



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

Distr.: General
21 March 2012

Original: English

Working Group on the Smuggling of Migrants

Vienna, 30 May-1 June 2012

Item 2 of the provisional agenda*

**Challenges and good practices in the criminalization,
investigation and prosecution of the smuggling of
migrants**

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Note 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 urged States parties to develop or strengthen, as appropriate, laws to prosecute migrant smugglers. In that resolution the Conference also referred to the fact that smuggling of migrants and trafficking of persons were distinct crimes that may in some cases share some features but that in most cases require separate legal, operational and policy responses.
3. The first session of the Working Group will be held 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.

* 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 its deliberations:

- What are the challenges in reconciling the implementation of the Smuggling of Migrants Protocol with the implementation of related domestic offences?
- How to ensure that offences used to prosecute persons who smuggle migrants or who have been smuggled do not undermine the objectives of the Smuggling of Migrants Protocol?
- What are the best practices in ensuring that the investigation of low-level actors who commit smuggling crimes do not divert investigative resources from organized criminal smugglers?
- How to ensure that investigations and prosecutions of smuggling of migrants are not jeopardized by responses to irregular migration?
- What disruptive techniques are most effective in obstructing the smuggling of migrants, while also protecting migrants?
- How can special investigative techniques be appropriately managed in the context of smuggling of migrants investigations so as not to compromise the rights of migrants?
- How can language and cultural barriers be overcome in using witnesses in smuggling of migrants investigations?
- How can admissible evidence be captured at the point of interception of smuggling of migrants situations, without compromising life and safety?
- Which aggravating and mitigating factors should be considered relevant in smuggling of migrants cases?

III. Overview of issues and guidance for response

A. Criminalization

6. There is a need for more clarity regarding the differences between the crimes of trafficking in persons and smuggling of migrants. Indeed, in practice the two crime types may sometimes overlap. What begins as a situation of smuggling may become one of trafficking. For instance, some trafficked victims may begin their journey agreeing to be smuggled into a country, only to be deceived, coerced or forced into an exploitative situation, such as being forced to work to repay “debts” to the smuggler/trafficker, later in the process. The exploitation may have been the intention of the criminal at the outset, or it may present itself as an opportunity later in the process. Furthermore, criminals may be involved in smuggling and trafficking people along the same routes, using the same methods to transport them. These factors pose significant challenges in distinguishing between smuggled migrants and trafficked victims. However, trafficking in persons and smuggling of migrants are distinct crimes, which are the subject of two different

Protocols, supplementing the Organized Crime Convention and thus require distinct responses.

7. There are three key differences between the two crimes. Firstly, the crime of trafficking in persons can occur within the borders of a State, while the crime of smuggling of migrants is always transnational. Secondly, while the smuggled migrant generally initially consents to being smuggled, the trafficked person is a victim of crime whose consent may never have been given or may have been vitiated by the use of means (threat or use of force, coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or giving or receiving of payments or benefits). Thirdly, while the source of profit for traffickers derives from the exploitation of the trafficked person, smugglers profit from payments to enable the illegal entry or stay of the smuggled migrant.

8. The Smuggling of Migrants Protocol requires States parties to criminalize the smuggling of migrants as a distinct offence. Article 3 of the Smuggling of Migrants Protocol defines the offence of smuggling of migrants as procuring the illegal entry of a person into a State of which that person is not a national or permanent resident, for the purpose of financial or material gain. Moreover, article 6, paragraph 1 (c) requires States parties to criminalize enabling of illegal stay of a person who is not a national or a permanent resident to remain without complying with the necessary requirements. To summarize, article 6 requires States parties to criminalize the constituent elements of smuggling of migrants and related conduct, namely:

- the procurement of illegal entry or illegal residence of a person,
- into or in a country in which the person is not a national or permanent resident,
- for the purpose of financial or material gain.

9. Additionally, States parties are required to criminalize producing, procuring, providing or possessing fraudulent travel or identity documents when committed for the purpose of enabling smuggling of migrants. Finally, subject to the basic concepts of a State's legal system, organizing or directing any of these offences must be criminalized, as must the attempt to commit any of these offences or participation as an accomplice. Offences listed in Article 6 constitute smuggling of migrants and related conduct.

10. States parties are also required, pursuant to Article 6, paragraph 3, to establish as aggravating circumstances to the above offences, any conduct that is likely to endanger or does endanger the migrants concerned, or subjects them to inhuman or degrading treatment, including exploitation. Good practice is for States to consider aggravating circumstances that go beyond those set out in the Smuggling of Migrants Protocol. Depending on the domestic legislation in a given jurisdiction, some aggravating circumstances may be 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.

11. There are two categories of people who are not intended to be criminalized by the Smuggling of Migrants Protocol. Firstly, the purpose of the requirement of financial or other material benefit provided in the definition of smuggling of migrants, is to ensure that the activities of family members or non-governmental groups or others who support migrants for humanitarian reasons rather than for

profit are not criminalized.¹ Secondly, migrants themselves are not the target of the Smuggling of Migrants Protocol. Article 5 of the Smuggling of Migrants Protocol states that “Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of [smuggling of migrants]”.

12. In relation to persons whose activities are not intended to be criminalized by the Smuggling of Migrants Protocol, Article 6, paragraph 4, explains that nothing in the Smuggling of Migrants Protocol prevents States parties from taking measures against a person whose conduct constitutes an offence under its domestic law. In this way Article 6, paragraph 4 upholds the sovereign right of States parties to establish or maintain other offences that would apply to such persons. For instance, while the Smuggling of Migrants Protocol does not require the criminalization of a person who facilitates the irregular entry of a person for humanitarian reasons rather than for financial or material gain, s/he could be prosecuted for immigration or document-related offences criminalized under national legislation. Similarly, while a smuggled migrant cannot be prosecuted for smuggling him or herself, he or she would not be immune from prosecution for immigration, transport-related or other offences, criminalized under national legislation or the criminalization requirement under the Smuggling of Migrants Protocol for smuggling another person.

13. Good practice in the criminalization of smuggling of migrants and related conduct is to build capacity of parliamentarians, policymakers and legislators on smuggling of migrants and related issues, including the distinction between smuggling of migrants and trafficking in persons and the non-criminalization provision of the Smuggling of Migrants Protocol.

B. Investigation

14. Investigative efforts are often aimed at irregular migrants rather than migrant smugglers. The key investigative challenge is to target organized criminal networks behind the smuggling of migrants, rather than low-level actors or migrants themselves. Smugglers strategize to pass risks of detection and investigation onto those they smuggle. To avoid playing into the hands of smugglers, good practice is to treat smuggled migrants as witnesses to smuggling of migrants rather than as targets of smuggling of migrants investigations. In this context, practitioners stress that protection and assistance of migrants can be crucial to effective investigations. In short, good practice is to develop and strengthen effective and intelligence-led investigative techniques that support the key mutually-reinforcing purposes of the Smuggling of Migrants Protocol: to prevent and combat the smuggling of migrants, cooperate to this end, and protect the rights of smuggled migrants.

15. The smuggling of migrants is a particularly challenging type of organized crime to investigate because the objects of smuggling are humans whose rights must be protected. The fact that lives and safety may be put at risk by smugglers highlights the urgent need to put in place legislation to allow for the confiscation of

¹ “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions: Addendum — Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto” (A/55/383/Add.1).

assets or other proceeds obtained through the commission of crime to obstruct further crimes from being committed. Furthermore, the need to protect migrants highlights the essentiality of disruptive techniques to be used where human life and safety are threatened by the unscrupulous methods of smugglers. Good practice involves specifically training investigators on the use of disruptive techniques in such a way that the rights of smuggled migrants are protected.

16. The particular nature of the smuggling of migrants as a transnational organized crime involving the smuggling of human beings also has implications for the use of special investigative techniques. Special investigative techniques provided for in Article 20 of the United Nations Transnational Organized Crime Convention include controlled delivery, electronic or other forms of surveillance and undercover operations. In the context of smuggling of migrants investigations, such techniques must be applied in such a way that the rights of smuggled migrants are protected, and the health and safety of migrants and involved personnel are not jeopardized. Good practice is for legislation governing special investigative techniques to be reviewed, enacted or amended to provide for both the use and the control of special investigative techniques in the context of smuggling of migrants, in accordance with international human rights standards.

17. The transnationality of the crime of smuggling of migrants also necessitates international cooperation during investigations, as discussed in the background paper entitled “Challenges and good practices concerning cooperation and coordination, including information and intelligence sharing in response to the smuggling of migrants”.²

C. Prosecution

18. In order for prosecutions to be successful, strong evidence is required to mount a case against smugglers. There are several challenges involved in collecting strong evidence in smuggling of migrants investigations. Those who first come into contact with smuggled migrants may not be capable of or equipped to gather evidence at the point of interception. Challenges involved in protecting information, while also protecting health and safety of people in smuggling of migrants situations, can result in evidence being lost. Good practices in overcoming these challenges are to provide special training to relevant persons in gathering evidence at the point of interception so that as much information is gained upon interception as possible, while protecting smuggled migrants.

19. Prosecutions of smugglers are more likely to succeed with the cooperation of smuggled migrants. A key challenge in using witnesses to achieve a prosecution of migrant smugglers, is that witnesses may come from different cultures and speak different languages to that spoken in the jurisdiction in which the trial is taking place. The result of language and cultural barriers may be that interviews and debriefs carried out with smuggled migrants do not yield strong evidence, or may be conducted in such a way that the results are not admissible at court. Misunderstandings of the purpose of interviews may result in the interviewee being

² CTOC/COP/WG.7/2012/5.

uncooperative. Failure to provide legal advice to smuggled migrants prior to interviewing them may for instance result in the inadmissibility of their testimony.

20. Good practices in overcoming these challenges to using witnesses, are to provide special training to relevant persons in carrying out interviews in a way that allows for their admissibility, providing them with adequate cultural training so that they are able to build trust, and making human resources available to provide interpretation. Those who come into contact with smuggling of migrants situations should seek the advice of prosecutors at the earliest appropriate opportunity. Good practice in using interpreters and independent advisors in respect of culture, is to cross-check interpretations and advice to ensure that translations are accurate and free of bias, and to dispel any cultural myths.

21. An additional challenge to achieving prosecution of smugglers is that those witnesses who could testify against them are often themselves the subjects of State interest. Access to smuggled migrants in the criminal justice process may be hampered by the fact that they are being held in detention facilities or have been returned to their countries of origin. Good practice is to strengthen cooperation in the prosecutorial process to maintain access to witnesses, as discussed in the background paper entitled “Challenges and good practices concerning cooperation and coordination, including information and intelligence sharing in response to the smuggling of migrants”.³

22. Securing effective cooperation from witnesses is hampered by threats of retaliation made by smugglers against migrants and their families. The transnational nature of smuggling of migrants means that the persons under threat may be in a different jurisdiction to the one in which the smuggler is being prosecuted. Good practices in protecting migrants and their families from retaliation by smugglers therefore depend on strong international cooperation, as discussed in the background paper titled “Challenges and good practices concerning cooperation and coordination, including information and intelligence sharing in response to the smuggling of migrants”.⁴

23. Sentences imposed on migrant smugglers should reflect the gravity of the offence committed. Where they are present, aggravating circumstances should be reflected in the sentence. Such aggravating circumstances may go beyond those provided for in the Smuggling of Migrants Protocol. For instance, while the Protocol includes conduct that is likely to or does endanger the migrants concerned, States parties could also consider conduct that endangers third parties such as border officials or others who encounter smuggling of migrants situations. Article 26, paragraph 2, of the Organized Crime Convention also requires States to consider providing for the possibility, in appropriate cases, of mitigating punishments of accused persons who provide substantial cooperation in investigations or prosecutions. In the context of smuggling of migrants, such circumstances may include the cooperation of low-level actors where such cooperation can support the prosecution of higher-level actors.

³ CTOC/COP/WG.7/2012/5.

⁴ Ibid.

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 1 offers an overview of the crime of smuggling of migrants. Tool 5 of the Toolkit is dedicated to the legislative framework of the response to the smuggling of migrants and addresses criminalization and Tool 7 addresses law enforcement and prosecution.

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 programmes of national training institutes. Module 1 on concepts and Module 7 on legislative issues are relevant to the criminalization of the smuggling of migrants and related crimes. Module 5 addresses special investigative techniques.

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 encourages 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 the smuggling of migrants, offering promising practices relevant to all countries of origin, transit and destination, regardless of their legal system. Module 10 addresses special investigative techniques. Module 14 addresses common legal issues in the investigation and prosecution of the smuggling of migrants.

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 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 the 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

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 by sea; and the processes related to return of smuggled migrants. Chapter 2 of the Model Law offers guidance on the criminalization of smuggling of migrants.

www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf

Issue Paper: A short introduction to migrant smuggling

This Issue Paper offers a brief overview of smuggling of migrants and related conduct. It explains aspects of the crime as defined by the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime.

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