficking in adults*

Article 150(1) of the new *Criminal Code* entitled 'human trafficking' criminalises the use of violence, threats to use violence, deception, or employment of other tricks to commit any of the following acts:

- (a) transferring or receiving people in exchange for money, property or other material gains;
- (b) transferring or receiving people for the purpose of sexual exploitation, forced labour, harvesting body organs of victims or for other inhumane purposes; or

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<sup>443</sup> Article 119(3) *Penal Code* of 1999.

<sup>444</sup> Article 120(3) *Penal Code* of 1999.

- (c) recruiting, transporting or harbouring other people for the commission of any of the acts specified in (a) and (b).

A person guilty of the basic offence in Article 150(1) is liable to five to ten years imprisonment.

Article 150 contains two levels of aggravations. The first level, set out in subsection (2), carries a penalty of eight to 15 years imprisonment, for circumstances in which:

- the offence is committed in an organised manner;
- the offence is committed by 'despicable motives';
- the victim suffers from a mental or behavioural disability because of the offence, assessed as being a disability of 11% to 45%;
- the offence results in a physical disability, assessed as being a disability of 31% or more, excluding cases where a victim's organ has been taken;
- the victim is taken across the border out of Viet Nam;
- the offence is committed against two to five people; or
- the offence has been committed more than once.

The second level, set out in Article 150(3), carries a penalty of 12 to 20 years imprisonment and applies in circumstances in which:

- the offence is committed in a professional manner;
- an organ of a victim has been taken;
- the victim suffers from a mental or behavioural disability because of the offence, assessed as being a disability of 46% or more;
- the offence causes the death or suicide of the victim;
- the offence is committed against six or more people; or
- 'dangerous recidivism'.

For the basic and aggravated offences, the offender may also be liable to a fine of between VND 20,000,000 and 100,000,000, be put under mandatory supervision, be prohibited from residence in Viet Nam, or have all or part of his or her property confiscated: Article 150(4).

#### *Trafficking in children*

Under Article 151 of the new *Criminal Code* it is an offence to

- (a) transfer or receive persons aged under 16 years old in exchange for money, property or other material gains except for the case of humanitarian purpose;
- (b) transfer or receive persons aged under 16 years old for the purpose of sexual exploitation, forced labour, harvesting body organs of victims or for other inhumane purposes;
- (c) recruit, transport or harbour persons under 16 years old for the commission of any of the acts specified in (a) and (b).

The penalty for offences under Article 151(1) is seven to 12 years imprisonment. A number of aggravating circumstances are set out in Article 151(2) to which a higher penalty of 12 to 20 years imprisonment apply. The aggravating circumstances contained in Article 151(2) partly reflect those under Article 150(2). Further aggravating circumstances, which partly reflect those under Article 150(3), are set out in Article 151(3) carry a penalty of 18 to 20 years imprisonment or life imprisonment. For the basic and aggravated offences under Article 151, the offender may also be liable to a fine of between VND 50,000,000 200,000,000, be prohibited from holding certain positions or doing certain work for one to five years, be put under mandatory supervision from one to five years or have all or part of his or her property confiscated (Article 151(4)).

The new *Criminal Code* of 2015 also provides for the criminalisation of fraudulently swapping persons under one year of age (Article 152), abduction of persons aged under 16 (Article 153) and trafficking in and appropriation of human tissues or organs (Article 154).

### XII.10.1.3 Law No 66/2011/QH12 on Human Trafficking Prevention and Combat

On 29 March 2011, *Law No 66/2011/QH12 on Human Trafficking Prevention and Combat* by the National Assembly of Viet Nam. Article 1 of the Law states:

This Law provides the prevention, detection and handling of human trafficking acts and other acts in violation of the law on human trafficking prevention and combat: receipt, verification and protection of and support for victims; international cooperation in human trafficking prevention and combat: and responsibilities of the Government, ministries, sectors and localities for human trafficking prevention and combat.

Article 3 of the Law states that a number of acts are prohibited. These include:

1. Trafficking in persons under Articles 119 and 120 of the *Penal Code*. [This will this be amended to say Articles 150 and 151 of the new *Criminal Code*.]
2. Transferring or receiving persons for sexual exploitation, forced labour or removal of human organs for other inhuman purposes.
3. Recruiting, transporting or harbouring persons for sexual exploitation, forced labour, removal of human organs or other inhuman purposes or for committing an act specified in Clause 1 or 2 of this Article.
4. Forcing others to commit an act specified in Clause 1, 2 or 3 of this Article.
5. Acting as a broker for others to commit an act specified in Clause 1, 2 or 3 of this Article.

[...]

Article 23(1) of the Law provides

A person who commits an act specified in Article 3 of this Article shall, depending on the nature and severity of his/her violation, be administratively handled or examined for penal liability.

The provisions under *Law No 66/2011/QH12 on Human Trafficking* are not criminal offences in the narrow sense,<sup>445</sup> but may be followed by administrative sanctions.

### XII.10.2 Unlawful recruitment of workers

Offences relating to the recruitment of workers from Viet Nam may be relevant in some instances of smuggling and trafficking. Viet Nam regulates the placement of its citizens in overseas positions through the *Law on Vietnamese Guest Workers* of 2006. Enterprises providing these services must be licensed and are prohibited from certain acts including:

- Sending workers to areas, sectors, occupations or jobs banned under Vietnamese regulations or by the host nation;
- Tricking Vietnamese guest workers to stay in foreign countries in contravention of the law.<sup>446</sup>

Violating these regulations can result in businesses having their license suspended or revoked.<sup>447</sup>

Viet Nam's *Law on Sending Vietnamese Labourers to Work Overseas of 2005* further prohibits enterprises from taking advantage of overseas work placement arrangements to facilitate unlawful migration of Vietnamese citizens, amongst other prohibited acts.<sup>448</sup> Various administrative sanctions are available for violations of these prohibitions including fines of between VND 15,000,000 and VND 20,000,000 and the suspension of business' licenses to send Vietnamese workers overseas.<sup>449</sup>

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<sup>445</sup> Article 2 *Penal Code* of 1999; Article 2 *Criminal Code* of 2015.

<sup>446</sup> Article 7 *Law on Vietnamese Guest Workers* of 2006.

<sup>447</sup> Articles 14 and 15 *Law on Vietnamese Guest Workers*.

<sup>448</sup> Article 4 *Law on Sending Vietnamese Laborers to Work Overseas*.

<sup>449</sup> Article 26 *Law on Sending Vietnamese Laborers to Work Overseas*.

### XII.10.3 Illegal entry

#### *Law No 47/2014/QH13 on entry, exit, transit and residence of foreigners*

Article 5(3) of *Law No 47/2014/QH13 on entry, exit, transit and residence of foreigners in Vietnam* prohibits the illegal entry, exit or residence in Viet Nam which may be followed by administrative sanctions. Article 5(3) is applicable to smuggled migrants though it is not a criminal offence with criminal sanctions.<sup>450</sup>

#### *Penal Code of 1999*

Article 274 of the *Penal Code* of 1999 makes it an offence for migrants to illegally enter or leave Viet Nam, and to illegally stay abroad or in Viet Nam. This offence applies to repeat offenders as it requires that the person 'has already been administratively sanctioned for such an act but continues the violation'. This criminal offence, which is punishable by imprisonment between three months and two years and a fine between VND 5,000,000 and 50,000,000, would thus not apply to migrants who are smuggled into (or out of) Viet Nam (for a first time). They may, however, be sanctioned administratively.

#### *Criminal Code of 2015*

Article 347 of the new *Criminal Code* of 2015 similarly contains an offence for persons who, having previously been sanctioned administratively, enter, exit or stay in Viet Nam for a second (or further) time. Unlike the predecessor provisions, the new offence does not apply to illegal stay abroad. Offences under Article 347 are punishable by imprisonment for six months to two years and a fine of VND 5,000,000 to 50,000,000.

## **XII.11 Non-criminalisation of smuggled migrants**

Viet Nam's existing and proposed laws contain no express provisions exempting smuggled migrants from liability for offences relating to having been smuggled. Although the smuggling of migrant offences under the new *Criminal Code* of 2015 are aimed squarely at persons who seek to benefit from facilitating the illegal entry, exit, or stay of others, smuggled migrants could conceivably be prosecuted for their role as objects or participants in these offences.

Viet Nam is not a State Party to the *Convention and Protocol relating to the Status of Refugees*. Vietnamese laws make no express exemptions from criminal liability for refugees who enter or are smuggled into the country illegally.

## **XII.12 Jurisdiction**

### XII.12.1 Penal Code of 1999

Jurisdiction for criminal offence under Viet Nam's *Penal Code* of 1999 is set out in Articles 5 and 6. Article 5(1) provides that the *Penal Code* applies to offences committed within the territory of Viet Nam. The first paragraph of Article 6(1) provides that the *Penal Code* applies to acts committed by Vietnamese citizens outside the territory of Viet Nam. The second paragraph of Article 6(1) provides that the *Penal Code* applies to stateless persons resident in Viet Nam. Article 6(2) provides that the

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<sup>450</sup> Article 2 *Penal Code* of 1999; Article 2 *Criminal Code* of 2015.

*Penal Code* applies to criminal offences of foreigners committed outside the territory of Viet Nam in circumstances provided for in international treaties which Viet Nam has signed or to which Viet Nam has acceded.

### XII.12.2 Criminal Code of 2015

The new *Criminal Code* of 2015 builds upon and, once it enters into force, extends the jurisdictional provisions of the *Penal Code* of 1999. Article 5(1) 1<sup>st</sup> para of the new *Criminal Code* of 2015 provides that the Code applies to offences committed within the territory of Viet Nam. The second paragraph provides that the *Criminal Code*, which does not appear in the *Penal Code* of 1999, provides that the *Criminal Code* applies to offences committed on or results thereof occurring on sea-going vessels and airplanes under Vietnamese flag or operating in Viet Nam's exclusive economic zone or continental shelf. These provisions reflect the requirements of Article 15(1)(a) and (b) of the *Convention against Transnational Organized Crime*. Article 6(3) establishes jurisdiction over criminal offences occurring or having consequences on airplanes or sea-going vessels not having Vietnamese nationality at sea and being outside Viet Nam's airspace, where provided for under an international agreement to which Viet Nam is a signatory.

Article 6(1) 1<sup>st</sup> para provides that the new *Criminal Code* applies to acts committed by Vietnamese citizens outside the territory of Viet Nam. This provision expressly extends to Vietnamese corporate entities operating outside the territory of Viet Nam. Article 6(1) 2<sup>nd</sup> para provides that the *Criminal Code* applies to stateless persons permanently residing in Viet Nam. These provisions reflect the optional requirements of Article 15(2)(b) of the *Convention against Transnational Organized Crime*.

Article 6(2) provides that the *Criminal Code* applies to criminal offences committed by foreigners or foreign corporate entities outside the territory of Viet Nam if the offence 'infringe[s] Vietnamese citizens' legitimate rights and interests or interests of the Socialist Republic of Vietnam, or in accordance with provisions of the international treaties of which the Socialist Republic of Vietnam is a member'. This provision partially reflects the optional requirement of Article 15(2)(a) of the *Convention against Transnational Organized Crime*.

## XII.13 Observations

Although Viet Nam has yet to sign the *Smuggling of Migrants Protocol*, it has introduced comprehensive offences that reflect many of the Protocol's provisions and elements. The research for this report coincided with the entry into force of Viet Nam's new *Criminal Code* which added a grant range of offences criminalising various aspects of smuggling of migrants and other conduct associated with smuggling and trafficking in persons.

Viet Nam's new laws on smuggling of migrants are rather complex. There are some uncertainties about the application and interpretation of some offences and their elements, though these may stem from the English language translation of Vietnamese texts. It is noteworthy though that many provisions are concerned with departures from Viet Nam rather than smuggling of migrants into the country, which may raise concerns about possible conflicts with the freedom of movement enshrined in international human rights law.

During the research conducted for the purpose of this report it has become evident that there is growing awareness and recognition by the Vietnamese Government of the benefits of human mobility and migration, including labour migration by Vietnamese nationals, which is occurring on some scale to the Gulf States, Japan, Republic of Korea, and Europe for skilled migrants and to China and Thailand for unskilled migrants. There is also growing official appreciation of remittances sent from

Vietnamese migrants to their country of origin which have grown to a sizeable component of Vietnam's economy.

It is for these reasons, that Viet Nam's renewed interest in acceding to the *Smuggling of Migrants Protocol* should be supported. Accession to the Protocol and compliance with its provisions—which would necessitate some changes to Viet Nam's new *Criminal Code*—are important steps to protect the rights of migrants and to criminalise those who take advantage, financially or otherwise, of persons seeking to move to or leave from Viet Nam.





## XIII ASEAN and Smuggling of Migrants

### XIII.1 Background and mandate

ASEAN, the Association of Southeast Asian Nations, was established on 8 August 1967 in Bangkok, Thailand, with the signing of the *ASEAN Declaration* (also referred to as the *Bangkok Declaration*) by five countries: Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam joined ASEAN on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar followed on 23 July 1997, and Cambodia on 30 April 1999, making up the current ten Member States of ASEAN.

ASEAN was set up as a venue and process in which common interests of Member States would be identified and pursued in cooperative ways.<sup>451</sup> The Association seeks to promote peace, progress, prosperity, and the welfare of people in Member States through a framework of action involving cooperation on political, economic, social, and cultural matters, information exchange and security.<sup>452</sup> The *ASEAN Declaration* was the common determination of the five original Member States to live in peace with one another, to settle disputes peacefully rather than by force, and to cooperate with one another for common purposes.<sup>453</sup> The *Second Bali Concord* of 2003 recognised that the three pillars to ASEAN's own community, namely political and security cooperation, economic cooperation, and socio-cultural cooperation, are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region.<sup>454</sup>

Since its establishment in 1967, ASEAN has made its mark on regional cooperation and development. The organisation offers an avenue for multilateral regional engagement and the pursuit of common goals in a part of the world where no other supranational union or strong regional organisation exists.<sup>455</sup>

ASEAN cooperation on security matters, which involves the fight against transnational crime and smuggling of migrants, evolved over the past 20 years. For the first three decades of its existence, ASEAN deliberately downplayed security matters as the Founding Members sought to avoid the impression that the Association would serve as a defence pact or military alliance. In hindsight, it was clear from the beginning that ASEAN had an important role to play in building peace and security in Southeast Asia.<sup>456</sup>

One of the key elements of establishing a peaceful, secure, and stable region is to enhance ASEAN capacity to address non-traditional security issues effectively and in a timely manner.<sup>457</sup> This involves the enhancement of cooperation against transnational crime, smuggling of migrants, and trafficking in persons.<sup>458</sup> However, due to the lack of proactive migration policies and modern immigration laws, most ASEAN Member States are now facing the problem of irregular migrants entering the countries through illegal channels, including by way of smuggling and trafficking.<sup>459</sup>

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<sup>451</sup> Rodolfo C Severino, *ASEAN* (2008) 6.

<sup>452</sup> *The Declaration of ASEAN Concord* (Bali, Indonesia, 24 February 1976).

<sup>453</sup> Rodolfo C Severino, *ASEAN* (2008) 2.

<sup>454</sup> Christopher Roberts, *ASEAN's Myanmar Crisis* (2009) 2; ASEAN, *2003 Declaration of ASEAN Concord II* (Bali, Indonesia, 7 October 2003) 2 [1].

<sup>455</sup> Mely Caballero-Anthony, *Regional Security in Southeast Asia* (2005) 19.

<sup>456</sup> Rodolfo C Severino, *ASEAN* (2008) 11.

<sup>457</sup> The ASEAN Secretariat, *ASEAN 2025: Forging Ahead Together* (2015) 33.

<sup>458</sup> The ASEAN Secretariat, *ASEAN 2025: Forging Ahead Together* (2015) 37.

<sup>459</sup> Sriprapha Petcharamesree, 'ASEAN and its approach to forced migration issues' (2016) 20(2) *The International Journal of Human Rights* 173, 174; UNODC, *Migrant Smuggling in Asia: Current Trends and Challenges* (2015) 57–72.

## XIII.2 Transnational Crime

### XIII.2.1 ASEAN Ministerial Meetings on Transnational Crime

#### XIII.2.1.1 Mandate and organisation

The topic of transnational crime, which includes the smuggling of migrants, is addressed by designated, regular meetings of relevant ministers from the ten ASEAN Member States.

ASEAN's Ministerial Meetings on Transnational Crime reflect the Associations' recognition of non-traditional security issues.<sup>460</sup> Since the first Ministerial Meeting on 18–20 December 1997, the ASEAN Ministerial Meetings on Transnational Crime and the meetings of senior-officials have become regular ASEAN forums.<sup>461</sup>

In 1997, the ASEAN Ministerial Meetings on Transnational Crime adopted the *ASEAN Plan of Action to Combat Transnational Crime*, which seeks to extend collective efforts and consolidate regional cooperation in this field. The Declaration advocates the exchange of information, legal cooperation, law enforcement, training, and institutional building.<sup>462</sup> Originally, ASEAN cooperation on matters relating to transnational crime was limited to eight crime types, including drug trafficking, terrorism, economic crimes, trafficking in person, money laundering, piracy, arms smuggling, and cybercrime.<sup>463</sup> In 2015, three further crime types—wildlife trafficking, trafficking in timber, and smuggling of migrants—were added to the agenda.<sup>464</sup> Since 1997, ASEAN Ministerial Meetings on Transnational Crime have been convened every two years and, since 2016 every single year.

The *ASEAN Declaration on Transnational Crime* was signed on 20 December 1997 by all Member States.<sup>465</sup> This Declaration broadened and intensified regional cooperation against transnational crime and represents a common position on the issue as well as a joint statement of political support and cooperation against this interconnected phenomenon.<sup>466</sup> The Declaration further encourages Member States to exchange and disseminate information, sign bilateral treaties and mutual assistance agreements, assign police liaison officers to other Southeast Asian capitals, and explore ways of extending cooperation to other organisations, including those of the United Nations (UN) system.<sup>467</sup> The Declaration also mandates the ASEAN Ministerial Meetings on Transnational Crime to coordinate actions of other bodies involved with transnational crime, including the ASEAN Chiefs of National Police (ASEANAPOL) and the ASEAN Senior Officials on Drug Matters (ASOD).

#### XIII.2.1.2 Smuggling of migrants

During the mid-1990s, ASEAN recognised that a range of transnational crimes had become a threat to regional development and stability.<sup>468</sup> The smuggling of migrants (or 'human smuggling') appears to have been first mentioned at an ASEAN Ministerial Meeting in July 1996. At this meeting, ASEAN foreign ministers discussed drug trafficking, smuggling of migrants, trafficking in persons, money laundering, and other types of transnational crime. They shared the view that 'the management of

<sup>460</sup> Irawan Jati, 'Critical Perspective on ASEAN's Security Policy under ASEAN Political and Security Community' (2016) 1(1) *Dauliyah Journal of Islamic and International Affairs* 1, 4; Ralf Emmers, 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003) 13(3) *The Pacific Review* 419, 424.

<sup>461</sup> Rodolfo C Severino, *ASEAN* (2008) 33.

<sup>462</sup> Ralf Emmers, 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003) 13(3) *The Pacific Review* 419, 426.

<sup>463</sup> *1997 ASEAN Declaration on Transnational Crime* (Manila, Philippines, 20 December 1997) 2; Irawan Jati, 'Critical Perspective on ASEAN's Security Policy under ASEAN Political and Security Community' (2016) 1(1) *Dauliyah Journal of Islamic and International Affairs* 1, 12.

<sup>464</sup> Prashanth Paramesaran, 'ASEAN to Step Up Fight Against Transnational Crime', *The Diplomat* (online) 30 September 2015 <<https://thediplomat.com/2015/09/asean-to-step-up-fight-against-transnational-crime/>>.

<sup>465</sup> *1997 ASEAN Declaration on Transnational Crime* (Manila, Philippines, 20 December 1997) 2.

<sup>466</sup> Ralf Emmers, 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003) 13(3) *The Pacific Review* 419, 424.

<sup>467</sup> Ralf Emmers, 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003) 13(3) *The Pacific Review* 419, 425.

<sup>468</sup> Ralf Emmers, 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003) 13(3) *The Pacific Review* 419, 424.

such transnational issues is urgently called for so that they would not affect the long-term viability of ASEAN and its individual member nations'.<sup>469</sup>

Despite the mention of smuggling of migrants at the 1996 meeting, it appears that the ASEAN Ministerial Meetings on Transnational Crime did not further discuss the issue until the 9<sup>th</sup> meeting of this group in September 2013. Here, the ASEAN Ministers

took note of the outcomes of the 16<sup>th</sup> and 17<sup>th</sup> Meeting of Directors-General of Immigration Departments of Consular Affairs Division of the Ministries of Foreign Affairs (DGICM) and encouraged the respective Senior Officials to strengthen regional collaboration on [...] smuggling of migrants.<sup>470</sup>

Following the events in 2015 known as the 'Andaman Sea crisis', which involved the smuggling of migrants and trafficking in persons from Myanmar and Bangladesh to Thailand, Indonesia, and Malaysia, an Emergency ASEAN Ministerial Meeting on Transnational Crime was convened in Malaysia in July 2015 for the purpose of providing a platform for ASEAN Member States to discuss the issue of irregular movement of persons and its connection with the crimes of trafficking in persons and smuggling of migrants.<sup>471</sup> At this meeting, three main issues were discussed: irregular movements of people in Southeast Asia by land and sea, the connection between these movements and smuggling of migrants and trafficking in persons, and a plan of action to resolve the issues.<sup>472</sup> The meeting resulted in multiple resolutions to combat the issue of irregular migration, including the establishment of a trust fund to assist ASEAN Member States in addressing the issue. The meeting closed with the presentation of the *Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia* which seeks to highlight the commitment by Member States to address the irregular migration, smuggling of migrants, and trafficking in persons.<sup>473</sup> Ministers resolved to strengthen law enforcement efforts through information and intelligence sharing. Other measures to address this issue include conducting analysis and studies, developing regional communication campaigns and strengthening cooperation with ASEAN Dialogue Partners and international organisations.<sup>474</sup>

At the 10<sup>th</sup> ASEAN Ministerial Meetings on Transnational Crime in September 2015, Ministers agreed to further step up ASEAN's fight against transnational crime. On this occasion, as mentioned, three additional crime types, including the smuggling of migrants, were added to the agenda of the Ministerial Meetings.<sup>475</sup> In his opening address of the meeting, the then Deputy Prime Minister Mr Ahmad Zahid Hamidi of Malaysia took note of the heightened concerns about cross-border illicit activities along the borders of Malaysia, including the rampant smuggling of migrants.<sup>476</sup> He further noted that:

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<sup>469</sup> Ralf Emmers, 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003) 13(3) *The Pacific Review* 419, 424; citing ASEAN, *Joint Communiqué of the 29th ASEAN Ministerial Meeting (AMM)* (Jakarta, Indonesia, 20–21 July 1996).

<sup>470</sup> *Joint Statement of the Ninth ASEAN Ministerial Meeting on Transnational Crime (9<sup>th</sup> AMMTC)* (Vientiane, Lao PDR, 17 September 2013) para 4.

<sup>471</sup> *Chairman's Statement – Emergency ASEAN Ministerial Meeting on transnational Crime Concerning Irregular Movement of Persons in Southeast Asia* (Kuala Lumpur, Malaysia, 2 July 2015) para 2.

<sup>472</sup> *Chairman's Statement – Emergency ASEAN Ministerial Meeting on Transnational Crime Concerning Irregular Movement of Persons in Southeast Asia* (Kuala Lumpur, Malaysia, 2 July 2015) para 3.

<sup>473</sup> *Kuala Lumpur Declaration on Irregular Movement of Persons in South East Asia* (Kuala Lumpur, Malaysia, 29 September 2015); ASEAN, *Statement On Behalf Of The Association Of Southeast Asian Nations By H.E. Ambassador Karen Tan, Permanent Representative Of The Republic Of Singapore To The United Nations On Agenda Item 106: Crime Prevention And Criminal Justice And Agenda Item 107: International Drug Control, Third Committee, 8 October 2015* (8 October 2015) para 4.

<sup>474</sup> ASEAN, *ASEAN Ministers Meet on Irregular Movement of Persons* (2 July 2015) Association of Southeast Asian Nations <<http://asean.org/asean-ministers-meet-on-irregular-movement-of-persons/>>.

<sup>475</sup> Prashanth Paramesaran, 'ASEAN to Step Up Fight Against Transnational Crime', *The Diplomat* (online) 30 September 2015 <<https://thediplomat.com/2015/09/asean-to-step-up-fight-against-transnational-crime/>>; *Joint Statement of the Tenth ASEAN Ministerial Meeting on Transnational Crime (10<sup>th</sup> AMMTC)* (Kuala Lumpur, Malaysia, 29 September 2015) para 5(i).

<sup>476</sup> Prashanth Paramesaran, 'ASEAN to Step Up Fight Against Transnational Crime', *The Diplomat* (online) 30 September 2015 <<https://thediplomat.com/2015/09/asean-to-step-up-fight-against-transnational-crime/>>.

This issue continues to be one of the main security threats in the region for quite a period, and it reaches the critical level during the middle of this year as well as impacted a few ASEAN member countries, including Malaysia, following the sudden influx of irregular migrants.<sup>477</sup>

### XIII.2.2 Senior Officials' Meeting on Transnational Crime

The Senior Officials Meeting on Transnational Crime (SOMTC) was established in 1999 and meets on an annual basis. Smuggling of migrants (or 'People Smuggling') is one of the areas of cooperation of this group. Several working groups have been established by the Senior Officials Meeting (including the SOMTC Working Group on Trafficking in Persons and the Heads of Specialist Trafficking Units). However, no such groups presently relate to directly smuggling of migrants.

Nevertheless, smuggling of migrants has been identified as a key issue by the Senior Officials Meeting. For instance, at the meeting in Siem Reap on 8–11 June 2015, senior officials discussed 'the complexity of irregular migration and the suffering of the victims who fall prey to human trafficking and people-smuggling crimes.'<sup>478</sup>

The 17<sup>th</sup> Senior Officials Meeting was held in Vientiane from 23–26 May 2017. At this meeting, ASEAN Members reviewed a number of important ASEAN contents such as the Senior Officials Meeting working programs for the period of 2016 to 2018, updates on the progress of the implementation of the ASEAN's 2025 Security–Politics Community Master Plan, and preparation for the agenda for the ASEAN Ministerial Meeting on Transnational Crime Prevention and Combat in 2017.<sup>479</sup>

Myanmar will host the 19<sup>th</sup> Senior Officials Meeting in Nay Pyi Taw from 22–26 July 2019, which follows on from the 18<sup>th</sup> Senior Officials Meeting hosted by Malaysia from 23–28 September 2019 in Putrajaya.

### XIII.2.3 Directors-General of Immigration

The ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of Ministries of Foreign Affairs Meeting (DGICM) was established in 1996 and meets annually. At the 16<sup>th</sup> meeting in September 2012, representatives, concerned by the increasing threat of criminal networks involved in the smuggling of migrants, unanimously agreed to take on the issues of smuggling of migrants and irregular migration under their purview.<sup>480</sup>

At the 17<sup>th</sup> DGICM In August 2013, then Deputy Minister of the Ministry of Public Security of Viet Nam Mr To Lam delivered the opening speech in which he emphasised the important role of ASEAN Immigration and Consular agencies and the close cooperation among them to facilitate the movement of people whilst at the same time effectively combating the smuggling of migrants, irregular migration, and transnational crime.<sup>481</sup>

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<sup>477</sup> Prashanth Paramesaran, 'ASEAN to Step Up Fight Against Transnational Crime', *The Diplomat* (online) 30 September 2015 <<https://thediplomat.com/2015/09/asean-to-step-up-fight-against-transnational-crime/>>.

<sup>478</sup> ASEAN, 'ASEAN to Enhance Cooperation in Combating Transnational Crime' [ASEAN Secretariat News](http://asean.org/asean-to-enhance-cooperation-in-combating-transnational-crime/) (online) 17 June 2015, <<http://asean.org/asean-to-enhance-cooperation-in-combating-transnational-crime/>>.

<sup>479</sup> Duy Tien, 'SOMTC 17 discusses measures to counter transnational crimes', *Public Security News* (online) 25 May 2017 <<http://en.cand.com.vn/Politics/SOMTC-17-discusses-measures-to-counter-transnational-crimes-442699/>>.

<sup>480</sup> ASEAN, 'Joint Press Statement of the Sixteenth Meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of Ministries of Foreign Affairs (DGICM)', *ASEAN Secretariat News* (online) 1 October 2012 <<http://asean.org/joint-press-statement-of-the-sixteenth-meeting-of-the-asean-directors-general-of-immigration-departments-and-heads-of-consular-affairs-divisions-of-ministries-of-foreign-affairs-dgicm/>>.

<sup>481</sup> ASEAN, 'Joint Press Statement of the Seventeenth Meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of Ministries of Foreign Affairs (DGICM)', *ASEAN Secretariat News* (online) 30 August 2013 <<http://www.asean.org/wp-content/uploads/images/Statement/joint%20press%20statement%20-%2017th%20dgicm%20adopted.pdf>>.

At the 21<sup>st</sup> DGICM meeting in November 2017, further views were exchanged on the challenges and significant national and international developments in immigration, information, capacity building programmes and best practices in border management, consular and immigration- related matters.<sup>482</sup> One of the main focus was on establishing new, practical, and effective ways for Member States to work together in combating issues such as smuggling of migrants.<sup>483</sup>

### XIII.3 ASEAN Regional Forum

#### XIII.3.1 General

Starting in 1972, ASEAN began establishing a system of dialogue partnerships by engaging with the major powers in Southeast Asia and beyond. Since then, a growing number of countries have established dialogue partnerships with ASEAN including Japan, Australia, New Zealand, Canada, United States, China, India, and the Russian Federation.<sup>484</sup> Every year, ASEAN foreign ministers meet with these dialogue partners at the Post-Ministerial Conference (PMC) immediately following the ASEAN Ministerial Meeting. Although initially driven by economic motives, in January 1992, the ASEAN Summit directed to convene Post-Ministerial Conferences for the intensification of political and security dialogues among ASEAN and its dialogue partners.<sup>485</sup> This new, expanded forum was set up in 1994 and named the ASEAN Regional Forum (ARF).<sup>486</sup>

The ARF brings together the ten ASEAN Member States as well as representatives from Australia, Bangladesh, Canada, China, Democratic People's Republic of Korea (DPRK), the European Union (EU), India, Japan, Mongolia, New Zealand, Pakistan, Papua New Guinea, Republic of Korea (ROK), the Russian Federation, Sri Lanka, Timor-Leste, and the United States. The centrepiece of the ARF is the meeting of foreign ministers, which is held in conjunction with the annual ASEAN Ministerial Meeting. ARF senior officials meet earlier in the year to prepare for the ministerial meeting and discuss substantive issues on their own.<sup>487</sup> One of the many areas in which the ARF conducts its activities includes transnational crime.<sup>488</sup>

#### XIII.3.2 ARF and the smuggling of migrants

The ARF first discussed the issue of smuggling of migrants at the 11<sup>th</sup> ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime in March 2013 and identified smuggling as one of many major trends in transnational crime.<sup>489</sup> The meeting also recognised the linkages between various types of transnational crime, including terrorism, smuggling of migrants, drug trafficking, and money laundering. The forum concluded that strengthened cooperation through increased information sharing by ARF participants is crucial to identify best practice in addressing these crimes.<sup>490</sup>

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<sup>482</sup> *Joint Press Statement - 21st Meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of the Ministries of Foreign Affairs (DGICM) and Its Related Meetings* (Vientiane, Lao PDR, 22-23 November, 2017) para 3.

<sup>483</sup> Times Reporters, 'ASEAN States set up cooperation on transnational crime prevention', *Vientiane Times* (Vientiane, Laos) 23 November 2017.

<sup>484</sup> Rodolfo C Severino, *ASEAN* (2008) 25.

<sup>485</sup> Rodolfo C Severino, *ASEAN* (2008) 25-6.

<sup>486</sup> Rodolfo C Severino, *ASEAN* (2008) 26.

<sup>487</sup> Rodolfo C Severino, *ASEAN* (2008) 26.

<sup>488</sup> Rodolfo C Severino, *ASEAN* (2008) 27.

<sup>489</sup> *Co-Chairs Summary Report*, Eleventh ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime (Ha Noi, Viet Nam, 4-5 March 2013) para 12.

<sup>490</sup> *Co-Chairs Summary Report* –Eleventh ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime (Ha Noi, Viet Nam, 4-5 March 2013) para 20.

In his opening remarks at the 13<sup>th</sup> ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime, Mr Cherdkiat Atthakor, then Deputy Director, General of the Department of ASEAN Affairs, noted that smuggling of migrants was one of the most significant challenges to global and regional peace and stability.<sup>491</sup> The meeting called for greater information sharing on lost and stolen passports to detect and disrupt the smuggling of migrants.<sup>492</sup> It was also noted that irregular migrants are vulnerable to smuggling and trafficking and thus should be treated with dignity and compassion.<sup>493</sup>

The 14<sup>th</sup> ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime in March 2016 recognised the importance of international and regional collaboration to address the smuggling of migrants and referred to the work of the Bali Process on People Smuggling, Trafficking in Persons, and Transnational Crime (the Bali Process).<sup>494</sup>

### XIII.3.3 ARF Security Policy Conference

In order to adapt to new security developments facing the ARF, the Forum convened the ARF Security Policy Conference in 2004. The Conference focussed on non-traditional security issues and the complexity and interdependence of the challenges faced by those issues. It subsequently highlighted the need for enhancing cooperation among regional countries in order to safeguard peace, stability and prosperity in the Asia Pacific Region.<sup>495</sup>

The smuggling of migrants was identified as an issue at the 7<sup>th</sup> ARF Security Policy Conference in 2007. Views were exchanged on various threats to the regional and global stability, including the emergence of non-traditional security challenges such as migrant smuggling which was identified as a threat common to all ARF participants.<sup>496</sup> The issue was also noted at the 8<sup>th</sup> and 9<sup>th</sup> ARF Security Policy Conference.<sup>497</sup>

Following the Andaman Sea crisis in 2015, the 12<sup>th</sup> ARF Security Policy Conference highlighted the plight of migrants in the Indian Ocean and Mediterranean Sea and discussed the means to provide humanitarian assistance to the migrants and to prevent the smugglers and traffickers from continuing their criminal operations.<sup>498</sup>

The 13<sup>th</sup> ASEAN Regional Forum Security Policy Conference again raised the issue of smuggling of migrants and noted the suggestion for the ARF to explore possible cooperation in the area.<sup>499</sup> In exchanging views on regional and international security issues, the conference underscored that countries and defence forces in the region should increase their engagements and commitment to military and defence cooperation on such challenges as smuggling of migrants.<sup>500</sup>

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<sup>491</sup> *Co-Chairs Summary Report*, Thirteenth ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime (Nanning, China, 14–15 May 2015) para 6.

<sup>492</sup> *Co-Chairs Summary Report*, Thirteenth ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime (Nanning, China, 14–15 May 2015) para 18.

<sup>493</sup> *Co-Chairs Summary Report – The Thirteenth Fourteenth ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime* (Nanning, China, 14–15 May 2015) para 31.

<sup>494</sup> *Co-Chairs Summary Report*, Fourteenth ASEAN Regional Forum Inter-Sessional Meeting on Counter Terrorism and Transnational Crime (Siem Reap, Cambodia, 21–22 March 2016).

<sup>495</sup> *Chairman's Summary of the First ASEAN Regional Forum Security Policy Conference* (Beijing, 4–6 November 2004) 2 [9].

<sup>496</sup> *Final Summary Report*, Seventh ASEAN Regional Forum Security Policy Conference (Da Nang, Viet Nam, 19 May 2010) para 5.

<sup>497</sup> *Summary Report*, Eighth ASEAN Regional Forum Security Policy Conference (Surabaya, Indonesia, 8 June 2011) [8]; *Summary Report*, Ninth ASEAN Regional Forum Security Policy Conference (Phnom Penh, Cambodia, 25 May 2012) 3 [14].

<sup>498</sup> *Summary Report*, Twelfth ASEAN Regional Forum Security Policy Conference (Kuching, Malaysia, 9 June 2015) para 11.

<sup>499</sup> *Summary Report*, Thirteenth ASEAN Regional Forum Security Policy Conference (Luang Prabang, Lao PDR, 6 May 2016) para 12.

<sup>500</sup> *Summary Report*, Thirteenth ASEAN Regional Forum Security Policy Conference (Luang Prabang, Lao PDR, 6 May 2016) para 5.

### XIII.4 East Asia Summit

The East Asia Summit is a forum of regional leaders for strategic dialogue and cooperation on key challenges facing the East Asia region. Membership of the East Asia Summit comprises of the ten ASEAN Member States, as well as Australia, China, India, Japan, New Zealand, Republic of Korea, the Russian Federation, and the United States. The centrepiece of the East Asia Summit is the annual leaders' Summit, usually held back-to-back with annual ASEAN leaders' meetings. In addition, ministerial and senior officials' meetings are held during the year to take forward leaders' initiatives.

At the 11<sup>th</sup> East Asia Summit in July 2016, leaders adopted the *East Asia Summit Declaration on Strengthening Responses to Migrants in Crisis and Trafficking in Persons*. This Declaration expresses the Summit's commitment to international and legal obligations to undertake efforts to prevent and combat smuggling of migrants, promotes the implementation of the *Smuggling of Migrants Protocol*, encourages the sharing of information, reaffirms the benefits of the Bali Process, and acknowledges the role that international organisations, the private sector and civil society play to help address the challenges posed by trafficking in persons, smuggling of migrants, and irregular migration.<sup>501</sup>

### XIII.5 Work programme on smuggling of migrants

In 2018, ASEAN's work on smuggling of migrants will gain a further dimension with the development of a new work programme on this topic. Shepherded by Malaysia, a draft for this work programme was in the early stages of development at the time this report was written.

Following consultations with representatives of the ASEAN Secretariat in Jakarta and representatives of Malaysian government agencies in Kuala Lumpur, it is understood that the Malaysian Ministry of Home Affairs, which is home to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Council (MAPO), is leading the initiative to draft a three-year work programme for consideration by the Senior Officials' Meeting on Transnational Crime in 2018. Further information about the specific content and purposes of this draft was not available at the time of writing and it is understood that such information will remain confidential for some time.

### XIII.6 ASEAN action against trafficking in persons

By way of comparison, it is useful to briefly discuss ASEAN's work relating to trafficking in persons, as it may reveal some lessons and provide insight that may shape future activities to prevent and combat smuggling of migrants. Unlike in the realm of smuggling of migrants, ASEAN plays a significant role in regional efforts to combat trafficking in persons since the late 1990s.<sup>502</sup> The scale of the trafficking in persons problem in the region was already acknowledged in the *ASEAN Vision 2020* published on 15 December 1997.<sup>503</sup>

A few years later, the *ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children* (2004) showed the association's recognition of the seriousness of the issues surrounding trafficking in persons, the regional nature of the problem, and ASEAN's commitment to deal with these

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<sup>501</sup> *East Asia Summit Declaration on Strengthening Responses to Migrants in Crisis and Trafficking in Persons* (Vientiane, Lao PDR, 6-8 September 2016) 2-4.

<sup>502</sup> Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2017) *Asian Journal of International Law* 1, 2.

<sup>503</sup> ASEAN, *ASEAN Vision 2020*, 15 December 1997 <[http://asean.org/?static\\_post=asean-vision-%3Cmac\\_font%3E2020%3C/mac\\_font%3E](http://asean.org/?static_post=asean-vision-%3Cmac_font%3E2020%3C/mac_font%3E)>.

issues.<sup>504</sup> The Declaration was, however, weak in content and merely required Member States to take measures 'to the extent permitted by their respective domestic laws'.<sup>505</sup> In implementing the Declaration, ASEAN has not made much progress towards addressing the problem. Even though an ASEAN Ad-Hoc Inter-Agency Working Group was established in 2006, ASEAN's efforts seem to be limited to the areas of information exchange, training of responsible officials and law enforcement agencies, and workshops.<sup>506</sup>

The most important step in ASEAN's efforts to combat trafficking in persons to date was initiated by the SOMTC Working Group on Trafficking in Persons. Spearheaded by the Philippines, a convention and an action plan to combat trafficking in persons was drafted.<sup>507</sup> In November 2015 the *ASEAN Convention Against Trafficking in Persons Especially Women and Children* was finalised and opened for signature.

The objectives of the Convention are to effectively

- a. prevent and combat Trafficking in Persons, especially against woman and children, and to ensure just and effective punishment of traffickers;
- b. protect and assist victims of trafficking in Persons, with full respect for their human rights; and
- c. promote cooperation among the Parties in order to meet these objectives.

To achieve these goals, the Convention defines relevant terms,<sup>508</sup> sets out rules for the criminalisation of trafficking in persons,<sup>509</sup> prevention,<sup>510</sup> protection of victims,<sup>511</sup> law enforcement,<sup>512</sup> and international cooperation.<sup>513</sup> According to Article 24(1) of the Convention, the Senior Officials Meeting on Transnational Crime (SOMTC) is responsible for promoting, monitoring, reviewing, and reporting to ASEAN Ministerial Meeting on Transnational Crime on the effective implementation of the Convention.

The Convention entered into force on 8 March 2017 after ratification by six States.<sup>514</sup> As on 26 March 2019, the Convention has been ratified by 8 Member States;<sup>515</sup> Indonesia and Brunei Darussalam have yet to ratify it.<sup>516</sup>

Implementation of the Convention will be guided by the *Bohol Trafficking in Persons Work Plan 2017–2020*, the first cross-sectoral and cross-pillar action plan developed by ASEAN to address trafficking in persons in the region. This plan

highlights harmonised regional activities to combat Trafficking in Persons in the four areas of prevention of trafficking in persons, protection of victims, law enforcement and prosecution of crimes of trafficking in persons, and regional and international coordination. The Work Plan further includes expected

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<sup>504</sup> Sriprapha Petcharamesree, 'ASEAN and its approach to forced migration issues' (2016) 20(2) *The International Journal of Human Rights* 173, 182.

<sup>505</sup> Sriprapha Petcharamesree, 'ASEAN and its approach to forced migration issues' (2016) 20(2) *The International Journal of Human Rights* 173, 182; citing *The ASEAN Declaration against Trafficking in Persons, Particularly Women and Children* (Vientiane, Lao PDR, 29 November 2004).

<sup>506</sup> Sriprapha Petcharamesree, 'ASEAN and its approach to forced migration issues' (2016) 20(2) *The International Journal of Human Rights* 173, 182.

<sup>507</sup> Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2017) *Asian Journal of International Law* 1, 15.

<sup>508</sup> Article 2 *Convention Against Trafficking in Persons Especially Women and Children*.

<sup>509</sup> Article 5–10 *Convention Against Trafficking in Persons Especially Women and Children*.

<sup>510</sup> Article 11–13 *Convention Against Trafficking in Persons Especially Women and Children*.

<sup>511</sup> Article 14–15 *Convention Against Trafficking in Persons Especially Women and Children*.

<sup>512</sup> Article 16–17 *Convention Against Trafficking in Persons Especially Women and Children*.

<sup>513</sup> Article 18–22 *Convention Against Trafficking in Persons Especially Women and Children*.

<sup>514</sup> ASEAN, 'ASEAN Welcomes Entry into Force of ACTIP' *ASEAN Secretariat News* (online) 8 March 2017 <<http://asean.org/asean-welcomes-entry-into-force-of-actip/>>.

<sup>515</sup> ASEAN 50, 'ASEAN adopts first cross-sectoral work plan to address trafficking in persons' *ASEAN 50* (online) 14 November 2017 <<http://www.asean2017.ph/asean-adopts-first-cross-sectoral-work-plan-to-address-trafficking-in-persons/>>.

<sup>516</sup> Indra Budiari, 'Government, police urge ratification of convention', *The Jakarta Post* (online) 5 October 2017, <<https://www.pressreader.com/indonesia/the-jakarta-post/20171005/textview>>.



outputs of each activity and its implementation status as reference in monitoring and evaluating the Work Plan.<sup>517</sup>

### XIII.7 Observations

Over the past 20 years, the smuggling of migrants has been discussed in a great range of ASEAN committees, conferences, meetings, and other forums. These range from technical and expert gatherings to high level ministerial meetings in which the scale and complexity of smuggling of migrants in Southeast Asia and the challenges to prevent and combat this phenomenon have been recognised. While efforts to acknowledge, discuss, and confront the smuggling of migrants have only been slowly forthcoming, and are still in their infancy, the topic now is a key issue for ASEAN and will remain an agenda item at different levels of regional cooperation for many years to come.

Discussions and activities concerning the smuggling of migrants, along with frank acknowledgements of the causes and challenges, gained greater momentum and urgency with the Andaman Sea crisis of 2015. These events brought the complexities of migrant smuggling to the fore and demonstrated the severe weaknesses of existing national and regional responses to the problem. The scale and suddenness of these events took some countries by surprise, although the problem has been a known and long-standing issue

ASEAN has the capacity — if not the duty — to provide a forum where national and regional responses to the smuggling of migrants are discussed and coordinated and where national differences are identified and reconciled. ASEAN is in the unique position to act as a catalyst for the process of developing regional strategies to criminalise smuggling of migrants, protect the rights of smuggled migrants, and foster regional cooperation. Recent steps to set up a work programme on the smuggling of migrants are welcome and important steps towards the development of best practice guidelines, regional approaches, and practical measures to prevent and combat a phenomenon that crosses international borders with mechanisms that, too, transcends borders.

Throughout the research conducted for this report, it has become evident that many political sensitivities surround the topic of smuggling of migrants. While all ASEAN Members are affected by migrant smuggling on a considerable scale, they maintain different views on the significance of and solutions to the problem. To this day, a main challenge has been to find enough common ground to initiate some dialogue and cooperation on smuggling of migrants among ASEAN Member States and start addressing the complex issues associated with smuggling in a structured and systematic way, aimed at achieving common goals.

Starting with the inclusion of smuggling of migrants in the scope of the ASEAN transnational crime portfolio, a foundation has been laid for further steps to be taken. The work programme presently under development is the next milestone which will shape ASEAN's anti-smuggling of migrants agenda for years to come. Further steps need to follow to set up an ongoing capacity for communication and cooperation and for promoting strategies, laws, and practical measures with real impact on the scale and patterns of smuggling of migrants in Southeast Asia and beyond.

The work that ASEAN has done on the topic of trafficking in persons, resulting in the 2015 *ASEAN Convention Against Trafficking in Persons Especially Women and Children*, is testimony to the fact that ASEAN has the capacity to develop meaningful, binding frameworks on topics that are both sensitive in nature and of great importance to all Member States. This gives reason to believe that similar

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<sup>517</sup> ASEAN 50, 'ASEAN adopts first cross-sectoral work plan to address trafficking in persons' *ASEAN 50* (online) 14 November 2017, <<http://www.asean2017.ph/asean-adopts-first-cross-sectoral-work-plan-to-address-trafficking-in-persons/>>; ASEAN, 'Malaysia deposits Instrument of Ratification of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP)' *ASEAN Secretariat News* (online) 7 September 2017 <<http://asean.org/malaysia-deposits-instrument-ratification-asean-convention-trafficking-persons-especially-women-children-actip/>>.

cooperation on the smuggling of migrants is possible and that ASEAN can take leadership on an issue that affects millions of lives across the region and that all too often results in human tragedy and the loss of life.

## XIV Conclusion

The smuggling of migrants is a significant and pressing issue for all countries in Southeast Asia. It concerns millions of migrants who rely on the assistance of smugglers to cross international borders and reach destinations where they hope to find safety and a better life for themselves and their families. Smuggled migrants come from a diverse range of backgrounds and are on the move for many different reasons, some seeking to leave temporarily, others permanently. Many smuggled migrants are refugees fleeing persecution; other flee from war or internal conflicts, discrimination and human rights violations. Others still seek to escape poverty, find employment and higher wages abroad, use their skills and education, join existing families and friends, or flee from natural disasters and effects of climate change.

In the absence of legal avenues of migration and faced by great obstacles in entering — or leaving — a country, many migrants are left with little choice but to resort to the offers made by migrant smugglers. This is also the case if existing avenues are perceived as being too slow, too costly, too cumbersome, too dangerous, or too uncertain. Smuggling of migrants thrives in such circumstances and becomes a highly profitable crime. Seeking to maximise their profits and in order to avoid detection and arrest, migrant smugglers frequently employ methods that place the safety of smuggled migrants at risk and their lives in jeopardy. All too frequently, migrant smugglers exploit the migrants financially, physically, sexually or otherwise; in such circumstances smuggling of migrants morphs into situations of trafficking in persons.

Although the smuggling of migrants has been a known and sizeable issue throughout Southeast Asia for many years, policies, laws, and practical measures to prevent and combat smuggling of migrants have emerged slowly and very unevenly across the region. To this day, some States completely lack specific strategies, provisions, and other mechanisms to respond to this problem. This report, which focuses merely on the criminalisation of smuggling of migrants in the ten ASEAN Member States, has shown that great disparities exist between the ways in which individual countries design, express, and enforce their offences relating to smuggling of migrants and that some States have yet to legislate on this issue. Other reports have to follow, which examine national and regional policies, laws, and practical measures to prevent the smuggling of migrants and protect the rights of smuggled migrants.

The disparities identified in this report are due in part by the fact that only six of the ten ASEAN Member States—namely Cambodia, Indonesia, Lao PDR, Myanmar, the Philippines, and Thailand—are Parties to the United Nations *Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the Convention against Transnational Organized Crime*. Brunei Darussalam, Malaysia, Singapore, and Viet Nam have not signed the Protocol.

This analysis of criminal laws pertaining to smuggling of migrants in ASEAN Member States has further shown that the *Smuggling of Migrants Protocol* is not the only influence on the existence and design of national anti-smuggling laws. Countries such as Brunei Darussalam and Malaysia, which are, as mentioned, not Parties to the Protocol have extensive and complex criminal laws on smuggling of migrants that reflect many if not most of the principles, provisions, and elements of the Protocol. In some instances, they exceed the Protocol's standards. This begs the question why such countries do not or not yet consider signing the *Smuggling of Migrants Protocol*, which would enable them to gain access to a wide range of international cooperation and information exchange tools and to take an active part in international forums that address the complex challenges associated with smuggling of migrants, chiefly the Working Group on Smuggling of Migrants which has been convened by the Conference of States Parties to the United Nations Convention against Transnational Organized Crime.

On the other hand, some States that are Parties to the *Smuggling of Migrants Protocol*, including some that have signed the Protocol a long time ago, have no or only marginal laws that criminalise the smuggling of migrants in the ways envisaged by the Protocol. Cambodia, Lao PDR, Myanmar, and

Thailand—four countries that experience particularly high levels of smuggling of migrants—almost completely lack specific offences and other laws to criminalise smuggling and to protect the rights of smuggled migrants. The research conducted for this report has, however, shown, that all four countries display a genuine interest to act against the smuggling of migrants and have taken steps to develop smuggling-related offences or to explore the implementation of the Protocol requirements. Particularly promising are recent steps taken by the Government of Thailand to develop a designated statute to prevent and suppress the smuggling of migrants, which was presented in April 2018 but has yet to be passed into law. Similarly, UNODC and IOM are assisting the Governments of Cambodia and Myanmar in the development of national smuggling of migrants laws and have done so for several years. Moreover, during the course of this research, government officials in Vientiane expressed a keen interest to work with UNODC to explore the implementation of the Protocol in Lao PDR.

Indonesia is presently the only ASEAN Member that is (1) a Party to the *Smuggling of Migrants Protocol* and that (2) has comprehensive domestic offences which, to a large degree, reflect the provisions of the Protocol. The Philippines should also be mentioned in this context as a Bill for an Anti-Smuggling of Migrants Act has been presented in September 2016. This Bill is a stellar example of a national law reflecting the spirit and requirements of the *Smuggling of Migrants Protocol*. Conversations held in Manila give reason to believe that the Bill, as required, will be reintroduced into parliament and pass, with minor amendments, in the present legislative session.

One crucial point of difference between the various domestic offences relating to smuggling of migrants, and between some of these offences and the offences envisaged by Article 6 of the *Smuggling of Migrants Protocol*, is the lack of a ‘financial or material benefit’ element in many domestic offences. This element, which is included as a purpose element in the definition of smuggling of migrants under Article 3 of the Protocol, is an essential ingredient of the concept of smuggling of migrants in international law and establishes the crucial link to organised crime. It is the intention of the Protocol to prevent and combat groups and individuals who seek to make a profit from the smuggling of migrants; it is not the intention to criminalise irregular migration and those who assist irregular migrants for altruistic reasons. Failure to include the financial or other material benefit element thus runs the risk of punishing people for providing humanitarian aid or for helping family members or friends free of charge.

Major discrepancies between some national laws on the one hand and the Protocol requirements on the other exist in relation to the offences involving fraudulent travel or identity documents propagated by Article 6(1)(b) of the *Smuggling of Migrants Protocol*. The obligation here is to legislate offences that specifically criminalise the production, possession, provision et cetera of such documents for the purpose of smuggling of migrants; Article 6(1)(b) is not merely a general offence concerning counterfeit documents. Many jurisdictions fail to establish this crucial link between fraudulent documents and smuggling of migrants in their domestic offences.

A further issue of concern in nearly all of the jurisdictions covered by this report is the strong focus of criminal laws on irregular migrants and the failure to implement or otherwise respect the non-criminalisation principle. This principle stipulated by Article 5 of the *Smuggling of Migrants Protocol* is an essential element of global efforts to prevent and combat smuggling of migrants. It recognises that smuggling of migrants is a transnational, organised crime committed by groups and individuals seeking to gain financial or other material benefits from their activities. It shifts the focus of investigations, law enforcement activities, prosecutions, and other criminal justice proceedings to the smugglers and facilitators, the organisers and ‘key players’ who take advantage of smuggled migrants. It thus turns the attention to a higher level of criminality. While the non-criminalisation principle does not grant blanket immunity to irregular migrants, it does take into account of the fact that migration per se is not a criminal activity and that many migrants who resort to smugglers do so out of despair and lack of other alternatives. It also upholds the cardinal principle of international law that refugees must not be penalised for their illegal entry or stay in a foreign country, coming directly from a

territory where their life or freedom was threatened.<sup>518</sup> For these reasons, it is important that countries that have not already done so develop legal provisions or find other ways that reflect the requirements of Article 5 of the Protocol.

The research conducted for this report and its publication are particularly timely not only because, as mentioned, several Southeast Asian nations are presently developing their national laws, including offences, against the smuggling of migrants, but also because ASEAN has started three-year work programme to further explore this topic and examine avenues for regional cooperation to prevent and combat the smuggling of migrants. While cooperation on this issue is long overdue and only in its early infancy, recent developments, outlined in Chapter XIII of this report, show that there is greater recognition of the scale of, and challenges posed by, smuggling of migrants in Southeast Asia and that new initiatives are emerging to examine this phenomenon and develop coordinated strategies against it.

It is hoped, that these emerging developments will lead to thorough analyses of the causes and consequences of smuggling of migrants, of the responses to the problem, to frank conversations about irregular migration and human mobility in all its forms, and ultimately to a more integrated and effective response to smuggling of migrants in the region. ASEAN has an integral role to play in this context and the present circumstances provide a unique opportunity to take leadership and assume a coordinating role on this important issue.

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<sup>518</sup> Article 31 *Refugee Convention*.







# UNODC

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UNODC would like to specifically recognize the contribution of the Government of Canada



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