

Policy Guide on Criminalizing Migrant Smuggling



The Bali Process

on People Smuggling, Trafficking in Persons and Related Transnational Crime

An introductory guide
for policy makers and
practitioners on how to
implement international legal
obligations to criminalize
migrant smuggling at the
domestic level

This policy guide may be used by all Bali Process countries, including those countries that have not signed and/or ratified the United Nations Convention against Transnational Organized Crime (Organized Crime Convention) and two of its supplementary protocols, 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. The terms used in this policy guide are consistent with these three international instruments, to the extent possible. However for translation purposes, official translations of the Convention and its Protocols should be consulted as authoritative points of reference for terminology used in this policy guide.



The Bali Process

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process) was established in 2002 and is a voluntary and non-binding regional consultative process co-chaired by the Governments of Australia and Indonesia and comprising over 45 member countries and organizations.

Queries about this policy guide should be addressed to the Regional Support Office (RSO) to the Bali Process at:

Email: info@rso.baliprocess.net

RSO website:

<http://www.baliprocess.net/regional-support-office>

Published August 2014.

Graphic design by the Australian Government Attorney-General's Department.

Acknowledgements

This policy guide has been developed by Bali Process members, supported by the Regional Support Office and led by the Bali Process Policy Guides Drafting Committee, comprised of the following members:



Dananti Galapitage,
Senior Legal Officer,
International Crime Cooperation Division,
Attorney-General's Department,
Australia (Co-Chair)



Chatchom Akapin,
Executive Director,
International Affairs (Division 1),
Office of the Attorney General,
Thailand (Co-Chair)



Andhika Chrisnayudhanto,
Acting Deputy Director,
Security and Political Treaties,
Ministry of Foreign Affairs,
Indonesia



Rebecca Miller,
Bali Process Project Coordinator,
Immigration New Zealand,
Ministry of Business, Innovation and Employment,
New Zealand



Anusha Abeywickrama-Munasinghe,
Senior Assistant Secretary,
Legal Division,
Ministry of Justice,
Sri Lanka



Sebastian Baumeister,
Project Coordinator,
UNODC Regional Office for Southeast Asia and the Pacific



Further support to the Drafting Committee from:
Sophie Nonnenmacher,
IOM Representative to the Regional Support Office



The Bali Process

Foreword

Since its inception in 2002, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) has effectively raised regional awareness of the consequences of people smuggling, trafficking in persons and related transnational crime, and also developed and implemented strategies and practical cooperation in response. More than 45 member countries and international organizations, as well as a number of observer countries and international agencies, participate in this voluntary forum.

At the Fifth Bali Process Regional Ministerial Conference in April 2013, Ministers agreed that policy guides be developed to assist policy makers and practitioners to criminalize people smuggling and trafficking in persons. Ministers directed that the Regional Support Office (RSO), in consultation with interested members, develop guides for States to enable a range of domestic agencies to promote a consistent understanding of international legal obligations, and to assist in the development of effective domestic legislation. Further to this direction, the RSO established a drafting committee of experts from Bali Process Member States and international organizations to develop the policy guides.

The policy guides are voluntary, non-binding and intended for use as reference tools by a range of domestic agencies in Bali Process Member States. In order to keep these policy guides short, practical and user-friendly, they focus on how to effectively criminalize migrant smuggling and trafficking in persons in domestic law. Issues of protection and assistance to smuggled and trafficked persons have been addressed within the thematic scope of the guides, but it is expected that these issues may be more comprehensively addressed by future policy guides. In line with the recommendations of the Fifth Ministerial Conference in April 2013, these policy guides are the first set of Bali Process Policy Guides falling within the thematic areas of the Bali Process and on issues of particular concern to Bali Process members.



Greg Kelly
RSO Co-Manager (Australia)



Bebek A.K.N. Djundjunan
RSO Co-Manager (Indonesia)



Acronyms and Abbreviations

ASEAN	Association of Southeast Asian Nations
Bali Process	Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime
FATF	Financial Action Task Force
IOM	International Organization for Migration
MLA	Mutual legal assistance
Organized Crime Convention	United Nations Convention against Transnational Organized Crime
RSO	Regional Support Office
Smuggling of Migrants Protocol	Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime

Contents

Executive Summary	2
Section 1: Introduction to Smuggling of Migrants and the Applicable International Framework	3
<hr/>	
1.1. Migrant smuggling: The crime challenge	3
1.2. Key international legal instruments	4
1.3. Definition of migrant smuggling and criminalizing the offence	9
1.3.1. Meaning of 'migrant smuggling'	9
1.3.2. Migrant smuggling offence – procuring illegal entry	5
1.3.3. Offence of enabling illegal residence	5
1.3.4. Documentary offences	5
1.3.5. Extension of criminal responsibility	7
1.3.6. Aggravating circumstances	8
1.4. Penalties	9
1.5. Differences between migrant smuggling and trafficking in persons	9
1.6. Jurisdiction – including extraterritorial jurisdiction	11
Section 2: Key Complementary Obligations Established by the Organized Crime Convention	13
<hr/>	
2.1. Integrated approach to effectively criminalize migrant smuggling	13
2.2. 'Follow the money: A key strategy to fight migrant smuggling'	13
2.2.1. Money laundering offences and other measures	
2.2.2. Criminal asset confiscation	15
2.3. International cooperation requirements under the Organized Crime Convention	16
2.3.1. Extradition	16
2.3.2. Mutual legal assistance	17
2.4. Criminalization of corruption	19
Section 3: Summary of Tips for Effective Legislation	20
<hr/>	



Executive Summary

Migrant smuggling – also referred to as people smuggling or smuggling of migrants – is the facilitated, irregular movement of people across borders for a financial or other benefit.

States need strong laws to combat migrant smuggling and to protect smuggled migrants. There are two key complementary international instruments that establish the international legal framework around migrant smuggling: the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol), which supplements the overarching United Nations Convention against Transnational Organized Crime (Organized Crime Convention). Migrant smuggling is different from trafficking in persons, which is governed by a separate Protocol under the Organized Crime Convention.

The Smuggling of Migrants Protocol *requires* State Parties to criminalize the following offences:

- migrant smuggling - that is, procuring the illegal entry of a person into a country;
- enabling illegal residence - that is, enabling a person to stay in a country illegally, even if they entered the country lawfully; and
- documentary offences relating to migrant smuggling - for example, producing fake travel documents such as visa and identity documents.

The Protocol also requires that States criminalize **attempts** to commit the above offences, participating as an accomplice in relation to these offences, and **organizing or directing** a person or persons to commit these offences. States should ensure that these offences are subject to higher penalties in cases with **aggravating circumstances**, such as where a migrant's life is endangered.

Migrant smuggling is transnational in nature and by its very definition requires illegal entry across a State's borders. It is therefore important for States to ensure that **extraterritorial jurisdiction** – or legal ability to exercise authority beyond normal territorial boundaries – applies to their migrant smuggling laws. This enables States to target smugglers and facilitators who conduct criminal activities across multiple countries.

The lifeblood of organized crime, including the smuggling of migrants, is money. To enable law enforcement authorities to deprive criminal bodies of the proceeds of these crimes, States need strong and separate **anti-money laundering and asset confiscation laws**. States also need **strong international crime cooperation laws**, including **extradition and mutual legal assistance laws**. Effective extradition laws enable law enforcement bodies to bring the offender to the appropriate jurisdiction for prosecution. Strong mutual legal assistance laws allow investigators to obtain and exchange evidence between countries, such as bank records, phone records and witness statements.

As organized crime syndicates are constantly evolving, it is vital that the international community works together to ensure that laws are aligned to the greatest extent possible in order to prevent criminals exploiting gaps in legal frameworks.

Section 1

Introduction to Smuggling of Migrants and the Applicable International Framework

1.1. Migrant smuggling: The crime challenge

Migrant smuggling (helping a person to enter into a country illegally for financial or other benefit) occurs in all regions of the world. There are no reliable global statistics on the number of migrants smuggled due to major challenges such as the hidden nature of the problem and the lack of established data recording systems.

So what do we know?

- Migrant smuggling is a deadly business. Thousands of people have been placed in inhumane and life-threatening circumstances and have lost their lives as a result of the reckless, harmful actions of smugglers.
- Migrant smuggling is a highly profitable business in which criminals are at low risk of detection and punishment. Consequently, the crime is increasingly attractive and smugglers are becoming more organized.
- Smugglers alter routes and methods in response to changing border controls and circumstances. This is often at the expense of the safety of smuggled migrants.
- Criminals are increasingly providing smuggling services to irregular migrants in order to evade border controls, migration regulations, and visa requirements. As orderly migration policies become more restrictive, migrants become more and more attracted to the services offered by smugglers. Asylum seekers in search of safety and protection may choose to rely on the services of migrant smugglers.
- Migrant smugglers undermine the capacity of States to control their borders and safeguard their own sovereignty.
- Migrant smuggling is costly for States. Border controls and detention, search and rescue operations, and deportation have significant budget implications.
- Migrant smuggling, and the vulnerabilities it creates, can be a significant factor fuelling trafficking in persons throughout the Bali Process region.

For States to effectively stop organized migrant smuggling activities, it is essential to criminalize migrant smuggling in domestic legislation, in accordance with international legal obligations.

1.2. Key international legal instruments

There are two main international treaties directly relevant to migrant smuggling:

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (Smuggling of Migrants Protocol)¹

¹ The Smuggling of Migrants Protocol is not an independent instrument. It deals with issues specific to migrant smuggling as part of the broader framework established by the Organized Crime Convention. States Parties to the Smuggling of Migrants Protocol must be a party to the Organized Crime Convention, which is why Section 2 of this guide sets out complementary obligations under the Organized Crime Convention.

This is the primary and most influential international instrument on smuggling. It entered into force on 28 January 2004.²

The Protocol requires States to criminalize the smuggling of migrants as defined in that instrument.

United Nations Convention against Transnational Organized Crime (Organized Crime Convention)

This is the main international instrument in the fight against transnational organized crime. It entered into force on 29 September 2003.³

In order to become party to the Smuggling of Migrants Protocol, States must also be party to the Organized Crime Convention.

1.3. Definition of migrant smuggling and criminalizing the offence

1.3.1. Meaning of ‘migrant smuggling’

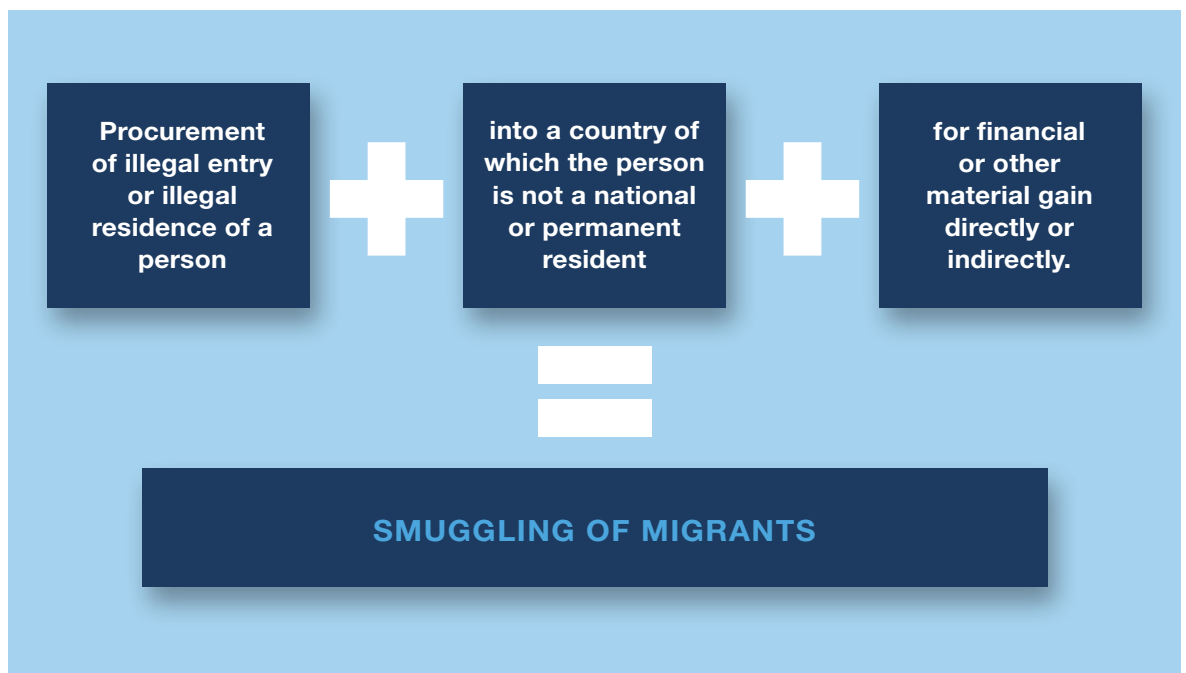
The term ‘smuggling of migrants’ is defined by Articles 3(a) and (b) of the Smuggling of Migrants Protocol:

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

“Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

Figure 1 below illustrates the combination of elements that must be present for migrant smuggling to exist.

Figure 1: Key elements of the international legal definition of migrant smuggling



² As of 1 July 2014, 138 countries have ratified the Smuggling of Migrants Protocol. For an up-to-date list of signatories and parties, see <http://www.unodc.org/unodc/treaties/CTOC/>.

³ As of 1 July 2014, 179 countries have ratified the Organized Crime Convention. For an up-to-date list of signatories and parties, see <http://www.unodc.org/unodc/treaties/CTOC/>.

The combination of the three elements in Figure 1 constitutes the crime of migrant smuggling. A person who is intentionally involved, directly or indirectly, in the smuggling of migrants is referred to as a smuggler. A person who is being assisted by smugglers to enter a country illegally is referred to as a smuggled migrant. Even though smugglers and migrants enter into an agreement for the smuggling to take place, the aim of the Protocol is not to target irregular migration, but to combat the organized crime of migrant smuggling.

1.3.2. Migrant smuggling offence – procuring illegal entry

In accordance with the definition in Article 3 of the Smuggling of Migrants Protocol, the offence of migrant smuggling must contain the elements above. Importantly, the focus of the migrant smuggling offence is the procurement (facilitation) of illegal entry, not the illegal entry by itself.

Illegal entry is defined at Article 3(b) of the Smuggling of Migrants Protocol as ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State’. For example, this would include facilitating the entry of someone into a country if that person does not have a valid visa for countries that require a visa or other valid, state-issued documents for entry.

The element of ‘financial or other material benefit’ has been interpreted broadly. For example, a benefit may include non-financial inducements (e.g. an advantage, privilege, sexual or other services) arising from the smuggling of migrants.

1.3.3. Offence of enabling illegal residence

Unlike the migrant smuggling offence above, which is about procuring illegal entry into a country, this offence relates to procuring the illegal stay in a country. The Smuggling of Migrants Protocol requires States to criminalize conduct that enables illegal residence of others for a benefit (Article 6.1(c)).

The offence of ‘enabling illegal residence’ consists of the following elements:

- enabling a person to **remain** in a State;
- where the person is **not a citizen or permanent resident** of the State and where the person does not comply with the requirements for legally remaining in the State;
- in order to obtain, directly or indirectly, a financial or other material **benefit**; and
- when committed intentionally.

The offence of enabling illegal residence captures situations where the smuggling scheme assists migrants to enter legally, but uses illegal means to enable the smuggled persons to remain in the country. For example, a migrant smuggler arranges valid, temporary business visas and related services to migrants, but on fraudulent grounds, knowing that these migrants intend to stay permanently in the destination country. The smuggler makes huge profits by charging migrants for this service.

1.3.4. Documentary offences

The Smuggling of Migrants Protocol requires States to enact certain documentary offences (Article 6.1(b)). In particular, States must criminalize the production, procurement, provision or possession of fraudulent travel or identity documents for the purpose of enabling migrant smuggling.

Documentary offences are useful in the fight against migrant smuggling because they allow the prosecution of people who play a key role in migrant smuggling syndicates, but who are not directly involved in the physical act of unlawfully transporting migrants across national borders.

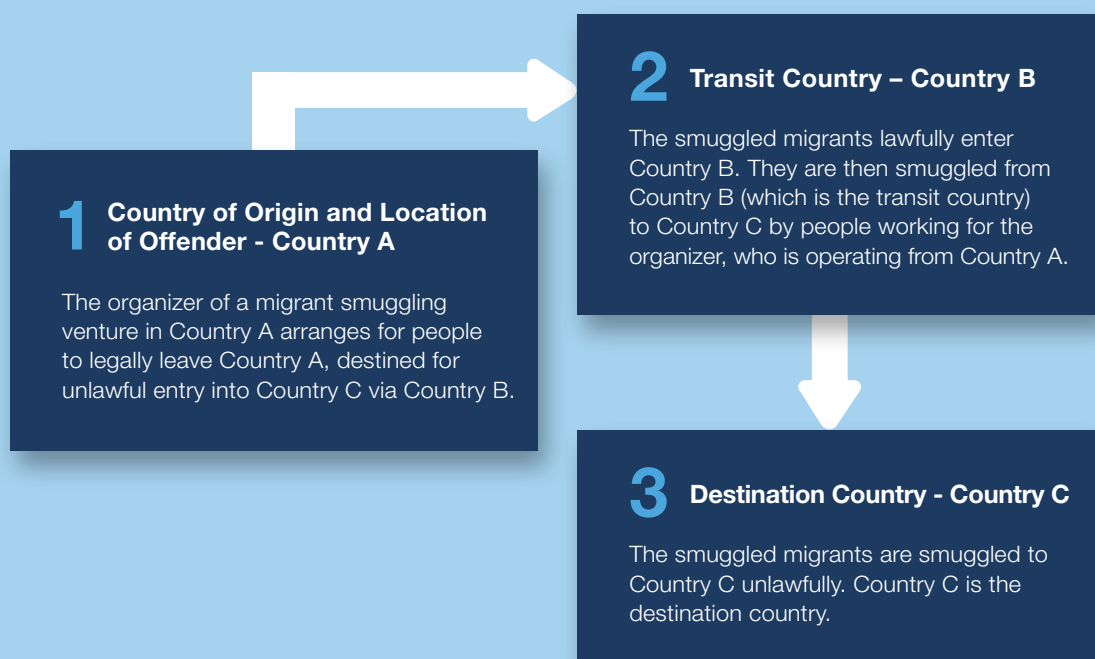
The term ‘fraudulent travel or identity document’ encompasses all types of documents issued by States such as passports, visas, and identity cards. The term is broadly defined and includes documents that are falsely made or fabricated, as well as genuine documents that have been altered in some material way. Fraudulent documents also include documents that are genuine, but improperly issued or obtained through misrepresentation, corruption or duress.

Tip: Standard migration laws are not enough

Standard migration laws, which deal only with illegal entry into or exit from a country, are not enough to criminalize migrant smuggling. Countries also need to create a separate, comprehensive migrant smuggling offence that targets activity occurring outside of the country.

A comprehensive migrant smuggling offence would allow prosecution of the organizer in the following scenario in Figure 2. An organizer of a migrant smuggling operation arranges for migrants to legally leave one country (Country A), transit legally through another country (Country B), in order to illegally enter a third country (Country C). Note this scenario involves the exercise of jurisdiction permissible under the Organized Crime Convention (described later in this section).

Figure 2: Need for a comprehensive migrant smuggling offence



If Country A has standard migration laws only, no laws have been breached, as exit has been legal.

However, if Country A has comprehensive migrant smuggling laws, it is able to prosecute the offender for the criminal conduct in Country A. Note that for some migrant smuggling ventures, many transit countries are involved.

This is why standard migration laws are not enough to target sophisticated migrant smuggling operations. Countries need comprehensive migrant smuggling offences to target the procurement of illegal entry, rather than criminalizing the illegal entry itself.

1.3.5. Extension of criminal responsibility

Article 6(2) of the Smuggling of Migrants Protocol also requires that criminal responsibility be extended to cover:

- **attempts** to commit a smuggling offence (subject to a State's domestic legal system);
- participation as an **accomplice** in a smuggling offence; and
- **organizing or directing** others to commit a smuggling offence.

Article 5(1)(a) of the Organized Crime Convention also requires States to criminalize participation in a criminal group. Countries may implement this by creating an offence of conspiracy, or by creating offences that prohibit association and participation in criminal organizations.

Those involved in transnational organized crime may seek to hide behind the cover of legal persons such as companies, charities, or other association. Therefore, Article 10 of the Organized Crime Convention requires States to ensure legal persons are held liable for participation in serious crimes involving an organized criminal group, and for specific offences under the Organized Crime Convention related to laundering proceeds of crime, corruption, and obstruction of justice. It is not mandatory to establish *criminal* liability of legal persons under the Organized Crime Convention, however, States *must* establish some form of liability of legal persons – for example, under *civil or administrative* regimes.

Extending criminal responsibility to all persons who play a role in migrant smuggling activities is particularly important, given that sophisticated smuggling syndicates operate by delegating tasks to different people, who are often located in different jurisdictions. The extension of criminal responsibility also ensures that failed migrant smuggling attempts can still be prosecuted. By way of example, a country may implement the offences of attempt, organizing/directing, and complicity through provisions in specific anti-smuggling laws or by establishing in its criminal code, general provisions of criminal responsibility that apply to all offences in that country.

⁴ Non-refoulement is a key principle of international law that concerns the protection of persons from being returned to another territory in any manner where their lives and freedoms could be threatened.

⁵ Article 31 of the Refugee Convention provides that: 'the Contracting States shall not impose penalties, on account of their illegal entry or presence on refugees who, coming directly from the territory where their life or freedom was threatened... enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

Tip: Non-criminalization of migrants for the smuggling offence

Article 5 of the Smuggling of Migrants Protocol states that migrants shall not be liable to criminal prosecution for the fact of having been smuggled. Article 19 provides that nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law.

The purpose of the Smuggling of Migrants Protocol is not to criminalize migration. However, the Protocol does not prevent States from taking measures against persons whose conduct constitutes an offence under its domestic law (Article 6(4), Smuggling of Migrants Protocol). These measures must be in accordance with the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the Convention and Protocol relating to the Status of Refugees and the principle of *non-refoulement*⁴ (see Article 19, Smuggling of Migrants Protocol).⁵ For example, illegal entry does not affect the right to seek asylum.

The important issue when developing domestic legislation is that the focus of the Smuggling of Migrants Protocol is to combat the smuggling of migrants. It is not to criminalize migrants for having been smuggled.

Tip: Protection for witnesses in migrant smuggling cases

Under Article 24 of the Organized Crime Convention, each State Party shall provide appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and, as appropriate, for their relatives and other persons close to them (described later in this section).

1.3.6. Aggravating circumstances

The Smuggling of Migrants Protocol requires States to address aggravating circumstances for migrant smuggling and related offences of enabling illegal residence and documentary offences (Article 6(3)).

Aggravating circumstances are circumstances in which a migrant smuggler's conduct endangers or is likely to endanger the lives or safety of the migrants being smuggled, or the conduct involves inhuman or degrading treatment, including exploitation. Where it is consistent with a country's domestic laws, aggravating circumstances should also apply to complicity in, and organizing or directing, migrant smuggling or related offences. The key to the aggravating circumstances obligation is that States ensure that migrant smugglers are subject to higher penalties when there are aggravating circumstances.

1.4. Penalties

Migrant smuggling can place vulnerable people in life-threatening circumstances and expose them to inhumane conditions. In order to effectively combat migrant smuggling, States need to ensure that offences have penalties that reflect the severity of the offence, as noted in Article 11 of the Organized Crime Convention.

For example, some States have established a maximum penalty of 10 years imprisonment for a migrant smuggling offence, while aggravating migrant smuggling offences carry a maximum penalty of 20 years imprisonment.

Tip: Aggravating circumstances should attract higher penalties

There are two main ways countries deal with aggravating circumstances in the commission of a migrant smuggling offence. The first is to create specific aggravating circumstances offences—that is, create a separate migrant smuggling offence that includes an element requiring there to have been aggravating circumstances in the conduct of the offence. This separate aggravating circumstances offence would attract higher penalty levels than the primary migrant smuggling offences where no aggravating circumstances occurred.

Another option is to have separate provisions containing aggravating circumstances that, once proven, need to be taken into account in the sentencing process in relation to the primary offence of migrant smuggling.

Both approaches ensure that where the conduct of migrant smuggling has involved aggravating circumstances, this more serious conduct attracts higher penalties.

1.5. Differences between migrant smuggling and trafficking in persons

Trafficking in persons is different from migrant smuggling as explained in Table 1 below. It is therefore important to ensure that the definitions of 'trafficking in persons' and 'smuggling of migrants' are well understood and defined in national legislation.

Table 1: Key differences between migrant smuggling and trafficking in persons

	Trafficking in persons	Migrant smuggling
Purpose of the crime	The purpose of trafficking is always exploitation. Exploitation can occur over an indefinite period of time.	The purpose of smuggling is to obtain a financial or other material benefit by facilitating illegal entry into or illegal residence in another country.
Consent and victimisation	The consent of a trafficked person is not relevant to the crime, because of the coercive, deceptive, or threatening actions of the trafficker.	Migrants have generally consented to being smuggled. ⁶ As a result, they are not considered to be a 'victim of migrant smuggling'. Yet, a smuggled migrant may become a victim of other crimes in the course of being smuggled. For example, violence may be used against the migrant, or the migrant's life may be endangered at the hands of smugglers. ⁷
Transnational	Both across and within borders.	Cross border.
Source of profit	Through the exploitation of the trafficked person.	Through obtaining a financial or other material benefit for the facilitation of illegal entry or stay of a person in another State.

In practice, it may be **difficult to distinguish** between trafficking in persons and migrant smuggling. For example, a trafficked person might begin his or her journey as a smuggled migrant. She or he may have contracted an individual or a group to assist in their illegal movement in exchange for a financial payment. However, the smuggled migrant might then be compelled (through the use of coercion, threat or deception) into a state of debt bondage to pay off 'costs' (financial or other) allegedly owed, or into a state of forced labour because of the migrant's illegal status in the destination country. Thus, a smuggled migrant can become a trafficking victim.⁸

⁶ Although experts and practitioners see 'consent' as a difference between trafficking and smuggling, it is important to note that the Smuggling of Migrants Protocol definition does not mention consent. Migrant smuggling is the *facilitation* of crossing borders illegally or residing illegally in another country with the aim of making a financial or other material profit.

⁷ UNODC Model Law against the Smuggling of Migrants, 2010, see http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf.

⁸ ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010, see http://www.unodc.org/documents/human-trafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf.

Tip: Separate offences for migrant smuggling and trafficking in persons

It is essential for countries to have separate offences for migrant smuggling and trafficking in persons respectively. This is important because the two offences have different elements that need to be taken into consideration when investigating the crimes, identifying the victims of trafficking in persons or of other human rights violations, and when prosecuting the offenders. Separate offences are particularly important when it comes to international cooperation (mutual legal assistance and extradition) to enable other countries to seek evidence or suspects/offenders that are located in another country in relation to those specific crimes (see Section 2).

1.6. Jurisdiction – including extraterritorial jurisdiction

Article 15 of the Organized Crime Convention outlines the jurisdiction (or legal authority) that States can establish over crimes set out in the Organized Crime Convention and the Smuggling of Migrants Protocol. Under the Organized Crime Convention, it is mandatory that States exercise territorial jurisdiction over offences established in accordance with the Smuggling of Migrants Protocol. The principle of territorial jurisdiction provides that States can make and enforce laws where the conduct constituting an offence occurs within the physical territory of the State. Territorial jurisdiction also extends to a vessel under the flag of a State or an aircraft registered under the law of a State.

However, territorial jurisdiction is often not enough. In order for States to effectively fight transnational crimes like migrant smuggling, they should consider ensuring they have **extraterritorial jurisdiction** over migrant smuggling offences. This is where a State's jurisdiction extends outside of the State's borders. Otherwise, organized criminal groups can exploit gaps in laws between different States to escape prosecution.

To ensure maximum effectiveness of laws that combat transnational crime, States may establish extraterritorial jurisdiction when an offence is committed:

- **against a national** of that State – Article 15(2)(a);
- **by a national** of that State or by a person who is stateless who habitually resides in that State – Article 15(2)(b); or
- **outside the territory** of a State with a view to commission of a serious crime within the territory of that State – Article 15(2)(c).

Under the Organized Crime Convention (Article 15), a State must establish jurisdiction if the offender is its own national and is present in its territory, but the State refuses to extradite (hand over) the offender to another country to face charges solely because the person is a national. This obligation on States to establish jurisdiction applies regardless of where the offence occurred.

The Convention also provides that a State may establish jurisdiction where an offender is present in its territory and the State refuses to extradite the offender for any other reason (i.e. not on the basis of nationality).

These extraterritorial jurisdiction provisions encourage (but do not compel) a State to take action against its own nationals where they commit a migrant smuggling offence in another country. They also allow a State to exercise jurisdiction over persons operating outside its territory who smuggle migrants into its territory.

Tip: Extraterritorial jurisdiction in smuggling legislation

As with all transnational crimes, it is important to make sure that smuggling of migrants laws provide for extraterritorial jurisdiction. This is key because the organizers of smuggling operations can be located in many countries—that is, countries which are origin countries, transit countries, destination countries, or other countries. The need for extraterritorial jurisdiction is graphically set out in Figure 3 below.

Figure 3: Need for extraterritorial jurisdiction



If **Country A's** anti-smuggling laws apply extraterritorially, then **Country A** is able to exercise jurisdiction over the offender who is located in **Country C**.

Tip: Minimum standards in the Smuggling of Migrants Protocol can be strengthened

The Smuggling of Migrants Protocol provides minimum standards, which countries must implement. However, countries can strengthen these minimum standards to improve their capacity to prevent and combat migrant smuggling.

Section 2

Key Complementary Obligations Established by the Organized Crime Convention

2.1. Integrated approach to effectively criminalize migrant smuggling

Many States have found that they need to take an integrated approach to effectively criminalize migrant smuggling and thereby make sure that they can effectively track down, prosecute, punish, and prevent organized criminal groups from engaging in migrant smuggling operations. An integrated approach to developing effective laws to criminalize migrant smuggling conduct includes the following elements:

- States need to effectively **criminalize activities related to migrant smuggling** as required by Article 6 of the Smuggling of Migrants Protocol;
- States need to deprive criminal bodies of the proceeds of these crimes through strong **anti-money laundering** and **asset confiscation laws** as organized crime – including migrant smuggling – is driven by profit;
- States need **strong international cooperation** mechanisms – including laws and agreements on **extradition** and **mutual legal assistance** – among others to assist in ensuring that evidence is efficiently made between governments for the enforcement of anti-smuggling laws; and
- Organizations (including government agencies, civil society, and industry) need to **coordinate** their efforts at the domestic level and international levels to operationalize laws effectively.

It is important to consider these complementary obligations under the Organized Crime Convention because in order to become a party to the Smuggling of Migrants Protocol, a State must be a party to the Organized Crime Convention and must have a legal framework that complies with both the Convention and the Protocol.

2.2. ‘Follow the money’ – a key strategy to fight migrant smuggling

As highlighted in the Organized Crime Convention, the main motive of organized criminal groups is the attainment, directly or indirectly, of financial or other material benefit. Therefore, it is crucial that law enforcement authorities have the capacity to deny organized criminal groups such benefit or gains. It is also important that law enforcement agencies target the profits and finance of organized criminal groups, in order to reduce the incentive in conducting the smuggling of migrants operations. In short, they must be able to ‘follow the money’ of migrant smuggling ventures. This helps to prosecute the ‘bosses’ of organized crime, who are more likely to deal with the profits of illegal smuggling activities than conduct the smuggling on the ground.

2.2.1. Money laundering offences and other measures

Money laundering involves concealing the identity, source, or destination of, or possessing or using, illegally gained money. In other words, money laundering is dealing with the proceeds of crime. The Organized Crime Convention requires States to criminalize the laundering of the proceeds of crime, as stipulated in Article 6(1)(a) and (b). The main requirements are to criminalize the conversion or transfer of property, the concealment or disguise of the true nature, and the acquisition, possession or use of property, knowing that such property is the proceeds of crime. In addition to the Organized Crime Convention, there are a number of international instruments that require States to criminalize and prevent money laundering.⁹

The Organized Crime Convention further obligates States to criminalize the participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of the offences related to money laundering.

The Organized Crime Convention *requires* that money laundering offences apply to the widest range of offences that may generate proceeds of crime – known as ‘**predicate offences**’.¹⁰ In this regard, migrant smuggling should be included as a predicate offence in a State’s money laundering law. The predicate offence (e.g. the migrant smuggling offence) does not need to occur within a State’s territory in order for that State to prosecute a person for money laundering.

Tip: Ensure that the money laundering and the predicate offences can be prosecuted separately

Requiring a conviction for the predicate offence (e.g. the migrant smuggling offence) may prevent convictions for money laundering in cases where a conviction cannot be secured for the predicate offence (e.g. where the suspect has left the jurisdiction or where the predicate offence occurred in another jurisdiction), but where there is clear evidence of a money laundering offence. Therefore, it is important that law enforcement officials have the ability to target the money laundering offence separately to the predicate (migrant smuggling) offence.

The Organized Crime Convention also provides States with additional measures (mandatory as well as non-mandatory) aimed at preventing money laundering, including assistance to financial institutions to prevent criminal funds from entering the financial system, and detecting and tracing of illicit assets.

Article 7 of the Convention provides that States shall:

- establish a regulatory and supervisory regime for banks and non-bank financial institutions;
- establish the capacity to cooperate and exchange information among law enforcement and relevant stakeholders;
- consider establishing the capacity to detect and monitor the movement of cash across their borders as applicable, utilize relevant regional, inter-regional and multilateral organizations against money laundering; and
- promote international cooperation among law enforcement and financial regulatory authorities.

⁹ To name a few, the United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances; United Nations Convention against Corruption; and the Organized Crime Convention discussed here set out obligations for States to criminalize and prevent money laundering. It is also noteworthy to recall the 40 Recommendations of the Financial Action Task Force (FATF), which set out a comprehensive standard for States to apply a robust anti-money laundering regime. These conventions can be found in the UN Treaty Collection at <https://treaties.un.org/>.

¹⁰ Criminals generate profits from serious and organized crimes, such as trafficking in persons, migrant smuggling, drug trafficking, arms trafficking, terrorism, corrupt practices, and tax evasion. These crimes are called predicate offences in anti-money laundering laws.

2.2.2. Criminal asset confiscation

Criminal asset confiscation may also be referred to as asset forfeiture, asset recovery or proceeds of crime action. Apart from establishing a robust anti-money laundering regime, States should have at their disposal the authority to identify, detect, trace, and seize proceeds of crime for the purpose of eventual **confiscation**.¹¹ This can be achieved through asset confiscation provisions in a State's penal code, its legislation pertaining to money laundering, or a stand-alone law on the proceeds of crime.

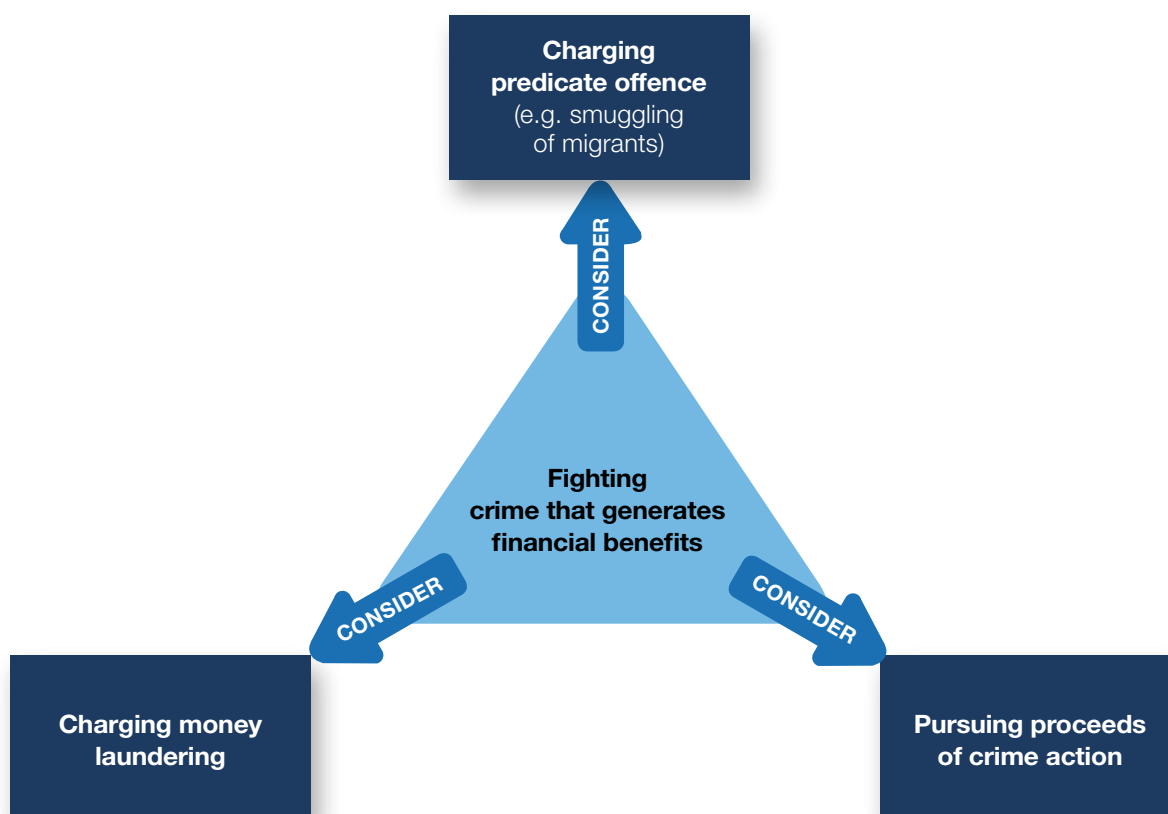
Generally, States can confiscate the proceeds of migrant smuggling in two ways:

- once a criminal conviction is secured (conviction based proceeds of crime laws); or
- in the absence of a criminal conviction where it's possible to prove that the particular assets are proceeds of migrant smuggling (non-conviction based proceeds of crime laws – also known as civil forfeiture).

The latter is a useful option for States to target criminals where it is not possible to secure a conviction for the smuggling offence.

The main legislative obligations are for States to create powers to enable seizures and confiscation of proceeds of crime, including the proceeds of migrant smuggling. Proceeds of crime laws allow law enforcement authorities to target the proceeds of all criminal activity, not just those relating to the offence of money laundering. In summary, it is important for law enforcement authorities to investigate all aspects of a crime that generates money as shown in Figure 4 below.

Figure 4: Multi-action on fighting crime that generates financial benefits



¹¹ 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence (Article 2(e), Organized Crime Convention).

'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets (Article 2(d), Organized Crime Convention).

'Freezing' or 'seizure' shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority (Article 2(f), Organized Crime Convention).

'Confiscation', which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority (Article 2(g), Organized Crime Convention).

2.3. International cooperation requirements under the Organized Crime Convention

States need effective international crime cooperation tools to fight migrant smuggling. Effective mutual legal assistance and extradition laws and agreements or arrangements allow for smooth and timely cooperation with foreign jurisdictions. In prosecuting transnational crimes, States need effective extradition laws to bring the offender to their jurisdiction for prosecution. States also need strong mutual legal assistance laws so that they can obtain evidence from other countries, such as bank records, phone records and witness statements. Other forms of international cooperation include transfer of sentenced prisoners, cooperation for asset confiscation, cooperation in using special investigative techniques, and joint investigations.

International cooperation on combating crime can be both formal and informal.¹² Formal cooperation in criminal investigations and prosecutions includes requests for mutual legal assistance. Informal assistance between police forces or other agencies can be used to obtain information from foreign countries prior to making a mutual legal assistance request. Both forms of international cooperation have been hampered by problems such as diversity of legal systems and law enforcement structures, inadequacy in established methods of communication of basic information and criminal intelligence, cultural and linguistic challenges, and lack of trust. With this in mind, it is important for agencies to make direct and early informal contact on matters of international cooperation.

The Organized Crime Convention and Smuggling of Migrants Protocol provide a detailed approach to both formal and informal cooperation. In general, States can use the Organized Crime Convention, which the Smuggling of Migrants Protocol supplements, as well as national legislation as the legal basis for international cooperation to execute extradition requests and to seek mutual legal assistance.

2.3.1. Extradition

Extradition is a formal process whereby one State (*the requested State*) will surrender a person at the request of another State (*the requesting State*), where the person is accused of or has been sentenced for a crime that is within the jurisdiction – including within the extraterritorial jurisdiction – of the requesting State. A State may request extradition of a person so she or he can face criminal prosecution in that State or serve a criminal sentence in that State in relation to an extraditable offence.

States may seek or provide extradition in relation to smuggling of migrants through different types of arrangements, including arrangements based on bilateral or multilateral treaties, as well as arrangements based on domestic law with no treaty foundation. The offence for which extradition is sought is an offence in the domestic law of both the requesting State and the requested State. This is known as the **double criminality requirement** for extradition – sometimes referred to as dual-criminality.

The Organized Crime Convention (Article 16(1)) and the Smuggling of Migrants Protocol (Article 1(3), which makes smuggling offences subject to the Convention) are examples of multilateral treaties incorporating extradition arrangements. Article 16(1) of the Organized Crime Convention defines the scope of the obligations to extradite. In domestic legislation, States must ensure that offences under the Organized Crime Convention and the offences in the Smuggling of Migrants Protocol are extraditable offences. Extradition requests should be in line with applicable international law.

¹² Formal and informal cooperation are complementary. In some cases informal cooperation will become formal cooperation, but once cooperation is formalized, informal cooperation may still continue to take place. For instance, during the early stages of an investigation, informal law enforcement cooperation can be helpful to efficiently gain investigative leads when there are time constraints. At a later stage, the information obtained informally may need to be re-obtained through formal means to ensure it is admissible in court (UNODC 2011, In-depth training manual on investigating and prosecuting the smuggling of migrants, p.3 see http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/In-Depth_Training_Manual_SOM_en_wide_use.pdf).

Tip: Ensure domestic extradition legislation supports migrant smuggling legislation

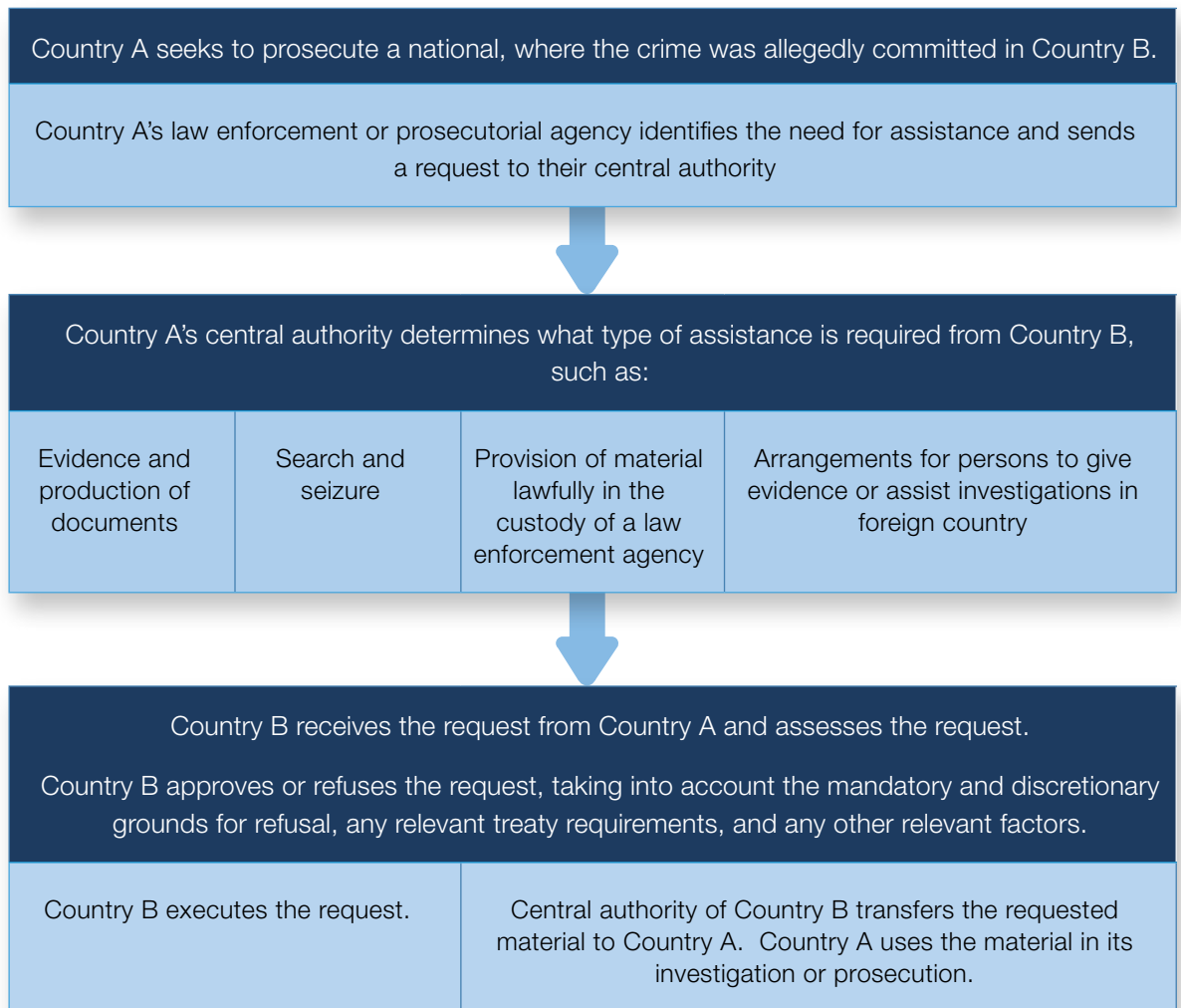
States may use the Organized Crime Convention as a direct legal basis for requesting and granting extradition. However, where States have not accepted to use the Convention for this purpose and rather require separate legal bases for extradition (e.g. national legislation or a specific extradition treaty), they should ensure that migrant smuggling is included as an extraditable offence. For example, if a State has a 'list' of extradition offences in its extradition legislation, it needs to make sure that the migrant smuggling offences are included in that list. This will ensure compliance with the international crime cooperation obligations in the Organized Crime Convention, which apply to the offences in the Smuggling of Migrants Protocol.

2.3.2. Mutual legal assistance

Mutual legal assistance (MLA) is a process by which States seek and provide formal government-to-government assistance in criminal investigations, prosecutions and related judicial proceedings. The types of assistance that may be provided through MLA are subject to applicable treaties and domestic law. The Organized Crime Convention sets out the types of MLA that may be requested:

- taking evidence or statements from persons;
- effecting service of judicial documents;
- executing searches and seizures, and freezing of assets;
- examining objects and sites;
- providing information, evidential items and expert evaluations;
- providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- identifying or tracing proceeds of crime, property, instrumentalities or other things for evidential purposes; and
- facilitating the voluntary appearance of persons in the requesting State Party.

Figure 5: Summary of a mutual legal assistance request process



Tip: Ensure that domestic mutual legal assistance measures support migrant smuggling offences

Article 18(1) of the Organized Crime Convention provides for a comprehensive regime on MLA, encouraging States to cooperate and provide to each other the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention and the Smuggling of Migrants Protocol.

For example, although a migrant smuggling case may be prosecuted in a destination country, key evidence may be located in the victim's country of origin. Ensuring that police, prosecutors and courts can cooperate within and across borders – both formally and informally – is vital to the successful prosecution of migrant smuggling and money laundering offences.

2.4. Criminalization of corruption

Criminalizing corruption is a key complementary Organized Crime Convention obligation that may assist in preventing acts or offences related to smuggling of migrants, such as crimes related to forgery of travel documents by way of bribing border officials. The Organized Crime Convention provides the necessary legal framework for international cooperation to combat corruption.¹³ Article 8 requires States to criminalize corruption.

For further guidance, the United Nations Convention against Corruption (UNCAC)¹⁴ provides a comprehensive international legal framework to combat corruption and notes the links between corruption and organized crime and economic crime, including money laundering.¹⁵

¹³ General Assembly Resolution 55/25 of 15 November 2000 Organized Crime Convention.

¹⁴ The UNCAC itself expands on the Organized Crime Convention and provides a comprehensive international framework to address corruption.

¹⁵ Preamble, United Nations Convention against Corruption.

Section 3

Summary of Tips for Effective Legislation

Summary of tips for effective legislation criminalizing migrant smuggling:

- ✓ Establish a **comprehensive migrant smuggling offence** as international obligations require more than standard migration laws that focus only on illegal entry.
- ✓ **Ensure that migrants are not criminalized for the fact of having been smuggled.** Be aware that the Smuggling of Migrants Protocol provides for the **protection of the rights of the smuggled migrants** consistent with State Parties' obligations under international law. (In contrast, the Protocol provides for the punishment of organizers of migrant smuggling ventures). State Parties shall take into account the special needs of women and children.
- ✓ Ensure that witnesses are protected in migrant smuggling cases.
- ✓ Ensure that migrant smuggling involving **aggravating circumstances attracts higher penalties.**
- ✓ Establish **separate offence provisions for migrant smuggling and human trafficking** as the elements of the offences are different.
- ✓ Establish **extraterritorial jurisdiction** so that organizers of migrant smuggling ventures cannot exploit gaps in the laws of different countries.
- ✓ Be aware that the Smuggling of Migrants Protocol provides for **minimum standards, which can be strengthened** in domestic law.
- ✓ Include an explicit provision in **anti-money laundering legislation** that a conviction for a predicate offence (e.g. migrant smuggling offence) is not required in order to take action for the money laundering offence.
- ✓ Ensure that **extradition** legislation applies to migrant smuggling offences.
- ✓ Ensure that domestic **mutual legal assistance measures** support migrant smuggling offences.



The Bali Process



REGIONAL SUPPORT OFFICE
THE BALI PROCESS

Contact

Regional Support Office - The Bali Process

27th Floor Rajanakarn Building

183 South Sathorn Road, Sathorn Bangkok 10120, THAILAND

Tel. +66 2 343 9477 Fax. +66 2 676 7337

info@rso.baliprocess.net



The Bali Process

on People Smuggling, Trafficking in Persons and Related Transnational Crime

<http://www.baliprocess.net/>