UNODC

United Nations Office on Drugs and Crime

Model Law against the Smuggling of Migrants

The development of the Model Law against the Smuggling of Migrants
was funded by the European Union.

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Model Law against the Smuggling of Migrants

UNITED NATIONS
New York, 2010

© United Nations, October 2010. All rights reserved.

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

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

Contents

Page

Introduction. 1

Model Law against the Smuggling of Migrants

Chapter I. General provisions 5
- Article 1. Statement of purpose 5
- Article 2. Interpretation. 8
- Article 3. Definitions. 12
- Article 4. Jurisdiction 20

Chapter II. Criminal offences 27
- *Basic offences: option A*
  - Article 5.A. Smuggling of migrants 31
  - Article 5.B. Offences in relation to travel or identity documents 32
  - Article 5.C. Enabling illegal residence 33
  - Article 5.D. Attempts 33
  - Article 5.E. Participating as an accomplice 34
  - Article 5.F. Organizing or directing 34
- *Basic offences: option B*
  - Article 5.G. Smuggling of migrants and enabling illegal stay 35
  - Article 5.H. Offences in relation to fraudulent travel or identity documents. 37
- *Basic offences: option C*
  - Article 5.I. Offences in relation to smuggling of migrants . 39
- Article 6. Aggravating circumstances 40
- Article 7. Abuse of vulnerability of smuggled migrants 52
- Article 8. Ancillary [additional] measures. 55
- Article 9. Criminal liability of smuggled migrants. 56
- Article 10. Duty of and offence by commercial carriers 57
- Article 11. Facilitating entry or stay for justice processes. 61

Page

Chapter III. Protection and assistance measures 65
Article 12. Right to urgent medical care. 65
Article 13. Protection of migrants against violence 67
Article 14. Assistance to migrants whose lives or safety are in danger 68
Article 15. [Civil] [judicial] proceedings. 69
Article 16. Smuggled migrants who are children 70
Article 17. Access to consular officials for smuggled migrants . 73

Chapter IV. Coordination and cooperation. 77
Article 18. Establishment of a national coordinating committee. . . 77
Article 19. Training and prevention. 79

Chapter V. Cooperation regarding the smuggling of migrants at sea. . . . 83
Article 20. Extended jurisdiction of this chapter 86
Article 21. Designation of competent national authority 86
Article 22. Designation of authorized officers 88
Article 23. Conditions and limitations on the exercise of special enforcement powers by authorized officers 88
Article 24. Operational framework for measures at sea. 91
Article 25. Safeguards in relation to danger to lives at sea. 95
Article 26. Compensation for loss or damage. 96

Chapter VI. Processes related to the return of smuggled migrants . . . 99
Article 27. Designation of agency or agencies 99
Article 28. Referral of migrants with specific protection needs . . .100
Article 29. Ensuring safety in exchange of information 101
Article 30. Legitimacy and validity of documents 102
Article 31. Facilitating return of smuggled migrants 103
Article 32. Protection of smuggled migrants in the return process 104
Article 33. Protection of existing arrangements 107

Introduction[1]

The Model Law against the Smuggling of Migrants was developed by the United Nations Office on Drugs and Crime (UNODC) in response to a request by the General Assembly to the Secretary-General to promote and assist the efforts of Member States to become party to and implement the United Nations Convention against Transnational Organized Crime and the Protocols thereto.[2] It was developed in particular to assist States in implementing the provisions contained in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention.

The Model Law will both facilitate and help systematize the provision of legislative assistance by UNODC as well as facilitate the review and amendment of existing legislation and the adoption of new legislation by States. It is designed to be adapted to the needs of each State, whatever its legal tradition and social, economic, cultural and geographic conditions.

The Model Law contains all the provisions that the Protocol requires or recommends that States introduce in their domestic legislation. The commentary to the Model Law indicates which provisions are mandatory and which are optional. That distinction is not made with regard to the general provisions (chapter I) and the definitions (article 3), as they are an integral part of the Model Law but are not mandated by the Protocol per se. Recommended provisions may also stem from other international instruments, including international human rights law, humanitarian law and refugee law. Whenever appropriate or necessary, options for the wording of the provision are suggested in order to reflect the differences between legal cultures.

The commentary also indicates the source of the provision and, in some cases, supplies alternatives to the suggested text or examples of national legislation from various States (in an unofficial translation where necessary).[3] Due regard is also given to the interpretative notes for the official records

---

[1]The introduction is intended as an explanatory note on the genesis, nature and scope of the Model Law against the Smuggling of Migrants. It is not part of the text of the Model Law.

[2]United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

[3]In cases where an official English version of the law was not available, the version used is that provided by national experts from the State concerned.

(*travaux préparatoires*) of the Protocol,[4] and the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*.[5]

It should be emphasized that matters related to international cooperation in criminal matters, as well as the crimes of participation in an organized criminal group, corruption, obstruction of justice and money-laundering, which often accompany the smuggling of migrants, are contained in the "parent" United Nations Convention against Transnational Organized Crime. It is therefore essential that the provisions of the Smuggling of Migrants Protocol be read and applied together with the provisions of the Convention and that domestic legislation be developed to implement not only the Protocol but also the Convention. In addition, it is of particular importance that any legislation on the smuggling of migrants be in line with a State's constitutional principles, the basic concepts of its legal system, its existing legal structure and its enforcement arrangements and that definitions used in such legislation on smuggling of migrants be consistent with similar definitions used in other laws. The Model Law is not meant to be incorporated as presented without a careful review of the whole legislative context of a given State. Also in that respect, the Model Law cannot stand alone, and domestic legislation implementing the Convention is essential for it to be effective.

The Model Law against the Smuggling of Migrants is a product of the global programme against the smuggling of migrants of the United Nations Office on Drugs and Crime. The work on the Model Law has been carried out by the Anti-Human Trafficking and Migrant Smuggling Unit and other colleagues of the Organized Crime and Illicit Trafficking Branch of the Division for Treaty Affairs. UNODC was assisted in this regard by two consultants: Ms. Fiona David, the main drafter, who prepared the drafts of the Model Law; and Ms. Georgina Vaz Cabral, who provided civil law expertise. A group of experts[6] in the field of countering the smuggling of migrants, from a variety of legal backgrounds and geographic regions, met over the course of three expert working group meetings to discuss and review the draft text of the Model Law. The expert group meetings were organized

[4]Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).

[5]United Nations publication, Sales No. E.05.V.2.

[6]Experts from the following countries participated in the three expert working group meetings: Albania, Belgium, Ecuador, Egypt, France, India, Jamaica, Kuwait, Morocco, Nigeria, Philippines, Serbia, Spain, Sudan, Thailand, Tunisia, United Kingdom of Great Britain and Northern Ireland, the United States of America and Yemen. In addition, representatives from the following offices, organizations and regional processes participated in meetings: Division for Ocean Affairs and the Law of the Sea; Office of Legal Affairs of the United Nations Secretariat; Office of the United Nations High Commissioner for Human Rights; International Organization for Migration; the Regional Conference on Migration ("the Puebla Process"); and the Bali Process (with Thailand as co-chair). Between meetings, comments were provided by the Office of the United Nations High Commissioner for Refugees and the International Labour Organization.

as part of a global project, funded by the European Union, that promotes the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the United Nations Convention against Transnational Organized Crime. The Government of Canada contributed to the organization of one of the expert group meetings.

Model Law against the Smuggling of Migrants

Chapter I. General provisions

Article 1. Statement of purpose

Option A

1. The present Law gives effect to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

2. The purposes of this Law are:

(a) To prevent and combat the smuggling of migrants;

(b) To promote and facilitate national and international cooperation in order to meet these objectives; and

(c) To protect the rights of smuggled migrants.

or

Option B

1. The present Law gives effect to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

2. The purposes of this Law are:

(a) To prevent and combat the smuggling of migrants;

(b) To protect the rights of smuggled migrants; and

(c) To promote and facilitate national and international cooperation in order to meet these objectives.

Commentary

Source: Smuggling of Migrants Protocol, articles 1 and 2; read together with article 1 of the Organized Crime Convention. See also article 5 and article 6, paragraph 4, of the Protocol.

The Model Law is intended to give effect to the Smuggling of Migrants Protocol, which has to be read together with the Convention. Article 2 of the Protocol states that "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." That article needs to be read together with article 1 of the Convention, which states that "the purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively".

Two options are presented for article 1 of the Model Law, the only difference being the order of the items listed in paragraph 2. Option A most closely mirrors the language of article 2 of the Protocol. Option B changes the order of items and moves the protection of the human rights of smuggled migrants higher up in the list. Option B reflects a suggestion made by a number of participants in the drafting process, including in consultations with North African countries conducted in Cairo in November 2009, to give greater visibility and priority to the human rights of smuggled migrants.

It is vital for drafters of national laws to understand the fundamental policy set by the Protocol itself. That is, it is the smuggling of migrants by organized criminal groups—and not mere migration or the migrants themselves—that is the focus of the Protocol. As noted in the Legislative Guide for the Implementation of the Smuggling of Migrants Protocol:

> Mere illegal entry may be a crime in some countries, but is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or material benefit), on the other hand, has been recognized as a serious form of transnational organized crime and is therefore the primary focus of the Protocol.[7]

The Protocol itself takes a neutral stance on whether those who migrate illegally should be the subject of any other offence (for example, an offence under a law on illegal entry). As noted in the Legislative Guide:

> Article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalization of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked

[7]Legislative guide for the implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, in *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2), part three, chap. II, para. 28, p. 340.

> to organized criminal groups. At the same time, article 6, paragraph 4, ensures that nothing in the Protocol itself limits the existing rights of each State party to take measures against persons whose conduct constitutes an offence under its domestic law.
>
> (Legislative Guide, part three, chap. II, para. 50, p. 347.)

Where a State wants to make it very explicit to those implementing the law that the focus is not mere migration or migrants, it may be useful to include an additional statement of intention (for example, "This Law is intended to criminalize the conduct of those who profit from migrant-smuggling and related conduct through financial or other material benefit. It is not intended to criminalize migration as such."). However, there is no requirement to include such a statement.

3. This Law shall apply to all forms of smuggling of migrants, whether or not connected with organized crime [an organized criminal group].

Commentary

Source: Smuggling of Migrants Protocol, article 4; read together with article 34, paragraph 2, of the Convention.

Article 4 of the Protocol states that the Protocol shall apply, except where otherwise stated, to the prevention, investigation and prosecution of offences established in accordance with article 6, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

Article 4 of the Protocol has to be read together with article 34 of the Convention, in particular paragraph 2, which provides as follows:

> The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

According to the Legislative Guide for the Implementation of the Protocol, applying the principle of mutatis mutandis, article 34, paragraph 2, of the Convention should be read as applying to any offences established in accordance with the Convention, including the offences established under article 6 of the Smuggling of Migrants Protocol. It follows that:

> In the case of smuggling of migrants, domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved.
>
> (Legislative Guide, part three, chap. I, para. 20, p. 334.)

The Model Law does not distinguish between provisions that require the elements of transnationality and organized crime and provisions that do not, in order to ensure equal treatment by national authorities of all cases of smuggling of migrants within their territory.

Article 2. Interpretation

Commentary

Source: Smuggling of Migrants Protocol, article 16, paragraphs 1 and 4, and article 19.

Compliance with articles 16 and 19 is mandatory. However, the manner in which compliance may be achieved may vary.

Overview

Regardless of their immigration status, smuggled migrants have certain inalienable rights arising from international law. These rights are defined in key international treaties, including the International Covenant on Civil and Political Rights,[8] the International Covenant on Economic, Social and Cultural Rights,[9] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[10] the Convention on the Elimination of All Forms of Discrimination against Women,[11] the International Convention on the Elimination of All Forms of Racial Discrimination[12] and customary international law. More specific protections relating to the standards of treatment of persons outside their country of origin are provided in the Convention relating to the Status of Refugees[13] and the 1967 Protocol relating to the Status of Refugees,[14] the Convention on the Rights of the Child[15] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[16] As recognized in the Protocol, States parties have agreed to ensure that these rights are not compromised in any way by the implementation of anti-smuggling measures.

This Law shall be interpreted and applied in a way:

(a) That is not discriminatory on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

[8]General Assembly resolution 2200 A (XXI), annex.
[9]Ibid.
[10]United Nations, *Treaty Series*, vol. 1465, No. 24841.
[11]Ibid., vol. 1249, No. 20378.
[12]Ibid., vol. 660, No. 9464.
[13]Ibid., vol. 189, No. 2545.
[14]Ibid., vol. 606, No. 8791.
[15]Ibid., vol. 1577, No. 27531.
[16]Ibid., vol. 2220, No. 39481.

Commentary

Source: Smuggling of Migrants Protocol, article 19, paragraph 2.

Compliance with article 19 of the Protocol is mandatory. However, the manner in which compliance may be achieved may vary. Article 19, paragraph 2, makes specific mention of "internationally recognized principles of non-discrimination". Any domestic law seeking to implement the Protocol must be consistent with those international obligations.

The language of article 2, paragraph *(a)*, of the Model Law reflects the language used in article 26 of the International Covenant on Civil and Political Rights:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection **against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status**. (emphasis added).

As in the International Covenant, the inclusion in the Model Law of the language "on any ground, such as …" and "or other status" ensures that this list is open-ended.

The drafting option provided for in the Model Law is not the only possible formulation on the issue of discrimination. For example, the drafters of the Model Law against Trafficking in Persons[17] used the following formulation:

> The measures set forth in this Law [in particular the identification of victims and the measures to protect and promote the rights of victims] shall be interpreted and applied in a way that is not discriminatory on any ground, such as **race, colour, religion, belief, age, family status, culture, language, ethnicity, national or social origin, citizenship, gender, sexual orientation, political or other opinion, disability, property, birth, immigration status, the fact that the person has been trafficked or has participated in the sex industry, or other status**.
>
> (Model Law against Trafficking in Persons, article 3, paragraph 2.)

Drafters of national legislation may choose to draw on other models, for example, regional human rights treaties.

(b) That is consistent with the principle of non-refoulement;

[17]United Nations publication, Sales No. E.09.V.11.

Commentary

Source: Smuggling of Migrants Protocol, article 19, paragraph 1.

Specifically, article 19, paragraph 1, of the Protocol provides that nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, international human rights law and refugee law. As noted in the interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol,[18] the Protocol does not seek to regulate or address the status of refugees.

(c) That is consistent with other obligations arising from [*name of State*] obligations under international law, [especially human rights, humanitarian and refugee law] [including but not limited to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and customary international law]; and

Commentary

Source: Smuggling of Migrants Protocol, article 16, paragraph 1, and article 19, paragraph 1.

The Smuggling of Migrants Protocol is without prejudice to the existing rights, obligations and responsibilities of States parties under other international instruments such as referred to in this article of the Model Law. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by the terms of the Smuggling of Migrants Protocol. Therefore, any State that becomes a party to the Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to any right, obligation or responsibility under that other instrument.

(Interpretative notes, para. 118; *Travaux Préparatoires*, p. 555.)

---

[18]Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, paras. 117 and 118, cited in the *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations publication, Sales No. E.06.V.5.), p. 555.

The key point is that in drafting and implementing national laws on the smuggling of migrants, States parties must ensure compliance with existing obligations arising under international law, including both treaty law (bilateral, regional and multinational) and customary international law. Drafters should carefully review existing international law obligations to avoid any inconsistency between any proposed national law and international obligations.

Reference to specific treaties or national laws implementing human rights obligations

Where national human rights laws exist, it may be appropriate to refer directly to them in national laws on smuggling of migrants. However, where a national human rights law is not already in place, it may be necessary to refer directly to relevant international instruments, such as the following:

(a) The Universal Declaration of Human Rights;[19]

(b) The International Covenant on Civil and Political Rights;

(c) The International Covenant on Economic, Social and Cultural Rights;

(d) The Convention on the Rights of the Child and the Optional Protocols thereto;[20]

(e) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(f) The Convention on the Elimination of All Forms of Discrimination against Women;

(g) The Convention on the Elimination of All Forms of Racial Discrimination;

(h) The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

(i) The Convention and the 1967 Protocol relating to the Status of Refugees;

(j) Convention on the Rights of Persons with Disabilities;[21]

(k) Any relevant regional treaties, such as the American Convention on Human Rights[22] or the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.[23]

It is not mandatory to specifically note or list all relevant treaties. However, including such a list may increase the visibility of relevant obligations to those responsible for implementing and applying the law on smuggling of migrants.

(d) That takes into account the special needs of smuggled migrants who are [women and children] [or who otherwise have special needs].

[19] General Assembly resolution 217 A (III).
[20] United Nations, *Treaty Series*, vols. 1577, 2171 and 2173, No. 27531.
[21] General Assembly resolution 61/106, annex I.
[22] United Nations, *Treaty Series*, vol. 1144, No. 17955.
[23] Ibid., vol. 213, No. 2889.

Commentary

Source: Smuggling of Migrants Protocol, article 16, paragraph 4.

The Protocol requires that States parties take into account the special needs of women and children. However, a State may wish to recognize additional groups of persons with special needs (e.g. the elderly, traumatized persons, persons with disabilities). Although that principle applies only to article 16 of the Protocol, it is suggested that it be recognized as a general principle in the application of the law.

Article 3. Definitions

Commentary

In some jurisdictions, a chapter on definitions is included in the individual law, at the beginning or at the end of the law. In other jurisdictions, the criminal code or law contains a general chapter on definitions, in which case some of the definitions below may need to be included. In some contexts, States find it preferable to leave interpretation to the courts. The definitions contained in this article should be read in conjunction with chapter 2, on criminal offences, of the Model Law.

Where possible, definitions used in the Model Law are derived from the Protocol, the Convention or other existing international instruments. In some cases, examples are given from existing national laws. In general, it is important to ensure that any definitions used in the law are consistent with existing national legislation.

The present article contains only definitions that are specific to the smuggling of migrants. General terms such as “attempt”, “territory” and “conduct” are not defined, as it is likely that they are covered by existing national laws.

In this Law:

(a) “Child” shall mean a person under the age of 18 years;

Commentary

Source: Convention on the Rights of the Child, article 1.

In some contexts, it may be appropriate to use the term “person under the age of 18” instead of the term “child”. This may be useful if, for example, national law distinguishes between certain categories of children (for example, persons under 14 years of age and persons under 18 years of age).

(b) “Commercial carrier” shall mean a legal or natural person who engages in the transportation of goods or people for commercial gain;

Commentary

This definition may be needed to ensure clarity of the coverage of the provisions concerning liability of commercial carriers in the Model Law. For consistency, this definition is the same as that used in the Model Law against Trafficking in Persons. However, it may be relevant to consider other definitions of "commercial carrier", including the following:

(a) "Commercial carrier" means any person or any public, private or other entity engaged in transporting persons, goods or mails for remuneration, hire or any other benefit." (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, article 1 *(d)*);

(b) "Carrier" shall mean any natural or legal person whose occupation it is to provide passenger transport by air, sea or land." (1990 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, article 1).

(c) "Financial or other material benefit" shall include any type of financial or non-financial inducement, payment, bribe, reward, advantage, privilege or service (including sexual or other services);

Commentary

Source: The term "financial or other material benefit" is an integral part of the definition of "smuggling of migrants" contained in the Smuggling of Migrants Protocol (article 3 *(a)*) and is used in defining the criminal offences contained in article 6 of the Protocol; it is also used in article 2 *(a)* of the Organized Crime Convention as part of the definition of "organized criminal group".

The interpretative notes on article 2 *(a)* of the Organized Crime Convention note that "the words 'in order to obtain, directly or indirectly, a financial or other material benefit' should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members". (A/55/383/Add.1, para. 3; *Travaux Préparatoires*, p. 17.)

Payment or profit arising from smuggling of migrants can include non-financial inducements, such as a free train or airplane ticket, or property, such as a car. Thus, it is important to ensure that the definition of "financial or other material benefit" is as broad and inclusive as possible.

The interpretative notes on article 3 *(a)* of the Smuggling of Migrants Protocol note that the reference to "a financial or other material benefit" was included as an element of the definition of "smuggling of migrants" in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provide

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. (A/55/383/Add.1, para. 88; *Travaux Préparatoires*, p. 469.)

Example 1

Financial or other material benefit includes any type of financial or non-financial inducement, payment, bribe, reward, advantage or service.

(Bali Process Model Law to Criminalize People-Smuggling.)

Example 2

Obtain a material benefit, in relation to doing a thing, means obtain, directly or indirectly, any goods, money, pecuniary advantage, privilege, property, or other valuable consideration of any kind for doing the thing (or taking an action that forms part of doing the thing).

(Section 2, Crimes Act 1961, No. 43, New Zealand.)

Example 3

The anti-corruption legislation of South Africa defines the term "gratification" broadly. The definition includes a variety of concepts, such as "discharge of debt" and "avoidance of loss or liability", which may be relevant in the context of legislation on the smuggling of migrants:

"Gratification" includes:

(a) Money, whether in cash or otherwise;

(b) Any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;

(c) The avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;

(d) Any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;

(e) Any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(f) Any forbearance to demand any money or money's worth or valuable thing;

(g) Any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;

(h) Any right or privilege;

(i) Any real or pretended aid, vote, consent, influence or abstention from voting; or

(j) Any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

(Section 1(ix), Prevention and Combating of Corrupt Activities Act, 2004, South Africa.)

Example 4

In Belgium, court judgements provide guidance on how "financial or material benefit" may be proven. In some situations, there is clear physical evidence that a benefit has been received. However, in other situations, there may be no such physical evidence, but there may be circumstances that strongly suggest that a benefit has been paid (for example, a person has unexplained financial wealth). In those instances, the courts have found that such circumstantial evidence may be sufficient. For example, in one Belgian case, the court noted that it was unusual that the suspect, a person who had only a part-time job with a small wage, had two cellular phones in his possession and sufficient funds to pay for the food and lodging in Germany and Belgium of two foreign persons whom he had not previously met. The court concluded from those circumstances that it was obvious that the accused had earned a financial benefit from his criminal activities that he could not have earned otherwise.

(Judgement of the Court of First Instance of Bruges of 11 July 2007, Belgium.)

(d) "Fraudulent travel or identity document" shall mean any travel or identity document:

(i) 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;

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

(iii) That is being used by a person other than the rightful holder;

Commentary

Source: Smuggling of Migrants Protocol, article 3 *(c)*.

The interpretative notes on article 3 of the Protocol note that:

> The words "falsely made or altered" should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. Furthermore, the intention was to include both documents that had been forged and genuine

documents that had been validly issued but were being used by a person other than the lawful holder.

(*Travaux Préparatoires*, p. 469.)

The definition of "fraudulent travel or identity document" is intended to cover a range of situations, including each of the following:

(a) Where a person uses another person's legitimate documents without making any changes to those documents. This might be possible if, for example, the person looks very similar in appearance to the legitimate owner of the documents;

(b) Where data, such as names or photographs, in legitimate documents has been illegally altered;

(c) Where the documents are complete forgeries;

(d) Where the documents are legitimate but have been obtained fraudulently (for example, incorrect information is provided on application forms, or other fake documents are used to obtain the document in question).

Example 1

"Fraudulent travel or identity document" means a travel or identity document:

(a) That has been made, or altered in a material way, by a person other than the person or agency lawfully authorized to make or issue the travel or identity document on behalf of a country; or

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

(c) That is being improperly used by a person other than the rightful holder.

(Section 2, Bali Process Model Law to Criminalize People-Smuggling.)

Example 2

73.7 Meaning of "false travel or identity document":

(1) For the purposes of this Subdivision, a travel or identity document is a false travel or identity document if, and only if:

(a) The document, or any part of the document:

(i) Purports to have been made in the form in which it is made by a person who did not make it in that form; or

(ii) Purports to have been made in the form in which it is made on the authority of a person who did not authorize its making in that form; or

(b) The document, or any part of the document:

(i) Purports to have been made in the terms in which it is made by a person who did not make it in those terms; or

(ii) Purports to have been made in the terms in which it is made on the authority of a person who did not authorize its making in those terms; or

(c) The document, or any part of the document:

(i) Purports to have been altered in any respect by a person who did not alter it in that respect; or

(ii) Purports to have been altered in any respect on the authority of a person who did not authorize its alteration in that respect; or

(d) The document, or any part of the document:

(i) Purports to have been made or altered by a person who did not exist; or

(ii) Purports to have been made or altered on the authority of a person who did not exist; or

(e) The document, or any part of the document, purports to have been made or altered on a date on which, at a time at which, at a place at which, or otherwise in circumstances in which, it was not made or altered.

(2) For the purposes of this Subdivision, a person is taken to make a false travel or identity document if the person alters a document so as to make it a false travel or identity document (whether or not it was already a false travel or identity document before the alteration).

(3) This section has effect as if a document that purports to be a true copy of another document were the original document.

(Section 73.7, Criminal Code (Commonwealth), Australia.)

(e) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

Commentary

Source: Smuggling of Migrants Protocol, article 3 *(b)*.

Drafters may choose to include in the definition a reference to the specific national laws defining legal entry.

(f) "Non-refoulement" refers to the principle of international law which prohibits the return by a State, in any manner whatsoever, of an individual to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion, or would run the risk of torture, inhuman and degrading treatment or other forms of irreparable harm. Refoulement includes any action having the effect of returning the individual to a State, including expulsion, deportation, extradition, rejection at the frontier (border), extraterritorial interception and physical return;

Commentary

As the principle of non-refoulement is referred to in several places throughout the Model Law, it may be most efficient to include a central definition of this important term in the definitions section of the national law.

Non-refoulement refers to the principle set out in article 33, paragraph 1, of the Convention relating to the Status of Refugees signed at Geneva on 28 July 1951, according to which:

> 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.
>
> The benefit of that principle cannot be "claimed by a refugee, whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."
>
> (Convention relating to the Status of Refugees, art. 33, paras. 1 and 2.)

The principle of non-refoulement is also reflected in human rights law and prohibits the return of a person to a real risk of torture, inhuman or degrading treatment or other forms of irreparable harm. See, for example, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 7 of the International Covenant on Civil and Political Rights, article 37 *(a)* of the Convention on the Rights of the Child and customary international law. The obligations with regard to non-refoulement that arise from those treaties apply to all persons (or, in the case of the Convention on the Rights of the Child, all persons within the definition of a "child") irrespective of whether they are asylum-seekers or refugees.

See Human Rights Committee General Comment No. 20 (1992), on the prohibition of torture and cruel treatment or punishment, which states that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement" (para. 9), and the Committee's General Comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the International Covenant on Civil and Political Rights.[24]

Similarly, the Committee on the Rights of the Child, in its General Comment No. 6 (2005), on the treatment of unaccompanied and separated children outside their country of origin, states, in its paragraph 27, that States parties to the Convention on the Rights of the Child shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under

[24]Available from www2.ohchr.org/english/bodies/hrc/comments.htm.

articles 6 [on the right to life] and 37 [on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment and the right not to be arbitrarily deprived of liberty] of the Convention.[25]

(g) "Serious crime" shall mean an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

Commentary

Source: Organized Crime Convention, article 2, paragraph *(b)*.

(h) "Smuggling of migrants" shall mean all conduct criminalized under chapter II of this Law;

(i) "Smuggled migrant" shall mean any person who has been the object of conduct criminalized under chapter II of this Law, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted;

Commentary

Article 3, paragraph *(a)*, of the Smuggling of Migrants Protocol defines "smuggling of migrants" 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." However, this is not the only conduct criminalized by the Protocol. Article 6 of the Protocol requires, among other things, the criminalization of enabling illegal residence and organizing or directing other persons to commit an offence established in accordance with article 6, paragraph 1, of the Protocol. This is significant, as various obligations in the Protocol (for example, obligations with regard to verification of identity documents; and the return of smuggled migrants, which is addressed in chapter VI of this Law) apply to all "offences established in accordance with article 6" and not only to the smuggling of migrants. Accordingly, it is important to clarify that generic references made in this Law to a "smuggled migrant" or to combating the "smuggling of migrants" are intended to include all forms of conduct criminalized by this Law and not just to "smuggling of migrants" in the narrow sense of procuring illegal entry for profit. For example, the return obligations apply equally to persons who have had their illegal residence enabled, irrespective of whether illegal entry was involved in that conduct.

The definition of a "smuggled migrant" refers to a person who has been the object of this criminal conduct. The use of the term "object", rather than "victim", of conduct criminalized by this Law is consistent with the Protocol (see, for example, article 5 of the Protocol). As noted in the forthcoming UNODC *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, a smuggled migrant is not considered to be a "victim of migrant-smuggling", because, generally, a person consents to being smuggled. However, a smuggled migrant

[25] Available from www2.ohchr.org/english/bodies/crc/comments.htm.

may be a victim of other crimes in the course of being smuggled. For instance, violence may be used against the migrant, or the migrant's life may be endangered at the hands of smugglers. Smuggled migrants may, for instance, withdraw their consent to being smuggled if, for example, they deem the conditions of transportation to be too dangerous but are nonetheless forced to continue the smuggling process. For example, a smuggled migrant may be physically forced to board a vessel. The crucial point is that while a migrant is not a victim of migrant smuggling, they can be victims of other crimes as a result of being smuggled.

The drafters of the Protocol decided that it was not appropriate to use the term "victim" in the statement of purpose contained in article 2 of the Protocol, even though the term had been used in the corresponding statement of purpose in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (*Travaux Préparatoires*, p. 461). Nonetheless, use of the word "victim" is certainly appropriate in any context where the smuggled migrant has been subjected to other criminal acts, in accordance with national legislation.

(j) "Protocol State" shall mean a State party to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime;

(k) "Vessel" shall mean any type of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

Commentary

Source: Smuggling of Migrants Protocol, article 3, paragraph *(d).*

The definition of "vessel" contained in the Model Law is based on the definition contained in the Protocol. However, States may have other definitions that they wish to draw upon. Provided that those other definitions cover, at a minimum, the types of vessels specified in the Protocol, use of broader definitions should not be an impediment to implementing the Protocol.

Article 4. Jurisdiction

Commentary

In order to effectively combat smuggling of migrants, and in the light of its transnational nature, it is vital that States establish jurisdiction over conduct that may have taken place beyond their national borders to enable, for example, the prosecution of persons who unsuccessfully attempt to smuggle persons by

sea into another State or who organize and direct the smuggling of migrants from a “safe” third-country location. Establishment of jurisdiction beyond the territorial grounds may also have implications for extradition and mutual legal assistance. In some cases, extradition may be refused when the offence has been committed outside the territory of either State party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances (See article 4 *(e)* of the Model Treaty on Extradition (General Assembly resolution 45/116, annex; amended by General Assembly resolution 52/88)). Without complementary regimes of jurisdiction, dual criminality may be difficult to establish, and efforts at mutual assistance or extradition may be frustrated.

1. This Law shall apply to any offence established under this Law when:

(a) The offence is committed [wholly or partly] within the territory of [*name of State*]; or

(b) The offence is committed [wholly or partly] on board a vessel that is flying the flag of [*name of State*] or an aircraft that is registered under the laws of [*name of State*] at the time the offence was committed; or

Commentary

Mandatory

Source: Organized Crime Convention, article 15, paragraph 1 *(a)* and *(b)*.

The issue of jurisdiction may already be addressed in existing national laws. However, if this is not the case, subparagraphs *(a)* and *(b)* should be incorporated into national law, at least in so far as they extend to the offence of smuggling of migrants.

In accordance with article 15, paragraph 1 *(a)* and *(b)*, of the Organized Crime Convention, it is mandatory for States to establish jurisdiction over offences established in accordance with the Protocol within their territory. This requirement reflects the “territorial principle” of jurisdiction, in which States are permitted to assert jurisdiction over prohibited conduct that takes place, wholly or substantially, within the territory of the State, on ships flying the flag of the State and aircraft registered in that State.[26] The capacity to invoke territorial jurisdiction and jurisdiction on board a vessel flying the flag of the State or an aircraft that is registered in the State (the so-called “flag State” principle) is widely recognized and should present little controversy.

Reference is also made to article 23, paragraph 1, of the Model Law, which concerns the exercise of enforcement powers with respect to the State’s flagged vessels.

[26]McClean, David, *Transnational Organized Crime: A Commentary on the United Nations Convention and its Protocols* (Oxford University Press, 2007), p. 164.

Territory includes territorial sea

If the State is a coastal State, use of the term "territory" throughout this Law should be understood to include the territorial sea. In many instances, this will already be made clear by other national laws. However, if this is not the case, this should be clarified with respect to smuggling of migrants. This approach is consistent with article 2 of the United Nations Convention on the Law of the Sea,[27] which provides the following:

> 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
>
> 2. This sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.
>
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

The territorial sea can extend up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the United Nations Convention on the Law of the Sea (art. 3).

Under the international law of the sea, a coastal State can take action within its territorial sea against a foreign vessel engaged in the smuggling of migrants. Under article 17 of the United Nations Convention on the Law of the Sea, ships of all States enjoy the right of "innocent passage" through the territorial sea. However, the passage of a foreign ship shall be considered "prejudicial to the peace, good order or security" of a coastal State (and therefore not engaged in innocent passage) if, in the territorial sea, the ship engages in the loading or unloading of any person contrary to the immigration laws and regulations of the coastal State (United Nations Convention on the Law of the Sea, art. 19, para. 2 *(g)*). A coastal State is entitled to enact laws and regulations, in conformity with international law, regarding innocent passage through the territorial sea, in order to prevent infringement of immigration laws (art. 21, para. 1 *(h)*). This right of protection of a coastal State includes taking the necessary steps in its territorial sea to prevent passage by a foreign vessel which is not "innocent" (art. 25, para. 1)). In exercising its right of protection, the coastal State does not need to obtain the consent of the flag State of the foreign vessel (art. 25).

A coastal State may also exercise criminal jurisdiction on board a foreign ship passing through its territorial sea in certain circumstances, including where the consequences of the crime extend to the coastal State or if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea (art. 27). The coastal State does not need to seek the consent of the flag State in those circumstances.

Further discussion of the international law of the sea, in particular the action that a State may take against a foreign vessel engaged in the smuggling of migrants by sea, is contained in the commentary on chapter V of the Model Law.

[27]United Nations, *Treaty Series*, vol. 1833, No. 31363.

(c) The offence is committed by a [*name of State*] national present in [*name of State*] territory whose extradition is refused on the grounds of nationality; or

Commentary

Mandatory

Source: Organized Crime Convention, article 15, paragraph 3.

Subparagraph *(c)* is mandatory, as it gives effect to article 15, paragraph 3, of the Organized Crime Convention, which requires States to establish jurisdictions over nationals—irrespective of where the offence actually occurred—when the alleged offender is present in their territory and extradition is refused on the grounds of nationality. This could potentially cover situations such as the following: the offender commits the crime abroad and then returns to his or her home country; or the offender commits the offence from the home country but in circumstances where the intended target of the offence is in another country.

(d) The offence is committed by a person present in [*name of State*] whose extradition is refused on any ground.

Commentary

Optional

Source: Organized Crime Convention, article 15, paragraph 4.

Subparagraph *(d)* is optional, as it gives effect to article 15, paragraph 4, of the Organized Crime Convention, which provides that each State party may establish jurisdiction over offences when the alleged offender is present in its territory and it does not extradite him or her for any reason. Note that if subparagraph *(d)* is used, there is no need to include subparagraph *(c)*, as subparagraph *(d)* covers situations where extradition is refused for any reason, including nationality.

2. This Law shall also apply to any offence established under this Law when:

(a) The smuggled migrant is a national [or permanent resident] [or habitual resident] of [*name of State*];

(b) The offence is committed by a [*name of State*] national [or permanent resident] [or habitual resident];

(c) The offence is committed outside the territory of [*name of State*] with a view to the commission of a serious crime within the territory of [*name of State*].

Commentary

Optional

Source: Organized Crime Convention, article 15, paragraph 2 *(a)*-*(c)*.

Application of jurisdiction in accordance with article 15, paragraph 2, of the Organized Crime Convention is optional. Also, it is important to remember that application of jurisdiction to offences that occur "outside of territory" is subject to the principles of sovereign equality and territorial integrity of other States, as expressed in article 4 of the Organized Crime Convention.

The reference in article 4, paragraph 2 *(a)*, of the Model Law is to offences committed against a national, but the additional options of "permanent resident" and "habitual resident" are also included. As McClean has noted, the scope of the term "national" is unclear. It may include, for example, not only permanent residents but also habitual residents (McClean, *Transnational Organized Crime*, pp. 164 and 169). The interpretative note for article 15, paragraph 2 *(a)*, of the Convention notes that:

> States parties should take into consideration the need to extend possible protection that might stem from the establishment of jurisdiction to stateless persons who might be habitual or permanent residents in their countries.

(A/55/383/Add.1, para. 26.)

The reference in article 15, paragraph 2 *(b)*, of the Convention to offences committed by a national, permanent resident or habitual resident reflects the active personality principle. As McClean has noted, the active personality principle is well recognized in international law (McClean, *Transnational Organized Crime*, p. 168). Some States that assert jurisdiction on this basis extend it to all habitual residents. However, the Organized Crime Convention refers only to "stateless" habitual residents (McClean, *Transnational Organized Crime*, p. 169).

The reference in paragraph 2 *(c)* to offences committed outside of territory with a view to the commission of serious crimes within territory is supported by article 15, paragraph 2 *(c)* (i), of the Organized Crime Convention. As McClean has noted, this "reflects the essentially transnational nature of much organized crime, with those conceiving and planning major crimes carefully insulating themselves from direct involvement in the execution of their plans even to the extent of remaining in another country." (McClean, *Transnational Organized Crime*, p. 169).

National legislatures may want to consider asserting jurisdiction even more broadly than in paragraph 2 *(c)*, for example, over any offence under this Law committed outside of territory, where the consequences of the offence are directed or intended to breach the law of the State. Article 4, paragraph 2 *(c)*, of the Model Law is limited to "serious" offences, that is, offences that attract a penalty of at least four years imprisonment or a more serious penalty. The assertion of jurisdiction over any offence (irrespective of penalty) committed under this Law could be supported by the protective principle, which asserts

jurisdiction where conduct threatens the interests of the State itself. An example of this would be the case of a person, living in country A, who arranges for migrants to be smuggled from country B to country C. Even though the person is not a national or present in either country B or C, he or she should nonetheless be liable to prosecution in those countries, because of the result of their conduct. If this approach is adopted, an additional subparagraph could be added, as follows:

> The offence is committed outside of territory, but the consequences of the offence are directed or intended to breach the law of [*name of State*].

Example 1

French Criminal law is applicable to offences committed beyond territorial waters, when international conventions and the law provide for it.

(Criminal Code of France, article 113-12.)

Example 2

Section 4. Applicability to Acts on German Ships and Aircraft

German criminal law shall apply, regardless of the law of the place where the act was committed, to acts which are committed on a ship or in an aircraft which is entitled to fly the federal flag or the national insignia of the Federal Republic of Germany.

Section 6. Acts Abroad against Internationally Protected Legal Interests

German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:

… (9) Acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

Section 7. Applicability to Acts Abroad in Other Cases

(1) German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

(2) German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

1. Was a German at the time of the act or became one after the act;

or

2. Was a foreigner at the time of the act, was found to be in Germany

and, although the Extradition Act would permit extradition for such an act, is not extradited because a request for extradition is not made, is rejected, or the extradition is not practicable.

(Criminal Code of Germany (*Strafgesetzbuch*). As promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322).)[28]

[28]Translation provided by the Federal Ministry of Justice of Germany, available from www.legislationline.org/documents/section/criminal-codes.

Chapter II. Criminal offences

Commentary

Overview of the main requirements

Under article 6 of the Smuggling of Migrants Protocol, States parties are required to criminalize certain conduct. It is therefore a mandatory requirement. The starting point for understanding this obligation is article 3 of the Protocol, which defines "smuggling of migrants" as follows:

> … 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.

The reference in this definition to "a financial or other material benefit" was included in order to emphasize that 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. As noted in the interpretative notes, 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 (Interpretative notes, A/55/383/Add.1, para. 88, *Travaux Préparatoires*, p. 469).

In summary, as a result of article 6 of the Protocol, States parties are required to criminalize the following conduct:

(a) Smuggling of migrants (Protocol, art. 6, para. 1 *(a)*);

(b) 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 by illegal means (Protocol, art. 6, para. 1 *(c)*);

(c) Producing, procuring, providing or possessing fraudulent travel or identity documents when committed for the purpose of enabling the smuggling of migrants (Protocol, art. 6, para. 1 *(b)*);

(d) Organizing or directing any of the above crimes (Protocol, art. 6, para. 2 *(c)*);

(e) Attempting to commit any of the above offences, subject to the basic concepts of the State party's legal system (Protocol, art. 6, para. 2 *(a)*);

(f) Participating as an accomplice in any of the above offences, subject to the basic concepts of the State party's legal system (Protocol, art. 6, para. 2 *(b)*).

As a result of article 5 of the Protocol, migrants shall not become liable to criminal prosecution under the Protocol for the fact of having been the object of conduct set forth in article 6 of the Protocol. Thus, all offence provisions developed to give effect to the Protocol should be aimed at targeting the smugglers and not the persons being smuggled.

Refugees often have to rely on smugglers to flee persecution, serious human rights violations or conflict. Article 31, paragraph 1, of the Convention relating to the Status of Refugees provides that refugees should not be penalized for such conduct, providing certain conditions are met:

> The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom is threatened in the sense of article 1 [of the Convention], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The protection afforded to refugees under article 31 of the Convention relating to the Status of Refugees operates to the benefit of the refugee, not the smuggler. There may be situations where smugglers deliberately abuse or misuse the asylum process (for example, by lodging fraudulent asylum claims) as part of their modus operandi for enabling illegal entry, transit or residence. Smugglers in that situation are in no way protected by article 31 of the Convention, and their actions would likely fall within the scope of the Smuggling of Migrants Protocol (for example, procuring or providing a fraudulently obtained travel document to enable illegal entry or residence).

Liability of legal persons

Article 10 of the Organized Crime Convention requires that all States parties adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for offences established by any Protocol (see article 1, paragraph 3, of the Smuggling of Migrants Protocol). Article 10, paragraph 2, of the Organized Crime Convention provides that, subject to the legal principles of the State party, the liability of legal persons may be criminal, civil or administrative. For further discussion of this issue and examples of national laws, see the Legislative Guide (pp. 115-129).

Model provisions on this issue will be developed as part of the model law to implement the Organized Crime Convention, to be developed by UNODC.

Issues to consider in the drafting process

There is no single ideal drafting option to give effect to the obligations contained in article 6 of the Smuggling of Migrants Protocol. Instead, these obligations could be met through national laws drafted in a variety of ways, provided that the key elements of the offences are established.

One option is to draft an omnibus offence that covers not only smuggling of migrants, but also enabling illegal residence and document-related offences.

It would be up to the prosecutor to specify in each case which elements of the offence were being prosecuted. An omnibus offence has advantages, including the fact that it ensures that the entire smuggling process is covered and that there are no gaps between each set of conduct (for example, gaps between "smuggling of migrants" and "enabling illegal residence" and document-related offences).

Another option is to draft three separate offences of smuggling of migrants, enabling illegal residence and document-related offences. However, care should be taken to ensure that gaps do not arise between the various forms of conduct. Also, attention may need to be paid to whether or not, for example, conduct in relation to fraudulent documents could be prosecuted both as smuggling of migrants and under the document-related offences.

States should give consideration to whether or not they want drafters to draw a line between attempted offences and the completed offences. While the Protocol refers to "attempts", it does not require that national laws differentiate between "attempts" and the "completed offences", as some laws may include preparation, attempts and "successful" completed offences in the one offence provision. Such an approach may be more appropriate in certain circumstances. For example, in many contexts, a strong coastguard presence will mean that smuggled migrants seeking to illegally enter a country by sea are rarely successful in achieving that illegal entry. Rather, the modus operandi of the smugglers is to take the migrants within sight of land and then dump the migrants into the sea knowing (or hoping) that they will be able to swim to shore or be rescued by the coastguard. Accordingly, the coastguard will seek to proactively intervene in these situations to avoid loss of human life. Should these situations, where the coastguard intervenes before the migrants have been dumped overboard, be referred to as "attempted" smuggling? In one view, the conduct may not have resulted in the "illegal entry" and is thus "incomplete". In another view, it would seem preferable to cover the entire smuggling process (from preparation to "successful" completion) under the offence provision.

States have many different ways of regulating the issue of preparation and attempts. For example, the law on trafficking in persons of Thailand contains the following offence: "Whoever prepares to commit an offence under section 6 (trafficking in persons) shall be liable to one third of the punishment stipulated for such offence." An "attempt" is also punished at one half the punishment stipulated for the completed offence. As there are so many different options, this issue will need to be resolved in accordance with existing national laws.

Finally, while the definition of "smuggling of migrants" contained in article 3, paragraph *(a)*, of the Protocol refers to illegal entry into "a State Party", in national laws, it may be more expedient to refer to illegal entry into "any State", to avoid restricting the scope of the offence to other parties to the Protocol. A number of States have offence provisions drafted in this way (e.g. Australia and the United Kingdom of Great Britain and Northern Ireland). Without a comparable offence particularly in source and transit countries, issues may arise with regard to a lack of dual criminality to support mutual legal assistance or extradition.

Relationship to offences under the Organized Crime Convention

It is essential to ensure that, in addition to the basic offences required by the Protocol, national laws adequately criminalize participation in an organized criminal group (Organized Crime Convention, art. 5); laundering of the proceeds of crime (Organized Crime Convention, art. 6); corruption (Organized Crime Convention, art. 8); and obstruction of justice (Organized Crime Convention, art. 23). In addition, measures to establish the legal liability of legal persons must be adopted (Organized Crime Convention, art. 10). UNODC intends to develop best practices and model provisions for the implementation of the above-mentioned articles, in the context of the development of a model law to give effect to the Organized Crime Convention.

Options presented in the Model Law

The Model Law contains four drafting options for the basic offences required by the Protocol. Option A is the most closely in line with the Protocol, but it is also potentially the narrowest in terms of coverage of conduct. As many of the terms used in the Protocol are simply reproduced in this option, some of the language may be too imprecise for national application. Option B takes a more flexible approach to the issues and introduces language that may be more suited to application at the national level. For example, option B introduces the concept of “facilitation” in addition to “procurement”. Finally, option C provides an example of an omnibus approach, where all conduct covered by article 6 of the Protocol is addressed in a single legislative article.

Some of the advantages and disadvantages of each approach are noted in the commentary for each option. These should be considered by national drafters.

Basic offences: option A

Option A is the narrowest of the four options presented in the Model Law. It is most suitable for States parties that want to draft national laws that closely reflect the terms used and structure followed in article 6 of the Protocol.

Option A designates separate offences for each set of conduct specified in article 6 of the Protocol, and the order of items follows the order of article 6. The language used strictly follows the language used in the Protocol. Attempts, participating and organizing are included as separate items.

While this approach has the advantage of clearly following the Protocol, it has the disadvantage that some of the terms used in the Protocol may be inappropriate for a domestic legal context (for example, the phrase “any illegal means” may be considered ambiguous in some legal systems). Also, questions may arise as to whether the document-related offences could also be prosecuted under the “smuggling of migrants” offence.

Article 5.A. Smuggling of migrants

Any person who intentionally, in order to obtain directly or indirectly a financial or other material benefit, procures the illegal entry of a person into a Protocol State of which the person is not a national or a permanent resident, commits an offence punishable by [*insert penalty*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 3, paragraph *(a)*, and article 6, paragraph 1 *(a)*.

As noted above, article 6, paragraph 1 *(a)*, of the Protocol requires States parties to criminalize "smuggling of migrants". Article 5.A of the Model Law makes reference to the important concept of "financial or other material benefit", which is defined in the definitions section (article 3) of the Model Law. Article 5.A also refers to the act of "procuring", a term which is used but not defined in the Protocol. Where the meaning of the term "procure" has not already been made clear by national law or the basic principles of statutory interpretation, it may be necessary to add a definition of this term. For example, the following definition could be used: "'Procure' shall mean to obtain something or to cause a result by effort".

This drafting suggestion is based on English language dictionary definitions. For example, the *Oxford Dictionary of English* lists the following definitions of the verb "procure":

> *(a)* Obtain (something), especially with care or effort: *food procured for the rebels*; [with two objs] he persuaded a friend to procure him a ticket;
>
> *(b)* [with obj. and infinitive] (Law) persuade or cause (someone) to do something: he procured his wife to sign the mandate for the joint account.
>
> (*Oxford Dictionary of English* (revised edition). Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2005. Oxford Reference Online.)

Example

98C: Smuggling migrants

(1) Everyone is liable to the penalty stated in subsection (3) who arranges for an unauthorized migrant to enter New Zealand or any other State, if he or she —

(a) Does so for a material benefit; and

(b) Either knows that the person is, or is reckless as to whether the person is, an unauthorized migrant.

(2) Everyone is liable to the penalty stated in subsection (3) who arranges for

an unauthorized migrant to be brought to New Zealand or any other State, if he or she —

(a) Does so for a material benefit; and

(b) Either knows that the person is, or is reckless as to whether the person is, an unauthorized migrant; and

(c) Either —

(i) Knows that the person intends to try to enter the State; or

(ii) Is reckless as to whether the person intends to try to enter the State.

(3) The penalty is imprisonment for a term not exceeding 20 years, a fine not exceeding $500,000, or both.

(4) Proceedings may be brought under subsection (1) even if the unauthorized migrant did not in fact enter the State concerned.

(5) Proceedings may be brought under subsection (2) even if the unauthorized migrant was not in fact brought to the State concerned.

(Section 98C, Crimes Act 1961, New Zealand.)

Article 5.B. Offences in relation to travel or identity documents

Any person who intentionally, in order to obtain directly or indirectly a financial or other material benefit, produces, procures, provides or possesses a fraudulent travel or identity document for the purpose of enabling the smuggling of migrants, commits an offence punishable by [*insert penalty*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 3, paragraph *(c)*, and article 6, paragraph 1 *(b)*.

As noted above, the Protocol requires States parties to criminalize the acts of producing, procuring, providing or possessing a fraudulent travel or identity document, when committed for the purpose of enabling smuggling of migrants. As noted in the Legislative Guide, strictly speaking, this offence will require proof of three different elements of intention:

> There must have been the intention to produce, procure, provide or posses the document, with the added intention or purpose of obtaining a financial or other material benefit. In the case of the document offences, however, there must also have been the intention or purpose of enabling the smuggling of migrants. This is an additional safeguard against criminalizing those who smuggle themselves (see A/55/383/Add.1, para. 93).
>
> (Legislative Guide, part three, chap. II, para. 41, p. 344.)

Article 5.C. Enabling illegal residence

Any person who intentionally, in order to obtain directly or indirectly a financial or material benefit, uses illegal means to enable a person who is not a national or a permanent resident to remain in the State without complying with the necessary requirements for legally remaining in the State, commits an offence punishable by [*insert penalty*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 6, paragraph 1 *(c)*.

The interpretative notes to article 6, paragraph 1 *(c)*, of the Protocol note that the words "any other illegal means" refer to illegal means as defined under domestic law (A/55/383/Add.1, para. 94; *Travaux Préparatoires*, p. 489). It may be necessary for national drafters to specify which particular offences, or which national laws are covered by the phrase "illegal means".

Article 5.D. Attempts

Any person who attempts to commit an offence under this chapter is subject to [*insert penalty*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 6, paragraph 2 *(a)*.

The obligation to criminalize attempts in article 6, paragraph 2 *(a)*, of the Protocol is "subject to the basic concepts" of the legal system. As noted in the interpretative notes for the *Travaux Préparatoires*:

> References to attempting to commit the offences established under domestic law in accordance with paragraph 2 *(a)* are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law.
>
> (A/55/383/Add.1, para. 95; *Travaux Préparatoires*, p. 489.)

In some (but not all) legal systems, attempts are punished with the same penalty as the completed offence. In other systems, attempts are subject to a lower penalty. This provision need be included only if it is not already included in the national criminal code or law.

Article 5.E. Participating as an accomplice

Any person who participates as an accomplice to [an offence under articles 5.A, 5.B or 5.C where this involves producing a fraudulent travel or identity document] [an offence under this chapter] is subject to [*insert penalty*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 6, paragraph 2 *(b)*.

Article 6, paragraph 2 *(b)*, of the Protocol requires the criminalization of participating as an accomplice for "smuggling of migrants", "enabling illegal residence" and "producing a fraudulent travel or identity document". However, the extension of criminalization to participating as an accomplice to "procuring, providing or possessing" a fraudulent travel or identity document is "subject to the basic concepts" of the legal system.

Article 5.F. Organizing or directing

Any person who organizes or directs another person or persons to commit an offence under this chapter is subject to [*insert penalty*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 6, paragraph 2 *(c)*.

This provision needs to be included only if it is not already included in the national criminal code or law.

Basic offences: Option B

Commentary

Option B highlights a number of different issues that could be considered in the drafting process. This option potentially covers a broader range of conduct that might be involved in the modus operandi of smugglers. Instead of using the term "to procure", this option uses the language of "engage in conduct for the purposes of procuring", which potentially covers preparation, attempts and persons who are involved in the commission of the offence without being the principal offender.

Accordingly, there is no separate treatment of "attempts" or "participating as an accomplice".

The language of "engage in conduct for the purpose of" is most familiar to the common law tradition. A similar option, which dispenses with the use of "engage in conduct for the purpose of" (using instead the direct language of "procures, facilitates or promotes, or attempts (to do so)" is included here as an alternative with similar effect. The minor drafting differences between the two alternatives are highlighted in bold.

Article 5.G. Smuggling of migrants and enabling illegal stay

Any person who intentionally, in order to obtain directly or indirectly a financial or material benefit, **engages in conduct for the purpose of procuring, facilitating or promoting** the actual or intended entry into, transit across or stay in [*name of State*] or a Protocol State of another person in breach of the law commits an offence punishable by [*insert penalty*].

or

Any person who intentionally, in order to obtain directly or indirectly a financial or material benefit, **procures, facilitates or promotes, or attempts to procure, facilitate or promote** the actual or intended entry into, transit across or stay in [*name of State*] or a Protocol State of another person in breach of the law commits an offence punishable by [*insert penalty*].

Commentary

Source: Smuggling of Migrants Protocol, article 6, paragraph 1 *(a)* and *(c)*.

Both drafting options for Article 5.G combine "smuggling of migrants" and "illegal residence" into a single article as most of the elements of these offences are identical. Also, the terms "facilitate or promote" are added to the basic language of the Protocol ("procure") to ensure broad coverage of a range of conduct that is integral to the smuggling process. While this approach may not be appropriate for all legal systems, this terminology reflects the terminology used in a number of national laws.

Both drafting options refer to "actual or intended" entry, transit or residence. As drafted, these offences could be applied to those who prepare for the smuggling of migrants and those who try to smuggle migrants without success. This approach reflects the purposes of the Protocol, which include the prevention and combating of smuggling.

These options also refer to the illegal entry of "another person", making it clear that the offence is intended to apply to those who smuggle others for profit, and not to the smuggled migrants themselves. Where this approach is used, a non-liability statement (such as those contained in article 9 of the Model Law) may be redundant.

These options refers to the word "entry or transit", reflecting the reality that in many States, domestic law or jurisprudence specifies that a person is taken not to have "entered" while they remain in the transit area of an airport or port. The inclusion of the word "transit" has proved important in a number of countries. For example, in Belgium, the law previously referred only to "helping a non-national to *enter into* or *reside on* the territory of the Kingdom". In 1999, the Court of Appeal of Brussels ruled that the presence of non-nationals in the transit zone of the airport, with the intention of travelling to another country, was not within the meaning of "helping a non-national to enter into" the Kingdom. Subsequent to that judgement, it was impossible to prosecute smugglers who were using Belgium simply as a transit point. A similar issue arose again in 1999, when the Court of Cassation of Belgium ruled that the material element of the smuggling offence had not been established in a situation where a non-national was intercepted at a border checkpoint. The Court ruled that the offence could be committed only once the person "entered" the Kingdom, which had not in fact occurred, as they had been stopped before entering. Following these decisions, the concept of "transit" was explicitly added to the definition of the offence of smuggling of migrants in Belgian law.

(The Act of 28 November 2000 on the Penal Protection of Minors (M.B., 17 March 2001).)

These drafting options refer to (actual or attempted) illegal entry into another Protocol State. The legality or illegality of that entry will therefore need to be proved as an element of the offence. It will be a matter for the investigating authority to collect evidence of this fact in accordance with relevant rules on admission of foreign documents and other evidentiary rules. The particular mechanisms that may be available to prove the legal situation in another country vary. For example, France has the "certificat de coutume" to inform the judge of the legal situation in another country, and various laws in the United Kingdom allow prosecutors to present certificates from a foreign authority for the purposes of verifying the legal situation in another country.

Example 1

Any person who assists in the unlawful entry or transit of an alien into or through a Member State of the European Union or neighbouring State of Austria with the intention of unlawfully enriching himself or a third party through payment made to that end shall be liable to a term of imprisonment not exceeding two years imposed by a court.

(Article 114 (1) of the 2005 Aliens Police Act, Austria.)

Example 2

Helping, in whichever way, either directly or through an intermediary, a person who is not a national of a Member State of the European Union, to enter into, transit over or reside on the territory of such an aforementioned Member State, or of a State party to an international agreement on the crossing of the external borders that is binding on Belgium, in violation of the legislation of the said State, with the aim to obtaining, either directly or indirectly, a profit.

(Article 77 (bis) of the Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens, Belgium.)

Example 3

1. Whosoever provides assistance to another person to acquire entry to the Netherlands or to transit the Netherlands, another Member State of the European Union, Iceland, Norway or any State which has acceded to the Protocol against the Smuggling of Migrants by Land, Sea and Air concluded in New York on 15 November 2000, supplementing the Convention against Transnational Organized Crime concluded on 15 November 2000 in New York, or provides that person with an opportunity or the means or information enabling him to do so, whilst cognizant of the fact or having serious reason to believe that the said entry or transit is illegal, will be guilty of the smuggling of human beings and receive a penal sentence of a maximum of four years or a pecuniary penalty of the fifth category.

2. Whosoever in pursuit of gain provides assistance to another person to acquire residence in the Netherlands or another Member State of the European Union, Iceland, Norway or any State which has acceded to the Protocol mentioned in the first paragraph, or provides that person with an opportunity or the means or information enabling him to do so, whilst cognizant of the fact or having serious reason to believe that the said residence is illegal, will be punished with a penal sentence of a maximum of four years or a pecuniary penalty of the fifth category.

(Article 197a, Smuggling of Human Beings, Criminal Code, Netherlands.)

Article 5.H. Offences in relation to fraudulent travel or identity documents

Any person who intentionally, in order to obtain directly or indirectly a financial or other material benefit, **engages in conduct for the purpose of offering, distributing, producing, procuring, providing or possessing** a fraudulent travel or identity document, in circumstances where the person knows or should reasonably have known or suspected that the document is to be used for the purpose of enabling the smuggling of migrants, commits an offence punishable by [*insert penalty*].

or

Any person who intentionally, in order to obtain directly or indirectly a financial or other material benefit, **offers, distributes, produces, procures, provides or possesses, or attempts to offer, distribute, produce, procure, provide or possess** a fraudulent travel or identity document, in circumstances where the person knows or should reasonably have known or suspected that the document is to be used for the purpose of enabling the smuggling of migrants, commits an offence punishable by [*insert penalty*].

Commentary:

Source: Smuggling of Migrants Protocol, article 6, paragraph 1 *(b).*

Both drafting options for article 5.H include the additional elements of "offering" and "distributing", in addition to the basic Protocol requirements of "producing, procuring, providing or possessing". The acts of offering and distributing fraudulent documents are instrumental to the smuggling process itself.

Strictly speaking, article 6, paragraph 1 *(b)*, of the Protocol applies only in relation to the "smuggling of migrants" and not in relation to "enabling illegal residence" (see Legislative Guide, part three, chap. II, para. 41, p. 344). However, drafters should note that legislatures implementing the Protocol can apply the document offences to both principal offences (smuggling of migrants and enabling illegal residence) if they choose, in accordance with article 34, paragraph 3, of the Convention. Accordingly, there may be a preference to combine all three elements (smuggling of migrants, document offences and enabling illegal residence) into a single offence. A drafting suggestion of this nature is included in the Model Law in Basic Offences: Option C.

Example

Making, providing or possessing a false travel or identity document

A person (the first person) is guilty of an offence if:

(a) The first person makes, provides or possesses a false travel or identity document; and

(b) The first person intends that the document will be used to facilitate the entry of another person (the other person) into a foreign country, where the entry of the other person into the foreign country would not comply with the requirements under that country's law for entry into the country; and

(c) The first person made, provided or possessed the document:

(i) Having obtained (whether directly or indirectly) a benefit to do so; or

(ii) With the intention of obtaining (whether directly or indirectly) a benefit.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(Section 73.8, Criminal Code (Commonwealth), Australia.)

Basic offences: Option C

Commentary

This option combines all the elements of article 6 of the Protocol into one omnibus offence provision. Prosecutors would need to specify the conduct to be charged on any charge sheet or indictment. The omnibus approach may have practical advantages:

- The use of overarching language moves prosecutions away from technical examinations by the defence of the meaning of individual words and legal arguments that a defendant's conduct falls outside the scope of that definition (thus invalidating prosecution for the offence), because the meaning is made clear by the range of words used in the article.
- This approach encompasses each stage of the smuggling process and recognizes that small links are nonetheless important parts of the overall chain of events and criminality.
- This approach dispenses with the need for a separate offence relating to documents or attempts. This minimizes the risk that a sentencing judge might form the view that legislators were intentionally reflecting different degrees of culpability in different offences. From the point of view of prosecuting these offences, there may be little or no difference in the degree of culpability of the different players involved at the different stages of the smuggling process.

This option may be most suited to States parties of a common law legal tradition that seek to ensure broad coverage of the entire smuggling process, without allowing for any of the small gaps that may inadvertently arise when three separate sets of conduct (smuggling of migrants, enabling illegal residence and document-related offences) are described.

Article 5.I. Offences in relation to smuggling of migrants

1. Any person who, in order to obtain directly or indirectly a financial or other material benefit, intentionally engages in conduct for the purpose of [facilitating or] enabling a person who is not a national or a permanent resident of [*name of State*] or of a Protocol State to enter, transit across or be in that State in breach of immigration law, commits an offence.

2. A person convicted under paragraph 1 above is subject to a penalty of [*insert penalty range to allow sufficient judicial discretion to deal appropriately with a range of conduct*].

Commentary

Source: Smuggling of Migrants Protocol, article 6, paragraphs 1 and 2.

Article 5.I refers to a person "being in a State" rather than "residing in", to avoid arguments that "residence" has a technical meaning (for example, it might be

argued that "residence" refers to demonstrating an intention to permanently stay). Also, the term "being in a State" is relevant, for example, to situations where a defendant receives a group of migrants arriving by airplane and houses them for a few days, provides them with mobile phones and airplane tickets, before moving them on to the next destination.

As a wide range of conduct is potentially covered by this offence, it is suggested that judges should be given a sentencing range to allow them to exercise discretion to reserve the most serious punishment for the most serious offenders. However, this issue may already be addressed under existing national law.

Example

Section 171a. Crossing state borders without permission and smuggling

(1) Whoever, with the intention of gaining for themselves or for another person direct or indirect financial or other material benefit, for a person who is not a citizen of the Slovak Republic or who does not have permanent residence on the territory of the Slovak Republic:

(a) Organizes a crossing of the State border of the Slovak Republic without permission, or transfer through its territory, or enables such acts, or assists in them,

(b) For the purpose given in subsection *(a)* obtains, provides or holds a false travel document or false proof of identity, or

(c) Allows or helps a person to remain or work on the territory of the Slovak Republic, shall be sentenced to deprivation of liberty for two years to eight years.

(Act No. 300/2005, Penal Code, Slovak Republic.)

Article 6. Aggravating circumstances

Commentary

Under article 6, paragraph 3 *(a)* and *(b)*, of the Protocol, States parties are required to ensure that the following circumstances are circumstances of aggravation: circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned; and circumstances that entail inhuman or degrading treatment, including for exploitation, of such migrants.

There are a variety of drafting options that might be used to comply with this obligation. For example, in some contexts it may be appropriate to refer to "factors to be taken into account in sentencing" rather than "aggravating circumstances." In other contexts, it may be appropriate to establish "aggravated offences." The precise manner in which the obligation is realized is not important. However, what is important is that where the following circumstances are present, offenders

are subject to more severe penalties than they would be if these circumstances were not present.

In addition to those required by article 6, paragraph 3, of the Protocol, a list of further, optional aggravating circumstances are included in the Model Law for consideration. These reflect a range of circumstances that are relevant to the smuggling context. Where appropriate, national legislators may want to pick and choose from this list or even add additional factors to reflect local realities. National drafters should ensure that guidance is given to the judiciary on how to respond, consistent with national policy on this issue, to situations where more than one aggravating circumstance is present.

Some of the circumstances of aggravation may be prosecuted as stand-alone offences (e.g. murder, assault).

If any of the following circumstances are present, the offences under this chapter shall be punishable by [*insert penalty greater than that for core offences*]:

(a) The offence involved circumstances that endangered or were likely to endanger the life or safety of the smuggled migrant;

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 6, paragraph 3 *(a)*.

Unfortunately, there are numerous examples of smuggled migrants having been subjected to danger in the smuggling process. This includes, for example, instances of migrants being transported in unseaworthy vessels where there was a risk of death by drowning, in sealed containers (such as shipping containers and lorries) where there was insufficient oxygen or the migrants were exposed to extreme temperatures. There are also instances of smuggled migrants being abandoned at sea, in the desert or in freezing conditions, where they have a limited chance of survival. Where these circumstances are present, those responsible should be subject to penalties higher than those penalties imposed on individuals who smuggle migrants without creating danger to life or safety.

Depending on national policy, drafters may want to consider expanding the coverage of this circumstance of aggravation to cover situations where the smuggling offence involved circumstances that endangered or were likely to endanger the life or safety not only of smuggled migrants but also other third parties. For example, the modus operandi of smugglers may involve actions that endanger the lives of public officials trying to suppress the smuggling of migrants or even trying to conduct a rescue at sea.

(b) The offence involved circumstances than entailed inhuman or degrading treatment, including for exploitation of the smuggled migrants;

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 6, paragraph 3 *(b)*.

It is mandatory to ensure that circumstances that entail "inhuman and degrading treatment, including for exploitation" are specified as circumstances of aggravation. The meaning of this phrase is not defined in the Protocol. The interpretative notes to the Protocol state that:

> The words "inhuman or degrading treatment" in subparagraph *(b)* were intended, without prejudice to the scope and application of the trafficking in persons protocol, to include certain forms of exploitation.
>
> (*Travaux Préparatoires*, p. 489.)

The phrase "inhuman and degrading treatment" is found not only in the Smuggling of Migrants Protocol but also in a range of other international instruments, including the following:

- Universal Declaration of Human Rights (article 5)
- International Covenant on Civil and Political Rights (article 7)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 16)
- Rome Statute of the International Criminal Court[29] (article 7)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 10)
- Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (article 3)
- American Convention on Human Rights (article 5)

The concept of "inhuman and degrading treatment" is not defined in any of these instruments. However, it is possible to identify some of the characteristics of treatment that has been said to constitute "inhuman or degrading treatment" by examining jurisprudence and commentary on this issue.

First, it is clear that inhuman or degrading treatment includes not only acts that cause physical suffering, but also acts that cause mental suffering to the victim.[30]

Second, "inhuman or degrading treatment" covers a range of treatment that causes physical or mental suffering but that cannot be defined as "torture" because

[29]United Nations, *Treaty Series*, vol. 2187, No. 38544.

[30]Human Rights Committee General Comment No. 20, para. 5; see also article 5, paragraph 1, of the American Convention on Human Rights, which refers specifically to the right of every person to have their "physical, mental and moral integrity respected". See also case of *Smith and Grady v. the United Kingdom* (Applications nos. 33985/96 and 33986/96), judgement at Strasbourg on 27 September 1999 § 120; and case of *Cyprus v. Turkey* (Application No. 25781/94), judgement at Strasbourg of 10 May 2001 § 157 and §309-310.

it lacks one of the requisite elements. As Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has noted, "torture" is defined in the Convention against Torture as involving acts of public officials that intentionally inflict severe physical or mental pain or suffering, in order to fulfil a certain purpose, such as the extortion of information or confessions.[31] Nowak has noted that:

> Other actions or omissions are not considered to be torture but rather, depending on the kind, purpose and severity, cruel, inhuman or degrading treatment; in these cases a certain minimum of pain or suffering is imposed, but one or several of the essential elements of the term torture are lacking: intent, fulfilment of a certain purpose, and/or intensity of the severe pain.[32]

Nowak gives the example of an Austrian prisoner forgotten by the authorities, who was left for 20 days without food or water and feared he would slowly starve to death. In view of the severe physical and mental pain it inflicted, this is considered to be an example of inhuman or cruel treatment. However, as there was no active undertaking, intent or purposefulness, it did not constitute torture.[33]

Third, treatment must meet a certain level of severity before it can constitute "inhuman or degrading treatment". Dating back to a landmark case in 1979 on the interrogation techniques put into practice by the United Kingdom on suspects in Northern Ireland, the European Court of Human Rights has held that treatment is inhuman where it was premeditated, was applied for hours at a time and caused either actual bodily injury or intense physical and mental suffering. Treatment has been held to be degrading because it was such as to arouse in the victims' feelings of fear, anguish and inferiority capable of humiliating and debasing them.[34]

It is important for drafters to consider the interaction or possible overlap between this circumstance of aggravation and pre-existing laws on trafficking in persons. As noted in the Legislative Guide, "inhuman and degrading treatment" may include treatment inflicted for the purpose of some form of exploitation. It should be noted that the presence of exploitation in what would otherwise be a smuggling case may make the trafficking offence applicable if the State party concerned has ratified and implemented the Trafficking in Persons Protocol. For example, it is very difficult to conceive of a situation where a migrant has been smuggled for the purpose of forced labour or slavery, without there also having been some element of deception or coercion in the process (the "means"

---

[31]Nowak, Manfred, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition (Kehl am Rhein, Engel, 2005), p. 161. The European Court of Human Rights has also sought to draw a line between "torture" and "cruel, inhuman and degrading treatment" in case of *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R (ser.A) (1978), in which torture is defined as treatment at the upper end of the spectrum of ill treatment.

[32]Nowak, Manfred, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, p. 161. Nowak makes this point in his report in his capacity as Special Rapporteur on Torture (E/CN.4/2006/6, para. 35).

[33]Nowak, Manfred, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, p. 161.

[34]This line of reasoning originated in case of *Ireland v. the United Kingdom*, European Court of Human Rights, 25 Eur. Ct.H.r (1978); 2 EHRR 25 (1979-1980). For a recent example of the application of this line of reasoning, see case of *Yordanov v. Bulgaria* (Application No. 56856/00), judgement at Strasbourg of 10 August 2006; case of *Cyprus v. Turkey* (Application No. 25781/94), judgement at Strasbourg of 10 May 2001 § 157 and §309-310; case of *Smith and Grady v. the United Kingdom* (Applications nos. 33985/96 and 33986/96), judgement at Strasbourg of 27 September 1999 § 120.

element of the trafficking definition). This would bring the conduct squarely within the definition of "trafficking in persons" contained in the Trafficking in Persons Protocol. As noted above, the interpretative notes indicate that the reference to exploitation here is without prejudice to that Protocol (A/55/383/Add.1, para. 96).

Drafting considerations

In many legal systems, the precise meaning of the phrase "inhuman and degrading treatment, including exploitation" will be left to the courts for judicial consideration. If however, there is a preference to define the meaning of this term, the following definition (based on the legislation noted above) may prove useful:

> Inhuman or degrading treatment includes treatment inflicted by any person that causes severe physical or mental pain, suffering or injury, or feelings of fear, anguish or inferiority that are capable of humiliating and debasing a person.

As the concept of "inhuman and degrading treatment" tends to be applied more commonly to public officials, it may be important to note that this concept is intended to apply to treatment inflicted by "any person" (whether a public official or a private individual).

Example 1

98E: Aggravating factors:

(1) When determining the sentence to be imposed on, or other way of dealing with, a person convicted of an offence against section 98C or section 98D, a court must take into account —

(a) Whether bodily harm or death (whether to or of a person in respect of whom the offence was committed or some other person) occurred during the commission of the offence;

[…]

(c) Whether a person in respect of whom the offence was committed was subjected to inhuman or degrading treatment as a result of the commission of the offence;

[…]

(2) When determining the sentence to be imposed on, or other way of dealing with, a person convicted of an offence against section 98D, a court must also take into account —

(a) Whether a person in respect of whom the offence was committed was subjected to exploitation (for example, sexual exploitation, a requirement to undertake forced labour, or the removal of organs) as a result of the commission of the offence.

(Section 98E, Crimes Act 1961, New Zealand.)

Example 2

Article 77 quater, 3°, 4° or 5° of the Aliens Act of 1980, Belgium, provides that the following are circumstances of aggravation:

- Direct or indirect violence or coercion
- Abuse of a particularly vulnerable situation of a person because of his or her illegal or precarious administrative situation, social situation, a pregnancy, illness or mental or physical disability or deficiency, such that a person has no other real and acceptable choice than to submit to the abuse
- When the life of the victim is put in danger, deliberately or by serious negligence (e.g. letting the victim starve to death)
- When there are serious consequences for the mental or physical health of the migrant.

Example 3

Section 171a. Crossing state borders without permission and smuggling

(2) A person who carries out the crimes referred to in Subsection 1 shall be sentenced to deprivation of liberty for 5-10 years if:

[…]

(c) They carry out the crime in a manner that threatens the life or health of the persons transferred or that represents inhumane or humiliating treatment of these persons, or their abuse;

[…]

(4) A person found guilty of a crime referred to in Subsection 1 shall be sentenced to deprivation of liberty for 8-12 years if the crime:

(a) Causes grievous bodily harm or death … .

(Act No. 300/2005, Penal Code, Slovak Republic.)

Example 4

5. If one of the offences described in the first and third paragraphs results in severe bodily injuries or it is feared that a person's life may be in jeopardy, a penal sentence of a maximum of 12 years or a pecuniary penalty of the fifth category will be awarded.

6. If one of the offences described in the first and third paragraphs results in death, a penal sentence of a maximum of 15 years and a pecuniary penalty of the fifth category will be awarded.

(Criminal Code, article 197a, Smuggling of Human Beings, Netherlands.)

(c) The offence involved serious injury or death of the smuggled migrant or another person, including death as a result of suicide;

Commentary

Optional

This option reflects the focus in article 6, paragraph 3 *(a)*, of the Protocol on circumstances that endanger smuggled migrants. Paragraph *(c)* applies to cases in which the smuggling resulted in serious injury or death, rather than simply exposing the migrants to that risk. National drafters may want to give guidance on establishing what constitutes a "serious injury" as defined in paragraph *(c)* of this article of the Model Law.

This option refers to serious injury or death to a smuggled migrant but also to "another person". This additional inclusion may be relevant if, for example, the smuggling process involves a modus operandi that endangers public officials trying to suppress the smuggling of migrants.

(d) The offender [took advantage of] [abused] the particular vulnerability or dependency of the smuggled migrant for financial or other material gain;

Commentary

Optional

Depending on national policy, there may be a desire to establish as aggravating circumstances situations where the offender "took advantage of" or "abused" the smuggled migrant for particular financial or material gain.

The following scenarios provide some examples:

- Migrants, abandoned in the desert and with no other option, accept the services of a smuggler who happens to be passing by, but have to pay him or her three times the normally agreed price when departing from the nearest city.
- An agent, as part of the smuggling "package of services", arranges for the migrants to rent a rundown house that he owns in a transit city for a very inflated amount of rent, and to buy packages of food that he provides at greatly inflated prices, while the migrants wait for their next connection.

(e) The offender has committed the same or similar offences before;

(f) The offence was committed as part of the activity of an organized criminal group;

(g) The offender used drugs, medications or weapons in the commission of the offence;

Commentary

Subparagraphs *(e)-(g)* are optional.

These circumstances of aggravation are intended to reflect the focus of the Protocol and the Convention on organized crime.

(h) The offence involved [a large number of] smuggled migrants;

Commentary

Subparagraph *(h)* is optional.

Depending on local conditions, it may be relevant to consider adding a circumstance of aggravation for offences involving large groups or large numbers of smuggled migrants. Offences that involve smuggling a large number of migrants may result in a heavier burden on the receiving State, and such offences may provide a greater profit for offenders. Some States, such as the United Kingdom, have sought to differentiate between situations where the "large group" of migrants involved members of a single, extended family group and situations where the migrants were not related to each other. The latter situation is considered a circumstance of aggravation, whereas the former is not. In a new bill to amend the Australian penal provisions on smuggling of migrants, smuggling of more than five persons is considered an aggravated offence.

(i) The offender was, at the relevant time, a public official;

(j) The offender abused his or her position of authority or position as a public official in the commission of the offence;

Commentary

Subparagraphs *(i)* and *(j)* are optional.

These circumstances of aggravation recognize the particular role that public officials have in facilitating the smuggling process by issuing false documents or allowing people through checkpoints without conducting a proper check. The Convention also focuses on the role of corruption in facilitating transnational organized crime (Organized Crime Convention, arts. 8 and 9).

Where there is not already a suitable definition of "public official" in national law, it may be necessary to include a definition such as the following:

"Public official" means:

(a) Any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; or

(b) Any other person who performs a public function, including for a public agency or public enterprise, or provides a public service.

For consistency, this definition is identical to the definition used in the Model Law against Trafficking in Persons. As noted in that Model Law, if national laws already contain a broader definition of "public official", that definition could be used for the purposes of the law on smuggling of migrants. It should be noted that the conduct described in subparagraphs *(i)* and *(j)* may be criminalized as specific offences under the Organized Crime Convention and the Convention against Corruption.

Example 1

The sentence established in this article [for smuggling of migrants] shall be increased a third when the author or accomplice is a government official or when minors are used to committing these crimes.

(Article 245, Aliens and Migration Law (Decree No. 8487), Costa Rica.)

Example 2

When the described behaviours included in the previous articles from this title [including migrant smuggling], are done with respect to minors, in conditions or by any means that endangers any person's health, integrity or life, or when actions are committed by a civil or a public employee, the sentence shall be increased in one third.

(Article 108 of the Migration Law (Decree No. 95-98), Guatemala.)

Example 3

3. If one of the offences described in the first and third paragraphs [smuggling of migrants or enabling illegal residence] be committed while exercising any office or practising any profession, a penal sentence of a maximum of six years or a pecuniary penalty of the fifth category will be awarded and the holder may be disqualified from holding that office or practising that profession and the judge may order his sentence to be made public.

4. If one of the offences described in the first and third paragraphs [smuggling of migrants or enabling illegal residence] is committed by a person who makes a profession of doing so or who habitually does so, or by several persons acting in association, a penal sentence of a maximum of eight years or a pecuniary penalty of the fifth category will be awarded.

(Criminal Code, article 197a, Smuggling of Human Beings, Netherlands.)

Example 4

If the author [of the crime of smuggling of migrants] is an authority, civil employee or public employee, the minimum and maximum limits of the previously predicted sentence will be increased a third, in addition to a special incapacitation from holding public office for the same length of time.

(Article 318, Smuggling of Illegal Migrants, Penal Code, Nicaragua.)

(k) The smuggled migrant is a child;

(l) The offender used a child as an accomplice or participant in the criminal conduct;

Commentary

Subparagraphs *(k)* and *(l)* are optional.

While these provisions are optional, their inclusion is supported by article 16, paragraph 4, of the Smuggling of Migrants Protocol, as well as by various human rights protections such as contained in the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (Convention No. 182), of the International Labour Organization.[35]

In some contexts, smugglers are known to use children in the commission of offences (for example, children are used as crew on vessels). This is not a reason to criminalize the conduct of children. Instead, this is a reason to ensure that those responsible for abusing children in this way are given more severe penalties. For example, in an Australian case, the crew of an Indonesian fishing vessel were charged with people smuggling offences. Among the crew was a 14-year-old and a 15-year-old. In the first instance, the court ordered the 14-year-old to forfeit the money he had in his pockets as punishment, and the 15-year-old was sentenced to a wholly suspended six-month sentence. On appeal, the Crown argued that the sentences were manifestly inadequate. However, the appeal judge rejected this argument, noting that:

> I reject the argument that because those who organize this trade are choosing to employ juveniles as crew because of perceived leniency afforded to them, this is a proper reason for imposing condign punishment on juvenile first offenders. The proper response to this kind of behaviour is to more severely punish the adults who recruit, employ or use such children.
>
> (Curtis and Sidik and Najar [1999] NTSC 135 (Supreme Court of the Northern Territory of Australia).)

(m) The smuggled migrant is pregnant;

(n) The smuggled migrant has an intellectual or physical disability;

[35]United Nations, *Treaty Series*, vol. 2133, No. 37245.

Commentary

Subparagraphs *(m)* and *(n)* are optional.

While these provisions are optional, their inclusion is supported by article 16, paragraph 1 and 4, of the Smuggling of Migrants Protocol and various human rights protections in the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Violence against Women.

It is relevant to note that according to article 1 of the Convention on the Rights of Persons with Disabilities, "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

(o) The offender used or threatened to use any form of violence against the smuggled migrant or their family;

Commentary

Optional

While this provision is optional, a focus on violence against smuggled migrants is supported by article 16, paragraph 2, of the Smuggling of Migrants Protocol, which requires State parties to take appropriate measures to afford smuggled migrants appropriate protection against violence that may be inflicted on them by reason of being the object of smuggling of migrants.

As noted in relation to other circumstances of aggravation, it may be appropriate to extend coverage of this provision to situations where the offender used or threatened to use any form of violence, not only against the smuggled migrant or their family, but also against "any other person".

(p) The offender confiscated, destroyed or attempted to destroy the travel or identity documents of the smuggled migrant.

Commentary

Optional

The destruction and confiscation of travel documents can suggest a change from the offence of smuggling of migrants to that of trafficking in persons, because control over the migrant's travel documents indicates an intention to control the legitimate owner of those documents. Accordingly, destruction and confiscation of travel documents are suggested as a particular circumstance of aggravation.

The importance of this issue is recognized in article 21 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides that:

It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.

Additional drafting considerations: mitigating circumstances

As noted above, in some contexts it may be appropriate to include both aggravating and mitigating circumstances. No specific drafting suggestions are made on this issue. However, a selection of "mitigating factors" are noted in the *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, including the following: where no risk is placed on smuggled migrants by virtue of the smuggling methodology used; where the smuggling is a one-off occasion; and where the offender cooperates with law enforcement officials.

Example 1

In Belgium, the following are considered circumstances of aggravation:

- Being a member of a minority (e.g. art.77quater, 1°) or the particular vulnerability of the victim
- Abuse of the particular vulnerability of the victim (e.g. art.77quater, 2°)
- Use of violence or threat (e.g. art.77quater, 3°)
- The offender is a public official (e.g. art.77ter, 2°)
- Abuse of authority or of the facilities of the function exercised (e.g. art.77ter, 1°)
- Having caused a serious illness, incapacity or ailment (e.g. art.77quater, 5°)
- The habit to commit the offence (e.g. art.77quater, 6°) or recidivism
- Having caused the death (e.g. art.77quinquies, 1°)
- Participation to the main or incidental activity of an association, whether the culprit has or not the quality of leader (a gang of criminals) (e.g. art.77quater, 7°)
- Participation to the main or incidental activity of a criminal organization, whether the culprit has or not the quality of leader (e.g. art.77quinquies, 2°)

(Aliens Act of 1980, Belgium.)

Example 2

Section 171a, Crossing state borders without permission and smuggling

(2) A person who carries out the crimes referred to in Subsection 1 shall be sentenced to deprivation of liberty for five years to ten years if:

(a) They are a member of an organized group;

(b) They seek to conceal or facilitate the carrying out of another crime; or

(c) They carry out the crime in a manner that threatens the life or health of the persons transferred or that represents inhumane or humiliating treatment of these persons, or their abuse.

(3) A person convicted of a crime referred to in subsection 1 shall receive the same sentence as in subsection 2 if they gain major benefits for themselves or another person thereby.

(4) A person found guilty of a crime referred to in subsection 1 shall be sentenced to deprivation of liberty for eight years to twelve years if the crime:

(a) Causes grievous bodily harm or death; or

(b) Brings significant benefit to the perpetrator or another person.

(5) A person convicted of a crime referred to in subsection 1 shall receive the same sentence as in subsection 4 if they carry out the crime as a member of a criminal group.

(6) A person convicted of a crime referred to in subsection 1 shall be sentenced to deprivation of liberty for 10 years to 15 years if the crime causes the death of more than one person.

(Act No. 300/2005, Penal Code, Slovak Republic.)

Example 3

A prison term of two to six years shall be imposed on anyone who conducts or transports persons into or out of the country via locations not authorized by the relevant immigration authorities, avoiding the established immigration controls or submitting false information or false or forged documents. The same penalty shall be imposed on anyone who, in any manner, encourages, promises or facilitates the acquisition of false or forged documents and on anyone who, with the aim of promoting illicit trafficking in migrants, houses, hides or harbours foreigners entering or residing in the country illegally. The penalty shall be three to eight years' imprisonment when:

(1) The migrant is a minor;

(2) The migrant's life or health is endangered owing to the conditions under which the offence is committed or severe physical or mental suffering is inflicted upon the migrant;

(3) The perpetrator or an accessory is a public servant;

(4) The offence is committed by an organized group of two or more persons.

(Article 249, Section XV, of the General Law on Migration and Aliens, No. 8764, Costa Rica)

Article 7. Abuse of vulnerability of smuggled migrants

A person who intentionally [takes advantage of] [abuses] the obvious [apparent] or known vulnerability or dependency of a smuggled migrant, including

vulnerability or dependency that arises from having entered or being in the State illegally or without proper documentation, pregnancy, physical or mental disease, disability or reduced capacity to form judgements by virtue of being a child, for profit or other material benefit, commits an offence punishable by [*insert penalty*].

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 16, paragraphs 1 and 3.

Under article 16, paragraph 1, of the Protocol, States parties are obliged to take all measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct criminalized by this Law. The reality is that the rights of many smuggled migrants are abused or improperly taken advantage of in the smuggling process or in the destination country. This is exacerbated by the fact that smuggled migrants fear detection by the authorities and they may have heavy financial obligations to smugglers. This results in situations where smuggled migrants are subjected to abusive and inhuman conditions of life, work or travel. In some instances, the exploitation may be so severe that it should most properly be prosecuted as a trafficking in persons case, or as another serious crime such as murder or manslaughter. However, experience suggests that migrants are subjected to a range of abusive or harsh treatment, most of which is not so severe as to fall within the meaning of “exploitation” as it is defined in the context of trafficking in persons cases. For example, a slum landlord who charges smuggled migrants excessive rent for rooms that are overcrowded and without basic facilities such as water or sanitary facilities would not likely fall within the scope of anti-trafficking laws. As another example, the conduct of a person who comes across a group of smuggled migrants dying in the desert and offers to take them to the nearest water hole but only in return for all their money and possessions would not fall within the meaning of trafficking in persons. In some contexts, these situations may unfortunately be so prevalent that a specific focus on this type of conduct may be warranted.

This provision reflects a trend towards a focus on these forms of abuse or exploitation. There are already a number of national examples that could be drawn upon, including the laws of France and Austria:

> Article 225-13 Penal Code: Obtaining the performance of unpaid services or services against which a payment is made which clearly bears no relation to the importance of the work performed from a person whose vulnerability or dependence is obvious or known to the offender is punished by five years’ imprisonment and a fine of €150,000.
>
> (Penal Code, France.)
>
> Article 225-14 Penal Code: Subjecting a person, whose vulnerability or dependence is obvious or known to the offender, to working or living conditions

incompatible with human dignity is punished by five years' imprisonment and by a fine of €150,000.

(Penal Code, France.)

(1) Any person who, with the intention of procuring for himself or a third party a regular income by taking advantage of the particular dependency of an alien who is residing unlawfully in Austria, has no work permit, or is otherwise in a state of particular dependency, exploits that alien, shall be liable to a term of imprisonment not exceeding three years imposed by a court.

(2) Any person who, through that act, subjects an alien to deprivation, or exploits a large number of aliens, shall be liable to a term of imprisonment of between six months and five years.

(3) Where the act results in the death of an alien, the perpetrator shall be liable to a term of imprisonment between one and 10 years.

(Article 116, 2005 Aliens Police Act, Austria.)

Following a similar line of thought, Belgium has a law that targets "sleep merchants":

CHAPTER III quater. — Abuse of the particular vulnerability of others by selling, renting or providing goods in order to make an abnormal profit

Art. 433 decies. Any person who abuses, either directly or through an intermediary, the particularly vulnerable position of a person because of his illegal or precarious administrative situation or his precarious social situation, by selling, renting or providing, with the intent to make an abnormal profit, personal property, a part thereof, real property, a room or another space given in article 479 of the Penal Code in conditions incompatible with human dignity, such that the person has no other real and acceptable choice than to submit to this abuse, shall be punished by imprisonment of six months to three years and a fine of 500 euros to 25,000 euros. The fine shall be applied as many times as there are victims.

(Penal Code, Belgium.)

Finally, a recent European Directive providing for sanctions against employers of illegally staying third-country nationals introduces the concept of "particularly exploitative working conditions", which includes situations where there is a "significant difference in working conditions from those enjoyed by legally employed workers" (Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, article 10 *(c)*).

Article 8. Ancillary [additional] measures

Where any person has been found guilty of an offence under this Law, a court may, in addition to any penalty imposed under this Law and without limiting any other powers of the court, order the following measures:

(a) Confiscation of assets, proceeds of crime and instruments of crime;

(b) Payment of restitution or compensation to victims of crime;

(c) Publicizing the legal decision;

(d) Prohibiting the exercise, directly or indirectly, of one or more social or professional activities permanently or for a maximum period of [*insert time period*];

(e) Temporary or permanent closure of any establishment or enterprise that was used to commit the offence in question;

(f) Exclusion from public bidding [and/or] from entitlement to public benefits or aid;

(g) Temporary or permanent disqualification from participation in public procurement;

(h) Temporary or permanent disqualification from practice of other commercial activities and/or from creation of another legal person; and

(i) Any other non-custodial measures as appropriate.

Commentary

Optional

Source: Smuggling of Migrants Protocol, articles 2 and 4, and article 11, paragraph 5.

This provision is optional, as the availability of similar ancillary measures may already be addressed in existing national laws or practices. However, they are noted as a suggestion following input from the expert working group meeting on the model law against the smuggling of migrants. It is also important to note article 11, paragraph 5, of the Protocol, which provides that States parties shall consider taking measures that permit, in accordance with domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with the Smuggling of Migrants Protocol.

These ancillary measures are intended to support the interests of criminal justice by ensuring that the courts can take a wide range of measures to sanction the behaviour of offenders, including confiscating assets and the proceeds of crime. This is intended to minimize the potential that offenders will have the financial resources and capacity to engage in these offences again in future. The language used is "without limiting" any powers of the court so as not to interfere with judicial independence. These measures are "in addition" to any other measures, to reflect the reality that in some contexts, there may be additional mechanisms that could be relied upon (for example, there may already be national laws on the recovery of proceeds of crime and on the payment of compensation to victims of crime). Also, the article includes a "catch-all" reference to "any other measures" that the court considers relevant. This could include a variety of measures that are considered useful at the local level.

Article 9. Criminal liability of smuggled migrants

Without prejudice to the applicability of other laws establishing criminal offences, migrants shall not become liable to criminal prosecution under this Law for the fact of having been the object of conduct set forth in chapter II of this Law.

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 5; also note article 6, paragraph 4, of the Protocol.

In accordance with article 5 of the Protocol, a person cannot be charged with the crime of smuggling for having been smuggled. This does not mean that they cannot be prosecuted for having smuggled others, or for the commission of any other offences. For example, many countries have laws that criminalize conduct such as possession of fraudulent travel documents or illegal entry.

The Legislative Guide notes the following:

> As noted above, the fundamental policy set by the Protocol is that it is the smuggling of migrants and not migration itself that is the focus of the criminalization and other requirements. The Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences: article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalization of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organized criminal groups. At the same time, article 6, paragraph 4, ensures that nothing in the Protocol limits the existing rights of each State party to take measures against persons whose conduct constitutes an offence under its domestic law.
>
> (Legislative Guide, page 347, para. 50.)

The Legislative Guide further notes that:

> Generally, the purpose of the Protocol is to prevent and combat the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration, even if illegal under other elements of national law. This is reflected both in article 5 and article 6, paragraph 4, as noted above, and in the fact that the offences that might otherwise be applicable to mere migrants, and especially the document-related offences established by article 6, paragraph 1 *(b)*, have been formulated to reduce or eliminate such application. Thus, for example, a migrant caught in possession of a fraudulent document would not generally fall within domestic offences adopted pursuant to paragraph 1 *(b)*, whereas a smuggler who possessed the same document for the purpose of enabling the smuggling of others would be within the same offence.

(Legislative Guide, page 349, para. 54.)

Note that if drafting options B or C of chapter II of the Model Law is used, this issue will not arise, as both options refer to actions against "another".

It is also important to note article 31, paragraph 1, of the 1951 Convention relating to the Status of Refugees, which specifically obliges States not to impose penalties on refugees who "coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present … without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence". Accordingly, it is vital that smuggled migrants falling within this category not be penalized for their unlawful entry. If this issue is not already addressed in national migration or asylum laws, it may be necessary to insert additional language into any law on smuggling of migrants on this issue.

Resource: "Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees", Geneva expert round table entitled "Global Consultations on International Protection", organized by the Office of the United Nations High Commissioner for Refugees and the Graduate Institute of International and Development Studies in Geneva on 8 and 9 November 2001.

Article 10. Duty of and offence by commercial carriers

1. Any [commercial carrier] [natural person responsible for the operation of the commercial carrier as a legal person] that fails to verify that every passenger possesses the identity and/or travel documents required to enter the destination State and any transit State, [commits an offence and] is liable to a fine of [*to be inserted*].

2. Any [commercial carrier] [natural person responsible for the operation of a commercial carrier] that fails to [report to] [notify] the competent authorities that a person has attempted to or has travelled on that carrier without the identity and travel documents required to enter the destination

State or any transit State with knowledge or in reckless disregard of the fact that the person was a smuggled migrant, [commits an offence and] [in addition to any other penalty provided in any other law or enactment] is liable to a fine [*to be inserted*].

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 11, paragraphs 2 and 3.

Article 11, paragraph 2 of the Smuggling of Migrants Protocol requires States parties to adopt legislative and other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of smuggling of migrants. Article 11, paragraph 3, provides that "where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers … to ascertain that all passengers are in possession of the travel documents required for entry". As noted in the interpretative notes, this paragraph "requires States parties to impose an obligation on commercial carriers only to ascertain whether or not passengers have the necessary documents in their possession and not to make any judgement or assessment of the validity or authenticity of the documents" (A/55/383/Add.1, para. 103).

As an identical obligation appears in the Trafficking in Persons Protocol, for consistency the provision used in the Model Law is based on the provision on this issue contained in the Model Law against Trafficking in Persons. However, additions have been made on exemption from carrier liability, in circumstances where the smuggled migrant has submitted an asylum claim or has been granted refugee status or a complementary form of protection; and also where entry results from a rescue, either at sea or elsewhere.

In some legal systems, criminal liability falls on the natural persons responsible for the legal person, even though some of the penalties, sanctions or measures will be imposed on the legal person itself. Accordingly, the two options for paragraph 1 of article 10 presented above refer to either the "commercial carrier" or the "persons responsible for operating the commercial carrier" such as a company director or senior manager responsible for operations. Also, options are included to refer to an "offence" having been committed or provide that the entity is "liable to pay a fine of".

As noted in the commentary on the Model Law against Trafficking in Persons, there are several ways to fulfil the obligation under article 11: the inclusion of a provision in criminal law is only one option. In many countries, it may be more appropriate to address this issue through civil regulatory laws. An example of such a regulation is the following:

1. Any [commercial carrier] [person who engages in the international transportation of goods or people for commercial gain] must verify that every passenger possesses the identity and/or travel documents required to enter the destination country and any transit countries.

2. A commercial carrier is liable for the costs associated with the person's accommodation in and removal from [State].

The following examples are taken from national legislation and regulations.

Example 1

Responsibilities of International Transportation Companies

(a) International transportation companies must verify that every passenger possesses the necessary travel documents, including passports and visas, to enter the destination country and any transit countries.

(b) The requirement in *(a)* applies both to staff selling or issuing tickets, boarding passes or similar travel documents and to staff collecting or checking tickets prior to or subsequent to boarding.

(c) Companies which fail to comply with the requirements of this section will be fined [insert appropriate amount]. Repeated failure to comply may be sanctioned by revocation of licenses to operate in accordance with [applicable law] [*insert reference to law governing revocation of licences*].

(United States State Department, Legal Building Blocks to Combat Trafficking in Persons, §400, released by the Office to Monitor and Combat Trafficking in Persons, February 2004.)

Example 2

1. International transportation companies have the obligation to verify, on issuing the travel document, whether their passengers possess the required identification for entry in their transit or destination country.

2. The obligation stipulated in paragraph 1 is also shared by the driver of the international road transportation vehicle on admitting passengers on board, as well as in the case of staff responsible for verifying travel documents.

(Law on the Prevention and Combat of Trafficking in Human Beings, article 47, Romania.)

3. A commercial carrier [does not commit an offence] [is not liable to a fine] under this article if:

(a) There were reasonable grounds to believe that the documents that the transported person has are the travel documents required for lawful entry in [*name of State*];

(b) The transported person possessed the lawful travel documents when boarded, or last boarded the means of transport to travel to [*name of State*];

(c) The entry into [*name of State*] occurred only because of circumstances beyond the control of the [commercial carrier] [person who engages in the transportation of goods or people for commercial gain];

(d) The entry into [*name of State*] resulted from a rescue [at sea].

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 11, paragraphs 2 and 3.

The interpretative notes to the Smuggling of Migrants Protocol note that measures and sanctions applied in accordance with article 11, paragraph 2, of the Protocol should take into account other international obligations of the State party concerned. Carrier sanctions should not be allowed to interfere with the long-standing obligation on shipmasters to render assistance to those in distress at sea. Article 7 of the Protocol provides that States parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea. The interpretative notes to the Protocol note that:

> The international law of the sea includes the United Nations Convention on the Law of the Sea as well as other relevant international instruments. References to the United Nations Convention on the Law of the Sea do not prejudice or affect in any way the position of any State in relation to that Convention.
>
> (A/55/383/Add.1, para. 98; *Travaux Préparatoires*, p. 494.)

Accordingly, the obligations in the Protocol, including the obligation to ensure that commercial carriers are not used to transport smuggled migrants, remain subject to existing obligations under the United Nations Convention on the Law of the Sea. As noted in the commentary to article 25 of the Model Law, a shipmaster has an obligation to render assistance to those in distress at sea (also see the discussion under article 25 of the Model Law). That obligation is a longstanding maritime tradition and an obligation under international law. Depending on the particular geography of the territory of the States parties and the modus operandi of smugglers in their region, States parties may want to consider other relevant exemptions for commercial carriers involved in rescue situations. For example, if smuggled migrants are found stranded in the desert, they should not be ignored by passing commercial carriers simply out of fear of prosecution under carrier liability provisions.

4. A commercial carrier is not liable under this article when the persons it transported were provided protection against refoulement and/or access to the asylum system by [the competent authorities] [in accordance with the provisions of the [*relevant act*]].

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 11, paragraphs 2 and 3.

This provision is optional and applies to States that are parties to the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the

Status of Refugees. States which have a specific law implementing the provisions of the 1951 Convention and its Protocol may refer to it in this provision.

The interpretative notes to the Smuggling of Migrants Protocol note that measures and sanctions applied in accordance with article 11, paragraph 2, of the Protocol should take into account international obligations of the State party concerned, including the 1951 Convention and 1967 Protocol relating to the Status of Refugees, as specifically underlined by article 19 of the Smuggling of Migrants Protocol:

> It should further be noted that this paragraph does not unduly limit the discretion of States parties not to hold carriers liable for transporting undocumented refugees and that article 19 preserves the general obligations of States parties under international law in this regard, making specific reference to the 1951 Convention and 1967 Protocol relating to the Status of Refugees. Article 11 was also adopted on the understanding that it would not be applied in such a way as to induce commercial carriers to impede unduly the movement of legitimate passengers.
>
> (A/55/383/Add.1, para. 103; *Travaux Préparatoires*, 521.)

Article 11. Facilitating entry or stay for justice processes

The [competent authority] [Minister] may grant a [visa] [residence permit] to a smuggled migrant in order to facilitate the [investigation and/or] prosecution of an offence under this Law.

Commentary

Optional

Source: This article is intended to support the practical achievement of the obligation to criminalize certain conduct set out in article 6.

While not required by the Protocol, experience suggests that the cooperation of smuggled migrants is essential for the detection, investigation and prosecution of smugglers. For example, smuggled migrants may be the only witnesses to the smuggling process. As a result, they may be the only people who can provide reliable intelligence or who can testify as to who was directing the smuggling process, who served as an escort, and who was simply another smuggled migrant. Given the importance of actively pursuing the investigation and prosecution of persons responsible for smuggling of migrants, practical steps may need to be taken to ensure that smuggled migrants can, where appropriate, remain in the country (or return) to participate in justice processes. The exact form that this will take depends on national law: for example, some countries such as the United States use the mechanism of "parole"; other countries give temporary visas; other countries provide residence permits. Accordingly, this provision will need to be

adjusted to ensure it is consistent with general principles regarding immigration and visa rules.

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

Belgium has amended its laws so that certain smuggled migrants, in particular those who have experienced aggravated smuggling, have access to the protection systems designed for victims of trafficking in persons. For example, the protection system can be accessed if, for example, the victim was seriously endangered by the crime, if the smuggling resulted in the victim being disabled, or if the victim was a child (77quater, 1°-5°, of the Law of 15 December 1980, Belgium.) The reflection period serves as a transition period during which the smuggled migrant can decide whether he or she is willing to make a statement or file a complaint.

Example 1

Aliens whose unlawful entry or transit is assisted by the act shall not be penalized as parties to the offence (article 12 of the Criminal Code). Their expulsion or deportation may be delayed where and in so far as this is necessary in order to question them as to the facts of the case.

(Article 114(6), 2005 Aliens Police Act, Austria.)

Example 2

(5)(A). The Attorney General may, except as provided in subparagraph *(b)* or in section 214 *(f)*, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of an alien shall not be regarded as an admission of the alien and when the purposes of the parole shall, in the opinion of the Attorney-General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(United States, Immigration and Nationality Act s.212 *(d)* (5).)

Example 3

1. The foreign national who has crossed the Spanish border outside the steps established for this purpose or who has not complied with his obligation to declare entry and is in Spain illegally or working without permission, without documentation or with illegal documentation, through having been victim of, harmed by, or witness to an act of illicit trafficking in human beings, illegal immigration, or trafficking in manpower or exploitation through prostitution by the abuse of his or her situation of necessity, may be declared exempt from administrative responsibility and not expelled if he or she reports to the appropriate authorities the perpetrators or cooperatives of said trafficking, or cooperates and collaborates with the competent immigration officials, providing essential information or testifying, if it be the case, in the corresponding legal proceedings taken against said perpetrators.

2. The competent administrative bodies charged with examining the sanctioning order shall present the appropriate proposal to the authority which must resolve it.

3. Foreign nationals declared exempt from administrative responsibility may be granted, at their choice, repatriation to their country of origin or residency in Spain, as well as a work permit and assistance in their social integration, in accordance with what is established in the present Law.

4. When the Public Prosecutor becomes aware that a foreign national against whom an expulsion order has been issued appears in a criminal procedure as victim, injured party or witness and considers that said foreigner's presence is essential for the carrying out of judicial proceedings, it shall be manifested to the competent governmental authority that non-execution of the expulsion is called for and, in the case of its having already been executed, in like manner the foreigner's return to Spain shall be authorized for the time necessary to carry out the necessary proceedings, without dismissing the possibility that the measures provided for in Organic Law 19/1994 of 23 December may be adopted for the protection of witnesses and experts in criminal cases.

(Article 59 of Organic Law 8/2000 of 22 December 2000, Spain.)

Example 4

The administrative immigration measures of protection and prevention established in this Decree Law and its regulation will be applied to the regular or irregular migrant that cooperates in the investigation of the illegal activities listed above.

(Article 81-4, Title VIII, Protection of Victims, Decree Law No. 3 of 22 February 2008, Panama.)

Chapter III. Protection and assistance measures

Commentary

As noted in the commentary to article 1 of the Model Law, certain rights are inalienable and apply to everyone, regardless of their migration status. Under the Smuggling of Migrants Protocol, States parties have agreed to ensure that inalienable rights arising from human rights, refugee and humanitarian law are not compromised in any way in the implementation of measures to counter the smuggling of migrants.

In addition to these general rights, several more specific rights have been restated in the Smuggling of Migrants Protocol. In particular, States parties are required to take all appropriate measures:

- To protect smuggled persons from death, torture or other cruel, inhuman or degrading treatment or punishment (article 16, paragraph 1)
- To protect smuggled migrants from violence (article 16, paragraph 2)
- To provide appropriate assistance to persons whose lives or safety are endangered by smugglers (article 16, paragraph 3)
- To provide information on consular notification and communication (article 16, paragraph 5)
- To refer asylum-seeking migrants to the asylum procedure (article 19, paragraph 1)

In applying all these measures, States parties are obliged to take into account the special needs of women and children (article 16, paragraph 4).

The precise manner in which these obligations are achieved is likely to include a range of measures: national laws and, most likely, relevant policies and procedures. Also, the Legislative Guide notes that drafters may also be required to adjust the language of existing legislative provisions to ensure that they are not applied in a manner which is discriminatory to smuggled migrants or illegal residents by virtue of their status as such (Smuggling of Migrants Protocol, article 19, paragraph 2).

Article 12. Right to urgent medical care

1. Smuggled migrants shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of [*name of State*].

2. Such emergency medical care shall not be refused to them by reason of any irregularity with regard to their entry or stay in [*name of State*].

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 16, paragraph 1.

While compliance with the obligation to preserve and protect the rights of smuggled migrants is mandatory (including the right to life), the manner in which it is achieved may vary.

Every human being has the inherent right to life (International Covenant on Civil and Political Rights, article 6, paragraph 1). This is restated in article 16, paragraph 1, of the Protocol, under which States parties agree to take all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been smuggled, in particular their right to life, and their right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee, the body tasked with oversight of the International Covenant on Civil and Political Rights, has noted that the right to life is the supreme right of which no derogation is permitted. In its General Comment No. 6 (1982), on the right to life, the Committee notes that "the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."

While the right of all persons, irrespective of migration status, to access emergency medical care is not clearly defined, it can be extrapolated from the right to life set out in the International Covenant on Civil and Political Rights. As the Human Rights Committee has observed, it is incumbent on States parties to the Covenant to ensure that that right is not interpreted narrowly, as protection of the right to life will frequently require positive action on the part of States parties. If that reasoning is applied, it follows that part of giving practical application to this right is to ensure that whenever a person (including a smuggled migrant) is in need of emergency medical care, they should be provided with such care, irrespective of considerations such as their immigration status. A denial or refusal of emergency medical care in a situation where this would have life-threatening consequences is clearly a violation of the right to life. This right has particular resonance in the smuggling of migrants context as smuggled migrants may be intercepted by the authorities after they have been locked in shipping containers without adequate air or food, or after they have undertaken long, dangerous journeys. They may be in need of the necessities of life (food, water, shelter), in addition to medical care.

The drafting option provided here is based on article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides that:

> Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or

the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

The human right to health is guaranteed in article 12, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, in which States parties to the Covenant recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The Committee on Economic, Social and Cultural Rights, in its General Comment No. 14 (2000), on the right to the highest attainable standard of health, states that "States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal migrants, to preventative, curative and palliative health services; and abstaining from enforcing discriminatory practices as State policy …". (E/C.12/2000/4)

Article 13. Protection of migrants against violence

The [competent authority] [Minister] [shall take appropriate measures] [shall develop guidelines on appropriate measures] [shall issue orders on appropriate 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 conduct described in chapter II of this Law. These measures shall take into account the special needs of women and children.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 16, paragraphs 2 and 4.

Pursuant to article 16, paragraph 2, of the Protocol, States parties are obliged to take appropriate 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 conduct criminalized by article 6 of the Protocol. In the application of article 16, States parties are required to take into account the special needs of women and children (article 16, paragraph 4, of the Protocol).

The Protocol does not provide guidance on what is meant by "appropriate measures" of protection. This will need to be decided at the national level, bearing in mind the types of violence likely to be inflicted on smuggled migrants, the situations where violence may arise, the communities and individuals that may be affected, and the resources that are available to respond to these issues. For example, some States may have dedicated crime prevention programmes, and the potential for victimization of smuggled migrants should be considered in the development of these programmes. Other States provide support programmes to

their nationals overseas through their embassies in major destination countries (see national example below). In other instances, protection will need to include ensuring that migrants have access to physical protection, through law enforcement.

Example

As one of the world's major origin countries of migrant workers, the Philippines has enacted a range of measures to ensure that migrant workers can access their rights in their destination countries, regardless of whether they are in distress. While migrant workers in general are not all smuggled migrants, the protection measures enumerated under the Migrant Workers Act of 1995 (Republic Act No. 8042) can be provided to smuggled migrants. The protection measures include, among other things, the establishment of an emergency repatriation fund, the mandatory repatriation of underage migrant workers and the establishment of Migrant Workers and other Overseas Filipinos Resource Centres. The centres are located on the premises and under the administrative jurisdiction of the Philippine embassies in countries with large concentrations of Filipino migrant workers.

The centres provide a range of assistance, including:

- Counselling and legal services
- Welfare assistance including the procurement of medical and hospitalization services
- Information, advice and programmes to promote social integration such as post-arrival orientation, settlement and community networking services for social integration
- Schemes for the registration of undocumented workers
- Human resource development, such as training and upgrading of skills
- Gender-sensitive programmes and activities to assist particular needs of women migrant workers
- Orientation programme for returning workers and other migrants
- Monitoring of daily situations, circumstances and activities affecting migrant workers and other Filipinos overseas.

The centres are a joint undertaking of the various government agencies, and they are staffed 24 hours a day. In countries where there is a concentration of migrant workers from the Philippines, the staff of the centre includes a lawyer and a social worker.

Article 14. Assistance to migrants whose lives or safety are in danger

The [competent authority] [relevant Minister] [shall afford] [shall develop guidelines on] [shall issue orders on] appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct described in chapter II of this Law. These measures shall take into account the special needs of women and children.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 16, paragraphs 3 and 4.

The obligations in articles 16, paragraphs 3 and 4, are mandatory, but the method through which these obligations can be achieved may vary.

Article 16, paragraph 3, of the Protocol requires States parties to afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct criminalized by article 6 of the Protocol. In the application of article 16, States parties are required to take into account the special needs of women and children.

As noted in the Legislative Guide, article 16, paragraph 3, does not create a new right but it "does establish a new obligation in that it requires States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol" (Legislative Guide, part three, chap. II, para. 71, p. 365).

Depending on the circumstances, key considerations may involve the provision of physical security (for example, by law enforcement personnel); access to emergency food, shelter and medical care; access to consular services; and legal advice.

In Belgium, persons who have been subjected to certain aggravated forms of smuggling of migrants enjoy protections similar to those provided to victims of trafficking. This applies to cases in which the life of the victim has been endangered deliberately or due to severe negligence and when the offence has resulted in a seemingly incurable disease, a permanent physical or mental disability, the full deprivation of an organ or of the use of an organ or a serious mutilation, as set forth in article 77quater, 4° and 5°, of the Law of 15 December 1980 of Belgium. The circular of 26 September 2008 on the introduction of multidisciplinary cooperation in the field of victims of trafficking in human beings and/or certain other aggravated forms of trafficking in human beings, published in the Belgian Official Journal of 31 October 2008, provides detailed procedures for implementation of the above-mentioned law; the guideline specifies, in its section III *(a)*, that as soon as a person could be considered, on the basis of indications, to be a presumed victim of trafficking in human beings or of certain aggravated forms of smuggling of human beings, he or she is informed about the procedure regarding his or her status not only by the front-line actors from the police or the social inspection services but also by any service that comes in contact with potential victims. In that context, a folder containing explanatory information is given to the victims.

Article 15. [Civil] [judicial] proceedings

1. A smuggled migrant who has been subjected to violence, torture or other cruel, inhuman or degrading treatment or punishment, or threats to his or her life or safety as a result of being the object of conduct criminalized

by this Law shall have the right to institute [civil] [judicial] proceedings to claim material and non-material damage suffered as a result of the acts specified.

2. The right to pursue a [civil] [judicial] proceeding for material or non-material damages shall not be affected by the existence of criminal proceedings in connection with the same acts from which the civil claim derives.

3. The immigration status or return of the smuggled migrant to his or her home country or other absence of the smuggled migrant from the jurisdiction shall not prevent the court from ordering payment of compensation under this article.

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 16, paragraphs 1-3.

States parties have agreed to take all appropriate measures, including legislation if necessary, to preserve and protect the rights of smuggled migrants, including the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. States parties have also agreed to take measures to afford migrants protection against violence and to assist migrants whose lives or safety have been endangered by reason of being the object of conduct criminalized by article 6 of the Protocol.

As a practical matter, while the criminal justice system offers the State an opportunity to pursue criminals, it may offer very little to the smuggled migrants who may merely be witnesses to a proceeding. The opportunity to take civil proceedings (which should be interpreted to include all non-criminal proceedings, such as proceedings available through labour or civil courts) against those responsible for harm or abuse in the smuggling process may provide an opportunity for the smuggled migrants to seek redress if they have been victimized in the smuggling process.

Under some legal systems, the term "judicial claim" may be more appropriate than "civil proceeding" or "civil suit". Under some legal systems, a civil suit may exclude proceedings against officials of the State (that is, government officials). The term "judicial claim" may be more appropriate in contexts in which the intention is to cover the actions of both government and private citizens,

Article 16. Smuggled migrants who are children

1. In addition to any other protections provided for in this Law:

(a) In all actions by government officials, agencies and the courts concerning smuggled migrants who are children, a primary consideration shall be the best interests of the child;

(b) When the age of a smuggled migrant is uncertain and there are reasons to believe that the smuggled migrant is a child, he or she shall be presumed to be a child pending verification of his or her age;

(c) Any interview or examination of a smuggled migrant who is a child shall be conducted by a specially trained professional, in a suitable environment, in a language that the child uses and understands and in the presence of the child's parent, legal guardian or a support person;

(d) Smuggled migrants who are children shall have the right of access to education, which shall not be refused or limited by reason of their irregular entry or situation, or that of their parents;

(e) The detention of a smuggled migrant who is a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

2. If a smuggled migrant is an unaccompanied child, the [*competent authority*] shall:

(a) Appoint a legal guardian to represent the interests of the child;

(b) Take all necessary steps to establish his or her identity and nationality;

(c) Make every effort to locate his or her family including for the purpose of facilitating family reunification when this is in the best interests of the child.

3. For the purposes of this article, "unaccompanied child" means 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.

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 16, paragraphs 1 and 4; Convention on the Rights of the Child, articles 2, 28 and 37.

While the obligations reflected in article 16, paragraphs 1 and 4, are mandatory to all parties to the Protocol, use of this specific language is optional. It should also be noted that ratification of the Convention on the Rights of the Child is universal, and therefore it is likely that most States are bound by its provisions. Hence, the Model Law, in article 16, paragraph 1 *(a)*, applies the principle of the best interests of the child from the Convention.

Additionally, article 16, paragraph 1 *(c)*, is based on the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex). The Model Law on Justice in Matters involving Child Victims and Witnesses of Crime, which implements the Guidelines, defines "support person" as a "specially trained person designated to assist a child throughout the justice process in order to prevent the risk of duress, revictimization or secondary victimization".[36]

The Committee on the Rights of the Child, in its General Comment No. 6 (2005), on the treatment of unaccompanied and separated children outside their country of origin, provides guidance on the obligations of States with regard to unaccompanied and separated children. General Comment No. 6 (2005) applies to the situation of all unaccompanied or separated children who are outside their country of nationality, irrespective of their migration status. Thus, it covers asylum-seekers, refugee children and children who are smuggled migrants. The definition of "unaccompanied child" contained in article 16, paragraph 3, of the Model Law is derived from the definition contained in paragraph 7 of General Comment No. 6 (2005) of the Committee on the Rights of the Child.

See also the Regional Guidelines for Assistance to Unaccompanied Children in Cases of Repatriation, produced at the Regional Conference on Migration held in Guatemala City on 9 July 2009.

Smuggled migrants who are children should not, as a general rule, be detained. Where detention is exceptionally justified (for example, for identification purposes), it shall be used only as a measure of last resort, for the shortest possible period of time and in an environment or setting that is appropriate for children (see article 37 of the Convention on the Rights of the Child). Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. The underlying approach in all situations should be "care" and not "detention".

Smuggled migrants who are children and are temporarily deprived of their liberty should be provided with all basic necessities, as well as appropriate medical treatment and psychological counselling, where necessary, and education. Ideally, this should take place outside the detention premises in order to facilitate the continuance of their education upon release. Children also have a right to recreation and play.

With regard to education, article 28 of the Convention on the Rights of the Child provides, inter alia, as follows:

> 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
>
> *(a)* Make primary education compulsory and available free to all;

[36] *Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary*, published by the United Nations Office on Drugs and Crime in 2009, available from www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf.

> *(b)* Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
>
> *(c)* Make higher education accessible to all on the basis of capacity by every appropriate means;
>
> *(d)* Make educational and vocational information and guidance available and accessible to all children;
>
> *(e)* Take measures to encourage regular attendance at schools and the reduction of dropout rates.
>
> 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

The Convention on the Rights of the Child further provides that States parties shall take all measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of the child's parents, legal guardians or family members (Convention on the Rights of the Child, article 2, paragraph 1).

Article 17. Access to consular officials for smuggled migrants

1. Where a smuggled migrant has been arrested, detained or is in custody, the arresting or detaining authority is required to inform the smuggled migrant without delay about his or her right to communicate with consular officers, and all reasonable steps are to be taken to facilitate such communication.

2. If the smuggled migrant expresses interest in making contact with consular officers, the arresting or detaining authority is required to notify the relevant consul or consuls that a national of that State has been arrested or detained, provide the location where the smuggled migrant is being held and facilitate contact.

3. If a smuggled migrant indicates that they do not want to have contact with the consular office, that choice is to be respected.

4. Smuggled migrants who are being held in custody or detention shall have the following rights:

(a) To receive visits from consular officers;

(b) To converse and correspond with consular officers; and

(c) To receive communications sent by consular authorities without delay.

5. The arresting or detaining authority shall take all reasonable steps to facilitate such visits and communication.

6. The arresting or detaining authority shall forward all correspondence from the smuggled migrant that is addressed to the relevant consular office without delay.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 16, paragraph 5; Vienna Convention on Consular Relations,[37] article 36.

While the obligation in article 16, paragraph 5, of the Protocol is mandatory for all States parties, the manner in which this obligation can be achieved may vary.

Article 36 of the Vienna Convention on Consular Relations provides the following:

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

[37]United Nations, *Treaty Series*, vol. 596, No. 8638.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Rights of liberty and security of persons

While the Smuggling of Migrants Protocol makes specific mention of the right to communicate with consular officials, this is, of course, not the only right of persons who are deprived of their liberty. All individuals who are deprived of liberty are entitled to a number of basic legal and procedural guarantees, including the following:

- Smuggled migrants shall enjoy the right to liberty and security and shall not be subjected individually or collectively to arbitrary arrest and detention.
- They shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by the law (such as for identification purposes or while awaiting removal).
- Detention must be ordered or approved by a judge, and there should be automatic, regular and judicial—not only administrative—review of detention in each individual case. Such review should extend to the lawfulness of detention and not merely to its reasonableness or other, lower standards of review.
- When applied, deprivation of liberty shall be used as a last resort and for the shortest appropriate period of time. An absolute maximum time limit for detention should also be established by law, and upon expiry of that period, the detainee must be automatically released. Measures alternative to detention should be applied as much as possible to smuggled migrants.
- Where smuggled migrants have been arrested, they shall be informed of the reasons for the arrest and promptly informed of any charges against them in a language that they understand.
- Where smuggled migrants have been deprived of their liberty by arrest or detention, they shall have the right to be brought promptly before a judicial authority to challenge the legality of their detention.
- Smuggled migrants who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity. When deprived of their liberty, they shall be always separated from convicted persons.

See in particular, articles 9 and 10 of the International Covenant on Civil and Political Rights.

In addition, the Council of Europe Twenty Guidelines on Forced Return contain important guidance on the international legal framework that applies to the detention of persons pending return.[38]

[38]The Guidelines are available from the website of the Council of Europe (www.coe.int).

Chapter IV. Coordination and cooperation

Article 18. Establishment of a national coordinating committee

1. The [relevant Minister] shall establish a national coordinating [committee/body] to be comprised of officials from [*insert relevant agencies*], officials from other relevant State agencies and representatives from local government and non-governmental service providers.

2. The national coordinating [committee/body] shall:

(a) Oversee and coordinate the implementation of this Law;

(b) Develop policy, [regulations,] guidelines, procedures and other measures to facilitate the implementation of this Law;

(c) Develop a national plan of action to ensure comprehensive and effective implementation of this Law, which shall include a process of periodic review of achievement of aims and objectives;

(d) Oversee and report to [the relevant Minister] [Parliament] on the implementation of obligations under the Smuggling of Migrants Protocol;

(e) Facilitate inter-agency and multidisciplinary cooperation between the various government agencies, international organizations and non-governmental organizations; and

(f) Facilitate cooperation with relevant countries of origin, transit and destination, in particular border control agencies.

3. [*Insert name of agency/representative*] shall be appointed as the [Secretary/Secretariat] of the Committee. The Committee shall have the capacity to establish [subcommittees/working groups] as required.

Commentary

Optional

Source: Smuggling of Migrants Protocol, articles 2, 7, 10 and 14.

Article 18 is optional, although it is in line with the purpose of the Protocol.

Implementing law and policy on smuggling of migrants is complex and necessarily involves multiple agencies, each of which will have an important role to play, while operating with different mandates and restrictions. Experience suggests that the establishment of an inter-agency coordinating body to work on smuggling issues "across government" greatly assists in both policy and operational coordination. Such a body can provide agencies with a forum that enables them to meet regularly to undertake planning, discuss legal, policy and procedural issues, and raise individual cases and budgetary issues.

In many instances, the establishment of such a body can be achieved without legislation. For example, in the context of trafficking in persons, Thailand has a Coordinating and Monitoring of Anti-Trafficking in Persons Performance Committee ("CMP Committee"). According to the national Anti-Trafficking in Persons Act:

> Section 23. The CMP Committee shall have powers and duties as follows:
>
> (1) To prepare and monitor the performance according to the implementation and coordination plans of the agencies concerned, whether they be at the central, regional or local level, or in the community and civil society, to ensure the consistency with the policies, strategies and measures on the prevention and suppression of trafficking in persons;
>
> (2) To prepare and monitor the implementation of plans and guidelines regarding the capacity-building for personnel responsible for prevention and suppression of trafficking in persons;
>
> (3) To formulate and monitor campaigns to inform and educate the public in relation to the prevention and suppression of trafficking in persons;
>
> (4) To monitor, evaluate and report to the Committee the performance according to the policies, strategies, measures, together with the performance under this Act;
>
> (5) To follow up, and report to the Committee the performance under the international obligations, cooperation and coordination with the foreign bodies on the issues of the prevention and suppression of trafficking in persons;
>
> (6) To lay down rules and approve the payment and disposal of property of the Fund under Section 44(4);
>
> (7) To prepare and monitor the implementation plans under this Act with a view to achieve the highest efficiency of law enforcement and to be in line with the law on anti-money-laundering, the law on the national counter corruption and any other related laws, including international obligations;
>
> (8) To perform any other acts as entrusted by the Committee.
>
> […]
>
> Section 25. The Committee and the CMP Committee may appoint a subcommittee or a working group to consider, give advice and execute any matter entrusted by the Committee and the CMP Committee …
>
> (The Anti-Trafficking in Persons Act, B.E. 2551 (2008), Thailand)

Note: "The Committee" is the Anti-Trafficking in Persons Committee chaired by the Prime Minister.

Another example in the United States relates to the development of outreach programmes to combat smuggling of migrants:

> The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach programme to educate the public in the United States and abroad about the penalties for bringing in and harbouring aliens in violation of this section.
>
> (Section 274, Immigration and Nationality Act [8 USC 1324], United States.)

Article 19. Training and prevention

The [*insert name of the national coordinating committee*] shall:

(a) Develop and disseminate to professionals, including immigration and criminal justice officers, who are likely to encounter smuggled migrants, information, materials and training to assist them to prevent and combat the smuggling of migrants, while protecting and preserving the rights of smuggled migrants;

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 14, paragraphs 1 and 2.

While the obligations described in article 14 are mandatory, the manner in which they are achieved may vary.

Article 14, paragraph 1, of the Protocol obliges States parties to provide or strengthen specialized training programmes for immigration and other relevant officials involved in preventing the smuggling of migrants and in the humane treatment of smuggled migrants. In addition, article 14, paragraph 2, of the Protocol requires States parties to cooperate with each other, international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate training in their territories to prevent, combat and eradicate the smuggling of migrants. The Protocol mandates that such training shall include:

- Improving the security and quality of travel documents
- Recognizing and detecting fraudulent travel or identity documents
- Gathering criminal intelligence, particularly in relation to the identification of organized criminal groups, methods used to transport migrants, the misuse

of travel or identity documents and the means of concealment used in the smuggling process

- Improved procedures for detecting smuggled migrants at conventional and non-conventional points of entry and exit
- The humane treatment of migrants and the protection of their rights

The drafting suggestion in the Model Law involves giving responsibility for training to the designated national coordinating committee in order to ensure that this issue is properly coordinated across agencies and receives high priority. However, this is the not the only manner in which the obligation in article 14 could be achieved. For example, the obligation could be met by non-legislative measures such as the development of suitable training programmes within individual agencies.

(b) Develop and disseminate public information programmes to increase public awareness of the fact that smuggling of migrants is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses a serious risk [threat] to smuggled migrants;

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 15.

While the obligations in article 15 are mandatory, the manner in which they are achieved may vary.

As noted in the Legislative Guide, the drafters of the Protocol sought to require measures to increase public awareness of the nature of the smuggling of migrants and the fact that much of the activity involved organized criminal groups. The drafting suggestion provided in the Model Law involves making the development of suitable information campaigns the responsibility of the designated national coordinating committee to ensure that this important task is given sufficient profile and attention. However, compliance with the obligation in article 15, paragraph 1, of the Protocol could be achieved through other measures, including non-legislative measures.

In developing information campaigns, it is important for the responsible authorities to give consideration to the right of all persons to leave any country, including their own (International Covenant on Civil and Political Rights, art. 12, para. 2) and the rights of persons to seek asylum. According to article 12, paragraph 3, of the International Covenant on Civil and Political Rights, the above-mentioned right to leave shall not be subject to any restrictions, except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant.

(c) Promote and strengthen development programmes and cooperation at the national level, taking into account the socio-economic realities of migration

and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 15, paragraph 3.

The obligation in article 15, paragraph 3, is mandatory. However, the manner in which this obligation could be achieved may vary.

As noted in the Legislative Guide, article 15, paragraph 3, of the Protocol, in recognition of the fact that a root cause of smuggling is the desire of people to migrate away from conditions such as poverty and oppression in search of better lives, requires the promotion or strengthening of development programmes and cooperation to address the socio-economic causes of smuggling (Legislative Guide, p. 372, para. 82). Legislators and drafters should note that the provisions on prevention contained in the Protocol should be read together with article 31 of the Convention, which deals with the prevention of all forms of organized crime.

Chapter V. Cooperation regarding the smuggling of migrants at sea

Commentary

The main focus of article 8 of the Smuggling of Migrants Protocol is to facilitate law enforcement action in relation to smuggling of migrants involving the vessels of other States parties. A State party may seek to cooperate with other States parties with respect to its own flagged vessels; vessels flying the flag of other States parties; vessels without nationality; or a vessel assimilated to a vessel without nationality.

In addition, article 8, paragraph 6, of the Protocol requires that each State party designate a central authority to deal with maritime cases, which may require legislative action establishing the authority and providing for the necessary powers, including the power to authorize another State party to take action against a vessel flying the flag of the State and the power to seek the authorization of another State party to take action against a vessel flying the flag of that State party. The central authority may also be involved in contacting the coastal State with a view to asking for the permission of the coastal State to take action against a vessel within its territorial sea (see article 23, paragraph 7, of the Model Law).

As noted in the Legislative Guide, the enactment of implementing legislation providing for enforcement powers in respect of foreign flagged vessels may therefore be necessary (Legislative Guide, p. 386, paragraph 96). In this regard, States will need to pay attention to issues such as the provision of powers to search and obtain information, powers of arrest and seizure, the use of reasonable force, the production of evidence of authority and the provision of appropriate legal protection for the officers involved. The question of whether this is achieved through reference to existing national law or through the creation of specific powers in the context of smuggling of migrants is best dealt with at the national level.

Purpose of cooperation: preventing and suppressing smuggling by sea

In drafting national laws on this issue, it is vital that States parties recall the fundamental purposes of the Protocol: 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. In the context of cooperation to combat smuggling of migrants by sea, achieving these objectives will require careful attention to several issues, including the following:

- *Law enforcement objectives*. What laws, policies and procedures need to be put in place to ensure that law enforcement activities undertaken at sea actually make a positive contribution to the criminal justice interests of

identifying, investigating and prosecuting those responsible for smuggling of migrants by sea? For example, smuggled migrants intercepted at sea may have valuable information about the identity and modus operandi of smugglers. In addition to raising human rights concerns, practices which focus on simply repelling or returning migrants without allowing any opportunity for debriefing will likely result in the loss of important intelligence and evidence about the activities of smugglers.

- *Human rights and humanitarian objectives*. How can activities undertaken at sea ensure the safety and dignity of all persons involved? How can activities undertaken at sea be "protection-sensitive" so as to avoid inadvertently denying a person the right to seek international protection or returning a person to a place where their fundamental human rights would be at risk?

Context: United Nations Convention on the Law of the Sea

Articles 7-9 of the Smuggling of Migrants Protocol should be read in the context of the international law of the sea, in particular the 1982 United Nations Convention on the Law of the Sea (referred to as "the Convention" in the following commentary on chapter V of the Model Law). In drafting national laws to implement the Smuggling of Migrants Protocol, States parties will need to ensure consistency with the Convention. It is also noted that the Model Law does not seek to implement relevant provisions of the Convention.

The Convention contains the general principle of international law that ships have the nationality of the State whose flag they are entitled to fly (art. 91, para. 1). Article 4, paragraph 1 *(b)*, of the Model Law, which establishes jurisdiction in respect of offences committed on board a vessel flying the flag of the State, reflects this principle. Ships are subject to the exclusive jurisdiction of the flag State on the high seas, except in exceptional cases provided for in treaties and under the Convention (art. 92, para. 1). The flag State has a duty to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (Convention, art. 94).

Under the international law of the sea, a State may take action against a foreign vessel engaged in the smuggling of migrants by sea. A coastal State can take action within its territorial sea against such a vessel (see the commentary on article 4 of the Model Law, above). Action may also be taken against a foreign vessel by a coastal State in its contiguous zone, or through the exercise of the right of hot pursuit (Convention, arts. 33 and 111). The consent of the flag State to such actions is not required under the applicable provisions of the Convention.

In the contiguous zone, a coastal State may exercise the control necessary to prevent or punish infringement by a foreign vessel of its immigration laws and regulations within its territory or territorial sea (Convention, art. 33). The right of hot pursuit arises where a coastal State has good reason to believe that a foreign ship has violated the laws and regulations of that State. Article 111 of the Convention sets out the scope of the right of hot pursuit and the procedure for the exercise of that right by a coastal State.

In addition, all States have the right of visit under article 110 of the Convention. Pursuant to article 110, a warship that encounters a foreign ship (other than a ship entitled to immunity) on the high seas may visit and board the ship if there are reasonable grounds for suspecting that the ship is engaged in certain activities, including cases in which the ship is without nationality or, although flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. Article 110 also applies to the exclusive economic zone, and the right of visit may be exercised in accordance with the provisions of article 58 of the Convention. The right of visit is an exception to the general principle of exclusive jurisdiction of a flag State over its ships on the high seas (Convention, art. 92).

Under article 8, paragraph 7, of the Smuggling of Migrants Protocol, a State party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, the State party may take appropriate measures in accordance with relevant domestic and international law.

Articles 7-9 of the Smuggling of Migrants Protocol establish a framework for cooperation between States parties to act with respect to the smuggling of migrants by sea. The framework provides for a State party, in respect of a vessel that is flying its flag or claiming its registry, or a vessel without nationality, or a vessel assimilated to a vessel without nationality, to request the assistance of another State party in suppressing the use of the vessel for the purpose of smuggling of migrants (Protocol, art. 8, para. 1).

In addition, the framework includes a mechanism for a State party, in respect of a vessel flying its flag, to authorize another State party to board, search and take other appropriate measures in respect of the vessel to suppress the use of the vessel for the purpose of smuggling of migrants by sea (Protocol, art. 8, para. 2).

Article 9, paragraph 3, of the Smuggling of Migrants Protocol

In considering which measures may be taken at sea, it is important for legislators to recall the safeguard provisions contained in article 9, paragraph 3, of the Smuggling of Migrants Protocol, which provide that any measure taken, adopted or implemented in accordance with chapter II of the Protocol shall take due account of the need not to interfere with or affect *(a)* the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea (referred to above); and *(b)* the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

Chapter V of the Model Law is modelled on the United Nations International Drug Control Programme (UNDCP) Model Drug Abuse Bill 2000, drafted to assist implementation of international drug control conventions. Articles 7-9 of the Smuggling of Migrants Protocol are based on article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

Article 20. Extended jurisdiction of this chapter

In addition to the jurisdiction provided for in article 4, this chapter applies to conduct engaged outside [*name of State*] on a vessel reasonably suspected of being engaged, directly or indirectly, in the smuggling of migrants by sea:

(a) If the vessel is without nationality or may be assimilated to a vessel without nationality;

(b) If the vessel, although flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State concerned; or

(c) If the vessel is flying the flag or displaying the marks of registry of a Protocol State other than [*name of State*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 8, paragraphs 1, 2 and 7.

As noted in the Legislative Guide, establishment of jurisdiction over smuggling at sea is a prerequisite for effective implementation of articles 7-9 of the Protocol (Legislative Guide, p. 386, para. 95). It is important to read this article together with article 4 of the Model Law.

The interpretative note on article 8 of the Protocol notes that the term "engaged" in the smuggling of migrants is to be interpreted broadly. For example, it should include mother ships that are apprehended after the migrants have been transferred to smaller vessels for landing, as well as ships simply carrying smuggled migrants (*Travaux Préparatoires*, p. 506.).

In accordance with article 92, paragraph 2, of the United Nations Convention on the Law of the Sea, a ship that sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State and may be assimilated to a ship without nationality.

Article 21. Designation of competent national authority

1. For the purpose of facilitating cooperation between [*name of State*] and other Protocol States to prevent and suppress the smuggling of migrants by sea, the [relevant Minister] shall designate in writing an authority or authorities:

(a) To receive and respond to requests for assistance from Protocol States;

(b) To transmit requests for assistance to Protocol States;

(c) To receive and respond to requests for confirmation of registry or of the right of a vessel to fly the flag of [*name of State*];

(d) To receive and respond to requests for authorization from Protocol States to take appropriate measures [as set out in this chapter]; and

(e) To transmit requests for authorization to Protocol States to take appropriate measures [as set out in this chapter].

2. The competent national authority or authorities shall respond expeditiously to any request made under paragraph 1.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 8, paragraph 6.

As noted in the Legislative Guide, article 8, paragraph 6, of the Protocol requires that each State party designate a central authority to deal with maritime cases, which may require legislative action establishing an authority and providing for the necessary powers, in particular the power to authorize another State party to take action against vessels flying its flag (Legislative Guide, p. 387, para. 98). States parties have an obligation under article 8, paragraph 6, of the Protocol to notify the Secretary-General of the United Nations about the designated authority so that this information can be conveyed to all States parties.

The location of the competent national authority is a matter for the State in question. However, it is important for the competent national authority to work closely and cooperatively with any other national or local authority with a role in relation to related issues. For example, the Legislative Guide notes that in deciding the location of its central authority, States should consider factors such as ease of access to the national shipping registry in order to provide confirmation of registry; ease of coordination with other domestic agencies, including maritime law enforcement agencies; and the existence of arrangements for the conduct of business around the clock (Legislative Guide, p. 387, para. 98). Other relevant considerations include the location of rescue coordination centres and rescue sub-centres established in accordance with the International Convention on Maritime Search and Rescue.[39] In addition, the competent national authority should also be responsible for outgoing requests to other States parties. It should thus be able to receive requests from domestic authorities (customs, police and other law enforcement agencies) and be in a position to assist in the transmission of requests to foreign States (Legislative Guide, p. 387, para. 98).

Once a competent national authority is designated, its details should be provided to UNODC so that that information can be included in the online directory of competent national authorities maintained by UNODC.

[39]United Nations, *Treaty Series*, vol. 1405, No. 23489; more information available from www.imo.org.

Article 22. Designation of authorized officers

1. The [relevant Minister] may in writing designate any [police officer] [customs officer] [any other person or class of persons] to be an authorized officer for purposes relating to the exercise of powers under this chapter.

2. The powers of authorized officers shall be [*insert statement of powers or cross reference to relevant national law*].

Commentary

Optional

As noted in the introduction to this chapter, law enforcement cooperative activities at sea raise a number of complex issues, including the challenges of ensuring safety of life at sea, criminal justice imperatives and the need to ensure that any activities are “protection-sensitive”. Given these complexities, legislatures may wish to consider limiting the authority to exercise powers created pursuant to the Protocol to a relatively small number of officials or officers who have the necessary training, competence and equipment (Legislative Guide, p. 388, para. 101).

Legislators may need to consider the issue of powers for authorized officers, particularly as in some instances they will be operating outside of national territory. If these issues are addressed in existing national laws, it may be most appropriate to make cross references to existing national laws. In this particular context, relevant considerations will include:

- Powers to stop, board and detain vessels
- Powers of search and seizure
- Powers to interview persons on board the vessel
- Capacity to take assistance such as translators or other persons who may be required to assist in an operational capacity (for example, a ship’s engineer or mechanic)
- Capacity to refer persons on board the vessel to the appropriate authorities, including law enforcement authorities, also including the agencies responsible for making assessments of claims for international protection

Where it is possible to simply make cross references to existing powers under an existing law, those cross references should be carefully checked to ensure that they apply to situations where the officer is on board a foreign flagged vessel.

Article 23. Conditions and limitations on the exercise of special enforcement powers by authorized officers

1. Any powers conferred on authorized officers as a result of this chapter shall be exercisable in relation to any vessel described in article 4, paragraph 1 *(b),*

or article 20 for the purposes of detecting and taking appropriate action in respect of the smuggling of migrants by sea.

2. Those powers shall not be exercised in relation to a vessel beyond the limits of the territorial sea of [*name of State*] and flying the flag or displaying the marks of registry of another Protocol State except if:

(a) [*Name of State*] is exercising its right of control in its contiguous zone or the right of hot pursuit; or

(b) The [relevant Minister] [head of the central national authority] has given authority.

3. The [relevant Minister] [head of the central national authority] shall not give the authority contained in paragraph 2 *(b)* above unless satisfied that:

(a) The Protocol State has requested assistance of [*name of State*] for the purposes of detecting or preventing the smuggling of migrants and taking appropriate action; or

(b) The Protocol State has authorized [*name of State*] to act for that purpose.

4. The [relevant Minister] [head of the central national authority] shall impose such conditions or limitations on the exercise of the powers as may be necessary to give effect to any conditions or limitations imposed by the Protocol State.

5. The [relevant Minister] [head of the central national authority] may, either on his or her own initiative or in response to a request from a Protocol State, authorize a Protocol State to exercise, in relation to a [*name of State*] vessel, powers corresponding to those conferred on officers authorized under this chapter but subject to such conditions or limitations, if any, as he or she may impose.

6. Paragraph 5 above is without prejudice to any agreement made, or which may be made, on behalf of [*name of State*] whereby [*name of State*] undertakes not to object to the exercise by any other State in relation to a [*name of State*] vessel of powers corresponding to those conferred on officers authorized under this chapter.

7. The powers conferred on officers authorized under this chapter shall not be exercised in the territorial sea of any other State without the authority of the [relevant Minister] [head of the central national authority], who shall not give such authority unless that State has consented to the exercise of those powers.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 8, paragraphs 2 and 5.

Article 23 of the Model Law is intended to establish a clear framework to regulate precisely when authorized officers are empowered to take action in respect of a vessel reasonably suspected of engaging in the smuggling of migrants by sea. This framework applies in respect of:

- A vessel flying the flag of the State (article 4, paragraph 1 *(b)*, and article 20, paragraph 1 *(b)*, of the Model Law
- A vessel without nationality or assimilated to a vessel without nationality (article 20(1) of the Model Law)
- A vessel flying the flag of another State party to the Smuggling of Migrants Protocol (article 20(3) of the Model Law

In respect of a vessel flying the flag of the State, article 23, paragraph 1, of the Model Law provides for the exercise of enforcement powers by authorized officers. Note, however, that the State may already have existing national legislation allowing for the exercise of appropriate enforcement powers in respect of its flagged vessels.

Article 23, paragraph 5, sets out the procedure for a senior person within government (a Minister or the head of the competent national authority) to authorize another State party to exercise enforcement powers in respect of a vessel flying the flag of the State.

Depending upon the circumstances, article 23, paragraph 6, may be applicable in respect of a vessel flying the flag of the State.

In respect of a vessel without nationality or assimilated to a vessel without nationality, article 20, paragraph 1, of the Model Law provides for the exercise of enforcement powers by authorized officers. In this context, article 4, paragraph 1 *(b)*, may be applicable (see the commentary on article 4 and chapter V of the Model Law with respect to the United Nations Convention on the Law of the Sea).

In respect of a vessel flying the flag of another State party to the Protocol and which is located beyond the limits of the territorial sea of the State, the framework contained in article 23 of the Model Law has a number of elements.

It is recalled that, under international law of the sea, a coastal State can take action within its territorial sea with respect to foreign vessels (see the commentary on article 4 of the Model Law). The exercise of enforcement powers may be addressed in separate national laws relating to the law of the sea.

Under article 23, paragraph 2, authority to exercise enforcement powers with respect to a vessel flying the flag of another State party that is located

beyond the limits of the territorial sea of the State must be obtained from a senior person within government (a Minister or the head of the competent national authority).

However, the requirement to obtain specific authority does not apply where the State is exercising its right of control in the contiguous zone or the right of hot pursuit in respect of the vessel (art. 23, para. 2 *(a)*) (see the commentary on chapter V of the Model Law regarding the United Nations Convention on the Law of the Sea). In this context, the exercise of enforcement powers may be addressed in separate national laws relating to the law of the sea.

Authority may be granted to exercise enforcement powers in respect of a vessel flying the flag of another State party if that State party has requested the assistance of the State or authorized the State to take action in respect of the vessel (art. 23, para. 3).

With regard to the exercise of enforcement powers in respect of a vessel located within the territorial sea of another State, no action can be taken against the vessel without the consent of that coastal State, as provided for in article 23, paragraph 7, of the Model Law and the United Nations Convention on the Law of the Sea

As noted in relation to article 4 of the Model Law, "territory" includes the territorial sea of a coastal State, in accordance with the United Nations Convention on the Law of the Sea. As noted in the interpretative notes on article 7 of the Smuggling of Migrants Protocol:

> It is understood that the measures set forth in chapter II of the protocol cannot be taken in the territorial sea of another State except with the permission or authorization of the coastal State concerned. This principle is well established in the law of the sea and did not need to be restated in the protocol.
>
> (A/55/383/Add.1, para. 98; *Travaux Préparatoires*, p. 494.)

With regard to the exercise of the enforcement powers in respect of a vessel under chapter V of the Model Law, the attention of legislators is drawn to the safeguard provisions in article 9, paragraph 3, of the Smuggling of Migrants Protocol with regard to the flag State and the coastal State (see the commentary on chapter V above).

Article 24. Operational framework for measures at sea

1. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft [including customs, coastguard and police vessels,] clearly marked and identifiable as being on government service and authorized to that effect.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 9, paragraph 4.

Identification of vessels as being on government service is likely to be achieved through a combination of physical markers, colour of the vessel and official flags (ensigns).

2. When taking measures against a vessel in accordance with this chapter, an authorized officer is required to take all necessary steps:

(a) To afford migrants protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct criminalized by this Law;

(b) To assist migrants whose lives or safety are endangered by reason of being the object of conduct criminalized by this Law;

(c) To take into account the special needs of women and children;

(d) To ensure the safety and humane treatment of the persons on board;

(e) To ensure that any measures taken are compliant with human rights and humanitarian obligations, including the right to leave any country, the right to seek asylum and international protection, and the obligation of non-refoulement;

(f) To take due account of the need not to endanger the security of the vessel or its cargo;

(g) To take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State; and

(h) To ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 9, paragraph 1; article 16, paragraphs 1-4; and article 19, paragraph 1.

The obligation in article 9, paragraph 1 *(a)*, of the Protocol to ensure the safe and humane treatment of all persons on board a vessel during law enforcement cooperative activities at sea is mandatory for all States parties. This obligation has particular relevance to situations where vessels are intercepted at sea as part of border measures undertaken to suppress the smuggling of migrants. There are safety implications, not only in terms of the immediate need to ensure the physical

safety of all persons (including the smuggled migrants) on board any intercepted vessel, but also with regard to ensuring that any persons at risk of harm (for example, from members of organized criminal groups) or who express a desire to seek international protection (either under human rights or refugee law) are referred to the appropriate expert authorities. It is also necessary to ensure that migrants removed from the vessel are taken to a suitable place where they will be safe.

Under article 16, paragraphs 2 and 3, of the Protocol, States parties have agreed to take "appropriate measures" to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups; and to "afford appropriate assistance" to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of the Protocol. These obligations may have particular relevance in the context of smuggling of migrants by sea if, for example, simply repelling a vessel or leaving smuggling migrants on board a vessel would mean leaving the smuggled migrants effectively in the hands of members of an organized criminal group. In addition to raising serious human rights concerns, such an action would likely undermine law enforcement objectives, which may be better served by taking the smuggled migrants to a place of safety and providing the necessary facilities for debriefing with expert investigators.

Under article 16, paragraph 4, of the Protocol, States parties agree that, in applying the provisions of article 16, they will take into account the special needs of women and children. Consideration will need to be given to how best to achieve that obligation in operational terms. For example, relevant considerations include ensuring the availability of both male and female officers and authorized officers with appropriate training in the operation and ensuring the availability of basic provisions such as sanitary protection, baby food and nappies.

Under article 16, paragraph 1, of the Protocol, States parties agreed to take, consistent with their obligations in international law, all appropriate measures, including legislation if necessary, to "preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of [the] Protocol as accorded under applicable international law, 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 19, paragraph 1, refers more explicitly to the obligation, where applicable, to preserve the operation of the 1951 Convention relating to the Status of Refugees, in particular, the principle of non-refoulement contained therein.

These obligations have particular implications in the context of law enforcement cooperation at sea. The Office of the United Nations High Commissioner for Refugees (UNHCR) has noted that increasingly, the term "entry systems" includes not only measures taken at the border but also interception operations intended to prevent, interrupt or stop individuals from reaching and/or entering territory. These measures are increasingly taken outside of a State's own territory, on the high seas and even on the territory of third States. In other words, as broadly conceived, law enforcement activities undertaken at sea are a part of entry systems. UNHCR advocates the use of "protection-sensitive" entry systems that take into account people's protection needs and the duty of States to respect their obligations under international human rights and refugee law, including the principle of non-refoulement. Protection-sensitive entry systems ensure that legitimate measures of control are not applied arbitrarily and allow for asylum-seekers and

other groups with specific protection needs to be identified and granted access to a territory where their needs can be properly assessed and addressed.[40] The “entry officials” who work in these systems include any officers authorized to take action against smuggling of migrants at sea. Accordingly, their actions need to take into account human rights and humanitarian obligations, including the right of all persons to leave any country, including their own; and the right of all persons to seek asylum and other measures of international protection. As the issues involved in achieving compliance with these standards in practice are complex, it is likely that States will need to consider the development of tools to facilitate implementation, such as codes of conduct, codes of practice, standard operating procedures and specialized training for entry officials.

The Executive Committee of the Office of the United Nations High Commissioner for Refugees has issued the Conclusion on Protection Safeguards in Interception Measures (No. 97 (LIV)–2003).[41] The Conclusion may provide useful guidance in the development of national practice with regard to interception. For example, the Executive Committee recommends the following:

- The State within whose sovereign territory or territorial waters interception takes place has the primary responsibility for addressing any protection needs of intercepted persons.
- Interception measures should take into account the fundamental difference under international law between those who seek and are in need of international protection and those who can resort to the protection of their country of nationality or of another country.
- Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a convention ground or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions.
- Intercepted persons who do not seek or who are determined not to be in need of international protection should be returned swiftly to their respective countries of origin or other country or nationality or habitual residence.
- All persons, including officials of the State and employees of commercial entities, implementing interception measures should receive specialized training, including available means to direct intercepted persons expressing international protection needs to the appropriate authorities in the State where the interception has taken place, or, where appropriate, to UNHCR.

[40] Office of the United Nations High Commissioner for Refugees, “Refugee protection and mixed migration: a 10-point plan of action”, January 2007.

[41] Available from www.unhcr.org.

Article 25. Safeguards in relation to danger to lives at sea

Nothing in this Law affects the obligation of any [person] [authorized officer] [shipmaster] to render assistance to those in distress at sea.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 8, paragraph 5; United Nations Convention on the Law of the Sea, article 98.

The safety of life at sea is paramount. In any situation at sea where life is in danger, the first obligation is to address safety and any danger to life. Legislation should be drafted and implemented to ensure that officials are aware that the duty to conduct rescue has priority over any other priorities, including law enforcement. It is important for officials to be aware that in any circumstance where there is evidence of distress at sea, rescue should be conducted even where there is no suspicion of smuggling.

The obligation to preserve life at sea is reflected in the language used in article 8, paragraph 5, of the Smuggling of Migrants Protocol, which provides that States parties shall take no additional measures without the express authorization of the flag State, "except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements."

A shipmaster has an obligation to render assistance to those in distress at sea. This is a longstanding maritime tradition and an obligation under international law. The United Nations Convention on the Law of the Sea provides that:

> Every State [party] shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
>
> *(a)* To render assistance to any person found at sea in danger of being lost;
>
> *(b)* To proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him
>
> (United Nations Convention on the Law of the Sea, art. 98, para. 1).

The duty to render assistance is not limited to the high seas and applies in other maritime zones, for example, the exclusive economic zone.

The duty to render assistance to those in distress at sea is also enshrined in other conventions, including the 1974 International Convention for the Safety of Life at Sea. Under the 1979 International Convention on Maritime Search and

Rescue, States parties are 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" (chap. 2.1.10) and to "provide for their initial medical or other needs, and deliver them to a place of safety" (chap. 1.3.2 of the International Convention on Maritime Search and Rescue).

In 2006, amendments to the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue, adopted under the auspices of the International Maritime Organization, entered into force. In accordance with the amendments, the contracting Governments/ States parties are required, inter alia, to coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage and arrange disembarkation as soon as reasonably practicable. The amendments also oblige masters who have embarked persons in distress at sea to treat those persons with humanity, within the capabilities of the ship.

Other relevant documents of the International Maritime Organization include the Guidelines on the Treatment of Persons Rescued at Sea (MSC 78/26/Add.2, annex 34) and the circular entitled "Principles relating to the administrative procedures for disembarking persons rescued at sea" (FAL.3/Circ.194).[42]

The following are useful references on this issue:

- Report of the Office of the United Nations High Commissioner for Refugees on the treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees (A/AC.259/17)
- International Maritime Organization/Office of the United Nations High Commissioner for Refugees, *Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees* (available from www.imo.org)

Article 26. Compensation for loss or damage

Option A

The [holder of legal rights in the] vessel is entitled to [reasonable] compensation for loss or damage sustained as a result of actions taken, or purportedly taken, by an officer authorized under this chapter when:

(a) The grounds for measures taken prove to be unfounded; and

(b) The vessel [or any person on the vessel] has not committed any act that would justify the measures taken.

[42]Available from www.imo.org.

or

Option B

The holder of legal rights in the vessel is entitled to [reasonable] compensation for loss or damage sustained as a result of actions taken, or purportedly taken, by an officer authorized under this chapter when the grounds for measures taken prove to be unfounded, except if the vessel [or any person on the vessel] has committed any act that would justify the measures taken.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 9, paragraph 2.

Article 9, paragraph 2, of the Protocol refers to compensation when "grounds for measures taken … prove to be unfounded … provided that the vessel has not committed any act justifying the measures taken". For example, a vessel that was knowingly anchored near a mother ship may, by that action, have given reasonable grounds to suspect that it was involved in the activities of that mother ship, even if this is proved to be incorrect. As a further example, a vessel that, without reasonable grounds, failed to stop when requested to do so by an authorized officer would also forfeit any entitlement to compensation.

Article 9, paragraph 2, of the Smuggling of Migrants Protocol is similar in some ways to articles 110 (right of visit) and 111 (right of hot pursuit) of the United Nations Convention on the Law of the Sea, as those articles of the Convention also provide for a ship to be compensated if the action taken in exercise of the right of visit or hot pursuit is unfounded or unjustified (see article 110, paragraph 3, and article 111, paragraph 8, of the United Nations Convention on the Law of the Sea).

A range of persons both natural and juridical, for example, the charterer of the vessel, might suffer loss of damage in these circumstances. Accordingly, the terminology of "the holder of legal rights in the vessel" is included in square brackets. More precise language may be available under national law.

Some additional drafting guidance may be found in the Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[43] Article 26 of the Agreement may provide possible options for the implementation of article 9, paragraph 2, of the Smuggling of Migrants Protocol:

Article 26—Damages

1. If, in the process of taking action pursuant to articles 9 and 10 above, any person, whether natural or legal, suffers loss, damage or injury as a result of negligence or some other fault attributable to the intervening State, it shall be liable to pay compensation in respect thereof.

[43]Council of Europe, *European Treaty Series*, No. 156.

2. Where the action is taken in a manner which is not justified by the terms of this Agreement, the intervening State shall be liable to pay compensation for any resulting loss, damage or injury. The intervening State shall also be liable to pay compensation for any such loss, damage or injury, if the suspicions prove to be unfounded and provided that the vessel boarded, the operator or the crew have not committed any act justifying them.

(Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 26.)

Chapter VI. Processes related to the return of smuggled migrants

Article 27. Designation of agency or agencies

1. The [*competent authority*] shall perform the functions described in this chapter.

2. In performing its functions, the [*competent authority*]:

(a) May cooperate with relevant international organizations, including the Office of the United Nations High Commissioner for Refugees and the International Organization for Migration; and

(b) Shall comply with any other relevant [national and international] laws.

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 18, paragraph 6.

The return of smuggled migrants is a complex issue, raising a number of significant issues under international law, in particular human rights, refugee and humanitarian law. While not required by the Protocol, States parties may find benefit in ensuring that one agency within the government structure is designated to oversee and coordinate the return process.

In a number of States, return is facilitated through cooperation with international organizations such as the International Organization for Migration and the Office of the United Nations High Commissioner for Refugees. It may be necessary to provide authorization to that effect.

The intention of article 27, paragraph 2 *(b)*, of the Model Law is to preserve the operation of other existing laws, for example, on the issuing of passports and other migration related issues. It may not be necessary in all legal systems.

Article 28. Referral of migrants with specific protection needs

1. In performing its functions under this chapter, the [*competent authority*] shall ensure that smuggled migrants who are seeking international protection under national asylum laws, the Convention relating to the Status of Refugees or international law, or who have particular protection needs are quickly referred to the [appropriate] [competent] authorities to decide on their case.

2. The [*competent authority*] shall ensure that the Office of the United Nations High Commissioner for Refugees is given access to smuggled migrants who are asylum-seekers and other persons of concern to the Office.

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 16, paragraphs 1-3, and article 19, paragraph 1.

Compliance with articles 16 and 19 of the Protocol is mandatory. The precise manner in which these obligations are achieved may vary.

Guideline 1 of the Council of Europe Guidelines on Forced Return states that “the host State should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.”

Smuggled migrants are frequently detected or identified as part of “mixed” migration flows. That is, there may be smuggled migrants with legitimate claims to international protection, for example, under the 1951 Convention relating to the Status of Refugees or under international human rights law because of a real risk that they will be subjected to torture or other forms of cruel, inhuman or degrading treatment or punishment on their return. It is essential that smuggled migrants who are in need of international protection are given a genuine opportunity to seek it.

In the smuggling process, smuggled migrants may have been subjected to trafficking in persons or other serious crimes such as sexual assault or other violence. Even if those migrants do not qualify for or are not seeking international protection, they may nonetheless need access to applicable protection measures (for example, specialized procedures and assistance available to victims of trafficking in persons).

Front-line officers (for example, border guards, detention centre staff, officers authorized under chapter V) will not have the necessary time, experience or competence to assess asylum claims or to fully assess, for example, if a person is a victim of trafficking. However, these front-line officers have an important role in making a preliminary identification of persons falling into relevant categories

(e.g. asylum-seekers and suspected victims of trafficking) and referring persons in these situations to the appropriate expert authorities. Front-line officers are likely to require guidelines, standard operating procedures and training on these issues, along with mechanisms to ensure strong working relationships with relevant expert authorities.

The obligation to identify, assist and protect smuggled migrants who are at risk of victimization is clear in the Smuggling of Migrants Protocol. Under article 16, paragraph 2, of the Protocol, States parties agree to take appropriate 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 conduct criminalized by the Protocol. In addition, article 16, paragraph 3, provides that States parties shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct criminalized under article 6 of the Protocol. That includes situations where, for example, smuggled migrants are at risk of being further victimized by organized criminal groups or where smuggled migrants have been transported in very dangerous conditions, such as locked shipping containers or lorries, whereby their physical and mental condition may have seriously deteriorated.

Article 29. Ensuring safety in exchange of information

1. The [*competent authority*] shall develop policies and procedures to ensure that any exchange of information about a smuggled migrant with [a State of return] [any other State] will not put the returnee, or his or her relatives, in danger [upon return].

2. Information about the existence or content of any application made by the smuggled migrant for international protection shall not be provided to [a State of return] [any other State].

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 16, paragraph 1, and article 19, paragraph 1.

Compliance with articles 16, paragraph 1, and article 19, paragraph 1, is mandatory. The precise manner in which these obligations are achieved may vary.

The exchange between States of some personal data about smuggled migrants will be necessary to facilitate the return process. However, it is vital that measures are put in place to ensure that any information exchange does not put the smuggled migrants (or their families) in danger. Without those protections, States may inadvertently expose the smuggled migrant to a risk of retaliation on their return to their country of origin.

Good practice with regard to treatment of information about smuggled migrants is contained in the Council of Europe Guidelines on Forced Return:

Guideline 12. Cooperation between States

1. The host State and the State of return shall cooperate in order to facilitate the return of foreigners who are found to be staying illegally in the host State.

2. In carrying out such cooperation, the host State and the State of return shall respect the restrictions imposed on the processing of personal data relating to the reasons for which a person is being returned. The State of origin is under the same obligation where its authorities are contacted with a view to establishing the identity, the nationality or place of residence of the returnee.

3. The restrictions imposed on the processing of such personal data are without prejudice to any exchange of information which may take place in the context of judicial or police cooperation, where the necessary safeguards are provided.

4. The host State shall exercise due diligence to ensure that the exchange of information between its authorities and the authorities of the State of return will not put the returnee, or his or her relatives, in danger upon return. In particular, the host State should not share information relating to the asylum application.

Article 30. Legitimacy and validity of documents

The [*competent authority*] shall, at the request of the appropriate authority or representative of another Protocol State, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in the name of [*name of State*] and suspected of being used for the purposes of smuggling of migrants.

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 13.

Note that article 13 of the Protocol has a general application: it is not limited to the return process. For example, it might be invoked by law enforcement officers who need to verify whether documents are legitimate before pursuing certain charges under criminal law.

Article 31. Facilitating return of smuggled migrants

The [*competent authority*] shall:

(a) At the request of the appropriate authority or representative of another Protocol State, of the smuggled migrant or of its own initiative, facilitate without undue or unreasonable delay, the return to [*name of State*] of a smuggled migrant who is a national of [*name of State*] or has the right of permanent residence in [*name of State*] at the time of return;

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 18, paragraph 1.

As noted in the Legislative Guide, States parties are required to cooperate in the identification or determination of status of their nationals or residents. They are required to cooperate in ("facilitate and accept") the return of nationals and to consider cooperation in the return of those with some rights of residency short of citizenship, including by the issuance of documents needed to allow the travel of such persons back from countries to which they have been smuggled (Legislative Guide, part three, chap. II, para. 106, p. 390). The requirement to accept the return of nationals and to "consider" accepting the return of others depends on the status of those individuals.

As noted in the interpretative notes to the Protocol, article 18, paragraph 1, was adopted on the understanding that a return would not be undertaken before the nationality or right of permanent residence of the person in question has been duly verified. Also, the term "permanent residence" is understood as meaning "long-term, but not necessarily indefinite residence". The interpretative notes add that article 18 is understood not to prejudice national legislation regarding the granting of the right of residence or the duration of residence. (A/55/383/Add.1, para. 112; *Travaux Préparatoires*, p. 552).

(b) At the request of the appropriate authority or representative of another Protocol State, of the smuggled migrant or of its own initiative, facilitate the return to [*name of State*] of a smuggled migrant who had the right of permanent residence in [*name of State*] at the time of entry into the receiving State, in accordance with [*insert relevant domestic laws*];

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 18, paragraph 2.

Article 18, paragraph 2, of the Protocol requires States parties to "consider the possibility" of facilitating and accepting the return of smuggled migrants who "had

the right of permanent entry in its territory at the time of entry into the receiving State in accordance with its domestic law".

(c) At the request of the appropriate authority or representative of another Protocol State, verify without undue or unreasonable delay whether a smuggled migrant is a national or has the right of permanent residence in [*name of State*];

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 18, paragraph 3.

(d) At the request of the appropriate authority or representative of another Protocol State, facilitate the issue of documents or other authorization as necessary to enable a smuggled migrant who is either a national of [*name of State*] or who has a right of permanent residence in [*name of State*], to travel and [transit or] re-enter [*name of State*].

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 18, paragraph 4.

Drafters will need to consider how this provision relates to any existing national laws on the issue of passports and other travel documents.

The words "transit or" are in square brackets as they are optional. However, the issue of transit can be important in the return process and is thus noted here.

Article 32. Protection of smuggled migrants in the return process

1. The [*competent authority*] shall ensure that [any planned or actual] return of a smuggled migrant is consistent with international law, in particular human rights, refugee and humanitarian law, including the principle of non-refoulement, the principle of non-discrimination, the right to life, the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment, and, where children are involved, the best interests of the child.

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 16, paragraph 1, and article 19, paragraphs 1 and 2.

Compliance with article 16, paragraph 1, and article 19, paragraphs 1 and 2, of the Protocol is mandatory. The precise manner in which those obligations can be achieved may vary. As they are already incorporated into article 2 of the Model Law, article 32, paragraph 1, is optional.

The Smuggling of Migrants Protocol clearly contemplates the return of smuggled migrants. However, it is clear from the obligations in article 16, paragraph 1, and the "saving clause" in article 19, paragraph 1, of the Protocol that States parties to the Protocol must ensure that any processes or procedures with regard to return of smuggled migrants comply with international law, in particular human rights, refugee and humanitarian law.

In practical terms, many issues will need to be considered in the development of policies and procedures regarding returns, in order to ensure compliance with international legal obligations. Good practices are described in the Council of Europe Twenty Guidelines on Forced Return, which note the importance of a number of issues, including the following:

- Promoting voluntary return of smuggled migrants who have no claim for protection. Voluntary return presents fewer risks to the human rights of the smuggled migrants than forced return (guideline 1).
- Ensuring that any decision to return a smuggled migrant is made in accordance with an established legal process that is subject to review. This will ensure the avoidance of arbitrariness in the decision-making process (an essential guarantee against the risk of discrimination in the enjoyment of human rights) (guideline 2).
- Ensuring that any decision to return a smuggled migrant has been taken after full consideration of any claims to international protection and of the issue of whether the proposed return would violate the individual's human rights (in particular, the right to life and the right to freedom from torture and other forms of cruel, inhuman or degrading treatment or punishment). This is essential to avoid breaching the principle of non-refoulement (guideline 2).
- Ensuring that any removal order is made on the basis of a reasonable and objective examination of the particular facts of each individual's case (rather than mass expulsions) (guideline 3).
- Ensuring that the returnee is provided with, in a language they can understand, a copy of the removal order and information about available review processes. This is essential to ensuring due process (guideline 4).
- Ensuring the availability of effective remedies against the removal order (guideline 5).

- Ensuring the lawfulness of detention pending the returns process, including time limits on the length of any detention; conditions of detention; and the availability of judicial remedies against detention (guidelines 6-11).
- Ensuring safety, order and dignity in the return process, including through seeking the cooperation of the returnees at all stages of the process, ensuring the fitness of the returnee to travel, the use of only properly trained escorts and restrictions on the use of force in the returns process (guidelines 15-20).

Further information can be found in the Council of Europe Twenty Guidelines on Forced Return (2005).

It is not the purpose of the Model Law to provide detailed guidance on how to establish a system for the return of irregular migrants, including smuggled migrants. However, it is important for legislators to ensure that any laws or regulations on this issue are cleared linked with the appropriate mechanisms that ensure respect for and promotion of the rights described above.

2. In facilitating the return of smuggled migrants, the [*competent authority*] shall take appropriate measures to ensure that [any planned or actual] return of smuggled migrants occurs in an orderly manner and with due regard for the safety and dignity of the persons involved.

3. Every effort should be made to limit the use of force in the [return] [removal] process. The only forms of restraint which are acceptable are those constituting responses that are strictly proportional to the actual or reasonably anticipated resistance of the particular returnee with a view to controlling him or her.

Commentary

Paragraph 2 is mandatory; paragraph 3 is optional.

Source: Smuggling of Migrants Protocol, article 18, paragraph 4.

Compliance with article 18, paragraph 4, of the Protocol is mandatory. However, the manner in which this obligation is achieved may vary.

Relevant measures that can be undertaken to ensure the safety and dignity of the person during a removal process are discussed in the Council of Europe Guidelines on Forced Return. As noted in the commentary on guideline 1, voluntary return should always be the preferred option. Voluntary return is likely to be the less expensive option for the State party, and it poses few risks with respect to human rights. The commentary on guideline 1 notes that voluntary returns can be assisted by adopting measures such as ensuring that the returnee is afforded reasonable time for complying voluntarily with a removal order and offering practical assistance such as incentives or meeting transport costs. (Twenty Guidelines on Forced Return, pp. 10 and 11).

The Council of Europe Guidelines also cover a number of other issues relevant to ensuring the safe, orderly and dignified return of smuggled migrants,

including the conditions under which detention pending removal can be ordered, limits on the length of detention and the importance of ensuring judicial remedies are available against detention (guidelines 6-11); and good practices that should be followed when a forced return is necessary, including ensuring fitness for travel and medical examination, use of escorts and restrictions on the use of force (guidelines 15-20).

Guideline 15 notes the importance of seeking to ensure the cooperation of returnees at all stages in the removal process in order to minimize the need to use any form of force. Guideline 15 suggests that where the returnee is detained, he or she should be given information in advance about the removal arrangements and the information given to the authorities of the State of return. He or she should be given an opportunity to prepare that return, in particular by making necessary contacts both in the host State and in the State of return and, if necessary, to retrieve his or her personal belongings which will facilitate his or her return in dignity.

Guideline 19, on means of restraint, is also particularly relevant to the issue of ensuring order and dignity:

> 1. The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.
>
> 2. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he or she risks asphyxia, shall not be used.
>
> 3. Members of the escort team should have training which defines the means of restraint which may be used, and in which circumstances; the members of the escort should be informed of the risks linked to the use of each technique, as part of their specialized training. If training is not offered, as a minimum, regulations or Guidelines should define the means of restraint, the circumstances under which they may be used, and the risks linked to their use.
>
> 4. Medication shall only be administered to persons during their removal on the basis of a medical decision taken in respect of each particular case.
>
> (Council of Europe Twenty Guidelines on Forced Return.)

Article 33. Protection of existing arrangements

Nothing in this chapter prejudices:

(a) Any rights or remedies afforded or available to persons who have been the object of any offence related to smuggling of migrants under any other law;

(b) Any obligations entered into under any applicable treaty, bilateral or multilateral, or any other applicable operational agreement that governs, in whole or in part, the return of persons who have been the object of smuggling of migrants.

Commentary

Optional

Source: Smuggling of Migrants Protocol, article 19, paragraph 2, and article 18, paragraph 8.

Subparagraph *(a)* is intended to preserve the operation of existing laws that may apply to all persons, including smuggled migrants. This may be necessary where, for example, there could be some uncertainty as to whether or not certain laws (such as criminal law or labour laws) could be applied to non-nationals, including smuggled migrants.

For example, smuggled migrants who have been victims of any crime (and not only crimes of violence) should be able to report any criminal victimization to the relevant authorities and have those claims properly investigated and prosecuted. If this is not possible, smuggled migrants may become easy targets for criminals who know that they can prey on smuggled migrants with relative impunity. Where criminal laws do not already cover all persons (including non-nationals such as smuggled migrants), States may need to extend application of existing criminal law offences, particularly those relating to violent crimes, to ensure that they are available to protect smuggled migrants who are victims of crime.

As another example, smuggled migrants may have the option of seeking to regularize their migration status through existing immigration programmes (for example, programmes for family reunification or skilled labour migration). This law is not intended to interfere with the operation of other such laws.

Subparagraph *(b)* is intended to preserve the operation of any existing or subsequent agreements governing the return process established between countries. This reflects article 18, paragraph 8, of the Protocol, which provides that article 18 shall not affect obligations entered into under any applicable treaty or operational agreement that governs, in whole or in part, the return of persons who have been the subject of conduct criminalized by the Protocol.

UNODC
United Nations Office on Drugs and Crime

Vienna International Centre, PO Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, www.unodc.org

V.10-52715—October 2010