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Review of the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Analytical report of the Secretariat

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I. Introduction

A. Legislative background

1. By its resolution 55/25 of 15 November 2000, the General Assembly adopted the United Nations Convention against Transnational Organized Crime (annex I) and two supplementary protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (annex II) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (annex III).

2. In accordance with article 32, paragraphs 1 and 2, of the Convention, a Conference of the Parties to the Convention was established and the Secretary-General of the United Nations convened the inaugural session of the Conference in Vienna from 28 June to 9 July 2004, less than one year following the entry into force of the Convention on 29 September 2003 pursuant to its article 38, paragraph 1. The Migrants Protocol had already been in force since 28 January 2004 pursuant to its article 22, paragraph 1, and consideration of its implementation was therefore included in the agenda of the first session of the Conference of the Parties (CTOC/COP/2004/1).

3. In accordance with article 32, paragraphs 1 and 3, of the Convention, the Conference of the Parties is to agree upon mechanisms for achieving the objectives of improving the capacity of States parties to combat transnational organized crime and of promoting and reviewing the implementation of the Convention, focusing in particular on periodically reviewing the implementation of the Convention and making recommendations to improve the implementation of the Convention (art. 32, para. 3 (d) and (e)).

4. For the purpose of achieving those specific objectives, the Conference of the Parties is to acquire the necessary knowledge of the measures taken by States parties in implementing the Convention and the difficulties encountered by them in doing so through information provided by them (art. 32, para. 4, of the Convention). Furthermore, the Convention requires States parties to provide the Conference with information on their programmes, plans and practices, as well as legislative and administrative measures to implement both the Convention and its supplementary Protocols (art. 32, para. 5).

5. In accordance with article 37 of the Convention and article 1, paragraph 2, of the Migrants Protocol, the provisions of the Convention apply, mutatis mutandis,[1] to the Migrants Protocol unless otherwise provided therein.

B. Mandate of the Conference of the Parties

6. At its first session, by decision 1/6, the Conference of the Parties decided to carry out the functions assigned to it in article 32 of the Convention by, inter alia, establishing a programme of work for reviewing periodically the implementation of the Migrants Protocol (see CTOC/COP/2004/6, chap. I). In the same decision, the Conference of the Parties also decided that, for its second session, the programme of work would cover the following areas:

(a) Consideration of the basic adaptation of national legislation in accordance with the Migrants Protocol;

(b) Commencement of the examination of criminalization legislation and difficulties encountered in the implementation of article 6 of the Migrants Protocol;

(c) Enhancing international cooperation and developing technical assistance to overcome difficulties identified in the implementation of the Migrants Protocol;

(d) Exchange of views and experience gained in the implementation of articles 15 and 16 of the Migrants Protocol.[2]

7. In the same decision, the Conference of the Parties requested the Secretariat to collect information from States parties and signatories to the Protocol, in the context of the above programme of work, using for that purpose a questionnaire to be developed in accordance with guidance provided by the Conference of the Parties at its first session; requested States parties to the Migrants Protocol to respond promptly to the questionnaire circulated by the Secretariat; invited signatories to provide the information requested; and requested the Secretariat to submit an analytical report based on the responses received to the Conference of the Parties at its second session.

C. Reporting process

8. A draft questionnaire was brought to the attention of the Conference for review and comments at its first session (CTOC/COP/2004/L.1/Add.4). The final text of the questionnaire, as approved by the Conference, was disseminated to States parties and signatories to the Protocol with a view to obtaining the required information in accordance with decision 1/6.

9. The Secretariat considered it appropriate to disseminate the questionnaire also to non-signatory States. The Secretariat was of the view that such dissemination would be in line with the spirit of inclusiveness that characterized the negotiation process of the Convention and its Protocols and with the already stated objective of the General Assembly and the Conference of the Parties of promoting the universal nature of the instruments and striving to achieve universal adherence to the Convention and its Protocols. The Secretariat believed that encouraging non-signatory States to participate in the information-gathering system of the Conference of the Parties would be a way to assist them in gaining experience on how States that were already parties to the Migrants Protocol had adjusted their legal and institutional framework in order to respond to the challenges posed by this criminal activity. Such an experience could be constructive in the context of future discussions at the national level in the process of the ratification of or accession to the Convention and the Migrants Protocol.

10. By means of information circulars the Secretariat reminded States parties to the Migrants Protocol of their obligation to provide information and invited signatories to do likewise by 29 July 2005.

11. As at 29 July 2005, the Secretariat had received responses from 52 Member States, of which 35 were parties to the Migrants Protocol, 11 were signatories and 6 were non-signatories.[3] As at the same date, the Migrants Protocol had received

112 signatures and 78 ratifications, which means that 45 per cent of States parties to the Protocol had responded to the questionnaire, many of them also providing copies of their relevant legislation.

12. Among the States parties to the Migrants Protocol that responded to the questionnaire, the breakdown by regional group of States Members of the United Nations was as follows: Group of African States: 4; Group of Asian States: 4; Group of Eastern European States: 11; Group of Latin American and Caribbean States: 7; and Group of Western European and Other States: 9. Of the signatories that responded to the questionnaire, 1 belonged to the Group of African States, 2 to the Group of Eastern European States and 8 to the Group of Western European and Other States. Of the non-signatories replying to the questionnaire, 1 belonged to the Group of African States, 4 to the Group of Asian States and 1 to the Group of Latin American and Caribbean States.

D. Scope and structure of the report

13. The present analytical report contains a summary and a first analysis of the relevant replies, which highlight the progress made towards meeting the requirements set out in the Migrants Protocol and, at times, the difficulties that States are facing in implementing its provisions.

14. The structure of the report follows the guidance given by the Conference of the Parties in its decision 1/6. The report thus contains information on the main thematic fields for which information on the basic adaptation of national legislation in the light of the Migrants Protocol is required and also addresses the following aspects: (a) examination of the legislation criminalizing smuggling of migrants and the difficulties encountered in incorporating the relevant basic provisions of the Protocol; and (b) the enhancement of international cooperation and the development of technical assistance to overcome those difficulties or other problems generally related to the implementation of the Protocol.

15. Issues relating to the implementation of articles 15 and 16 of the Protocol (prevention and measures for the protection and assistance of smuggled migrants), which, in accordance with decision 1/6, is one of the components of the programme of work for the second session of the Conference of the Parties, were not addressed in the questionnaire and therefore are not reflected in the present report. That was because the decision of the Conference was made on the understanding that preventive policies and measures taken for the protection of smuggled migrants constituted substantive areas for action to which more time must be devoted in subsequent sessions, after having addressed the basic criminalization and international cooperation standards and requirements. However, the Conference deemed it appropriate to begin an initial round of exchange of views and experience in these areas during the second session of the Conference.

16. As also highlighted in the questionnaire itself, the provisions of the Convention on international cooperation apply, mutatis mutandis, to the Migrants Protocol and therefore any information received from States related to international cooperation requirements under the Protocol is included in the analytical report on the implementation of the Convention (CTOC/COP/2005/2).

17. The present report does not purport to be comprehensive or complete, as it reflects the situation in less than half of the States parties to the Protocol.

II. Analysis of national legislation and measures in relation to the relevant provisions of the Protocol against the Smuggling of Migrants by Land, Sea and Air

A. Definition and criminalization requirements

1. Criminalization of the smuggling of migrants

18. The Migrants Protocol requires States parties to establish as a criminal offence the smuggling of migrants, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit (art. 6, para. 1 (a)).[4] Most of the responding States reported that they had adopted the necessary legislative measures to criminalize this activity. Of the countries that gave a negative response on this issue, Costa Rica and South Africa reported that the relevant legislation was to be developed. Action to that effect had been undertaken in Costa Rica, where specific legislative amendments in the Penal Code had been proposed to provide for criminalization of the offence and related confiscation measures. In addition, other countries (Jamaica, Nigeria and the United Republic of Tanzania) indicated that specific legislation was not in force, but the constituent elements of the offence were contained in other legislation (concerning passports, aliens and immigration legislation). In the case of one country (the Maldives), smuggling of migrants was not dealt with by specific legislation, but by various rules and practices followed by the immigration authorities, which had the status of law under the country's Constitution.[5]

19. The majority of the States responding that smuggling of migrants was criminalized under their national legislation (approximately 75 per cent) stated that the offence concerned was defined in their domestic legal system in accordance with the definition of the Migrants Protocol. An overview of the replies received reflected a common denominator of national legislative approaches, in that the criminal conduct prescribed involved the procurement of the entry of a person into the territory of the country where that person was not a national or permanent resident and where any or all of the requirements for legal entry had not been complied with.

20. Although the Convention clarifies that transnationality established pursuant to the Convention need not be considered a constituent element of domestic offences, including those established in accordance with the Protocol (see art. 34, para. 2, of the Convention in conjunction with art. 1, para. 2, of the Protocol), the nature of the smuggling of migrants as a criminal conduct involving the element of transborder activity is appropriately reflected in the domestic laws of States responding to the questionnaire. However, the specific transnationality criteria provided for in the Convention (see art. 3, para. 2) are not considered as requirements in domestic legislation. Therefore, it appears that such criteria would not constitute elements of national prosecution of cases of smuggling of migrants.

21. The same applies to the involvement of an organized criminal group, which is also not required as an element of the offence, as established in national legislation and subsequently as a fact that must be proved in the context of a domestic prosecution. It is noted, however, that whether or not the smuggling of migrants is committed by individuals or persons associated with an organized criminal group, the primary focus of the Protocol is to address the criminal exploitation of migration and the generation of illicit profits from the procurement of the illegal entry in the territory of a State.[6]

2. Distinction from trafficking in persons

22. Most States countries responding to the questionnaire indicated that both trafficking in persons and smuggling of migrants were treated as distinct offences in their domestic legislation (see also the replies given by Member States in the context of the questionnaire on the implementation of the Trafficking in Persons Protocol, as reflected in a separate report (CTOC/COP/2005/3)). Only a few exceptions were reported of States that either did not make a distinction between the offences (Myanmar) or had legislation that generally provided for illegal trafficking in persons regardless of the means and the purpose involved (El Salvador) or had not yet enacted specific legislation to regulate this issue (Jamaica and the Maldives). The responses received by the Secretariat reflected more or less a convergence in national approaches concerning two constituent elements of trafficking in persons that were not present in smuggling of migrants cases: first, an improper form of recruitment, such as coercion, deception or some abuse of authority; and second, the element of obtaining a profit as a result of an exploitative purpose for which the trafficking had been undertaken, although that purpose did not necessarily need to have been fulfilled. The relevant provisions of the domestic legislation described in the replies, or attached thereto, indicated or implied consideration of the element of the voluntary nature of the conduct of smuggled migrants, as opposed to the case of the victims of trafficking in persons, the lack of intended exploitation as a substantive parameter in defining the relevant criminal conduct and the passage through a border as a requirement for establishing the offence of smuggling of migrants, which was not necessary for trafficking in persons.

23. In view of the above, it should be noted that both trafficking in persons and smuggling of migrants may differ, but they do represent overlapping crime problems. The competent law enforcement and prosecutorial authorities usually face actual cases that may involve elements of both offences or may shift from one to the other, as many victims of trafficking in human beings begin their journey by consenting to be smuggled from one State to another or smuggled migrants may later be tricked or coerced into exploitative situations and thus become victims of trafficking in human beings. The replies received from Member States could be used as a springboard for further considering and discussing practical problems and difficulties encountered at the national level concerning the application of the existing legislative provisions and the actual prosecution of perpetrators involved in activities related to smuggling of migrants.

24. In addition, the relevant discussions could further identify priority areas for action aimed at dealing with those problems, such as provision of assistance to countries in need in order to put in place or review domestic legislation that would encompass the requirements established by both the Migrants and the Trafficking in

Persons Protocols; and identification of technical assistance devices and mechanisms, for example the provision of legal advisory services by the Secretariat on an ad hoc basis or the dissemination of guidance manuals or compilations of best practices that would enable the competent authorities of Member States to assess available crime evidence in the best way and thus effectively deal with complicated cases involving imperceptible differences between trafficking and smuggling of migrants offences.

3. Criminalization of facilitating illegal residence

25. Article 6, paragraph 1 (c), of the Migrants Protocol creates the obligation for States parties to criminalize any activities geared towards enabling a person to remain in a State where that person is not entitled to remain by virtue of status (nationality or right of permanent residence) or by virtue of having met other requirements, such as the issuance of a visa or another kind of permission. The vast majority of the States responding to the questionnaire stated that the conduct concerned was criminalized domestically either in the context of their Penal Code or within the framework of other specific legislation (immigration laws). One State reported that appropriate action had been taken with a view to amending existing legislation in order to cover this issue in a more comprehensive manner (the Czech Republic). In general terms, this criminal offence was perceived by Member States to be a necessary supplement of the offence of smuggling of migrants, so that effective legislative response was ensured in cases where the entry of the migrants in the national territory of each State had taken place legally, but then illegal means were involved to enable residence for reasons other than those used for entry or beyond the length of time initially approved or authorized.

4. Offences in relation to travel or identity documents for the purpose of facilitating the smuggling of migrants

26. Article 6, paragraph 1 (b), of the Migrants Protocol establishes a series of offences related to the use of travel and identity documents for the purpose of enabling the smuggling of migrants. All States responding to the Secretariat's questionnaire confirmed that acts of producing, procuring, providing or possessing such documents to that effect were criminalized in their domestic legislation. Different options and approaches were reflected in the replies only in terms of the legislative context used for penalizing such acts. Other countries reported inclusion of criminal offences related to travel or identity documents in their specific legislation against the smuggling of migrants, while others clarified that the general provisions of their Penal Code or their immigration legislation on forgery and generally misuse and falsification of documents were applicable in cases involving smuggling of migrants (Canada, El Salvador, Estonia, Finland, Peru, Sweden). In general terms, the responses received indicated that national legislation treated these offences either as separate offences within the broader context of the criminal activity concerned or as a preparatory step for the commission of the principal offence(s) of the smuggling of migrants and/or facilitating illegal residence, which could be dealt with by virtue of provisions on attempt and/or complicity to commit the offences (for example, Sweden).

27. Issues related to how national laws regulate the validity of documents and, more specifically, to whether documents used for the purpose of smuggling of

migrants were falsely made, improperly issued or altered in some material way, were not dealt with in the questionnaire sent to Member States and therefore no specific information has been received on these issues. It was considered appropriate at this stage not to include these factual elements within the context of reviewing the basic adaptation of domestic legislation in accordance with the Migrants Protocol, since they are not critical for the formulation of the domestic offences in conformity with the Protocol. The Conference of the Parties may wish to consider such aspects in subsequent stages of its work, in particular when dealing with the implementation of chapter III of the Protocol, on prevention, cooperation and other measures, including border measures and measures geared towards ensuring the security and control, as well as the legitimacy and validity, of travel or identity documents used in cases involving smuggling of migrants.

5. Criminalization of attempt to commit the offences established under the Protocol

28. It should be noted that the obligation to criminalize the attempt to commit any of the offences established in the Migrants Protocol is subject to the basic concepts of the legal system of States parties (art. 6, para. 2 (a), of the Protocol). Most of the States replying to the questionnaire confirmed the establishment of criminal liability at the domestic level also for those involved in activities constituting an attempt to commit the three basic Protocol offences. An overview of the national responses on this issue demonstrates consistency in prosecuting attempts to perpetrate smuggling of migrants[7] in cases of acts committed in preparation of this criminal offence.[8] The definition of the concept of attempt, as well as issues related to the acts carried out in an unsuccessful attempt to commit the Protocol offences,[9] were regulated in accordance with the general provisions of national legislation on attempting to commit a criminal offence.

29. The information received by Member States could provide the opportunity for further discussion of potential problems that could arise from a narrow definition of preparation of the offence. In this context, consideration could be given to the criminalization of separate offences committed mainly at the initial stages of the smuggling process, with a view to avoiding impediments to prosecution where the smuggling was not completed (see also the report on the implementation of the Trafficking in Persons Protocol (CTOC/COP/2005/3)).

6. Criminalization of participating as an accomplice in the offences established under the Protocol

30. Pursuant to article 6, paragraph 2 (b), of the Migrants Protocol, States parties are required to establish as a criminal offence participation as an accomplice in the main Protocol offences and, if it is not contrary to the basic concepts of their legal systems, in the acts of procuring, providing or possessing fraudulent travel or identity documents for the purpose of enabling the smuggling of migrants. Like the responses concerning attempt to commit the Protocol offences (see para. 28 above), the national responses with regard to the criminalization of participation as an accomplice in the Migrants Protocol offences demonstrated a high degree of consistency and uniformity.[10] Furthermore, issues related to participation as an accomplice in acts of procuring, providing or possessing a fraudulent travel or identity document for the purpose of the smuggling of migrants were regulated in

accordance with the general provisions of the national laws on participation in the commission of a criminal offence and domestic prosecution could be initiated in such cases on the basis of the criminal evidence available.

7. Criminalization of organizing or directing other persons to commit the offences established under the Protocol

31. The Migrants Protocol creates an obligation for States parties to criminalize any acts of organizing or directing other persons to commit any of the Protocol offences (see art. 6, para. 2 (c)). Almost all States reported that domestic legislation to that effect had already been put in place.[11] The responses on this issue could be considered jointly with the corresponding replies of Member States on the issue of organizing and directing serious crime committed by members of an organized criminal group (art. 5, para. 1 (b), of the Convention), which is covered in the context of the report on the implementation of the Convention (CTOC/COP/2005/2). In this connection, it should be noted that the confirmed ability to establish at the domestic level the criminal liability of persons who give orders with a view to organizing or directing the commission of the principal offences involving smuggling of migrants, but who do not actually engage in the perpetration of the offences themselves, offers the advantage of dealing effectively with more organized schemes of smugglers of migrants without it being necessary to resort to the requirement of the involvement of an organized criminal group (see art. 34, para. 2, of the Convention).

8. Sanctions and aggravating circumstances

32. States parties to the Migrants Protocol are required to adopt sanctions within domestic law that take into account and are proportionate to the gravity of the Protocol offences (art. 11, para. 1, of the Convention in conjunction with art. 1, para. 2, of the Protocol). An overview of the national replies demonstrates a diversity in the imprisonment terms foreseen for the basic offence of the smuggling of migrants from State to State, but most laws resorted to the establishment of aggravating circumstances so that more severe punishments could be imposed (see para. 34 below).[12]

33. States parties to the Protocol are further obliged to provide for aggravating circumstances to some of the Protocol offences (smuggling of migrants, enabling illegal residence, producing a fraudulent travel or identity document and, subject to the basic concepts of their legal system, participating as an accomplice in or organizing or directing such offences) when the commission of such offences entails real or potential danger to the lives of the migrants concerned or their inhuman or degrading treatment, including their exploitation (art. 6, para. 3, of the Protocol). Almost two thirds of the States responding to this question confirmed the establishment of the above-mentioned aggravating circumstances at the domestic level.

34. Different legislative techniques were reported on this issue in terms of either providing for parallel offences (aggravated smuggling), resorting to the generally applicable aggravating circumstances of the Penal Code (for example, Finland and Iceland) or establishing an appropriate framework of sanctions enabling domestic courts to consider and impose more severe sentences where the aggravating factors were present. On the other hand, negative responses from Member States reflected

cases where the national legislation was silent (Jamaica and Namibia), the rules and practices followed were not comprehensive enough (the Maldives) or the existing legislation was in the process of being amended to address the issue adequately (the Czech Republic).

35. The Conference of the Parties could fulfil a productive role by offering an opportunity to exchange views and opinions on whether appropriate evidentiary standards and requirements are in place at the national level to make a clear distinction between smuggling of migrants and trafficking in persons where the aggravating condition is related to some form of exploitation of the smuggled migrants.

36. The Conference of the Parties may wish to take into consideration national approaches and regulations on related issues in subsequent stages of its work, in particular when dealing with the implementation of chapter II of the Migrants Protocol and the measures taken by national authorities of States parties to ensure the safety, security and humane treatment of migrants smuggled by sea.

37. It should be noted that Member States also submitted information on further aggravating circumstances provided for in their legislation beyond the ones related to the treatment of smuggled migrants.[13] Such aggravating factors included, inter alia, recidivist behaviour, commission of the offence by an organized criminal group, abuse of authority or public functions for the purpose of smuggling, holding of a managerial position in a legal person involved in smuggling of migrants and smuggling of a large number of persons.

9. Treatment of smuggled migrants

38. Since a key policy of the Migrants Protocol is to criminalize the smuggling of migrants and not migration itself, States parties are required not to subject smuggled migrants to any criminal liability for the fact of having been the object of the criminal conduct prescribed in the Protocol (art. 5). At the same time, the Protocol does not preclude States parties from taking measures against such persons for violating other national administrative regulations or criminal law provisions (art. 6, para. 4). The vast majority of States responding to the questionnaire indicated that the illegal entry and residence of migrants in their territory entailed violation of their immigration legislation and were treated as misdemeanours resulting in the imposition of criminal and/or administrative sanctions. It was further reported that administrative measures were used for the return of the illegal migrants to the countries of origin. However, it was also pointed out that in cases where such persons claimed refugee status, they might not be charged with certain offences while their claim was pending (Canada).

39. The information received in response to the questionnaire reflected a common approach to focus the criminal and/or administrative responsibility of smuggled migrants only on the factual conduct of entering and residing illegally in the territory of Member States and not on their involvement in the smuggling process and their voluntary recruitment and, to some degree, complicity in their own smuggling.[14]

40. The Conference of the Parties may wish to consider further issues related to the treatment of smuggled migrants, especially in view of its decision 1/6 to devote part of the discussions during the second session to issues associated with protection

and assistance measures for smuggled migrants. In this connection, it should be recalled that, according to article 19 of the Protocol, the implementation of the Migrants Protocol at the national level should not affect the rights, obligations and responsibilities of States under international law, international humanitarian law and, in particular, refugee law and the principle of non-refoulement and therefore should not detract from the existing protections afforded to smuggled migrants who are also refugees or asylum-seekers.

41. Furthermore, in view of the fact that protective measures for smuggled migrants constitute a critical component in the effective detection, investigation and prosecution of relevant cases, the Conference of the Parties could further be used as a forum for discussing the establishment of witness and victim protection schemes and programmes, as suggested in one of the national replies to the questionnaire (El Salvador).[15] Consideration could also be given to the special needs of smuggled women and children and to measures geared towards ensuring the protection against gender violence, as proposed by Spain.

B. Difficulties encountered and assistance required

42. Several States highlighted the lack of the necessary capacity, technical expertise and resources to address smuggling of migrants effectively as the main obstacle hampering the adoption of national legislation in this field. In this connection, a number of States reported that they needed technical assistance in order to overcome difficulties and practical problems in adapting their legislation to the requirements of the Migrants Protocol. The Maldives identified as key components of such assistance training programmes for upgrading legislation drafting skills and legal expertise. Namibia also reported that its national authorities needed assistance in collecting and submitting relevant information to the Secretariat and completing technical papers such as the questionnaire on the implementation of the Protocol. El Salvador stressed the importance of disseminating best practices and practical experience of other countries in the areas of investigation, operations and mutual legal assistance. El Salvador also highlighted the need for establishing procedural mechanisms to enable the confiscation of property derived from the smuggling of migrants and further concluding bilateral agreements or arrangements to that effect. Jamaica and South Africa highlighted as priority areas the provision of technical assistance in developing appropriate legislation.

C. Technical assistance provided

43. A number of States provided information on technical assistance activities and programmes initiated either at the bilateral level or through international organizations. The participation in relevant projects of the European Commission within the framework of the Phare Programme and Transition Facility Programme was highlighted by one country (Germany), while Spain pointed out the provision of technical assistance to foreign police authorities in the framework of bilateral and multilateral cooperation programmes, as well as through the European Union mechanisms. Other States made reference to cooperation with the Secretariat and the Organization for Security and Cooperation in Europe in carrying out technical

assistance activities (France and Portugal). Tunisia reported on cooperation through the United Nations system with other countries with a view to preventing and combating smuggling of migrants, especially though technical cooperation programmes, as well as on the endeavours to that effect in the framework of the African Union and the League of Arab States.

44. Canada reported that, with occasional support from the International Organization for Migration, its national authorities had worked with counterparts in the Mexico and the United States to coordinate training sessions for officials from States participating in the Regional Conference on Migration (Puebla Process). It was further pointed out that the main objective of this initiative was to identify illegal migration patterns and trends and to improve knowledge on recognizing and detecting fraudulent travel and identity documents and therefore the training sessions incorporated overviews of trends as well as practical elements of examination of documents and interview techniques. Such activities were supported by Canada's international network of migration integrity officers. In this context, two recent occasions were reported where Canada had cooperated with the United States, through the Asia-Pacific Economic Cooperation Business Mobility Group and the Organization of American States Inter-American Committee against Terrorism, to organize a Border Symposium in Vancouver aimed at highlighting methods of international cooperation at land, sea and airports and promoting the efficiency of border controls, with a special focus on screening and identification, as well as on identifying irregular migration and trends in smuggling of migrants. Canada also informed the Secretariat on its immigration intelligence network, which assigned migration integrity officers to diplomatic and consular missions in other States to monitor irregular migration and trends in smuggling of migrants. It was clarified that their work included assistance and training to airline personnel, airport screening staff and local government officials in identifying fraudulent travel and identity documents and impostors.

45. In relation to the provision of technical assistance at the bilateral level, the Secretariat also received information on various activities ranging from the provision of technical advice in reviewing immigration systems and drafting legislation on cooperation with origin, transit and destination countries in order to prevent and combat smuggling of migrants focusing, inter alia, on improving the security and quality of travel documents and exchanging information for the identification of criminals involved in the offence. New Zealand reported on its cooperation with Australia in drafting model provisions for inclusion in legislation against transnational organized crime for the Pacific Island States. In this context, funding had been given to legal drafters to work with the government agencies of those States for the development and adoption of relevant implementing laws.

III. Concluding remarks

46. The existence of domestic legislation to tackle the smuggling of migrants in almost all Member States responding to the questionnaire on the basis of which the present report was drafted should not make one lose sight of the effort that is still required for streamlining the implementation of national provisions in order fully to meet the requirements established by the Migrants Protocol. The Conference of the Parties may wish to consider practical ways and means of assisting States that lack

the necessary capacity, especially developing countries and countries with economies in transition, to ensure full compliance with the provisions of the Protocol.

47. In this context, high priority should be accorded to the promotion of technical assistance programmes, activities and projects, including training programmes for investigators, prosecutors, judges and law enforcement officers. Training programmes geared towards enhancing capacity-building in the fight against the smuggling of migrants could be accompanied by such initiatives as the placement of short- and/or long-term mentors to provide assistance in this field or the dissemination of best practices to national authorities involved. In addition, the Secretariat should continue promoting activities aimed at improving domestic legislative capacities for the ratification and implementation of the Protocol by, inter alia, providing in-depth analysis of existing legislation and relevant institutions, helping drafters of legislation to update and/or adopt legislation and assisting Governments in the establishment and reinforcement of international cooperation mechanisms to combat the smuggling of migrants.

48. The effectiveness of the assistance to be provided by the Conference of the Parties mostly relies on the availability and further utilization of adequate information on national programmes, plans and practices, as well as domestic legislative and administrative measures to implement the Protocol. In view of that, Member States that have not responded to the questionnaire are called upon to facilitate further the work of the Secretariat and provide the information required by the Conference of the Parties. States parties to the Migrants Protocol, in particular, should take into account to that effect their relevant obligation stipulated in the Convention itself (art. 32, para. 5). The efficiency of the reporting mechanism supporting the function of the Conference of the Parties can only be ensured when the information available is representative and reflects as many national approaches as possible and not only a portion covering less than half of the States parties to the Protocol.

49. As this initial evaluation and review of the implementation of the Protocol provisions, in particular those on the relevant criminalization requirements, has been made at the early stages of the work that the Conference of the Parties has undertaken in accordance with article 32 of the Convention, the information already submitted by Member States will further be systematized and assessed in conjunction with additional information to be received in subsequent stages pursuant to the programme of work of the Conference of the Parties. It has already been identified that such material would focus on other aspects of national action aimed at addressing the challenges posed by the smuggling of migrants, including preventive measures, and policies to ensure better protection of smuggled migrants and full respect for their human rights.

Notes

[1] The words “mutatis mutandis” mean “with such modifications as circumstances require” or “with the necessary modifications”. Provisions of the Convention that are applied to the Protocol under its article 1, paragraph 2, would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention (see the interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the

Transnational Organized Crime Convention and the Protocols thereto, note on article 1, paragraph 2, of the Migrants Protocol (A/55/383/Add.1), para. 87).

[2] It was the understanding of the Conference of the Parties that the questionnaire developed in accordance with guidance provided by it in decision 1/6 (see sect. C below) would not include questions on the implementation of articles 15 and 16 of the Protocol.

[3] Responses to the questionnaire on the implementation of the Migrants Protocol were received from the following Member States:

(a) *States parties*: Azerbaijan, Bahrain, Belarus, Belgium, Brazil, Canada, Costa Rica, Croatia, Cyprus, El Salvador, Estonia, France, Guatemala, Jamaica, Latvia, Lithuania, Malta, Mexico, Myanmar, Namibia, Netherlands, New Zealand, Nigeria, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Tunisia, Turkey;

(b) *Signatories*: Austria, Czech Republic, Finland, Germany, Iceland, Republic of Moldova, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America;

(c) *Non-signatories*: Angola, China, Honduras, Kuwait, Malaysia, Maldives.

As at the date of the present report, the following States parties to the Migrants Protocol had either not responded to the questionnaire or their response was received after the expiration of the deadline: Albania, Algeria, Argentina, Armenia, Australia, Benin, Bosnia and Herzegovina, Botswana, Bulgaria, Burkina Faso, Cape Verde, Chile, Djibouti, Ecuador, Egypt, Gambia, Grenada, Guinea, Kenya, Kyrgyzstan, Lao People's Democratic Republic, Lesotho, Liberia, Libyan Arab Jamahiriya, Malawi, Mali, Mauritania, Mauritius, Monaco, Norway, Oman, Panama, Saint Kitts and Nevis, Senegal, Serbia and Montenegro, Seychelles, Tajikistan, the Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, Uruguay, Venezuela (Bolivarian Republic of), Zambia.

[4] According to article 3, subparagraph (a), of the Protocol, smuggling of migrants means 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 or a permanent resident.

[5] However, it was also reported that a draft immigration law had been prepared and was under review prior to submission to the parliament.

[6] Some States that they had adopted a broader concept of the smuggling of migrants offence without requiring the element of "financial or other material benefit" (Czech Republic, Finland, Netherlands, United States). In this connection, it is noted that article 34, paragraph 3, of the Convention, which applies, mutatis mutandis, also to the Migrants Protocol, enables States parties to adopt more strict or severe measures for preventing and combating transnational organized crime and the smuggling of migrants.

[7] Almost all the States responding to the questionnaire had legislation in place allowing this option. From the countries providing a negative reply, Costa Rica specified that its legislation criminalized attempts to commit the offence of facilitating illegal residence, as well as offences in relation to travel or identity documents, but not the offence of smuggling of migrants, which, as mentioned above, had not yet been specifically established. Peru reported that attempts to commit smuggling of migrants were not punishable, because this offence, as prescribed in the Penal Code, encompassed an element of finality and required the completion of the conduct concerned. Finland highlighted in its response the criminalization of some forgery offences linked to the basic offence of smuggling of migrants.

[8] An exception to this existed only where specific legislation establishing the basic offence of the smuggling of migrants had not yet been put in place (Costa Rica).

[9] See also the interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Transnational Organized Crime Convention and the Protocols thereto, note on article 6, paragraph 2, of the Migrants Protocol (A/55/383/Add.1), para. 95.

[10] Only Costa Rica reiterated the lack of specific legislation on this point.

[11] See note 12. Furthermore, Jamaica indicated that its legislation required the direct involvement of the persons concerned in the commission of the relevant offences.

[12] Liability of legal entities involved in the smuggling of migrants and relevant security measures imposed on them were also reported (Turkey).

[13] Article 34, paragraph 3, of the Convention, which applies, mutatis mutandis, also to the Migrants Protocol, enables States parties to adopt more strict or severe measures for preventing and combating transnational organized crime and the smuggling of migrants.

[14] In this connection, it should be recalled that an interpretative note on article 3 of the Migrants Protocol clarifies that the intention of the Protocol was to exclude from criminal liability the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties (see the Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Transnational Organized Crime Convention and the Protocols thereto, note on article 6, paragraph 2, of the Migrants Protocol (A/55/383/Add.1), para. 88).

[15] See, in this connection, articles 24 and 25 of the Convention and the replies of Member States as reflected in the report on the implementation of the Convention (CTOC/COP/2005/2).