



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

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**Review of the implementation of the United Nations
Convention against Transnational Organized Crime and
the Protocols thereto: Protocol against the Smuggling of
Migrants by Land, Sea and Air**

Activities of the United Nations Office on Drugs and Crime to promote and support the implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Report of the Secretariat

I. Introduction

1. The Conference of the Parties to the United Nations Convention against Transnational Organized Crime, in its decision 4/5, entitled “Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”, requested the Secretariat, in consultation with States Parties, to develop, if necessary, tools to improve the cooperation between law enforcement agencies, inter alia, in the area of communication and data collection and analysis. The Conference also requested the Secretariat to make available to Member States information on successful practices and measures with the aim of facilitating the participation of witnesses in the criminal justice system and to report to it, at its fifth session, on the activities of the Secretariat, including participation in international and regional organizations, to promote and support the implementation of the Smuggling of Migrants Protocol.

2. In addition, the Open-ended Interim Working Group of Government Experts on Technical Assistance, at the close of its intersessional meeting held in October 2009, requested the Secretariat to prepare, for submission to the Working

* CTOC/COP/2010/1.



Group at its next meeting, to be held during the fifth session of the Conference, a report on the current technical assistance programmes and the programmes envisaged for the future, with an evaluation of the outcome of those programmes, and a report on the proposals for implementing the priority activities recommended by the Working Group during its intersessional meeting. The present report includes information on work carried out by the United Nations Office on Drugs and Crime (UNODC) in response to the requests of the Working Group in the area of smuggling of migrants.

II. Implementation of Conference decision 4/5

A. Tools to improve the cooperation between law enforcement agencies, inter alia, in the area of data collection and analysis

3. The “Model Law against the Smuggling of Migrants”, to be published by UNODC in October 2010, was developed to assist States in implementing the provisions of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The Model Law is intended to facilitate and help to systematize the provision by UNODC of legislative assistance and to assist States in reviewing and amending their current legislation and in adopting new legislation. It is designed to be adaptable to the needs of each State, irrespective of the legal tradition or the social, economic, cultural or geographical conditions of that State. The Model Law also contains a detailed commentary providing further information on the legal provisions set out in the Smuggling of Migrants Protocol.

4. The Model Law sets out all provisions that States are required or recommended by the Protocol to incorporate into their domestic legislation. Article 18 of the model law, which provides the establishment of a national coordinating body, states that “The [relevant Minister] shall establish a national coordinating [committee/body] to be comprised of officials from [*insert relevant agencies*], officials from other relevant State agencies and representatives from local government and non-governmental service providers.” The tasks of the coordinating body are to oversee and coordinate the implementation of the law; develop policy, guidelines, procedures and other measures to facilitate the implementation of the law; develop a national plan of action to ensure comprehensive and effective implementation of the law, inter alia, through a process of periodic review of achievement of aims and objectives; oversee and report to the relevant Minister or the Parliament on the implementation of obligations under the Smuggling of Migrants Protocol; facilitate inter-agency and multidisciplinary cooperation between the various government agencies, international organizations and non-governmental organizations; and facilitate cooperation with relevant countries of origin, transit and destination, particularly with border control agencies.

5. The commentary on the article advises that the implementation of law and policy relating to the smuggling of migrants is complex and necessarily involves multiple agencies, each of which has an important role to play within its respective area of competence while potentially being subject to certain limitations. Experience suggests that the establishment of an inter-agency coordinating body to work on smuggling issues greatly assists in both policy and operational

coordination. Such a body can provide agencies with a forum that enables them to meet regularly in order to undertake planning, discuss legal, policy and procedural issues and raise individual cases and budgetary issues. In many instances, the establishment of such a body can be achieved without legislation. However, for those countries in which such legislation might be required, the Model Law provides some examples of existing national legislation.

6. In May 2010, UNODC published its *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*,¹ which contains a detailed module on international cooperation in cases of smuggling of migrants (Module 8). The Manual is the result of input received over the course of a series of expert group meetings² and reflects existing practices that have been identified as effective and endorsed by expert practitioners from numerous jurisdictions and organizations. The purpose of the Manual is threefold: to serve as a reference tool for self-study by providing a basic introduction to the investigation and prosecution of the smuggling of migrants, to serve in providing relevant training to investigators and prosecutors and, since there is no “one size fits all” solution to building capacity to investigate and prosecute such smuggling, to provide a solid knowledge base that can be adapted to the specific context of the country concerned. The Manual has been designed in such a way that individual modules can be adapted to the needs of different regions and countries and can serve as the basis for upgrading or supplementing the training programmes of national training institutes. UNODC stands ready to assist national institutions in that adaptation process.

7. Module 8 underscores that, in view of the transnational dimension of the smuggling of migrants, international cooperation is an essential prerequisite to preventing and combating the phenomenon. Cooperation between law enforcement authorities may be formal or informal. Informal cooperation involves police-to-police requests for assistance in conducting investigations prior to judicial proceedings. In such instances, the necessary arrangements can usually be made between the relevant police officers or agencies without applying the provisions of mutual legal assistance agreements or of the Organized Crime Convention. Formal international cooperation might be based on existing bilateral or multilateral agreements on mutual legal assistance in criminal matters or extradition, or on the relevant articles of the Organized Crime Convention, depending on the jurisdiction of the countries concerned. The issue of whether to cooperate formally or informally is often a difficult one and depends on the relevant legal regimes. Where there are prosecutorial objectives or the information sought requires a search, seizure or other coercive measures, informal communications between police must be formalized so as to ensure the admissibility of evidence in court. Both informal and formal international cooperation might be pursued in parallel.

8. The Manual goes on to set out the following points summarizing the investigator’s role in international cooperation:

- (a) To determine whether and where cooperation is required;

¹ United Nations publication, Sales No. E.10.IV.7.

² The first expert group meeting was held in Saly Portudal, Senegal from 30 November to 2 December 2008, the second in Cairo from 23 to 25 March 2009 and the third in Abuja from 23 to 24 June 2009.

- (b) To determine the evidentiary materials required;
- (c) To identify possible legal constraints;
- (d) To decide on the approach most likely to produce the desired result;
- (e) To seek advice from senior officers, prosecutors or investigating judges, as appropriate, before seeking the assistance of other States;
- (f) To consider seeking the assistance of the International Criminal Police Organization (INTERPOL), the European Police Office (Europol) or other regional law enforcement agencies;
- (g) To respond promptly to requests made by international partners.

9. Where a formal request for mutual legal assistance is necessary, such requests are made by designated central authorities, which have the responsibility and power both to execute and to receive requests or to pass them on to the competent national authority or authorities.

10. In drafting written requests for submission to the designated central authority, investigators should seek to:

- (a) *Be highly specific;*
- (b) *Link the existing investigation or proceedings to the assistance required;*
- (c) *Specify the precise nature of the assistance sought;*
- (d) *Focus on the end result rather than on the method of securing it.* It may be possible, for instance, for the requested State to obtain the necessary evidence by means of a court order rather than by means of a search warrant.

11. States are required to share information either on a voluntary basis or in accordance with existing agreements or arrangements. Without effective channels of communication, operational and general information cannot be obtained. Article 27 of the Organized Crime Convention encourages close cooperation among States, while article 10 of the Smuggling of Migrants Protocol requires States to exchange information regarding:

- (a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by migrant smugglers;
- (b) The identity and methods of migrant smugglers;
- (c) The authenticity and proper form of travel documents issued by a State party and the theft or related misuse of blank travel or identity documents;
- (d) Means and methods of concealment and transportation of persons;
- (e) Legislative experiences and practices and measures to prevent and combat the smuggling of migrants;
- (f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the smuggling of migrants.

12. Effective systems of information-sharing should be developed at regional and international levels in order to enhance international cooperation. Principal considerations when sharing information include:

- (a) The need to determine what procedures are in place and to follow them;
- (b) The importance of ensuring that information is not shared in breach of domestic legislation;
- (c) The requirement of using information in compliance with the wishes of the State that has provided that information;
- (d) The continuing need to look for opportunities to share information that may help to stop or disrupt smuggling of migrants in other jurisdictions;
- (e) The importance of providing personal contact details in order to facilitate direct contact when communicating through INTERPOL.

13. The “Issue Paper on Migrant Smuggling by Air”,³ published by UNODC in 2010, aims to strengthen the response to the smuggling of migrants. Currently available information on the smuggling of migrants by air is incomplete and scattered. Smuggling routes are often circuitous. The lack of comprehensive knowledge about the phenomenon hampers a concerted and cooperative response to it. In order to address this lacuna, an expert group meeting on the smuggling of migrants by air was convened by UNODC in Vienna from 7 to 9 December 2009 with the aim of gaining a better understanding of:

- (a) The modus operandi of migrant smugglers who use air routes to commit their crimes;
- (b) Good practices of law enforcement and other actors involved in responding to the problem;
- (c) The gaps in knowledge concerning and responses to this particular method of smuggling migrants;
- (d) How UNODC and other international actors can better assist States in strengthening capacities to prevent and combat the smuggling of migrants by air.

14. The paper includes a number of recommendations, inter alia, on strengthening cooperation with airport and airline authorities and personnel at the earliest possible stage. The paper advises that the modern open spaces that facilitate “passenger contamination” (the travelling of smuggled migrants together with ordinary passengers) are difficult to control and pose security challenges. This can be avoided if border control and law enforcement officers are involved in airport security at an early stage. Cooperation among various stakeholders could be strengthened through meetings of the International Air Transport Association (IATA) Control Authorities Working Group at the international level.

15. In addition, the paper recommends that liaison officers be assigned to airports to establish good working relationships with local airport authorities and airport and airline staff. Where there is no liaison officer, airport managers or other personnel

³ See www.unodc.org/documents/human-trafficking/Migrant%20Smuggling%20Issue%20Papers/Issue_Paper_-_Migrant_Smuggling_by_Air.pdf.

should be encouraged to maintain direct contact with law enforcement personnel at relevant embassies. Investigators should build partnerships and harness the information-gathering potential of airports and airlines. They should be able to access security company and airline information dissemination networks and airport and airline statistics. Airport security units can exchange information on passenger profiling, watch lists, check-in, boarding and disembarkation procedures and effective use of human resources. Closer cooperation should be formed with IATA and the International Civil Aviation Organization with respect to standard-setting so that responses to the smuggling of migrants can be standardized.

16. In addition, in a recommendation on strengthening and broadening the gathering and sharing of information on trends in the smuggling of migrants, it is noted that operational methods and timelines of responses in airports need to be strengthened in order to increase law enforcement capacity to stay ahead of constantly adapted smuggling routes and methods. Such information-sharing should take place both nationally and internationally. Networks for sharing information are often informal, relying on personal interactions between individuals. Such information-sharing should be systematized and formalized. Information can be further disseminated through regional border and police organizations and through international organizations. Regional information-sharing systems such as the European Union information and coordination network for migration management, a secure web-based information management system shared by border authorities, could be replicated at a global level.

17. In a recommendation on strengthening multisector and multi-agency cooperation, it is advised that law enforcement, border and immigration officials need to strengthen relationships with non-governmental organizations, international organizations and local service providers. Communication must be improved between non-governmental organizations and law enforcement actors in order to enhance understanding of their specific roles. The role of law enforcement in combating the smuggling of migrants must be emphasized so that non-governmental and civil society organizations understand that law enforcement responses to the smuggling of migrants target smugglers rather than the smuggled migrants. Lessons can be drawn from countries that have implemented multi-agency approaches to address the smuggling of migrants and thus enhanced the sharing of intelligence and other information, operational support, strategic assessments and policy recommendations. Such multi- and inter-agency coordination and cooperation should be replicated elsewhere in order to facilitate information-sharing and strengthen responses internationally.

18. The paper recommends that regional joint operations be considered in order to strengthen international cooperation. Some regions conduct joint air border operations in which officers from different countries work at the same airport and transmit new information to their respective countries. Such information can be further disseminated through regional organizations such as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and regional police organizations. Cooperation and coordination between countries and agencies at the national, regional and international levels must be strengthened. Networking is key to ensuring information flow, and bilateral networking should evolve into multilateral networking. Mechanisms should be put in place to facilitate greater cooperation

among countries of origin, transit countries and countries of destination to ensure sustained information exchange. Multinational teams should be put in place in international hubs to overcome language and cultural barriers to detecting and interviewing potential smuggled migrants and migrant smugglers.

B. Information on successful practices and measures with the aim of facilitating the participation of witnesses in the criminal justice system

19. Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, published by UNODC in 2008, outlines protection measures that are appropriate for victims or witnesses who may be vulnerable. Those measures are not usually based on statute; rather, their application may be based on a number of factors that must be demonstrated to the court.

20. Article 11 of the Model Law against the Smuggling of Migrants on facilitating entry or stay for justice processes, establishes that the competent authority or Minister may grant a visa or residence permit to a smuggled migrant in order to facilitate the investigation and/or prosecution of an offence.

21. The commentary on the article states that, while the cooperation of smuggled migrants is not required by the Smuggling of Migrants Protocol, experience suggests that such cooperation is essential in the detection, investigation and prosecution of smugglers. For example, smuggled migrants may be the only witnesses to the smuggling process. As a result, they may be the only people who can provide reliable intelligence or who can testify as to who was directing the smuggling process, who served as an escort or who was simply another smuggled migrant. Given the importance of actively pursuing the investigation and prosecution of persons responsible for the smuggling of migrants, practical steps may need to be taken to ensure that smuggled migrants can, where appropriate, remain in the country or return to participate in criminal justice processes. The way in which this is achieved depends on national law: for example, some countries, such as the United States of America, use the mechanism of parole, while others issue temporary visas or residence permits. Accordingly, article 11 will need to be adjusted when incorporated into national law in order to ensure that it is consistent with the immigration and visa regulations of the country concerned.

22. While entry permits and visas tend to be used in situations in which persons have already agreed to give evidence against a suspect, those mechanisms can also be used as a measure to ensure that smuggled migrants have a period of time in which to reflect on their situation and make an informed decision about whether or not they will agree to participate in the criminal justice process. Some smuggled migrants may have been exposed to extreme danger or threats on their journeys (for example, by being starved or locked in containers in extreme heat without sufficient air). They may need time to recover from their experience before they can effectively participate in a debriefing or interview or make an informed decision about whether or not to participate in the criminal justice process.

23. The Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants outlines ways of securing the cooperation of witnesses. Some of those methods include:

(a) Requests to the immigration authorities for smuggled migrants who are witnesses to be allowed to stay (on either a temporary or a permanent basis);

(b) The use of video link testimony, if such facilities exist, so that a smuggled migrant who has been repatriated may still give evidence from his or her home country;

(c) The provision of legal advice to the smuggled migrants prior to their being interviewed, which may help to ensure that they are aware of what they are doing and to reassure the judiciary that debriefing and witness interviews are being conducted properly. A statement made by a person who has already received legal advice may be viewed in a different light from a statement obtained under other circumstances;

(d) The corroboration of evidence given by smuggled migrants using other means, such as wiretaps or other witnesses;

(e) Audio or video recording of witness interviews;

(f) Where laws allow and there are grounds to support the use of such methods, consideration should be given to the formal protection of the witness's identity, which may include the provision of witness protection.

24. The "Issue Paper on Migrant Smuggling by Air" also includes a recommendation on involving smuggled migrants in the criminal justice process, advising that adequate time should be devoted to debriefing suspected smuggled migrants and migrant smugglers rather than immediately deporting them, so that information can be gathered and a full report containing material facts prepared. Dedicated prosecution units can be placed in airports and statements can be taken from airport or immigration liaison officers, arresting officers, airline staff and witnesses. The paper also advises that measures to encourage the cooperation of smuggled migrants with the law enforcement process should be considered as a means of strengthening the criminal justice response and increasing the number of smugglers convicted.

C. Participation in international and regional organizations

25. A transnational response is required in order to prevent and combat the transnational crime of smuggling migrants. In order to enhance the effectiveness of its technical assistance, UNODC engages in partnerships with international, regional and subregional organizations. At the international level, partnerships facilitate the optimal use of resources, enhance the complementarity of mandates and expertise, promote broad-based and holistic initiatives and help to avoid duplication of work. At the regional and subregional levels, they help to ensure that political, economic and social dynamics and developmental sensitivities are properly understood and effectively incorporated into technical assistance activities. Partner organizations bring invaluable local expertise and experience that enhance the overall quality and relevance of those activities. Moreover, partnerships add political legitimacy, provide valuable logistical support, facilitate knowledge transfer and contribute to the development of locally sustainable capacity. Collaboration and substantive input are also sought from the institutions of donor governments.

26. UNODC also works closely with international, regional and non-governmental organizations involved in countering the smuggling of migrants in order to promote a comprehensive and multidisciplinary approach, in recognition of the fact that migrant smuggling is a multi-faceted issue. This approach is applied consistently in all UNODC activities relating to the smuggling of migrants. For example, the UNODC “Model Law against the Smuggling of Migrants” has been drafted with the input of experts from a range of national institutions and other organizations. In addition, a number of offices, organizations and regional forums participated directly in the elaboration of the Model Law, including the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the Secretariat, the International Labour Organization, the International Organization for Migration, the Office of the United Nations High Commissioner for Human Rights, the Regional Conference on Migration (also known as the Puebla Process) and the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime.

27. UNODC is also part of the Global Migration Group, a mechanism for promoting inter-agency coordination that brings together heads of agencies seeking to promote the wider application of all relevant international and regional instruments and norms relating to migration and to encourage the adoption of more coherent, comprehensive and better-coordinated approaches to the issue of international migration. UNODC uses this mechanism to increase its network of partnerships to address the specific issue of smuggling of migrants, both by gathering expertise from agencies that are part of the Global Migration Group and by disseminating specific information on the smuggling of migrants throughout that network. It also uses the forum that the Group provides to promote the collaborative incorporation of components on combating the smuggling of migrants into the migration projects and activities of other agencies.

28. UNODC currently works with law enforcement organizations such as INTERPOL in preventing and combating the smuggling of migrants. Building on that collaboration, UNODC seeks to further strengthen its cooperation with national, regional and international police organizations and training institutes involved in countering the smuggling of migrants in order to strengthen the capacity of front-line officials, increase cross-border cooperation and ensure that criminal justice responses enable the effective investigation and prosecution of migrant smugglers, while considering wider issues such as the rights of smuggled migrants and the principle of non-refoulement.

III. Technical assistance activities to support the implementation of the Smuggling of Migrants Protocol

29. UNODC is currently implementing seven technical assistance projects worldwide to address all aspects of the Smuggling of Migrants Protocol. While each project is tailored to the specific needs of the country or region concerned, all reflect the underlying principle of the Protocol that a comprehensive State response balances effective criminal justice with protection of the rights of smuggled migrants. While the focus of individual projects varies, standardized core activities include the development of legislation, national strategies, local capacity and expertise.

30. The outcome-oriented strategy of UNODC focuses on the development of material and training programmes on good practices that are put to use in technical assistance programmes and disseminated for use by Member States and relevant actors in the fight against the smuggling of migrants. One of the core functions of UNODC is the development of practical tools for criminal justice actors, including law enforcement agencies, services providing assistance to victims, prosecutors, judges, policymakers and administrators.

31. Data on the extent and nature of the smuggling of migrants are crucial to the design and implementation of effective countermeasures. On 17 June 2010, UNODC launched a report entitled *The Globalization of Crime: A Transnational Organized Crime Threat Assessment*,⁴ which contains a chapter on routes used to smuggle migrants from Latin America to the United States and from Africa to Europe.

32. The assessment and research activities conducted by UNODC on the smuggling of migrants and related activities have contributed to improving knowledge on shortcomings in the implementation of the Smuggling of Migrants Protocol. Issue papers, including “A short introduction to migrant smuggling”,⁵ “Migrant Smuggling by Air”⁶ and “Organized crime involvement in trafficking in persons and smuggling of migrants”,⁷ have been published by UNODC within the framework of a project supported with funding from the European Union and based on an extensive survey of routes used to smuggle migrants from West and North Africa into Europe.

33. In 2010, UNODC launched a comprehensive programme to assist Member States in East and South-East Asia in combating criminal networks that smuggle migrants across borders. The programme addresses the lack of specific data on smuggling of migrants in the region, including information on: (a) the extent of smuggling of migrants; (b) characteristics of the organized criminal groups involved; and (c) national responses. The programme is to establish a coordination and analysis unit that will, with the help of a regional database, coordinate, generate, manage, analyse, report and use information on the smuggling of migrants with a view to ensuring that such smuggling is detected and acted upon by means of targeted operational responses. Information will be entered into the regional database, which will be used by the unit to produce detailed situation assessments, develop strategic information and propose evidence-based interventions by partners and Member States.

34. On the basis of the positive response to the publication of the *International Framework for Action to Implement the Trafficking in Persons Protocol*, UNODC is currently developing a similar framework to facilitate the implementation of the Smuggling of Migrants Protocol, with funding from the Government of France.

35. In October 2009, UNODC held a second informal expert group meeting to draft model legislative provisions on the smuggling of migrants with a view to

⁴ See www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf.

⁵ See www.unodc.org/documents/human-trafficking/Migrant%20Smuggling%20Issue%20Papers/Issue_Paper_-_A_short_introduction_to_migrant_smuggling.pdf.

⁶ See www.unodc.org/documents/human-trafficking/Migrant%20Smuggling%20Issue%20Papers/Issue_Paper_-_Migrant_Smuggling_by_Air.pdf.

⁷ See www.unodc.org/documents/human-trafficking/FINAL_REPORT_06052010_1.pdf.

meeting the special needs of a diverse range of legal systems. The European Union-funded project under which the “Model Law against the Smuggling of Migrants” was developed has also funded activities in four regions (Central Asia, East Asia, South Asia and Southern Africa) to increase international cooperation in cases relating to trafficking in persons and the smuggling of migrants. Under the same project UNODC has also started developing material for criminal justice practitioners to be used in specialized training on combating the smuggling of migrants. The first expert group meeting, held in Vienna from 21 to 25 June 2010, brought together expert practitioners from relevant national agencies and regional and international institutions. *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* was published in June 2010.
