



# Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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## Working Group on the Smuggling of Migrants

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Item 3 of the provisional agenda\*

**How to strengthen the capacity to prosecute cases of  
smuggling of migrants**

### **How to strengthen the capacity to prosecute cases of smuggling of migrants**

**Background paper prepared by the Secretariat**

#### **I. Introduction**

1. The present background paper was prepared by the Secretariat to facilitate the discussion of the Working Group on the Smuggling of Migrants at its eighth meeting. It sets out a series of issues that the Working Group may wish to address in the course of its deliberations, provides background information and practical suggestions for actions that would have a positive impact on efforts to enhance the capacity of States to prosecute cases of smuggling of migrants and also provides an overview of key provisions of the United Nations Convention against Transnational Organized Crime and its supplementary Protocol against the Smuggling of Migrants by Land, Sea and Air. In addition, it presents a list of specific references, resources and tools that States may use to further develop related responses to the smuggling of migrants.

#### **II. Issues for discussion**

2. Delegations may wish to consider the responses of their States to the following questions in preparing for the Working Group's deliberations:

(a) Is the concept of financial or other material benefit included in the national definition of smuggling of migrants? Are other related forms of conduct established as criminal offences?

(b) To what extent have bilateral and multilateral agreements contributed to avoiding loopholes in jurisdiction over cases of smuggling of migrants, in particular at sea?

(c) Which aggravating and mitigating circumstances should be considered relevant in effectively prosecuting cases of smuggling of migrants in line with the Smuggling of Migrants Protocol?

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(d) To what extent does international and regional collaboration among States help overcome barriers to bringing high-level organizers of the smuggling of migrants to justice?

(e) What measures, including at the regional and international levels, are effective in increasing the capacity of criminal justice practitioners to investigate and prosecute the smuggling of migrants, given the changing dynamics of the crime?

(f) To what extent is corruption that facilitates the smuggling of migrants effectively prevented and/or prosecuted by States?

(g) How are States ensuring the full command by relevant law enforcement and judiciary authorities of technological advances to strengthen the investigation and prosecution of cases of smuggling of migrants?

(h) How are States strengthening investigations to target the financial business of migrant smuggling operations?

(i) How are States prioritizing the protection of smuggled migrants, in particular from violations and abuses in the context of aggravated forms of smuggling of migrants, in line with human rights obligations?

(j) What role is played by witnesses and “collaborators of justice” in dismantling migrant smuggling operations and networks?

(k) What lessons have been learned at the international and regional levels with regard to seconding prosecutors to foreign countries to strengthen collaboration in dismantling migrant smuggling networks?

### **III. Overview of issues and guidance for response**

#### **A. How to strengthen the capacity to prosecute cases of smuggling of migrants**

##### **Reinforcing effective implementation of the international legal framework**

3. A crime with a high cost in terms of lives lost, the smuggling of migrants is characterized by a low worldwide prosecution rate. The limited number of investigations carried out across jurisdictions have rarely resulted in a conviction, and too often have addressed only low-level opportunistic actors, without reaching and/or disrupting the core of the criminal networks that are behind related organized crime. Despite the significant progress of many criminal justice systems across the world since the adoption of the Smuggling of Migrants Protocol, prosecutors still often report recurring common challenges in building solid cases that could lead to successful prosecution of key perpetrators of this crime.

4. As a crime that is by definition transnational, the smuggling of migrants can be effectively prosecuted only when competent authorities in the States concerned share a common understanding of its definition and constitutive elements, and jointly operate across borders within the provided international framework for action.

5. The smuggling of migrants is defined in the Smuggling of Migrants Protocol as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national (art. 3).

6. Furthermore, conduct related to such smuggling is listed in article 6, paragraph 1, of the Protocol, which requires States to criminalize the production, procurement, provision or possession of fraudulent travel or identity documents, where such conduct is committed for the purpose of enabling the smuggling of migrants. States are also required to criminalize, when perpetrated through these document-related offences, the enabling of a person who is not a national or a permanent resident to remain in the State concerned without complying with the

necessary requirements in that regard, in order to obtain directly or indirectly a financial or other material benefit.

7. The structure of the criminalization provisions introduces the element of “financial or other material benefit” not only into core smuggling offences, but also into related offences regarding documents and the facilitation of stay.

8. Often, smuggled migrants embark on perilous journeys, which can be even more perilous, or even deadly, because of the violence and abuses perpetrated against them by smugglers. Under article 6, paragraph 3, of the Smuggling of Migrants Protocol, States are mandated to establish as aggravating circumstances to the above-mentioned offences any conduct that endangers, or is likely to endanger, the lives or safety of the migrants concerned, or subjects them to inhuman or degrading treatment, including for exploitation.

9. Aggravated circumstances involving the smuggling of migrants encompass a variety of forms of conduct that may go beyond those listed in article 6. Depending on the domestic legislation in a given jurisdiction, other aggravating circumstances may be further investigated and prosecuted as distinct offences, for instance, where violent treatment of migrants amounts to criminal assault, or where exploitation of smuggled migrants amounts to trafficking in persons.

10. States have increasingly implemented, individually and collectively, legislative and procedural reforms, refined training and other capacity-building efforts, and enhanced collaboration among authorities to face the complexity of prosecuting this and other crimes committed in the context of migratory movements.

11. At the international level, the Global Compact for Safe, Orderly and Regular Migration includes, as one of its 23 objectives, objective 9, on strengthening the transnational response to the smuggling of migrants. The objective is operationalized through a set of recommended actions, agreed by Member States, aimed at strengthening responses and international cooperation to prevent, investigate, prosecute and penalize the smuggling of migrants in order to end the impunity of smuggling networks, and at protecting the human rights of smuggled migrants.

12. The concrete actions identified include prevention of migrant smuggling along the migration cycle, including in cooperation with relevant stakeholders, measures to enhance cooperation in prosecuting the smuggling of migrants, including in its aggravated forms, and the use of transnational, regional and bilateral mechanisms to share relevant information and intelligence on the smuggling routes, *modi operandi* and financial transactions of smuggling networks, the vulnerabilities faced by smuggled migrants and other data to dismantle the smuggling networks and enhance joint responses.

13. Furthermore, in the Global Compact, Member States committed themselves to cooperating towards the development of gender-responsive and child-sensitive protocols along migration routes to adequately identify and assist smuggled migrants, distinguishing between trafficking in persons and the smuggling of migrants, while acknowledging that smuggled migrants might become trafficking victims or be subjected to aggravated smuggling, thus requiring enhanced protection and assistance.

14. In the context of this articulated set of provisions, it is critical that States design and apply criminal law provisions and administrative acts that are in line with the agreed international normative and policy framework, thus allowing for the facilitated sharing of information, expertise and resources, and also conduct joint investigations leading to effective prosecutions to disrupt the deadly business of the smuggling of migrants.

**Enhancing migrant smuggling prevention efforts in countries of origin and transit**

15. Present along the vast majority of migration routes, the smuggling of migrants is largely a demand-driven crime, whose incidence relates to the number of people who require smuggling services, which in turn is based on their motivation to migrate, combined with a lack of regular alternatives for travel. The basic demand from people is for migration, but when regular and independent migration is not possible or feasible, it becomes a demand for smuggling of migrants.<sup>1</sup>

16. The smuggling of migrants often thrives when there is a layer of social tolerance or acceptance of its practices, which makes prosecution of the perpetrators challenging in some jurisdictions. A good practice to address related concerns is to engage in efforts to develop knowledge of the risks associated with smuggling and its criminal connotations, which, although underestimated in some local contexts, would certainly be prosecuted at some point, if detected along transnational migration routes.

17. While migrant smuggling routes may change over time owing to various circumstances, smuggling hubs, where the demand and supply of smuggling services meet, tend to remain stable.<sup>2</sup> Such hubs serve as meeting places where disparate routes converge and arrangements are made for subsequent travel. Often, the locations of smuggling hubs are capitals or large cities, although they may also be remote towns where much of the economic activity is linked to the smuggling of migrants. In such hubs, smugglers are not the only ones providing services for, and profiting from, migrants. For example, enterprising locals may sell telephone or communication services and residents may rent out rooms, apartments or houses to migrants. In well-organized hubs, there may be several hundred people acting as smugglers and facilitators on an ad hoc and opportunistic basis, including boat owners, boat crews, owners of restaurants and cafés, accommodation managers, telephone centres and truck drivers.

18. Promoting options for sustainable livelihoods in countries of origin and transit additionally subtracts available manpower from criminal organizations, enabling increasing numbers of people to engage in legal activities instead of relying on smuggling practices to survive.

19. Especially in times of crisis, adverse socioeconomic conditions further exacerbate vulnerabilities of people, including stranded migrants or those in transit, to organized crime. Fostering development in countries of origin and transit contributes to creating an environment conducive for local populations to, inter alia, gain better access to regular migration pathways and further supports efforts to integrate transiting migrants into the legal economy. Gender-sensitive approaches should be considered by relevant stakeholders when developing crime prevention strategies.

20. In pursuing such efforts, it is important for countries of destination, as they are more often able to deploy financial and material resources, to engage in targeted dialogues with countries of transit and destination, with a view to focusing interventions on the specific necessities of their socioeconomic contexts.

**Establishing jurisdiction over a migrant smuggling incident**

21. The concept of jurisdiction relates to the power of a State to lawfully act, through the exercise of legislative, executive or judicial action, in a given circumstance. There are various principles governing the establishment of jurisdiction, and the particular application of such principles in a given State reflects the sovereign independence of that State and its systems vis-à-vis others.

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<sup>1</sup> United Nations Observatory on Smuggling of Migrants.

<sup>2</sup> Ibid.

22. Establishing jurisdiction over a case of smuggling of migrants can represent a significant challenge for any prosecutor faced with the criminal phenomenon, which is transnational by nature and thrives within the loopholes caused by limited international cooperation.

23. It is not always easy to determine where a sea border has been crossed and therefore precisely where a migrant smuggling offence has been committed. Different laws are applicable in different seas; some laws allow travel on territorial waters without specific authorization, others only consider a case to be one of irregular migration once the irregular migrant sets foot on land.<sup>3</sup>

24. The question of establishing jurisdiction to prosecute and punish all forms of transnational organized crime is addressed in article 15 of the Organized Crime Convention.

25. Article 15, paragraph 1, provides for the exercise by a State party of jurisdiction over the offences established in accordance with the Convention when they are committed:

- (a) In the territory of the State party (the territoriality principle); or
- (b) On board a ship flying the flag of the State party, or an aircraft registered under its laws (the flag principle).

26. In addition, under article 15, paragraph 3, in cases where an alleged offender is in the territory of a State party and the State party does not extradite him or her solely on the ground that he or she is one of its nationals (see art. 16, para. 10), that State party must be able to exercise jurisdiction over the commission of the following, even when committed outside its territory:

- (a) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention, when they involve an organized criminal group;
- (b) Serious crime that involves an organized criminal group, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party;
- (c) Offences established in accordance with the Protocols supplementing the Convention to which States are parties.

27. Article 15 enumerates several further grounds for establishing jurisdiction that a State party may wish to consider when:

- (a) The offence is committed against one of its nationals (art. 15, para. 2 (a)) or against a habitual or permanent stateless person resident in its territory. This may also extend to offences against nationals committed abroad (the so-called “passive personality principle”);<sup>4</sup>
- (b) The offence is committed by one of its nationals or by a habitual resident in its territory (art. 15, para. 2 (b), the so-called “active personality principle”);<sup>5</sup>
- (c) The offence relates to activities outside its territory of an organized criminal group aimed at the commission of a serious crime inside its territory (art. 15, subpara. 2 (c) (i), the so-called “protection principle”);<sup>6</sup>
- (d) The offence consists of participation in money-laundering outside its territory aimed at the laundering of criminal proceeds in its territory (art. 15, subpara. 2 (c) (ii));

<sup>3</sup> H.A.C. Priyantha, “The impact of post-war situation on human smuggling from Sri Lanka to Australia”, Master’s thesis, General Sir John Kotelawala Defence University, Sri Lanka, 2016.

<sup>4</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (Vienna, 2017), para. 266 (a).

<sup>5</sup> Ibid., para. 266 (b).

<sup>6</sup> Ibid., para. 266 (c).

(e) The alleged offender is present in its territory and the State party does not extradite him or her (art. 15, para. 4).

28. Establishing jurisdiction over a case of smuggling of migrants carries with it the duty to prosecute the case. As is noted in more detail below, no single jurisdiction can effectively aim to dismantle the complex phenomenon of the smuggling of migrants alone. In that regard, collaboration among authorities of States along migration routes increases the likelihood of comprehensively addressing all aspects of the crime.

29. A large proportion of the smuggling of migrants worldwide takes place at sea. In that context, criminals often benefit from the complications in establishing jurisdiction over cases occurring outside of the territorial waters of States, especially in the high seas. The capacity of a State to act against the crime of migrant smuggling by sea is thus subject to the United Nations Convention on the Law of the Sea, which contains what is known as the international law of the sea. The international law of the sea complements the international framework provided by the Organized Crime Convention and the Smuggling of Migrants Protocol, especially with regard to the practical measures to be taken to respond to the crime.

30. To facilitate cooperation among States in countering the smuggling of migrants, the Organized Crime Convention and the Smuggling of Migrants Protocol provide an appropriate framework under which cooperation between law enforcement authorities, intelligence systems and prosecutors can be established.

#### **Ensuring prosecution of the crime in line with the international definition**

31. The international legal framework provided by the Organized Crime Convention and the Smuggling of Migrants Protocol is primarily aimed at supporting States in collectively addressing the illegal facilitation of irregular migration, when motivated by the pursuit of a financial or other material benefit.

32. Nonetheless, the smuggling of migrants is not always consistently covered in the various national criminal justice systems of the States parties to the Smuggling of Migrants Protocol. In some instances, the core national smuggling offence doesn't include the purpose of obtaining a financial or other material benefit as a key element, but only considers this component as an aggravation to the offence of facilitating illegal entry for sentencing purposes. In such cases, the basic offence describes conduct that does not fall within the scope of the Protocol.

33. The element of financial or other material benefit is thus key for effective criminalization and prosecution of cases of smuggling of migrants, in line with the Smuggling of Migrants Protocol. Solid interpretation of the Protocol's provisions, including as derived from the drafters' intentions,<sup>7</sup> indisputably indicates that such criminalization is not intended to target individuals or entities, such as family members, non-governmental organizations or religious groups, that might directly or indirectly facilitate the irregular entry or enable the stay of migrants in a country for reasons other than profit.

34. The same logic applies to document offences related to the smuggling of migrants. Such conduct is not per se sufficient to amount to an offence under the Smuggling of Migrants Protocol. In such cases, there must be an intention to obtain a financial or other material benefit and an intention or purpose of enabling the smuggling of migrants or irregular stay. This requirement provides an additional protection against prosecution of refugees and migrants who independently engage in their own irregular border crossing.

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<sup>7</sup> *Legislative Guide for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, paras. 31–32.

### **Focusing operations on the identification and prosecution of high-level smugglers**

35. Aspects of migrant smuggling operations, such as structure, size, mobility, actors involved and modus operandi, are still challenging to characterize. Criminal groups engaging in the smuggling of migrants are divergent in structure, varying from small groups to large transnational networks, depending on the route, countries and nationality of migrants and smugglers involved.

36. One of the main reported challenges in prosecuting the smuggling of migrants is related to identifying smugglers among migrants intercepted at border crossing points, especially as they are often not easily detectable or even present at that stage of the smuggling process. High-ranking smugglers coordinating organized groups may in fact avoid border crossing points to mitigate the risk of being intercepted or to maintain oversight over their business, outsourcing the last stages in the smuggling process to low-level operators, or even migrants themselves.

37. Furthermore, investigations are often conducted in a restricted and reactive way, with the resolution of cases based solely on the elements found at a certain crime scene. For example, often, after a boat or a land vehicle transporting irregular migrants is intercepted, the driver or crew is prosecuted, and the investigation is terminated. Other hypotheses or lines of investigation that lead to other, and upper, levels of the criminal group are often not widely explored.

38. Consequently, the individuals who are more easily detected are often low-level smugglers, opportunistic actors making limited profit, facilitators supporting movements for no financial gain, individuals or organizations driven by purely humanitarian motives or even migrants not otherwise associated with the criminal organizations, who accept a leading role in order to increase their own chances of survival or success.

39. Targeting low-ranking actors is thus an inefficient strategy that could result in saturating the capacity of prisons, adding an additional burden to criminal justice systems and potentially leading them to investigate and criminalize forms of conduct that might not fall within the international definition of smuggling. Such a strategy rarely tilts the balance of organized crime groups or incapacitates their continued operation. Failing to acknowledge the complexity of prosecuting this crime may lead to the misdirection of investigative capacity and law enforcement resources, and unintendedly increase criminalization of smuggled migrants or humanitarian actors.

40. Dismantling organized smuggling networks and bringing top-level organizers to justice requires political will, prioritization of resources and concerted efforts, as well as a common understanding of the phenomenon, its routes and complexity, and very solid judicial cooperation along smuggling routes. Prosecutors and law enforcement authorities should avoid dispersing capacity in apprehending seemingly easy targets and instead focus on complex and often necessary coordinated action to climb up the chain of command of criminal networks.

### **Promoting the specialization of prosecutors and enhancing their ability to harness technology to counter crime**

41. Because of the legal and material complexity in investigating and prosecuting cases of smuggling of migrants, several States have increasingly sought to establish dedicated prosecutors, even providing for multisectoral prosecutorial teams, often working in partnership with foreign authorities.

42. The use of special prosecution teams encourages technical specialization, which has produced tangible results in a number of jurisdictions, as the resulting development of skills and relationships has enhanced the overall capacity of prosecutorial services to deal with complex cases of smuggling of migrants. Similar approaches have led to success in the prosecution of other serious crimes, terrorist acts, corruption and money-laundering offences, cybercrime, and financial and economic crime.

43. Criminals increasingly exploit technology to communicate and further commit crimes through the use of online platforms and related technologies, often leaving behind digital traces of their activities. The smuggling of migrants is no exception to this trend, as online methods of recruitment of migrants and the frequent use of technology to facilitate the conduct of journeys play an important role in such smuggling.

44. To address the increasing digital component of criminal activities, law enforcement and judicial authorities increasingly strive to coordinate with financial and technology service providers to obtain swift access to digital leads and evidence.

45. As countering the smuggling of migrants requires sharing of the burden of its prosecution among countries with different capacities and resources, it is important for countries along migratory routes to support each other's efforts to build capacity to harness the potential of technology as a key factor in disrupting the operations of smuggling networks.

#### **Promoting information-sharing and other forms of institutional collaboration across borders**

46. In prosecuting the smuggling of migrants, or more generally in cases where transnational organized criminal groups are involved, States have proved to significantly benefit from coordinating their investigations and prosecutions with regional and global partners to identify and prosecute perpetrators and halt their international activities more effectively. Despite significant progress achieved, including at dedicated intergovernmental forums, coordination of cross-border investigations and prosecutions is still rare in many contexts and tends to require considerable preparation through formal channels.

47. Collaboration between countries, especially those along migration routes, enhances the capacity of national authorities to react in a timely manner to challenges posed by organized criminal groups, as well as to proactively establish plans to disrupt them. Joint intelligence gathering and information-sharing further supports efforts to identify vulnerable migrants in need of assistance and refugees, as well as to effectively investigate and prosecute the organized crime networks masterminding smuggling operations, including through complex financial investigations.

48. Experience, especially with regard to the central Mediterranean route, has shown the benefit of deploying, in foreign countries along the migrant smuggling route, prosecutors or liaison magistrates who have specific competence in countering the smuggling of migrants, as well as trafficking in persons in international migration. Along with formal channels of cooperation, and to a large extent facilitated by them, the promotion of informal information-sharing and collaboration at the law enforcement and prosecution levels significantly facilitates the implementation of effective responses to the smuggling of migrants. International databases of investigations that are accessible to relevant authorities play an increasingly important role.

49. Mutual trust and the related willingness to share resources, information and data among countries are thus key factors in addressing the smuggling of migrants, as they serve to avoid duplication of efforts and institutional disconnection that could be of benefit to criminals.

#### **Addressing corruption as a facilitator of the smuggling of migrants**

50. The impact of corruption on facilitating the smuggling of migrants varies considerably from one country to another and depends on the prevailing level of integrity within a country's institutional frameworks and its capacity to avoid the infiltration of its administrative branches involved in migration management at various levels by corrupt practices. As experience has shown, corruption and the smuggling of migrants are often closely interconnected crimes. Along migration



routes, smuggled migrants become a source of income not only for smugglers, but also for law enforcement officials and local economies.<sup>8</sup>

51. Corruption represents a major obstacle to the prevention, detection, investigation and prosecution of the smuggling of migrants. Corrupt officials, whether border or immigration officials, police, soldiers, employees of port authorities or staff in embassies and consulates, can directly or indirectly contribute to facilitating the smuggling of migrants, for example, in exchange for a bribe, for some other undue advantage or for a share of the criminal proceeds generated. Law enforcement, border protection and immigration control activities can be circumvented or sabotaged by corruption.

52. Corruption further plays a major role in facilitating smuggling-related document offences, including the production or use of fraudulent travel and identity documents. In other instances, corruption supports fraudulent adoption, marriage or employment schemes and various other forms of fraud linked to the smuggling of migrants.

53. Corruption also has a negative impact on effective international cooperation in investigating and prosecuting smuggling of migrants at all levels. It undermines the essential trust needed to cooperate across borders, whether in relation to border management, immigration control, criminal investigations, or intelligence gathering and sharing leading up to the prosecution phase.

54. The United Nations Convention against Corruption provides the most comprehensive international legal framework to address this crime. In addition, articles 8 and 9 of the Organized Crime Convention, which are applicable *mutatis mutandis* in relation to migrant smuggling offences, further include specific provisions aimed at criminalizing corruption through dedicated responses, including by adopting legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

55. Effective strategies to address the smuggling of migrants thus require the implementation of specific institutional procedures and safeguards to prevent, detect and respond to corruption in key sectors such as immigration and consular services, as well as border management and law enforcement.

56. Each concerned administration should develop and implement its own corruption risk mitigation strategy, committing to pursue transparency and accountability, as well as a zero-tolerance policy with regard to corruption. Proactive measures must be taken in every agency concerned with smuggling of migrants in order to detect corruption. This includes, *inter alia*, facilitating internal and external reporting of alleged incidents of corruption, and enhancing supervisory methods and inspections.

57. It is important to emphasize the need for effective investigation and prosecution of corruption, as it relates to the response to the smuggling of migrants. Financial investigations are a major part of the investigation of alleged incidents of corruption. To that end, the agencies involved in preventing the smuggling of migrants should have a strong internal capacity to conduct investigations, including financial investigations.

#### **Enhancing capacity to protect witnesses, victims, and “collaborators of justice”**

58. Successful experiences in the prosecution and dismantling of organized criminal groups worldwide have shown that a key role to those ends can be played by witnesses and victims, as well as by “collaborators of justice”.

59. In prosecuting migrant smugglers, the cooperation of smuggled migrants who are witnesses, and, as is often the case, victims, of aggravated forms of smuggling, is key. Nonetheless, migrants may often have no incentive to collaborate with the authorities if they face criminalization, forced return or lack of access to application

<sup>8</sup> United Nations Observatory on Smuggling of Migrants.

to stay. They might also feel further demotivated, owing to the perceived sense of impunity for the abuses often suffered in the context of the smuggling process.

60. It may not be practical for smuggled migrants to give testimony in criminal proceedings, as they may be detained in border facilities, or may have escaped or been released, or already returned to their countries of origin. In a study conducted by the United Nations Office on Drugs and Crime (UNODC) of 98 migrant smuggling-related cases from the UNODC case law database on the smuggling of migrants, 23 per cent of the cases involved women charged with committing or attempting to commit their own smuggling or smuggling acts on behalf of their friends and family for no profit. Facilitation of one's own irregular entry does not constitute smuggling under the Smuggling of Migrants Protocol. However, the data indicated that national legislation or legal interpretation often departed from the Protocol, and had thus led to the criminalization of those women, many of whom were refugees and therefore outside of its scope.<sup>9</sup>

61. Securing effective cooperation from witnesses may also be hampered by threats of or actual violence perpetrated by smugglers against migrants and their families. The transnational nature of the smuggling of migrants means that the persons under threat may be in a jurisdiction different from the one in which the smuggler is being prosecuted. All these barriers may undermine the obtaining of strong evidence to be used in court proceedings.

62. Article 24 of the Organized Crime Convention contains specific provisions requiring States parties to take appropriate measures within their means to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and its Protocols.

63. Being smuggled across borders is often a traumatic experience. Giving testimony involving the recollection of all the details of their journey may have a strong retraumatization effect, with the risk of further deteriorating the well-being of migrants who have been subjected to aggravated smuggling. The principle of "do no harm" should guide the assessment of the risks and opportunities related to the adoption of this practice for witness identification. Interviewers should be adequately trained to conduct interviews with smuggled migrants using trauma-informed, as well as human rights-based and child- and gender-sensitive, approaches. Interviews should be held in safe spaces, after the successful completion of disembarkation procedures, in full compliance with the principle of "do no harm" and with the paramount aim of protecting smuggled migrants, regardless of the extent of their collaboration with the authorities.

64. During criminal proceedings, arrangements should be made to ensure that witnesses are able to give testimony freely and without intimidation, or alternative methods of providing evidence should be used. Furthermore, witnesses may be protected by the permitting of limitations on the disclosure of information concerning their identity or whereabouts.<sup>10</sup>

65. First responders, including cultural mediators, also play a key role in creating a safe and collaborative environment for arriving migrants, including through the sharing of information on their rights and entitlements in countries of arrival.

66. Standard operating procedures should also be in place to connect front-line responders – those in immediate contact with migrants – with representatives of the judiciary, ensuring that criminal justice efforts to dismantle illicit businesses behind migration are strengthened by the support of migrants themselves, who, in turn, may be reassured by the implementation of safeguards to grant them non-prosecution for

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<sup>9</sup> See UNODC, "Women in migrant smuggling" (Vienna, 2017), p. 9.

<sup>10</sup> UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (Vienna, 2008).

being the object of smuggling of migrants, in line with article 5 of the Smuggling of Migrants Protocol.

67. To ensure greater international cooperation in offering effective witness protection at home or across borders, prosecution services should also collaborate with other jurisdictions for the safe examination of witnesses at risk of intimidation or retaliation, including in other countries.

68. Prosecution services must also have the capacity to cooperate with “collaborators of justice”, as has been effectively exercised in several jurisdictions as a way of combating organized crime more generally. The investigation and prosecution of complex and often fragmented crimes can be greatly assisted by the cooperation of members and other participants of the same or connected organized criminal groups, as outlined in article 26 of the Organized Crime Convention.

69. In some cases, these individuals may be offered immunity from prosecution or comparative lenience in exchange for their collaboration. Also, in accordance with article 26, paragraph 4, of the Organized Crime Convention, they should be provided with access to witness protection. In fact, “collaborators of justice” are among the main participants in witness protection programmes.<sup>11</sup>

70. Article 26, paragraph 2, of the Organized Crime Convention requires States to consider providing for the possibility, in appropriate cases, of mitigating the punishment of accused persons who provide substantial cooperation in investigations or prosecutions. In the context of the smuggling of migrants, such circumstances may include the cooperation of low-level actors, where such cooperation can support the prosecution of higher-level actors.

### **Introducing stronger penalties for aggravated forms of smuggling of migrants**

71. Unfortunately, there are numerous examples of smuggled migrants having been exposed to various degrees of danger in the smuggling process. This includes, for example, instances of migrants being transported in unseaworthy vessels that posed the risk of death by drowning, in sealed containers such as shipping containers and lorries in which there was insufficient oxygen or exposure to noxious gas, and extreme temperatures. There have also been instances of smuggled migrants being abandoned at sea, in the desert or in freezing conditions, where they had a limited chance of survival. As is well documented, many migrants perish during smuggling journeys.

72. Though often inflicted for no apparent reason, physical violence is largely used as a form of punishment, intimidation or coercion. The most severe forms of violence, such as torture, are often perpetrated for the purpose of extortion and are associated with other forms of abuse and crime, including kidnapping and coercion. Sexual violence is an unfortunate yet common feature of all smuggling routes, one that affects female migrants in a much larger proportion than men. It is inflicted as a form of retaliation for alleged misconduct or as a form of payment in the absence of other means, where women are coerced into sexual services in order to pay for transportation or to pay bribes.<sup>12</sup>

73. So-called aggravated smuggling of migrants is codified in the Smuggling of Migrants Protocol in its article 6, paragraph 3. It includes all conduct related to the smuggling of migrants that endangers, or is likely to endanger, the life or safety of migrants, or that entails inhuman or degrading treatment.

74. Where these circumstances are present, those responsible should be subject to penalties higher than those imposed on individuals who simply facilitate irregular journeys for a financial or other material benefit.

75. Depending on national policy, some States have continued to consider expanding the coverage of aggravated smuggling of migrants to respond to situations

<sup>11</sup> Ibid., p. 19.

<sup>12</sup> UNODC, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response* (Vienna, 2021).

involving extortion, robberies, and arbitrary detention of migrants. Furthermore, inhuman or degrading treatment is increasingly understood as including not only acts that inflict physical suffering on the victim, but also acts that inflict mental suffering.<sup>13</sup>

76. It is important for prosecutors to not let aggravated forms of smuggling go unpunished in cases in which building a case of smuggling of migrants against a suspected criminal proves challenging or impossible. One practical way of ensuring that there is no impunity is to disaggregate the conduct of aggravated smuggling into the different crime types identified in the given national legal system.

77. Such attempts should still be conducted within the broader framework of anti-smuggling policies aimed at disrupting smuggling operations led by transnational organized criminal groups.

#### **Aiming at effective tracing, freezing and confiscation of proceeds of crime**

78. The smuggling of migrants is a crime influenced by dynamics of supply and demand and strongly driven by profit. According to an assessment by the European Union Agency for Law Enforcement Cooperation, in 2021, approximately 50 per cent of the criminal groups involved in smuggling of migrants into the European Union had exclusively engaged in that illicit activity, showing limited involvement in other crimes. The remaining share had also occasionally been involved in trafficking in persons, drug trafficking, excise fraud, firearms trafficking and money-laundering.<sup>14</sup>

79. In the smuggling of migrants, the criminals' immediate profits originate from the fees they charge migrants for their services. The fees are largely determined by the distance of the smuggling trajectory, the number of border crossings, geographic conditions, the means of transport used, the use of fraudulent travel or identity documents and the risk of detection. The fees are not fixed and may change according to the migrants' profiles and their perceived wealth.<sup>15</sup>

80. Such fees are paid or extorted using different means. As an example, along smuggling routes in West and North Africa, smuggling fees are paid upfront – before each leg of the journey – and in cash.<sup>16</sup>

81. It has been reported that, besides using savings and other resources accumulated prior to departure, migrants often work en route to earn the amount of money they need to afford even the least expensive smuggling service for the next leg of the journey. Some people interviewed by UNODC reported that they had compensated the smuggler directly with their labour, by working for the smuggler or a third party in exchange for the smuggling service. While mostly described as contractual arrangements, such alternative remuneration methods carry a risk of forced labour for women, men and children, and sexual exploitation or domestic servitude for women and girls.

82. From the supply side, proactive recruitment and misinformation by smugglers increase the number of migrants who are willing to buy smuggling services. In some regions, smugglers advertise their business where migrants can be easily reached, such as in neighbourhood homes, among diaspora communities in countries of destination, in refugee camps or on various social networks online.

83. Money-laundering enables criminal organizations to benefit from their illegal activities and sustain their operations. In essence, by means of money-laundering, the earnings generated through illegal cross-border activities, such as smuggling of migrants, are used to acquire, convert or transfer property while hiding the true nature of its origin, in order to use the revenues of these crimes in the legitimate economy.

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<sup>13</sup> UNODC, *Model Law against the Smuggling of Migrants*.

<sup>14</sup> European Union Agency for Law Enforcement Cooperation, *European Union Serious and Organized Crime Threat Assessment, 2021* (The Hague, 2021).

<sup>15</sup> United Nations Observatory on Smuggling of Migrants.

<sup>16</sup> Ibid.

84. Despite the extensive use of cash on many routes, successful investigation of the financial aspects of the smuggling of migrants increasingly relies on the swift identification and obtaining of relevant information from banks or other formal and informal financial institutions. The subsequent effective prosecution of the connected money-laundering offences may greatly contribute to the identification of the largest criminal organizations.

85. The tracing and confiscation of assets, both within a jurisdiction and internationally, are often made difficult by the complexity of the banking and financial sector. Technological advances also complicate such efforts, and the use of cyberpayments and the proliferation of “virtual banks” operating in underregulated offshore jurisdictions present practical problems for international cooperation between prosecution authorities.

86. In the prosecution of financial crimes and money-laundering, the use of efficient methods for the tracing, freezing, seizure and confiscation of crime-related assets is a crucial aspect of the intervention. Similarly, disrupting the activity of criminal organizations requires action to trace and intercept their means of financing their activities.

87. Because many of these transactions are transnational in nature, bilateral treaties or national legal frameworks are required to allow for the lawful and expeditious exchange of the collected information across borders between prosecution services or between other law enforcement authorities.

88. A strengthened criminal justice response to money-laundering contributes to cutting off sources of finance and countering the financial incentives that drive crime, thereby making a powerful contribution to the wider fight against organized crime.

89. The Organized Crime Convention provides for an effective cooperation framework to respond to all aspects of money-laundering, particularly in its articles 6 and 7. The Convention requires States to, inter alia, establish comprehensive regulatory and supervisory regimes for banks and other financial institutions, in order to deter and promptly detect all forms of money-laundering. In line with article 6 of the Convention, States should also consider establishing the smuggling of migrants as a predicate offence of money-laundering, to allow for stronger crime prevention and criminal justice responses to tackle the financial core of the crime.

## **B. Cross-cutting policy considerations on smuggling-facilitated migration**

90. Migration is one of the great driving forces behind human progress and development. People move all over the world for a variety of reasons: to search for better economic and education opportunities; to reconnect with their families; or to seek protection from conflict, disasters or persecution. In turn, migration has also led to the proliferation of languages, cultures, cuisines and ideas on an international scale.

91. Not all persons who wish to migrate have legally sanctioned opportunities to do so. Profit-seeking criminals take advantage of this fact by offering illicit smuggling services, giving migration a negative connotation. The criminal activity of smugglers of migrants undermines the capacity of States to safeguard their own sovereignty and contributes to restrictive migration policies, further reducing the opportunities available to migrants to move to other countries legally and safely.

92. Virtually every country in the world where restricted border policies are not coupled with appropriate channels for regular movement offers an opportunity for profit-seeking criminals to engage in the smuggling of migrants, thereby serving as a country of either origin, transit or destination, or a combination thereof.

93. Much progress has been made in addressing the smuggling of migrants through specialized units for investigation and criminal prosecution, including through the development of international and regional regulations, and the modification of

agreements in order to address emerging modalities and trends. Often, however, authorities adopt a reactive approach to the crime, that is, an approach based on the incidental detection of cases, without developing and implementing an overarching strategy.

94. Intelligence operations and evidence gathering that lead to more effective prosecution of the crime have also significantly improved. Prosecutors and law enforcement authorities are increasingly joining forces with other institutions and non-governmental organizations to ensure the care and protection of migrants, which, as discussed above, may play a key role in dismantling the chain of command of criminal groups. Furthermore, in some countries, victim and witness protection programmes have become a part of the prosecution or police strategy.

95. Additionally, joint operations at the regional and subregional levels are being carried out between countries with the objective of apprehending local cells of migrant smuggling networks. Such operations are intended to follow the migrant route from the countries of origin to the countries of transit and destination. These operations are predictably complex, and require and benefit from the establishment of efficient communication channels between the different authorities in the various countries specialized in investigating the crime and in dismantling international networks.

96. An effective approach to migration management is one that is complemented by legislative measures that criminalize the smuggling of migrants, protects the human rights of migrants, with particular attention to victims of trafficking in persons in mixed migration movements, and expands regular channels of migration, especially for those in need of international protection.

#### **1. Previous recommendations of the Working Group on the Smuggling of Migrants on related topics**

97. The Working Group on the Smuggling of Migrants has, to date, formulated more than 200 recommendations advising States parties on the implementation of the Smuggling of Migrants Protocol.

98. Prior to its present meeting, the Working Group adopted very few recommendations specifically on the prosecution of the smuggling of migrants, but did adopt a large number of recommendations on the related subtopics addressed in the present paper.

99. In the publication prepared by the Secretariat entitled *Smuggling of Migrants: Compendium and Thematic Index of Recommendations, Resolutions and Decisions*, containing a thematic index of recommendations adopted by the Working Group at its first six meetings, relevant guidance can be found, including in relation to the following topics listed in the index: assistance to smuggled migrants; criminal justice system – financial investigations, investigations, proceeds of crime and predicate offences, punishment and sentencing, witness protection; emerging technologies; identity and travel documents; information-sharing; international cooperation – general, capacity-building; international law, jurisdiction over migrant smuggling on the high seas; legislation; liaison officers; Protocol against the Smuggling of Migrants by Land, Sea and Air, definitions.

## **IV. Key tools and recommended resources**

100. The selected tools and resources listed below, in reverse chronological order of publication, are available on the UNODC website ([www.unodc.org](http://www.unodc.org)). A comprehensive overview of tools and resources for responding to the smuggling of migrants is available at [www.unodc.org/unodc/en/human-trafficking/resources.html](http://www.unodc.org/unodc/en/human-trafficking/resources.html).

***United Nations Observatory on Smuggling of Migrants (2021)***

101. The United Nations Observatory on Smuggling of Migrants is a pilot project to assess the characteristics, drivers and impact of the smuggling of migrants in rapidly changing contexts. The Observatory collects and disseminates data, information and analyses on the smuggling of migrants. The information is gathered through regular field research in countries of origin, transit and destination, and from people on the move, law enforcement authorities, and civil society and other key actors, and is complemented by targeted surveys among people on the move and migrant smugglers in countries of origin and transit.

102. The Observatory website provides up-to-date evidence relating to the modus operandi of migrant smugglers, smuggling routes, financial aspects of related practices, and abuses suffered in the context of the smuggling of migrants. The information and analysis provided is essential to better understanding the phenomenon of smuggling of migrants, better preventing and combating such smuggling and related crimes, and protecting the human rights of people who are smuggled.

***Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response (2021)***

103. The UNODC publication entitled *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response*, on aggravated forms of smuggling of migrants and related gender dimensions, analyses the circumstances and experiences of smuggled migrants during the migration journey, including repeated episodes of sexual violence, abuse and exploitation, in particular among migrant women. The publication is aimed at identifying gender dynamics and providing guidance to Member States with a view to increasing protection and access to justice for smuggled migrants and strengthening overall responses to aggravated forms of smuggling of migrants, including by ensuring their appropriate criminalization.

***UNODC Toolkit for Mainstreaming Human Rights and Gender Equality into Criminal Justice Interventions to Address Trafficking in Persons and Smuggling of Migrants (2021)***

104. The *UNODC Toolkit for Mainstreaming Human Rights and Gender Equality into Criminal Justice Interventions to Address Trafficking in Persons and Smuggling of Migrants* was developed under the framework of the Global Action against Trafficking in Persons and the Smuggling of Migrants (GLO.ACT), a joint initiative of the European Union and UNODC that is being implemented in partnership with the International Organization for Migration. It is a collection of tools to help practitioners understand and incorporate human rights and gender equality into criminal justice responses to the smuggling of migrants and trafficking in persons.

***UNODC Global Study on Smuggling of Migrants (2018)***

105. The UNODC *Global Study on Smuggling of Migrants*, the first such study published by UNODC, shows that migrant smuggling routes affect every part of the world. The study is based on an extensive review of existing data and literature and provides insight into trends, smuggling routes, profiles of smugglers and those smuggled.

***Migrant Smuggling in Asia and the Pacific: Current Trends and Challenges (2018)***

106. The research material contained in the 2018 publication by UNODC entitled *Migrant Smuggling in Asia and the Pacific: Current Trends and Challenges* updates the 2015 publication on the same subject by outlining the current patterns of smuggling of migrants in the region and presenting evidence-based knowledge to guide policy and strengthen international cooperation. The report is part of a series of knowledge products that explore important and far-reaching issues confronting States

and communities in Asia and the Pacific, as part of an ongoing analytical and capacity-building process.

***The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol: Issue Paper (2017)***

107. The study entitled *The Concept of “Financial and Other Material Benefit” in the Smuggling of Migrants Protocol: Issue Paper* examines legislation and case law among a broadly representative group of States in order to gain a comparative perspective on how the “financial and other material benefit” element of the international definition of smuggling of migrants has been understood and applied. It gives particular attention to the experiences and views of practitioners involved in investigating and prosecuting smuggling of migrants and related crimes. The principal purpose of the study is to contribute to more effective and consistent interpretation and implementation of the international legal obligations that States have assumed through their ratification of or accession to the Smuggling of Migrants Protocol and its parent instrument, the Organized Crime Convention.

***Women in migrant smuggling (2017)***

108. The UNODC report entitled “*Women in migrant smuggling*” seeks to provide answers regarding women’s participation in the smuggling of migrants. It relies on a sample of 98 migrant smuggling-related cases from 20 different countries from the case law database on the smuggling of migrants, part of the UNODC online knowledge management portal known as Sharing Electronic Resources and Laws on Crime (SHERLOC). In the report, it is observed that while the roles and motivations of the women participating in smuggling-related tasks are varied and complex, their backgrounds tend to be quite similar. Most importantly, the report stresses the need for additional and improved data and analysis on the gender dimensions of smuggling and its criminalization.

***Issue Paper: Corruption and the Smuggling of Migrants (2013)***

109. The aim of this issue paper is to assist policymakers and practitioners in preventing and addressing corruption related to the smuggling of migrants. It contains a review of the available evidence on the links between corruption and the smuggling of migrants, including the ways in which corruption facilitates the smuggling of migrants and undermines efforts to control it. It covers different forms of corruption associated with the smuggling of migrants in both the public and private sectors and contains examples of cases of the smuggling of migrants that involved corruption.

***Issue paper: Smuggling of Migrants by Sea (2011)***

110. The purpose of the UNODC publication entitled *Issue Paper: Smuggling of Migrants by Sea* is to capture expertise from a range of experiences in countries of origin, transit and destination for the purpose of increasing understanding of the issue and the challenges in addressing it. The overall goals of the issue paper are to provide a global perspective on the issue of the smuggling of migrants by sea, examining the framework in which it is addressed and the key inherent challenges it poses, and to recommend concrete measures that can be taken to strengthen responses to the crime.

***In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants (2011)***

111. The UNODC *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* builds on the previously published basic training manual on the same subject to further promote a common understanding of relevant concepts and approaches in the response to the smuggling of migrants. The manual offers a practical approach to the investigation and prosecution of the smuggling of migrants by providing promising practices relevant to all countries of origin, transit and destination, regardless of their legal systems.



***International Framework for Action to Implement the Smuggling of Migrants Protocol (2011)***

112. The UNODC *International Framework for Action to Implement the Smuggling of Migrants Protocol* is a technical assistance tool to help States parties and non-State actors to identify and address gaps in their response to the smuggling of migrants, in accordance with international standards. It draws on international instruments, political commitments, guidelines and best practices to propose a comprehensive approach to preventing and combating the smuggling of migrants. Part two of the *International Framework for Action* contains an overview, in the form of four tables, of the following topics: prosecution and investigation; protection and assistance; prevention; and cooperation and coordination.

***Model Law against the Smuggling of Migrants (2010)***

113. The *Model Law against the Smuggling of Migrants* was developed to assist States in implementing the provisions contained in the Smuggling of Migrants Protocol. It is aimed at facilitating the review and amendment of existing legislation and the adoption of new legislation, in line with the Protocol. Each provision of the Protocol is presented and accompanied by a detailed commentary, legal sources and examples, providing various options for legislators, as appropriate.

***Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants (2010)***

114. The UNODC *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* is a practical guide and training tool targeted at criminal justice practitioners around the world. Individual modules are designed to be readily adapted to the needs of different regions and countries and can serve as a basis for upgrading or supplementing the training programmes of national training institutes.

***Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime (2008)***

115. The compendium entitled *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* is intended as a useful reference tool, drawing on the experiences of Member States in establishing effective and sustainable programmes for the protection of witnesses. The good practices identified in the compendium are directed at policymakers, legislators, legal practitioners and senior law enforcement and justice officials. The intention is to provide those professionals with a comprehensive picture of the relevant measures and options available for incorporation into their legal systems and operational procedures, subject to the specific social, political and economic circumstances of their countries.

***Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2004 and 2017)***

116. The purpose of the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* is to assist States in implementing the Organized Crime Convention and its Protocols. The publication can be found under the heading “Legislative Guide” on the SHERLOC knowledge management portal (<https://sherloc.unodc.org>).