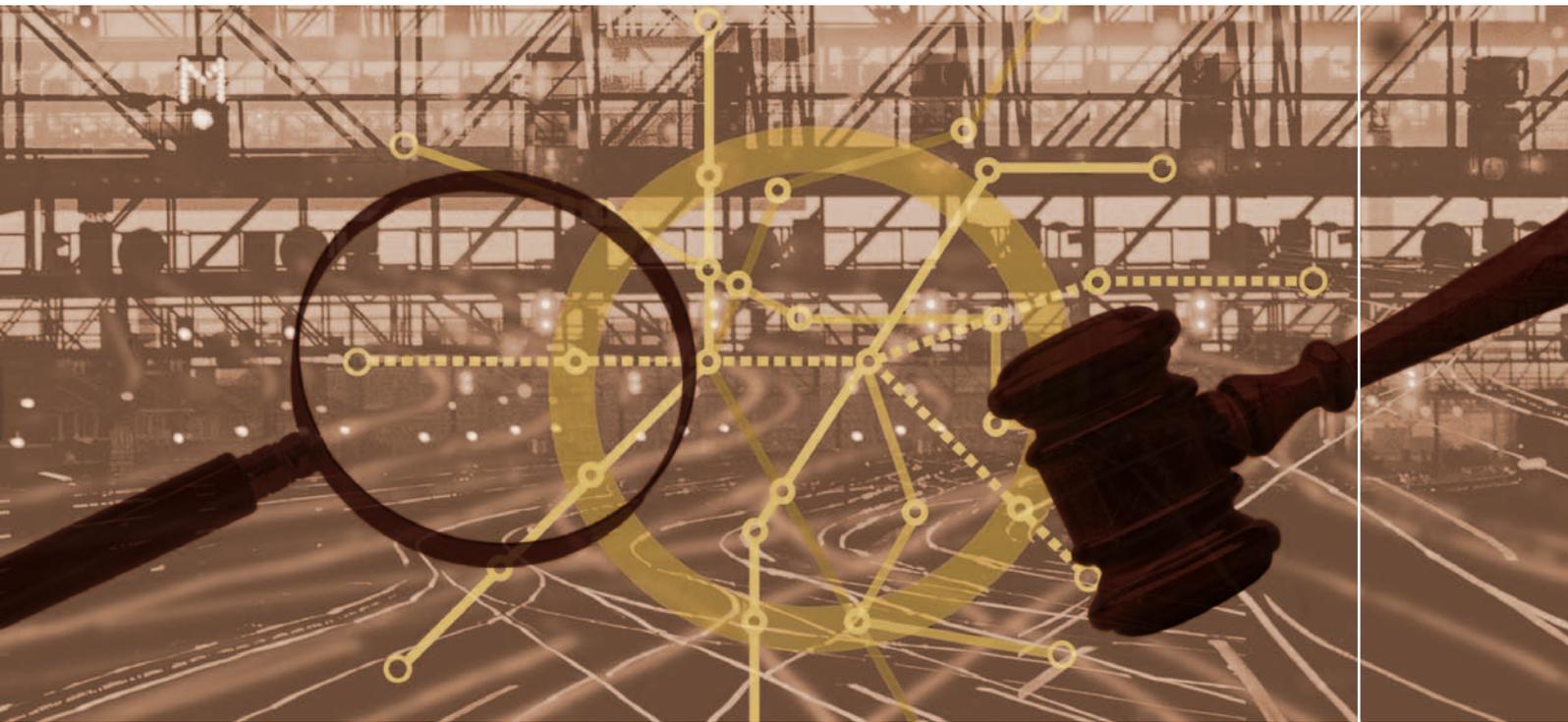




**UNODC**

United Nations Office on Drugs and Crime



# In-depth training manual on investigating and prosecuting the smuggling of migrants

Overview of modules  
Introduction



This publication is made possible through funding received from the European Union.

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UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **In-depth training manual on investigating and prosecuting the smuggling of migrants**

Overview of modules  
Introduction



UNITED NATIONS  
New York, 2011

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

# Acknowledgements

This work was led by the Anti-Human Trafficking and Migrant Smuggling Unit (AHTMSU) of UNODC and was made possible thanks to the financial support of the European Union.

This Manual is the product of a broad participatory process involving experts from the field of law enforcement and prosecution from several regions of the world. These experts contributed their time, imparted their expertise, shared their experiences and brought boundless energy and enthusiasm to the process of elaborating these training modules. UNODC is profoundly grateful not only for their dedication in the context of working meetings held in Austria, Thailand and South Africa, but also for their having remained committed to the initiative by providing feedback, commentary and suggestions throughout the process of generating tangible and practical modules from the wealth of expertise gathered.

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The expert group meetings would not have been possible without the organizational support of the following UNODC staff:

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KITITHAMMASATIAN, Kitiya –Regional Centre for East Asia and the Pacific

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The following UNODC interns also supported AHTMSU in the elaboration process:

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## **Overview of modules**

### **Module 1. Understanding migrant smuggling and related conduct**

The first module explains the offence of migrant smuggling and related conduct in the context of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling of Migrants Protocol).

The module sets out elements of the offence according to the Smuggling of Migrants Protocol, and discusses alternative offences which may be charged in where migrant smuggling has not been criminalized in accordance with the Smuggling of Migrants Protocol. The module also discusses how migrant smuggling is organized, from simple ad hoc structures to the more complex hierarchical ventures which may involve organized crime groups. The different roles of various actors within these processes are discussed, as well as the relationships between them and the relationship between smuggling actors and migrant smugglers.

Finally, the module discusses conduct that is not considered to be migrant smuggling, including movement of migrants by humanitarian actors or family members of migrants who do not receive financial or material benefit.

### **Module 2. Comparative analysis of migrant smuggling and trafficking in persons**

This module discusses the constitute elements of the crime of Trafficking in Persons as defined by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Trafficking in Persons Protocol). The module goes on to differentiate the crime of trafficking in persons from that of migrant smuggling based on three key issues: the source of profit, the fact that migrant smuggling is a transnational crime, and issues of victimization and consent.

Finally, while the elements of the offences are clearly different, the module discusses overlaps between trafficking in persons and migrant smuggling which investigators must be aware of in order to appropriately approach investigations.

### **Module 6. Protection and assistance issues**

One of the three explicit purposes of the Smuggling of Migrants Protocol is to protect the rights of the smuggled migrants. Specific obligations of States Parties to protect and assist migrants are set out in article 16.

Many distinct protection and assistance issues arise where migrant smuggling occurs at sea, where smuggled migrants have special needs, where smuggled migrants are victims of and/or witnesses to crime, or where smuggled migrants are refugees seeking asylum. Such considerations may also be applicable to persons who are not smuggled migrants, but require protection from criminal smugglers nonetheless, such as members of the public or smugglers themselves who have become witnesses in the criminal justice process.

These issues are discussed in turn in this module.

## **Module 7. International cooperation in criminal matters**

The purpose of this module is to discuss some of the general considerations that may apply to international cooperation in the investigation and prosecution of migrant smuggling. In light of the general approach taken by this module, it is important for criminal justice practitioners to understand the specific provisions of other relevant treaties and domestic legislation that may also be relevant to individual cases.

## **Module 8. Law enforcement cooperation and information sharing**

The fact that migrant smuggling is a crime that crosses borders, means that law enforcers are often required to investigate, share information, collect evidence and prosecute in more than one jurisdiction.

This module is concerned with operational cooperation between law enforcement actors in different jurisdictions, which may include exchange of information and documents, assistance with investigative operations or even may involve running joint operations across jurisdictions. The module presents different types of law enforcement cooperation and discusses some of the challenges involved in achieving effective law enforcement cooperation and potential responses to those challenges.

# Introduction

## How the Manual was elaborated

The UNODC *In-depth training manual on investigating and prosecuting the smuggling of migrants* (the Manual) is the product of criminal justice expertise gathered from around the world.

Three expert group meetings were held in three different continents. The first expert group meeting was convened in Vienna, Austria from 21 to 25 June 2010, the second in Bangkok, Thailand from 27 to 29 September 2010 and the third and final meeting was held in Pretoria, South Africa, from 18 to 20 January 2011. In the course of these meetings, experts discussed issues ranging from investigative techniques to international cooperation and protection of smuggled migrants, to decide upon and elaborate content that other practitioners could benefit from.

The depth of experience of the investigators and prosecutors involved in the process, combined with the diversity of their country contexts ensures that the Manual reflects content of relevance to practitioners in countries of origin, transit and destination.

The Manual builds upon and complements the material covered in the UNODC *Basic training manual for investigating and prosecuting the smuggling of migrants*, published in 2010.

## Purpose of the Manual

The Manual aims to assist States to fulfil their obligations under the United Nations Convention against Transnational Organized Crime (UNTOC), and its supplementary Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol). This being the case, the Manual should be used alongside these legal instruments, relevant provisions of which have been extracted throughout.

The purpose of this Manual can best be understood in reference to the purpose of the Smuggling of Migrants Protocol.

### **Article 2. Smuggling of Migrants Protocol, Statement of Purpose**

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Source: United Nations Convention against Transnational Organized Crime.

In short, the Manual aims to assist States Parties to the Smuggling of Migrants Protocol to operationalize the commitments they have made to prevent and combat migrant smuggling, cooperate to this end and in doing so, protect the rights of smuggled migrants. The diversity of

those involved in the process of elaborating the Manual reflects its target audience of criminal justice practitioners including investigators, examining judges, investigating judges, prosecutors, magistrates, law enforcement officers, border agents and all other professionals who are involved in the criminal justice system.

At a broad level, the manual aims to promote common understanding of relevant concepts and encourage States to take a mutually reinforcing approach in their responses to the transnational organized crime of smuggling of migrants.

More specifically, the aim of the manual is to offer its users a theoretical understanding and a practical approach to the investigation and prosecution of migrant smuggling, relevant to all countries regardless of their legal system or whether they are countries of origin, transit or destination for migrant smuggling.

## Guiding principles

UNODC is the guardian of UNTOC and its supplementary Protocols including the Smuggling of Migrants Protocol. The Manual has therefore been drafted in accordance with these instruments and the rights, obligations and responsibilities of States Parties to them.

The special responsibility that criminal justice practitioners have to uphold civil order and protect persons they encounter in the course of their work has been borne in mind in the elaboration of this Manual. Given this, international standards such as those set out in the Code of Conduct for Law Enforcement Officers, are underlined as essential to guide the practitioners who are using this manual to strengthen their work in response to migrant smuggling.<sup>1</sup>

In accordance with article 19 of the Smuggling of Migrants Protocol, a guiding principle in the elaboration of the Manual has been the obligation of States Parties to ensure that international law, including human rights and refugee law is not compromised in any way by the implementation of anti-smuggling measures.

### **Smuggling of Migrants Protocol**

#### **Article 19—Savings Clause**

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

*Source:* United Nations Convention against Transnational Organized Crime.

It is important to understand that not only are guiding principles offered in accordance with international obligations, but so too do they serve criminal justice goals; where smuggled migrants are inadequately protected and assisted, they in turn will be unable to assist in the criminal justice process against migrant smugglers.

<sup>1</sup>For more information, see United Nations General Assembly Resolution 34/169 which adopted a Code of Conduct for Law Enforcement Officials, available at [www.unhchr.ch/html/menu3/b/h\\_comp42.htm](http://www.unhchr.ch/html/menu3/b/h_comp42.htm).

## **Rights-based approach**

Human rights considerations apply to everyone involved in the criminal justice process, including criminal smugglers. There are several provisions in the Smuggling of Migrants Protocol which explicitly emphasize the rights of migrants. In addition to article 19 extracted above, article 16 obliges States Parties to take measures to preserve and protect the rights of smuggled migrants, in particular, the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>2</sup>

In accordance with the rights-based approach promoted by the Smuggling of Migrants Protocol, criminal justice practitioners are encouraged to use and interpret this Manual alongside the principles contained in the following key treaties:

- The International Convention on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention against Torture (CAT)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- The International Convention on the Protection of Migrant Workers and their Families (IMWC)<sup>3</sup>

For more information about human rights considerations relevant to the investigation and prosecution of migrant smuggling, users are encouraged to refer to module 8 of the Basic Training Manual on investigating and prosecuting migrant smuggling.<sup>4</sup>

## **Non-refoulement**

Refugees have specific rights under international law, primarily by virtue of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, both of which are explicitly mentioned in article 19(1) of the Smuggling of Migrants Protocol.<sup>5</sup>

Key among those rights is the principle of non-refoulement, which prohibits the return of a person to a real risk of torture, inhuman and degrading treatment or other forms of irreparable harm.<sup>6</sup> The principle of non-refoulement is enshrined in international Conventions but is also widely considered to be a principle of customary law.

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<sup>2</sup>Article 16, Smuggling of Migrants Protocol.

<sup>3</sup>See annex C.

<sup>4</sup>UNODC Basic Training Manual on Investigating and Prosecuting Migrant Smuggling (2010), available at [www.unodc.org/unodc/en/human-trafficking/electronic-basic-training-manual-on-investigating-and-prosecuting-smuggling-of-migrants.html](http://www.unodc.org/unodc/en/human-trafficking/electronic-basic-training-manual-on-investigating-and-prosecuting-smuggling-of-migrants.html).

<sup>5</sup>Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137, [www.unhcr.org/refworld/docid/3be01b964.html](http://www.unhcr.org/refworld/docid/3be01b964.html)

<sup>6</sup>For instance see Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prevents a person from being returned to a place where he or she risks being tortured or treated in a cruel or inhuman way. Article 7 of the International Covenant on Civil and Political Rights and article 37(a) of the Convention on the Rights of the Child and customary international law also uphold this principle.

**Article 33(1)—1951 Convention Relating to the Status of Refugees**

“no Contracting 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.”

Source: United Nations Convention against Transnational Organized Crime.

Some refugees and asylum seekers with legitimate claims to international protection turn to the service of smugglers. Therefore, a guiding principle of this Manual is that criminal justice practitioners must be aware that smuggled migrants may be refugees and/or asylum seekers. This need is driven not only by the obligation to afford such persons appropriate protection, but also in pursuit of criminal justice objectives; indeed UNHCR’s Agenda for Protection sets out the mutually reinforcing relationship existing between combating migrant smuggling and upholding international protection of refugees.<sup>7</sup>

**Gender and age sensitivity**

In accordance with States obligations to take into account the special needs of women and children, a gender and age sensitive approach informs the elaboration and use of this manual.<sup>8</sup>

The particular needs of migrants on the basis of their gender need to be provided for at all stages of responding to migrant smuggling throughout the criminal justice process and in any measures that are taken in respect of the migrant. A gender-sensitive approach empowers people to assist the criminal justice process, makes protection and assistance measures more effective, and is in accordance with internationally recognized principles.

Countries of origin, transit and destination are also encouraged to adopt child-sensitive approaches in which the “best interests” of the child are the guiding principle in all measures taken in respect of children.<sup>9</sup> The underlying principles of the best interests of the child means that children are entitled to special protection measures in accordance with their special rights and needs; in relation to migrant smuggling this is particularly relevant in ensuring that unaccompanied and separated children are adequately protected and assisted.<sup>10</sup> In particular, all actions undertaken in relation to children should be guided by the principles of protection and respect for children’s rights as set out in the United Nations Convention on the Rights of the Child (CRC).<sup>11</sup>

<sup>7</sup>UNHCR, Agenda for Protection, UN High Commissioner for Refugees, Agenda for Protection, October 2003, Third edition, [www.unhcr.org/refworld/docid/4714a1bf2.html](http://www.unhcr.org/refworld/docid/4714a1bf2.html).

<sup>8</sup>Article 16(4), Smuggling of Migrants Protocol.

<sup>9</sup>A/HRC/15/29, Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the Protection of the rights of the child in the context of migration, 5 July 2010, [www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29_en.pdf)

<sup>10</sup>See for instance, Report of the Special Rapporteur on the human rights of migrants, A/HRC/11/7, 14 May 2009, paragraph 85.

<sup>11</sup>Convention on the Rights of the Child, adopted by the General Assembly in its resolution 44/25 of 20 November 1989 United Nations, Treaty Series, vol. 1577, No. 27531, [www2.ohchr.org/english/law/crc.htm](http://www2.ohchr.org/english/law/crc.htm)

## **How to use the Manual**

The Manual is composed of 15 modules. Users are invited to work through each module in the order in which they appear or focus on specific modules as needed. Beyond the training environment, it is also hoped that the Manual can serve as a handbook for practitioners in the course of their daily work investigating and prosecuting migrant smuggling.

Each module begins by setting out key learning objectives and ends with a self-assessment section. Users of the Manual are encouraged to keep the learning objectives of each module in mind when working through the content.

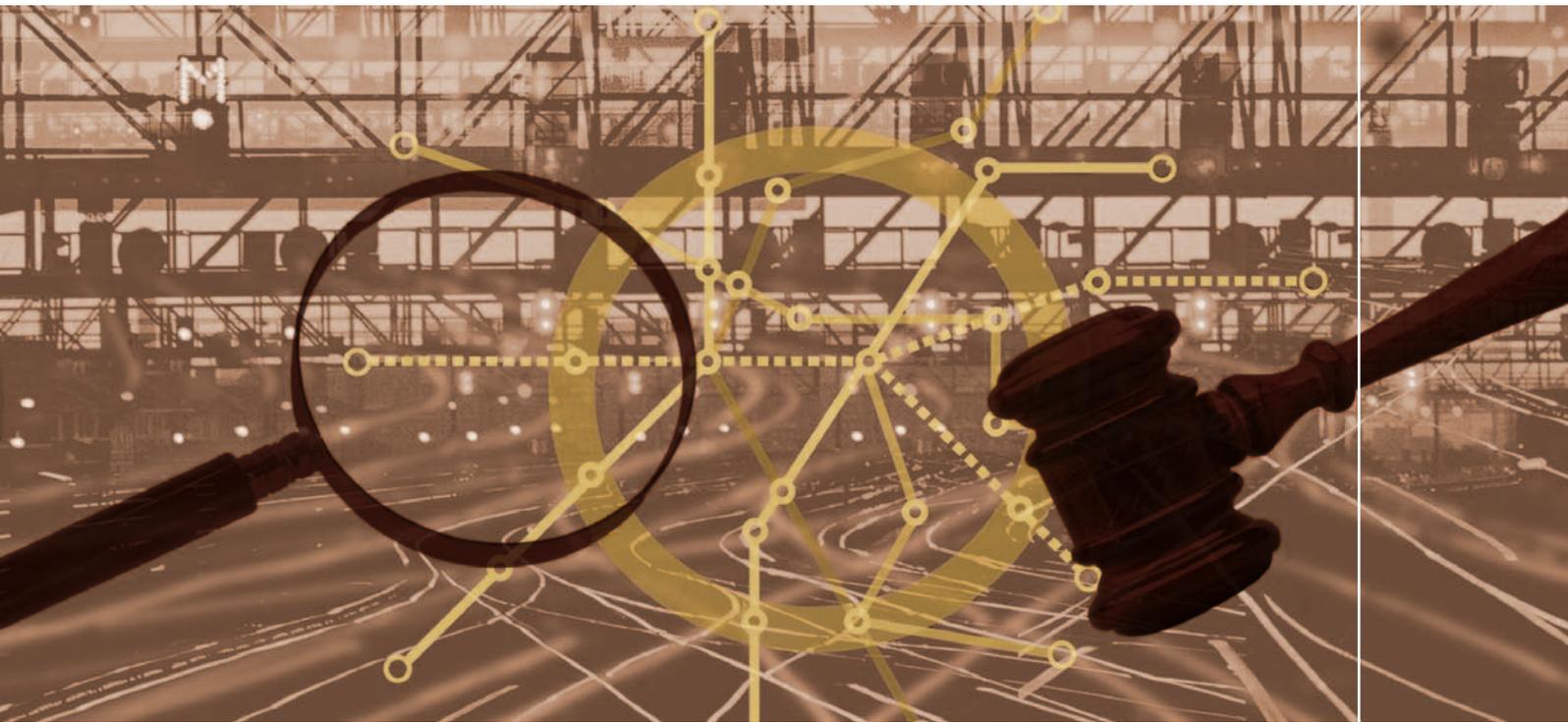
General principles and guidance are contained throughout each module, with a view to increasing theoretical understanding of criminal justice practitioners and offering practical instruction which can be applied to their work. In engaging with the content, users are asked to consider how the various approaches discussed apply to their own work, and to consider how the approaches suggested are similar and/or different to those used in their own jurisdictions. In this way, it is hoped that the users' working knowledge will be challenged, reinforced and expanded.

Upon completing each module, users' confidence in responding to self-assessment questions can serve as a guide to determining which sections of the module should be revised.



**UNODC**

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# In-depth training manual on investigating and prosecuting the smuggling of migrants

Module 1  
Understanding migrant smuggling and  
related conduct



This publication is made possible through funding received from the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **In-depth training manual on investigating and prosecuting the smuggling of migrants**

Module 1

Understanding migrant smuggling and related conduct



UNITED NATIONS  
New York, 2011

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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# **I. Objectives**

After completing this module users should be able to:

- Analyse the elements of the offence of migrant smuggling in accordance with the Smuggling of Migrants Protocol
- Describe different forms of migrant smuggling and related conduct
- Define and describe the role of fraudulent travel or identity documents in the crime of migrant smuggling
- Describe how a smuggler can enable the stay of a smuggled migrant in a country where he or she is not a national or permanent resident
- Understand the difference between ad hoc and pre-organized stage-to-stage smuggling
- Describe the roles of the different actors involved in smuggling of migrants
- Explain what conduct is not considered to be migrant smuggling in the Smuggling of Migrants Protocol

# **2. Introduction**

Migrant smuggling is a complex crime which may involve several stages, countries and actors. This module explains the offence of migrant smuggling and related conduct in the context of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling of Migrants Protocol).

The module also sets out elements of the offence according to the Smuggling of Migrants Protocol, and discusses alternative offences which may be charged in where migrant smuggling has not been criminalized in accordance with the Smuggling of Migrants Protocol.

The module also discusses how migrant smuggling is organized, from simple ad hoc structures to the more complex hierarchical ventures which may involve organized crime groups. The different roles of various actors within these processes are discussed, as well as the relationships between them and the relationship between smuggling actors and migrant smugglers.

Finally, the module discusses conduct that is not considered to be migrant smuggling, including movement of migrants by humanitarian actors or family members of migrants who do not receive a financial or material benefit.

# **3. Definition of migrant smuggling**

Throughout this module, the term “migrant smuggling” is used interchangeably with the term “smuggling of migrants”, which is defined by article 3 of the Smuggling of Migrants Protocol.

## Smuggling of Migrants Protocol

### Article 3

(a) “Smuggling of migrants” shall mean 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 permanent resident.

(b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

Source: United Nations Convention against Transnational Organized Crime.

A person who is involved directly or indirectly in the smuggling of migrants is referred to as a smuggler. A person who is being assisted by smugglers to enter the country illegally is referred to as a migrant. The offence of migrant smuggling occurs when a smuggler has procured or facilitated the illegal entry of a migrant into a State of which the migrant is not a national or permanent resident, in exchange for a financial or other material benefit.

The countries that the migrants travel from, through and to, are respectively referred to as:

- *Origin country*: the country that migrants travelled from originally, where migrants are nationals or permanent residents
- *Transit country*: the country the migrants travel through on the way to their ultimate destination. There may not always be a transit country; migrants may simply leave the country of origin and go directly to the destination country
- *Destination Country*: the country in which the migrants ultimately arrive and intend to remain in

Though smugglers and migrants enter into an agreement in order for the smuggling to take place, some key points must be kept in mind:

- Even if migrants agreed to be smuggled they can not consent to harm or injury at the hands of the smugglers
- The offence of migrant smuggling as defined in the Smuggling of Migrants Protocol criminalizes acts done for profit. It does not criminalize acts done for humanitarian reasons or for other reasons that do not involve financial or material gain<sup>1</sup>
- The target of migrant smuggling investigations and prosecutions is the smuggler, not the migrant. It is acknowledged that in some jurisdictions, migrants may be investigated for other charges such as illegal entry, but they should not be criminalized for the fact of being smuggled<sup>2</sup>
- Migrant smuggling is not to be confused with trafficking in persons. Although the offences may overlap and approaches to investigating and prosecuting the two crimes may have some commonalities, they are distinct crimes with distinct elements to prove<sup>3</sup>

<sup>1</sup>For more information, see section 8.2.

<sup>2</sup>Article 6(4) and article 5, Smuggling of Migrants Protocol. For more information, see section 8.3.

<sup>3</sup>Module 2 contains a comparative analysis of migrant smuggling and trafficking in persons.

## 4. Criminalization of migrant smuggling

### 4.1 Criminalization of conduct

The Smuggling in Migrants Protocol obliges States Parties to criminalize specific conduct related to migrant smuggling, so as to capture all those involved in any aspect of the commission of the offence or related offences. As such, the criminalization of the following conduct is required by article 6 of the Smuggling of Migrants Protocol:

- Smuggling of migrants<sup>4</sup>
- Producing a fraudulent travel or identity document; procuring, providing or possessing such a document, when committed for the purpose of enabling the smuggling of migrants<sup>5</sup>
- 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<sup>6</sup>
- Attempting to commit the offence of migrant smuggling or related offences, subject to the basic concepts of the State Party's legal system<sup>7</sup>
- Participating as an accomplice to a migrant smuggling offence or related offences, subject to the basic concepts of the State Party's legal system<sup>8</sup>
- Organizing or directing migrant smuggling or related offences<sup>9</sup>

Conduct such as “organizing, attempting or participating as an accomplice” refers to engaging in conduct for the purpose of migrant smuggling, but the conduct may not be central to the offence itself. This refers to persons who are involved in the commission of the offence without being principal offenders, for example, someone who has made preparations or attempts in relation to the migrant smuggling offence.

### 4.2 Constituent elements of migrant smuggling

#### 4.2.1 *The criminal act (actus reus) requirement*

Actus reus is the Latin term for the act or conduct of the offence. It is the prohibited conduct itself; as such no consequence of that act need be established. The act must be committed voluntarily. The material elements of migrant smuggling will vary depending on domestic legislation.

According to the Smuggling of Migrants Protocol, the acts to be proven to establish smuggling of migrants are:

- Procuring the illegal entry of a person into a country, or illegal stay of a person in a country

<sup>4</sup>Defined by article 3(a) of the Smuggling of Migrants Protocol.

<sup>5</sup>Article 6(1)(b), Smuggling of Migrants Protocol.

<sup>6</sup>Article 6(1)(c), Smuggling of Migrants Protocol.

<sup>7</sup>Article 6(2)(a), Smuggling of Migrants Protocol.

<sup>8</sup>Article 6, Smuggling of Migrants Protocol.

<sup>9</sup>Article 6(1)(c), Smuggling of Migrants Protocol.

- Of which that person is neither a national nor permanent resident, and did not have the requisite travel documents, visas or passports to enter or remain in that country
- For the purpose of receiving a financial or other material benefit<sup>10</sup>

In other words, an offence of migrant smuggling will exist where a smuggler has procured or facilitated a migrant to enter or stay in a country of which the migrant was not a national or permanent resident, and did not have the documents required by that country's domestic law. The smuggler will have procured the entry or provided this assistance for a financial or material benefit.

#### **4.2.2 The criminal intent (*mens rea*) requirement**

*Mens rea* is the Latin term for criminal intention. In addition to the criminal conduct, in order for a criminal offence to have been committed, the person charged with the offence must have the requisite state of mind or *mens rea* at the time of the offence. Only those with a sufficiently "guilty mind" can be found liable for a criminal offence.

The intention can be either direct, where the defendant intends a particular consequence of their act; or it can be indirect, where the defendant foresees the likelihood of a consequence of his act even if it is not their main objective. In the migrant smuggling context, this means that the smuggler must have intended to commit the material act(s) of the offence in order to obtain, directly, or indirectly, a financial or other material benefit.

In some jurisdictions, *mens rea* can be established by proving "willful blindness", whereby the offender chose to "shut his or her eyes" to the fact that an offence was being committed. In such a situation, intent is proven when it can be shown that the smuggler intended to commit a criminal act, and had knowledge or was willfully blind to the fact that a criminal act was being committed.

The *mens rea* requirement may also be established on a lesser standard, such as recklessness, or even criminal negligence, subject to the requirements of the domestic legal system. Not all jurisdictions require *mens rea*. In certain jurisdictions and in certain cases, criminal liability may be imposed in "strict liability" offences even in the absence of *mens rea*. In such situations, it is enough to prove the act without also proving the criminal state of mind.

## **5. Analysis of the elements of the offence of migrant smuggling**

The Smuggling of Migrants Protocol provides definitions for most of the elements of migrant smuggling. Given that domestic legislation may not precisely mirror the provisions in the Smuggling of Migrants Protocol, practitioners should analyse and understand the elements in the context of their own jurisdictions.<sup>11</sup>

<sup>10</sup>Article 3, Smuggling of Migrants Protocol.

<sup>11</sup>A Model Law against the Smuggling of Migrants has been prepared to assist countries to draft domestic legislation in accordance with the Smuggling of Migrants Protocol so as to harmonize understanding and response to the crime. See UNODC, Model Law against the Smuggling of Migrants (2010).

In countries where there is no domestic legislation specific to migrant smuggling, it is essential that the offence or issues related to migrant smuggling are understood so that appropriate alternative offences can be used to prosecute migrant smugglers. Some examples of other offences that may apply are included in the box below.



### Examples – alternative offences

- Conspiracy to commit migrant smuggling or related offences. Conspiracy involves the agreement of two or more people to carry out a criminal act. Conspiracy may be more or less difficult to prove than migrant smuggling depending on legislation.<sup>a</sup>
- “Illicit association” or organized crime, in the commission of a migrant smuggling offence as defined in UNTOC. This occurs when a smuggler commits aggravated offences on two or more occasions with a specific group.<sup>b</sup>
- Attempt to commit migrant smuggling or related offences. Usually an “attempt” to commit an offence occurs when the offender commits some but not all of the elements of the offence.
- Organizing, directing, aiding, abetting, facilitating, or counselling, directly or indirectly.<sup>c</sup> In other words, the offender has helped, assisted, or aided in the commission of one or more of the elements of the offence.
- Illegal entry, that is, the smuggler has entered a country without the required travel or identity documents.
- Misrepresentation, which can include fraudulent passports and other travel documents, or an individual fraudulently recognizing a child on a birth certificate (see case study below).
- Counselling misrepresentation, which is advising or assisting another person to misrepresent material facts; and
- Unauthorized employment of smuggled migrants.

<sup>a</sup>For more information about proof of offences, see section 4, module 14, Common legal issues in migrant smuggling investigations and prosecutions.

<sup>b</sup>See article 5, UNTOC.

<sup>c</sup>Article 5, UNTOC.

## 5.1 Procurement

Procurement refers to the act of bringing about or facilitating an event. To procure means to “obtain something or to cause a result by effort.” In the case of migrant smuggling, procuring could include the actions of the smuggler organizing, recruiting, and arranging the illegal entry of the migrant. In this manner, the smuggler has “caused the result” which was the illegal entry of the migrant, “by effort” which was the organizing and arranging.

## 5.2 Illegal entry

Illegal entry is defined in the Smuggling of Migrants Protocol as “crossing borders without complying with necessary requirements for legal entry into the receiving State.”<sup>12</sup> Some legislation further qualifies illegal entry as “entering without the required documents”, or “having made fraudulent statements to obtain those documents” or “using counterfeit documents.”

In some jurisdictions “crossing border” occurs the moment the migrant physically passes across the border. In other jurisdictions ‘crossing borders’ is defined in a much broader sense and can include the moment the migrant boards a vessel or plane bound for the destination country.

Once it is determined that the migrant has crossed the border as defined by the relevant legislation, there must be an assessment to determine who was involved to assist, facilitate or procure the crossing of the border. For example, one smuggler may provide fraudulent documents to the migrant, and another may transport him or her. In some jurisdictions, legislation will capture the conduct of both smugglers because both assisted or procured the illegal entry of the migrant although only one smuggler physically drove the migrant over the border.

In some very large smuggling ventures, a “human chain” may be required to smuggle migrants. In such situations, the procurement of illegal entry of the migrant may include all of the actions that are involved in organizing, facilitating, transporting, or harbouring migrants, as well as aiding or abetting in this process from those who supplied fraudulent documents to the migrants to those who accommodated them in safe houses or transported them throughout the journey.

The above considerations highlight the fact that it is important to understand the elements of illegal entry as they are defined in the relevant legislation to determine who can be charged.

## 5.3 Fraudulent travel or identity document

Another element that must be proven is that the migrant did not have the requisite travel or identity document. To prove this;

- Demonstrate that the smuggled migrant is not a national or permanent resident of the country
- Identify the domestic requirements of the State to obtain the requisite travel and identity documents to lawfully enter or remain in that State
- Demonstrate that the migrant did not meet necessary requirements because he or she did not have the requisite travel documents, visas or passports to enter or remain in that country. The migrant may have:

Fraudulent documents that were provided by the smuggler; or

No documents at all

Obtaining necessary visas or permits to remain in a State may be subject to applications, interviews and background checks. Migrant smugglers may take advantage of systems by assisting migrants to obtain a permit/visa for a fee, and then stay in the State beyond the period they are authorized to do so. This method of migrant smuggling, known as “enabling stay” is discussed in section 6.2.

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<sup>12</sup>Article 3(b), Smuggling of Migrants Protocol.

## 5.4 For financial or other material benefit

The element of financial or material benefit must be proven as it distinguishes criminal smugglers who are motivated by profit from persons who may have assisted migrants for completely altruistic purposes. The latter should not be charged with migrant smuggling.<sup>13</sup>

The element of financial or material benefit in the migrant smuggling offence should be interpreted broadly to include any type of financial or non-financial inducement, payment, bribe, reward, advantage, privilege or service (including sexual or other services).

Migrant smuggling involves an agreement, offer or intention to receive—directly or indirectly—a financial or other material benefit. The smugglers may actually receive the money or material benefit, but simply agreeing or intended to receive it is sufficient to satisfy this element.

A financial exchange could be in the form of cash or paid through the exchange of property, assets, sexual services, or transactions through informal financial systems.<sup>14</sup>

Some domestic legislation does not include the element of financial or material gain, but may take the element into account as an aggravating factor or in some other way. In jurisdictions where it is sufficient to prove that the illegal entry was facilitated by smugglers, there are typically safeguards in place to ensure that smuggling charges are not laid where motivations were humanitarian or altruistic.

## 6. Related conduct

The Smuggling of Migrants Protocol criminalizes offences related to migrant smuggling, including those that involve fraudulent travel or identity documents and enabling the stay of the smuggled migrant. These offences are explained and discussed below.

### 6.1 Producing, procuring, providing or possession fraudulent travel or identity documents

Fraudulent travel and identity documents are defined in article 3 of the Smuggling of Migrants Protocol.

#### **Protocol against Migrant Smuggling**

##### **Article 3(c)**

“Fraudulent travel or identity document” shall mean any travel or identity document:

That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

<sup>13</sup>See below, section 8.

<sup>14</sup>For more information on informal financial systems and “financial and material benefits”, see section 4.3.3, module 11, Financial investigations and prosecutions.

That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

That is being used by a person other than the rightful holder.

Source: United Nations Convention against Transnational Organized Crime.

The term, “travel document” includes any type of document required for entering or leaving a State under its domestic law.

The term “identity document” includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State (including visa and permits).

Such documents may have been forged, or may be genuine documents validly issued but used by a person other than the lawful holder.

The words “falsely made or altered” should be interpreted as including:

- The creation of fraudulent documents
- The alteration of legitimate documents
- The filling in of stolen blank documents

There are many types of fraudulent travel or identity documents, including:

- “Look-alike” documents: a person uses another person’s legitimate documents without making any changes to those documents where the two people are similar in appearance
- Altered documents: data, such as names or photographs in legitimate documents illegally altered
- Forged documents: documents were created through illegal means
- Fantasy documents: travel or identity documents from non-existing States
- Documents obtained through misrepresentation: documents are legitimate but have been obtained fraudulently, for example, by providing incorrect information on application forms or by using other fake documents to obtain the document in question
- Documents that were improperly issued: obtained through corruption, duress, or in any other unlawful manner<sup>15</sup>



### Case study

#### **Immigration lawyer charged with migrant smuggling using documents obtained through misrepresentation**

Mr A worked as an immigration lawyer in destination country I. Over three years, Mr A and his colleagues charged migrants extremely high fees to obtain visas for them to enter

<sup>15</sup>Article 3(c), Smuggling of Migrants Protocol. For examples of definitions of fraudulent travel or identity documents, see UNODC, Model Law against the Smuggling of Migrants, pp. 15-17.

and work in country I. Mr A would submit applications to the Immigration Office containing false information. Mr A altered facts on the application forms so that migrants who were not eligible for work visas would appear to be so. To support these applications, Mr A provided fraudulent information about the migrants' past employment, biographical data, and jobs that were available for the migrant in destination country I and supplied fake documents in support of his assertions. In the course of his activities, Mr A also harboured smuggled migrants who had entered country I on the visas he had obtained through misrepresentation.

Mr A was charged with 28 counts of visa fraud and 24 counts of harbouring smuggled migrants for the purpose of financial gain. Each charge of visa fraud carries a sentence of 10 years in prison and a fine of up to US\$250,000.

Article 6(1)(b) of the Smuggling of Migrants Protocol requires criminalization of:

- Producing a fraudulent travel or identity document
- Procuring, providing or possessing such a document<sup>16</sup>

“Producing a false travel or identity document,” means making or creating the fraudulent document, or causing it to be created. For example, a smuggler could obtain an authentic or genuine passport, remove the photograph on the passport and substitute a picture of the migrant. Or, the smuggler could be running a criminal enterprise such as a fraudulent passport factory.

“Procuring” means obtaining or causing a result by effort. For example, the smuggler could obtain the document for someone else.

“Providing” means giving. For example, the smuggler could give the document to the migrant or to another smuggler in the smuggling network.

The legal definitions of possession may vary according to jurisdiction, but essentially means having control of the document with the knowledge that it is fraudulent. In some jurisdictions possession implies direct, joint or constructive possession.

- *Direct possession:* the smuggler or migrant is physically holding the fraudulent document
- *Joint possession:* both the smuggler and migrant have possession of the document by virtue of its location (e.g. the document is visible in the car between the migrant and smuggler)
- *Constructive possession:* the document is not in physical possession, but knowledge and control can be inferred from circumstantial evidence. For example, if the smuggler mails the document to the migrant as part of the smuggling activity, it could be inferred through fingerprint evidence, postage and return address on the package that the smuggler was in possession of the fraudulent document

<sup>16</sup>Article 6(1)(b), the Smuggling of Migrants Protocol.

## 6.2 Enabling the migrant to remain in the State

Recall that article 6 of the Smuggling of Migrants Protocol criminalizes the act of enabling a person who is not a national or permanent resident to remain in a State without complying with the necessary requirements for legally remaining in that State.<sup>17</sup> There are other ways for smugglers to enable stay:

- *Overstay*: A smuggler facilitates migrants to stay in the State over the maximum period of time they were legally allowed to remain in that State. The length of permissible time to remain in the State is determined by the type of visa they legally obtained or in case of visa exemptions, by the regulations related to their nationality. In order to establish that the smuggler assisted the migrant in overstaying, the investigating officer would first identify the regulations or legislation setting out the requirements for the migrant to obtain a legitimate visa and remain in the State for a given period of time. It should be shown that the migrant has not fulfilled these requirements, and the smuggler has knowingly enabled the migrant overstay in the State, for profit or material gain
- *Harbouring*: A smuggler may enable a migrant to remain in a State by harbouring the migrant, thereby assisting the migrant to evade detection of the authorities. For example, the smuggler may permit the migrant to stay in his/her home for a fee, knowing that the migrant is not a national or permanent resident, and knowing that the migrant does not have the requisite travel documents to remain in the State
- *Abuse of legal procedures*: Legal procedures are usually in place to allow migrants to enter or stay in a State; smugglers abuse these legal procedures to facilitate the entry or enable the stay of migrants. For example, “sham marriages” or “marriages of convenience,” take advantage of procedures which would permit a spouse to obtain citizenship for a non-resident spouse. A sham marriage occurs when a smuggler facilitates a marriage between a resident and non-resident for a fee and for the sole purpose of enabling the non-resident to obtain status. Asylum procedures are legal channels that are often abused in various ways



### Case study

#### Abuse of legal channels—recognition of children

In country I, a procedure exists enabling a man to legally recognize a child who is not his own. There are few requirements which need to be met in order to legally recognize a child.

Mr A was a national of country I, where he was legally residing. For a fee, he agreed to recognize babies of several non-resident women. Over a period of three years, he recognized at least 17 children who were not his biological offspring. The mothers of these babies all received residency permits through their recognized children.

Once evidence of Mr A’s abuse of procedures for financial gain was discovered, Mr A was criminally charged for migrant smuggling.

<sup>17</sup>Article 6(1)(c), the Smuggling of Migrants Protocol.



## Case study

### **Abuse of legal channels—migrant smuggling through sham marriages**

Mr A is a national of country 2, living in destination country 1. Mr A organized sham marriages by recruiting nationals from destination country 1 to marry nationals of origin countries. Also involved in the migrant smuggling venture were Mr B from origin Country 3 and Mr C from origin country 4 who would recruit migrants from their respective countries who wanted to enter into a sham marriage, and put them in touch with Mr A.

Mr A would arrange the wedding ceremony, and witness and sign the marriage certificate with the cooperation of Mr D, a minister of a church in destination country 1. Mr D abused his position as a minister of religion by performing up to eight sham marriage ceremonies every Sunday. Over four years, Mr D performed 360 sham marriage ceremonies.

After the wedding ceremony, the married couple would never see each other again. Nationals of destination country 1 who married the smuggled migrants would be paid. After the marriage ceremony, Mr A and Mr D would assist the smuggled migrants to apply for residency in destination country 1 and provide falsified documents to assist them with their application. Smuggled migrants were charged high fees for the sham marriage service, which were divided among Mr A, Mr B, Mr C and Mr D.

## **7. Organization of migrant smuggling**

Migrant smuggling can take many forms, from very small or simple activities conducted by opportunistic individuals, to very complex ventures organized by criminal groups in which smugglers perform various roles.

### **7.1 Simple and complex migrant smuggling**

A simple form of smuggling may involve only one smuggler and one migrant. There may only be a small amount of money paid to the smuggler, and it may involve no violence or intimidation. For example, for a fee, a smuggler may transport a migrant hidden in the trunk of his car over the border into the destination country.

A more complex form of smuggling may involve organized criminal smugglers and many migrants, with repeated smuggling activities occurring over a long period of time. For example, a smuggling network may involve 20 smugglers operating out of three different countries who recruit migrants, charge large sums of money and provide fraudulent travel and identity documents and arrange transportation. Throughout the smuggling process, the smugglers may use intimidation, threats and even violence if the migrants do not follow the instructions of the smugglers.

### 7.1.1 Ad hoc smuggling

Ad hoc smuggling occurs when migrants organize most of their journey themselves but need the assistance of smugglers for parts of their journey, for example in order to obtain travel documents, or to be transported across the border undetected. This type of smuggling often requires little planning and little financial cost to the migrant, but often comes with a greater risk to the migrants' life and safety, and a greater risk of being detected.



#### Case study

##### Ad hoc smuggling

Making contact with migrant smugglers in destination country 1 is relatively easy. According to a national from origin country 2 who has crossed the border without authorization to destination country 1, migrant smugglers can be contacted at a local bar through a person who "recommends" him or her. The smuggler tells the migrant to meet him within some days at a specific part of the border at a specific time and to carry cash and water. Between US\$2,000-5,000 is required to be "assisted" by one of these smugglers, depending how far a migrant wants to go. The higher the sum, the farther a migrant will be escorted.

The smuggler gathers a group of migrants and they cross the border together. After crossing, the smuggler tells the group to run and to separate so as to make it more difficult for border patrols to intercept them. Smugglers often abandon the migrants in the desert in destination country 1. Some migrants manage to pass undetected to destination country 1, but many die, succumbing to the extremes of the desert climate. According to a radio announcement widely broadcast and sponsored by the government of origin country 2, some 400 people died trying to cross the border every year though the real number is certainly higher, given that some bodies are never recovered from the desert.

### 7.1.2 Pre-organized stage-to-stage smuggling

Pre-organized stage-to-stage smuggling involves a high level of planning. The smuggling is pre-organized, meaning that the migrants themselves usually do not have to conduct negotiations with local smugglers during their journey. "Stage coordinators", often a chain of independent but closely interacting individuals, carry out negotiations with "local service providers" and pay them. Local service providers, most often nationals or residents of the transit country, change from stage to stage. The stage coordinators usually have the same ethnic background as the migrants. Each stage coordinator outsources the actual smuggling activities to either a "local coordinator" who in turn outsources the actual smuggling to local service providers, or directly to local services providers.



#### Case study

##### Pre-organized stage-to-stage smuggling

Persons already living in destination country 1, commissioned the smuggling of their relatives from origin country 2. To do this, they contacted smuggler A (a fellow citizen of country 2

living legally in a city in destination country 1), who they knew through joint acquaintances. The migrants started their journey with local smugglers who guided them over the border to transit country 3. A subsequent bus journey to the capital of that country was conducted with the assistance of a locally recruited smuggler. Smuggler B, another fellow citizen who legally resided in both the destination country 1 and the transit country 3, received the migrants in transit country 3. He arranged food and accommodation and organized the next stage.

Little is known about that next stage to another capital in transit country 4, (bordering destination country 1) other than that it was outsourced to other coordinators. The smuggled migrants arrived by boat to country 4 where they were received by smuggler C and declared themselves to the authorities. The migrants were asked to leave the countries within 2 weeks as it was determined that they were not refugees. During this time smuggler C assisted in arranging accommodation and buying travel tickets to a northern part of the country. Smuggler C informed smuggler A, who picked them up and drove them hidden in a car to destination country 1 where they were handed over to their relatives. During the whole smuggling process smuggler B remained in constant contact with those who commissioned the smuggling and those who smuggled them.

## 7.2 Actors involved in migrant smuggling

Opportunistic individuals can provide ad-hoc smuggling services, but more complex, pre-organized stage-to-stage smuggling generally requires a higher level of organization and increased means. This more complex type of smuggling is more likely to be overseen by organized criminal groups who may be involved in criminal activities additional to migrant smuggling.<sup>18</sup>

### 7.2.1 Organized criminal group

The United Nations Convention against Transnational Organized Crime (UNTOC) requires States to criminalize participation in an organized crime group.<sup>19</sup> “Organized criminal group” is defined by article 2(a) of UNTOC.

#### Article 2(a)

“Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Source: United Nations Convention against Transnational Organized Crime.

Migrant smuggling criminal organizations may operate based on loose networks linking largely independent smugglers. Networks are often run like a business, where smugglers take on roles

<sup>18</sup> For more information about roles, see the UNODC, Basic Training Manual for Investigating and Prosecuting Migrant Smuggling (2010) module 1.

<sup>19</sup> Article 5 of the UNODC, Convention against Transnational Organized Crime and the Protocols thereto, (2004) (UNTOC)

similar to general contractors and subcontractors working together in order to make a profit. General contractor may hire the subcontractors to carry out specific and isolated tasks. There will generally be some structure and hierarchy within the migrant smuggling venture but the structure will be fluid, meaning that a smuggler could lead a smuggling venture one day, but act as transporter the next.

### **7.2.2 Roles of actors**

The list below describes various actors who may be involved in smuggling ventures with varying degrees of autonomy:

- Coordinator or organizer
- “Employees” or “subcontractors”
- Recruiters, transporters or guides
- Spotters, drivers, messengers, enforcers
- Service providers and suppliers
- Corrupt public officials
- Safe house operators
- Forgers of travel and identity documents
- Train conductors
- Taxi and bus drivers
- Airline staff
- Boat owners or owners of other vehicles
- People responsible for upkeep of vehicles (for instance, trucks, rubber dinghies) and supply of fuel
- Financiers or cashiers, responsible for passing payments from migrants to smugglers upon successful completion of the smuggling venture

Note that the above actors may be involved in both legitimate and illegitimate business at the same time.

## **7.3 Relationships involved in migrant smuggling**

### **7.3.1 Relationships between smugglers**

The nature of the relationship between smugglers will depend on the nature of the smuggling. In the context of pre-organized stage-to-stage smuggling, often there is an organized hierarchy with for example, lead organizers, mid-level facilitators who create and provide fraudulent passports and identity documents, and lower level transporters. In smaller ad-hoc ventures, there may only be one or two smugglers, such as a smuggler who transports migrants in a boat, and another who operates a safe house.

There may be circumstances in which smugglers compete with each other within the smuggling process, or compete with rival smuggling networks. Competition can involve threats and/or use of violence which will create dangerous situations for migrants and investigators, particularly when

organized crime groups are involved. However, such competition can also offer opportunities to investigators for instance when smugglers provides information about a rival smuggling group.

### **7.3.2 Relationships between smugglers and migrants**

The relationship between migrants and smugglers is typically complex and must be understood in context. In some cases the relationship is purely commercial, for instance, where the smuggler is be a travel agent who runs a legitimate business as well as offering smuggling services. In other cases, there is a closer relationship between migrants and smugglers, for example, where the smuggler is a well respected member of the community in the country of origin, or a friend or relative of the migrant's family.

Migrants may have varying degrees of autonomy in the course of being smuggled. In some instances, migrants choose the destination and the smuggler simply acts as facilitator. In other instances, the smuggler determines smuggling routes and the country of destination, with little input from the migrant. In the latter circumstance, migrants may become stranded in a transit country that they never intended to be in with no resources to return home or travel elsewhere.<sup>20</sup>

Though in many cases migrants have sought out smugglers to use their services, this does not mean that they have consented to inhumane or degrading treatment in the process of being transported and harboured.

## **8. Conduct that is not migrant smuggling**

### **8.1 Non-financial or other material benefit**

Persons who assist migrants for altruistic or humanitarian reasons without receiving or agreeing to receive a financial or material benefit are not intended to be covered by the Smuggling of Migrants Protocol. Though such persons may be charged with other offences under States' domestic laws they should not be charged with migrant smuggling according to the Protocol.<sup>21</sup>

Employees, staff and volunteers associated with humanitarian groups, religious organizations, NGOs (non-governmental organizations), and other charitable organizations, as well as close family members, are not considered migrant smugglers, for purposes of the Protocol, in circumstances where they assist in the transportation or enable the stay of migrants or refugees for humanitarian purposes and for no financial or material gain.

<sup>20</sup>For more information, see Policy brief 5: Towards a better understanding of human smuggling, Friedrich Heckmann, IMISCOE Policy Briefs. Amsterdam: IMISCOE (2007).

<sup>21</sup>The interpretive notes indicate "the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations." UNODC, 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, Interpretative notes for the official records of the negotiation of the UNTOC and the Protocols thereto, Fifty-fifth session (Interpretive Notes).

However, it should also be borne in mind that such scenarios may be used as a defense by smugglers to avoid prosecution, emphasizing the importance of proving the financial or material element of the crime.<sup>22</sup>

## 8.2 Non-criminalization of migrants for the smuggling offence

The Smuggling of Migrants Protocol does not intend to criminalize migrants themselves. Indeed, by virtue of article 5, smuggled migrants must not be held responsible for the crime of smuggling for the fact of having been smuggled.

### Smuggling of Migrants Protocol

#### Article 5—Criminal liability of migrants

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

Source: United Nations Convention against Transnational Organized Crime.

The Smuggling of Migrants Protocol does not prevent States Parties from taking measures against persons whose conduct constitutes an offence under its domestic law.<sup>23</sup> Accordingly, it is acknowledged that migrants may be charged with other offences, such as illegal entry, in some jurisdictions. However, like the Smuggling of Migrants Protocol, this Manual is focused on the crime of migrant smuggling, which article 5 clarifies smuggled migrants should not be liable to criminal prosecution for.

Additionally it must be stressed that refugees often have to rely on smugglers to flee persecution, serious human rights violations or conflict. Such persons should not be penalized for making use of smugglers or for their illegal entry.<sup>24</sup> The fact of having been smuggled into the territory should not be taken into consideration in assessing their asylum claim.<sup>25</sup>

## 9. Summary

### 9.1 Key points

The combination of the following elements constitutes migrant smuggling according to the Smuggling of Migrants Protocol:

- The procurement of an illegal entry or illegal residence of a person
- Into or in a country of which that person is not a national or permanent resident
- For the purpose of financial or other material benefit

<sup>22</sup>The use of this argument by smugglers as a defence is discussed further in section 9, module 11 Financial investigations and prosecutions, and section 4.1.1, module 14, Common legal issues in migrant smuggling investigations and prosecutions.

<sup>23</sup>Article 6(4), Smuggling of Migrants Protocol.

<sup>24</sup>Article 31(1), OHCHR, Convention relating to the Status of Refugees, 28 July 1951 (Refugees Convention).

<sup>25</sup>Article 19(1), Smuggling of Migrants Protocol. For specific considerations which arise when smuggled migrants are refugees or asylum seekers, or victims or witnesses of crime, see section 4.3 and section 5 of module 6, Protection and assistance issues.

Criminal conduct that is related to migrant smuggling includes producing, procuring, providing or possession fraudulent travel or identity documents.

Enabling a migrant to remain in a State in which he or she is not a national or permanent resident can also constitute migrant smuggling.

The organization and level of planning required for smuggling ranges from simple ad-hoc undertakings to more complex, pre-organized stage-to-stage approaches.

Several methods are used to smuggle migrants or enable their stay, including the use of fraudulent documents and the abuse of legal procedures.

Humanitarian groups, NGOs, or family members who assist migrants and do not receive a financial or a material benefit, should not be considered migrant smugglers.

The Smuggling of Migrants Protocol clarifies that smuggled migrants cannot be prosecuted for having been the object of smuggling.

## 9.2 Self-assessment questions

- What is migrant smuggling, in your own words?
- What elements constitute the offence of migrant smuggling as defined by the Smuggling of Migrants Protocol?
- Is there legislation criminalizing migrant smuggling in your jurisdiction? How is it similar to or different from the Smuggling of Migrants Protocol?
- If there is no offence of migrant smuggling in a particular jurisdiction, what other relevant offences could be charged?
- What is the role of fraudulent travel or identity documents in the crime of migrant smuggling?
- How can a smuggler enable the stay of a smuggled migrant in a country where he or she is not a national or permanent resident?
- What is the difference between ad hoc and pre-organized stage-to-stage smuggling?
- Who are the different actors involved in migrant smuggling and what is their role?
- Which articles of the Smuggling of Migrants Protocol (a) prevent States Parties from prosecuting a smuggled migrant for having been smuggled, but (b) allow them to take measures against smuggled migrants for other offences in their domestic jurisdiction?



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This publication is made possible through funding received from the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

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UNITED NATIONS  
New York, 2011

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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# 1. Objectives

After completing this module users should be able to:

- Recall and distinguish the elements of migrant smuggling and trafficking in persons as defined by the relevant Protocols to the UNTOC
- Explain the key differences between migrant smuggling and trafficking in persons
- Explain the consequences of mistaking a situation of trafficking in persons with one of migrant smuggling
- Describe the overlap between migrant smuggling and trafficking in persons investigations

# 2. Introduction

The offences of migrant smuggling and trafficking in persons are sometimes confused; this module aims to assist practitioners to distinguish between them. Although there are similarities between these crimes, there are also significant differences which must be understood. Before any charges are laid against a person, the facts should be carefully assessed so that migrant smuggling charges are not laid when the crime is one of trafficking in persons, or vice versa.

In practice, investigations into both crime types may overlap. For example, what may begin as a case of migrant smuggling may become one of trafficking in persons. Indeed, smuggled migrants are extremely vulnerable to falling victim to trafficking. Furthermore, some criminals involved in the commission of smuggling migrants may also be involved in trafficking in persons. However, the constituent elements of the respective offences are different.

This module discusses the constituent elements of the crime of trafficking in persons as defined by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Trafficking in Persons Protocol). The module goes on to differentiate the crime of trafficking in persons from that of migrant smuggling based on three key issues: the source of profit, the fact that migrant smuggling is a transnational crime, and issues of victimization and consent.

Finally, while the elements of the offences are clearly different, the module discusses overlaps between trafficking in persons and migrant smuggling which investigators must be aware of in order to appropriately approach investigations.

# 3. Definition of trafficking in persons

Recall from module 1 that migrant smuggling is defined by the Smuggling of Migrants Protocol, as:

- The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident<sup>1</sup> or
- 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 remaining in the State<sup>2</sup>

Contrasted to this, “trafficking in persons” is defined in article 3(a) of the Trafficking in Persons Protocol.

### Article 3. Trafficking in Persons Protocol

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Source: United Nations Convention against Transnational Organized Crime.

## 4. Constituent elements of trafficking in persons

As with migrant smuggling legislation, trafficking in persons legislation may not reflect the precise language used in the Trafficking in Persons Protocol. The Trafficking in Persons Protocol should be used as a starting point to understand the definitions of terms, followed by a review of the relevant domestic law

According to the Trafficking in Persons Protocol, the crime of trafficking in persons has three constituent elements:

- *Act*: Recruiting, transporting, transferring, harboring or receiving a person
- *Means*: Use of force or threat of force; or coercion; or abduction; or fraud; or deception; or abuse of power; or abuse of a position of vulnerability; or giving or receiving of benefits
- *Purpose*: Exploitation

The trafficking in persons offence is complete when at least one of the “acts” and at least one of the “means” is combined with the “purpose” of exploitation.

The matrix below sets out these elements: any combination of three items, one from each of the three columns, can constitute trafficking in persons. For example: the act of transporting a person + using the means of deception + for the purpose of exploiting him or her through organ removal = trafficking in persons.

<sup>1</sup>Article 3(a), Smuggling of Migrants Protocol.

<sup>2</sup>Article 6(1)(c), Smuggling of Migrants Protocol

<b>Trafficking in persons Matrix of elements of the offence</b>				
Act	+	Means	+	Purpose (exploitation)
Recruitment OR		Threat or use of force OR		Exploitation of the prostitution of others OR
Transportation OR		Other forms of coercion OR		Sexual exploitation OR
Transfer OR		Abduction OR		Forced labour or services OR
Harbouring OR		Fraud OR		Slavery or practices similar to slavery OR
Receipt of persons	+	Deception OR Abuse of power OR Abuse of a position of vulnerability OR Giving or receiving payments or benefits to achieve the consent of a person having control over another person	+	Servitude OR Removal of organs OR Other forms of exploitation
= Trafficking in persons				

These three elements constitute the actus reus (physical element, or guilty act) of the crime. In most jurisdictions, the mens reus (internal element, or guilty mind) also must be established. All of these elements are discussed in turn below.

#### 4.1 The criminal act (actus reus) requirements

The actus reus (a Latin term referring to the “guilty act”) forms the conduct or act of trafficking in persons. The actus reus is sometimes referred to as the material or external element of the

crime. What constitutes the act of trafficking in persons varies according to domestic laws; *actus reus* requirements according to the Trafficking in Persons Protocol are discussed below.

### **4.1.1 Act**

The offence must include any one of the following acts:

- Recruiting
- Transporting
- Transferring
- Harboring
- Receiving a person

Some or all of these terms are likely to have clearly defined meanings in domestic legislation.

It is important to note that there is no requirement that the traffickers or victims cross the border for this offence to be committed.

### **4.1.2 Means**

Unless the trafficking victim is a child, the act must also contain at least one of the following means:

- Use of force
- Threat of force
- Coercion
- Abduction
- Fraud
- Deception
- Abuse of power or of a position of vulnerability
- Giving or receiving of benefits<sup>3</sup>

Where a child is trafficked, the trafficking in persons offence can be established even if none of the means are used.

### **4.1.3 Purpose**

The purpose of the acts and means of trafficking in persons is to exploit the victim. The Trafficking in Persons Protocol does not define exploitation but gives a non-exhaustive list of forms of exploitation: exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

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<sup>3</sup>For more information about trafficking in persons, see the UNODC, *Anti-Trafficking in Persons Manual for Criminal Justice Practitioners* (2009). For definitions of terms related to trafficking in persons, see the UNODC, *Model Law against Trafficking in Persons*.

The Trafficking in Persons Protocol states that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant once it is demonstrated that deception, coercion, force or other prohibited means have been used. Consent of the victim, therefore, cannot be used as a defence by the trafficker. In trafficking cases involving children, it is sufficient to prove the act and the purpose only; there is no need to prove the means.

### Article 3. Trafficking in Persons Protocol

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

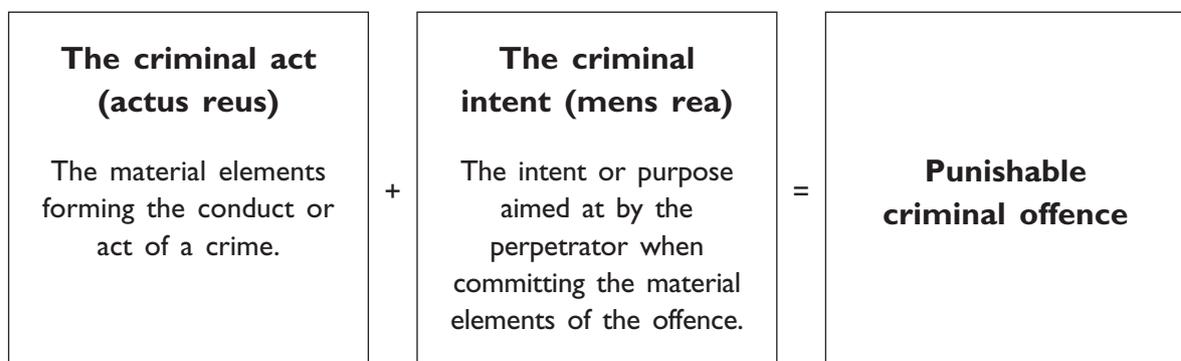
(d) “Child” shall mean any person under eighteen years of age.

Source: United Nations Convention against Transnational Organized Crime.

## 4.2 The criminal intent (*mens rea*) requirement

Mens rea is a latin term denoting the internal element of the crime, or the “guilty mind” of the culprit. In some legal systems, mens rea must be proven in addition to the above elements, in order to establish a criminal offence.<sup>4</sup> In other legal systems and in certain cases, trafficking in persons may be a “strict liability” offence, meaning that establishing criminal liability requires only that the criminal act be proven; no proof of the mental element is required.

Where the mental element does need to be proven, it must be demonstrated that the culprit intended to traffic the person for the purpose of exploitation. In other words, it must be demonstrated that the perpetrator committed the material act(s) of the offence with the knowledge and intention that the victim be “exploited” as defined by relevant domestic laws prohibiting trafficking in persons.



<sup>4</sup>For more information about mens rea, see section 4.2.2, module 1, Concepts, categories and analysis of migrant smuggling and related conduct.

It is the purpose that matters, not the practical result attained by the perpetrator. Thus, the fulfillment of the mental element does not require that the aim be actually achieved. In other words, it is not necessary that the perpetrator actually exploits the victim, only that the “acts” and “means” of the perpetrator aimed to do so.

Exploitation can be understood as having objective and subjective elements in that the victim performs or offers to perform an act or provides a material benefit to the trafficker because of a subjective fear of the trafficker that is objectively reasonable in the particular circumstances. Fear may include fear of physical harm, fear for one’s psychological well-being, or fear of harm to one’s family or friends. It need only be established that it would be objectively reasonable for the victim to believe that the trafficker would cause harm to the victim; the act of physical harm does not have to actually be realized to be proven in these contexts.<sup>5</sup>

## 5. Key differences between smuggling of migrants and trafficking in persons

The main differences between migrant smuggling and trafficking in persons fall into three categories:

- Exploitation and source of profit
- Transnationality
- Victimization and consent

These differences serve simply as a starting point to assist in differentiating between the two crimes; the ultimate conclusion reached depends on the unique facts of each case. Often the crimes may overlap with each other.

### 5.1 Exploitation and source of profit

One important indicator of whether a case is one of migrant smuggling or of trafficking in persons is how the offenders obtain criminal profit. The primary source of profit and thus also the primary purpose of trafficking in persons is to generate income through the exploitation of the victims. Generally, traffickers will continue to exploit the victims for profit or material benefit for an indefinite time period, which may last for many years.

In contrast, the smuggler and migrant have generally entered into a temporary contract, exchanging money for the procurement of illegal entry into another State, or in order to remain in another State unlawfully. The relationship between the smuggler and the migrant generally ends once illegal entry or stay in the destination country is achieved. In such situations, once the smuggler has been paid or has received whatever material benefit is agreed upon, he or she has no intention to exploit the smuggled migrant.

The line between the two offences becomes less clear when the migrant is exploited during the migrant smuggling journey, or upon arrival in the destination country. For example, the migrant may be faced with the option of being stranded in an unknown country or paying the smuggler an even greater amount of money than what had been originally agreed to. The migrant may fear

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<sup>5</sup>For more information, see the UNODC Toolkit to Combat Trafficking in Persons.

for his safety and therefore agree to make the payment, or if he or she cannot afford to make such payment he or she may provide some other kind of benefit to the smuggler which could be tantamount to exploitation (for instance, the provision of sexual services). Alternatively, the smuggler may offer the migrant work in the country of destination. The conditions of work may be such that a situation of trafficking arises. Given that the migrant has no legal entitlement to be in the country, he or she may be reluctant to enlist the help of the authorities.

Not all exploitation rises to the level necessary to establish trafficking in persons, but these situations illustrate that each case must be looked at in its entirety, taking into account all of the facts in order to determine whether a case is one of migrant smuggling or trafficking in persons.

## 5.2 Transnationality

The objective of migrant smuggling and related conduct is always to facilitate the illegal entry or stay of a person in the destination country. Migrant smuggling may therefore involve a simple crossing from the origin country to the destination country, or more complex journeys involving several negotiations through several transit countries. Either way, migrant smuggling always has a transnational dimension involving more than one country.

Trafficking in persons on the other hand, may involve the illegal entry or stay of a person, but this is not a necessary element of the offence. Trafficking can occur in the home State of the victim without any border crossings or border crossings and stay may occur legally. Alternatively, victims of trafficking may be trafficked across borders or be bought and sold repeatedly to different traffickers and moved to various countries.

In short, though there may be a transnational element in a given trafficking case, such an element is not required. The trafficking in persons offence concerns the intended exploitation of the victim.

## 5.3 Victimization and consent

The crime of migrant smuggling does not require the victimization of the smuggled migrant. Indeed, migrants may have freely entered into a contract with the smugglers for the smuggling services. For this reason, in the smuggling context migrants will generally be referred to as “migrants” and not “victims”. However, this does not mean that migrants cannot become victims of crime. Indeed, often crimes are committed against smuggled migrants during the smuggling process. For instance, if a migrant deems the conditions of transportation to be too dangerous he or she may seek to discontinue the journey, but be physically forced to enter a vessel. The migrant has then become a victim of crime and should be treated accordingly in the investigation and prosecution of the offence.

In contrast to migrant smuggling, trafficking in persons is always a crime against a person. Victims of trafficking have either never consented, for instance, if they have been abducted or sold, or any initial consent they gave has become meaningless by the improper means used by the traffickers, such as through deception or violence.<sup>6</sup> In the case of children, their vulnerable position makes the use of any means irrelevant.<sup>7</sup>

<sup>6</sup>Article 3(b), Trafficking in Persons Protocol.

<sup>7</sup>Article 3(c), Trafficking in Persons Protocol.

In short, where migrants no longer have freedom of choice and have been forced, intimidated, manipulated or coerced into complying with the smugglers, it must be determined whether the crime has become one of trafficking in persons.

## 6. Overlap between migrant smuggling and trafficking in persons

The consequences of treating a trafficking case as one of migrant smuggling can be significant; victims of trafficking may not have access to adequate protection and assistance entitlements if they are not recognized as victims of a serious crime, while offenders may not be punished as severely as their crime warrants where they are charged with smuggling rather than trafficking offences.

However, identifying whether a case is one of trafficking in persons or migrant smuggling can be very difficult for a number of reasons:

- Some trafficked persons might start their journey by agreeing to be smuggled into a country, but find themselves deceived, coerced or forced into an exploitative situation later in the process. For example, they may be forced to work for extraordinarily low wages to repay the cost of transportation to the country of destination
- Traffickers may present an “opportunity” that sounds more like smuggling to potential victims. For instance, persons wanting to migrate could be asked to pay a fee in common with other people who are being smuggled but the intention of the offender from the outset was exploitation of the person. The “fee” was part of the fraud and deception, and a way to increase profit
- Smugglers may permit migrants to pay the smuggling fee upon arrival in the destination country. This may make the situation initially appear to investigators as one of debt bondage and trafficking in persons. However, if the smugglers charge only the agreed upon fee and do not charge extremely high interest, it would more likely be a case of smuggling. On the other hand, the existence of a fee can initially look like a situation of smuggling but on closer examination of the terms and conditions can turn out to reveal exploitation of a type that constitutes trafficking in persons
- Smuggling may be the planned intention of the smugglers at the outset but a “too good to miss” opportunity to traffic people presents itself to them at some point in the process
- Alternatively, criminals may both smuggle and traffic people, sometimes in the same event. The same routes and transportation methods may be used to deliver people to entirely different fates. The fact that the same venture may include mixed migration flows of people who may be being smuggled or trafficked is complicated by the fact that early on in the process it is difficult to distinguish the two situations. Indeed, where a trafficked person is being transported in the same way as persons who are being smuggled, he or she may be entirely unaware that they are being trafficked

The above considerations highlight that what may begin as an investigation of migrant smuggling could develop into one of trafficking in persons once all of the facts are established. Conversely, an investigation of trafficking in persons may turn out to be a migrant smuggling venture that was entered into willingly by the migrants for an agreed upon price and with no evidence of any actual or intended exploitation. The key is to investigate the conduct and circumstances to see what, if any, offence or offences have been committed and investigate and prosecute all the offences involved.



## Case study

### Smuggling and trafficking in the same migration flow

A criminal organization entered into contracts with 10 persons, to smuggle them from the origin country 1 to the destination country 2. Each person was quoted a fee of US\$ 10,000. Upon arrival in destination country 2, nine people paid the US\$ 10,000 and were released by the smugglers. However, the smugglers, seeking to maximize their profits, informed the tenth person that her smuggling fee was now US\$ 30,000. The tenth migrant was unable to pay the increased fee and, instead of releasing her, the smugglers sold her to a brothel owner.

The criminal organization has engaged in both migrant smuggling and trafficking in persons in the same event. What began as a migrant smuggling venture involving ten migrants, ended in the smuggling of nine migrants and the trafficking of one victim.

When abusive or inhumane treatment is involved, the case will not necessarily be categorized as trafficking in persons. Rather it may be properly categorized as a migrant smuggling offence with additional charges to account for the aggravating factors. The offence will be one of trafficking in persons if for example, the person concerned is recruited through deception and is not permitted to leave, and is then exploited by the offenders. The facts must be carefully considered in each case to determine whether the appropriate offence charged should be migrant smuggling with aggravating factors, or trafficking in persons.

The subtle differences and overlaps between migrant smuggling and trafficking in persons are discussed below in the context of forced labour and forced marriages.

## 6.1 Forced labour

Although a common scenario, cases that are particularly difficult to distinguish involve the payment of the fee after the smuggling has taken place.

In the trafficking in persons context, forced labour may be one method of profiting from exploitation of the victim. It can include illegal employment in casinos, restaurants and farms, construction sites and factories, begging and selling wares on the streets, or domestic servitude in private residences. When children are used in the forced labour context, they may have been instructed to impersonate someone else, use fraudulent documents, and be transported to another country to provide cheap labour. Upon arrival at the destination country or place of employment, children are often subject to abuse, starvation and inhumane conditions.

In the migrant smuggling context, migrants may have agreed to pay the smugglers an agreed upon price for being smuggled, and may have even agreed to pay interest. The migrant may have agreed to work for a pre-arranged period of time at a pre-arranged place in order to pay smugglers back. The issue is to then determine at what point this has become “debt bondage” or “forced labour”. If the migrant is working reasonable hours for a fair price, paying reasonable interest on the smuggling fee, and has not been intimidated or threatened, then the arrangement is probably a voluntary contract entered into and fulfilled by the migrant and smuggler.

On the other hand, the smuggler may charge a very high rate of interest, or continue to impose fines or increase the amount owed through other exploitive means. The smuggler may not permit the migrant to leave after the agreed upon amount has been paid back or impose a curfew or other restrictions on liberty, taking the migrant's travel documents or using other means to impede the movements of the migrant. Based on these facts, the situation may be one of trafficking in persons, in which the migrant has become a victim of exploitation at the hands of the smugglers who have become traffickers.



### Case study

#### Forced labour

Authorities in country I conducted an investigation into trafficking of persons. The traffickers recruited victims with the aim of exploiting them at tomato plantations located in a certain region.

On the basis of gathered evidence it was concluded that the traffickers placed advertisements in national newspapers offering work picking tomatoes in that region. Persons providing information on working conditions and departure dates over the phone introduced themselves using false personal data. Phone numbers featured in job offers were changed frequently. The charge for the journey to the destination country was US\$ 130 to US\$ 260; workers were additionally charged US\$ 200 upon arrival. Transport was provided by private companies and by individual carriers.

Recruited workers were transported directly to the plantations. Workers were enslaved in the holdings, and subject to physical and psychological violence. In order to prevent them from contacting anyone from the outside, they were supervised by guards during the working day and at night they were locked in the premises where they slept. Frequently, their mobile phones and documents were taken away.

One of the methods of forcing the recruited persons to work was by charging them excessive costs for accommodation and electricity. They would also be charged excessive fees to go shopping for food and other necessities. The charged costs were so high and earnings so low that the persons could not cover the alleged debt, even after a few months. The work was organized in such a way that it was impossible to meet the conditions of picking a certain amount of tomatoes within a certain time. Where a victim failed to meet conditions, the trafficker charged him/her with a fine and thus the indebtedness of the victim kept increasing. The victims were accommodated in premises unfit for humans, mainly in ruined buildings with no water, electricity or furnishings; in many cases victims were forced to live in tents. The "guards" carried guns and were extremely brutal.

## 6.2 Forced marriages

"Forced marriages" may involve an act, means and purpose that fit the definition of trafficking as defined in the Trafficking in Persons Protocol. The act may be transfer or receipt of a person; the means may include force, threats, coercion or abduction; the purpose may be sexual exploitation and/or servitude.

This is not to be confused with “sham marriages” as discussed in module 1, in the context of migrant smuggling. A sham marriage is a voluntary agreement to marry someone for a fee. A sham marriage can be used as a technique for facilitating the entry of someone who may otherwise not be permitted to enter and/or remain in the country.

In general, a sham marriage is voluntary but there may be situations where a sham marriage becomes a forced marriage. If the agreement to marry begins as a voluntary agreement but then an element of deception or coercion is introduced, this may become a matter more akin to trafficking in persons. As always, determinations must be made on a case-by-case basis with a careful analysis of the facts. The two scenarios are contrasted below:

- In the context of a forced marriage in a trafficking in persons context, the victim of trafficking does not have a choice. There is no consent to enter into the marriage
- In the context of a sham marriage in a migrant smuggling context, both the individual and the migrant have made free and voluntary choices to enter into the “marriage” and are free at any time to decide not to enter the sham marriage. The individual who has agreed to marry the migrant has often agreed to do so in exchange for a sum of money. Generally the fee will be paid by the migrant to the smuggler and the smuggler will then pay the individual the agreed upon fee
- In a trafficking in persons context, often a forced marriage will involve sexual exploitation or servitude and the victim must remain in the marriage indefinitely or until the trafficker releases the victim from the marriage
- In the context of a sham marriage, the plan is almost always that the “sham” will be kept up for as long as needed for the migrant to obtain residence, and then the two will divorce and go their separate ways

## 7. Summary

### 7.1 Key points

Criminal justice practitioners should be clear about the difference between the constituent elements of migrant smuggling and trafficking in persons, and be aware of the potential overlaps.

Identify the elements of the offences according to relevant domestic legislation. Victims need to be identified and treated as such and criminals must be prosecuted for the most serious offences they have committed. In most jurisdictions, trafficking in persons carries heavier sentences.

The main differences between migrant smuggling and trafficking in persons are:

- *Transnationality:* Trafficking in persons is not necessarily transnational, whereas migrant smuggling always is
- *Consent:* In the migrant smuggling context, migrants have consented to being smuggled whereas persons who are trafficked did not consent to be trafficked, or their consent has been negated by the means used by the trafficker
- *Exploitation:* In a trafficking in persons context, the victim is exploited by the traffickers, and such exploitation may continue for an indefinite period of time. In the migrant smuggling context, the migrant is not exploited and has agreed to be smuggled and to

pay an agreed upon fee. When the fee is paid, the migrant is free to leave and will have no further contact with the smugglers

## **7.2 Self-assessment questions**

- What are the elements of trafficking in persons in your jurisdiction?
- How do the elements of trafficking in persons differ from those of smuggling of migrants in your domestic legislation?
- Why is important to distinguish between trafficking in persons and migrant smuggling in a given case?
- Discuss the role of consent in establishing whether or not a smuggled migrant is a victim of trafficking in persons.
- Describe and discuss situations you have encountered where elements of both trafficking in persons and smuggling of migrants have been present.
- Describe a situation in which a situation of migrant smuggling becomes one of trafficking in persons.



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# In-depth training manual on investigating and prosecuting the smuggling of migrants

Module 6  
Protection and assistance issues



This publication is made possible through funding received from the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **In-depth training manual on investigating and prosecuting the smuggling of migrants**

Module 6

Protection and assistance issues



UNITED NATIONS  
New York, 2011

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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# 1. Objectives

After completing this module users should be able to:

- Recognize the mandatory obligation to protect and assist smuggled migrants
- Understand the role of criminal justice practitioners in providing protection and assistance to smuggled migrants
- Discuss key considerations relevant to protecting life and safety at sea
- Discuss key considerations relevant to the special needs of women and children in the context of protecting and assisting smuggled migrants
- Understand protection and assistance implications for a smuggled migrant who is a victim and/or a witness of crime
- Describe some measures that can be used to protect persons who are witnesses to migrant smuggling
- Understand the principle of non-refoulement and referral mechanisms in the context of protecting and assisting smuggled migrants

# 2. Introduction

One of the three explicit purposes of the Smuggling of Migrants Protocol is to protect the rights of the smuggled migrants.<sup>1</sup> Specific obligations of States Parties to protect and assist migrants are set out in article 16.

Many distinct protection and assistance issues arise where migrant smuggling occurs at sea, where smuggled migrants have special needs, where smuggled migrants are victims of and/or witnesses to crime, or where smuggled migrants are refugees seeking asylum. Such considerations may also be applicable to persons who are not smuggled migrants, but require protection from criminal smugglers nonetheless, such as members of the public or smugglers themselves who have become witnesses in the criminal justice process.

These issues are discussed in turn in this module.

# 3. General considerations

To protect migrants from violence and assist those whose lives or safety are endangered, States need to take a responsible, multi-agency approach which includes:

- National, regional and local governments
- Border protection officers

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<sup>1</sup>Article 2, Smuggling of Migrants Protocol.

- Maritime response units at sea
- Law enforcement officers
- Prosecutors
- Members of the judiciary
- NGOs
- Others as necessary

Each of the above entities may have a role to play in protecting and assisting migrants. National, regional and local governments can pass legislation pursuant to the Protocol, implementing domestic laws relating to protection and assistance for migrants. Governments can also promote education and awareness, and can support related community initiatives. Border officers may be the first to identify the need for assistance, for example, if a truck carrying migrants is discovered at the border crossing. Similarly, maritime response units at sea will often be the first to respond in a search and rescue capacity, or to a vessel carrying migrants that has just entered its territorial waters. The priority in these circumstances will be to preserve the life and safety of those on board the vessel. Law enforcement, prosecutors and judges will often have legislative guidelines and protocols that will dictate the forms of assistance and protection that can be offered. NGOs and community groups often work with criminal justice practitioners to provide shelter, clothing and other basic necessities.

Authorities who are assisting intercepted persons should receive specialized training in order to carry out their duties in accordance with applicable protocols and conventions.<sup>2</sup> Officers could unknowingly breach international obligations if there is no guidance with respect to jurisdiction and responsibilities including the duty to assist.

Criminal and civil consequences could result if protection and assistance is not provided. In some jurisdictions, authorities are responsible for protection of life and safety, meaning they could be liable to prosecution if they failed to address protection and any threat to life. In other jurisdictions, officers could face a public inquiry for criminal offences including, misfeasance, malfeasance, and manslaughter. In some states, there is a clause in legislation called the “Good Samaritan clause” which provides that if persons (including immigration officers or members of the public) can assist without causing harm or risk to themselves then they should act.

### **3.1 Protection**

Protection means safeguarding people from harm, without discrimination, and ensuring that migrants are treated according to internationally recognized standards.<sup>3</sup>

Protection may be necessary in countries of origin, transit or destination. Migrants may have provided information to authorities while still in the country of origin and be in need of protection. Sometimes migrants are abandoned in transit and have no means of returning home or continuing their journey and may have become victims of crime en route. It also may be that the first encounter migrants have with authorities and the first opportunity to receive protection and assistance is in the country of destination.

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<sup>2</sup>Article 14, Smuggling of Migrants Protocol.

<sup>3</sup>Article 19, Smuggling of Migrants Protocol. See also OHCHR, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

According to article 16 of the Smuggling of Migrants Protocol, States Parties are obliged to:

- Take all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of migrant smuggling and related conduct. In particular the right to life and the right not to be subjected to torture or other cruel inhuman or degrading treatment or punishment (article 16(1))
- Take measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of migrant smuggling and related conduct (article 16(2))<sup>4</sup>

Law enforcement will have a role in identifying those in need of protection and working with prosecutors and the judiciary to implement the appropriate legislative safeguards to protect them. Protection can also be offered by proactively risk assessing investigations so that interventions will be timely and will preserve the life and safety of the migrants.<sup>5</sup>

### 3.2 Assistance

The Smuggling of Migrants Protocol obliges States Parties to afford appropriate assistance to migrants whose lives or safety is endangered by reason of being the objects of migrant smuggling and related conduct (article 16(3)).<sup>6</sup> Assistance means providing for needs and safety. An example of assistance in the migrant smuggling context would be a maritime unit apprehending a vessel in distress, taking the migrants on board, and providing them with shelter and medical assistance.

First responders such as law enforcement officers, the coast guard, or port of entry officers are often the first authorities to come into contact with smuggled migrants. They should be trained and equipped to respond to migrants in need of assistance. Law enforcement officers will need to risk assess whether lives and safety are in danger due to threats of violence, medical related issues, or issues of forced labour or sexual exploitation.<sup>7</sup> The types of assistance required may include food, shelter, clothing, and medical assistance.

### 3.3 Prevention

An overall strategy for assistance and protection should include proactive prevention measures that aim to reduce or eliminate potential harm to smuggled migrants. Such measures can result from law enforcement interventions or more general efforts, for instance, to raise awareness among would-be smuggled migrants of the dangers of placing their lives in the hands of smugglers.<sup>8</sup>

Law enforcement preventative measures take place through crime prevention programs or special units that work within communities to detect crime patterns and take a multi-organizational approach to reduce or eliminate targeted criminal activities. In the migrant smuggling context, agencies can work together to detect and respond to smuggling routes and methods to reduce harm to migrants. A general preventative response for example may result when border officials identify a particularly dangerous route resulting in several deaths, and initiate a campaign to warn

<sup>4</sup>Articles 16(1), and (2), Smuggling of Migrants Protocol.

<sup>5</sup>For more information about risk assessment, see module 5, Risk assessment.

<sup>6</sup>Article 16(3), Smuggling of Migrants Protocol.

<sup>7</sup>For more on risk assessment, see module 5, Risk assessment.

<sup>8</sup>Article 15(1) Smuggling of Migrants Protocol.

would-be migrants of the dangers and deter smugglers. A targeted response could include intervention of law enforcers in response to intelligence received that migrants are being transported in the back of a truck in potentially dangerous conditions.

States Parties are obliged to take other non-law enforcement prevention measures in accordance with article 15 of the Smuggling of Migrants Protocol, namely, to strengthen information programmes to increase public awareness of the fact that migrant smuggling is a criminal activity, frequently perpetrated by organized crime groups for profit, and that it poses a serious risk to the migrants concerned.<sup>9</sup> Public awareness-raising efforts have been undertaken in various countries (to varying effect) to provide education and raise awareness, for instance, through distributing flyers and transmitting messages on television networks, radio and internet, to warn people of the dangers of migrant smuggling. Prevention measures should also involve steps to reduce the demand for smuggling services through promoting or strengthening social and economic development programs to combat the root socio-economic causes of smuggling of migrants, such as poverty and underdevelopment.<sup>10</sup>

## 4. Vulnerable persons

Beyond being vulnerable by virtue of having been smuggled, smuggled migrants may be vulnerable persons for other reasons. International best practice is to take into consideration other particular vulnerabilities, for instance, disabilities and serious medical conditions.

Article 16(4) of the Smuggling of Migrants Protocol specifically obliges States Parties to take into account the special needs of women and children in protection and assistance measures.<sup>11</sup> Additionally, the Savings Clause of the Smuggling of Migrants Protocol acts to oblige States Parties not to do anything to undermine the rights of asylum seekers and refugees.<sup>12</sup> Finally, circumstances may render smuggled migrants especially vulnerable, such as during interception at sea.

### 4.1 Women

Article 16(4) of the Smuggling of Migrants Protocol obligates States Parties to consider the special needs of women in protection and assistance measures. In the context of protection and assistance, the special vulnerability of women before, during and after the smuggling process must be borne in mind and mainstreamed in any protection and assistance measures. This consideration requires measures such as;

- Addressing gender-based violence
- Providing same-gender counseling and assistance whenever possible
- Training criminal justice practitioners in gender sensitive approaches

The above considerations are not exhaustive; they serve only to highlight some important considerations, as a starting point, when providing protection and assistance to women.

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<sup>9</sup>Article 15(1) Smuggling of Migrants Protocol.

<sup>10</sup>Article 15(3), Smuggling of Migrants Protocol.

<sup>11</sup>Article 16(4), Smuggling of Migrants Protocol.

<sup>12</sup>Article 19(1), Smuggling of Migrants Protocol.

## 4.2 Children

Children have special needs which must be tended to in protecting and assisting children who have been smuggled. Children who are unaccompanied or separated from parents or guardians are particularly vulnerable.

In addition to the general obligation set forth in article 16(4) of the Smuggling of Migrants Protocol, State parties to the Convention on the Rights of the Child (CRC) have legal obligations in relation to providing protection for unaccompanied or separated children who are outside their country of nationality, regardless of their migration status. Officers should be trained to follow the procedures and observe obligations under international conventions to assist and protect unaccompanied and separated children.<sup>13</sup>

The following considerations should be taken into account in efforts to protect and assist children:

- Confirm age of the child using non-intrusive, child-friendly measures such as observations of physical, mental and emotional development, or through a review of identity document(s) and background checks. In rare circumstances, with justification such as for clinical needs, consider medical testing to confirm age, if this method is available. In the absence of such confirmation, where age is in question, presume that he or she is a child for the purpose of offering assistance and protection
- Identify, interview and register unaccompanied and separated children as soon as possible in an age and gender-sensitive manner. If the child is with a guardian, conduct an assessment to determine whether the guardian can represent the best interests of the child
- Commence family tracing as early as possible<sup>14</sup>
- Provide legal representation where required
- Advise children of their rights in a language they can understand and take measures to uphold those rights, including: healthcare, education, and the right to the protection of physical integrity. Authorities should take measures to provide children with immediate and ongoing medical assistance and the highest attainable standard of health<sup>15</sup>
- Inform children about risks and establish measures to provide further assistance to children particularly at risk such as unaccompanied or separated children, or children who have been the victims of crime. For example, make sure that children have received identity documents, that their best interests are being represented, and if necessary that they are placed with families with due regard for the language, culture and wishes of the child
- Solicit the assistance of established and specialized IOs and NGOs to aid in child care, placement and community support
- Notify the relevant local or national agency that deals with family and child care matters

In keeping with the obligation of States Parties to the Smuggling of Migrants Protocol to mainstream consideration for the special needs of children in their measures to implement the Protocol,<sup>16</sup> it must be borne in mind that a child also has the right not to be returned to a country

<sup>13</sup>Article 20, CRC.

<sup>14</sup>Article 22(2), 9(3) and 10(2), CRC.

<sup>15</sup>Article 24, CRC.

<sup>16</sup>Article 16(4), Smuggling of Migrants Protocol.

where there are substantial grounds for believing that there is a real risk of irreparable harm to the child. The child has the right to life, and the right not to be arbitrarily deprived of liberty.<sup>17</sup>

### 4.3 Asylum seekers and refugees

Article 3 of the Smuggling of Migrants Protocol adopts a wide approach to the notion of “migrant” to include both voluntary and involuntary movements. A distinction is drawn between migrants who are generally accepted as being persons who move voluntarily, and refugees who do not, and furthermore, who may have no other choice but to use smugglers in order to escape persecution.

A refugee is defined as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his [or her] nationality, and is unable to or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.”<sup>18</sup>

Refugees and asylum seekers may turn to the services of migrant smuggling networks because they are unable to migrate otherwise. Asylum may be granted to migrants upon application to the state. Often, notwithstanding the absence or invalidity of travel documents, migrants may apply for refugee status, or for consideration on humanitarian and compassionate grounds. In some circumstances, migrants may be granted temporary resident status, which may lead to permanent resident status.

Refugees have specific rights under international law, primarily by virtue of the 1951 Refugees Convention which is explicitly recognized by the article 19 Saving Clause in the Smuggling of Migrants Protocol.

#### **Smuggling of Migrants Protocol**

##### **Article 19(1)—Savings Clause**

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

Source: United Nations Convention against Transnational Organized Crime.

#### **4.3.1 Non-refoulement**

While it is recognized that in some cases smuggled migrants will be returned to their country of origin, this return must never amount to refoulement, which would be contrary to principles of international law.

The principle of non-refoulement is protected by article 33 of the Refugees Convention which determines 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,

<sup>17</sup> UNHCR, General Comment no. 6 (2005) Treatment of Unaccompanied and Separated children outside their Country of Origin.

<sup>18</sup> Article 1A(2), 1951 Refugees Convention.

religion, nationality, membership of a particular social group or political opinion.<sup>19</sup>

### 4.3.2 Access to the asylum procedure

The processing of asylum claims will differ across jurisdictions. Domestic legislation and regulations will govern processes that apply in each jurisdiction in relation to asylum claims. For example, in some jurisdictions asylum seekers will be directed to the UNHCR office, while in other jurisdictions a national specialized agency will review claims.

Each jurisdiction will have different procedures for referring asylum seekers and refugees to competent authorities for a determination of their status according to refugee law and regardless of their immigration status. It is important that practitioners who need to make such referrals are familiar with processes in their own jurisdictions.

In practice, the principle of non-refoulement means that States must ensure that any return of a person to his or her country of origin or other country is consistent with international human rights standards, domestic legislation and relevant international conventions. Decisions to return a person should not be immediate, careless or subjective. Authorities must make every effort to observe and ensure obligations under international law such as the right to claim asylum are respected.

In practice, protection may require a number of interviews with law enforcement, immigration or port of entry authorities; it may include background checks undertaken with extreme caution in order to protect the life and safety of asylum seekers. There should be education and training about managing claims and referring asylum seekers to competent authorities to examine the asylum claim. Senior officers should be involved in claims where asylum seekers are at high risk, to ensure that claims are given a generous, humanitarian and compassionate review. Some pragmatic steps that can be taken by states include:

- Training first responders in methods to best assist asylum seekers
- Making applicable policies readily available by providing first responders with a reference card or pamphlet summarizing relevant policies
- Having adequate screening mechanisms in place to identify refugees and asylum seekers and ensure that persons who claim to be refugees or asylum seekers are given access to asylum procedures
- Having referral mechanisms in place to provide immediate assistance and adequate assessments for refugees and asylum seekers, by maintaining current contact information for such agencies, and by cooperating with immigration agencies, NGOs and other community support agencies
- Providing assessments without delay and offering assistance while the applicant is being processed by immigration authorities, by having well-structured and organized procedures to process claims within a reasonable timeframe
- Not discriminating against asylum seekers and refugees who have been smuggled and giving them equal access to the asylum processes, by objectively reviewing all claims and generously recommending asylum seekers for independent reviews<sup>20</sup>
- Educating law enforcement in the most current and applicable procedures that apply in each jurisdiction

<sup>19</sup> Article 33(1), Convention relating to the Status of Refugees signed at Geneva on 28 July 1951.

<sup>20</sup> Article 19(2), Smuggling of Migrants Protocol.

## 4.4 Persons intercepted at sea

### 4.4.1 International obligations

Pursuant to mandatory obligations to protect and assist migrants at sea set out in the Smuggling of Migrants Protocol, States Parties are obliged to:

- Relieve imminent danger to the lives and safety of persons at sea<sup>21</sup>
- Ensure the safety and humane treatment of persons on board vessels<sup>22</sup>
- Afford appropriate assistance to migrants whose lives or safety is endangered<sup>23</sup>

By virtue of the 1979 International Convention on Maritime Search and Rescue (SAR Convention), States parties are also obliged to:

- Ensure that assistance be provided to any person in distress at sea regardless of the nationality or status of such a person or the circumstances in which that person is found,<sup>24</sup> and to
- Provide for their initial medical or other needs, and deliver rescued persons to a place of safety<sup>25</sup>

### 4.4.2 Key considerations

The State within whose sovereign territory, or territorial waters, interception takes place, has the primary responsibility for addressing any protection needs of intercepted persons.

A number of measures need to be put in place to implement obligations to protect and assist persons at sea. Many states have legislation and guidelines implementing these requirements.

Below are some key considerations in relation to responsibility to protect and assist at sea:

#### *Life and safety*

- States must render assistance to a vessel in distress within their territorial waters
- The first priority when providing protection and assistance at sea is to take measures to relieve imminent danger to the lives of persons.<sup>26</sup> This priority is obligatory, regardless of whether there is a suspicion of migrant smuggling or not<sup>27</sup>
- Preservation of life and safety is always paramount; there should be no criminal consequences in the context of a rescue operation
- Where there are frequent smuggling incidents between two countries, there are often operational guidelines in place for frontline officers on both sides of the border. These should be consulted

<sup>21</sup>Article 8(5), Smuggling of Migrants Protocol.

<sup>22</sup>Article 9(1)(a), Smuggling of Migrants Protocol.

<sup>23</sup>Article 16(3), Smuggling of Migrants Protocol.

<sup>24</sup>International Convention on Maritime Search and Rescue, chapter 2.1.10.

<sup>25</sup>International Convention on Maritime Search and Rescue, chapter 1.3.2. For more information see [www.imo.org/Facilitation/mainframe.asp?topic\\_id=398](http://www.imo.org/Facilitation/mainframe.asp?topic_id=398)

<sup>26</sup>Article 8(5), Smuggling of Migrants Protocol.

<sup>27</sup>Articles 8(5) and 9(1), Smuggling of Migrants Protocol.

*Appropriately equipped rescue vessels*

- Rescue vessels should be properly equipped to assist large numbers of migrants. Enough vessels with adequate space should be available to assist during mass arrivals
- Carry additional life vests/preservers and issue a life vest/preserver to each passenger
- Whenever possible, use rescue vessels with separate quarters to house migrants and smugglers separately and in some cases, to accommodate women and children separately from men. Consider making separate trips to bring migrants back to the mainland where there is no possibility of separate quarters on the rescue vessel
- Bring medical personnel on board the rescue vessel, whenever possible, and have adequate first aid provisions on board to provide immediate medical attention

*Reception centres*

- Equip reception centres to receive intercepted smuggled migrants
- Utilize IOs, NGOs and others to access centres to assist, as migrants will need some kind of shelter upon arrival to the mainland, and will often need water, food and clothing

*Refugees and asylum seekers*

- Make applicable policies and guidelines available to first responders by providing them with a reference card or pamphlet summarizing relevant policies. For instance, the International Maritime Organisation (IMO) Guidelines for treatment of persons rescued at sea<sup>28</sup>

*Investigations*

- Provide training to first responders and marine units about evidence collection, and preservation of documentation; the vessels may be a rich crime scene. Preservation of evidence may be a particular concern as often smugglers utilize vessels that are in disrepair and are at risk of sinking before reaching shore<sup>29</sup>

## 5. Victim protection and assistance

Authorities have a duty to offer protection and assistance to smuggled migrants, but where smuggled migrants become victims of crimes, additional obligations and responsibilities arise to protect migrants and prosecute offenders.

### **Article 25. Assistance to and protection of victims**

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

<sup>28</sup>For more information see [www.imo.org/Facilitation/mainframe.asp?topic\\_id=398](http://www.imo.org/Facilitation/mainframe.asp?topic_id=398).

<sup>29</sup>For more on crime scenes and protection of evidence, see module 12, Crime scene and physical evidence examination.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.
3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Source: United Nations Convention against Transnational Organized Crime.

When officers first encounter migrants who have been victimized, they may require urgent medical and psychological attention. Such needs should be tended to before the investigation proceeds.

When the victim is ready, officers should conduct a debrief to document the details of the alleged crime. Officers should be trained to debrief migrants systematically to look for signs of violence and abuse; in some cases distress may be clear but in others migrants not display obvious symptoms of trauma. When migrants have already indicated that they have been victimized, detailed statements should be taken by trained and experienced officers.<sup>30</sup>



### Case study

#### Trains of death

In country I, trains used to smuggle migrants became so prevalent, exploitative and notorious that they were referred to as “trains of death”. Migrants would be loaded onto the trains and were then robbed, sexually assaulted and in some cases kidnapped during the journey.

When one of these trains was intercepted by law enforcement authorities, 12 migrants were found deceased in the train. The remaining migrants were too afraid to provide information to police about the smugglers and requested to be returned to their country of origin.

## 5.1 Determining victim status

Interviews should be conducted with due regard for the fragile or traumatized state of the victim depending on the circumstances of the offence alleged. Victims should be referred for medical treatment by authorities and be given appropriate time to recover physically, mentally and emotionally before an interview if required.<sup>31</sup>

Once declared a “victim”, a person has certain entitlements and, in some jurisdictions, responsibilities. For instance, a victim may be entitled to healthcare and medical assistance, visas, temporary residence, and may even be given opportunities for education and employment in some jurisdictions. Therefore the assessment to determine who is a victim and who is not a victim is significant for the state and for the person being assessed.<sup>32</sup>

<sup>30</sup>For more information on taking statements and debriefing smuggled migrants, see module 13, Debriefing, interviews and testimony.

<sup>31</sup>For more on interviews, see section 6, module 13, Debriefing, interviews and testimony.

<sup>32</sup>In some jurisdictions it may be possible for a person to be considered a victim of a criminal act but not a victim for the purpose of receiving benefits.

Some jurisdictions have specific procedures that apply to the declaration of victim status. The word “victim” may be used in a very wide and general sense, such that anyone who has had a crime committed against him or her would automatically be regarded as a “victim of crime”, from a person who has had a purse stolen to someone who has been murdered. Conversely, other jurisdictions have a very narrow and specific definition of a victim in which a person’s victim status is decided in a judicial or administrative process according to certain criteria.

However, not all jurisdictions have a procedure in place to determine victim status. In some countries, the first step is to process the migrants through immigration procedures; the migrant may be a victim or witness but that will be dealt with depending on whatever their immigration status is. In other countries, the processes will run parallel to each other. In tragic cases where the migrants do not survive their journey, another level of law enforcement may be responsible for the case. On the whole it is a good practice to extend certain support, assistance and protection to anyone suspected of being a victim of crime.

The case study below illustrates a situation in which the surviving migrant was both a victim and witness in the case. This case study also illustrates the importance of international cooperation in migrant smuggling investigations.



### Case study

#### **Smuggled migrant as victim and witness**

At midday, in destination country 1, three unidentified males were found by the side of a road. One of the men was dead, another was unconscious and later died in hospital, and the third was distressed but alive. The subsequent investigation led investigators to believe that a total of five men had been smuggled in a truck from transit country 2. The survivor found at the scene was a 21-year-old man from origin country 5. The others were believed to be from a neighbouring country.

According to the survivor, he and several other persons were loaded into a van in transit country 3 and transported to a safe house in transit country 4. The five men were transported to a service station in transit country 2 where they were moved to a tool box under a refrigerated truck. The height of the tool box space was believed to be approximately 70 centimetres.

The truck later used the ferry from a port in transit country 2 to a port in destination country 1; a 12-hour trip. Statements taken during the investigation indicate that the men may have been placed in the tool box for up to 14 hours before the departure of the ferry. There was limited air in the tool box and no water supplies. Weather conditions were very hot.

After a long and intensive investigation involving close cooperation with other law enforcement authorities outside destination country 1, it was possible to identify the truck and the driver. Information from closed circuit television cameras in the harbours and testimony from the surviving victim/witness helped identify the truck.

Information obtained from the GPS system in the truck was used in the investigation to prove that the driver had diverted from his route to stop and pick up the migrants. The

GPS also showed that the driver had not stopped to seek help once he realized that one of the migrants had died.

The driver was arrested and found guilty of manslaughter for the deaths of the migrants. He was sentenced to eight years imprisonment and deportation at the conclusion of the sentence. The migrant who survived was both a victim and witness in this scenario. He was offered protection and assistance by first responders and then processed by law enforcement where his protection needs were addressed.

As illustrated by the case study above, migrant smuggling can be complex and can result in deaths of migrants. After officers determine whether or not migrants are victims of crime, there will often be legal procedures to follow to provide them with further assistance. This procedure varies in each jurisdiction.

## 5.2 Types of protection and assistance for victims

States are required to establish procedures to protect victims, and to enable victims to be considered during criminal proceedings. Domestic legislation may include protections for victims such as the right to be protected from the accused, the right to be heard at a public hearing, the right to restitution, and the right to be treated with dignity and fairness.

In some jurisdictions, once “victim” status has been conferred, supports and benefits are formally provided and victims may be deemed eligible by the state to be part of a victim protection project. The following measures are examples of the types of assistance that could be rendered to smuggled migrants who are determined to be victims of serious crimes, particularly those that result in physical injury or psychological trauma:

- Provision of clothing, food and shelter
- Health and needs assessment
- Registration with a medical doctor in order to receive any necessary medical treatment
- Access to counselling services
- Access to education and language classes
- Integration and/or re-settlement support including, where applicable, support with the voluntary return scheme
- Education sessions covering areas such as equal opportunities, welfare benefits and healthy relationships
- Help contacting family and friends
- Support accessing legal advice, including information relating to immigration status and applications for asylum
- Liaison with police and immigration services
- Risk assessments and safety planning

Special visas for temporary residence may also be issued to victims of serious crimes such as sexual violence, domestic violence, extortion, false imprisonment, physical assaults, or hostage taking.<sup>33</sup>

<sup>33</sup>For more information, see module 13, Debriefing, interviews and testimony; and module 14, Common legal issues in migrant smuggling investigations and prosecutions.

Such a procedure may depend on the victim's willingness to testify against the culprit or culprits, though such a visa should not be offered in exchange for testimony.

To provide such assistance to victims, governments or relevant agencies may establish a formal project, setting aside resources to enable the agency to provide required support. A fund may be sought in setting up the project and eventually be taken over and sustained by an appropriate agency. NGOs may be invited to participate.

Victims may require protection from retaliation by offenders; authorities should risk assess the situation to determine physical security needs which may include temporary relocation, armed physical security, physical surveillance of the victim's residence, or other interventions by law enforcement. The victim should be provided with contact numbers to maintain communication with authorities responsible for security. The judiciary may have authority to impose specific orders restraining the offender from further contact with the victim, and the victim's family or friends. The prosecutor may be able to facilitate contact between the victim and specific victim support groups or victim services as discussed above.

## 6. Witness protection and assistance

“Witness protection” is any form of physical protection provided for a witness, victim or informant or anybody concerned with the supply of vital information (against a criminal group, network or activities) that may activate a criminal justice process against such group or network with a view to dismantling it. In most jurisdictions when someone receives “witness protection”, they are being provided with specific legal protections by the state.<sup>34</sup>

Article 24 of UNTOC obliges State Parties to proactively protect witnesses.

### **Article 24. Protection of witnesses**

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.
2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
  - (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
  - (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of witnesses, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

<sup>34</sup>For more information see UNODC, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime (2008), available at [www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf](http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf).

3. States Parties shall consider entering into agreements or arrangements with other States for the relation of persons referred to in paragraph 1 of this article.
4. The provisions of this article shall also apply to victims insofar as they are witnesses.

Source: United Nations Convention against Transnational Organized Crime.

Article 29 of the UNTOC also requires State Parties to provide training programmes for criminal justice practitioners to provide investigators, prosecutors and the judiciary with practical methods for protecting witnesses and victims.<sup>35</sup>

It also must be borne in mind that a migrant may be a victim, a witness or both; practitioners should understand how each term has been defined in domestic legislation.

Assistance measures which can be taken in respect of victims of crime may in some jurisdictions also be available for witnesses. Additional assistance measures may be taken for witnesses who are not victims but are participating in the investigation or prosecution. For instance, support persons can be assigned to witnesses to guide, assist and support through the criminal justice process.

## 6.1 Determining the need for witness protection

Smugglers may threaten or intimidate witnesses and may have the means to carry out these threats, even from jail. “Witness protection” in its formal sense occurs after a determination has formally been made that a witness is in need of protection from the state because of an assessed and legitimate risk to his or her life or security. The need for witness protection may arise as a result of a police initiative or at the witness’s initiative. Witness protection may have different meanings, regulations, procedures and practices in each jurisdiction.

In the migrant smuggling context persons in need of protection may include migrants, migrants who are victims of crime, smugglers or private citizens who have agreed to testify, and anyone else involved. The UNTOC includes protection of family and friends of the witness.<sup>36</sup>

### 6.1.1 Migrants who have agreed to testify

Criminal justice practitioners must make every effort to protect vulnerable witnesses and not permit criminals to intimidate or harm those who are willing to assist the state. The relationship between the migrants and smugglers may have been amicable before the smugglers were arrested and charged but could change significantly once the smugglers learn that the migrants are going to testify against them. Smugglers may want revenge and may threaten or harm the migrants or their relatives before, during or after the trial. Often smugglers have connections to other criminals or organized crime groups and to the relatives and friends of the migrants in the country of origin.

<sup>35</sup> Article 29(1)(i) UNTOC.

<sup>36</sup> Article 25(1), UNTOC.

### 6.1.2 Family and friends of migrants

Threats made to family and friends of the witness may be particularly problematic when the witness is testifying in one jurisdiction but the smuggler is threatening family and/or friends in another jurisdiction. While smugglers often have contacts in both jurisdictions it is significantly more difficult for authorities to provide protection in another jurisdiction.

Smugglers often know the location of the family members or friends of witnesses and may use this knowledge to manipulate migrant witness. The smugglers may intimidate the family members, or monitor communications between the family members and the witness in order to establish the location of the witness.

For safety reasons, authorities may suggest that a witness temporarily not communicate with his or her family. Messages could instead be passed through or under the control of the investigation team. In some instances authorities may deem that the entire family should be moved to another country where protection can be more assured. This will depend, of course, on the level of risk, seriousness of charges, and other relevant considerations. In all cases, whichever course of action is deemed the most appropriate from welfare and security perspectives, the views of the witness should be sought and taken into account before any decision or action is taken.

### 6.1.3 Migrants who are victim-witnesses of crime

Where migrants have become crime victims in the course of being smuggled, the penalty against smugglers will likely be higher and the sentence upon conviction longer. Smugglers have more to lose, and therefore may be more inclined to threaten victim-witnesses to deter them from testifying.

Migrants who are victim-witnesses are also particularly vulnerable if the crime committed against them caused trauma. There also may be complicated power dynamics between the migrant and the smuggler, particularly whether the victimization took place over a long period of time. Such factors increase the need for assistance to empower victim-witnesses to testify against smugglers.

### 6.1.4 Offenders who have agreed to testify

Those facing criminal charges also may need protection if they are going to assist the investigation. Smugglers who have cooperated with authorities by providing information and/or by agreeing to testify at trial will need protection in case the co-accused seeks revenge. In particular, smugglers who were a part of an organized criminal group may be particularly vulnerable.



#### Case study

##### Smuggler turned witness

Smuggler A had been convicted of hostage taking in connection with a migrant smuggling undertaking, and faced a sentence of 25 years to life. He hadn't been sentenced yet. He became a witness when he testified against the number one smuggler of country I, smuggler B. Smuggler A's testimony was instrumental to the prosecution of smuggler B.

Migrants who have committed offences in cooperation with smugglers may be in a particularly good position to provide police with valuable information, but be facing charges themselves. Where a witness has been criminally charged, standard operating procedures, guidelines and protocols should be consulted. There are usually specific procedures to follow relating to: assessments of evidence provided, ability to use evidence based on level of risk to the witness, immunity, reduction in sentence or withdrawal of charges, and protection for the witness that may need to extend even beyond the sentencing of the smugglers the witness testified against.

## **6.2 Types of protection for witnesses**

The type of protection offered to witnesses will be determined based on an assessment by authorities. Where risk is low to moderate, proportionate protections will be offered such as escorting witnesses to court or allowing them to testify in a different courtroom. If there is a moderate to high risk posed to the witness involved in the judicial process, he or she may be in need of more significant protection measures. In the most extreme cases where there is a serious risk to witnesses, a witness protection program may be considered.

### **6.2.1 General protection of witnesses**

The goal of witness protection is to ensure the physical safety of the witness during criminal proceedings and after conviction and sentence is passed. General physical witness protection measures that can be taken include:

- Providing clothing, shelter and necessities of life to migrants who have just experienced a difficult journey
- Asking questions early in interviews to establish if the migrants are aware of threats to themselves or others
- Keeping witnesses and suspects separate at all times
- Consult senior practitioners to determine options for the migrant to testify for example, under a pseudonym, behind a screen, or in disguise

Migrants may also benefit from established victim and witness support programmes in some States, in which skilled and experienced professionals can assist with counselling, housing, and integration into society.

### **6.2.2 Procedural protection**

In addition to general protection measures, more formal procedural protection may also be available. Procedural measures are actions taken by the court during testimony to ensure that witnesses may testify free of intimidation or fear for their life. Such measures include, but are not limited to video-conferencing (sometimes with voice and face distortion techniques), screening and withholding of details of a witness's identity.<sup>37</sup>

The procedures in court are often unfamiliar and intimidating to witnesses. Depending on the jurisdiction, the prosecutor may take the following measures to prepare the witness for trial (being careful to do so in a way that does not influence his or her testimony):

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<sup>37</sup>For more information see UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008) available at [www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf](http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf).

- Showing the migrant the courtroom prior to the trial
- Explaining court process and roles of all the persons who will be present in simple terms
- Consider whether an argument for detaining the smuggler could be justified based on the criminal history, and the potential risk to the migrant
- In some jurisdictions, where the risk assessment is high, the migrant may be held in a shelter or other safe houses and protected
- Application to the court to permit:
  - The migrant to testify behind a screen
  - The migrant to testify from another courtroom via video-link or audio-link, from another courthouse, or from another jurisdiction
  - The use of witness supporters in accordance with local procedures
- Arrangements to have an officer available to escort the migrant to and from the courthouse
- Arrange a separate waiting area while the migrant waits to testify

Prosecutors may choose not to disclose information to the defence where it would put the migrant at risk. The judiciary will have to make informed decisions about whether to allow an application for disclosure of this information if the defence argues that the information is relevant.

The judge may take the following measures:

- Relax the court environment to put the migrant at ease
- Issue a publication ban to keep the information about the migrant out of the media
- Hold court proceedings in a closed court or in the judge's chambers
- Seal records of court proceedings and make information relating to the migrant witness/victim may be privileged
- Permit the witness to testify in court without the smuggler present. If the smuggler has a question for the witness he can ask the judge and the judge can ask the witness. However, in many jurisdictions where the accused has the right to face his accuser, this is not permitted

### **6.2.3 Witness protection programme**

In some exceptionally rare cases, a full witness protection programme may be required. A “witness protection programme” is a formally established covert programme that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.<sup>38</sup>

There are strict criteria for an individual to be admitted to a witness protection programme. Authorities must consider the:

- Nature of the threat to the witness
- Value of his or her testimony
- Significance of the case
- Impact of the witness's relocation on the witness and the community

<sup>38</sup> UNODC, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime (2008), available at [www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf](http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf).

These factors must be considered against the investment of resources required.

Given its serious consequences and costs, alternatives should be explored before considering use of a witness protection programme.

### **6.3 Duties of criminal justice practitioners**

Relevant criminal justice practitioners involved protecting witnesses may include:

- First responders
- Investigators
- Prosecutors
- Members of the judiciary

There should be open lines of communication between all criminal justice practitioners involved. There will often be overlapping roles so an investigative plan should set out responsibilities, goals and objectives in order to provide effective witness protection.

#### **6.3.1 Assess**

Those who are offering support and protection to the witness will need to evaluate and assess risks when they first receive information from first responders.<sup>39</sup> The risk assessment will lead to a specific plan for the physical protection of the witness.

During the initial risk assessment, authorities should speak with the witness to find out if there are specific concerns. After risk is assessed it will fall into a particular category; a plan for protection is then prepared, setting out actions taken appropriate to the risk level with support from community partners, NGOs or others as necessary.

Risks should be continually assessed as the case proceeds; one or two officers should be responsible for the witness and lines of communication should be open so the witness can immediately report any new threats or concerns.

#### **6.3.2 Communicate**

Any concerns held by anyone in the criminal justice system about the safety of a witness or victim-witness should be communicated without delay so that appropriate measures can be taken.

There should be a contact person or persons for the witness to notify and 24 hour emergency numbers should be provided that could include law enforcement, shelters and community support workers.

If prosecutors have concerns they should contact police or there may be procedures to confidentially notify the judge and take procedural steps to address the risk. Similarly, if police have concerns they may take action to address the risk, and/or contact the prosecutor so that procedural steps can be taken to do so. If a prosecutor or police officer is transferring the case, the file should contain a detailed report of security concerns and steps taken to address them.

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<sup>39</sup> For more on risk assessment, see module 5, Risk assessment.

### 6.3.3 Consult

If the witness decides not to testify because he or she is not confident in the protection offered, then the option not to testify should always be available.

Protection of witnesses and their family and friends should not be offered as an inducement for the witness to testify. Although he may be more likely to testify if assured that protection measures will be put in place the decision to become a witness should be voluntary and informed.

Unless information is confidential, relevant information relating to safety concerns must be disclosed to the person whose safety is at risk. The witness has a right to know about the risk he or she is facing and any decisions taken in relation to his or her protection. Some jurisdictions do not have many resources to allocate to protection of witness and victims; it is better to be up front with the witness or victim about the limitations of protection that can be offered. There may be disastrous consequences if promises are made that cannot be met.<sup>40</sup>

## 7. Summary

### 7.1 Key points

States Parties to the Smuggling of Migrants Protocol are obliged to protect and assist migrants.

Protection measures and procedures differ from between jurisdictions; practitioners should be familiar with applicable procedures in their jurisdiction.

There may be legal consequences for officials who fail to protect and assist persons, regardless of the status of the person.

In protecting and assisting smuggled migrants, States Parties must take into account the special needs of women and children and other vulnerable persons.

Smuggled migrants can be refugees; states must observe the principle of non-refoulement.

Smuggled migrants can be victims of crime; appropriate measures must be taken to protect crime victims of crime from retaliation or intimidation by smugglers.

Witnesses to smuggled migrants can include migrants, victims of crime, offenders and others.

### 7.2 Self-assessment questions

- What is the legal basis for mandatory protection and assistance of smuggled migrants?
- What is the role of criminal justice practitioners in protecting and assisting smuggled migrants?

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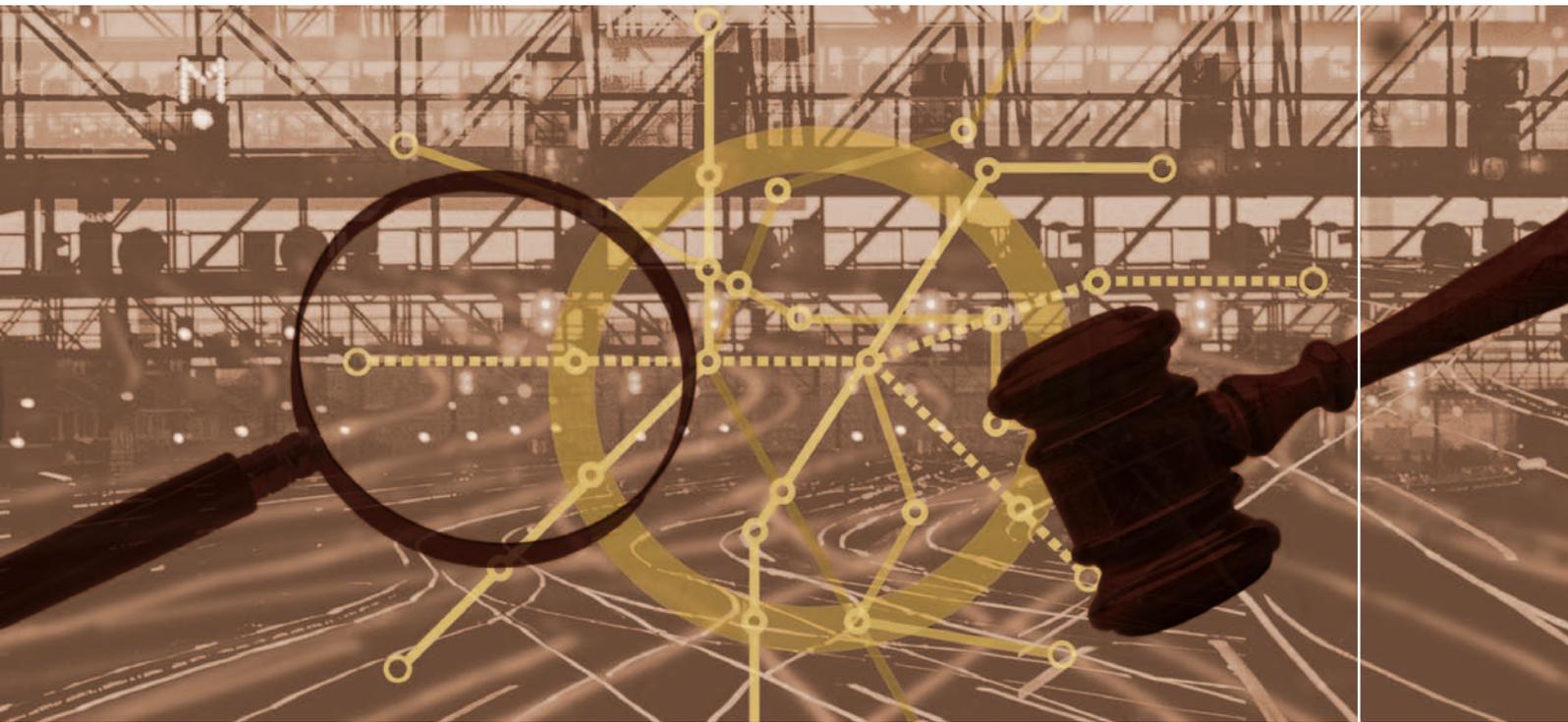
<sup>40</sup> For more information on risk levels and action to mitigate risk, see section 5 and section 7, module 5, Risk assessment.

- What are the obligations of States which intercept vessels which may be smuggling migrants in their territorial waters?
- What are some key considerations in protecting and assisting smuggled migrants who are women or children?
- What is the principle of non-refoulement? How can a State respect the principle of non-refoulement?
- What are the protection and assistance implications for a smuggled migrant who is found to be a victim of crime?
- What factors necessitate witness protection measures? What types of protection may be afforded to a witness of migrant smuggling?
- What are the benefits of witness protection measures for migrant smuggling investigations and prosecutions?



**UNODC**

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# In-depth training manual on investigating and prosecuting the smuggling of migrants

Module 7  
International cooperation in criminal matters



This publication is made possible through funding received from the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **In-depth training manual on investigating and prosecuting the smuggling of migrants**

Module 7

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UNITED NATIONS  
New York, 2011

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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# 1. Objectives

After completing this module users should be able to:

- Describe types of mutual legal assistance and the process for making a mutual legal assistance request
- Explain the extradition process, and the purpose of provisional arrest or detention
- List the reasons for which mutual legal assistance may be refused
- Explain the obligations of a State that refuses to extradite a person sought on the basis that he or she is a national
- Describe the framework involved to facilitate the confiscation of assets internationally
- Understand the relevant considerations involved in transferring sentenced persons

# 2. Introduction

The transnational crime of migrant smuggling must be met with a criminal justice response that also crosses borders. Without international cooperation, essential evidence and intelligence would often be impossible to obtain and prosecutors would not be able to effectively prosecute smugglers.

International cooperation is the agreement between State authorities to work together towards a common end. International cooperation occurs when States share information, resources, investigators and prosecutors to achieve the common goal of combating criminal activities, including migrant smuggling.

Several provisions of UNTOC which are also applicable to the Smuggling of Migrants Protocol, offer a legal basis for international cooperation. These include:

- International cooperation for the purposes of confiscation (article 13)
- Extradition (article 16)
- Transfer of sentenced persons (article 17), and
- Mutual legal assistance (article 18).

UNTOC also offers several provisions which provide a basis for international law enforcement cooperation and information sharing, which will be discussed in module 8.

The purpose of this module is to discuss some of the general considerations that may apply to international cooperation in the investigation and prosecution of migrant smuggling. In light of the general approach taken by this module, it is important for criminal justice practitioners to understand the specific provisions of other relevant treaties and domestic legislation that may also be relevant to individual cases.

### 3. Mutual legal assistance

Mutual legal assistance (MLA) is a mechanism that allows one State to provide assistance to another State during an investigation or a prosecution. For instance, State A may be conducting a migrant smuggling investigation and make a formal request to State B to obtain a specific item of documentary evidence that is in State B's jurisdiction.

The types of assistance that may be provided through MLA are subject to applicable treaties and domestic laws and may include compulsory or coercive measures. UNTOC sets out the types of MLA that may be requested under the Convention, including:

- Conducting judicial hearings using video conferences (article 18(8))
- Taking evidence or statements from persons (article 18(3)(a))
- Effecting service of judicial documents (article 18(3)(b))
- Executing searches and seizures, and freezing of assets (article 18(3)(c))
- Examining objects and sites (article 18(3)(d))
- Providing information, evidentiary items and expert evaluations (article 18(3)(e))
- Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records (article 18(3)(f));
- Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes (article 18(3)(g));
- Facilitating the voluntary appearance of persons in the requesting State Party (article 18(3)(h))
- Any other type of assistance that is not contrary to the domestic law of the Requested Party (article 18(3)(i))<sup>1</sup>

#### 3.1 Legal basis

MLA may be conducted on the basis of multilateral or bilateral mutual legal assistance agreements, or on the basis of provisions on mutual legal assistance that are contained in international conventions such as the UNTOC. While domestic legislation may also have been enacted to give effect to international or bilateral agreements, MLA may also be granted on the basis of reciprocity and governed solely by domestic legislation.

Article 18 of the UNTOC provides for a comprehensive regime on MLA, encouraging States to cooperate and provide assistance to each other. Article 18(1) of the UNTOC requires that:

- State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention, including all serious crimes
- State Parties shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that:

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<sup>1</sup>Note that Article 18(4) of UNTOC permits the spontaneous transmission of information, whereby the authorities are allowed, even without prior request, to pass on to the competent authorities of another State information that they believe might be of use.

The offence is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party  
 The offence involves an organized crime group<sup>2</sup>



### Example. MLA between origin and destination countries

Both destination country 1 and origin country 2 were cooperating in the investigation of smuggling of migrants between the two countries. The smuggling venture involved the use of falsified travel and identity documents. Three falsified passports were found in origin country 2, and held by authorities as evidence. To support the prosecution of smuggler A in destination country 1, authorities in destination country 1 requested authorities of origin country 2 to send the three falsified passports they had in their possession which could be used as evidence at trial. This request for mutual legal assistance was made on the basis of UNTOC, to which both country 1 and country 2 were parties. Origin country 2 transferred the three falsified passports to destination country 1 pursuant to article 18(3) (e) of UNTOC.

## 3.2 Making a request for MLA under UNTOC

To make a request, the State that requires assistance will review the requirements of the relevant international, regional or bilateral treaty and any relevant domestic legislation. If the MLA request is being made in the absence of a mutual legal assistance treaty, then the State Parties may rely on the procedures set out in article 18 of UNTOC. States Parties may also choose to rely on the UNTOC procedures even if there is another applicable treaty.<sup>3</sup>

The process of preparing a MLA request will vary from state to state. Preparation of a request may be done by prosecutors or magistrates, or may be prepared directly by the Central Authority. Investigators will assist the process by providing evidence that will form the grounds for the request.

The request must be made in writing, although it may be possible to allow for an urgent request to be made orally on the condition that it will be confirmed in writing.<sup>4</sup>

There are several considerations that may be taken into account in the preparation of an MLA request:

- *Central Authority*: States Parties to UNTOC are required to designate a Central Authority to make and receive MLA requests.<sup>5</sup> The prosecutor, with the assistance of the investigator, will provide the Central Authority with summaries, evidence and further information in relation to the case

<sup>2</sup>Article 18(1) UNTOC.

<sup>3</sup>Article 18(7) of UNTOC applies to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

<sup>4</sup>Article 18(14), UNTOC.

<sup>5</sup>Article 18(13), UNTOC.

- *Online tools:* Online tools and templates are available to facilitate the preparation of a request for MLA. UNODC's Mutual Legal Assistance Request Writer Tool prompts users for required information and automatically generates a complete request<sup>6</sup>
- *Communication:* Maintain ongoing and open communication between States and among all actors involved in processing the request. Such actors may include Central Authorities, investigators, prosecutors, judicial officers and diplomatic officials
- *Special procedures:* Review any domestic law or relevant treaties to determine the specific provisions or procedures that must be followed in making the request
- *Precision:* When drafting the request, state the request clearly but avoid overly technical language
- *Translation:* Have certified translators available to provide accurate translation of requests. Often legal terms may have slightly different meanings depending on the jurisdiction or State. As such, translators must be properly trained so as to be able to provide an accurate and useable translation that reflects the correct intents and purposes of the original document
- *Cost:* Agree in advance how the cost of executing the request will be allocated

### 3.2.1 Contents of request

Specific procedures to be followed in making a request will be found in the governing treaties and domestic law. If no relevant treaty or law exists, or if States agree to apply relevant UNTOC articles, article 18(15) of UNTOC provides that a request shall contain:

- The identity of the authority making the request
- The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution and judicial proceeding
- A summary of the relevant facts, except in relation to requests for the service of judicial documents
- A description of the assistance sought and details of any particular procedures that the requesting State Party wishes to be followed
- Where possible, the identity, location and nationality of any person concerned
- The purpose for which the evidence, information or action is sought<sup>7</sup>

Additionally, a request may also contain:

- The legal basis for the request
- Prior case-related contact between the requesting State and the requested State's authorities
- Summary of the procedural history of the case
- Whether the request is confidential and the reasons for this need for confidentiality
- Alleged offences and related provisions in national laws, as well as the maximum penalty for commission of the offence

<sup>6</sup>UNODC's Mutual Legal Assistance Request Writer Tool is available at [www.unodc.org/mla/index.html](http://www.unodc.org/mla/index.html). The MLA Tool is currently available in English, French, Spanish, Russian, Portuguese, Bosnian, Croatian Montenegrin and Serbian.

<sup>7</sup>Article 18(15), UNTOC.

The requesting State must address the principle of dual criminality which requires that the conduct giving rise to the investigation is considered a criminal offence in both States, regardless of differences in wording or in the legislative instrument or instruments used. Article 18(9) of the UNTOC notes that States Parties may decline to render MLA in the absence of dual criminality, however, it also may at its discretion choose to render the assistance sought even in the absence of dual criminality<sup>8</sup>

- Available background information on suspects/alleged offenders and entities/organizations relevant to the request. For instance, in some domestic law corporations are considered “legal persons” and therefore can be the subject of MLA requests
- Whether the request is urgent or subjected to a particular time-limit and the reasons for and details of any specific time-limits in relation to the investigation or prosecution of the case
- An acknowledgment that information or assistance provided pursuant to the MLA request will only be used for the purpose that was stated in the request. If this is not the case, this should be specifically indicated. Such a condition is known as a “use limitation”. If the UNTOC or the United Nations Convention against Corruption (UNCAC) is the legal basis for the MLA request, then the requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions, or judicial proceedings other than those stated in the request, without the prior consent of the requested State Party<sup>9</sup>

### 3.2.2 *Transmission of request*

The relevant treaty and/or domestic legislation will set out the method that must be used for the transmission, receipt and handling of an MLA request. In general, the request may be transmitted directly through Central Authorities or through diplomatic channels.

UNODC’s Competent National Authorities (CNAs) online Directory contains contact information for over 600 CNAs authorized to receive, respond to and process such requests.<sup>10</sup>

### 3.3 **Executing the request**

When MLA requests are received by the requested State, they must be processed. They are usually received by the Central Authority which reviews the request for compliance with the requirements of the treaty and domestic law and then forwards the request to a prosecutor, investigator or judicial officer for execution.

In addition to the relevant considerations listed above (such as following the specific procedures, respecting confidentiality, and agreeing to allocation of costs in advance), the following considerations apply to the execution of the request:

<sup>8</sup> Article 18(9), UNTOC.

<sup>9</sup> Article 18(19), UNTOC and Article 46(19), UNCAC. The principle of use limitation/confidentiality must not prevent the Requesting State Party from disclosing in its proceedings, information or evidence that is exculpatory to an accused person. In other words, information that is favourable to the accused, or that may justify or excuse the accused person’s actions or show they are not guilty

<sup>10</sup> UNODC, “The Competent National Authorities (CNAs) on-line Directory”, available at: [www.unodc.org/comppauth/en/index.html](http://www.unodc.org/comppauth/en/index.html). Access to the CNA Directory is password protected. However, Central Authority officials can request a password from UNODC, following a procedure detailed on the website.

- *Flexibility:* Often the States involved will have very different judicial systems and governing legislation. Be flexible and generous in the interpretation of the request despite differences in the systems and legislation. It is important that the request be executed wherever possible in accordance with the procedures specified in the request to the extent that these are not contrary to the domestic law of the requested State.<sup>11</sup>
- *Timeliness:* Make best efforts to reply to requests for assistance from other States as quickly as possible. This establishes a working reciprocal relationship with other States and could mean the difference between a successful investigation or prosecution, and one that fails because of delay.
- *Communication:* There should be communication between all agencies and jurisdictions involved, including through consultation with the requesting State in order to avoid duplication of efforts.

### 3.4 Reasons for refusal

Specific treaty considerations will be relevant to specific situations; the discussion that follows therefore pertains to general considerations which may apply to refusal to comply with MLA requests.

There are multiple grounds upon which a State may refuse to comply with a request for MLA. Where State authorities intend to refuse the request for assistance, they should communicate this to the requesting State and specify the reason for refusal.<sup>12</sup> Requesting and requested States should consult with one another in advance to discuss the reason for refusal as they may be able to resolve the issue.

#### 3.4.1 UNTOC grounds for refusal

Article 18(21) of the UNTOC sets out the following grounds upon which a request for MLA may be refused:

- If the request is not made in conformity with the provisions of article 18
- If the requested State Party considers that the execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests
- If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction
- If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted<sup>13</sup>

Also, as mentioned above, article 18(9) sets out that States may refuse to provide assistance on the basis of dual criminality; that is, if the conduct in question is not considered “criminal” in their jurisdiction. However, States Parties are not required to refuse to provide assistance but may

<sup>11</sup> Article 18(17), UNTOC.

<sup>12</sup> Article 18(23), UNTOC.

<sup>13</sup> Article 18(21)(a)–(d), UNTOC.

exercise their discretion to execute the request.<sup>14</sup> States may consider restricting the requirement of dual criminality to certain types of assistance where coercive measures are required such as search and seizure.<sup>15</sup>

### 3.4.2 Other grounds for refusal

Beyond those grounds specifically listed in UNTOC, some other possible reasons for refusal may include:

- *Double jeopardy*: A person shall not be tried or punished again for an offence for which he/she has already been finally convicted or acquitted. Review the relevant governing treaty as this may be a mandatory ground for refusal
- *Reciprocity*: If a requesting Party fails to undertake that it will comply with a future request of a similar nature by the requested Party for assistance in a criminal matter, this may be a factor relevant to refusal depending on the terms of an applicable treaty

It also must be borne in mind that there are some grounds upon which States may not refuse to provide assistance. For example, article 18(8) of the UNTOC prohibits States from declining to provide MLA on the ground of bank secrecy.<sup>16</sup>

## 4. Extradition

Extradition is the process whereby one State (the requested State) will surrender a person to another State (the requesting State) for the purpose of criminal prosecution or for the enforcement of a criminal sentence in relation to an extraditable offence.

Extradition of the person is facilitated through a formal judicial process, often requiring an evidentiary basis for the extradition, although the final decision on surrender generally rests with the executive.

When seeking extradition, a requesting State may simultaneously make a request for MLA, for instance, so they are able to interview the person extradited.



### Case study

#### Extradition of smuggler from transit to destination country

Some 70 migrants from origin country 1 and origin country 2 were smuggled in a boat from transit country 3. Upon reaching the coast of destination country 4, the boat capsized throwing passengers against rocks in the turbulent ocean. Rescue attempts were made, but authorities of destination country 4 were only able to rescue 41 people; the remaining 29 people perished.

<sup>14</sup>Article 18(9), UNTOC

<sup>15</sup>For more information, see the United Nations Model Treaty on Mutual Assistance in Criminal Matters (1990).

<sup>16</sup>Article 18(8), UNTOC.

Investigations of the smuggling network responsible for the incident resulted in identification and arrest of a key organiser, smuggler A (a national of origin country 2), based in transit country 3. The legislation in transit country 3 contains no specific migrant smuggling provisions, meaning that smuggler A would only be charged for immigration related crimes receiving a sentence of no more than five years in prison if he were prosecuted there. The legislation of destination country 4 explicitly criminalizes the crime of migrant smuggling, meaning that smuggler A could face up to 20 years in prison if prosecuted. Destination country 4 sought extradition of smuggler A from transit country 3, with whom it has a strong cooperative relationship.

## 4.1 Legal basis

As with mutual legal assistance, extradition may take place on the basis of regional or bilateral extradition treaties or on the basis of international conventions, such as the UNTOC. Domestic legislation on extradition will also serve as the basis for extradition, and may allow for extradition to occur on a case-by-case basis or on the basis of reciprocity. Extraditions under the UNTOC are subject to the domestic law of the requested State.<sup>17</sup>

The UNTOC may also operate in conjunction with an extradition treaty to render all offences under the UNTOC extraditable offences under the relevant extradition treaty.

If there is no pre-existing legal basis for extradition the requested State may still agree to extradite based on assurances of reciprocity; an assurance by the requesting State that it will comply with the same type of request and provide similar cooperation to the requested State in a similar case in the future.

## 4.2 Making a request for extradition

It is advisable to send a draft request in advance to the requested State for review, and then follow this with the formal request. If the requested State has concerns about the formal request, the requesting State may send a supplementary request.

At the outset, the requested State must decide whether to seek a full order or a request a provisional arrest or detention of the person whose extradition is sought. A provisional arrest or detention may be requested in circumstances where there is a real risk of flight, or if there is a likelihood that the person sought will commit other offences. This measure will enable the person sought to be arrested and detained prior to the full extradition request being made; the full extradition request would then have to be made according to the requirements and within the allotted time period. If not, the person sought should be released.

When making a request for extradition, it is important to understand the legal and procedural framework for the request, including any relevant time limits and procedural requirements. All relevant officials should be involved in the drafting of the request, including the Central Authority, the prosecutor and the investigator. The request must be drafted with sufficient detail to allow the requested State to decide if its pre-conditions to extradition have been met. Throughout the process, the requested State should be communicated with on an ongoing basis.

<sup>17</sup>Article 16(7), UNTOC.

### 4.2.1 Contents of request

The extradition request should contain details for the requested State to make an informed decision. The extradition request may include:

- The identity and aliases of the person sought; including photographs, documents, fingerprints and a description. Interpol or regional law enforcement agencies may be able to assist by providing further information in this regard
- The location of the person sought
- Facts and procedural history of the case, including dates of key events, locations, number of migrants smuggled, and amounts paid to the smugglers
- A clear and complete description of the modus operandi of the migrant smuggler
- The names of the individuals involved in the case and their dates of birth
- Applicable legislation, including details of the relevant provisions and penalties
- The legal basis for the request
- A copy of a warrant or order of arrest issued by requesting State judge or other competent authority
- A copy of the charging document or record of conviction if seeking enforcement of a sentence
- Information about the status of any proceedings for which the person sought is requested, for example prosecution or sentencing
- Information relating to bail, with details justifying any objections to bail
- Assurances that particular punishments, such as death penalty, will not be sought

To facilitate the processing of the request, specific language requirements should be observed and the document should be translated in advance.

### 4.2.2 Transmission of request

The method for transmitting the request will depend on the legal basis for the request and the type of request. A “full order” request for extradition is usually transmitted through the Central Authority or through diplomatic channels. A “provisional warrant” request may be made via Interpol or the Central Authority.

There are various conditions for extradition that should be taken into account when considering an extradition request:

- *Location:* Is the person whose extradition is being sought, located in the territory of the requested State Party?  
There should be evidence to support this assertion, for example, an officer may be able to provide evidence clearly identifying the person whose extradition is being sought, and may provide supporting documents establishing that his/her present location is within that territory
- *Extraditable offence:* Is the offence for which the person is being sought an extraditable offence under the relevant treaty or domestic legislation?

The UNTOC provides that if a request includes several separate offences, so long as at least one offence is extraditable under the treaty, the Requested State may grant extradition for all offences not covered by the UNTOC<sup>18</sup>

- *Dual criminality*: Is the offence punishable under the domestic law of both jurisdictions?

The offence need not be called the same thing, or the legislation phrased in the same way, but the criminal conduct that occurred must also be criminal in the requested State. For example, when compared, the elements of the relevant migrant smuggling legislation in both jurisdictions (or the legislation that would be used to prosecute migrant smuggling if that offence is not specifically criminalized) are shown to form the same substantive offence

- *Evidence*: Is there sufficient evidence of the criminal conduct of the person sought?

The evidence must be sufficient to meet the evidential standard set out in the relevant treaties and to satisfy any evidentiary test set out in the domestic legislation of the requested State

- *Specialty*: Is it understood that the State is obligated only to prosecute the offences for which the extradition was granted?

The State must detail with specificity the offences for which the extradition request is being sent and acknowledge that it recognizes that it is limited to prosecuting the person sought only for the offences for which the extradition was granted and not on all offences sought

### 4.3 Executing the request

In some cases a State may request a provisional arrest or detention pending extradition. Article 16(9) makes it possible for the person whose extradition is sought to be arrested or detained before the extradition hearing.

#### Article 16(9)

Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

Source: United Nations Convention against Transnational Organized Crime.

The process of extradition will vary according to the jurisdiction. The procedures set out below may be involved:

- A formal extradition hearing will be held, not to determine guilt or innocence, but to determine identity, existence and applicability of an extradition arrangement, dual

<sup>18</sup>Article 16(2), UNTOC.

criminality, extradition objections (for example consideration of issues such as nationality, human rights concerns or the political nature of the offence), authenticity of the request, and sufficiency of the supporting evidence where required

- Phase 1: The person sought is brought before the court so that the legal issues related to the extradition request can be considered and a determination can be made if the requirements for extradition are met. If not, the person is released. If the conditions are met the person is held in custody or released on bail
- Phase 2: The executive branch of the requested State decides whether the individual should be surrendered; this may be based on political, humanitarian and/or legal considerations
- Appeal: The person whose extradition is sought may appeal against the decision of the requested State's extradition judge, or against the executive government decision to order his/her surrender. An appeal of the decision by the requested State judge to deny extradition may also be made by the requesting State

In some jurisdictions there is also the possibility for simplified extradition, involving the endorsement of a warrant. The requested State judge would simply endorse the original arrest warrant issued in the requesting State, which would then be executed in the same way as a locally issued arrest warrant. This is a more expeditious form of extradition but is not available in all jurisdictions.

## 4.4 Reasons for refusal

Extradition is subject to conditions provided for in the domestic law of the requested State or applicable extradition treaties including grounds upon which the requested State may refuse extradition.<sup>19</sup> There are various grounds upon which a State may refuse the request to extradite. These grounds should be communicated and discussed in advance by both States involved as the reason for refusal may be resolved.<sup>20</sup>

### 4.4.1 Protection against prejudice

The UNTOC does not obligate a requested State to extradite a person if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions, or that compliance with the request would cause prejudice to that person's position for any one of these reasons.<sup>21</sup>

### 4.4.2 Non-extradition of nationals

The UNTOC also does not obligate States to extradite their own nationals; however there will be other requirements on the State that refuses to do so.

According to article 16(10) of UNTOC, if a requested State refuses to extradite a person sought on the basis that he or she is a national, the requested State, shall be obliged at the request of the requesting State, to submit the case without undue delay to its competent authorities for the purpose of prosecution.<sup>22</sup> This illustrates the principle of *aut dedere aut judicare* (extradite or prosecute).

<sup>19</sup>Article 16(7), UNTOC.

<sup>20</sup>Article 16(16), UNTOC.

<sup>21</sup>Articles 16 (13) and (14), UNTOC.

<sup>22</sup>Article 16 (10), UNTOC.

The possibility of conditional extradition is set out in article 16(11) of UNTOC according to which the requested Party will agree to surrender one of its nationals for prosecution on the condition that he or she is returned to serve his or her sentence.<sup>23</sup> According to this arrangement, the States agree to such terms (and any other conditions imposed) which will be deemed sufficient to satisfy the principle of *aut dedere aut judicare*.

Finally, according to article 16(11) of UNTOC, if the extradition was for the purpose of enforcing the sentence but the requested State refuses to extradite a person on the basis that he or she is a national, the requested State may agree to enforce a sentence (or the remainder of it) under the domestic law of the requesting State.<sup>24</sup>

## 5. Confiscation of assets

The proceeds of migrant smuggling and the property or instrumentalities used in the commission of the offences, will almost always be located in two or more jurisdictions. As such, international cooperation is required to identify, trace, freeze and/or seize those assets.

In cases of international cooperation for purposes of confiscation, it is essential that the States agree in advance how any confiscated assets will be shared. In some instances, one State will be responsible for the costs and execution of an entire investigation, and in that situation, the other States involved may agree that the assets will be forfeited to the leading State. In other circumstances, such as where two States have engaged in a joint investigation, the assets may be shared between the two States. The main point is that this decision should be made in advance so that there is no misunderstanding between States at the conclusion of the investigation.



### Case study

#### International cooperation for asset confiscation

Over three years, an organized smuggling network had smuggled thousands of migrants from several countries from origin/transit country 1 across the border to destination country 2. The migrant smuggling network operated unimpeded for several years until origin/transit country 1 and destination country 2 increased their cooperative approach to investigation through use of a Joint Investigative Team. The Joint Investigative Team agreement included a clear plan on confiscation and use of criminal assets.

On a designated day, police officers from nine different agencies took coordinated action in several locations throughout destination country 2, resulting in the arrests of 47 smugglers from truck drivers to high-lever organizers, and the seizure of US\$ 10 million worth of assets including cash, property and vehicles. On the basis of the Joint Investigative Team agreement, a specified portion of the seized assets was given to authorities of origin/transit country 1 as an incentive for continued international cooperation and for the purpose of strengthening capacity of country 1 to prevent migrant smuggling.

<sup>23</sup>Article 16 (11), UNTOC.

<sup>24</sup>Article 16 (12), UNTOC.

## 5.1 Legal basis

### 5.1.1 Domestic confiscation of assets

Article 12 of UNTOC obligates States to adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

- Confiscation of proceeds of crime derived from offences established in accordance with the Convention or property the value of which corresponds to that of such proceeds;<sup>25</sup>
- Confiscation of property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention<sup>26</sup>
- Identification, tracing, freezing or seizing the proceeds of crime or instrumentalities for the purposes of eventual confiscation<sup>27</sup>

When proceeds of crime have been identified, court orders will be required in order to seize or confiscate the property. Some of the court orders that may be granted include:

- *Forfeiture orders*: These orders provide for permanent forfeiture of property, including assets or money, that was deemed to be proceeds of crime
- *Seizure orders*: These orders allow investigators to seize, freeze or restrain property during the investigation
- *Proceeds assessment orders, or proceeds of crime orders*: These orders are based on the estimated amount that the offender has profited from a criminal activity, and that amount will be ordered forfeited, in those systems that allow for value-based confiscation<sup>28</sup>

Countries may allow for conviction-based confiscation, and/or non-conviction based confiscation. In conviction based regimes, some systems provide for assets to be automatically forfeited to authorities. In other systems, the court will have discretion to hear submissions by the prosecution and defence and decide whether the assets should or should not be forfeited following conviction. In non-conviction based regimes, assets may be ordered confiscated after a hearing that establishes that the assets are proceeds or instrumentalities of crime. A criminal conviction of the owner of the asset is not required.

### 5.1.2 International cooperation for purposes of confiscation

The UNTOC also requires States to provide international assistance with respect to confiscation.

By virtue of article 13, States are required to assist the other requesting State to the greatest extent possible within their domestic legal systems, to:

- Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it (obtain an order based on the foreign request)<sup>29</sup>

<sup>25</sup> Article 12(1)(a), UNTOC.

<sup>26</sup> Article 12(1)(b), UNTOC.

<sup>27</sup> Article 12(2), UNTOC.

<sup>28</sup> For further discussion of confiscation of assets, see section 3.3.3 module 11, Financial investigations and prosecutions.

<sup>29</sup> Article 13(1)(a), UNTOC.

- Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party (enforce the foreign order directly)<sup>30</sup> or
- Take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities for the purpose of eventual confiscation to be ordered by the relevant authorities<sup>31</sup>

Requests for international cooperation for purposes of confiscation are essentially mutual legal assistance requests. The UNTOC provides that the procedures applicable to mutual legal assistance apply to requests for international cooperation for purposes of confiscation as well.<sup>32</sup>

## 5.2 Making a request for confiscation of assets

As discussed in relation to MLA requests, there are considerations and minimum requirements that should be included when making an international request for assistance.<sup>33</sup> Those considerations and minimum requirements will apply when requesting mutual legal assistance with respect to asset confiscation. In addition to what is required for all MLA requests, the following information will further be required as set out in the UNTOC:

- In cases where a domestic order is sought: a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law<sup>34</sup>
- In cases where the direct enforcement of a foreign order is sought: a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested<sup>35</sup> or
- In cases where measures to identify, trace and freeze or seize are sought: a statement of the facts relied upon by the requesting State Party and a description of the actions requested<sup>36</sup>

## 6. Transfer of sentenced persons

The transfer of sentenced persons allows for a person who is convicted and sentenced in one State to serve his or her sentence in another State. For instance, if a person is convicted and sentenced to a term of imprisonment or a penalty that has resulted in a deprivation of his or her liberty in one State, he or she may be able to serve this sentence in another State to which he or she has ties, usually by virtue of being a national of that State.

There are several reasons why a person may be transferred to serve their sentence. For instance, rehabilitation and reintegration are generally more likely to occur in a country in which the person has family and ties. The decision may also be made to transfer a person on the basis of humani-

<sup>30</sup> Article 13(1)(b), UNTOC.

<sup>31</sup> Article 13(2), UNTOC.

<sup>32</sup> Article 13(3), UNTOC.

<sup>33</sup> See Section 3, Mutual legal assistance.

<sup>34</sup> Article 13(3)(a), UNTOC.

<sup>35</sup> Article 13(3)(b), UNTOC.

<sup>36</sup> Article 13(3)(c), UNTOC.

tarian or compassionate grounds including medical or mental health needs, disabilities, or where the conditions in the institution in which the person was convicted and sentenced fall below minimum international standards. There may be human rights grounds for seeking a transfer, and international relations may also play a role with mutual respect for sovereignty and jurisdiction.

The transfer agreement or domestic legislation that is the basis of the request may explicitly require certain elements. Generally, States may take into account various factors when considering request for the transfer of sentenced persons, including:

- *Ties to the State that will administer the prison sentence:* The offender must have a link to the administering State, usually he or she will be a national of that State, although ties can be demonstrated on other grounds
- *State consent:* The consent of the sentencing State is decided by the State on a case by case basis
- *Consent of the sentenced person:* The sentenced person may be required to consent to his or her transfer, depending on the transfer agreement and relevant domestic legislation.
- *The final judgment:* The offender must be convicted and final judgment must be passed before a transfer can be affected
- *The term left to serve:* Under most transfer agreements, the term of imprisonment left to be served must be at least six months, although this should be verified in a particular case. The practical reason for this time requirement is that the transfer takes time to complete, and if the prisoner will already be released within that time period then the transfer will no longer be required
- *The cumulative effect:* All of the considerations relating to the transfer should be taken into account and not considered in isolation



### Case study

#### Transfer of sentenced smuggler

Smuggler A, a national of origin country 1, smuggled hundreds of migrants from origin country 1 to destination country 2 via transit country 3. After a joint investigation by authorities in destination country 2 and transit country 3, smuggler A was arrested in transit country 3 where he was convicted of migrant smuggling and sentenced to seven years in prison.

Pursuant to a bilateral agreement between origin country 1 and transit country 3, a formal request was made by country 1 to transfer smuggler A to country 1 to serve his sentence. The decision to transfer smuggler A was based on the fact that successful rehabilitation of smuggler A was considered to be more likely in a prison system that spoke his native language, in a location where his family could visit him. In agreeing to transfer smuggler A to country 1, authorities in country 3 also considered that there would be no more risk of smuggler A being released from prison earlier in country 1 than he would be in country 3, given that comparable rules applied. Prison security in country 1 was also such that authorities in country 3 deemed that there was no danger of smuggler A escaping from or being mistreated in prison in country 1. It was further hoped that imprisoning smuggler A in origin country 1 may act as a deterrent to other smugglers known to be operating from origin country 1. The transfer was agreed to by country 3 and duly effected.

## 6.1 Legal basis

Article 17 of the UNTOC provides for the transfer of sentenced persons.

### **Article 17. Transfer of sentenced persons**

State Parties may enter bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.

Source: United Nations Convention against Transnational Organized Crime.

The United Nations Model Agreement on the Transfer of Foreign Prisoners provides a model for bilateral transfer agreements.<sup>37</sup> Two regional agreements on transfer of sentenced persons: the Council of Europe Convention on the Transfer of Sentenced Persons and the Inter-American Convention on Serving Criminal Sanctions Abroad, are often used as the basis for transfer of sentenced persons even between countries outside the region.

## 6.2 Making a request for transfer

Consider the governing legislative provisions, treaties or conventions that set out the process for the transfer of prisoners. These provisions will set out the requirements for the sentencing or sending State and those for the administering or receiving State. Generally, the process of transferring a sentenced person may involve the following steps:

- A request for transfer will usually be sent to the administering State in writing, and the reply from the administering State to the sentencing State should also be sent in writing
- The request and response are usually sent directly from and to the competent national authority in each state, often being the Ministry of Justice. In some instances a diplomat, consular official, or authority from the department of corrections may need to be involved.
- The sentencing State should provide:
  - Information relating to the offence, conviction, sentence and remaining term to be served (certified copy of the judgment and sentence)
  - Details of the behaviour of the offender while serving sentence (case file and statement from corrections officer)
  - Request by the offender for transfer (declaration or sworn affidavit from the offender)
  - Other relevant details and special considerations such as health issues (medical reports)
  - Relevant legislation and governing procedures (copies of these provisions)

<sup>37</sup> For more information, see UNODC Compendium of norms and standards on crime prevention and criminal justice (2006), [www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html](http://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html)

Evidence of the ties between the offender and receiving State (relevant documentation, passport or identification)

### 6.3 Executing the request

If an agreement is reached to transfer the offender, the States will arrange the physical transfer of the prisoner. If the prisoner is to be transferred through a third State, permission from that State should be obtained. The sentencing and administering States will need to agree in advance as to the costs for the transfer.

Once the prisoner arrives in the administering State, he or she will begin serving his or her sentence in that State. The general principle of the transfer of sentenced persons requires that the administering State maintains the sentence that was imposed by the sentencing State; some exceptions may apply where the sentence is incompatible in the administering State. In such instances, the sentence may be adapted to reflect the original sentence as closely as possible. Another possibility is that the sentence will be converted; the administering State will consider the facts and evidence upon which the conviction was based, and will then sentence the offender according to the provisions in the administering State's domestic legislation. The understanding between the States is that the sentence will still be reasonably similar to that originally imposed. In order to respect this principle, the administering State should carefully consider whether to alter the original sentence.

## 7. Summary

### 7.1 Key points

When preparing a request for MLA, extradition or other form of international cooperation, conform to procedures determined in relevant treaties and domestic legislative provisions in the requested State.

All requests for assistance should be in writing, and should contain sufficient detail to enable the Central Authority of the requested State to make an informed decision.

When requests for assistance are received they should be interpreted flexibly, processed expediently, and with open communication with the State who made the request.

Any reasons that a requested State has for refusing a request for assistance should be discussed with the requesting State in the event that concerns can be addressed and international cooperation can take place.

States are required to assist each other to confiscate proceeds of crime, property, equipment or other instrumentalities used in the commission of migrant smuggling. When making requests for such assistance, the requirements of MLA will apply along with additional considerations.

A person who has been convicted and sentenced to a term of imprisonment or a penalty that has resulted in a deprivation of his or her liberty in one State, may be able to serve this sentence in another State. The original sentence that was imposed should be upheld, within reason, by the administering State.

## 7.2 Self-assessment questions

- What are some different types of mutual legal assistance?
- What is the process of making a request for mutual legal assistance?
- What should be included in a request for mutual legal assistance?
- Who should receive requests for mutual legal assistance?
- What is the process for making and executing an extradition request?
- What should be included in an extradition request?
- What is the purpose of provisional arrest or detention?
- Why may a request for mutual legal assistance be refused?
- When a requested State refuses to extradite one of its nationals, what are they obliged to do instead?
- What is the framework involved for the confiscation of assets internationally?
- What are some relevant considerations involved in deciding whether or not to transfer a sentenced person to serve his or her sentence in another State to the one in which he or she was convicted and sentenced?
- How do the processes of international cooperation described in this module differ to the processes used in your jurisdiction.
- Describe situations in which you have used international cooperation in the course of investigating and/or prosecuting migrant smuggling.



**UNODC**

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Module 8  
Law enforcement cooperation and  
information sharing



This publication is made possible through funding received from the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

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UNITED NATIONS  
New York, 2011

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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# I. Objectives

After completing this module users should be able to:

- Explain different types of law enforcement cooperation
- Discuss some of the challenges involved in achieving effective law enforcement cooperation and potential responses to those challenges
- Describe types of information that States Parties are obliged to share with each other in accordance with the Smuggling of Migrants Protocol
- Explain different mechanisms for law enforcement and cooperation
- Describe different types of joint investigation teams
- Describe the types of information that should be included in an agreement to establish a joint investigation team

# 2. Introduction

The fact that migrant smuggling is a crime that crosses borders, means that law enforcers are often required to investigate, share information, collect evidence, and prosecute in more than one jurisdiction.

Module 7 discussed processes and mechanisms for making requests for and providing international cooperation in criminal justice matters. This module is concerned with operational cooperation between law enforcement actors in different jurisdictions, which may include exchange of information and documents, assistance with investigative operations or even may involve running joint operations across jurisdictions.

UNTOC offers a legal basis for operational law enforcement cooperation, providing for:

- Joint investigations (article 19)
- Cooperation for use of special investigative techniques (article 20)
- Cooperation between law enforcement authorities including exchanging information and cooperation in conducting inquiries (article 27)

In addition, States Parties to the Smuggling of Migrants Protocol are obligated to:

- Cooperate in respect of migrant smuggling by sea (article 7 and article 8)
- Exchange information with other relevant States regarding the smuggling of migrants, consistent with domestic legal systems (article 10)
- Comply with conditions imposed upon it by States sending such information (article 10(2))
- Consider strengthening cooperation among border control agencies, including by establishing and maintaining direct channels of communication (article 11(6))

- Cooperate with each other and competent international organizations and non-governmental organizations to ensure adequate training to prevent and eradicate smuggling of migrants (article 14(2))<sup>1</sup>

### 3. Law enforcement cooperation

Article 27 of UNTOC, which is applicable to the Smuggling of Migrants Protocol, obligates States Parties to cooperate with each other to:

- Enhance the effectiveness of law enforcement action (article 27(1))
- Enhance and strengthen channels of communication between competent authorities, agencies and services to facilitate information exchange (article 27(1)(a))
- Conduct inquiries with respect to persons and movements of the proceeds and instrumentalities of crime (article 27(1)(b))
- Share items or substances for analytical or investigative purposes (article 27(1)(c))
- Facilitate effective coordination and promote exchange of personnel and other experts including posting liaison officers (article 27(1)(d))
- Exchange information on the criminal means and methods used (article 27(1)(e))
- Exchange information and coordinate measures for the purpose of early identification of offences (article 27(1)(f))
- Consider entering into bilateral or multilateral agreements of arrangements on direct cooperation between their law enforcement agencies (article 27(2))<sup>2</sup>

The following case study is an example of successful law enforcement cooperation between police agencies from different jurisdictions, resulting in strong criminal justice results in respect of a migrant smuggling investigation.



#### Case study

##### Successful law enforcement cooperation

A truck containing 36 migrants was found in country 1. The truck had entered country 1 from ferry from transit country 4. All the migrants found in the truck were from origin country 5. Country 1 began investigations and identified a local smuggling group in country 1.

Police in country 1 informally communicated this information to a regional police agency, which in turn found connections between the smuggling group in country 1 and another smuggling group in destination country 2. Both groups were found to be involved in smuggling migrants from origin country 5. At the same time, country 3 intercepted migrant smuggling from destination country 5 and informed the regional police agency. The regional police agency again established a link between the criminal smuggling group in destination country 3 and other smuggling groups in country 1 and 2. The three smuggling groups were found to be a part of a larger organized network of migrant smugglers.

<sup>1</sup>Articles 7, 8(3), 8(4), 8(6), 10(1), 10(2) and 14(2) of the Smuggling of Migrants Protocol.

<sup>2</sup>Article 27, UNTOC.

Parallel investigations were conducted in all three countries, and coordinated at the regional level by the regional police agency. Information was fed to the regional police agency lead to extensive mapping of the connections between the criminal smugglers. Once adequate evidence had been collected to support apprehension and prosecution of key members of the smuggling network, a day of action was decided upon. On that day, police in countries 1, 2 and 3 simultaneously took action against the criminal smuggling groups in their respective countries. More than 60 smugglers were arrested.

### 3.1 Types of law enforcement cooperation

Types of law enforcement cooperation are often delineated along “formal” and “informal” lines. The distinction between these types of cooperation is not always clear; in some cases informal cooperation will become formal cooperation, but once cooperation is formalized, informal cooperation may still continue to take place. Laws may prohibit a particular type of cooperation or only allow one type.

The discussion of whether to cooperate formally or informally is often difficult, but reality both may be pursued in a given case. For instance, during the early stages of an investigation, informal law enforcement cooperation can be helpful to efficiently gain investigative leads when there are time constraints. At a later stage, the information obtained informally may need to be re-obtained through formal means to ensure it is admissible at court.

#### 3.1.1 Informal law enforcement cooperation

In some cases law enforcement agencies have a strong rapport with agencies from other jurisdictions, and routinely assist each other in international migrant smuggling investigations through officer-to-officer communication and information sharing.

For example, a law-enforcement agency is provided with information that a smuggling venture is occurring across a particular border. The officer who received the information may contact another officer in the jurisdiction across the border to inform him or her and collectively develop a strategy to further investigate.

Informal cooperation may include:

- Officer-to-officer or agency-to-agency information sharing, investigations, and assistance
- Assistance with communications, witness statements, contact information, and referrals
- Cooperation in conducting inquiries

Informal cooperation has a number of advantages. Indeed, officer-to-officer contact is arguably the fastest, cheapest and most flexible way to seek information or intelligence and should be used wherever appropriate. Although informal cooperation may be as simple as a phone call or email, it should always comply with local procedures which may include use of central liaison officers, central intelligence agencies or specifically designated task forces.

One disadvantage to informal cooperation is that information obtained through informal means may not be admissible as evidence as the method of collection may not pass judicial scrutiny.

Another disadvantage is that information may not be shared effectively with central intelligence agencies when it is acquired through informal means.

### **3.1.2 Formal law enforcement cooperation**

Formal cooperation can be helpful to law enforcement officers at the investigation stage. For example, officers may be seeking to gather evidence in other jurisdictions and need to conduct surveillance across borders and collect intelligence or documentary evidence in other jurisdictions. They can use many methods of formal cooperation to achieve these goals, such as setting up joint investigations with other law enforcement agencies to conduct surveillance across border or sharing intelligence based on existing memorandums of understanding (MoUs).<sup>3</sup>

Formal cooperation may include:

- Joint investigations and prosecutions
- Use of special investigative techniques
- Posting liaison officers (LOs) to facilitate cooperation with the host government's law enforcement officers in criminal investigations
- Bilateral and multilateral agreements and MoUs on law enforcement cooperation and on sharing of law enforcement information
- Cooperation within structures such as the international criminal police organization (Interpol) or regional police or judicial cooperation structures
- Programs where officers from each State will be exchanged in undercover operations, training programmes, or to conduct investigations
- Memorandums of understanding (MoUs)

Formal cooperation often involves treaties, MoUs or other written agreements. When agreements are in writing, there are generally fewer misunderstandings as the goals, investigative parameters and methods of conveying information are set out in detail. Agreements have usually been reviewed in light of domestic and international legislation by prosecutors and legal advisors. The result is that evidence obtained will generally be admissible and withstand judicial scrutiny in the courts.

Often treaties and international agreements set out procedures or provisions for member States to request and share information, and receive assistance or authorization to investigate in a timely fashion. Processes and agreements can be relatively simple or extremely complex depending on the number of States and the type of agreements involved.

Though written agreements may expedite formal cooperation, this is not always the case. More often, formal cooperation will be a much slower process than informal cooperation which can be a disadvantage if there is an urgent request. Another disadvantage is that in some instances States will not share information easily when the communication is formalized and subject to written agreements.

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<sup>3</sup>For more on MoUs, see section 5.1.

### 3.2 Considerations for law enforcement cooperation

The following are considerations for law enforcement cooperation in migrant smuggling investigations:

- List all information and intelligence gathered
- Identify what information is missing, and/or what cooperation is required to obtain missing information
- Identify the jurisdiction where that information will be found or where the cooperation will be requested from
- If informal channels for law-enforcement cooperation exist between relevant jurisdictions, consult with criminal justice practitioners to confirm if it is lawful to make an informal request in a given situation
- If the cooperation must be formalized, consult with criminal justice practitioners to determine the process for making a formal request
- Consider using INTERPOL or international or regional law-enforcement cooperation bodies/organizations
- Requesting States should make requests as early as possible to allow adequate response time, and requested States should respond as quickly as possible
- Review existing MoUs carefully and understand the terms. For example, some agreements specifically include or exclude exchange of personal data
- Before acting, consider seeking legal advice to ensure that information or assistance being requested falls within the scope of the MoU, and is being provided in accordance with relevant domestic legislation
- Take a systematic approach to building and maintaining effective law enforcement cooperation; there are many benefits in establishing international agreements and there may be serious consequences in not doing so

Because of the nature of migrant smuggling, often at least two or three countries will be involved and not all will have MoUs in place. Sophisticated organized crime groups may use this fact to their advantage knowing that they cannot be pursued into certain States. The operational plan for joint investigations should therefore include analysis of the anticipated routes of smugglers, and the authority pursuant to existing MoUs and relevant domestic legislation to pursue suspects.

### 3.3 Challenges in and responses to law enforcement cooperation

There are a number of challenges to international law enforcement cooperation largely relating to the differences in States legislation, procedures, languages, cultures, resources and priorities. These challenges can be overcome in several ways, beginning with training criminal justice practitioners about treaty obligations to cooperation against migrant smuggling. Other measures can respond to multiple challenges; for instance, exchanging liaison magistrates between States can help to bridge differences in approaches and priorities facilitate exchange of information and also build trust between jurisdictions and systems.

The following considerations are offered in response to some challenges that may be encountered.

Challenge	Response
<p><i>Diversity of legal systems:</i> Information sharing procedures may be different, as may legislation criminalizing migrant smuggling. Alternatively, States may not have specific migrant smuggling legislation but instead rely on alternative offences to charge smugglers.</p>	<p>Before it is possible to compose a formal request for information or assistance, criminal justice practitioners may have to exchange memoranda of law explaining the judicial system, migrant smuggling legislation, and legislation governing information sharing and evidence collection.</p> <p>Willingness to make concessions in line with human rights obligations will also help to overcome this challenge.</p> <p>Timely and thorough implementation of treaty and convention obligations will address the challenge in the long term; a cooperative approach can be taken by implementing an international framework for action to assist States in identifying procedures for implementation.</p>
<p><i>Diversity of law enforcement structures:</i> Policing and prosecutorial roles may be very different in the jurisdictions involved in cooperation.</p>	<p>Roles and duties in each jurisdiction should be understood before the formal process to request international cooperation can begin.</p>
<p><i>Diversity of information technology, intelligence and communication systems:</i> Different resources and processes used to store and exchange information may make it difficult for law enforcers to cooperate and communicate in a structured way across jurisdictions.</p>	<p>Diplomat or liaison officers may be able to assist. A Central Authority should be designated to process requests for foreign assistance. Contact information for this Central Authority, and international or foreign affairs offices should be circulated nationally and internationally among States with whom frequent cooperation is required. Policing agencies should be provided with updated information for foreign affairs officers, LOs, Interpol, etc including on which agencies are available on a 24 hour, 7 day/week basis.</p>
<p><i>Diversity in investigative approaches and priorities:</i></p>	<p>States should find common ground and create a joint investigative plan in order to work together. For instance, by creating a migrant smuggling working group.</p>

Challenge	Response
<i>Lack of trust:</i> Trust and open communication are essential to foster cooperation.	Over time, trust can be established between States through formal and informal cooperation. Treaties may set out common goals and expectations which can serve as a platform to build trust. Joint training sessions, conferences and meetings open lines of communication and build rapport and understanding between members of each State.
<i>Linguistic and cultural differences:</i> May lead to misunderstandings and slow down the process of building trust and establishing cooperation	<p>Centralized agencies with efficient and readily available translators will assist to expedite requests between States. Where translation needs can be anticipated, translators should be on standby to facilitate efficient processing of requests. In the long term, language training can be provided to officers and prosecutors in relevant languages, and/or by employing officers and prosecutors who already speak relevant languages.</p> <p>Education and awareness of the culture, politics and traditions of countries that States are cooperating with will also help to overcome cultural challenges.</p>
<i>Resource constraints:</i> States have varying levels of human, technical and financial resources available to assist with international cooperation.	Some States may be able to share costs for investigations and/or share technical resources. Resource constraints can be taken into account in joint investigative plans to properly budget according to resources available.

## 4. Information sharing

As mentioned, article 27(1)(e) of UNTOC obliges States Parties to exchange information on criminal means and methods used (article 27(1)(e)). The types of information to be exchanged in respect of migrant smuggling are explained in article 10 of the Smuggling of Migrants Protocol, requiring States to exchange information about:

- Embarkation and destination points as well as routes, carriers, means of transportation known to be or suspected of being used by migrant smugglers (article 10(1)(a))
- Identity and methods of migrant smugglers (article 10(1)(b))
- Authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents (article 10(1)(c))

- Means and methods of concealment and transportation of persons and the unlawful alteration, reproduction or acquisition or misuse of travel or identity documents used to smuggle migrants (article 10(1)(d))
- Legislative experiences and practices and measures to prevent and combat migrant smuggling (article 10(1)(e))
- Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate migrant smuggling (article 10(1)(f))

The case study below illustrates how law enforcement agencies in two countries began cooperating to exchange information in the wake of a tragedy.

	<b>Case study</b>
<p data-bbox="220 745 1066 784"><b>Law enforcement cooperation arising out of a tragedy</b></p> <p data-bbox="220 817 1337 1182">Migrants were being smuggled from origin country 1 to destination country 2 in a container truck. Because it was tightly sealed, all 54 people died from suffocation. Shortly after the incident a consultation between the destination and origin country was organized in the province where the migrants had died. The meeting was attended by central and provincial level authorities from concerned agencies of both countries. At the meeting, agreements on the selection of key witnesses, duration of the pre-trial testimony, joint investigation and exchange of information, and focal points for both countries were reached. A special task force was formed combining law enforcement officers from both States. Meetings were held on a quarterly basis, at which information was shared and followed up on with email and phone communication as needed.</p> <p data-bbox="220 1220 1337 1361">The result was that six people from a well known smuggling gang in the destination country 2 were arrested, while eight smugglers from the origin country 1 were arrested. The smugglers were prosecuted and sentenced to imprisonment. Assets were seized and confiscated, including six residences.</p>	

## 4.1 Considerations when sharing information

The following considerations apply to sharing of information:

- Always look for opportunities to share information that may help stop or disrupt migrant smuggling in other jurisdictions
- Find out the authority that governs information sharing before sharing or discussing information with another State
- Find out and follow information exchanging procedures in the relevant State
- Consider legal guidance before sharing or discussing information with another State
- Obtain clear written instructions outlining information to be shared and methodology to share information as governed by domestic legislation and international agreements
- Use secure lines of communication to transmit the information if possible
- Only use information in a way that complies with the sending State's restrictions<sup>4</sup>

<sup>4</sup>Article 10(2), Smuggling of Migrants Protocol.

- Obtain the request for information in writing including instructions about the use of the information
- Sensitive, confidential, and privileged information as it may relate to informants or ongoing investigations must be properly discussed and vetted before being used and distributed; failure to do so could endanger life and public safety
- Obtain written agreements about maintenance, destruction or return of the information once it has been used for the agreed purpose
- When communicating through Interpol and seeking direct contact, include required personal contact details in order to be quickly and easily reachable
- Review and consider impact of legislation (including media or public “access-to-information” laws, official secrecy laws and similar legislation) to ensure balance between confidentiality and disclosure
- Establish a system or mechanism of integrated cooperation to exchange information between law enforcement, border, immigration and other relevant authorities and coordination of activities
- Agree upon data formats and models when exchanging information
- Have a number of established and publicized points of contact such as central and regional offices, for information sharing. These points of contact should include a number of people and agencies to expedite information sharing

## 4.2 Formal intelligence sharing procedures

Regardless of the original method used to obtain information, formal intelligence procedures should always be used to obtain information that will or can be expected to be needed as evidence at trial. Formal intelligence sharing procedures and systems will help to ensure that evidence is collected in an admissible fashion, and will keep other agencies informed about developments. This form of communication can be carried out through:

- INTERPOL, Europol and other regional law enforcement agencies
- Local crime liaison officers (LOs)
- Applicable MoUs
- International letters of request (LoR) or
- Regional arrangements

## 5. Mechanisms for cooperation and information sharing

There are several mechanisms which can be used to facilitate and systematise operational law enforcement cooperation and information sharing between and among States, including:

- Memorandums of understanding
- Treaties or other agreements
- Specialized law enforcement agencies, and
- Joint investigation teams

Depending on the circumstance of the law enforcement cooperation, a combination of these mechanisms may be employed in the investigation of migrant smuggling offences.

## 5.1 Memorandums of understanding

Memorandums of understanding (MoUs) can set out agreements between police agencies and prosecutors. Such agreements often address objectives of the agencies, investigative approaches, and roles and responsibilities. It is important that the MoU is signed at an appropriate level depending on the scope of the agreement; an MoU with a strategic scope may be signed by ministers, whereas an MoU between two agencies may be signed by the heads of those agencies.

- MoUs should include the following contents:
- Title of the MoU
- Parties to the MoU
- Acknowledgements and purpose of the MoU
- Agreements made by parties
- Procedures

The following example shows how such information may be reflected in a MoU.

	<b>Example of a MoU between countries 1, 2 and 3</b>
Title:	MoU on Cooperating in the Fight against Migrant Smuggling
Parties:	Country 1, country 2, country 3.
Acknowledgements:	This MoU recognizes that migrant smuggling is detrimental to the national security, economic, fiscal and social interests of our countries, and can threaten the lives and safety of people in our countries.
Purpose:	States wish to develop and strengthen practical cooperation, capacity building and information sharing in matters of mutual interest. Cooperation will be built on mutual trust, with common goals of preventing and combating migrant smuggling while protecting the rights of migrant.
Agreement:	States agree to provide capacity-building and support through joint training, conferences, and the exchange of knowledge and expertise, legislative and regulatory documents and relevant scientific and technical information. States also agree to operational assistance by obtaining evidence and willing witness testimony and by exchanging information.
Procedures:	The requesting participant will pay ordinary costs, and the request should be addressed in a timely manner by the participant receiving the request.

Ideally MoUs will relate specifically to migrant smuggling. However, some States will not have migrant smuggling legislation nor bilateral agreements or MoUs specific to migrant smuggling. In those circumstances, MoUs that have been established to combat other transnational crimes such as trafficking in persons may be helpful to establish communication and foster formal and informal cooperation against smuggling. For instance, communication mechanisms that have been established through the related MoUs can be used to facilitate cooperation to combat migrant smuggling.

When developing MoUs consider the ultimate goal; some MoUs will be agency to agency, some country to country, and some will involve many agencies at many levels such as marine or coast guards, border officers, law enforcement and prosecutors.

## 5.2 Treaties or other agreements

States may establish formal agreements related to migrant smuggling investigations. Such agreements can be extremely complex, involving large political processes and several countries. Provisions may specifically provide for information sharing and cooperation in relation to migrant smuggling by encouraging:

- Exchange of information on routes and modus operandi used by smugglers
- Increased practical cooperation between law enforcement, border and protection authorities
- Increased cooperation between these authorities and liaison officers in third countries
- Exchange of officers between Parties by mutual agreement in order to monitor the effectiveness of measures to prevent migrant smuggling

Other regional or multilateral agreements may address a number of investigative considerations, such as:

- Authorizing officers to continue an investigation or conduct surveillance across the border without obtaining further authorization in exigent circumstances
- Authorizing information sharing between enforcement agencies
- Providing a framework for joint investigations



### **Examples: INTERPOL Model [bi-lateral] Police Cooperation Agreement**

Interpol offers a Model Bilateral Police Cooperation Agreement, with Articles addressing:

- General provisions
- Information exchange
- Protection of personal data
- Right of observation and pursuit
- Participation in investigations
- Special investigative techniques

### Other forms of cooperation

#### Implementation assessment

#### Resolving implementation problems

The 22 articles of the Model agreement have been drafted in general terms so that States can adapt it to their own needs, specificities and legislative restrictions. Each article is annotated with guiding notes.<sup>3</sup>

<sup>3</sup>The Model Police Cooperation Agreement is available at: [www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp#chap2](http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp#chap2)

Authorities should be familiar with treaties, conventions and agreements that govern investigations and prosecutions in their jurisdiction. This is important for two reasons:

- Requesting States will rely on such agreements and have legitimate expectations in relation them which authorities in requested States must be familiar with in order to best assist requesting States
- There may be serious consequences of not understanding the extent and limits of one's authorization to investigate in another jurisdiction. For instance, if an officer has authority to pursue a suspect across a border but does not do so because of uncertainty about the governing authority, an opportunity to apprehend a smuggler is missed. Alternatively, if an officer crosses into another jurisdiction to investigate or arrest a smuggler without having authority to do so, there may be serious political and legal consequences

## 5.3 Specialized law enforcement agencies

International law enforcement cooperation and information exchange can be greatly facilitated through specialized regional and international law enforcement agencies such as the International Criminal Police Organization (INTERPOL), or regional cooperation structures such as the European Police Office (Europol).

Regional and or international law enforcement cooperation bodies and organizations have a presence in every country in the world and can facilitate efficient, cost-effective and flexible police-to-police contact. Such agencies can also act as clearing houses for information and intelligence. INTERPOL for instance has a colour-coded notice system which it uses to quickly inform all member countries about specific facts, including about migrant smugglers and their methods. Secure databases managed by such organizations can also be a powerful tool in information sharing; data can be retrieved from and fed into such systems thereby strengthening collective information and intelligence against smugglers.<sup>5</sup>

<sup>5</sup>For a list of links of police agencies around the world, see the INTERPOL database at [www.interpol.int/Public/Links/PolJust.asp](http://www.interpol.int/Public/Links/PolJust.asp).

## 5.4 Joint investigation teams (JITs)

Joint investigations can be effective means of cooperating to investigate and prosecute high level migrant smugglers. Joint investigations may be reactive or proactive, established on a small or large scale, and created to combat migrant smuggling in general, or be targeted to combat migrant smuggling in a specific context.

Article 19 of the UNTOC sets out measures that can be implemented to establish joint investigations between States, by:

- Obliging States Parties to consider entering into bilateral or multilateral agreements or arrangements in relation to investigations, prosecutions or judicial proceedings and encouraging competent authorities to establish joint investigative bodies
- In the absence of such agreements or arrangements, encouraging joint investigations to be undertaken by agreement on a case-by-case basis

Article 19 also obliges States Parties involved in joint investigations to fully respect the sovereignty of the State Party in whose territory such investigation is to take place.

When commencing a joint investigation, it is useful to:

- Identify which origin, transit and destination countries may be able to assist and how they may be able to assist.
- Consider the type of information and intelligence required.
- Review domestic legislation in light of international obligations and agreements, including agreements between other policing agencies.
- Establish how information exchange and coordination of activities is to take place. An agreement on joint investigation may already be in existence but if not it is advised to create an agreement which to define roles and responsibilities.

There are various ways to establish joint investigation teams. Some models of joint investigation teams are summarized below:

- *Co-located:* Teams work together in the same location:
  - Integrated supportive team: Could include situations where a foreign law enforcement official is integrated with officers from the host State in an advisory or consultancy role or, in a supportive role based on the provision of technical assistance to the host State
  - Integrated operational team: Would include officers from at least two jurisdictions with the ability to exercise operational powers under host State control in the territory or jurisdiction where the team is operating. This is a specially created infrastructure enabling officials from at least two countries to work in one jurisdiction with at least some equivalent operational powers
- *Non co-located:* Teams are not physically in the same location. The officials involved are non co-located and able to work jointly on the basis of long-standing cooperative practices and/or existing mutual legal assistance legislation depending on the nature of the legal system(s) involved

### **5.4.1 Considerations when establishing joint investigative teams**

Consider the checklist below when establishing a joint investigation team:

#### *Practicalities*

- Have an early discussion about the investigation
- Clarify who are to be the parties in the discussion, including law enforcers, prosecutors, magistrates and/or others
- Discuss relevant cultural and language issues
- Put in place coordination mechanisms and language interpretation resources

#### *Coordination*

- Appoint and use liaison officers or a single point of contact
- Establish a clear operational plan including goals and objectives, roles of officers, a command structure and resource requirements
- Set out clear lines of responsibility
- Consider risk assessment
- Level of assistance and special facilities available
- Review all joint operation plans to ensure that they specifically prohibit refolement

#### *Investigative considerations*

- Whenever possible, ensure the MoU between law enforcement agencies details the methods of investigation, judicial authorizations required, mutual agreements, and procedures for protecting human rights
- Compare legislation in both States to ensure that the investigation and prosecution relates to the same substantive offence. Consider the point at which there is a completed offence; the point at which conspiracy or “attempt” has been established
- Clarify which techniques will be used (eg electronic interception of communications, surveillance); whether judicial authorization will be required; what search powers are authorized by States involved; whether adequate resources are available for surveillance; a review of national and international agreements with respect to pursuit policies and the parameters on pursuit
- Clarify detention, release and terms of release; determine if warrants are required
- Determine who will prosecute offender(s)
- Decide which State will seize and retain assets confiscated from smugglers
- Confirm if witness or target can be contacted by agents of the State
- Determine the extent of disclosure obligations, including the treatment of privileged information
- Evaluate

### **5.4.2 Agreements for joint investigation teams**

When law enforcement officials from two States are establishing a joint investigative team, they will create and sign an agreement. Such agreements can serve to facilitate mutual legal assistance more generally, so that individual requests for assistance do not need to be made throughout the

course of the investigation. Some parts of the agreement may contain sensitive information which should be marked and treated as such.

The agreement may include:

#### *Names*

- Names of the parties who are entering into the agreement. This section may also specify the agency which initiated the agreement. The agreements should include all of the law enforcement officials and agencies who will be involved during all of the phases of the investigation, which may include agencies such as coast guard, immigration officials, the military and law enforcement officials
- The name of the operation or the JIT established by the agreement
- Specifications as to whether parties may invite other parties and/or make arrangements with third countries

#### *Purpose and action*

- A description of specific purpose of the JIT. For instance, the JIT may be established to investigate the offence(s) of migrant smuggling organization X with the aim of providing information and evidence for judicial proceedings
- Clarification as what actions are agreed to in response to the stated purpose. For instance, to adopt a joint agency approach in respect of the investigation and any subsequent prosecution
- It may also be noted here that the purpose of the agreement may change/adapt

#### *Background*

- Investigative methods that have been deployed or are being deployed such as particular investigative techniques used (such as surveillance, informants, undercover operations, etc)
- Investigative outcomes that have been achieved to date, such as number of persons arrested, number of disruptions to criminal organizations, number of seizures made, number of confiscations/forfeitures, intelligence material gathered, evidence gathered against targets
- Any other relevant background information, intelligence and data

#### *The anticipated time period for the investigative team to be in place*

- Generally JITs are established for a limited period of time which may be terminated or extended by mutual consent

#### *State(s) in which the JIT will operate*

- Where the JIT will be located and clarification that it will be subject to the laws of the State in which it operates

#### *Roles and responsibilities*

- Names of persons designated to be JIT leader(s), members of the JIT, judicial and police authorities, listed with their State, Rank, and name of agency
- Clarification of the mechanism for informing other States in the event that designated persons are replaced i.e. in writing

### *General and specific arrangements of the agreement*

- Clarification that conditions shall apply as implemented by each Party in which the JIT operates
- Terms under which members of the JIT may be excluded when investigative measures are taken, conditions for carrying weapons, and data protection rules. For instance, specific arrangements can address:
  - Limitations on the transfer of the joint investigation (law enforcement agencies, prosecuting authorities)
  - Whether seconded (foreign) law enforcement officers can participate in operational investigative measures in the host state
  - Whether seconded (foreign) law offers can carry firearms

### *Organizational arrangements*

- Details of arrangements necessary to enable the JIT to carry out its work including for instance, office accommodation, use of vehicles, allowances, insurance, use of liaison officers, use of judicial networks and cost-sharing arrangements

### *Signatures of all parties*

- Signatures of all parties, the date that the signatures were made, and the location where the agreement was entered into

## **6. Summary**

### **6.1 Key points**

International law enforcement cooperation and information sharing is essential to combat migrant smuggling.

Both formal and informal cooperation should be utilized in migrant smuggling investigations; informal cooperation is often more expedient, however, for evidence to be admissible at trial it must usually be obtained through formal means.

Establishing trust and strong lines of communication between State authorities is critical for effective international cooperation and information sharing.

States Parties to the Smuggling of Migrants Protocol are obliged to share information relating to migrant smuggling with each other.

There are several mechanisms which can be used to systematize international cooperation and information sharing, including MoUs, treaties or other agreements, specialized law enforcement agencies and joint investigation teams.

### **6.2 Self-assessment questions**

- What are the different types of international law enforcement cooperation which can be used to investigate migrant smuggling?

- 
- What are some of the challenges involved in achieving effective law enforcement cooperation? What are some ways of overcoming these challenges?
  - According to the Migrant Smuggling Protocol, what types of information should be shared in relation to migrant smuggling?
  - What are the different mechanisms for law enforcement cooperation and information sharing?
  - What are the different types of joint investigation team?
  - How is a joint investigation team established?
  - Describe experiences you have had cooperating with other jurisdictions in migrant smuggling cases by use of MoUs, treaties or other agreements, specialized law enforcement agencies or joint investigation teams.



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# In-depth training manual on investigating and prosecuting the smuggling of migrants

Annexes



This publication is made possible through funding received from the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

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Annexes



UNITED NATIONS  
New York, 2011

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

## Annex I. Abbreviations and acronyms

API	Advance passenger information
CCTV	Closed-circuit television
CI	Confidential informant
CRC	Convention on the Rights of the Child
DNA	Deoxyribonucleic acid
ECOWAS	Economic Community of West African States
EU	European Union
Europol	European Police Office
FATF	Financial Action Task Force
FIU	Financial Investigation Unit/Financial Intelligence Unit
GPS	Global Positioning System
Interpol	International Criminal Police Organization
IMEI	International Mobile Equipment Identity
IMO	International Maritime Organization
IMOLIN	International Money Laundering Information Network
IOM	International Organization for Migration
IT	Information technology
ICT	Information communications technology
ITC	Information technology and communication
IVTS	Informal value transfer systems
JIT	Joint investigation team
LO	Liaison officer
LOR	Letter of Request
MLA	Mutual legal assistance
MOU	Memorandum of understanding
NCIS	National Crime Intelligence Service
NGOs	Non-governmental organizations
OHCHR	Office of the High Commissioner for Human Rights
PNR	Passenger name register

SAR Convention	International Convention on Maritime Search and Rescue
SIM	Subscriber identity module; or Subscriber identification module
Smuggling of Migrants Protocol	United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (2000)
SOP	Standard Operating Procedures
Trafficking in Persons Protocol	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000).
UCO	Undercover officer
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNHCR	Office of the United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime and its Protocols
VoIP	Voice over the internet protocol
1951 Refugees Convention	1951 Convention Relating to the Status of Refugees
1967 Refugees Protocol	1967 Protocol Relating to the Status of Refugees

## Annex II. Glossary of terms

The definitions provided in this glossary are neither official nor universal. They are provided here purely for the purpose of facilitating use of the UNODC *In-depth training manual on investigating and prosecuting the smuggling of migrants*.

Term	Definition
Admissible	Acceptable or allowable by a court of law at trial.
Aggravating factor/ circumstance	A factor or circumstance that makes a situation or action worse than it would otherwise be.
Anti-surveillance	Actions which attempt to evade surveillance.
Asset seizure	Assuming custody or control of property on the basis of an order issued by a court or other competent authority.
Asylum seeker	A person seeking to be admitted into a country as a refugee.
Bilateral treaty	Treaty involving two or more States.
Border officer	Includes border police and others involved in processing new arrivals at airports, ports and other frontier crossing points.
Case file	File containing papers, evidence, transcripts, intelligence reports, etc., that is relevant to a particular case.
Cell site analysis	The analysis and marking on a map of the transmitter (mast) locations where a mobile phone has been used. This can often show that the telephone has been in various areas and can map out routes or narrow down possible sites for safe houses or similar.
Child	According to international law, any person under eighteen years of age (also see <i>Minor</i> ).
Classified	Information or communication which is arranged in classes or categories so as to be available to authorized persons only.
Collate	To bring together different pieces of information so that similarities and differences can be seen or established.
Confidential	Something done or communicated in confidence/secretcy.
Controlled delivery	The technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence (UNTOC, article 2(i)).

<b>Term</b>	<b>Definition</b>
Corroborate	Independent confirmation of information received; to confirm and or add substantiating value to the testimony of a witness or party in a trial.
Counterfeited document	A document that has not been legitimately manufactured or issued.
Counter-surveillance	Actions which attempt to identify those conducting surveillance.
Covert	Discreet or hidden. Used in operational work. For example, covert policing means discreet policing where the primary aim is for suspects not to know that police are engaging in operations.
Criminal enterprise	An organized crime group engaged on criminal activity or enterprise.
Criminal organization	An organized criminal group engaged in criminal activity or enterprise.
Debrief	To question for the purposes of obtaining knowledge or information, or to provide information or instruction.
Decision log	Document recording all decisions made and policies and objectives set with respect to a particular investigation.
Disrupt/Disruption	To disrupt a crime group without necessarily arresting the ringleaders. For example you could arrest the forger of passports used by migrants.
Drop-down device	A portable audio recorder, concealed in an everyday object (such as an empty Coke can) dropped or placed near a point where a criminal meeting is to take place.
Entrapment	The act of a law enforcer officer or government agent inducing or encouraging a person to commit a crime.
Exit strategy	Strategy by which a person can be removed from a situation where changed circumstances or events put them or an operation in danger.
Forensic	Science or technology used in the investigation and establishment of facts or evidence in a court of law.
Fraudulent document	A document that has been altered but was originally legitimately manufactured and issued
Fraudulently obtained document	A document that is unaltered, legitimately manufactured but not "legitimately" issued.
Gang master	Someone providing labourers to someone else, such as temporary labourers for agriculture, fisheries or other industries.
Genuine document	A document that is unaltered, legitimately manufactured and legitimately issued.

Term	Definition
Green border	A land border between State checkpoints.
Hard wired device	An audio recorder or transmitter (or location device) concealed within a vehicle or premises. Provides a longer battery life and the possibility for real time listening or tracking.
Informant	Someone who provides information to law enforcers on an ad hoc or regular basis, and is often recruited for the purpose.
Information	Raw data that is received by law enforcement.
Instrumentalities of crime	Property used in connection with the commission of an offence or the equivalent value of such property.
Intelligence	Information that has had something done to it to give it more meaning (for example, corroboration, analysis, evaluation and dissemination) and is passed on or used by another person/ agency/unit.
International Convention or Treaty	A treaty or convention involving all of the States Parties to that treaty or convention.
Investigation	Process carried out by law enforcement personnel of inquiring into a matter through research, follow-up, study, or formal procedure.
Irregular migrant	<p>Someone who, owing to illegal entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country (also called clandestine/illegal/undocumented migrant or migrant in an irregular situation).</p> <p>See IOM Glossary on Migration</p>
Irregular migration	<p>Movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is illegal entry, stay or work in a country, meaning that the migrant does not have the necessary authorization or documents required under immigration regulations to enter, reside or work in a given country. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfill the administrative requirements for leaving the country. There is, however, a tendency to restrict the use of the term "illegal migration" to cases of smuggling of migrants and trafficking in persons.</p> <p>See IOM Glossary on Migration</p>

Term	Definition
Law enforcement officer	Police officers or other officials responsible for enforcing the law.
Migrant	<p>At the international level, no universally accepted definition of migrant exists. The term migrant is usually understood to cover all cases where the decision to migrate is taken freely by the individual concerned for reasons of “personal convenience” and without intervention of an external compelling factor. This term therefore applies to persons, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family.</p> <p>See IOM Glossary on Migration</p> <p>Throughout this manual, the term “migrant” has often been used to refer to those who have been smuggled enabled by smugglers to remain in a State where they are not authorized to remain.</p>
Minor	According to international law, any person under eighteen years of age.
Mission creep	When an investigation advances in directions or tangents that are not in line with the objectives of that investigation.
Mitigating factor/ circumstance	A factor or circumstance that makes a situation or action better than it would otherwise be.
Multilateral treaty	Treaty involving two or more States.
Non-national	A person who is not a national of the State.
Non-refoulement	The principle that a State cannot expel or return a person to the frontiers of territories where his or her life or freedom is threatened because of his or her race, religion, nationality, membership of a particular social group or political opinion.
Open source	Information that is made freely available to the public.
Operation	Process or series of acts to achieve a law enforcement goal.
Organizational log	Document recording all actions taken with respect to a particular investigation.
Proactive investigation	An investigation commenced in response to the receipt of information/complaint or intelligence.
Profiling	Analysis of information or intelligence, to develop indicators to enable easier identification of, for instance, smuggled migrants, migrant smugglers, routes, communication methods, false passports, etc.

Term	Definition
Property	Assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets (UNTOC, article 2(d)).
Pull factor	The factors that draw would-be migrants towards particular countries. For example: language, family ties, employment, benefits, schooling, health care, etc.
Push factor	The facts that would push would-be migrants away from particular countries. For example: war, poverty, conflict, natural disaster, lack of employment, crime, etc.
Reactive investigation	An investigation commenced as a law enforcement response to a particular incident.
Refoulement	The expulsion or return of a refugee to the frontiers of territories where his or her life or freedom is threatened because of his or her race, religion, nationality, membership of a particular social group or political opinion.
Refugee	A person who, owing to a well-founded fear of persecution on the grounds of race, religion, nationality, membership in a particular social group, or political opinion or political reasons, including conflict and war, is unable or unwilling to return to his or her country of origin (or, if stateless, to his or her country of habitual residence).
Regional treaty	Treaty involving States from a particular region.
Resources	The human, financial, technical, logistical, informational and other assets which can be utilized in combating migrant smuggling.
Risk	The possibility of suffering harm, loss or danger.
Separated child	A child who has been separated from both parents, or from legal or customary primary caregiver, but not necessarily from other relatives. This may, therefore, include children accompanied by other adult family members.
Sham marriage	A marital union entered into for the purpose of circumventing immigration laws.
Smartphone	Mobile phones that are capable of advanced computing and connectivity and can run multiple applications. Smartphones include personal digital assistants.
Smuggled migrant	A person whose illegal entry or stay in a country of which he or she is not a national or permanent resident has been facilitated by another person, for the purpose of financial or other material benefit.
Smuggler	Throughout this module, the term “smuggler” refers to migrant smuggler.

<b>Term</b>	<b>Definition</b>
Strategic intelligence	Intelligence that informs the bigger picture of migrant smuggling, beyond specific investigation or investigations.
Strategy	A detailed plan outlining specific measures to reach a specific goal.
Surveillance	Observing persons engaged in criminal activity through the use of static (observation posts), mobile (following by foot, in a car, etc.) or technical (tracking device) surveillance.
Tachograph	A device that measures the speed of a vehicle and the distance that it covers, and produces a record (or tachogram) of its readings.
Tactic	An operational procedure or approach used to achieve a goal. For example, use of covert monitoring.
Tactical intelligence	Intelligence that supports investigations.
Target hardening	Making an object being targeted by a crime group more difficult to achieve. For example imposing scanning devices at ports to scan lorries in the hope of detecting concealed migrants.
Technique	A means by which a tactic is performed. For example, use of wiretapping.
Top-up information	Some mobile telephones do not operate on a contract and must be paid in advance. Where these phones are topped up can show regular locations or shops used and indicate usage.
Trafficking in persons	<p>The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.</p> <p>Trafficking in Persons Protocol supplementing the United Nations Transnational Organized Crime Convention</p>
Trauma	Psychological or emotional injury that creates substantial, lasting psychological damage to a person.
Treaty	A formal agreement between two or more States. Depending on the jurisdiction of a State, the treaty may become directly affective at the domestic level, or may required to be transposed into national laws before becoming affective.

<b>Term</b>	<b>Definition</b>
Unaccompanied child	A child who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so.
Vessel	Large boat or ship.
Victim of crime	Person who has been harmed by perpetrator of a crime according to international and/or domestic law.
Wiretap	Also known as telephone interception. The listening to telephone calls (or reading email/SMS messages) between criminal suspects by law enforcement.

## Annex III. Resources

### Tools and references

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