



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

Distr.: General  
21 March 2012

Original: English

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## **Working Group on the Smuggling of Migrants**

Vienna, 30 May-1 June 2012

Item 3 of the provisional agenda\*

**Challenges and good practices in the protection of and  
assistance to smuggled migrants**

## **Challenges and good practices in the protection of and assistance to smuggled migrants**

**Note prepared by the Secretariat**

### **I. Introduction**

1. Pursuant to resolution 5/3, adopted by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime at its fifth session, an open-ended intergovernmental interim working group on the smuggling of migrants was established to advise and assist the Conference in the implementation of its mandate with regard to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.
2. In that resolution, the Conference underlined the need to provide migrants with humane treatment and full protection, in accordance with the Smuggling of Migrants Protocol, mindful in that regard that States parties are obliged, in accordance with article 16 of the Protocol, to take all appropriate measures to protect the rights of persons who have been the object of smuggling in accordance with the Protocol, in particular the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment.
3. The first session of the Working Group is to take place in Vienna, Austria, from 30 May to 1 June 2012.
4. The present background paper was prepared by the Secretariat to aid in the discussions of the working group.

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\* CTOC/COP/WG.7/2012/1.



## **II. Issues for discussion**

5. The Working Group on Smuggling of Migrants may wish to consider the following issues as a basis for deliberations:

- What are the current challenges to fulfilling the protection obligations set out in the Smuggling of Migrants Protocol?
- What are the current barriers to the access of smuggled migrants to justice in situations where they are victims of violence in the course of being smuggled?
- What are the current challenges to addressing the special needs of women and children?
- What are the current challenges in assisting migrants whose lives or safety have been endangered by reason of being smuggled?
- How can States best cooperate in assisting migrants whose lives or safety have been endangered in the process of being smuggled?
- How to ensure that effective referral mechanisms are in place for smuggled migrants who are also victims of crimes or in need for special protection?
- How can access to justice for smuggled migrants who are victims of crime be improved?

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

### **A. Protection and assistance obligations**

6. The purpose of the Smuggling of Migrants Protocol, stated in article 2, is to prevent and combat the smuggling of migrants and to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants. Article 16 of the Smuggling of Migrants Protocol includes mandatory protection and assistance measures that States parties must take to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of the Smuggling of Migrants Protocol. Such conduct includes inter alia the smuggling of migrants and enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State.

7. The main requirements of article 16 of the Smuggling of Migrants Protocol can be summarized as follows: each State party is to take appropriate measures to protect smuggled migrants from death, violence, torture or other cruel, inhuman or degrading treatment or punishment, and to provide appropriate assistance to persons endangered by smugglers, taking into account the special needs of women and children. Additionally, in the case of detention, each State party is required to comply with its obligations under the Vienna Convention on Consular Relations to inform the person of the notification and communication obligations under that Convention.

8. Article 19, paragraph 1, of the savings clause of the Smuggling of Migrants Protocol clarifies that the implementation of the Protocol is not to affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law, and where applicable, the 1951 Convention relating to the Status of Refugees<sup>1</sup> and the 1967 Protocol relating to the Status of Refugees<sup>2</sup> and the principle of non-refoulement contained therein.

9. Article 19, paragraph 2, of the savings clause of the Smuggling of Migrants Protocol clarifies that the measures set forth in the Protocol shall be interpreted and applied in a way that is not discriminatory to smuggled migrants on the grounds that they are smuggled migrants, and that the interpretation and application of measures shall be consistent with internationally recognized principles of non-discrimination.

## **B. Protection of the rights of smuggled migrants**

10. Article 16, paragraph 1, of the Smuggling of Migrants Protocol reiterates the fundamental right to life contained in Article 6, paragraph 1, of the International Covenant on Civil and Political Rights. While the right of all persons, irrespective of their migration status, to access to emergency medical care is not clearly defined, it can be extrapolated from the right to life, given that in some situations the denial or refusal of such emergency medical care may violate that right. This positive obligation on States parties to protect the right to life is particularly relevant in situations where the conditions in which migrants are smuggled are life-threatening.

11. By virtue of article 16, paragraph 2, States parties are obliged to take appropriate measures to protect migrants against violence that may be inflicted upon them by reason of being the object of conduct set forth in article 6 of the Smuggling of Migrants Protocol. Appropriate measures to fulfil this obligation will be decided at the State level, taking into consideration the types of violence likely to be inflicted on smuggled migrants. Good practices in this respect include considering smuggled migrants in crime prevention programmes, providing support programmes to nationals overseas who are smuggled migrants, and ensuring that migrants have access to justice and physical protection through law enforcement. In addition to investigating acts of violence as distinct crimes committed against smuggled migrants, good practice is also to consider such acts as aggravating circumstances in smuggling of migrants prosecutions in addition to those included in article 6, paragraph 3, of the Smuggling of Migrants Protocol.

## **C. Assistance to migrants whose lives or safety are endangered**

12. Article 16, paragraph 3, of the Smuggling of Migrants Protocol requires States parties to afford appropriate assistance to migrants whose lives or safety are endangered by reason of being smuggled. The provision of assistance is a mandatory obligation in the Smuggling of Migrants Protocol, though it leaves States parties to decide how such assistance is to be given. Depending on the circumstance

<sup>1</sup> United Nations, *Treaty Series*, vol. 189, No. 2545.

<sup>2</sup> Ibid. vol. 606, No. 8791.

in which migrants are smuggled, key considerations may involve legislation or other measures to ensure the provision of physical security for instance, to protect migrants from retaliation by smugglers, access to emergency food, shelter and medical care, access to consular services and legal advice.

13. The minimum assistance that States parties must provide can be extrapolated from international law. In addition to the right to life discussed above in paragraph 9, the right to health contained in article 12 of the International Covenant on Economic, Social and Cultural Rights imposes a positive obligation on States to ensure that all persons, regardless of their migration status, receive emergency medical care. Similarly, the right to food contained in article 11 of the International Covenant on Economic, Social and Cultural Rights, would imply that States have a positive duty to ensure that everyone has access to adequate food.

14. Good practices include allocation of adequate resources to provide assistance to smuggled migrants, establishment of appropriate standards of conduct for officials who deal with smuggling of migrants situations, implementation of standard operating procedures in providing assistance to migrants whose lives and safety are in danger, and investigation of allegations of failure to assist smuggled migrants whose lives or safety are endangered.

15. Smuggled migrants who are adequately assisted are more likely to cooperate with the authorities in the framework of the criminal justice process and support investigations and prosecutions of smugglers.

#### **D. Referral**

16. States are obliged by virtue of article 18, paragraph 8, and article 19, paragraph 1, to ensure that the implementation of the Smuggling of Migrants Protocol does not detract from existing protections afforded by international law to migrants who are refugees or asylum-seekers. Some refugees and asylum-seekers turn to the services of migrant smugglers when fleeing their homes. Such persons may have legitimate claims to international protection, for instance, under the 1951 Convention or under international human rights law. The principle of non-refoulement contained in article 33, paragraph 1 of the 1951 Convention, states that no State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

17. Some smuggled migrants may become victims of crime as a result of being smuggled. For instance, some smuggled migrants can become victims of trafficking, as discussed in the background paper entitled “Challenges and good practices in the criminalization, investigation and prosecution of smuggling of migrants and related conduct”.<sup>3</sup> Smuggled migrants can also fall victim to other crimes in the course of being smuggled, including assault or sexual violence. Like all victims of crime, smuggled migrants should have access to criminal justice processes to ensure that the crimes committed against them are investigated and prosecuted.

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<sup>3</sup> CTOC/COP/WG.7/2012/2.

18. Referral mechanisms need to be put in place to ensure that persons in need of particular protection and assistance (including refugees, asylum-seekers or victims of crime) are able to access appropriate services. Good practice in applying referral systems in respect of smuggled migrants who are found to be refugees, asylum-seekers or victims of crime is to ensure that such persons can remain involved in the criminal justice process as witnesses to the crime of smuggling of migrants.

## Annex

### **Key tools and recommended resources**

#### **UNODC Toolkit to Combat Smuggling of Migrants**

The UNODC Toolkit to Combat Smuggling of Migrants has been designed to assist countries to implement the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The Toolkit provides guidance, offers promising practices and recommends resources in thematic areas. Tool 8 specifically addresses protection and assistance.

[www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/toolkit-to-combat-smuggling-of-migrants.html](http://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/toolkit-to-combat-smuggling-of-migrants.html)

#### **UNODC Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants**

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

[www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Basic\\_Training\\_Manual/Basic\\_Training\\_Manual\\_e-book\\_English\\_web\\_version.zip](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Basic_Training_Manual/Basic_Training_Manual_e-book_English_web_version.zip)

#### **UNODC In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants**

The UNODC In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants builds on the Basic Training Manual to promote common understanding of relevant concepts and encourage States Parties to take a mutually reinforcing approach in their responses to the transnational organized crime of smuggling of migrants. The manual offers a practical approach to the investigation and prosecution of smuggling of migrants, offering promising practices relevant to all countries of origin, transit and destination, regardless of their legal system.

[www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/in-depth-training-manual-on-smuggling-of-migrants.html](http://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/in-depth-training-manual-on-smuggling-of-migrants.html)

#### **UNODC International Framework for Action to Implement the Smuggling of Migrants Protocol**

The Framework for Action to Implement the Smuggling of Migrants Protocol is a technical assistance tool that aims to support effective implementation of the Smuggling of Migrants Protocol. The purpose of the International Framework for Action is to assist States Parties and non-state actors to identify and address gaps in their response to the smuggling of migrants, in accordance with international standards. International instruments, political commitments, guidelines and best practices are drawn upon towards a comprehensive approach to preventing and combating smuggling of migrants. The International Framework is comprised of

four tables addressing prosecution (and investigation), protection (and assistance), prevention and cooperation (and coordination).

[www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework\\_for\\_Action\\_Smuggling\\_of\\_Migrants.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf)

### **UNODC Model Law against the Smuggling of Migrants**

The UNODC Model Law against the Smuggling of Migrants has been developed to assist States in implementing the provisions contained in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The Model Law aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation, by model provisions on criminalization of the offence of smuggling of migrants; protection and assistance of smuggled migrants; cooperation and coordination among and between agencies; cooperation in respect of smuggling of migrants and sea; and the processes related to return of smuggled migrants.

[www.unodc.org/documents/human-trafficking/Model\\_Law\\_Smuggling\\_of\\_Migrants\\_10-52715\\_Ebook.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf)

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