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United Nations Office on Drugs and Crime



Assessment Guide to the
**Criminal Justice Response to
the Smuggling of Migrants**



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Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants



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The designations employed and the presentation of the material in this document 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.

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Introduction

The *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* provides an inventory of measures for assessing the legislative, investigative, prosecutorial, judicial and administrative responses to the smuggling of migrants by land, sea and air, for deterring and combating such crime, and for integrating the information and experience gained from such assessment into successful national, regional and international strategies.

The *Assessment Guide* is based on lessons learned from domestic and international efforts to curtail the smuggling of migrants, scholarly analysis and case examinations, and consultation with key stakeholders and relevant experts. The *Assessment Guide* is a standardized and cross-referenced set of measures designed to enable government officials in immigration, customs and law enforcement agencies and United Nations agencies, as well as other organizations, industry and individuals, to conduct comprehensive assessments of domestic systems, to identify areas of technical assistance, to assist in the design of interventions that incorporate international standards and norms on the prevention and suppression of the smuggling of migrants, and to assist in training on these issues.

A. Background

Virtually every country in the world is affected by the smuggling of migrants, whether as a country of origin, transit or destination for migrants smuggled by profit-seeking criminals. Smuggled migrants are vulnerable to life-threatening risks and exploitation. Thousands of people have suffocated in containers, perished at sea or died of thirst in deserts. Generating huge profits for the criminals involved, the smuggling of migrants fuels corruption (and vice versa) and empowers organized crime.

Protocol against the Smuggling of Migrants by Land, Sea and Air

Under the aegis of the United Nations, the international community produced a consensus agreement to target this crime type: the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.¹ The Protocol adopts an aspirational, yet pragmatic and multifaceted approach to fulfilling its express purpose: “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”.² These objectives reflect the inherent complexity in establishing an appropriate international legal modality that takes account of the host of complex criminal justice and human rights considerations embroiled in this issue. To that end, the Protocol elaborates a comprehensive international framework to criminalize the smuggling of migrants, calling for unprecedented levels of international cooperation and collaborative law enforcement efforts.

¹United Nations, *Treaty Series*, vol. 2241, No. 39574.

²Article 2 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

The smuggling of migrants, as defined by the Protocol, means:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.³

Upon signing the Smuggling of Migrants Protocol, States parties agree to criminalize smuggling of migrants, including participatory and/or ancillary conduct.⁴ The prevention and suppression of smuggling of migrants by sea is specifically addressed in the Protocol.⁵ The Protocol also requires the adoption of general prevention measures targeted at improving border control capabilities, information-gathering and law enforcement.⁶ States parties must also adopt appropriate measures to preserve and protect the rights of smuggled migrants.⁷ Finally, the Protocol provides a framework for the repatriation of smuggled migrants.⁸

United Nations Office on Drugs and Crime

The United Nations Office on Drugs and Crime (UNODC) is the guardian of the Smuggling of Migrants Protocol and the United Nations Convention against Transnational Organized Crime.⁹ UNODC leads international efforts to comprehensively prevent and suppress the smuggling of migrants and to protect smuggled migrants.

B. Objectives of the *Assessment Guide*

1. Purpose

The purpose of the *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* is to provide comprehensive guidance for assessing the criminal justice responses to the smuggling of migrants in a given country. Specifically, the present document guides assessors in gathering and analysing information with the objectives of:

- (a) Identifying gaps in the existing criminal justice system response to the smuggling of migrants; and
- (b) Facilitating the formulation and development of technical assistance projects that adequately respond to the gaps and needs identified.

The present *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* contributes to achieving the overall objective of establishing in a country a criminal justice response that effectively reduces the smuggling of migrants, brings perpetrators to justice, protects the rights of smuggled migrants and promotes cooperation. The *Assessment Guide* facilitates the collection and analysis of

³Article 3 of the Smuggling of Migrants Protocol.

⁴Article 6 of the Smuggling of Migrants Protocol.

⁵Articles 7-9 of the Smuggling of Migrants Protocol.

⁶Articles 10-14 of the Smuggling of Migrants Protocol.

⁷Articles 5, 16 and 19 of the Smuggling of Migrants Protocol.

⁸Article 18 of the Smuggling of Migrants Protocol.

⁹United Nations, Treaty Series, vol. 2225, No. 39574.

information from policymakers, law enforcers, judges, prosecutors, researchers, administrators and members of civil society who are working at different levels towards the same objectives.

2. Specific objectives

The *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* is designed to help:

- To assess the capacity of national Governments, policymakers, law enforcement agencies, prosecutors and the judiciary in identifying, investigating, prosecuting and sentencing cases involving the smuggling of migrants
- To assess the procedures, capacity and level of transparency in the criminal justice system
- To assess the effectiveness of existing mechanisms and proposals for enhancing the overall capacity of a criminal justice system in countering the smuggling of migrants
- To identify any gaps in the existing criminal justice response to smuggling of migrants
- To facilitate the formulation and development of measures that adequately respond to the needs and deficiencies identified

3. Audiences

The *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* is designed to enable experts from international organizations, non-governmental organizations, national development agencies and other governmental entities, as well as relevant institutions and individuals, to conduct comprehensive assessments of domestic criminal justice systems, to identify areas for technical assistance, to assist in the design of interventions that integrate international standards and norms on the prevention and suppression of smuggling of migrants, and to assist in training on these issues.

The present *Assessment Guide* is sufficiently flexible to be used for assessments both in places where a solid infrastructure for combating the smuggling of migrants exists, and in places with little such infrastructure. Specifically, the *Assessment Guide* serves the following audiences and target groups:

- Governments, by providing them with a sound understanding of their responses to the smuggling of migrants, and the strengths, weaknesses and areas requiring improvement in these responses
- International, non-governmental and other civil society organizations, by assisting them in assessing the degree to which responses provided by countries meet existing international obligations and best practice standards
- Specialized law enforcement agencies, prosecutorial authorities and members of the judiciary, by assisting them in reviewing their own organization and activities
- Governmental and international entities, by enabling cross-border law enforcement and judicial cooperation
- International and national entities and research institutions, by assisting them in developing in-depth and comparable analyses of countries' responses
- Donor countries and agencies, by enabling and improving the purposeful funding of activities to prevent and suppress the smuggling of migrants

C. Using the *Assessment Guide*

1. Outline and overview

This *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* is organized into 13 sections, as follows:

- I. Legal framework
- II. National coordination
- III. Human resources and staff management
- IV. Criminal intelligence
- V. Investigation powers and procedures
- VI. Border control, carrier liability, sea patrol
- VII. Prosecution
- VIII. Judiciary
- IX. International cooperation
- X. Identity and travel documents
- XI. Assistance and protection measures
- XII. Prevention and awareness
- XIII. Research and data collection

Each section represents one of the sectors involved in the criminal justice response to the smuggling of migrants. Each section of the present *Assessment Guide* contains assessment tools designed to enable a comprehensive assessment of that aspect of the criminal justice response to the smuggling of migrants. Wherever possible and relevant, tools are cross-referenced to relevant sections elsewhere in the *Guide*.

Within each section, the *Assessment Guide* provides guidance on specific aspects of criminal justice measures. A thorough assessment of any jurisdiction will require the use of the *Assessment Guide* as a whole. Individual sections and tools may be used separately for smaller, discrete assessments of individual sectors and thus cater for different types of analyses, budgets and time frames.

The *Assessment Guide* is designed for a variety of audiences in the government and non-government sectors and for those working in official capacities or carrying out independent research or assessment functions. Table 1 provides an indicative—but by no means comprehensive—outline of key audiences for each section of the present *Assessment Guide*.

Table 1. Key audiences for the different sections of the *Assessment Guide*


SECTION	LIKELY OR INTENDED AUDIENCE AND STAKEHOLDERS
I. Legal framework	Policy and lawmakers, departments of justice and attorney general, ministries of interior or home affairs
II. National coordination	Policymakers, departments of justice and attorney general, ministries of interior or home affairs, police and other law enforcement agencies, immigration agencies, customs and border control agencies, military, coordinating committees, anti-corruption agencies, civil aviation authorities, airlines and airline associations
III. Human resources and staff management	Ministries of interior or home affairs, police and other law enforcement agencies, immigration agencies, customs and border control agencies, departments of justice and attorney general, military
IV. Criminal intelligence	Police, other law enforcement and intelligence agencies
V. Investigation powers and procedures	Police and other law enforcement agencies, prosecution services, judiciary
VI. Border control, carrier liability, sea patrol	Police and other law enforcement agencies, immigration and border control agencies, navy and other parts of the military, civil aviation authorities, airlines and airline associations, sea carriers (cargo and passengers), maritime authorities
VII. Prosecution	Prosecution services, police and other law enforcement agencies, judiciary, departments of justice and attorney general, law and bar associations
VIII. Judiciary	Judiciary, prosecution services, police and other law enforcement agencies, departments of justice and attorney general, law and bar associations
IX. International cooperation	Policymakers, departments of justice and attorney general, national International Criminal Police Organization (INTERPOL) offices, international organizations, police and other law enforcement agencies, immigration and border control agencies, judiciary, ministries of foreign affairs, embassies, consulates, liaison officers, regional law enforcement cooperation bodies
X. Identity and travel documents	Ministries of interior or home affairs, ministries of foreign affairs, police and other law enforcement agencies, border control and immigration agencies, commercial carriers (such as airlines)
XI. Assistance and protection measures	Ministries of interior or home affairs, social welfare agencies (government and non-government), immigration departments, refugee support groups, international organizations, non-governmental organizations
XII. Prevention and awareness	Policymakers, ministries of interior or home affairs, immigration departments, law enforcement agencies, international organizations, non-governmental organizations, media
XIII. Research and data collection	All relevant government agencies, universities and research institutes, international organizations, non-governmental organizations

The *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* is, as its title suggests, primarily concerned with the criminal justice response to the smuggling of migrants, including assistance provided to and protection of the rights of smuggled migrants. Matters relating to domestic immigration and administrative systems, measures pertaining to international labour migration, correctional services and demand reduction are not covered by the present *Guide*.

2. Structure and organization of the assessment tools

The present *Assessment Guide* is divided into sections designated with roman numerals (I, II, III and so forth), each of which is subdivided into individual, numbered assessment subsections (I.A, I.B, I.C and so forth). Each section provides a practical and detailed guide to the key issues to be examined, with reference to relevant international conventions, standards and best practice guidelines (where applicable).

The assessment identifies and outlines international benchmarks for each section as set out in the mandatory and optional requirements contained in the Smuggling of Migrants Protocol and the United Nations Convention against Transnational Organized Crime. Where applicable, key provisions of the Convention and Protocol are set out in a separate box, as shown below.

	[SECTION NUMBER].[SUBSECTION LETTER] [SECTION TITLE]: [SUBSECTION TITLE]
	<p>International requirements</p> <ul style="list-style-type: none"> → Relevant article of the Smuggling of Migrants Protocol. → Relevant article of the Convention against Transnational Organized Crime.

The Convention and Protocol are complemented by the

- *Interpretative notes for the official records (Travaux Préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*¹⁰
- *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*¹¹
- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*¹²
- In addition, UNODC has developed a range of publications to further assist States parties in their implementation and interpretation of the Convention and the Protocol. These include:

¹⁰ A/55/383/Add.1.


¹¹ United Nations publication, Sales No. E.06.V.5.

¹² *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).

- *Issue Paper: a short introduction to migrant smuggling* (2010)¹³
- *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* (2010)¹⁴
- *Criminal Justice Assessment Toolkit* (2006)¹⁵
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* (2011)¹⁶
- *International Framework for Action to Implement the Smuggling of Migrants Protocol* (2012)¹⁷
- *Issue Paper: Migrant Smuggling by Air* (2010)¹⁸
- *Model Law against the Smuggling of Migrants* (2010)¹⁹
- *Issue Paper: Smuggling of Migrants by Sea* (2011)²⁰
- *Toolkit to Combat Smuggling of Migrants* (2010)²¹

These documents identify and explore international best practice guidelines for the criminal justice response to the smuggling of migrants and assist in the assessment of domestic responses to the many issues associated with the prevention and suppression of this crime. A complete list of documents referenced in this *Assessment Guide* is set out in the bibliography.

The outline of international law and best practice guidelines relevant to each section is followed by a list of assessment questions. These questions, set out in a separate box, help guide the inquiry of the assessor. Where applicable, questions are separated between different fields of inquiry, and primary questions are followed by secondary questions, as shown below.

	SECTION NUMBER.SEBSECTION LETTER	ASSESSMENT QUESTIONS
Field of inquiry		<ul style="list-style-type: none"> • Primary question <ul style="list-style-type: none"> → Secondary question • [...]

¹³United Nations Office on Drugs and Crime, *Issue Paper: a short introduction to migrant smuggling* (2010). Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_A_short_introduction_to_migrant_smuggling.pdf.

¹⁴United Nations Office on Drugs and Crime, *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* (2010). Available from www.unodc.org/unodc/en/human-trafficking/electronic-basic-training-manual-on-investigating-and-prosecuting-smuggling-of-migrants.html.

¹⁵United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit* (2006). Available from www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html.

¹⁶United Nations Office on Drugs and Crime, *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* (2011). Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/In-Depth_Training_Manual_SOM_en_wide_use.pdf.

¹⁷United Nations Office on Drugs and Crime, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (2012). Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf.

¹⁸United Nations Office on Drugs and Crime, *Issue Paper: Migrant Smuggling by Air* (2010). Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Migrant_Smuggling_by_Air.pdf.


¹⁹United Nations Office on Drugs and Crime, *Model Law against the Smuggling of Migrants* (2010). Available from www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf.

²⁰United Nations Office on Drugs and Crime, *Issue Paper: Smuggling of Migrants by Sea* (2011). Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf.

²¹United Nations Office on Drugs and Crime, *Toolkit to Combat Smuggling of Migrants* (2010). Available from www.unodc.org/documents/human-trafficking/SOM_Toolkit_E-book_english_Combined.pdf.

In combination, these questions are designed to provide a comprehensive assessment of the relevant aspect of the criminal justice system, though assessors should always be mindful about adapting their assessment questions to local situations and drawing from their own experience and knowledge of the issue. These questions are not checklists and are not designed to grade or rank States and their domestic systems; the assessment questions merely provide a starting point for inquiry and discussion.

The assessment questions are followed by a short, boxed list of additional guidelines and tools. These provide resources for further reading and avenues for further inquiry, as shown below.

	[SECTION NUMBER].[SUBSECTION LETTER] ADDITIONAL GUIDELINES AND TOOLS
	<ul style="list-style-type: none"> • Title of publication • Title of publication

3. Preparing an assessment

What follows are some general suggestions for conducting assessments of the criminal justice response to smuggling of migrants. While not comprehensive, these suggestions serve as general guidelines for all assessments, though assessors may need to adapt them to the specific purpose and focus of their assessment.

During the initial stage, the organization or individual carrying out the assessment must decide on the specific purpose and outline of the assessment. A preparatory desk review should then follow, as well as an analysis of the relevant stakeholders and the identification of contact points.

(a) Purpose of the assessment

The *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* provides a set of interventions that, together, allow for a comprehensive assessment of the criminal justice response to the smuggling of migrants. An assessment does not, however, have to touch upon all areas of intervention. The purpose might be either to look into one specific area in detail or to appraise an overall strategy in more general terms.

At the very beginning of any assessment, assessors should reflect on the terms of reference of the assessment and clarify any unclear requirements. Assessors need to be clear and certain about the level of depth expected from the assessment, the resources and time dedicated to the assessment and the composition and coordination of the assessment team (if the assessment is conducted by more than one individual). The scope of the assessment also needs to be clear: will the assessment examine the overall capacity of the criminal justice system or focus on specific sectors such as legislation, enforcement and prosecution? If several sectors of the criminal justice system are to be assessed, the terms of reference should give some indication of the balance among these to be sought in the assessment. In some cases, it may be advisable to conduct joint assessments that would examine the response not only to smuggling of migrants but also to other crimes, such as trafficking in persons. This should be clearly established from the beginning of the process.

In planning and preparing the assessment, it is also important to reflect on the audience and the use of any reports that follow. This will also determine whether and how classified information may be used and whether the circulation and dissemination of the assessment will be (or has to be) restricted. This decision will inform the message delivered to stakeholders regarding the use that will be made of their statements and of the documents they produce. Just as important is gaining an understanding of the political sensitivities that may be associated with issues covered by the assessment.

It is strongly advised to secure prior approval by government authorities before conducting the assessment. It may be useful to form an advisory group, ideally consisting of senior managers from identified relevant stakeholders, to agree on the terms of reference of the proposed assessment and in order to ensure that access is granted to appropriate officials. The advisory group should also be invited to add questions and themes to the assessment that may be of particular national interest.

A decision has to be made at the planning stage by those carrying out the assessment, in close cooperation with the relevant partners, donors and/or initiators, on the overall purpose of the assessment. In addition, the following factors need to be determined (the findings of the preparatory desk review may be used to fine-tune plans):

- The number of stakeholders to be interviewed
- The availability, quality and nature of data to be collected
- The structure of the assessment report
- The number of missions to the State being assessed
- The time frame of the overall endeavour

While the terms of reference for an assessment mission may call for an assessment of a specific aspect of the criminal justice response to smuggling of migrants, such as policing or the judiciary, a complete assessment will always include the country's legal and administrative framework so that decision makers may understand the context in which a system exists and operates, as well as the opportunities, challenges and limitations that the current framework may present. Critical in this regard is an adequate understanding of different legal traditions, as well as basic legal concepts and national policy directives.

(b) Preparatory desk review

Preparatory research is critical to a successful assessment. It is essential that a preparatory desk review be carried out before conducting an assessment mission. This desk review serves three important purposes.

First, it helps to develop an understanding of the broader political, legal, economic and social reality of the country and region. Only when examined in this larger context can the criminal justice and the challenges it may be facing be understood—and only then can technical assistance interventions be appropriately designed.

Second, the preparatory desk review should involve the collection and review of available literature on the levels and patterns of the smuggling of migrants and about the criminal justice response

to smuggling of migrants in the country (or countries) under assessment. Initial research into contextual information and obtaining a measure of a country's capacity can often be conducted using libraries, databases or the Internet. This will assist in identifying relevant government country reports, scholarly papers and reports by international and regional organizations, non-governmental organizations and the media.

Third, preliminary research should involve obtaining and reviewing existing data on smuggling of migrants and the criminal justice response. This includes:

Data on the smuggling of migrants

Such data include research findings and other information collected in national crime statistics, other crime-related statistics, statistics collected by international, governmental and non-governmental providers of services to smuggled migrants (for example, in the form of annual statistics and annual reports), the national rapporteur, international treaty mechanisms, Governments, regional and international organizations and anecdotal evidence gathered by other stakeholders, the media and others. The availability of data relating to the smuggling of migrants will differ greatly between countries and in many cases there may be little or no pre-existing data that can be used in planning and preparing the assessment.²²

Other relevant data

Such data could be gathered by authorities dealing with migrants (including migrants apprehended in the territory of a given State, refugees, asylum seekers and returned migrants) and migration-related issues (including the refusal of entry by border control officers), authorities dealing with unaccompanied minors and ethnic minorities, civil society organizations (non-governmental actors representing, for example, migrants, ethnic minorities and women) and others.

This information is essential to the proper planning of the assessment—as well as to the development of recommendations for justice reforms, capacity-building and technical assistance initiatives. During the preparatory review phase, available data and information concerning the jurisdiction being assessed should be evaluated against the overall purpose of the assessment. In this context, it is essential to identify and examine other assessments that may have touched on similar issues and elements. It is important to recognize and acknowledge the work done by other authors and agencies and learn from their experience and observations, as well as their mistakes. A literature review will also assist in identifying knowledge gaps and missing evidence.

In order to reach accurate conclusions during an assessment, information has to be classified according to its reliability and transparency. While anecdotal reports and information disseminated by the media should be taken into account during the assessment, they should not be confused with, or replace, more reliable sources of information.

In summary, in preparation of an assessment mission, it is important:

- To gain a basic understanding of the structure and operation of the criminal justice system

²²See further sections XIII.A and XIII.B below.

- To identify, locate and examine any previous similar assessments
- To identify and, if necessary, request in advance (where possible) relevant statistical information
- To identify, locate and read relevant scholarly papers and reports by national, international and non-governmental organizations
- To determine the full range of research tools that will be used in the assessment mission, including document study, interviews, focus groups, use of questionnaires or surveys and site visits

(c) Analysis of stakeholders

As a next step, all relevant stakeholders who are indispensable for the assessment and potential interviewees should be identified. Depending on whether the assessment is to be broad or relatively specific, the following might be considered stakeholders:

- Police and other law enforcement authorities (general and specialized units)
- Front-line officers dealing with immigration, customs, border control, social service provision, labour inspection, police patrols, detention and paralegal service provision
- Prosecutors, judges and other members of the judiciary
- Government entities, including mandated bodies, ministries with responsibilities with regard to smuggling of migrants (Ministry of Justice, Ministry of Internal Affairs), health service providers and managers of government-run shelters
- Civil society (including non-governmental organizations)
- International organizations
- Existing mechanisms (including national task forces, designated central authorities and intragovernmental working groups on the smuggling of migrants)
- Main donors other than the Government

(d) Identification of contact point(s)

Once the stakeholders have been identified, a contact point in each institution should also be identified to support the assessment. A national contact point might assist in updating the data collected. In addition, it might be helpful to appoint a local administrator to support efforts to identify stakeholders and set up meetings. When making appointments, it may be necessary to obtain appropriate clearances to meet with relevant local agencies and other stakeholders.

4. Conducting an assessment

The assessment should be conducted in close cooperation with the identified contact point(s) in a given jurisdiction and in line with the agreed outline for the assessment report. The *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* provides a basis for designing a questionnaire that will help assess the existing legal, logistical and financial infrastructure related to combating the smuggling of migrants.

During the assessment, interviews should be set up with all the relevant stakeholders who have been identified. Should it not be feasible to conduct interviews on a one-on-one basis, the possibility of arranging a meeting attended by all relevant stakeholders should be considered. Alternatively, two or three meetings bringing together representatives of similar institutions could be arranged.

The interviews should be conducted using neutral and non-judgemental language. Insofar as possible, the questions should be posed in such a way as to elicit open answers. The questions contained in the present *Assessment Guide* are, for the most part, formulated accordingly. During the interviews, it is essential to listen to and respect the interviewee. If necessary and appropriate it may be useful to repeat questions in different ways as this may generate different answers. Assessors should pay attention to information that is not provided to them or that may otherwise be missing.

Information on the effectiveness of measures should be elicited by asking respondents for supporting evidence. Interviewers should use professional judgement as to when to do this. As a general rule, assessors should ask to be shown how things work and what people do, rather than just being told about them. Site visits and practical demonstrations reveal more than any briefing can.

Wherever possible, assessors should corroborate information by consulting a range of sources. This may include, for example, representatives from national and local governments, international organizations, non-governmental organizations, members of the public (also including offenders as well as smuggled migrants), lawyers (including legal aid and public defenders), prosecutors, judges, academic and research institutions, donor countries, assistance or aid agencies and journalists.

Knowing when one has consulted sufficient sources and spoken to enough individuals and agencies is a matter of judgement, not only of the availability and willingness of sources to be forthcoming, but also of the amount of time and resources allocated in the terms of reference for the assessment. Assessors should indicate where any information reported is unsubstantiated and, where appropriate, explain whether they consider this information credible and why.

5. Concluding an assessment

The outcome of the desk review and the actual assessment should be documented in a report. While the terms of reference will sometimes dictate the specific format of the assessment report, the following points set out some general suggestions for drafting and dissemination.

(a) Drafting the report

Assessors may wish to provide the background information that will give depth and context to the assessment and to give the assessment's intended audience an understanding of the country's specific issues and challenges in context. This should include the current situation of organized crime and migration in the assessed country.

The report should contain information on the stakeholders interviewed and the findings of the interviews. Reference should be made to the institutions and organizations that provided information rather than to the individuals interviewed. The list of individual contributors could be acknowledged in an annex to the report. The findings of the desk review should be included in the report and

information collected during the process should be electronically systematized for ease of reference. The findings of the assessment mission and interviews should constitute a significant part of the report.

Assessors should seek to identify the key issues that have emerged from the interviews they conducted and from the documents and other sources they consulted during the assessment. The assessment report should also identify, where possible, the following:

- Official perceived prevalence, nature and scope of the issue of smuggling of migrants in the assessed country
- Public perception of smuggling of migrants
- Any factors that may impede or assist reform efforts such as:
 - Institutional attitudes to reform (resistance or openness to accepting reform; existence of opponents to and supporters of reform in the upper hierarchy; lack or presence of partnerships with civil society groups)
 - Overly hierarchical or centralized decision-making among criminal justice actors
 - Proximity of elections, and other factors

Once identified, strategies for the removal or diminution of obstacles should be part of the intervention planned.

(b) Drawing conclusions; making recommendations

The conclusions should be based on the outcome of the interviews, the country assessment and the desk review. For the sake of transparency, the bases for drawing the conclusions should be explained. Ideally, conclusions reached should be objective, reliable, verifiable, valid and comprehensive. Where assessors are unable to draw conclusions because of conflicting information or where there are controversies, assessors should record the existence of such issues, instead of resolving them, as they may provide insight for future programming. In such a case, the conclusions should be qualified as tentative.

Conclusions determine the actual needs of a country and may be drawn by evaluating the existing legal infrastructure and the degree to which relevant laws are implemented in accordance with international standards and legal provisions. Another set of conclusions might be based on the potential discrepancy between policies that have been officially announced or published and policies that have actually been implemented.

Recommendations for interventions should flow from the conclusions and take into account the terms of reference for the assessment, integrate United Nations standards and norms and other relevant international standards and be realistic and sustainable. They should to the extent possible address issues relating to implementation, timelines and deadlines, and, where possible, estimated costs.

Identifying priorities for development should bear a direct relationship to any existing development strategy, including seeking to improve management reform and governance, and be ranked as follows:

- Immediate
- Short-term
- Medium-term
- Long-term

When recommending adapting and transferring a system or process from another country, assessors should consider the feasibility of the process being carried out. Due account should be taken of the perceived national priorities of the country being assessed.

Priorities for intervention can be determined by ranking recommendations within each assessment area, also including advice on the proposed sequence in which interventions should be implemented.

When an advisory group of stakeholders is created, it is sometimes useful, in order to enhance transparency and sustainability, to offer the advisory group an opportunity to be verbally briefed on the findings, tentative conclusions and recommendations following the completion of the assessment.

(c) Distributing the report

The distribution of the assessment report should be considered as early as the planning stage by the initiators of the assessment. The report should be distributed to all organizations and institutions that collaborated in the assessment process. If the report contains sensitive information, the option of producing a classified version in addition to a public version could be considered. The box below lists additional guidelines and tools for preparing, conducting and concluding assessments.



INTRODUCTION.C ADDITIONAL GUIDELINES AND TOOLS FOR PREPARING, CONDUCTING AND CONCLUDING ASSESSMENTS

- *Criminal Justice Assessment Toolkit* (see Introduction, pp. 5-9).
- *Toolkit to Combat Smuggling of Migrants*:
 - Tool 1, entitled “Understanding the smuggling of migrants” (pp. 1-48);
 - Tool 4, entitled “Problem assessment and strategy development” (pp. 1-42).

I. Legal framework

A central element of any assessment of criminal justice responses to the smuggling of migrants is the identification and analysis of relevant international and domestic legal frameworks, their jurisdiction and scope, as well as key definitions of terms that shape and direct the understanding and interpretation of the smuggling of migrants in a given country. An assessment of the legal framework serves to identify accession to and compliance with relevant international treaties and other agreements and the existence and operation of domestic laws and regulations, and to explain and explore key concepts. This should also involve an analysis of relevant criminal offences and their application.

A. Ratification of and accession to international legal instruments

In international law, the Smuggling of Migrants Protocol is the first and only global treaty aimed at preventing and combating the smuggling of migrants, protecting the rights of smuggled migrants and promoting cooperation between States. The Protocol supplements the United Nations Convention against Transnational Organized Crime, the main international instrument in the fight against transnational organized crime.²³

The United Nations Convention against Transnational Organized Crime represents a major step forward in the fight against transnational organized crime and signifies the recognition by States parties of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money-laundering, corruption and obstruction of justice); the adoption of frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities. These elements are discussed throughout this *Assessment Guide*.

The Protocol is not an independent treaty. Rather, complementary regimes of jurisdiction are established by the critical link between the Protocol and its “parent”, the United Nations Convention against Transnational Organized Crime. Article 37, paragraph 2, of the Convention establishes that in order to become a party to the Protocol, a State must also be (or become) a State party to the Convention. The *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* further emphasize that “it is not possible for a State to be subject to any obligation arising from the Protocol unless it is also subject to the obligations of the Convention”.²⁴ “This ensures that, in any case that arises under a Protocol to which the States concerned are parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions were drafted on that basis.”²⁵

²³ Article 1, paragraph 1, of the Smuggling of Migrants Protocol.

²⁴ *Legislative Guides*, p. 330.

²⁵ *Ibid.*, p. 329.



I.A LEGAL FRAMEWORK: RATIFICATION OF AND ACCESSION TO INTERNATIONAL LEGAL INSTRUMENTS

International requirements

- Article 1, paragraphs 1 and 2, of the Smuggling of Migrants Protocol.
- Article 37 of the United Nations Convention against Transnational Organized Crime.

Given the transnational nature of the smuggling of migrants, it is vital that States ratify the United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol to enhance international cooperation on this matter. Other international instruments such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,^a the United Nations Convention against Corruption,^b the Convention relating to the Status of Refugees,^c or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families^d are of particular relevance to the issue of smuggling of migrants.

Accordingly, questions about the accession to relevant treaties should stand at the very beginning of any assessment of domestic criminal justice responses to the smuggling of migrants. If the country is a State party, the assessment should also identify any reservations the country may have filed to exclude or modify the legal effect of certain provisions of the Protocol, of the Convention or any other relevant international instrument in their application to that state.

The Toolkit to Combat Smuggling of Migrants sets out a comprehensive catalogue of other international and regional instruments that may assist countries in their efforts to prevent and suppress the smuggling of migrants.^e

^a United Nations, *Treaty Series*, vol. 2237, No. 39574.

^b *Ibid.*, vol. 2349, No. 42146.

^c *Ibid.*, vol. 189, No. 2545.

^d *Ibid.*, vol. 2220, No. 39481.

^e *Toolkit to Combat Smuggling of Migrants*, Tool 3, entitled “International legal framework”, pp. 9-16.



I.A ASSESSMENT QUESTIONS

Ratification of the Convention and Protocol

- Is the country a State party to the United Nations Convention against Transnational Organized Crime?
 - If so, since when?
 - If not, are there any plans for it to become a State party? Within what time frame?
- Is the country a State party to the Smuggling of Migrants Protocol?
 - If so, since when?
 - If not, are there any plans for it to become a State party? Within what time frame?
- Has the country filed any reservation towards the Convention or Protocol?
 - If yes, what reservations have been filed and why?

Other international or regional instruments

- Is the country a State party to any other international or regional instruments relevant to the smuggling of migrants or to migration, especially the Trafficking in Persons Protocol, the United Nations Convention against Corruption, the Convention relating to the Status of Refugees, the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families? If so, does it have a plan for the full implementation of these instruments?
- What other regional or bilateral agreements are relevant to the country in its legal capacity to address the smuggling of migrants?



I.A ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 329-332.
- *Toolkit to Combat Smuggling of Migrants*:
Tool 3, entitled “International legal framework”;
Section 3.1, entitled “Introduction to international instruments against transnational organized crime”, pp. 2-4;
Section 3.2, entitled “Relationship between the Organized Crime Convention and the Migrants Protocol”, pp. 5-6;
Section 3.4, entitled “Other relevant international instruments”, pp. 9-14;
Section 3.5, entitled “Regional instruments”, pp. 15-16.
- *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, pp. 1-7.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, p. 119.

B. National laws and policies relating to the smuggling of migrants

It is essential that States parties to the United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol take the steps necessary to fully implement these treaties through the development of national laws. Article 31, paragraph 1, of the Convention specifically notes that:

Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

Accordingly, any assessment of national criminal justice systems must establish whether national legislation for countering smuggling of migrants is in place and, if it is, what such legislation

encompasses. National legislation relating to smuggling of migrants may be set out in general criminal laws, codes of criminal procedure, immigration law and/or specific laws pertaining to this issue.

When national laws pertaining to smuggling of migrants are identified and examined, the assessment should take note of the fact that the requirements set out in the Convention and Protocol serve as minimum standards.²⁶ Accordingly, domestic measures may be broader in scope or more severe than those required by the Convention and Protocol, so long as the obligations set forth in these treaties have been fulfilled.²⁷

In many countries, the existence and implementation of domestic laws pertaining to smuggling of migrants are guided or informed by national policies or action plans, clear policy documents or official statements; or more general policy documents relating to immigration, border control, refugees and asylum seekers, transnational crime and international law enforcement and judicial cooperation may outline the Government's stand on these issues and, directly or indirectly, shape and explain the overall approach to the smuggling of migrants and the formulation of laws and law enforcement responses.²⁸



I.B LEGAL FRAMEWORK: NATIONAL LAWS AND POLICIES RELATING TO THE SMUGGLING OF MIGRANTS

International requirements

- Article 34, paragraphs 1 and 3 of the United Nations Convention against Transnational Organized Crime.

Note: Specific aspects of national legal frameworks and the domestic implementation of the Convention and Protocol are addressed in other sections of the present *Assessment Guide*, in line with each section's specific focus.



I.B ASSESSMENT QUESTIONS

National implementation of Protocol and Convention

- In which domestic law or laws has the Smuggling of Migrants Protocol been implemented?
 - If so, since when?
 - Does the national law (or laws) relating to smuggling of migrants pre-date the ratification of the Protocol or has it been enacted or amended since the country became a State party?

²⁶ Article 34, paragraph 3, of the Organized Crime Convention.

²⁷ *Legislative Guides*, p. 331.

²⁸ See also *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 9-10.

- In what domestic law or laws has the United Nations Convention against Transnational Organized Crime been implemented?
 - Is there a single law on organized crime or are there multiple legislative instruments?
 - Does the national law (or laws) relating to organized crime pre-date the ratification of the Convention or has it been enacted or amended since the country became a State party?

National policy or action plan

- Does the country have a national policy or action plan outlining the response to the smuggling of migrants and/or migration?
 - If yes, where is this policy documented; what does it say?
 - In the absence of any national policy or action plan, are there other documents, “white papers”, statements, regional action plans and so forth that set out individual elements of the country’s approach to the smuggling of migrants?
- Does the country have a national policy or action plan outlining the response to trafficking in persons or corruption?



I.B ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 9-11 and 331.
- *Toolkit to Combat Smuggling of Migrants: Section 3.3, entitled “Ratification of the Smuggling of Migrants Protocol”, pp. 7-8.*
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 11-20.
- *Model Law against the Smuggling of Migrants.*

C. Definition of smuggling of migrants

At the beginning of any assessment of laws and other measures to counter the smuggling of migrants stands a discussion of relevant terms and concepts pertaining to this phenomenon. It is important to identify and examine concepts and definitions in domestic laws as they may determine and explain the general direction and scope of the criminal justice response to the smuggling of migrants in a given country.

With the United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol, the international community agreed on the first international, legally binding definition of smuggling of migrants. In some countries there is confusion about the specific characteristics and elements of the smuggling of migrants and the differences, if any, from the

phenomenon of trafficking in persons. For this reason, it may be necessary to examine the distinction drawn between those two crimes in national laws.

Article 3, paragraph (a), of the Smuggling of Migrants Protocol provides that the term “smuggling of migrants”

shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.



I.C LEGAL FRAMEWORK: CONCEPTS AND DEFINITIONS

International requirements

→ Article 3, paragraph (a), of the Smuggling of Migrants Protocol.

Financial or other material benefit

The *Interpretative Notes* state that the reference 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. 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

Furthermore, the reference to “other material benefit” is relevant to the criminalization of smugglers of migrants who request sexual favours rather than financial payment for the provision of smuggling services.

Illegal entry

Article 3, paragraph (b), of the Smuggling of Migrants Protocol further defines “illegal entry” as the crossing of borders without complying with the necessary requirements for legal entry into the receiving State. “Illegal” thus refers only to non-citizens; the Protocol does not cover entry requirements placed on nationals and permanent residents of the receiving State.

The definition of smuggling of migrants in article 3, paragraph (a), forms the basis of the offences set out in article 6 of the Smuggling of Migrants Protocol; these are discussed in section D below.

Smuggling of migrants – trafficking in persons

Although the Smuggling of Migrants Protocol provides a universally accepted definition of smuggling of migrants, it may be difficult to distinguish between the smuggling of migrants and trafficking in persons cases at the operational level. Yet, in order to prevent and combat both crimes effectively it is important to draw a clear distinction between the two concepts. Smuggling of migrants and trafficking in persons are addressed by separate international legal instruments with widely different requirements and consequences. Accordingly, the distinction between the two concepts in domestic systems is imperative.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime provides an internationally agreed definition of “trafficking in persons” that is instructive in drawing a distinction between the two concepts. Article 3, paragraph (a), of that Protocol defines “trafficking in persons” as:

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

Despite internationally agreed definitions of the smuggling of migrants and trafficking in persons, in practice there remains a degree of overlap between the two concepts. Three principal points have been identified to clarify the difference between the smuggling of migrants and trafficking in persons.^b

The first point relates to the purpose of the criminal enterprise. “[T]he primary source of profit and thus also the primary purpose of trafficking in persons is exploitation”.^c In the case of smuggling of migrants, however, there is typically “no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country.”^d Rather, smugglers of migrants seek payment in advance or upon arrival from the smuggled migrant. In many cases this distinction is not an easy one to draw. For example, a person may agree to be smuggled unaware that on arrival he or she will be forced to work in poor or restrictive conditions for the smuggler in order to pay off a “debt” for the service. This situation would be considered an instance of trafficking because of the exploitation of the smuggled person and the means of deception used.

Secondly, the two concepts have differing requirements relating to transnationality and the legality or illegality of the trafficked or smuggled person’s entry into another State. For the smuggling of migrants, there must be “illegal entry of a person into a State party of which the person is not a national or a permanent resident.”^e Alternatively, the smuggling of migrants may arise by enabling a person to remain illegally in a country that he or she has entered (legally or illegally). There is thus both a cross-border element and a requirement of illegal entry or illegal stay. Trafficking in persons, in contrast, may involve illegal or legal entry into a country and does not require the crossing of a border. There is no requirement that trafficking in persons occurs transnationally; it can also occur completely within one country.

The final and critical difference between the two concepts is the issue of consent, which is considered to be irrelevant pursuant to the Trafficking in Persons Protocol, once the means are established.^f This Protocol is based on the understanding that:

[v]ictims of trafficking have either never consented — for instance if they have been abducted or sold — or, if they have given an initial consent, their initial consent has become void through the means the traffickers have used to gain control over the victim, such as deception or violence.^g

Although the Smuggling of Migrants Protocol does not address the issue, in practice, smuggling of migrants involves an agreement whereby a person may pay or give some other benefit to a

smuggler in order to facilitate that person’s illegal migration. It has been recognized that smuggled migrants might retract their initial consent during a smuggling operation but be forced to continue on the journey.^h Retracting consent, however, does not automatically denote an instance of trafficking. Other elements of the trafficking definition, such as the purpose of exploitation, would still need to be satisfied.

^a *Interpretative Notes*, para. 88.

^b *Issue Paper: a short introduction to migrant smuggling*, p. 10.

^c *Ibid.*

^d *Ibid.*

^e Article 3, subparagraph (a), of the Smuggling of Migrants Protocol.

^f Article 3, subparagraph (b), of the Trafficking in Persons Protocol.

^g *Issue Paper: a short introduction to migrant smuggling*, p. 10.

^h *Ibid.*, *Legislative Guides*, pp. 340-341.

Table 2 below illustrates the key differences between the two definitions.

Table 2. Definitions of “trafficking in persons” and “smuggling of migrants” compared

	Trafficking in persons (adults)	Trafficking in persons (children)	Smuggling of migrants (children and adults)
Material elements	<ul style="list-style-type: none"> • Act • Means • Exploitative purpose 	<ul style="list-style-type: none"> • Act • Exploitative purpose 	<ul style="list-style-type: none"> • Act: Procurement of illegal entry of a person • Purpose: For financial or other material benefit. Relationship usually ends after the border crossing.
Consent of the trafficked or smuggled person	Irrelevant once the means are established	Irrelevant. Means do not need to be established.	Smuggled person generally consents to the smuggling (though consent may be retracted or the person may be misinformed).
Victim’s age	Over 18	Below 18	Irrelevant
Transnationality	Not required	Not required	Smuggling involves illegal border crossing and entry into another country, or border crossing and illegal stay.
Involvement of an organized criminal group ^a	Not required	Not required	Not required
Mental element	Intention	Intention	Intention

^aSee section A.7 below.



I.C ASSESSMENT QUESTIONS

Definition of smuggling of migrants

- Does national law include a definition of smuggling of migrants?
 - How is this conduct defined?
 - Is this consistent with the definition set out in the Smuggling of Migrants Protocol?
 - What is this conduct called under national law?

Other definitions

- Is “financial or material benefit” an element of the definition of smuggling of migrants?
 - If so, is financial or material benefit further defined?
 - If not, are there reasons for not including an element of benefit or profit in the definition of smuggling of migrants?
- How is “illegal entry” defined in domestic law?
- How is “illegal stay” defined in domestic law?
- Is trafficking in persons defined in national law?
 - If so, how does that definition differ from the definition of smuggling of migrants?



I.C ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 339-341.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 1.8, entitled “What is the smuggling of migrants and related conduct?”, pp. 27-28;
 - Section 1.11, entitled “Related concept: trafficking in persons”, pp. 33-37;
 - Section 1.12, entitled “Distinguishing between the smuggling of migrants and trafficking in persons”, pp. 38-42.
- *Issue Paper: a short introduction to smuggling of migrants*, pp. 2-12.
- *Model Law against the Smuggling of Migrants*, pp. 12-20.
- *In-depth Training Manual on Investigating and Prosecuting Smuggling of Migrants*:
 - Module 1, entitled “Understanding migrant smuggling and related conduct”, pp. 1-2;
 - Module 2, entitled “Comparative analysis of migrant smuggling and trafficking in persons”, pp. 1-12.
- *Basic Training Manual on Investigating and Prosecuting Smuggling of Migrants*:
 - Module 1, entitled “Concepts and categories of the smuggling of migrants and related conduct”, pp. 1-26.

D. Criminalization of smuggling of migrants and related conduct

The core feature of international law relating to the smuggling of migrants—and a central element of any national criminal justice response—is the criminalization of the smuggling of migrants. Article 6 of the Smuggling of Migrants Protocol sets out a comprehensive list of obligations that must be satisfied in order to appropriately criminalize the smuggling of migrants. Specifically, article 6, paragraph 1 identifies three categories of offences that must be established in domestic law, including:

- Smuggling of migrants offences (article 6, paragraph 1, subparagraph (a))
- Document fraud offences (article 6, paragraph 1, subparagraph (b))
- The offence of enabling of illegal residence (or harbouring) (article 6, paragraph 1, subparagraph (c))



I.D LEGAL FRAMEWORK: CRIMINALIZATION OF SMUGGLING OF MIGRANTS

International requirements

- Article 6, paragraphs 1, 3 and 4, of the Smuggling of Migrants Protocol.
- Articles 6, 8 and 23 of the United Nations Convention against Transnational Organized Crime

The following obligation in the chapeau of article 6, paragraph 1, of the Smuggling of Migrants Protocol applies to each category of offence:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.

Article 6, paragraph 1, limits the application of relevant offences to “intentional” offences. Article 34, paragraph 3, of the United Nations Convention against Transnational Organized Crime, in conjunction with which the Smuggling of Migrants Protocol must be read, however, provides that “each State Party may adopt more strict or severe measures”. States parties are thus free to create offences that require less onerous mental elements than “intention”, such as recklessness or, perhaps, negligence.

Article 6, paragraph 1, subparagraph (a): Smuggling of migrants offence

Article 6, paragraph 1, subparagraph (a), of the Smuggling of Migrants Protocol requires the criminalization of “smuggling of migrants”, as defined in article 3, paragraph (a).^a The *Legislative Guides* make an important point about the requirement of “illegal entry” in this offence by noting that “the drafters intended that cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence” under article 6, paragraph 1, subparagraph (c).^b The requirement of intention (specified in the chapeau of article 6, paragraph 1) when applied to this offence means “there must have been a primary intention to procure illegal entry and there must have been a second intention, that of obtaining a financial or other material benefit.”^c

Article 6, paragraph 1, subparagraph (b): Document fraud offence

Article 6, paragraph 1, subparagraph (b), of the Smuggling of Migrants Protocol provides that “Producing a fraudulent travel or identity document”^d and “Procuring, providing or possessing such a document”^e should be criminalized, but only when it is intentionally committed for the purpose of the smuggling of migrants. The reference to “smuggling of migrants” means that the document offences must relate to the procurement of illegal entry into a State party where that person is not a national or a permanent resident.^f There is also the requirement that the smuggling of migrants, and therefore the document offence, is committed for “financial or other material benefit”.^g

Article 6, paragraph 1, subparagraph (c): Enabling illegal residence (harbouring)

Article 6, paragraph 1, subparagraph (c) of the Protocol creates the offence of:

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 the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

This is primarily aimed at criminalizing the harbouring and concealing of persons who have no legal status in the host country in order to avoid their apprehension by law enforcement and immigration authorities. The “means mentioned in subparagraph (b)” refers to the document fraud offences in article 6, paragraph 1, subparagraph (b).^h The conduct element of article 6, paragraph 1, subparagraph (c) is cast widely to also capture illegal residence for “any other illegal means” as defined under domestic law.ⁱ

As with other offences in article 6, paragraph 1, there must be an “intention to commit whatever act is alleged as having enabled illegal residence and the further intent or purpose of obtaining some financial or other material benefit.”^j The Legislative Guides state that the intent of this particular offence is:

to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors’ permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorizations to enter.^k

Aggravations

Article 6, paragraph 3, of the Smuggling of Migrants Protocol creates obligations to incorporate “aggravating circumstances” into some of the offences established by the Protocol. Specifically, this requires the criminalization of circumstances:

- (a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or
- (b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.^l

These aggravating circumstances need to be connected to the smuggling of migrants offence,^m the offence of producing a fraudulent travel or identity document to enable the smuggling of migrants,ⁿ and the offence of enabling illegal residence.^o This can be achieved by creating parallel offences, such as an aggravated smuggling of migrants offence, or by inserting provisions that require courts to consider more severe penalties where there has been an aggravating circumstance.^p

Other examples of aggravating circumstances may include (but are not limited to):

- Abuse of a child or abuse of a position of trust or authority
- Connections with other crimes such as drug trafficking: for instance, migrants may be compelled to carry drugs when they are themselves smuggled
- Smuggling of migrants under harsh conditions, such as in particularly hot, cold, wet, dry or crowded vessels, or where currents at sea are particularly strong^g

Article 34, paragraph 3 of the United Nations Convention against Transnational Organized Crime provides for States Parties to establish aggravating circumstances beyond those set out in the Protocol. It should be noted, however, that the commission of a separate offence during the course of a smuggling operation, such as an assault, rape or homicide, should not be treated simply as an aggravating factor to the smuggling of migrants offence. These offences require separate investigation and prosecution under relevant laws.

^a See further section I.C.

^b *Legislative Guides*, p. 342; see article 6, paragraph 1 (c), of the Smuggling of Migrants Protocol.

^c *Legislative Guides*, p. 342.

^d Article 6, paragraph 1 (b) (i), of the Smuggling of Migrants Protocol.

^e Article 6, paragraph 1 (b) (ii), of the Smuggling of Migrants Protocol.

^f Article 3, paragraph (a), of the Smuggling of Migrants Protocol.

^g Article 3, paragraph (a), of the Smuggling of Migrants Protocol; see further section J.1.

^h See further section A.3.

ⁱ A/55/383/Add.1, para. 94; *Legislative Guides*, p. 343.

^j *Legislative Guides*, p. 343.

^k *Ibid.*, pp. 342-343.

^l Article 6, paragraph 3, of the Smuggling of Migrants Protocol.

^m Article 6, paragraph 1 (a), of the Smuggling of Migrants Protocol.

ⁿ Article 6, paragraph 1 (b) (i), of the Smuggling of Migrants Protocol.

^o Article 6, paragraph 1 (c), of the Smuggling of Migrants Protocol.

^p *Legislative Guides*, para. 346.

^q UNODC, *Toolkit to Combat Smuggling of Migrants* (2010), Tool 5, p. 25.



I.D ASSESSMENT QUESTIONS

Criminal offences

- Is the smuggling of migrants a criminal offence under domestic law?
 - What are the constituent elements of the crime of smuggling of migrants?
 - Do they reflect the elements contained in the Smuggling of Migrants Protocol?
 - What is the criminal intent or mens rea for this offence?
- Is the production, procuring, providing and/or possession of a fraudulent travel or identity document in connection with the smuggling of migrants criminalized?
 - If so, what are the elements of that offence?
- Is the harbouring or enabling illegal residence of smuggled migrants a criminal offence under domestic law?
 - If so, what are the elements of that offence?

Aggravating offences or elements

- Are circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants recognized as aggravating offences or aggravating elements under domestic law?
- Are circumstances that entail the inhuman or degrading treatment or the exploitation of smuggled migrants recognized as an aggravating offence or aggravating element under domestic law?
- What, if any, additional aggravating circumstances are recognized under domestic law?
- What, if any, mitigating circumstances are recognized under domestic law?

**I.D ADDITIONAL GUIDELINES AND TOOLS**

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 341-343; pp. 346-347.
- *Toolkit to Combat Smuggling of Migrants*:
Section 5.2, entitled “Criminalization of the smuggling of migrants”, pp. 5-10;
Section 5.8, entitled “Criminalization of aggravating circumstances”, pp. 24-27.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 21-22, pp. 57-59 and pp. 68-69.
- *Model Law against the Smuggling of Migrants* (2010) pp. 31, 33 and 35-38.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 1, entitled “Understanding migrant smuggling and related conduct”, pp. 3-10 and 15.

E. Extensions to criminal liability

It is important that the criminalization of the smuggling of migrants not be limited to completed offences and also extend to those who try to smuggle migrants but fail, and those who participate as aides or facilitators. More important still is the criminalization of organizers and directors who oversee one or more smuggling of migrants ventures but may not be involved in the physical commission of the crime.

It is for these reasons that, in addition to requiring States parties to criminalize the smuggling of migrants, the Smuggling of Migrants Protocol also requires them to criminalize the attempt to commit the crime, the participation as an accomplice in the crime and the organization or directing of other persons to commit the crime (article 6, paragraph 2). Articles 5 and 10 of the United Nations Convention against Transnational Organized Crime further extend criminal liability to include corporations (legal persons) and persons who participate in an organized criminal group.



I.E LEGAL FRAMEWORK: EXTENSIONS TO CRIMINAL LIABILITY

International requirements

- Article 6, paragraph 2, of the Smuggling of Migrants Protocol.
- Articles 5 and 10 of the United Nations Convention against Transnational Organized Crime.

Attempts

Article 6, paragraph 2, subparagraph (a) of the Smuggling of Migrants Protocol requires States parties to extend criminal liability for the smuggling of migrants, travel or identity document related offences and offences relating to enabling illegal residence to instances in which an accused attempts any of these offences. The provision is not mandatory. This is explained by the fact that “not all legal systems make provision for the criminalization of cases in which an unsuccessful attempt has been made to commit the offence.”^a

Participation

Article 6, paragraph 2, subparagraph (b) of the Smuggling of Migrants Protocol requires States parties to adopt such legislative and other measures as may be necessary to criminalize:

Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article.

Insofar as the possession of fraudulent travel or identity documents is concerned (article 6, paragraph 1, subparagraph (b) (i), of the Smuggling of Migrants Protocol) States parties have discretion as to whether to extend liability to participants and accomplices. This safeguard clause recognizes that national legal systems may have difficulties “in accommodating some aspects of the proposed offence, notably that of ‘possessing’ a fraudulent document.”^b In some jurisdictions it is not established “whether one could be made an accomplice to offences such as possession.”^c The introduction of a “participating offence” in relation to article 6, paragraph 1, subparagraph (b) (ii), is therefore conditional on the jurisdiction in question.

Organizing and directing

Article 6, paragraph 2, subparagraph (c) of the Smuggling of Migrants Protocol creates a mandatory obligation for States parties to adopt such legislative and other measures as may be necessary to criminalize the organization or direction of other persons to commit an offence established in accordance with article 6, paragraph 1.

Participation in an organized criminal group

A further extension to criminal liability is created by virtue of article 5 of the United Nations Convention against Transnational Organized Crime, which creates an offence for participating in an organized criminal group. Article 5, paragraph 1, subparagraph (a), offers two different concepts for this offence and States parties are free to choose either one or both models. The first of these concepts, set out in article 5, paragraph 1, subparagraph (a) (i), is based on the offence of conspiracy, which is generally found in common law countries. The concept under article 5, paragraph 1, subparagraph (a) (ii), derives from civil law traditions and focuses on the active participation in activities of an organized criminal group.

The Convention defines “organized criminal group” as:

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

Article 2, subparagraph (c) of the Convention further defines “structured group” as:

a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Corporate liability

Article 10 of the United Nations Convention against Transnational Organized Crime requires that liability should also be extended to legal persons, corporate entities in particular. While States parties may choose whether such liability is criminal, civil or administrative, this provision offers an additional avenue to extend the scope of criminal liability for smuggling of migrants offences.

^a *Legislative Guides*, pp. 347-348.

^b David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford, Oxford University Press, 2007), p. 395.

^c *Legislative Guides*, p. 348.

^d Article 2, paragraph (a), of the Organized Crime Convention.



I.E ASSESSMENT QUESTIONS

Extensions to criminal liability

- Does national law criminalize the attempt to smuggle migrants?
- Does national law criminalize participation as an accomplice in the smuggling of migrants?
- Does national law criminalize the directing, organizing and/or financing of the smuggling of migrants?

Participation in a criminal organization

- Does national law criminalize participation in an organized criminal group?
- Does national law define the term “organized criminal group” (or an equivalent)?
 - If so, how is the term defined and does it contain the elements set out in the United Nations Convention against Transnational Organized Crime?

Corporate liability

- Does national law provide for the liability of legal persons?
 - If so, can corporations be held liable criminally and/or through civil or administrative means?



I.E ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 13, 20-35, 115-128; 345-346 and 347-349.
- *Toolkit to Combat Smuggling of Migrants*:
Section 5.9, entitled “Liability of legal persons”, pp. 28-29.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 22-24, 59, 60-61 and 62.
- Model Law against the Smuggling of Migrants, pp. 33-34.

F. Non-criminalization of smuggled migrants

Article 5 of the Smuggling of Migrants Protocol states that:

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



I.F LEGAL FRAMEWORK: NON-CRIMINALIZATION OF SMUGGLED MIGRANTS

International requirements

→ Article 5 of the Smuggling of Migrants Protocol.

The *Legislative Guides* state that it:

is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned [...].^a

The principle articulated in article 5 is limited to criminal prosecutions relating to smuggling of migrants offences as set out in article 6 of the Protocol. Consequently, smuggled migrants should not be held criminally liable for being the object of smuggling of migrants (article 6, paragraph 1, subparagraph (a)), for offences involving document fraud (article 6, paragraph 1, subparagraph (b)), and for remaining in the host country clandestinely or otherwise illegally (article 6, paragraph 1, subparagraph (c)).

Article 5 nevertheless does not grant blanket immunity to smuggled migrants as they may face criminal prosecution for offences unrelated to the smuggling of migrants and/or may be returned to another State.^b The *Legislative Guides* note that:

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.^c

The Smuggling of Migrants Protocol recognizes that smuggled migrants (who may be asylum seekers and refugees) are often unable to comply with relevant domestic legal and regulatory requirements relating to immigration and emigration. It is accepted that persons fleeing from persecution, emergencies and other hardship are often unable to collect, keep or request relevant travel documents and permits or engage in lengthy bureaucratic processes, and that they may sometimes have little choice but to cross international borders unlawfully, often facilitated by smugglers of migrants.

Ideally these measures should be implemented legislatively, however, in the absence of legislative provisions, law enforcement may rely on guidelines that are compliant with these principles.

^a *Legislative Guides*, p. 340.

^b See also article 18 of the Smuggling of Migrants Protocol; and section IX.G.

^c *Legislative Guides*, p. 347.



I.F ASSESSMENT QUESTIONS

Non-criminalization of smuggled migrants

- How do the legislative provisions or procedures ensure that smuggled migrants are not liable to criminal prosecution for the fact of having being the object of the smuggling of migrants?
- What migration offences could smuggled migrants be charged with under domestic law?



I.F ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 340 and 347.
- *Toolkit to Combat Smuggling of Migrants*:
Section 1.9, entitled “What cannot be characterized as the smuggling of migrants?”, pp. 29-30;
Section 5.3, entitled “Non-criminalization”, pp. 11-13.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 21 and 60.
- *Model Law against the Smuggling of Migrants*, pp. 56-57.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*: Module 1, entitled “Understanding migrant smuggling and related conduct”, p. 16.

G. Scope of application

Article 4 of the Smuggling of Migrants Protocol sets out the scope of application:

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, 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.

This provision has to be read in conjunction with article 34, paragraph 2, of the United Nations Convention against Transnational Organized Crime, which provides that the offences established in accordance with the 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. In other words, while the offences set out in international law apply exclusively to transnational cases, domestic law should be designed to cater for transnational as well as purely domestic cases. The *Interpretative Notes* confirm that the purpose of article 34, paragraph 2, is to indicate unequivocally that the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes.²⁹



I.G LEGAL FRAMEWORK: SCOPE OF APPLICATION

International requirements

- Article 4 of the Smuggling of Migrants Protocol.
- Article 34, paragraph 2, of the United Nations Convention against Transnational Organized Crime.

For the definition in article 3, paragraph (a), of the Smuggling of Migrants Protocol, it is necessary to establish an element of cross-border activity in order to prove the specific offence of smuggling of migrants. In this instance, the element of transnationality must be incorporated. Offences incorporating the “smuggling of migrants” definition in the Protocol are thus the only ones to require an element of transnationality.

The *Legislative Guides* further state that:

[W]hile States parties should have to establish some degree of transnationality and organized crime with respect to most aspects of the Protocol, their prosecutors should not have to prove either element in order to obtain a conviction for smuggling of migrants or any other offence established in accordance with the Convention or its Protocols. 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.^a

^a *Legislative Guides*, p. 333.

²⁹ A/55/383/Add.1, para. 59.



I.G ASSESSMENT QUESTIONS

Scope of application

- Does the offence of smuggling of migrants under domestic law require an element relating to transnationality?
 - Can the offence be established if transnationality does not exist or cannot be proved?
- Does the offence of smuggling of migrants under domestic law require an element in relation to the involvement of an organized criminal group?
 - Can the offence be established if the involvement of an organized criminal group does not exist or cannot be proved?



I.G ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 9-11 and 332-334.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 5.6, entitled “The element of transnationality”, pp. 19-20;
 - Section 5.7, entitled “The element of ‘organized criminal group’”, pp. 21-24.
- *Model Law against the Smuggling of Migrants*, pp. 7-8.

H. Jurisdiction

One of the principal obstacles in combating the smuggling of migrants is the ability of offenders to evade prosecution by moving between jurisdictions or by committing offences across borders or in more than one country. In order to effectively combat the 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.³⁰



I.H LEGAL FRAMEWORK: JURISDICTION

International requirements

- Article 15 of the United Nations Convention against Transnational Organized Crime.

The frameworks established by the United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol seek to close jurisdictional loopholes and reduce

³⁰*Model Law against the Smuggling of Migrants*, p. 20.

or eliminate safe havens for fugitives, and to facilitate cooperation between States parties in instances where more than one country may have jurisdiction over the offender or his or her criminal activity. Article 15 of the United Nations Convention against Transnational Organized Crime addresses the jurisdiction to prosecute and punish crimes under the Convention. The obligations under the article apply equally to the offences established under the Protocol.

Article 15 contains mandatory requirements in paragraphs 1, 3 and 5. Article 15, paragraph 1, requires States parties to establish jurisdiction if offences are committed: (a) in their territory (including their territorial sea); or (b) on board aircraft or vessels registered under their laws. Article 15, paragraph 3, establishes the principle of extradition or prosecution by requiring States parties to establish jurisdiction in instances where they cannot extradite a person solely on grounds of nationality.

Article 15, paragraph 5, requires States parties to consult with each other in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdictions.^a The *Legislative Guides* further emphasize that:

In some cases, this coordination will result in one State party deferring to the investigation or prosecution of another. In other cases, the States concerned may be able to advance their respective interests through the sharing of information they have gathered. In yet other cases, States may each agree to pursue certain actors or offences, leaving other actors or related conduct to the other interested States.^b

[...]

[I]n many cases, the successful investigation and prosecution of serious offenders will hinge upon the swift coordination of efforts among concerned national authorities and coordination between States parties can ensure that time-sensitive evidence is not lost.^c

Article 15, paragraphs 2, 4 and 6, of the United Nations Convention against Transnational Organized Crime contain supplementary, optional measures in relation to jurisdiction. Article 15, paragraph 2, invites States parties to consider the establishment of jurisdiction in a number of additional situations, including cases:

- (a) Where their nationals are victimized;
- (b) Where the offence is committed by a national or stateless person residing in its territory; and
- (c) Where the offence is linked to serious crimes and money-laundering planned to be committed in its territory.

Article 15, paragraph 4, allows for the establishment of jurisdiction over persons whom the requested State does not extradite for reasons other than nationality.^d Furthermore, article 15, paragraph 6, provides that the bases for jurisdiction listed in article 15 are not exhaustive and that States parties can establish additional bases of jurisdiction without prejudice to norms of general international law and in accordance with the principles of their domestic law.

The *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* contains a list of considerations in determining jurisdiction that may facilitate the decision about which jurisdiction a trial should be held in.^e

^a *Legislative Guides*, p. 105.

^b *Ibid.*, pp. 108-109.

^c *Ibid.*, p. 109.

^d As per article 15, paragraph 3, of the Organized Crime Convention.

^e *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 14, p. 3. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.



I.G ASSESSMENT QUESTIONS

Jurisdiction

- Does national law have jurisdiction if a smuggling of migrants offence is committed within the national territory, including the territorial sea?
- Does national law have jurisdiction if a smuggling of migrants offence is committed on board a vessel or aircraft registered under that State's law or flag?
- Does national law have jurisdiction if the offender is a national of that State or a stateless person having his or her habitual residence in the territory of that State?
- Does national law have jurisdiction if the offender is a national of that State or habitual resident and extradition is refused on grounds of nationality?
- Does national law have jurisdiction if the offence is committed outside the national boundaries of that State with a view to committing an offence within the territory of the State?
- In what other cases related to the smuggling of migrants does national law have jurisdiction?
- Are designated parts of the territory exempted from jurisdiction, including for the smuggling of migrants and related conduct offences?
- Are there regional instruments that regulate jurisdiction in regard to smuggling of migrants offences?



I.G ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 103-115.
- *Toolkit to Combat Smuggling of Migrants*:
Section 3.2, entitled "Relationship between the Organized Crime Convention and the Smuggling of Migrants Protocol", pp. 5-6.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, p. 61.
- *Model Law against the Smuggling of Migrants*, pp. 20-26.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 14, entitled "Common legal issues in migrant smuggling investigations and prosecutions", pp. 2-4.

II. National coordination

A. Enforcement mandate(s)

The first step in assessing law enforcement and border control capacities in relation to the smuggling of migrants involves an understanding of law enforcement macro-structures and responsibilities. It is important to gain a clear understanding of who is who and who does what in smuggling of migrants enforcement as doubts about who has authority to enforce relevant laws may lead to difficulties, discrepancies and duplication.³¹

In most jurisdictions, there will be more than one entity with responsibility for enforcing the many aspects associated with the smuggling of migrants. Even in jurisdictions with a single national police force, there are likely to be additional law enforcement organizations with either highly specialized skills or specific functions. Jurisdictions with federal structures usually have multiple layers of law enforcement, with a single federal law enforcement agency that complements local, state or provincial police forces. Federal or national police forces are generally authorized to address crime issues of national concern or those with inter-State implications. Offences relating to smuggling of migrants often, but not always, fall into this category.³² In countries with a federal system, additional questions may arise about how state or provincial and local investigators cooperate with federal law enforcement officers.³³

International law and best practice principles do not require or advocate a particular organizational model for law enforcement relating to the smuggling of migrants. Which agency or agencies are tasked to investigate these offences will depend on the individual country and will also be determined by its internal structures.



II.A ASSESSMENT QUESTIONS

Enforcement mandate(s)

- Which organizations, agencies or bodies are involved in enforcing legislation or measures against the smuggling of migrants?
 - Describe the tasks, responsibilities and jurisdiction of each agency.
 - Have gaps or overlaps been identified?
 - Are the tasks, responsibilities and jurisdiction of each agency clearly defined and understood by its staff and the agencies with which it interacts?
 - To which government ministry or ministries does each agency report?
 - Are these agencies dedicated exclusively to the smuggling of migrants or do they also have responsibilities for other crime types; if so, which ones?
 - What is their structure?

³¹ *Toolkit to Combat Smuggling of Migrants*, Tool 4, entitled “Problem assessment and strategy development”, sect. 4.6, pp. 29-30.

³² *Criminal Justice Assessment Toolkit*, sector on policing, Tool 1, entitled “Public safety and police service delivery”, p. 1.

³³ *Ibid.*, Tool 3, entitled “Crime investigation”, p. 21.



II.A ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*:
Sector on policing, Tool 3, entitled “Crime investigation”, pp. 7-8;
Sector on policing, Tool 1, entitled “Public safety and police service delivery”, pp. 4-5.

B. National coordination and partnerships

The investigation of the smuggling of migrants is a challenge for multiple branches of government and is not limited to law enforcement agencies. It usually involves a variety of government departments and other entities, each of which helps to bring an additional dimension to the response. Accordingly, dealing with the smuggling of migrants in isolation, especially without the buy-in of enforcement agencies such as police and immigration, affects the ability to effectively address the causes and consequences of the crime. For these reasons, national coordination, consultation with key stakeholders and building partnerships are crucial in combating the smuggling of migrants.³⁴

Consultation and partnership-building can occur at various levels and may be formalized in a national coordination framework, in memorandums of understanding and in committee structures, or may be ad hoc and informal, based on changing needs and developments. In some jurisdictions, interdepartmental committees have been set up to coordinate control and enforcement measures across government sectors.

Along with formal law enforcement cooperation, it is important that all agencies involved in preventing and suppressing the smuggling of migrants share relevant information and engage in frequent communication. Law enforcement cooperation can also be enhanced by practical means such as joint operations, task forces and/or joint training.

Collaboration between different agencies—often with conflicting or opposing mandates and objectives—is not always easy. Some organizations and entities may be reluctant to assist law enforcement agencies because of concerns that they might alienate their constituents, because their priorities may be different, because sufficient resources may not be available, or because there are legal constraints (for instance, in the case of classified information and data protection).³⁵

Neither the Smuggling of Migrants Protocol nor the United Nations Convention against Transnational Organized Crime set out specific requirements in relation to the coordination and partnerships between national agencies. 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

³⁴ *Model Law against the Smuggling of Migrants*, p. 78.

³⁵ *Criminal Justice Assessment Toolkit*, sector on policing, Tool 1, entitled “Public safety and police service delivery”, p. 17; and Tool 3, entitled “Crime investigation”, p. 21.

individual cases and budgetary issues.³⁶ Accordingly, the *Model Law against the Smuggling of Migrants* recommends the creation of a national coordinating committee that brings together officials from relevant national, provincial and local agencies, as well as non-government service providers.³⁷ The *Model Law* further suggests that a national coordinating body should have a mandate to:

- (a) Oversee and coordinate the implementation of relevant laws;
- (b) Develop policies, regulations, guidelines, procedures and other measures to facilitate the implementation of relevant laws;
- (c) Develop a national plan of action to ensure comprehensive and effective implementation of relevant laws, which shall include a process of periodic review of achievement of aims of objectives;
- (d) Oversee and report to the relevant Minister or 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.³⁸



II.B ASSESSMENT QUESTIONS

National coordination

- What kind of coordination exists among law enforcement agencies to combat the smuggling of migrants?
- What kind of coordination exists between law enforcement agencies, border control agencies and other public service departments to combat the smuggling of migrants?
- What kind of cooperation exists between law enforcement and other government agencies and non-government service providers, including community organizations?
- If a national coordinating body or committee exists, which agencies are represented on it?
 - Who chairs the body or committee?
 - What are the tasks and duties of the body or committee?
- Are mechanisms in place to enable and facilitate cooperation between law enforcement officers, the prosecution service and judicial entities in relation to the smuggling of migrants, where the legal system allows?

³⁶*Model Law against the Smuggling of Migrants*, p. 78.

³⁷*Ibid.*, pp. 77-79.

³⁸*Ibid.*, p. 77.

Partnerships

- Are there partnerships between law enforcement and other government agencies, international organizations and non-governmental organizations in relation to the smuggling of migrants?
 - How do these partnerships work in practice?
 - Are they based on written protocols, memorandums of understanding, committees and so forth?
- Are joint operations undertaken?
- Can “strike forces” or joint task forces be convened?



II.B ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants:*
 - Section 4.8, entitled “Developing a multiagency approach to intervention”, pp. 38-41;
 - Section 4.9, entitled “Developing inter-agency coordination mechanisms”, p. 42;
 - Section 4.10, entitled “National action plans and strategies”, p. 43;
 - Section 4.13, entitled “National coordination mechanisms and institutions”, pp. 57-61.
- *Criminal Justice Assessment Toolkit:*
 - Sector on policing, Tool 1, entitled “Public Safety and Police Service Delivery”, p. 6;
 - section 6, entitled “Partnerships and coordination”, pp. 17 and 21;
 - Sector on policing, Tool 3, entitled “Crime Investigation”, p. 6.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 47-48 and 108.
- *Model Law against the Smuggling of Migrants*, pp. 77-79.

III. Human resources and staff management

Adequate training and staffing levels are essential to controlling and curtailing the smuggling of migrants. Conversely, lack of law enforcement personnel and poor training of staff may result in many crimes going unnoticed, with offenders evading detection and arrest. It is also important that law enforcement personnel be accountable and that measures be taken to prevent corruption. The following sections of the present *Assessment Guide* address these issues.

The importance of proper human resource and staff management is, of course, not unique to law enforcement and, in the context of the smuggling of migrants, equally concerns other relevant agencies, including justice departments, immigration, customs and other border control agencies, the military and other agencies involved in combating the smuggling of migrants. To that end, the following sections may be adapted for assessments of those entities.

A. Recruitment and staffing

Around the world, many units charged with enforcing laws relating to the smuggling of migrants lack the human resources to fulfil their diverse duties. Elsewhere, relevant units suffer from severe staff shortages. Posts remain unfilled for years and salaries and allowances may be months overdue. An assessment of enforcement capacities thus requires a basic stocktaking of the human resources available to police the smuggling of migrants. This involves identifying staffing levels, locations and organizational hierarchies.³⁹

Recruitment procedures for law enforcement personnel need to be fair and transparent to ensure professionalism and integrity, and avoid nepotism and corruption. The selection of staff at all levels must be based on merit, experience and education, and selection criteria need to be clearly articulated.⁴⁰ Especially in larger agencies, recruitment should occur at the junior, middle and senior levels. Internal policies can assist in balancing the need to maintain expertise and experience with the desire to rotate staff and bring in new ideas and fresh perspectives, and prevent corruption.

While there are no specific requirements or guidelines relating to the staffing of law enforcement agencies in the Smuggling of Migrants Protocol, it is of paramount importance that units tasked with policing the smuggling of migrants be staffed adequately, that vacancies be filled swiftly and that personnel be located at border control points, in all major cities and other locations that are of significance to the local problems associated with the smuggling of migrants. All selections and other decisions relating to recruitment need to be objective and based on merit, taking into account the quality, skills and professional experience of applicants.

³⁹*Criminal Justice Assessment Toolkit*, sector on policing, Tool 1, entitled “Public safety and police service delivery”, p. 7.

⁴⁰*Ibid.*; p. 8; sector on policing, Tool 2, entitled “The integrity and accountability of the police”, p. 10; and Tool 3, entitled “Crime investigation”, p. 8.



III.A ASSESSMENT QUESTIONS

Staffing

- Among each agency dealing with the smuggling of migrants, how many officers are engaged in border control and criminal investigation relating to the smuggling of migrants?
 - If there are units dedicated to the smuggling of migrants only, how many officers are working in them?
 - If these units are also dealing with other crimes, how many officers work exclusively on the smuggling of migrants?
 - What is the percentage of time dedicated by staff to the smuggling of migrants?
 - What is the case load for smuggling of migrants compared to other crimes?
- What is the coordination process between the specialized units or specialized law enforcement officers and other law enforcement agencies?
- Within relevant units, what proportion of enforcement officers is in supervisory or management ranks?
 - How long, on average, do officers stay in the relevant units?
- Are enforcement officers deployed strategically and efficiently in important locations such as airports, seaports, land border crossings, large metropolitan areas and similar locations?
- Are staff moved to different departments or agencies after a set period of time?
 - How often do they rotate?
 - What percentage of them rotates?
- Is there provision for drawing upon other agencies to supplement staff needs for operational requirements or during times of shortage?
- Are positions in relevant units sought after or are they difficult to fill? Why?

Recruitment

- What are the selection processes and recruitment procedures for joining the relevant law enforcement agencies and units tasked with the smuggling of migrants?
 - How are people selected?
 - Are there recruitment guidelines established by policy?
- Have the relevant agencies established the level of qualification, skills and professional experience required to join these law enforcement agencies and units?
 - Have they determined the basic educational requirements for recruitment (such as literacy or numeracy)?
- Is there a vetting procedure for applicants?
 - Is recruitment based on objective assessment and interviews?
 - Are selection procedures fair and objective?
- Are staff recruited and/or seconded from other agencies?
- How are counter-corruption concerns taken into account in the recruitment?
- Are there other issues relating to the recruitment or retention of competent staff?



II.B ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*:
Sector on policing, Tool 1, entitled “Public safety and police service delivery”, pp. 8-9;
Sector on policing, Tool 2, entitled “The integrity and accountability of the police”, pp. 9-11;
Sector on policing, Tool 3, entitled “Crime investigation”, pp. 8-9.

B. Training: availability and delivery

It is crucial that staff at all levels be adequately trained and skilled to meet the many challenges and hazards associated with combating the smuggling of migrants. If alleged crimes are investigated by officers insufficiently familiar with the relevant background, techniques, processes and legal requirements, then it is possible that the integrity of investigations may be compromised, with potential implications for subsequent prosecutions and trials.⁴¹ The availability of quality training programmes is thus of paramount importance.

Training programmes can be designed to build new enforcement networks and partnerships if they involve participants from a variety of backgrounds and agencies, both domestic and international. This is particularly important when developing effective responses to the smuggling of migrants that involve multiple government departments and transcend international borders.

In addition to (or in lieu of) formal training courses, some agencies may also offer opportunities for secondments to other agencies, professional development and higher education outside the agency, thus enhancing their knowledge base and skill set.⁴²

An assessment of law enforcement capacities should therefore involve a review of training programmes, their delivery and content, and of the types and depth of training available to specialized units and general law enforcement.



III.B HUMAN RESOURCES AND STAFF MANAGEMENT: TRAINING

International requirements

→ Article 14, paragraphs 1 and 2 of the Smuggling of Migrants Protocol.

International law and best practice guidelines recognize training of law enforcement personnel as a crucial element in effectively combating the smuggling of migrants. Article 14, paragraphs 1 and 2 of the Smuggling of Migrants Protocol specifically state:

⁴¹ *Criminal Justice Assessment Toolkit*, sector on policing, Tool 2, entitled “The integrity and accountability of the police”, p. 11.

⁴² Article 29, paragraph 1, of the Organized Crime Convention; *Criminal Justice Assessment Toolkit*, sector on policing, Tool 1, entitled “Public safety and police service delivery”, pp. 8-9.

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

2. States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. [...]

The Protocol advocates collaboration with international organizations and non-governmental organizations to develop adequate and individualized training modules. Such organizations often have highly developed expertise in the field of the smuggling of migrants and can offer valuable insights for law enforcement personnel. Article 14, paragraph 2, also requires that countries cooperate with one another in training to prevent and combat smuggling and in appropriate methods for dealing with smuggled migrants. Matters pertaining to international cooperation are further detailed in section IX of the present *Assessment Guide*.



III.B ASSESSMENT QUESTIONS

Training: availability

- How are training needs assessed?
- Have any training plans been developed by any of the agencies involved in enforcing smuggling of migrants laws and measures?
- What is the capacity for training relating to the smuggling of migrants?
- Is there a measure of accreditation applied to ensure the quality and standardization of training?
- Is there a cross-agency training programme?
- Does the training involve participants from multiple agencies (domestic and foreign)?
 - Are members of the prosecution service and judiciary involved in the training of law enforcement personnel (as participants and/or trainers or guest presenters)?
 - How are new staff introduced to counterparts in partner agencies?
- Are officials of general police agencies, immigration and labour departments and other agencies trained in issues related to the smuggling of migrants?
- Are officials provided with specific foundation training when they join smuggling of migrants enforcement specialized units?
- How often do officers receive refresher training? What specialized training courses are available?
- What other training opportunities are available (such as further study, professional development or secondments or attachments to central units or to other agencies)?
- Do staff remain in their function after receiving relevant training?
 - Are measures in place to ensure that?

Training: delivery

- How is training delivered: via classroom, self-study, computer-based?
- Who delivers the training?
 - What measures are taken to assess the qualifications of trainers?
 - What relevant training have trainers received?
 - Is there a train-the-trainer programme?
- How is the syllabus for the training developed?
 - Do partner agencies contribute to syllabus development?
- Are other countries (and/or their agencies) involved in the delivery, design or participation in relevant training programmes?
- Has the training and its impact been evaluated?

**III.B ADDITIONAL GUIDELINES AND TOOLS**

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 385 and 389.
- *Toolkit to Combat Smuggling of Migrants*:
Tool 10, entitled “Capacity-building and training”.
- *Criminal Justice Assessment Toolkit*:
 - Sector on policing, Tool 1, entitled “Public safety and police service delivery”, pp. 8-9;
 - Sector on policing, Tool 3, entitled “Crime investigation”, pp. 8-9.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 44-45, 50 and 115-116.
- *Model Law against the Smuggling of Migrants*, pp. 79-80.

C. Training: content

Law enforcement pertaining to the smuggling of migrants requires an understanding of relevant investigative powers and procedures, as well as technical knowledge of the operation of the relevant sectors, of social and cultural issues, general human rights and the specific rights of refugees and migrants. Moreover, personnel at border control points have to be familiar with visa requirements, immigration and customs procedures and relevant international obligations.

Where comprehensive training programmes exist, it is important that syllabi and curricula be reviewed regularly to ensure they remain up to date and keep pace with the ever-changing nature of the smuggling of migrants.⁴³

⁴³*Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 9.



III.C HUMAN RESOURCES AND STAFF MANAGEMENT: TRAINING

International requirements

- Article 14, paragraph 2, of the Smuggling of Migrants Protocol.
- Article 29 of the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol provide a great amount of detail in relation to the content of training programmes.

Article 14, paragraph 2, of the Smuggling of Migrants Protocol suggests that training should include:

- (a) Improving the security and quality of travel documents;
- (b) Recognizing and detecting fraudulent travel or identity documents;
- (c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;
- (d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and
- (e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.^a

The requirements in article 14 emphasize that training will need to be provided not only on the smuggling of migrants and related conduct, but also on human rights and other relevant issues.^b In addition, the *Toolkit to Combat Smuggling of Migrants* states that:

In order for law enforcement officials and other actors to be able to respond better to the smuggling of migrants and to the smuggled migrants they encounter in their work, it is important for them to have an understanding of broader migration issues. This includes understanding issues with respect to smuggled migrants who may be refugees, and also the human rights of the migrants (and smugglers of migrants) they engage with in their work.^c

Further, article 29, paragraph 1, of the United Nations Convention against Transnational Organized Crime recommends that training programmes should cover:

- (a) Methods used in the prevention, detection and control of the offences covered by this Convention;
- (b) Routes and techniques used by persons suspected of involvement in offences covered by this Convention, including in transit States, and appropriate countermeasures;
- (c) Monitoring of the movement of contraband;
- (d) Detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes;

- (e) Collection of evidence;
- (f) Control techniques in free trade zones and free ports;
- (g) Modern law enforcement equipment and techniques, including electronic surveillance, controlled deliveries and undercover operations;
- (h) Methods used in combating transnational organized crime committed through the use of computers, telecommunications networks or other forms of modern technology; and
- (i) Methods used in the protection of victims and witnesses.

UNODC, in cooperation with other agencies, has developed extensive material that can assist in the development of curricula and syllabi and that outline and explain the key components of training programmes related to the smuggling of migrants. Assessors should consult the *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* and the *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* for further guidance.

^a *Model Law against the Smuggling of Migrants*, p. 80.

^b *Toolkit to Combat Smuggling of Migrants*, Tool 10, entitled “Capacity-building and training”, p. 3.

^c *Ibid.*, p. 10.



III.C ASSESSMENT QUESTIONS

Training: content

- Does the training cover issues such as:
 - Domestic laws relating to the smuggling of migrants?
 - Levels and characteristics of criminal activity in these sectors?
 - Protection of smuggled migrants and witnesses?
 - Visa requirements and immigration procedures?
 - Intelligence-gathering and dissemination?
 - Human rights, rights of refugees, asylum seekers and other migrants?
 - Investigation techniques and procedures?
 - Financial investigations and confiscation of assets?
 - Availability and limitations of enforcement powers?
 - Use of equipment, technology, forensic procedures?
 - International cooperation?
 - Partnership-building and collaboration with domestic and international agencies?
 - Prevention, education and awareness-raising?
 - Detection of fraudulent and fraudulently obtained documents?
- Does the training involve elements relating to accountability, ethics, integrity and corruption?
- When were the training programmes last updated?
- Is the training supplemented by manuals summarizing these issues?



III.C ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 385 and 389.
- *Toolkit to Combat Smuggling of Migrants*:
Tool 10, entitled “Capacity-building and training”.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 44-45 and 102.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*.
- *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*.
- *Criminal Justice Assessment Toolkit*:
Sector on policing, Tool 1, entitled “Public safety and police service delivery”, pp. 8-9;
Sector on policing, Tool 3, entitled “Crime investigation”, pp. 8-9.
- *Handbook on Police Accountability, Oversight and Integrity*.

D. Integrity and accountability

Efforts to control and prevent the smuggling of migrants can often be defeated by corruption. Criminal organizations use corruption and intimidation to defeat the efforts of law enforcement agencies. In addition to front-line police, border control and other law enforcement officers, other security officers may be targeted by criminal organizations. For example, security and other personnel working at international airports and other border control points are also vulnerable to attempts at infiltration or corruption.

Combating corruption is therefore an essential part of any comprehensive strategy to curb the smuggling of migrants. It is most important for countries to have in place effective measures to counter corruption, including independent police oversight mechanisms, proactive internal investigations and the creation of special anti-corruption units. Ideally, law enforcement agencies should adopt comprehensive and integrated anti-corruption measures. The United Nations Convention against Corruption refers explicitly to these measures. In addition, the Convention encourages the establishment of independent bodies, with formal legislative authority, that can promote good practices in preventing corruption. These bodies may become partners in the fight against the smuggling of migrants.

The prevention of corruption requires all law enforcement agencies to have in place some efficient, transparent and objective systems for the recruitment, hiring, retention, promotion and retirement of their staff. Those systems must also recognize that certain persons or agencies, such as those involved in certain aspects of law enforcement, may be more susceptible to corruption than others. The specific vulnerabilities of those persons and agencies must be identified and analysed. The

specific risks in those areas of work need to be identified and addressed through concrete measures, and those measures need to be evaluated and revised periodically. Some of the risks may be addressed by measures such as the pre-appointment screening of successful candidates for a post or special assignments to specialized enforcement units; rotation of staff; and benchmarking the performance of individuals and teams. Law enforcement agencies should all have in place procedures such as: regular appraisals; disclosure of conflicts of interest; incompatibilities and associated activities; and the declaration and registration of assets, interests and gifts, as well as adequate procedures for monitoring the accuracy of those declarations.

Procedures to allow for confidential reporting of suspicious transactions and incidents must be in place, together with provisions for effective investigation of those reports by internal affairs departments or independent oversight mechanisms, and provisions for the protection of informants and witnesses (whistle-blowers).

Border control officials can be especially vulnerable to corruption. Attention needs to be given to the recruitment, training and monitoring of border protection staff and supervisory personnel. The development of strategies to counter corruption among these officials involves determining the specific risks of corrupt behaviour at the various stages of the customs clearance process and, if appropriate, the development of a “risk map” outlining the extent to which various elements of the existing process facilitate potential violations and create opportunities for corruption.



III.D HUMAN RESOURCES AND STAFF MANAGEMENT: ACCOUNTABILITY

International requirements

→ Article 9 of the United Nations Convention against Transnational Organized Crime.

Article 9 of the United Nations Convention against Transnational Organized Crime provides that:

1. [...] each State party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.
2. Each State party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.

This article highlights the importance of efforts to ensure the accountability of the relevant agencies tasked with combating the smuggling of migrants. These requirements are, however, not necessarily legislative in nature and will depend on the traditions, laws and procedures of individual States.^a

^a *Legislative Guides*, p. 85.



III.D ASSESSMENT QUESTIONS

Integrity and accountability

- Does the law establish mechanisms for the monitoring and oversight of the conduct and performance of officials involved in control, investigation and prosecution of the smuggling of migrants?
 - What are these mechanisms?
 - How often are they used?
- Are there clear codes of conduct for units charged with combating the smuggling of migrants?
 - What is stated in the codes?
 - How do the codes work?
 - How are they enforced and implemented?
- How are officials involved in control, investigation and prosecution of the smuggling of migrants viewed by other agencies; by the general public?
 - Are they trusted and well respected? If not, why not?

Enforcement and reporting

- Are there effective measures in place to counter corruption, such as independent police oversight mechanisms, proactive internal investigations or specially created anti-corruption units?
- Is there a national anti-corruption body? Has it been mobilized in combating the smuggling of migrants?
- Have the specific risks of corruption in the agencies involved in combating the smuggling of migrants been systematically identified? If so, have concrete measures been taken to address these vulnerabilities?
- What procedures, if any, are in place to allow for confidential reporting of suspicious transactions and incidents and for the protection of informants and witnesses (whistle-blowers)?
- What measures are taken to facilitate the reporting of failures to maintain integrity and professional standards?
- Are there avenues for civilians to lodge complaints against officials involved in the smuggling of migrants? Is there independent oversight of the complaints system?
- Are there any allegations that officials involved in smuggling of migrants enforcement take or solicit bribes in return for ignoring relevant offences?
- Are there procedures for disciplinary sanctions in cases of corruption?
 - Have any officials connected to the control, investigation and prosecution of the smuggling of migrants been sanctioned?
- Are there offences that criminalize corruption?
 - Have any officials connected to the control, investigation and prosecution of the smuggling of migrants been charged?



III.D ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 78-90.
- *Criminal Justice Assessment Toolkit*, sector on policing, Tool 2, entitled “The integrity and accountability of the police”.

IV. Criminal intelligence

Law enforcement work is increasingly led by intelligence. This involves, inter alia, the collation, analysis and dissemination of information, and provides a systematic approach to critical thinking which, in turn, can assist in the prevention and suppression of criminal activities, including the smuggling of migrants. Well-managed, intelligence-led investigations can also often prove more resource and cost-effective than investigations using speculative or reactive methods.

In the field of smuggling of migrants, intelligence relating to perpetrators, smuggling routes, recruitment and supply patterns, markets, consumers and so forth is often missing or non-existent. In many countries, there is a poor understanding of intelligence and the gathering, collation, analysis and dissemination of intelligence, and few countries assign dedicated intelligence officers. Where there is a focus on intelligence, this may be done in a “stand-alone” manner, so that the intelligence gathered is not incorporated into or does not take account of intelligence regarding other forms of crime. This restricts the ability to coordinate responses to individual cases or to establish strategies, policies or general operational guidance.

A. Intelligence-gathering and exchange

Information-gathering and the exchange of intelligence between relevant agencies is crucial to the success of measures aimed at curtailing the smuggling of migrants. To be of maximum value, intelligence-gathering activity should focus simultaneously on the strategic and tactical levels:

- Strategic intelligence is intelligence that enables accurate assessments of the levels and patterns of the smuggling of migrants at the local, national and international levels. Strategic intelligence facilitates law reform, international cooperation, the development of prevention strategies, education and awareness campaigns and helps prioritize the deployment of law enforcement resources.
- Tactical intelligence is intelligence about the activities of specific individuals or groups. It can help identify criminals, give advance information about their activities and help plan proactive, disruptive and further intelligence-led investigations.

While it is important to gather information from a wide range of sources, it is likely that the information will vary in quality, and the sources will differ in reliability and motivation. It is essential that information be subjected to some form of analysis and grading before it is disseminated or used.

Gathering and analysis of intelligence are not, in themselves, sufficient. A vital factor in the expeditious and effective exchange of intelligence is the speed at which material can be transmitted to relevant agencies or investigators who may be in a position to use and respond to it. Information-sharing between law enforcement agencies is further detailed in section IX.D, below.



IV.A CRIMINAL INTELLIGENCE: INTELLIGENCE-GATHERING AND EXCHANGE

International requirements

→ Article 14, paragraph 2, subparagraph (c) of the Smuggling of Migrants Protocol.

The Smuggling of Migrants Protocol does not set out specific requirements pertaining to intelligence-gathering, but emphasizes the importance of information exchange between domestic agencies and between countries. Article 14, paragraph 2, subparagraph (c) of the Protocol also explicitly states that any training to eradicate the smuggling of migrants should include:

Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in [the smuggling of migrants], the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of [the smuggling of migrants], and the means of concealment used in the smuggling of migrants.

Legislative and law enforcement guidelines and other toolkits further emphasize the significance of intelligence-gathering and exchange in relation to the smuggling of migrants, stating that:

Strategic intelligence:

- Enables accurate assessment of the nature and scale of smuggling at the local, national and regional levels
- Facilitates changes in legislation, international liaison, prevention strategies, education and awareness-raising campaigns etc.
- Assists policymakers in planning
- Provides fundamental information to raise the awareness of the media and the general public

Tactical intelligence:

- Forms the basis of investigations
- May lead to the interception of smuggling operations
- Is fundamental in the preparation and planning of any operation
- Helps identify specific opportunities to prevent, detect or disrupt smuggling networks^a

Other forms of relevant intelligence include socioeconomic factors that may affect the market for the smuggling of migrants;^b cultural factors that affect the nature of the crime and how it is committed; and international relations, including historical, cultural or colonial connections between source, transit and destination countries.

Routine surveillance of newspapers, Internet websites and other media is an additional method to uncover the smuggling of migrants. This frequently involves an examination of advertisements for overseas migration, work abroad and the like. Internet surveillance recognizes that online websites are sometimes used to offer services that are not otherwise available legally.

The *Criminal Justice Toolkit* published by UNODC contains further recommendations that reflect the minimum structure, functionality and facilities required for a rudimentary but effective use of police information and intelligence.^c

^a *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 45.

^b See also article 15, paragraph 3, of the Smuggling of Migrants Protocol.

^c *Criminal Justice Assessment Toolkit*, sector on policing, Tool 4, entitled “Police information and intelligence systems”, pp. 11-19.



IV.A ASSESSMENT QUESTIONS

- Is there existing legislation or other frameworks on the gathering, storage, analysis and dissemination of criminal intelligence?
 - Are there special considerations in relation to the response to the smuggling of migrants?
- What do existing laws and frameworks allow?
 - What are the constraints and limitations?
- Who oversees how information and intelligence are gathered, managed and exchanged?
 - How are they gathered?
- Have any issues been identified with regard to the existing procedure to gather, manage and exchange information and intelligence?

Intelligence storage and exchange

- Where and how are intelligence and information stored?
 - Are specific databases and analysis tools used?
 - Is information recorded manually or electronically?
- How is information recovered, analysed, graded and disseminated?
- Are officers encouraged to collect information, write reports and file them in a central place?
- Are there national crime statistics that also contain information relating to the smuggling of migrants?
- Is there a national and/or regional crime threat assessment or other strategic crime analysis?
 - Does it address and describe existing and emerging criminal activities pertaining to the smuggling of migrants?
- Do law enforcement officers receive regular information and intelligence briefings concerning their area of patrol or work?



IV.A ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*: Section 7.15, entitled “Intelligence-gathering and exchange”, pp. 45-47.
- *Criminal Justice Assessment Toolkit*, sector on policing, Tool 4, entitled “Police information and intelligence systems”, pp. 11-12.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*: Module 9, entitled “Intelligence”.
- *Criminal Intelligence Training Manual for Front-line Officers*.

B. Covert investigation techniques

In the investigation of smuggling of migrants offences, which are often very sophisticated and frequently involve a great number of criminal elements, covert investigation techniques may be extremely useful—and in some cases the only method of investigation. The availability of such measures will, however, depend on domestic legal systems that may permit or restrict the use of individual covert investigation techniques.

Covert surveillance is, however, a particularly intrusive method for collecting evidence. The use of covert investigation techniques involves a careful balancing of a suspect’s right to privacy against the need to investigate serious criminality. Consequently, most jurisdictions require a number of strict safeguards against abuse, including the requirement that the offence be serious, that the use of the technique be vital to the case, and that essential evidence cannot be secured by less intrusive means. Judicial or independent oversight is common and is required under international human rights law.



IV.B CRIMINAL INTELLIGENCE: COVERT INVESTIGATION TECHNIQUES

International requirements

- Article 20 of the United Nations Convention against Transnational Organized Crime.

Article 20 of the United Nations Convention against Transnational Organized Crime encourages—insofar as possible and permissible under domestic law—the appropriate use of special investigative techniques such as electronic or other forms of surveillance and undercover operations by competent authorities for the purpose of effectively combating organized crime. The Smuggling of Migrants Protocol contains no specific provisions on this point, but the requirements of article 20 of the United Nations Convention against Transnational Organized Crime are applicable to the Protocol.^a

The *Legislative Guides* and the *Toolkit to Combat Smuggling of Migrants* further emphasize that covert investigation techniques:

are especially useful in dealing with sophisticated organized criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in domestic prosecutions, as well as providing mutual legal assistance to other States Parties. In many cases, less intrusive methods will simply not prove effective or cannot be carried out without unacceptable risks to those involved.^b

Undercover operations

Article 20, paragraph 1, of the United Nations Convention against Transnational Organized Crime provides for the use of undercover operations and the *Legislative Guides* state: “Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence”.^c The purpose of undercover operations is to determine the nature and extent of criminal activities, identify the people involved and obtain evidence that allows offenders to be prosecuted. The *Toolkit to Combat Smuggling of Migrants* further states:

An undercover officer is a law enforcement officer who goes undercover (that is, pretends to be a criminal in order to learn information) to infiltrate a group. It is an extremely difficult and dangerous job; undercover operations should only be carried out by well-managed and properly trained staff.

An undercover officer can provide more information than an informant can; everything that an undercover officer sees or hears is potential evidence. Before an undercover officer is deployed, advice must be sought from a senior officer and/or prosecutor or the judiciary as appropriate.^d

Provisions relating to undercover operations are not mandatory and article 20, paragraph 1, “does not imply an obligation on States parties to make provision for the use of all the forms of special investigative techniques noted”.^e

Electronic surveillance

Article 20, paragraph 1, of the United Nations Convention against Transnational Organized Crime also encourages the use of “electronic or other forms of surveillance”. The *Legislative Guides*, along with other international best practice guidelines, state that:

Electronic surveillance in the form of listening devices or the interception of communication [...] is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.^f

Provisions relating to electronic surveillance are not mandatory and article 20, paragraph 1, “does not imply an obligation on States parties to make provision for the use of all the forms of special investigative technique noted”.^g

International cooperation

To further capitalize on the use of covert investigation techniques, article 20, paragraph 2, of the United Nations Convention against Transnational Organized Crime advocates standing arrangements between States parties in the form of bilateral and multilateral accords. In the absence of any such accords, decisions about the use of special investigative techniques should be made on a case-by-case basis.^h

Considerations and limitations

The use of covert investigation techniques may have implications for the safety of smuggled migrants. Accordingly, a key consideration in using covert investigation techniques in operations relating to the smuggling of migrants must be the risk posed to smuggled migrants by such techniques.ⁱ To that end, the *Toolkit to Combat Smuggling of Migrants* recommends the development of “an intervention plan in the event that evidence emerges that a migrant is being harmed or is likely to be harmed.”^j

Covert investigation techniques may also infringe on basic rights and freedoms of the persons under surveillance and may pick up private information that is unrelated to any criminal act.^k

^a Article 37, of the Organized Crime Convention; article 1, paragraph 2, of the Smuggling of Migrants Protocol.

^b *Legislative Guides*, p. 183; *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 25.

^c *Legislative Guides*, p. 184.

^d *Toolkit to Combat Smuggling of Migrants*, Tool 7.9, entitled “Special investigative techniques”, p. 26.

^e A/55/383/Add.1, para. 44; see also *Legislative Guides*, p. 185.

^f *Legislative Guides*, pp. 183-4.

^g A/55/383/Add.1, para. 44; see also *Legislative Guides*, p. 185.

^h Article 20, paragraph 2, of the Organized Crime Convention.

ⁱ See generally *Criminal Justice Assessment Toolkit*, sector on policing, Tool 4, entitled “Police information and intelligence systems”, p. 12.

^j *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 25.

^k *Ibid.*, p. 26.



IV.B ASSESSMENT QUESTIONS

Covert investigations

- Do investigators of the smuggling of migrants use covert investigation methods? Which of the following methods are used:
 - Interception of telecommunications, e-mail traffic and post
 - Listening devices, tracking and positioning devices
 - Mobile surveillance teams; photographic and video surveillance
 - Covert search of premises, letters, packages, containers and vehicles
 - Simulated or test purchase of an item
 - Internet surveillance
 - Simulation of a corruption offence or “integrity test”
 - Covert real-time monitoring of financial transactions
 - Undercover infiltration of networks
 - Monitored transport of migrants?
- Which of these methods are investigators permitted to use by law?
- What are the preconditions for the use of covert investigation techniques?
 - Is authorization required from a judicial or other independent source?
 - What are the limits and conditions on orders for covert surveillance?
 - Are there operational procedures to guide the use of covert investigation methods?
 - How is the safety of migrants secured?
 - Are investigators aware of and trained in the use of these covert investigation techniques?

- Do investigators run undercover operations in which they pose as criminals or clients?
 - How and how often is this done?
 - In what kind of cases is this allowed?
 - Is there a legal concept of entrapment?
- Is the country party to any bilateral or multilateral accords for using covert investigation methods in the context of smuggling of migrants investigations?



IV.B ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 183-192.
- *Toolkit to Combat Smuggling of Migrants*:
Section 7.9, entitled “Special investigative techniques”, pp. 24-27.
Criminal Justice Assessment Toolkit, sector on policing, Tool 3, entitled “Crime investigation”, pp. 13-14.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 14-15.
- *UNODC, In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 10, entitled “Covert investigative planning, techniques and tactics”.

C. Informants

Informants are persons who provide information about a crime to law enforcement agencies: an informant may be a person who simply lodges a complaint or provides one piece of information to the law enforcement authorities or a person who has engaged in a lengthy relationship with members of a criminal group.⁴⁴ The informant may be a member of the public, a victim of crime, a perpetrator or a police officer.

The information provided by informants can be vital—and is sometimes the only means to prevent or solve a crime. Effective recruitment and handling of informants can prove significantly more cost—and resource-effective than other covert methods of investigation. The development of a network of informants can be facilitated by means of reward schemes and confidential information hotlines to allow the supply of information.

⁴⁴*Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 25.



IV.C CRIMINAL INTELLIGENCE: INFORMANTS

International requirements

→ Article 20 of the United Nations Convention against Transnational Organized Crime.

The use of informants is one of the special investigative techniques referred to (but not explicitly outlined) in article 20 of the United Nations Convention against Transnational Organized Crime.^a

The process of smuggling of migrants involves many people; networks are often large and smugglers may come into contact with many people, and each one is a potential informant. In investigations of the smuggling of migrants, informants can be used to provide information, inter alia, about the structure and nature of the criminal organizations involved, about whether potential smuggled migrants are at certain premises; when migrants or victims are being moved and where they are being moved to; and about the proceeds of the smuggling of migrants (how much money is being paid, where it is being paid from and to, what the money is being used for).^b

The use of informants must be carried out in compliance with national laws. The transnational nature of smuggling of migrants means that investigators should be familiar with any relevant legislation in their own jurisdiction and also in the jurisdictions with which they are cooperating.

Many informants are themselves criminals with a variety of motivations for providing information and therefore require very careful management. The management of informants can create some specific vulnerabilities to corruption. It is thus important to examine the systems employed for using, managing and supervising informants and the payments made to them.

^a See section IV.B.

^b *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 25.



IV.C ASSESSMENT QUESTIONS

Informants

- To what extent are informants used in the investigation of the smuggling of migrants?
- How are informants managed?
 - What procedures are in place for contact with informants and recording information?
- Who is trained in the management of informants?
 - What training do they receive?
- Is the identity of informants protected throughout the criminal justice system? How?
- Are informants rewarded?
 - How are they rewarded?
 - If they are paid, what systems exist to manage the payment of informants?
- Are there standard operational procedures on the handling of informants, including on their protection?



IV.C ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 7.9, entitled “Special investigative techniques”, pp. 24-27.
- *Criminal Justice Assessment Toolkit* (2006), sector on policing, Tool 3, entitled “Crime investigation”, pp. 14-15, and Tool 4, entitled “Police information and intelligence systems”, p. 13.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 10, entitled “Covert investigative planning, techniques and tactics”, pp. 3-9.

D. Patrols and covert physical surveillance

Smuggled migrants are often kept in private homes and businesses or in concealed or clandestine premises. Vehicles and vessels of various sorts are used to transport or conceal smuggled migrants. Moreover, public areas may be used to transfer smuggled migrants, or to exchange money or pass on information. For example, a motorway rest area may be used regularly to board vehicles or transfer smuggled migrants; a public park or train station may be a place where smugglers recruit migrants or exchange information.

Law enforcement officials can usually monitor and check only a small number of places, premises and vehicles and, as a result, may not detect the smuggling of migrants in progress or cannot be the first to observe evidence of criminal activity. For these reasons, risk management, systematic patrols and physical surveillance designed to optimize coverage of hotspots for the smuggling of migrants are basic methods to improve intelligence-gathering and detection. A hotspot for the smuggling of migrants could for instance be a vulnerable stretch of border, a poorly staffed port of entry, a safe house for smuggled migrants, a truck stop or petrol station used to load smuggled migrants into vehicles or a travel agency also facilitating smuggling of migrants operations.

Beyond the general statements in article 20 of the United Nations Convention against Transnational Organized Crime,⁴⁵ there are no specific provisions relating to patrols and physical surveillance in the Smuggling of Migrants Protocol. International best practice guidelines suggest that routine patrols and covert physical surveillance (for instance, following suspects on foot or in vehicles) be used to keep particular suspects, premises or locations under observation.⁴⁶ Requirements and best practice principles relating to the identification and examination of crime scenes are explored further in section V.E below.

As with other covert investigation methods, if and when investigators become aware through patrols or surveillance that persons are being harmed, they are obliged to intervene.⁴⁷

⁴⁵See chapter IV.B, above.

⁴⁶*Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 26.

⁴⁷*Ibid.*



IV.D ASSESSMENT QUESTIONS

Patrols and covert physical surveillance

- What systems are used to determine smuggling of migrants hotspots, patrol routes, physical surveillance and inspections of vehicles and vessels, and how often is this information reviewed and updated?
- How and how frequently are smuggling of migrants hotspots patrolled and inspected by law enforcement officers?
- Do law enforcement officers regularly inspect vehicles and vessels that may be used for the smuggling of migrants?
- How and how frequently are suspects placed under surveillance?
- Who conducts the patrols and surveillance?
- Are patrols conducted jointly across borders?



IV.D ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 7.9, entitled “Special investigative techniques”, pp. 24-27.

E. Proactive investigations

Proactive investigations seek to target prominent and emerging crime threats to reduce the harm they cause, rather than respond to crimes after they have been committed or when they have been reported. This is also a method used in response to intelligence regarding ongoing or planned criminal activity. In such cases, the methodologies for investigators remain similar to those used for reactive investigations, but the offences to which they are applied are identified through research and intelligence-gathering. This strategy is particularly useful in combating organized crime and may be of great assistance in curtailing the smuggling of migrants.⁴⁸

Neither the United Nations Convention against Transnational Organized Crime nor the Smuggling of Migrants Protocol contains specific requirements relating to proactive investigations; the objectives and means of proactive investigations will also vary from case to case.

Generally, a proactive investigation will start as the result of an event that is brought to the attention of law enforcement officers. For example, law enforcement officers receive a phone call reporting suspicious activity. That event is usually researched in an attempt to establish if it is a one-off event or part of a series of similar or related events.⁴⁹

⁴⁸*Criminal Justice Assessment Toolkit*, sector on policing, Tool 4, entitled “Police information and intelligence systems”, p. 10.

⁴⁹*Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 12.

If investigators work separately from those who collect, collate or analyse intelligence, they must establish a close link that will protect the intelligence while allowing investigators to act when the time is right. Investigators must ensure that their colleagues in an intelligence section understand what they are trying to achieve and what they require from them.⁵⁰

Once the investigators have a picture of what is going on, they need to look at all potential uses of law enforcement tactics. When commencing proactive investigations, objectives should always be set. Once the objectives are set, consideration should be given to what can be achieved to gain evidence or intelligence, with the secondary aim of disrupting a group's activities or preventing the illegal entry of some people.⁵¹

Often, such investigations allow adequate time for investigators to carefully plan all stages of the investigation and to consider all standard and special investigative techniques.⁵² In proactive investigations, the investigators have slightly more control over how they will collect evidence and seek to prove their case.⁵³



IV.E ASSESSMENT QUESTIONS

Proactive investigations

- Are investigators deployed (individually or in teams) to investigate pre-identified targets, individuals or groups (rather than in response to crime reports or victim testimony)?
- Do investigators use analysis and profiling to build a case against a target?
 - If yes, how are targets chosen?
- Is there a criminal intelligence cell or unit that collects, collates and analyses information related to the smuggling of migrants?



IV.E ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*: Section 7.5, entitled “Proactive investigations”, pp. 12-13.
- *Criminal Justice Assessment Toolkit* (2006), sector on policing, Tool 3, entitled “Crime investigation”, pp. 10-11, and Tool 4, entitled “Police information and intelligence systems”, p. 10.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*: Module 4, entitled “Investigative approaches and the role of the criminal justice practitioner”, pp. 3-9.
- *Issue Paper: Migrant Smuggling by Air*, pp. 16-17.

⁵⁰Ibid.

⁵¹Ibid., p. 13.

⁵²See section IV.B, above.

⁵³*Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 12.

V. Investigation powers and procedures

Investigating the smuggling of migrants can be complex and may require a variety of investigative methods and approaches. The following sections set out some core elements of investigation procedures and techniques. This list of elements is, however, by no means exhaustive.

A. Direct reporting of smuggling of migrants to authorities

The commission of a smuggling of migrants offence can come to the attention of police or other enforcement units in a number of different ways. Criminal intelligence, patrols and surveillance, and proactive investigations, as outlined in section IV of the present *Assessment Guide*, are avenues of detecting the smuggling of migrants. In addition, the public, smuggled migrants, witnesses and other law enforcement agencies (both domestic and international) are common sources of reports of instances of smuggling of migrants. It is important that the relevant law enforcement agencies have mechanisms and procedures in place to ensure instances of smuggling of migrants are accurately and efficiently brought to their attention through each of these avenues.

Hotlines and whistle-blower schemes

Some countries and some local communities have established online or telephone hotlines as an alternative avenue to detect smuggling of migrants. These systems encourage residents and businesses to report suspicious behaviour in their local area.

Inter-agency reporting

In addition to public reporting, many instances of smuggling of migrants may be detected by persons working for other agencies in other fields, such as immigration, or front-line police officers in the course of their regular duties. Foreign law enforcement agencies may also refer cases to domestic authorities. It is thus important that the law enforcement agency charged with investigating instances of smuggling of migrants have formal procedures and relationships implemented to effectively facilitate reports from other agencies. This aspect of law enforcement is further examined in sections II.A and V.E. Proactive investigation methods are further explored in section IV.E.



V.A INVESTIGATION POWERS AND PROCEDURES: DIRECT REPORTING OF SMUGGLING OF MIGRANTS TO AUTHORITIES

International requirements

- Article 31, paragraph 5, of the United Nations Convention against Transnational Organized Crime.

International instruments do not go into detail about mechanisms to report instances of the smuggling of migrants beyond a general statement in article 31, paragraph 5, of the United Nations

Convention against Transnational Organized Crime: “States parties shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by transnational organized crime.”

The *Criminal Justice Assessment Toolkit* states: “The use of anonymous police hotlines has also been effective as a way of reaching out to the public.”^a Where an anonymous tip is provided, through either a hotline or directly, there are a number of considerations for law enforcement. It may be difficult to establish the credibility of such sources and the evidence may be of little weight at trial; however, the tip may provide justification for further investigation. It should be noted that certain measures, such as search and seizure, are not justifiable on the basis of an anonymous tip alone.^b Thus the facilitating and use of public reporting, while valuable, can be considered only one small part of the overall investigative process.

Another important consideration in regard to reporting by smuggled migrants themselves is to ensure that they are aware that their involvement in an investigation will not lead to their own prosecution. International requirements relating to the non-criminalization of smuggled migrants are further examined in section I.F.

^a *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 19.

^b *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 10, p. 5. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.



V.A ASSESSMENT QUESTIONS

Direct reporting of smuggling of migrants

- How do instances of smuggling of migrants come to the attention of law enforcement agencies?
 - How and how frequently do members of the public, other agencies, organizations and so forth report cases of smuggling of migrants to the authorities?
 - Which organizations, individuals or agencies are required to bring a case of smuggling of migrants to the attention of law enforcement?
- Is contact information (telephone, fax number, e-mail address or other contact information) available to the public to enable them to report or seek advice on smuggling of migrants?
 - What specifically is the public encouraged to report—for example, suspicions about smuggling of migrants, illegal entry, harbouring of migrants? Is smuggling of migrants specifically targeted?
 - How is this advertised?
 - Is the public aware of how to recognize these crimes; what information or indicators about smuggling of migrants is communicated to the public to encourage reporting?
- What systems are in place to deal with reports in different languages?
- Are officials able to refer smuggled migrants seeking advice, assistance or protection to appropriate services?

- Does the country have a reward scheme for persons reporting such crimes as smuggling of migrants, illegal entry, harbouring or irregular migration?
 - What are the criteria for receiving a reward?
 - Are false allegations made in order to receive rewards?
- Do smuggled migrants face potential prosecution if they report to the authorities?
- Are there formal relationships with other foreign and domestic agencies to facilitate effective reporting of the smuggling of migrants?



V.A ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 9.6, entitled “Raising awareness among potential smuggled migrants”, pp. 22-24;
Section 7.9, entitled “Special investigative techniques (use of informants)”, pp. 25-26.
- *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, section 5.7, “Informants”, pp. 14-15; section 5.10, “Use of media”, p. 19.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 3, entitled “Detecting migrant smuggling”, pp. 1-12;
Module 10, entitled “Covert investigative planning, techniques and tactics”, pp. 3-10.

B. Identifying, debriefing and interviewing smuggled migrants

Identifying smuggled migrants

A crucial component of investigating the smuggling of migrants is the capacity of law enforcement to accurately identify smuggled migrants. Persons who are likely to be in contact with them (particularly police, immigration officers and border guards) should receive training in order to enable them to identify smuggled migrants and to be sensitive to their needs. Proper training in this area ensures smuggled migrants can be referred to the appropriate support organizations. Assistance measures and referral processes are further outlined in section XI.A of the present *Assessment Guide*.

There is an inherent difficulty in accurately identifying migrants who have been smuggled (especially by organized crime groups) and distinguishing them from irregular migrants who have made their way independently and without the assistance of migrant smugglers. Moreover, it is often difficult to differentiate between smuggled migrants and victims of trafficking in persons given that there is often a lack of clear lines distinguishing the two and the indicators are subtle. Indeed, it is perhaps best to think in terms of identifying a person as being somewhere on a continuum as opposed to belonging to one of two discrete categories. For example, a migrant who is smuggled

may, after arrival at the destination, be subjected to exploitation. This would then constitute an instance of trafficking in persons. It is therefore important for law enforcement to be aware of the intricacies involved in classifying a person as having been trafficked or smuggled. International law, however, draws a distinction between smuggled migrants and victims of trafficking in persons.⁵⁴

Several best practice manuals have been developed that list indicators of smuggling of migrants.⁵⁵ These best practice guidelines may also assist in identifying smuggled migrants and distinguishing them from victims of trafficking in persons and from other types of irregular migrants. Profiling used to identify migrant smugglers and investigate the smuggling of migrants may also lead to the identification of smuggled migrants.⁵⁶ It should be noted, however, that the presence of certain indicators does not always prove conclusively that a person is indeed a smuggled migrant. Further inquiries should be made as indicators can vary from country to country and from situation to situation.

Debriefing smuggled migrants

A debriefing occurs after smuggled migrants—and perhaps their smugglers—have been identified and after any urgent assistance has been provided. The debriefing may occur at the port of entry or once smuggled migrants have been placed in temporary shelters. The purpose of debriefing is to provide smuggled migrants with an opportunity to speak to law enforcement and voluntarily provide information about the circumstances of their journey and the persons involved in it.

Unlike formal interviews, debriefing presents an opportunity to gather intelligence and other important information informally, though basic rules that govern the way in which persons who are not suspected of a crime can be questioned and held do apply. Importantly, smuggled migrants should be free not to answer questions and leave the debriefing at any time. Permission should be sought from smuggled migrants before their statements are recorded.⁵⁷

Interviewing smuggled migrants

The approach taken to interviewing smuggled migrants requires particular sensitivity to ensure a relationship of trust is built with the investigators. Many cases involve persons who are irregular migrants and as such are inherently fearful of authorities.⁵⁸

While the Smuggling of Migrants Protocol does not set out specific requirements regarding the interviewing of smuggled migrants, there are some general principles that need to be followed. The Protocol specifically requires that the special needs of women and children be taken into account. Furthermore, the Protocol requires in article 5 that smuggled migrants should not be

⁵⁴See further section I.C.

⁵⁵See further *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, pp. 32-34; *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 3.4, pp. 3-10. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

⁵⁶See further *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 3, pp. 10-11. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

⁵⁷*Ibid.*, Module 13, pp. 5-7. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

⁵⁸*Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 17.

criminalized for being the object of the smuggling.⁵⁹ While they may be liable for other offences, interviews should not be used to gather evidence for the purpose of holding smuggled migrants criminally liable for smuggling of migrants.

Migrants who have agreed to testify against their smugglers are often the best resource for prosecutors and should be used where possible. This, in turn, requires that investigators and prosecutors maintain a good rapport with smuggled migrants. Matters are complicated if there are legal requirements to remove smuggled migrants from the country. In such cases, it may be necessary to explore avenues to allow smuggled migrants to stay temporarily for the duration of the smugglers' trial, to bring smuggled migrants back after they have been removed to testify in court or to obtain video or written testimony from smuggled migrants after they have been removed to their home country.

It is suggested that the provision of legal advice to the smuggled migrants prior to their being interviewed may help to ensure that they are aware of what they are doing and may help to reassure the judiciary that debriefings and witness interviews are being conducted properly (a statement made by a person who has already received legal advice may be viewed in a different manner from one that was obtained in other circumstances).⁶⁰

It is crucial that statements made by smuggled migrants are recorded using written notes, video or audio equipment.⁶¹ Whatever the method, it should be used in such a way that it does not detract from the quality of the interview being conducted. Furthermore, best practice guidelines indicate that "interviews will not result in valuable information for investigation or prosecution purposes unless special circumstances are considered."⁶² Interviews of the smuggled migrants during criminal proceedings should also take place with due respect for the person, and away from the presence of the public and media.

Specifics on best practices for interviewing techniques are provided for in the UNODC *Toolkit to Combat Smuggling of Migrants*, and a range of other training manuals.⁶³ The details of these techniques are too exhaustive to cover here, although compliance with them is obviously desirable.

The *Model Law against Smuggling of Migrants* provides best practice guidelines on interviewing children either as victims or witnesses. It is suggested that interviews, examinations and other forms of investigation should be conducted by specially trained professionals in a suitable environment and in a language that the child uses and understands, and, insofar as possible, in the presence of the child's legal guardian or a support person.⁶⁴

⁵⁹See further section I.F.

⁶⁰*Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled "Law enforcement and prosecution", sect. 7.17, p. 52.

⁶¹*Ibid.*

⁶²*In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 13, p. 278. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

⁶³*Ibid.*; *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled "Law enforcement and prosecution", sect. 7.17, pp. 52-54; Tool 8, entitled "Protection and assistance measures", sect. 8.3, pp. 9-11; *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled "Crime investigation", pp. 17-18.

⁶⁴*Model Law against Smuggling of Migrants*, p. 71.



V.B ASSESSMENT QUESTIONS

Identification of smuggled migrants

- Are there guidelines and procedures available to assist front-line agencies to identify smuggled migrants?
- Are investigators trained to identify smuggled migrants?
 - Are investigators trained to distinguish between irregular migrants, smuggled migrants and victims of trafficking in persons?
- Do investigators proactively seek to identify smuggled migrants or wait for them to be reported?

Debriefing smuggled migrants

- Are smuggled migrants given the opportunity to provide information to law enforcement before they are removed from the country?
 - Is there a set of standard, pre-prepared questions that are used?
- What basic rules apply to questioning persons that are not suspects of a crime?
 - Are these rules followed when smuggled migrants are debriefed?
- What information is kept by government authorities on the identity, contact details and other information in relation to smuggled migrants?

Interviewing smuggled migrants

- Do investigators receive training in interviewing smuggled migrants?
 - What does the training consist of?
- Are interviews written, audio or video-recorded?
- Where do interviews take place?
- What happens when the interviewee cannot speak the same language as the interviewer?
 - Is an interpreter provided?
 - What happens where the person is illiterate?
- What are the rules for the interviewing of smuggled migrants?
 - Does the interviewer inform interviewees of their right to freedom from self-incrimination during the interview?
 - Does a smuggled migrant have the right to have a lawyer or support person present during the interview?
- Is the criminal investigation interview kept separate from any interview relating to the immigration status of the smuggled migrant?
- Are smuggled migrants entitled not to answer questions?
 - Is there a right against self-incrimination?
 - Are smuggled migrants informed of that right?
- Do smuggled migrants have the opportunity to read their statements and certify that each page is accurate?
- What options are available to allow smuggled migrants to remain in the country or return to the country to testify against their smugglers in court?

- Are there any options to suspend deportation pending a smuggled migrant's testimony in court as a witness?
- Are there any options to issue temporary or permanent residency permits to smuggled migrants testifying in court?
- Are children interviewed?
 - If so, what procedures are involved?
 - Are there investigators who have been specially trained to interview children or vulnerable people?



V.B ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants:*
 - Section 7.11, entitled “Indicators of smuggling of migrants (and trafficking in persons)”, pp. 32-34;
 - Section 7.17, entitled “Seeking the collaboration of smugglers of migrants and smuggled migrants”, pp. 52-54;
 - Section 8.3, entitled “Understanding the psychological impact of smuggling of migrants on the migrant”, pp. 9-11.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants:*
 - Module 3.4, entitled “Detecting migrant smuggling (indicators)”, pp. 3-10.
 - Module 13, entitled “Debriefing, interviews, and testimony”.
- *Basic Training Manual on Investigating and Prosecuting Smuggling of Migrants:*
 - Module 2.B: Debriefing, pp. 1-10;
 - Module 2.D: Smugglers and smuggled migrants as witnesses, pp. 12-16.
- *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, pp. 17-18.

C. Case management and data storage

Information is the mainstay of crime investigation; the accurate recording of complaints and allegations of crimes, management of case files and storage of data are crucial. Computer databases represent a significant investment, which is often underestimated. Hardware can soon become obsolete and software licences require regular and expensive subscriptions. However, there are important benefits to be had in terms of managing volume data that would soon become unmanageable otherwise. Although many countries still do not operate computer databases, similar results can be achieved through careful and accurate filing of paper files or index cards.

The main risk factor in both paper and electronic files is poor information management. Records may not have been properly completed in the first place or cross-referenced and inaccurate data

entries or “key-in” errors (typing mistakes) can mean not only that searches are incomplete, but also that false matches are made. As time goes by, information may become dangerously out of date or incomplete (a significant risk factor where dangerous criminals are involved). Poor security protocols can mean that the data may not be secure from unauthorized access or tampering. All these risks can be offset by proper protocols, but they must be effectively applied, enforced and supervised.⁶⁵



V.C INVESTIGATION POWERS AND PROCEDURES: CASE MANAGEMENT AND DATA STORAGE

International requirements

- Articles 18, paragraph 3, subparagraph (f) and 29 of the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime requires States parties to provide originals or certified copies of relevant documents and records as part of their obligation to mutually assist other States parties.^a As with other criminal offences, it is essential that any reports about smuggling of migrants be accurately, sensitively and comprehensively recorded. The *Criminal Justice Assessment Toolkit* states:

As soon as a crime is reported, someone should review (or “screen”) the allegation together with any supporting facts and then allocate sufficient resources to deal with it. This decision can be made more difficult when there are competing priorities and only limited resources to deal with them.^b

The implementation of clear procedures and guidelines in this regard ensures that all matters are appropriately prioritized and dealt with.

There are also a number of best practice guidelines relating to the physical recording and storage of reports. It is suggested that, where possible, a computer-based recording system is ideal in terms of “managing volume data that would soon otherwise become unmanageable.”^c However, where such a system is in place, there is a clear need for robust security protocols to prevent unauthorized access or tampering. It is acknowledged that “the least expensive solution is to maintain intelligence on hard copy in chronological or alphabetical order, or arranged by target or project.”^d Regardless of whether a paper-based or electronic system is used, the overriding concern is that records be properly completed in the first instance, cross-referenced with other data, indexed alphabetically or chronologically, easily retrievable and kept up to date.^e

Those responsible for record-keeping must also be aware that “there are often strict international conventions, domestic legislation such as privacy laws and regulations governing storage of information.”^f It is important that any record-keeping system is compliant with domestic law in this regard.

⁶⁵ *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 10.

The *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* makes some further recommendations regarding the storage of data.^g

^a Article 18, para. 3 (f), and article 29 of the Organized Crime Convention.

^b *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 10.

^c *Ibid.*, p. 15.

^d *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 9.7, p. 15. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

^e *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 15; *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 9.7, p. 15. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

^f *Ibid.*

^g *Ibid.*



V.C ASSESSMENT QUESTIONS

Case management

- What happens when a smuggling of migrants offence is reported or otherwise comes to the attention of the authorities?
 - Who records it?
 - Are procedures in place for processing such reports and information?
- What is the capacity of the relevant agencies to store and manage relevant information?
- Is there a set format for recording intelligence, suspicions, reports and other information and allegations of smuggling of migrants?
 - Does the format include information about date, persons involved, type of event/offence, suspects and the source of information?
- How is immediate action identified and managed?
 - Who has to be notified about the crime?

Data storage

- How and where are reports and other information about instances of smuggling of migrants recorded?
 - Is it recorded on paper or electronically?
 - How are reports and other information stored and filed?
 - Are these reports centralized, and where there are separate databases, are they interconnected?
- What measures are in place to protect the security of these records (whether physical or digital)?
 - Are record-keeping systems in compliance with international and domestic law regarding privacy and the storage of information?
 - Are there policies and procedures in place to determine who has access to these records and how are these procedures enforced?



V.C ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit, sector on policing*, Tool 3, entitled “Crime investigation”, pp. 10 and 15-16.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* (2011):
Module 9.7, entitled “Storage and analysis”, pp. 15-20.

D. Information- and evidence-gathering

The outcome of a criminal case will depend on the quality and weight of the evidence. The decision as to what information or material should be collected or recorded needs to be made by someone competent in evidence-gathering. This will ensure that no evidence is compromised or lost at the scene,⁶⁶ thus jeopardizing further investigations and prosecution. Accordingly, it is important that evidence be collected and recorded thoroughly and systematically.

The rules of evidence adopted by a criminal justice system may preclude some types of information from being considered during trial if they are unreliable, biased or prejudicial.⁶⁷



V.D INVESTIGATION POWERS AND PROCEDURES: INFORMATION- AND EVIDENCE-GATHERING

International requirements

- Articles 23, subparagraph (a) and 29, paragraph 1, of the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol do not offer detailed guidance on appropriate information- and evidence-gathering techniques. There is, however, a broad requirement under article 29, paragraph 1, of the Organized Crime Convention that: “Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel [...]”. That article specifically states that such programmes are to deal with the “collection of evidence”.^a Front-line officers are often responsible for collecting and preserving evidence until specialized investigation teams take over the case. It is thus particularly important that those officers be trained in the rules of evidence.

⁶⁶Crime scene work is explored further in section V.F.

⁶⁷*Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 11.

On a related matter, it is also imperative that law enforcement personnel be trained not to use “physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding.”^b Article 23 of the Convention also requires that this conduct be criminalized as the obstruction of justice.^c

^a Article 29, paragraph 1, subparagraph (e), of the Organized Crime Convention.

^b Article 23, subparagraph (a), of the Organized Crime Convention.

^c See also *Legislative Guides*, p. 92.



V.D ASSESSMENT QUESTIONS

Information- and evidence-gathering

- Are all relevant officers trained in the rules of evidence?
 - Are they trained in what to look for and how to collect and protect evidence?
- What are the rules for collecting, documenting, recovering and preserving evidence?
 - Are there issues with compliance with these rules within the relevant agencies?
- In major cases, is an officer designated to ensure continuity and preserve the integrity of evidence and exhibits?
- What measures are taken to prevent the loss, theft or destruction of evidence?
 - Are there instances in which evidence is lost, stolen or destroyed?
- Are officers trained to ensure they do not intentionally or unintentionally induce false testimony or evidence?



V.D ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 7.10, entitled “Investigating the smuggling of migrants (crime scenes)”, pp. 28-31.
- *Criminal Justice Assessment Toolkit, sector on policing*, Tool 3, entitled “Crime investigation”, pp. 11-12.
- UNODC, *Crime Scene and Physical Evidence Awareness for Non-forensic Personnel*, pp. 10-25.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* (2011):
Module 12, entitled “Crime scene and physical evidence examinations”.

E. Enforcement powers

For law enforcement to be meaningful, investigators of smuggling of migrants, including police, customs and other agencies need to be equipped with relevant powers that enable them to conduct searches, interview witnesses and suspects, enter premises, seize assets and make arrests. As these powers are intrusive, they need to be limited and monitored to prevent the abuse of powers and unnecessary infringements of human rights and civil liberties.

Virtually all enforcement powers are matters for discretion, and some powers may require prior approval by a court or a higher-ranking officer. While most valid police powers are created by law, it is rare for a law to prescribe that a certain power must be exercised. For instance, an officer may need “reasonable grounds” or “probable cause” to suspect a crime before he or she may act. The decision about whether or not to exercise a certain power, and the factors that influence discretion, are important in understanding how law enforcement affects people and communities.⁶⁸

The Smuggling of Migrants Protocol and the United Nations Convention against Transnational Organized Crime contain no provisions relating to the types of exercise of enforcement powers. Best practice guidelines and toolkits pertaining to these crimes also contain no specific recommendations on this point. Questions about the availability and exercise of discretion and the approval and use of law enforcement powers are, however, not unique to combating the smuggling of migrants and equally apply to the whole spectrum of law enforcement activities. Accordingly, general laws and regulations pertaining to police powers will usually articulate a range of procedural checks and balances that are implicit in the granting of a particular power. In some jurisdictions, different rules and thresholds apply to different offences, providing police with wider powers and greater discretion in instances in which police intervention is particularly urgent.



V.E ASSESSMENT QUESTIONS

Enforcement powers: availability

- Who among law enforcement officers is authorized:
 - To stop, question and conduct searches of people, premises and conveyances?
 - To gather information about persons, places, vehicles and so forth suspected of involvement in the smuggling of migrants?
 - To make arrests?
 - To seize or freeze property and assets?
 - To seize vessels, vehicles, aircraft and other means and equipment used to transport persons?
 - To carry firearms or other weapons?
- Are these powers adequate or sufficient to prevent and disrupt the smuggling of migrants?

⁶⁸ *Criminal Justice Assessment Toolkit*, sector on policing, Tool 2, entitled “The integrity and accountability of police”, p. 6; Tool 1, entitled “Public safety and police service delivery”, p. 4.

Enforcement powers: limitations

- Does the law define the grounds and threshold for the application of coercive powers (for example, the concept of “reasonable grounds”, “reasonable belief” or “probable cause”)?
- Is the application of enforcement powers limited to the use of minimum or reasonable force (or similar) such that officers should apply only that level of force necessary to achieve their lawful purpose?
- What enforcement actions require the issue of a warrant? Who issues the warrants?
- What other expressed or implied limitations for the use of enforcement powers exist?

**V.E ADDITIONAL GUIDELINES AND TOOLS**

- *Criminal Justice Assessment Toolkit*, sector on policing, Tool 2, entitled “The integrity and accountability of police”, pp. 6-7, and Tool 1, entitled “Public safety and police service delivery”, pp. 4-5.

F. Crime scene work

Crime scenes are the starting point of the forensic process. At this stage, the investigation involves a process that aims to record the scene as it is first encountered and recognize and collect all physical evidence potentially relevant to the solution of the case.⁶⁹ Crime scenes can be persons, places or objects that are the subject of a criminal investigation.⁷⁰ Smuggling of migrants crime scenes are somewhat unique in that there is likely to be more than one crime scene owing to the movement of the persons involved. A serious consideration is that the main source of evidence in this crime type is the smuggled migrant.

In crime scene work, as in other forms of forensic endeavour,⁷¹ it is vital that the investigations be meticulous, that detailed records be kept and that a proper chain of custody (the continuity of evidence) be maintained for each item of evidence. Such a chain will minimize the chance of loss, contamination or substitution of material and helps to prove the origin and veracity of specimens or exhibits.

Crime scene work involves proper preparation for and rapid preservation of the crime scene. It requires special equipment, ranging from protective clothing to specimen containers, as well as personnel familiar with crime scene management and record-keeping.

⁶⁹*Criminal Justice Assessment Toolkit*, sector on policing, Tool 5, entitled “Forensic services and infrastructure”, p. 13.

⁷⁰*In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 12, p. 1. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

⁷¹See further section V.F.



V.F INVESTIGATION POWERS AND PROCEDURES: CRIME SCENE WORK

International requirements

- Articles 23, subparagraph (a) and 29, paragraph 1, of the United Nations Convention against Transnational Organized Crime.

Dealing with crime scenes related to the smuggling of migrants is, in many ways, the same as for any other crime. The United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol are silent on requirements in relation to crime scene work. There is only a broad requirement that each State party “to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel [...]”, including in terms of the “collection of evidence”.^a There are, however, a number of tools and publications produced by UNODC that offer best practice guidance on dealing with the specifics of smuggling of migrants and trafficking in persons crime scene work.^b The following sections explore some of the basic requirements of effective crime scene investigation.

First responders

First responders to crime scenes, typically police officers, are instrumental to the “preservation of the scene and the integrity of the evidence, as well as early documentation of the crime scene, its evidence and all activities at the scene.”^c It is thus important that first responders have adequate training to deal with crime scenes in the manner outlined above until specialized crime scene investigators take over the work. It should be noted that first responders also inevitably deal with victims and witnesses before others.

The United Nations Convention against Transnational Organized Crime contains a number of requirements in respect of training law enforcement to protect victims and witnesses. These requirements are further discussed in sections XI.C and XI.D but it should be noted that such requirements are important in the context of crime scene work. Securing a trusting relationship with victims and witnesses is crucial to subsequent evidence-gathering and successful prosecutions.

Crime scene investigation services

Smuggling of migrants is a unique crime type that requires specialized investigation services. The use of dedicated crime scene investigation services, trained to deal with the specifics of this crime, ensures the best possible chance for a successful prosecution. For this reason it is also important that these services have quality assurance procedures in place. Furthermore, there needs to be a clear and established relationship between crime scene investigators, first responders, police, investigators and detectives, forensic experts and prosecutors.^d

Crucial to the work of crime scene investigation services is the use of the equipment necessary to process a crime scene and a mechanism to secure and transport the evidence to either a laboratory or police facilities. For specific crimes, such as smuggling of migrants, the *Criminal Justice Assessment Toolkit* suggests that specifically designed crime scene investigation kits be used for the collection of evidence. Whether crime scene investigation services have access to dedicated cars, mobile laboratories, information technology equipment, portable equipment and evidence protection materials will also affect their ability to respond effectively.^e

The capacity of crime scene investigation services to effectively carry out crime scene work largely depends on the training of staff. To this end it is important that education and training be provided, with specific courses on smuggling of migrants.

^a Article 29, paragraph 1, of the Organized Crime Convention.

^b See further *Criminal Justice Assessment Toolkit*, sector on policing, Tool 5, entitled “Forensic services and infrastructure”, pp. 13-16; *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, sect. 7.10.

^c *Criminal Justice Assessment Toolkit*, sector on policing, Tool 5, entitled “Forensic services and infrastructure”, p. 13.

^d *Ibid.*, p. 15.

^e *Ibid.*



V.F ASSESSMENT QUESTIONS

Crime scene work: availability

- Are there gaps in the capacity of the relevant agencies to manage a crime scene?
- Are dedicated crime scene investigation services available for the investigation of smuggling of migrants?
 - Are there quality assurance procedures regarding their work?
 - What is the relationship between the crime scene investigation services and other relevant agencies?

Crime scene work: training

- Are law enforcement officials or other staff involved in responding to or investigating cases of smuggling of migrants trained in identifying, protecting and collecting relevant evidence?
 - Are they trained in the proper technique for identifying, establishing, organizing, securing and preserving a crime scene?
 - Are they provided with adequate training to ensure preservation of the crime scene and migrants or witnesses?
- Are there specialized personnel for crime scene management?
- Are relevant staff properly trained in record-keeping, electronic data collection, use of equipment, photography and other areas?
 - Are they aware of potential cross-contamination issues?
 - Do they know how to bag, label and record evidence and exhibits?



V.F ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 7.10, entitled “Investigating the smuggling of migrants (crime scenes)”, pp. 28-31.
- *Crime Scene and Physical Evidence Awareness for Non-forensic Personnel*, pp. 8-25.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 12, entitled “Crime scene and physical evidence examinations”.

G. Forensics

Forensic services are key to an effective and fair criminal justice system because they provide objective and timely information for multiple phases at different stages of the criminal justice process. The ultimate objective of forensic science is to contribute to finding the truth, more precisely to provide the criminal justice system with answers, using objective evidence, and through questions aimed at determining the guilt or innocence of an offender. It is therefore essential that forensic services be provided by a highly qualified and impartial entity.⁷²

The United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol do not contain any specific requirements in relation to forensic work. There are, however, a number of UNODC publications that offer best practice guidance.

Types of forensic evidence

Fingerprints, biological materials and DNA are all particularly important when investigating the smuggling of migrants. Fingerprints may be found on travel or identity documents, vehicles or other items such as weapons. The recovery of fingerprint evidence is important in linking smugglers to migrants. Biological materials are useful in proving aggravating factors, as well as that the smuggling took place. For example, sexual exploitation (where sexual services have constituted part of the fee) can often be established through the collection and analysis of biological material. It is recommended that:

gender, cultural and privacy issues must be respected when seeking to obtain biological evidence either with the consent of the individual, pursuant to judicial authorization or under legislative authority.⁷³

DNA is also of value as forensic evidence as it carries genetic information and can be found on items such as mobile phones or cigarette butts. Specialized resources are necessary to collect DNA evidence but it may be used to link persons to crime scenes or victims. It is noted that “extracting a DNA sample involves a significant invasion of privacy and in most jurisdictions is governed by strict laws.”⁷⁴ To this end, it is important that those involved in forensic services be properly trained to be compliant with these laws.



V.G ASSESSMENT QUESTIONS

Forensics

- Are there forensic teams or laboratories specialized in or dedicated to smuggling of migrants cases?
- What procedures are there to ensure the integrity and identity of evidence throughout the forensic process?
- Are forensic personnel trained to deal with victims and witnesses in a sensitive manner?

⁷²*Criminal Justice Assessment Toolkit*, sector on policing, Tool 5, entitled “Forensic services and infrastructure”.

⁷³*In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 12, p. 4. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

⁷⁴*Ibid.*

- To what extent is equipment available for the collection of fingerprints, DNA and biological materials?
 - Is this equipment portable?
- What are the scope and limitations of forensic services provided by forensic laboratories?
- What is the relationship between forensic services and investigation personnel?
 - Is there a cost implication and could this be a limitation?



V.G ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit, sector on policing*, Tool 5, entitled “Forensic services and infrastructure”.
- UNODC, *Staff Skill Requirements and Equipment Recommendations for Forensic Science Laboratories*.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 12*, entitled “Forensic evidence”, p. 4.

H. Identification of suspects

The investigation process is aimed at identifying the perpetrator of a crime, and a case will be greatly strengthened by good identification evidence. The procedures by which a suspect can be identified have to be strictly controlled in order to prevent a miscarriage of justice. Poor identification procedures can lead to unacceptable bias and to all resulting evidence being ruled inadmissible.⁷⁵

Profiling is an investigative technique used to identify smugglers of migrants and their criminal activities. It may be employed, for instance, to conduct select screenings of passengers at airports, seaports and border control points. If authorities develop profiles to identify smugglers of migrants they need to ensure that profiles are regularly updated with the most recent information and that this information is shared with relevant agencies. Caution should also be exercised to ensure that profiling is not based on race or bias and persons involved in developing profiles and those who act on them need to be aware of possible human rights implications and the dangers of discrimination.⁷⁶

The United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol do not have any specific requirements in relation to the processes and methods used to identify suspects. The *Criminal Justice Assessment Toolkit*, however, does provide some basic guidance.⁷⁷

⁷⁵*Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 12.

⁷⁶*In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 3, pp. 10-11. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

⁷⁷*Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 12.



V.H ASSESSMENT QUESTIONS

Identification of suspects

- Are existing laws and procedures considered adequate to enable and facilitate the identification of suspects, and in particular those suspected of smuggling migrants?
- Is profiling used as a technique to identify smugglers of migrants?
 - If so, how and on the basis of what information are profiles developed? Who develops them?
 - Are profiles regularly updated, and on what basis?
 - Are they shared between agencies?
 - Are mechanisms in place to ensure profiles are not based on race or bias and do not lead to unfair discrimination?
- Do investigators have the means to take, analyse and compare fingerprints and DNA from people suspected of crime for the purpose of timely identification?
- Do investigators have ledgers, files or databases containing photographs, fingerprints and other biometrical information on known criminals?
 - How is this information stored and organized?
 - Is this information updated regularly?
- Do investigators have access to identification facilities and equipment, such as “identification suites” and cameras?



V.H ADDITIONAL GUIDELINES AND TOOLS

- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 3*, entitled “Detecting migrant smuggling”, pp. 10-11.
- *Issue Paper: Smuggling of Migrants by Sea*, p. 46.
- *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, pp. 12-13, and Tool 4, entitled “Police information and intelligence systems”.

I. Interviewing and treatment of suspects

Interviewing is a cornerstone of any investigation. There are two basic types of interview conducted by investigators: interviews with suspected smugglers of migrants, and interviews with witnesses and smuggled migrants.⁷⁸ Suspects will normally be trying to avoid giving truthful answers to investigators’ questions and therefore, by implication, such interviews are more adversarial.⁷⁹

⁷⁸See section V.B.

⁷⁹See further *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, pp. 17-18.

International law and best practice guidelines, along with many domestic laws, limit the use of coercive interviewing techniques and strictly prohibit the use of torture. It is therefore important that investigators have a clear understanding about the boundaries of permissible interviewing techniques.



V.I INVESTIGATION POWERS AND PROCEDURES: INTERVIEWING AND TREATMENT OF SUSPECTS

International requirements

→ Article 23 of the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol are largely silent on matters relating to the interviewing of suspects and the rights of accused persons in general. Article 23 of the Organized Crime Convention does, however, oblige States parties to criminalize the obstruction of justice. To this end, it is important that authorities do not use physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony from a suspect.

There are other sources of international law that do offer some guidance on how suspects should be interviewed. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,^a the Code of Conduct for Law Enforcement Officials^b and the Universal Declaration of Human Rights^c are the most instructive instruments on this matter. Among other relevant international instruments are the International Covenant on Civil and Political Rights,^d the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,^e the Declaration on the Elimination of All Forms of Racial Discrimination^f and the Standard Minimum Rules for the Treatment of Prisoners.^g It is outside the scope of the present *Assessment Guide* to comprehensively examine all these elements of international law. The important point here is that any interviewing of suspects must abide by the principles laid down by these instruments if the country is a signatory to them. In any event, these instruments provide a minimum benchmark to use in conducting interviews as a matter of best practice.

Importantly, authorities must follow procedural guidelines when questioning persons suspected of smuggling of migrants. Suspects may not be forced to incriminate themselves; they should have an opportunity to seek legal assistance before being questioned and be cautioned that information they provide may be used against them in criminal proceedings.^h The *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* further suggests that suspects should be informed of their rights, a record of relevant data should be kept, the arrest record communicated to the detainee or his or her legal counsel, and, where necessary, an interpreter provided during the interview.ⁱ It should be noted that interpreters can be particularly vulnerable to corruption.

^a General Assembly resolution 43/173, annex.

^b Assembly resolution 34/169, annex.

^c Assembly resolution 217 A (III).

^d Assembly resolution 2200 A (XXI), annex.

^e Assembly resolution 3452 (XXX).

^f Assembly resolution 1904 (XVIII).

^g Economic and Social Council resolution 1984/47, annex.

^h *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 13, pp. 13-15. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

ⁱ *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 9, p. 11.



V.I ASSESSMENT QUESTIONS

Interviewing of suspects

- Do investigators receive training in interview techniques?
 - What does the training consist of?
- Are interviews of suspected smugglers of migrants recorded?
 - If yes, where and how?
- Are there guidelines or codes of practice on interviewing and dealing with suspects?
 - Do these guidelines reflect international standards?
- Are suspected smugglers of migrants entitled not to answer questions?
 - Is there a right against self-incrimination?
 - Do suspects have the right to have a lawyer present during the interview?
 - Are suspects informed of that right?
- What happens when the interviewer cannot speak in a language that the interviewee understands?
 - Is an interpreter provided?
 - What happens where the person is illiterate?
- Are investigators aware of the risk involved in interviewing vulnerable persons?
- Do investigators adhere to international (and national) standards or is there evidence that severe interviewing techniques and/or torture are used?

Treatment of suspects

- Are suspects treated according to international standards?
 - How long are they detained for and in what conditions?



V.I ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, pp. 17-18.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 62 and 65.
- *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 9*, entitled “Human rights”, p. 11.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 13.6*, entitled “Interviews”, pp. 7-21.
- *Handbook on Police Accountability, Oversight and Integrity*.

J. Financial investigations

Financial investigation involves the collection, collation and analysis of all information available to assist in the prosecution and to deprive smugglers of migrants of the proceeds of crime. The action may target an individual, an entity or criminal organizations involved in the crime. Smugglers of migrants commit their crimes for direct or indirect financial benefit; examining a suspect's finances is therefore vital to facilitating an investigation.⁸⁰

Money is involved at all levels of the criminal enterprise: the initial investment into infrastructure and personnel, the ongoing management of the proceeds of crime, the laundering and movement of the profits, and the use of said profits to pursue a desirable lifestyle (involving, for example, real estate, travel, luxury items or jewellery).

Regardless of whether evidence of financial gain is needed to establish an offence, an investigation of finances can lead to opportunities to seize assets and ultimately secure a conviction. Consequently, the investigation of financial transactions and the analysis of the results often provide important information that can be used to ensure that the operation progresses more efficiently. For example, an investigation of the purchase of travel tickets may reveal details of travel arrangements, and analysis of credit card expenditure can reveal airlines, hotels, restaurants or other venues regularly used by perpetrators. This information can be the basis for the allocation of surveillance resources and may be valuable evidence.

It is ideal to coordinate the arrest phase with seizure and freezing procedures in order to arrive at the optimal situation of synchronized arrest of offenders and seizure of their assets.



V.J INVESTIGATION POWERS AND PROCEDURES: FINANCIAL INVESTIGATIONS

International requirements

- Articles 7 and 29, paragraph 1, subparagraph (d), of the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime advocates the institution of adequate financial regulations, including enforcement measures, to deter and detect all forms of money-laundering.⁸ Article 7, paragraph 1, of the Convention requires each State to ensure that:

administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, [it] shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

⁸⁰Ibid., Module 4, pp. 1 and 3. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

Article 29, paragraph 1, subparagraph (d), further requires that States parties shall, to the extent necessary, initiate, develop or improve specific training programmes for law enforcement personnel on:

Detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes.

The *Toolkit to Combat Smuggling of Migrants* suggests that:

Where there is no trained financial investigator, unless legal opinions or the advice of senior officers indicates otherwise, investigators might approach senior banking staff for guidance about financial systems. That could help investigators to understand how money is moved and suggest opportunities for attacking an organized criminal group.^b

The *Basic Training Manual on Investigating and Prosecuting Smuggling of Migrants* advises that “law enforcers [...] should be aware of privacy considerations throughout their investigations; otherwise, the investigation or prosecution can be put at risk.”^c

The Financial Action Task Force (www.fatf-gafi.org), an intergovernmental body that develops and promotes national and international policies to combat money-laundering, the financing of terrorism and proliferation of weapons of mass destruction, has developed recommendations and guidance documents that can be considered to detail good practice in the field of financial investigations and actions to combat money-laundering.

^a Article 7 of the Organized Crime Convention.

^b *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 18.

^c *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 4, p. 4. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.



V.J ASSESSMENT QUESTIONS

Financial investigations

- Are investigators authorized, trained and equipped to conduct financial investigations?
 - Do they cooperate with financial investigation units?
 - Are they aware of privacy considerations?
 - Does the procedure include tracing, seizure and freezing of assets or their confiscation?
- Are investigators authorized to seize assets, freeze bank accounts and so forth?
 - If so, have these measures been used in connection with smuggling of migrants investigations?
 - If so, in which cases or circumstances have these measures been used?
- Have measures been implemented to ensure that authorities dedicated to combating money-laundering have the ability to cooperate and exchange information both at the national and international levels?

- What agencies, strategies and specific procedures are in place to combat money-laundering and intercept the proceeds of smuggling of migrants and transnational organized crime generally?
- If the country has a financial intelligence unit:
 - What are its resources?
 - How does it operate?
 - What are the suspicious financial transaction reporting requirements?
- Are there any special anti-money-laundering provisions in relation to the smuggling of migrants and organized crime generally?
- Are there measures to ensure parallel financial investigations are not disclosed or compromised?
 - Are these measures compliant with the Financial Action Task Force recommendations?



V.J. ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 36-78 and 137-162.
- *Toolkit to Combat Smuggling of Migrants*:
Section 7.7, entitled “Financial investigation”, p. 19.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 11, entitled “Financial investigations and prosecutions”.

K. Tracing, seizure, freezing and confiscation of assets

Effective action against the smuggling of migrants must include measures to deprive perpetrators of the proceeds of crime. The ability of law enforcement agencies to identify, investigate, trace and seize assets derived from these offences sends a message to criminals that these activities do not result in high profit. Tracing, in this context, involves following the money paid by smuggled migrants, for example, to the bank account where it was deposited or to the asset that was purchased with that money. Seizure involves taking physical possession of the targeted asset.

As a general rule, relevant officers should be authorized to exercise the power to trace and seize money and other assets whenever they have reason to suspect that smuggling of migrants takes place. Furthermore, it is important that seized items be stored securely to ensure that they are available as evidence in prosecutions and other proceedings.

Freezing and confiscation of assets, bank accounts and so forth are carried out on the basis of formal injunctions usually issued by a court or another authority. There are considerable differences between domestic laws as to which authorities—whether administrative or judicial—can order the

freezing and confiscation of assets, the respective powers of these authorities, and the procedures they must follow. In some countries, for instance, confiscation may be imposed by a judgement rendered by a court of law. Confiscation by court order may be either mandatory under the law or left to the discretion of the court itself. Elsewhere, confiscation can be ordered by administrative authorities. This order may be mandatory if certain conditions are met, or the authority may have discretion to order the confiscation.



V.K INVESTIGATION POWERS AND PROCEDURES: CONFISCATION OF ASSETS

International requirements

- Articles 12-14 and 29, paragraph 1, subparagraph (d), of the United Nations Convention against Transnational Organized Crime.

Proceeds of the smuggling of migrants and the property or instrumentalities used in their commission will almost always be located in two or more jurisdictions.^a As in many other areas of investigation into the smuggling of migrants, international assistance or cooperation may be required in order to trace money; and rather than confine their investigation to domestic boundaries, investigators should pursue all lines of enquiry. INTERPOL may be able to assist if other bilateral agreements (formal or informal) are not in place or are not effective. The United Nations Convention against Transnational Organized Crime can also be relied upon to facilitate cooperation in the absence of other agreements.^b

Article 12 of the United Nations Convention against Transnational Organized Crime addresses the issue of asset seizure and the confiscation of proceeds of crime. Article 13 of the Convention governs international cooperation with respect to confiscation and seizure. Article 14 addresses the final stage of the confiscation process: the disposal of confiscated proceeds of crime or property. While such disposal is to be carried out in accordance with domestic law, article 14, paragraph 2, requires States parties to give priority consideration to returning the confiscated proceeds of crime or property to the requesting State for use as compensation to crime victims or for restoration to the legitimate owners.

Article 29, paragraph 1, subparagraph (d), of the Convention requires States parties to initiate, develop or improve specific training programmes for its law enforcement personnel that deal with

Detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes.

^a *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 7, p. 12.

^b *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 4, p. 14. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.



V.K ASSESSMENT QUESTIONS

Tracing and seizure of assets

- What mechanisms exist to identify, trace and seize property and other assets, including bank, financial or commercial records, as well as equipment and other instrumentalities used in, or destined to be used in, the commission of crimes, including smuggling of migrants?
 - Who is authorized to use these measures?
 - Are these measures used in the investigation of smuggling of migrants? If so, how and when?
 - Are these measures compliant with the Financial Action Task Force recommendations?
- Are investigators trained in detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes?

Freezing and confiscation of assets

- What is the framework for the freezing and confiscation of criminal and non-criminal assets?
 - Are there special provisions in relation to the smuggling of migrants?
 - Are these frameworks adequate?
- Which agency (administrative or judicial) can order freezing and confiscation of assets?
- Are records of frozen or confiscated assets kept?
- What happens to frozen or confiscated assets?
 - Are they stored securely?
 - How are confiscated assets disposed of?
 - Can confiscated assets be used?



V.K ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 137-162.
- *Toolkit to Combat Smuggling of Migrants*:
Section 7.8, entitled “Seizure of assets and confiscation of proceeds of crime”, pp. 20-23.
- *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, pp. 16-17.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 65-66.
- *Model Law against the Smuggling of Migrants*, pp. 55-56.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Section 7.5, entitled “Confiscation of assets”, pp. 12-14;
Module 11, entitled “Financial investigations and prosecutions”, pp. 1-7.

L. Facilities and equipment

Powers and responsibilities assigned to law enforcement agencies often bear little relationship to their ability to implement them. Investigators of smuggling of migrants require certain basic facilities, and may also need special equipment to carry out their tasks. This may involve fundamental resources such as offices, accommodation, stationery, transportation, access to motor vehicles, handcuffs, telephones, or more sophisticated equipment such as computers, radios to communicate, equipment for forensic procedures,⁸¹ laboratories and firearms. It also requires sufficient funding to carry out day-to-day functions as well as specialized operations.⁸²

The availability and standards of facilities and equipment used by law enforcement agencies vary greatly between jurisdictions and between different agencies. International law and best practice guidelines do not set out any minimum standards, though the *Criminal Justice Assessment Toolkit* published by UNODC recognizes that: “Investigators need to have certain basic facilities with which to work, but these must be reviewed in the light of the local socioeconomic conditions.”⁸³

There are no requirements in the Smuggling of Migrants Protocol or the United Nations Convention against Transnational Organized Crime relating specifically to facilities and equipment.



V.I ASSESSMENT QUESTIONS

Facilities

- What are the physical facilities of relevant smuggling of migrants enforcement units?
 - Where are they accommodated?
 - Are the buildings structurally sound?
- Is there a steady and reliable source of electricity?
 - Is there a working backup generator?
- Is the office equipment (furniture, stationery, photocopiers and other equipment) adequate?
- Does the public have access to these offices?
- Is the supervisor or manager of the unit located in that facility or nearby?
 - If prosecutors lead the investigation, where are they located?
 - Do they have easy access to the investigators?

Equipment

- What information and communication technology and equipment are available: computers, software, Internet, phones, mobile phones, walkie-talkies, fax machines?
- Are front-line officers adequately funded, sufficiently equipped and trained in equipment use?

⁸¹Forensic services are discussed separately in section V.F.

⁸²*Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 9.

⁸³*Ibid.*

- Do investigators have access to personal protective equipment such as batons, handcuffs, tasers, firearms or other weapons?
 - Are they stored and issued in a secure manner?
- Do investigators have access to vehicles, vessels and other means of transport?
 - What types and how many of them are available?
 - Is there sufficient fuel available?
- Do investigators have access to specialized equipment such as X-ray machines for vehicles, detector dogs, equipment used to examine documents, carbon dioxide detectors or other equipment?
- Are there other non-operational demands placed upon these resources (shared vehicles)?
- What maintenance and replacement provisions are in place for this equipment?
- Who provides and supplies relevant equipment?



V.L ADDITIONAL GUIDELINES AND TOOLS

- UNODC, *Criminal Justice Assessment Toolkit*, sector on policing, Tool 3, entitled “Crime investigation”, p. 9.

VI. Border control, carrier liability, sea patrol

A. Border control

Land border crossings, seaports and airports play a crucial role in the smuggling of migrants. Many borders are porous; long coastlines and mountainous and remote borders are difficult to patrol and thus easily penetrated by the smugglers of migrants. At the same time, border crossings and ports can constitute important points for intervention by customs and other law enforcement officers.

The practical outcome of the requirement to strengthen basic border controls is to make it more difficult for smugglers to use conventional means of transport and travel routes to enter countries.⁸⁴ However, a possible negative side effect of strengthened border controls is the displacement of smuggling routes as smugglers change their methods and take greater risks, often at the expense of the lives and safety of smuggled migrants. For this reason, international cooperation is imperative to combat the smuggling of migrants effectively.

Law enforcement, along with customs and immigration officers posted at border control points, and sometimes the military, are tasked with enforcing a great number of national laws covering physical movements across the borders. On the one hand, they are faced with increasing volume and the complexities of international trade, increased security threats and organized crime, while on the other hand, they have to facilitate the cross-border movements of people. Accordingly, it is crucial that police forces, along with other border control and customs authorities, be adequately equipped and trained to detect and disrupt cross-border smuggling of migrants.

It has to be remembered that even well-trained and highly resourced police, border and customs authorities can ever physically inspect only a tiny fraction of the huge volume of shipments that cross international borders. It is therefore important that law enforcement, customs and border control agencies operate on a targeted risk-management basis by acting on information, intelligence or suspicions that suggest smuggling of migrants is occurring. This approach highlights the need for comprehensive data and intelligence systems and information exchange between agencies and with other countries, which is explored in sections IX.D and XIII.B of the present *Assessment Guide*.

⁸⁴*Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 36.



VI.A BORDER CONTROL, CARRIER LIABILITY, SEA PATROL: BORDER CONTROL

International requirements

→ Article 11, paragraphs 1 and 6, of the Smuggling of Migrants Protocol.

The Smuggling of Migrants Protocol contains only general statements relating to border control measures in article 11. Article 11, paragraph 1, stipulates that States parties should strengthen their border controls to detect smuggling of migrants without unduly hampering the free movement of people. Article 11, paragraph 6, further calls on States parties to consider strengthening communication and cooperation between border control agencies. The *Legislative Guides* note:

The strengthening of cooperation between agencies and establishment of direct channels of communication may require some legislation to establish that the agencies concerned have the authority to cooperate and to allow the sharing of information that may otherwise be protected by confidentiality laws.^a

Many of the issues raised by cooperation between border control agencies will be similar to those raised by cooperation between law enforcement agencies, and article 27 of the United Nations Convention against Transnational Organized Crime.^b These measures are further examined in section IX.D.

^a *Legislative Guides*, p. 388.

^b *Ibid.*, p. 312.



VI.A ASSESSMENT QUESTIONS

Border control: mandate and operation

- What agencies are in charge of and involved in controlling borders (immigration, customs, military or others)?
 - What is the mandate of each agency?
- What measures are in place to detect instances of smuggling of migrants at conventional and non-conventional points of entry and exit?

Border control: cooperation and coordination

- What measures are in place to foster cooperation among border control agencies—domestically and across borders—especially in relation to combating the smuggling of migrants?
 - Are there direct channels of communication?
- What measures are in place to detect instances of smuggling of migrants at authorized border crossing points as well as to detect illegal border crossings?
- To what extent is relevant intelligence relayed from the central authorities to the border-crossing points to detect smuggling of migrants?
 - What system is in place to report intelligence from the border crossing point to the central authority?
- Are officials at border-crossing points trained to detect document fraud?



VI.A ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 388.
- *Toolkit to Combat Smuggling of Migrants*:
Section 6.12, entitled “Border cooperation”, pp. 48-52;
Section 7.12, entitled “Border control measures”, pp. 35-38.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 34-35, 43-44, 49, 85-86, 97-98 and 114-115.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 8, entitled “Law enforcement cooperation and information sharing”.

B. Carrier sanctions

Closely connected to the issue of border control are those measures designed to curb the smuggling of migrants on board commercial vessels, including planes, ships, trains, buses and trucks. To prevent the arrival of undocumented migrants, including smuggled migrants, most countries set out regulations that make carriers liable for transporting non-citizens who do not possess valid documentation to enter their territory.



VI.B BORDER CONTROL, CARRIER LIABILITY, SEA PATROL: CARRIER SANCTIONS

International requirements

→ Article 11, paragraphs 2-5, of the Smuggling of Migrants Protocol.

The Smuggling of Migrants Protocol requires States parties to adopt legislative or other measures to prevent commercial carriers from being used by smugglers of migrants.^a Article 11, paragraphs 2-5, contains several requirements to ensure that persons travelling across international borders hold the necessary documents. While the exact nature of measures dealing with commercial carriers is left to the discretion of individual States, article 11, paragraph 3, advocates regulations that require commercial carriers to ensure that their passengers are in possession of the travel documents that may be needed to enter the destination country, such as passports and visas. There is, however, no obligation on carriers to assess the validity or authenticity of the documents.^b Article 11, paragraph 4, obliges States parties to provide for sanctions against carriers if they fail to comply with these requirements,^c although there should be no liability on carriers for transporting undocumented refugees.^d

The relevant travel or identity document is understood to include any document that can be used for international travel and any document commonly used to establish identity in a State under the laws of that State.

The requirements in article 11, paragraphs 1-5, reflect similar obligations in international aviation and maritime standards.^e For example, air carriers are required to ensure that their passengers are properly documented and meet the immigration requirements at the destination point. Standards supplementing the *Convention on International Civil Aviation*^f provide that undocumented or otherwise inadmissible passengers, including those travelling with fraudulent documents, are to be returned to the custody of the air carriers, which should return the persons at their expense to the point of departure or another place where the returnees are admissible. Carriers that are found transporting undocumented passengers can be fined if they neglect to verify the documentation of their passengers. Carriers cannot be fined, however, if their passengers possess fraudulent documents. The emphasis of these standards is on the possession of documents, not on their authenticity. Commercial airlines are not burdened with the obligation to apprehend false and altered travel and identity documentation. If, however, fraudulent documents are found, carriers are required to seize them and return them to the authorized agencies of the issuing country.

The *Model Law against the Smuggling of Migrants* provides a model offence in article 10, “Duty of and offence by commercial carriers”, and a definition of “commercial carrier” that is relevant to the implementation of these requirements.^g

^a *Toolkit to Combat Smuggling of Migrants*.

^b *Ibid.*; A/55/383/Add.1, para. 103.

^c *Legislative Guides*, pp. 373-374; see further *Model Law against the Smuggling of Migrants*, pp. 12-13 and 57-61.

^d A/55/383/Add.1, para. 103.

^e *Ibid.*

^f United Nations, *Treaty Series*, vol. 15, No. 102; see also Standards and Recommended Practices on Facilitation (annex 9 to the Convention on International Civil Aviation) (www.icao.int/Security/FAL/Pages/Annex9.aspx).

^g *Model Law against the Smuggling of Migrants*, pp. 12-13 and 57-61.



VI.B ASSESSMENT QUESTIONS

Carrier sanctions

- Are commercial carriers, including any transportation company or the owner or operator of any means of transport, obliged to ascertain that all passengers are in possession of valid travel documents on international journeys?
- How do relevant agencies assess compliance?
 - Are liaison officers posted at airports, seaports and other entry points?
- How do carriers assess compliance?
 - Do airlines and other carriers have designated compliance staff?
- What other measures have been implemented to prevent commercial carriers (airlines, shipping lines, trucking companies) from being used for the purpose of smuggling of migrants?
- Is a risk assessment technique applied to target high-risk routes, airlines, shipments and so forth?
- To what extent are sanctions applied in cases of non-compliance?



VI.B ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 373-374.
- *Toolkit to Combat Smuggling of Migrants*:
Section 7.14, entitled “Carrier sanctions”, pp. 43-44.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 98-99.
- *Model Law against the Smuggling of Migrants*, pp. 12-13 and 57-61.
- *Issue Paper: Migrant Smuggling by Air*, pp. 13-14.

C. Measures relating to smuggling of migrants by sea

The smuggling of migrants by sea is widely seen as a particularly dangerous type of smuggling as it leaves migrants vulnerable to poor weather conditions on the open sea. It also frequently involves vessels that are in poor condition, not seaworthy, and lack food, fresh water and proper sanitary facilities. In some instances, crew are not acquainted with the vessel or the sea conditions, or are insufficiently familiar with maritime navigation. Smuggling of migrants by sea also creates additional jurisdictional, legislative and enforcement challenges, especially in international waters.

The search and seizure of vessels suspected of use in the smuggling of migrants may create risks for the passengers, crew, cargo and the vessel itself, especially if measures against the vessel are taken on the open seas. For this reason, it is important that any enforcement action be conducted with due regard for the safety of persons and cargo on board.



VI.C BORDER CONTROL, CARRIER LIABILITY, SEA PATROL: MEASURES RELATING TO SMUGGLING OF MIGRANTS BY SEA

International requirements

- Articles 7 and 8 of the Smuggling of Migrants Protocol.
- Article 15 of the United Nations Convention against Transnational Organized Crime.

Cooperation

The Smuggling of Migrants Protocol contains several measures to address the jurisdictional and enforcement matters associated with the interdiction of smuggling of migrants in open waters. As a general principle, article 7 advocates 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.

While article 7 does not create any binding obligations for States parties, it emphasizes the importance of cooperation in international waters. Neither article 7 nor articles 8 or 9 permit any activity:

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

Article 7 also recognizes the role of international maritime law, which is left unaltered by the Smuggling of Migrants Protocol. While the Protocol does not refer to any specific international instruments, the *Interpretative Notes* make specific mention of the United Nations Convention on the Law of the Sea. The *Interpretative Notes* stress that countries that are States parties to the Smuggling of Migrants Protocol but not parties to the United Nations Convention on the Law of the Sea or another international instrument referred to in the Protocol do not become subject to any rights, obligation, or responsibility under that other instrument.^b

In order to implement the obligations stemming from articles 7-9 of the Smuggling of Migrants Protocol it is necessary to establish jurisdiction over the smuggling of migrants by sea. To that end, article 15 of the United Nations Convention against Transnational Organized Crime requires signatories to establish jurisdiction when offences have been committed on board a vessel flying their flag. The *Legislative Guides* further suggest that:

In addition and although not a requirement under the Convention or the Protocol, States parties may wish also to establish their jurisdiction over vessels on the high seas flying the flag of another State party as well as over those without nationality, as this will ensure the proper functioning of the measures provided for under part II of the Protocol.^c

Combating smuggling by sea

Article 8 of the Smuggling of Migrants Protocol contains specific enforcement measures in relation to the smuggling of migrants by sea. By and large, the article sets out basic obligations and procedures for bilateral cooperation in intercepting, boarding, searching, and, where necessary, detaining vessels suspected of engaging in the smuggling of migrants. Article 3 defines the term “vessel” as:

any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as 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.

Article 8, paragraph 1, concerns situations in which vessels used for the smuggling of migrants fraudulently fly foreign flags or show no flag. In these situations, the article enables signatories to seek assistance from other States parties and obliges the requested State to provide assistance as soon as practicable.

Article 8, paragraphs 2 to 5, sets out content and procedural guidelines for requests (by the State appearing to be the flag State) concerning two separate matters. The first concerns requests for confirmation of registry in that State (article 8, paragraph 2) to which the requested State must respond expeditiously (article 8, paragraph 4). The second matter concerns requests to the flag State for authorization to take action against vessels suspected of engaging in smuggling of migrants. Such action may include boarding and searching the vessel as well as other appropriate

measures (article 8, paragraph 2). If the measures are approved by the flag State and subsequently taken by the requesting State, the flag State concerned must be informed of the results of that measure, article 8, paragraph 3.^d

In its response to a request, the flag State may place limitations and conditions on the authorization to the requesting State. Should additional measures be necessary, the requesting State may require further authorization from the flag State unless these measures are necessary to relieve imminent danger to the lives of persons, pursuant to article 8, paragraph 5.

In this context, it needs to be noted, however, that the “suppression of a criminal activity should not lead law enforcement officers to overlook the duty established under maritime law and custom to rescue those in peril at sea.”^e

In order to facilitate and accelerate the processes set out in article 8, paragraphs 1-5, the Smuggling of Migrants Protocol encourages States parties to designate one (or more) authority to receive and respond to requests made, pursuant to article 8, paragraph 6. No requests and authorization are required if the vessel suspected of engaging in the smuggling of migrants is without nationality, pursuant to article 8, paragraph 7.

^a A/55/383/Add.1, para 98.

^b *Ibid.*, para 99.

^c *Legislative Guides*, p. 386.

^d *Issue Paper: Smuggling of Migrants by Sea*, p. 39.

^e *Legislative Guides*, p. 387.



VI.C ASSESSMENT QUESTIONS

Measures to combat smuggling of migrants by sea

- Which agencies are responsible for detecting vessels at sea?
 - Is there a designated agency with a mandate to detect and/or assist vessels involved in the smuggling of migrants?
 - What equipment, personnel and other resources are available to these agencies to detect the smuggling of migrants by sea?
- How are vessels in use for the smuggling of migrants generally apprehended or how does the smuggling of migrants by sea usually come to the attention of authorities?
 - What procedures and measures are used to board, search, secure and detain vessels suspected of smuggling of migrants?
 - What procedures are used to interview passengers and crew and collect evidence on board vessels?
 - Are law enforcement and sea patrol officials trained in these procedures?
- Are measures in place to cooperate with other States to prevent and suppress the smuggling of migrants by sea?
- Does the country have a designated authority to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures?
 - Has this authority been notified through the Secretary-General to all other States parties?



VI.C ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 386-388.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 2.8, entitled “Smuggling of migrants by sea”, pp. 34-36;
 - Section 6.11, entitled “Cooperation and assistance in relation to smuggling of migrants by sea”, pp. 46-47;
 - Section 7.21, entitled “Responding to smuggling of migrants by sea”, pp. 63-69.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 42-43, 50-51, 95-97 and 117-118.
- *Model Law against the Smuggling of Migrants*, pp. 83-96.
- *Issue Paper: Smuggling of Migrants by Sea*, pp. 38-40 and 55.

D. Safeguards in relation to vessels

The suppression of a criminal activity should not lead law enforcement officers to overlook the duty established under maritime law and custom to rescue those in peril at sea. Vessels used for smuggling may be confiscated if apprehended and, for that reason, smugglers often use dilapidated vessels. In some cases, when such vessels are encountered at sea, they are overloaded with migrants and in imminent danger of sinking. The poor condition of vessels often used by smugglers and the fact that boarding may take place at sea and far from safe harbour conditions raise concerns about the basic safety and security of migrants and others on board such vessels. The stopping and boarding of vessels also involve the sovereignty of States to which such vessels are flagged or registered, and raise issues about the commercial losses to shipowners that might result.

It should also be noted that the International Maritime Organization and the Office of the United Nations High Commissioner for Refugees have expressed concern that unnecessary searches or detention of vessels may deter masters of vessels from meeting fundamental humanitarian requirements, including the rescue of migrants from small vessels found in distress at sea. In establishing and implementing powers to stop and search vessels and to detain vessels or crew members who may be witnesses (but not criminal suspects), legislators should bear in mind that such procedures should be carefully considered and used with as much restraint as possible.⁸⁵

⁸⁵ *Legislative Guides*, p. 367.



VI.D BORDER CONTROL, CARRIER LIABILITY, SEA PATROL: SAFEGUARDS IN RELATION TO VESSELS

International requirements

→ Article 9 of the Smuggling of Migrants Protocol.

Article 9, paragraph 1, of the Smuggling of Migrants Protocol qualifies the measures set out in article 8, discussed in section VI.C above, by ensuring that any measures taken against a vessel suspected of smuggling migrants are carried out with due regard for the safety of persons, their humane treatment and the need not to endanger cargo, not to prejudice legal or commercial interests and not to endanger the environment. The principles set out in article 9, paragraph 1, are mandatory.^a

If the action taken against the vessel is unfounded, States parties are obliged to pay compensation for any loss or damage, which may include, for instance, damage to the vessel itself, loss of charter hire income, loss of cargo and compensation for the detention of and injury to the crew. Article 9, paragraph 2, of the Protocol reflects similar obligations to those under article 110, paragraph 3, of the United Nations Convention on the Law of the Sea.

Article 9, paragraph 3, of the Smuggling of Migrants Protocol seeks to ensure that any enforcement action does not affect the exercise of jurisdiction under international maritime law. It should be noted that article 98, paragraph 1, of the Convention on the Law of the Sea sets out the long-standing obligation of a State to require the master of a ship flying its flag to render assistance to persons and ships in distress at sea. The duty to render assistance is not just applicable in the high seas, but also extends to maritime zones (see articles 18, paragraph 2, 39, paragraph 1, subparagraph (c), 45, 52, 54 and 58, paragraph 2, of the United Nations Convention on the Law of the Sea).^b

Article 9, paragraph 4, of the Protocol reflects similar obligations to those under articles 107 and 111, paragraph 5, of the United Nations Convention on the Law of the Sea, to the effect that measures against vessels suspected of engaging in the smuggling of migrants should be taken only by clearly marked and identifiable craft.^c

^a *Issue Paper: Smuggling of Migrants by Sea*, pp. 40-42.

^b *Toolkit to Combat Smuggling of Migrants*, Tool 8, entitled “Protection and assistance measures”, p. 13.

^c See further *Legislative Guides*, p. 388.



VI.D ASSESSMENT QUESTIONS

Safeguards in relation to vessels

- What measures are in place to protect the safety of persons on vessels that are boarded and searched?
- Are there procedures to ensure that the security of vessels and their cargo are not compromised when boarded and searched?

- What safeguards are in place to ensure that the commercial and legal interests of vessels from another State are not prejudiced?
- Are all measures taken with regard to boarding or rescuing of vessels environmentally sound?
- Is compensation available where vessel owners suffer loss or damage as a result of unfounded investigations into potential incidents of smuggling of migrants?
- Are laws and procedures relating to the boarding and search of vessels compliant with the international law of the sea?
- Are search and rescue and border patrol vessels clearly marked and identifiable as being on government service and authorized to that effect?



VI.D ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 362-367.
- *Toolkit to Combat Smuggling of Migrants*:
Section 8.4, entitled “Rescue at sea”, pp. 12-19.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 35-37 and 87-89.
- *Model Law against the Smuggling of Migrants*, pp. 91-98.
- *Issue Paper: Smuggling of Migrants by Sea*, pp. 40-42 and 56-57.

VII. Prosecution

Public prosecutors play a unique role in criminal cases in that they appear on behalf of the Government as the representative of the people rather than an individual victim. A prosecutor has the broad obligation to uphold the rule of law, with an attendant ethical and professional duty to ensure that a person accused of a crime receives a fair trial. Where prosecutors fail to fulfil these obligations, miscarriages of justice ranging from malicious prosecutions to wrongful convictions may result, damaging the integrity of the justice system and violating the public's trust.⁸⁶ Inadequate or non-existent prosecution of smuggling of migrants also sends the message that this type of crime is less serious than other crimes. Therefore, the competent authority in charge of prosecution should continuously be aware of the complexities related to the smuggling of migrants. In addition, prosecutors play an important role in ensuring that smuggled migrants are not further traumatized by the criminal court proceedings.

The design and delivery of prosecution services differ greatly between countries and are frequently influenced by common law, civil law or hybrid traditions. Due to the diversity of prosecution structures and approaches, it is difficult to address all potential issues in the tools set out in the following sections. Moreover, many issues do not specifically relate to the prosecution of the smuggling of migrants, and are better assessed across all types of criminal activity. The *Criminal Justice Toolkit* published by UNODC contains a specific section on the prosecution service that can be used to assess all elements of a prosecution authority comprehensively.⁸⁷ Furthermore, the International Association of Prosecutors has issued "Standards of professional responsibility and statement of the essential duties and rights of prosecutors"⁸⁸ that should be integrated into any comprehensive assessment of prosecution services.

The following sections focus exclusively on the assessment of the principal features of prosecutions of smuggling of migrants offences.

A. Organization of the prosecution service

Once the legal framework for the prosecution of criminal offences—including smuggling of migrants—has been identified, it is necessary to examine the organization and delegation of authority for prosecutions and associated investigative functions. While some countries have specialized smuggling of migrants prosecution units, very few systems have prosecutors who focus solely on these offences. Moreover, it is rare for countries to spell out specific procedures applicable exclusively to the prosecution of smuggling of migrants. In their absence, the general procedures for the prosecution of criminal offences apply.⁸⁹

⁸⁶ *Criminal Justice Assessment Toolkit*, sector on access to justice, Tool 3, entitled "The prosecution service", p. 1.

⁸⁷ *Ibid.*

⁸⁸ International Association of Prosecutors, "Standards of professional responsibility and statement of the essential duties and rights of prosecutors" (23 April 1999). Available from www.iap-association.org/ressources/Standards_English.pdf.

⁸⁹ *Criminal Justice Assessment Toolkit*, sector on access to justice, Tool 3, entitled "The prosecution service", p. 5.



VII.A ASSESSMENT QUESTIONS

Organization of the prosecution service

- What is the role of the prosecutor in relation to smuggling of migrants offences?
 - What is the prosecutor's role at trial, at sentencing and on appeal?
- How is the prosecution service organized?
 - Does the prosecution service have specialized staff or units for prosecuting smuggling of migrants and/or organized crime?
- Under the law and procedures of this criminal justice system, how does a criminal case involving smuggling of migrants proceed from the allegation or suspicion of an offence to advice to investigators to formal charging to adjudication and disposition?
- What working relationship exists between immigration, law enforcement units, other agencies involved in detecting and investigating smuggling of migrants and the prosecution service?
 - How do these agencies communicate; how do they exchange information?



VII.A ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*, sector on access to justice, Tool 3, entitled "The prosecution service", pp. 13-18.

B. Operation of the prosecution service

In many countries, the prosecution service is too significantly understaffed and ill-resourced to function properly. This can result in long delays and, in some instances, can cause cases to fall apart if witnesses die, evidence disappears or for other reasons. Also, prosecutors are often pressured to prioritize other serious offences over the prosecution of smuggling of migrants offences. Accordingly, an integral part of assessing the effectiveness of a prosecution service is to obtain some information, including statistics, about the basic operation of the prosecution authority and the workload of prosecutors.

In evaluating statistical information, it will be important to obtain an understanding of what is meant by a "criminal case" or "filing" and whether such filings reflect individual charges for a single criminal act or the aggregate of charges filed against an individual or a group charged with one or more criminal acts. Similarly, it is important to understand what is meant by the various descriptors of case events, resolutions or outcomes, as this may vary even among the various institutions and agencies that produce statistical reports within a single criminal justice system.⁹⁰

⁹⁰Tbid., pp. 3-4.

Case management capacity and specialization of prosecutors

Complex cases, particularly transnational ones, require management methods, processes and skills that do not always exist within prosecution services. This obviously includes a capacity to effectively coordinate multi-jurisdictional cases among jurisdictions. Case management practices among prosecutors are evolving rapidly as they benefit from various technological advancements that facilitate safe information storage, management and analysis, as well as communication, resource management and inter-agency collaboration. Increasingly, prosecutors and prosecution services are held publicly accountable for their performance and for the resources placed at their disposal. Modern management methods are therefore at the heart of successful prosecution practices and services. Case management support and offering training in the necessary management skills are now part of the activities of modern prosecution services. Individual prosecutors can be encouraged to specialize in the conduct of major smuggling cases and develop the skills required to succeed in prosecuting increasingly complex cases.

Evidence and management and disclosure

The amount of evidentiary material to be managed and protected in complex smuggling cases can be overwhelming. Technological advances and dedicated databases with search facilities can support that process. The safe storage of that evidence can also be an issue. In common-law countries, the management of the disclosure process is an important part of the overall case management process. In complex cases, with numerous witnesses and large quantities of evidentiary material—which may include evidence obtained from foreign jurisdictions—the disclosure process can become very complicated. That process, when poorly managed, can be a source of delays and complications that may threaten the overall success of a prosecution. In some jurisdictions, prosecutorial services have delegated prosecutors to work directly with the police to form a disclosure unit and thus help tightly manage that process.

Another effective measure consists of developing disclosure protocols intended to improve the timeliness and completeness of disclosure. In some cases, the codification and/or the review of criminal procedure as it relates to disclosure rules are necessary. In such instances, the review must take into consideration the impact of disclosure rules on international cooperation and the work of joint investigative bodies in which local law enforcement and prosecution officials may be called upon to participate.

Plea bargaining

In several countries, there is a well-established practice of plea bargaining. “Plea bargaining” is a term that can describe a broad range of behaviours, from simple discussions to concrete agreements, that may occur among actors in the criminal justice system, including the police, prosecutors, defence counsel and the accused, and the judge. Plea bargaining has been described as the practice whereby the accused’s plea of guilty has been bargained for and some consideration has been received for it, usually related to the charge or the sentence. The accused foregoes his right to plead not guilty and demand a full trial and instead uses a right to bargain for a benefit. Plea bargaining can obviously increase the efficiency of the prosecution process and court proceedings, but it is also a controversial issue in many jurisdictions. The range of practices that plea bargaining can cover include:

- Charge bargaining, which refers to discussions about the charges and could include reducing a charge to a lesser or included offence; withdrawal or stay of other charges or the promise not to proceed with other possible charges; or the promise not to charge friends or family of the accused.
- Sentence bargaining, which refers to discussions with respect to the sentence and could include the promise: to proceed by way of a summary conviction instead of by indictment; to make a specific sentence recommendation; not to oppose defence counsel's sentencing recommendation; to submit a joint sentencing submission; or not to seek additional optional sanctions or seek more severe punishment.
- Fact bargaining, where discussions involve what agreed facts will be submitted to the court at the sentencing hearing. For example, the prosecutor might promise not to mention circumstances that could be seen as an aggravating factor by the judge.

In most cases, these discussions occur primarily between the prosecutor and the accused and his or her defence counsel and the judge generally does not take part in this process. In addition, the prosecutor may involve the investigating police officer but this is not always the case. However, the judge and the courts do play an important role in the process as the plea bargaining agreements are verified in court, which serves to ensure the propriety of the discussions and to enhance the public's understanding of the matter.

The reality in many jurisdictions is that despite the controversial nature of plea bargaining, it is seen as a necessity to ensure an efficient criminal justice system. In many jurisdictions, the majority of criminal convictions are secured through guilty pleas. The benefit to the accused might be avoiding a lengthy trial and gaining sentence concessions. To respond to existing concerns, a number of safeguards can be put in place to ensure a just, fair and efficient practice of plea bargaining. Ensuring competent, ethical and informed defence counsel is important. In order to ensure that defence counsel is informed, there must be complete and timely disclosure of the prosecution's case. The prosecution, defence and the court should have comprehensive knowledge of principles of sentencing and the appropriate range of sentences. In order to ensure consistency and transparency, the prosecutor should maintain complete and accurate records of plea discussions. The prosecutor should also solicit views of victims and the police and ensure they understand the agreement. The agreement should be discussed in open court where the judges are independent and impartial.



VII.B PROSECUTION: OPERATION OF THE PROSECUTION SERVICE

International requirements

- Article 11, paragraph 2, of the United Nations Convention against Transnational Organized Crime.

Article 11, paragraph 2, of the United Nations Convention against Transnational Organized Crime requires each State party to endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by the Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences. This provision highlights the importance of assessing the operation of the prosecution service in order to determine whether smuggling of migrants cases are being effectively pursued and prosecuted to the greatest extent possible.



VII.B ASSESSMENT QUESTIONS

Operation of the prosecution service

- At what stage of the investigation are prosecutors involved? What is the role of the prosecutor in relation to the investigation?
- In jurisdictions where the police file the original charging documents, how many criminal cases involving smuggling of migrants are received by the prosecution service annually?
 - In jurisdictions where the prosecutor is responsible for the filing of charges in court, how many such cases are filed annually?
- How many criminal cases involving smuggling of migrants are dealt with annually by the prosecution service?
 - Are they resolved via trial? If not, how?
 - What is the estimated proportion of large and complex cases?
- How many cases result in a conviction on at least one of the charges?
 - How many cases are withdrawn, stayed or dismissed?
- Are cases involving smuggling of migrants and/or organized crime assigned to particular prosecutors?
 - If so, what is their average annual caseload?
 - How many pending cases are the prosecutors handling at any one time?
- Is there a backlog of cases involving smuggling of migrants?
 - Is it possible to determine how long a smuggling of migrants case assigned to a prosecutor has been pending without examination?
- Are there budgetary constraints that limit the number of smuggling of migrants cases that can be prosecuted?
- Given limited capacity, what strategies are in place to decide whether or not to prosecute smuggling of migrants cases?
- What measures are in place to prevent corruption in the prosecution service?



VII.B ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit, sector on access to justice*, Tool 3, entitled “The prosecution service”, pp. 3-4.

C. Training of prosecutors

As with those involved in investigating smuggling of migrants, it is crucial that prosecutors be adequately qualified and trained. This requires an in-depth understanding of relevant legal frameworks, case law and the function and operation of every aspect of the criminal justice system, as

well as the technical elements of laws relating to smuggling of migrants. If offences are prosecuted by persons not sufficiently familiar with the relevant background, techniques, processes and legal requirements, then it is possible that the integrity of prosecutions may be compromised, with potential implications for trials and convictions.⁹¹

An assessment of prosecution capacities should therefore involve a comprehensive review of training programmes, their delivery and contents, and of the types and depth of training available to prosecutors. Furthermore, even where comprehensive training programmes exist, it is important that syllabi and curricula be reviewed regularly to ensure they remain up to date and keep pace with legislative and jurisprudential developments and with the ever-changing nature of smuggling of migrants.



VII.C PROSECUTION: TRAINING OF PROSECUTORS

International requirements

→ Article 29, paragraph 1, of the United Nations Convention against Transnational Organized Crime.

Article 29, paragraph 1, of the United Nations Convention against Transnational Organized Crime, which applies to the offences established under the Smuggling of Migrants Protocol, broadly requires each State party to develop or improve training programmes for its prosecutors (and other law enforcement personnel). The article sets out a range of matters that should form the focus of such programmes. Not all of these matters are relevant to the smuggling of migrants or the training of prosecutors who deal with the crime. It is important, however, that training programmes cover issues related to the collection of evidence and methods used in the protection of victims and witnesses.



VII.C ASSESSMENT QUESTIONS

Training of prosecutors: availability

- Where specialized units charged with prosecuting smuggling of migrants offences exist: How are people selected for these units?
- What foundation training is given to persons joining the prosecution service? Is specialized training on the smuggling of migrants offered to new staff members and/or to existing staff?
- How often do prosecutors receive refresher training?
 - What ongoing and specialized training courses are available? How are training needs assessed?
 - How is the training delivered?
- Are mechanisms in place to provide prosecutors who come across cases of smuggling of migrants only occasionally with access to relevant expertise?

⁹¹Ibid., pp. 20-21.

Training of prosecutors: content and participation

- Where a training programme is offered, what are the contents of the training programme?
 - Does it cover issues related to the collection of evidence in smuggling of migrants cases and is there guidance on the appropriate protection of victims and witnesses in such cases?
 - Does it cover international cooperation issues such as mutual legal assistance and extradition?
- Does the training involve participants from multiple agencies (domestic and foreign) such as the police, judiciary and relevant government departments?
 - Is there any involvement of international or regional organizations, non-governmental organizations, and/or academic institutions with expertise in the smuggling of migrants?
- Do prosecutors have access to relevant legislation, including criminal laws, and laws on the smuggling of migrants?



VII.C ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*, sector on access to justice, Tool 3, entitled “The prosecution service”, pp. 20-21.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*: Section 14.3, entitled “Prosecutorial procedures”, pp. 2-6.

VIII. Judiciary

A functioning court system is an integral part of any criminal justice system and is an important element in efforts to effectively prevent and suppress the smuggling of migrants. Even if the capacity to detect and investigate the smuggling of migrants is high, the potential deterrent effects of prosecutions are close to non-existent so long as the judicial system is weak and prone to corruption and delays. Accordingly, the management of the courts must be efficient and effective so that the criminal caseload can be adjudicated fairly, appropriately and promptly.

An assessment of the judiciary will usually involve a much broader approach that is beyond the scope of the present *Assessment Guide*. To that end, the UNODC *Criminal Justice Toolkit* provides the relevant assessment tools in two special sections entitled “The courts”⁹² and “The independence, impartiality, and integrity of the judiciary”.⁹³

The following sections provide some general tools to provide a basic assessment of the organization of the judiciary, the availability of specific training for the judiciary and matters pertaining to the appropriate sentencing of smugglers of migrants.

A. Organization of the judiciary

Criminal court system

Insofar as the criminal justice system is concerned, the principal focus of the assessment will be on the structure and operation of the criminal court system. This involves identifying and assessing the various levels of the court system charged with hearing primary cases, appeals and judicial reviews involving smuggling of migrants offences.⁹⁴

Independence of the judiciary

In some countries, the lack of separation of the judiciary function of the State from executive and legislative branches is a common problem, leading to widespread interference in the affairs of the judiciary and corruption at all levels.

While the relationship between law enforcement units involved in investigating the smuggling of migrants and a country’s judiciary should be maintained at an appropriate distance, it is very important that relevant units raise awareness among the judiciary about the smuggling of migrants and promote their participation in appropriate sentencing and deterrent responses. The unit should

⁹²*Criminal Justice Assessment Toolkit*, sector on access to justice, Tool 1, entitled “The courts”.

⁹³*Ibid.*, Tool 2, entitled “The independence, impartiality and integrity of the judiciary”.

⁹⁴*Ibid.*, Tool 1, entitled “The courts”, pp. 5-6.

also seek information and feedback from the judiciary on relevant decisions and issues that have arisen in criminal cases and any problems with evidence or the manner in which investigations have been conducted.



VIII.A ASSESSMENT QUESTIONS

Organization of the judiciary

- What is the overall structure of the judicial system?
- Before which courts are cases involving the smuggling of migrants first heard? Which courts hear appeals?
 - Who determines in which court a case involving the smuggling of migrants is first heard?
 - Are there, at any level, courts, judges and other judicial officers who focus solely on smuggling of migrants offences?
- Does the law make provisions for a jury system in criminal cases?
 - Can charges involving smuggling of migrants offences be heard by a jury?
 - How does the system work in practice?
- Are smuggling of migrants offences indictable offences (tried by a jury) or summary (simple) offences tried by a single judge?
- What interaction and communication, if any, occurs between law enforcement units involved in investigating smuggling of migrants cases and the judiciary?

Independence of the judiciary

- To what extent does the judiciary enjoy full independence in compliance with international standards?
- What measures are in place to prevent corruption in the judicial system?



VIII.A ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*, sector on access to justice, Tool 1, entitled “The courts”, pp. 5-6; Tool 2, entitled “The independence, impartiality and integrity of the judiciary”, pp. 5-8.

B. Training of the judiciary

As with those involved in investigating and prosecuting the smuggling of migrants, it is crucial that judges and their staff be adequately trained. If cases are heard by judges not sufficiently familiar with the relevant background, techniques, processes and legal requirements, then it is possible that the integrity of the trial may be compromised.

Many countries have judicial training centres, and the location of these institutions is considered an important issue in relation to the independence of the judiciary. Some judges are understandably resistant to being trained by a government-run institution and would prefer to have the training schools run by the judiciary, with the curriculum to be developed and the training to be delivered by the judges themselves, sometimes in partnership with academic institutions.⁹⁵



VIII.B JUDICIARY: TRAINING OF THE JUDICIARY

International requirements

- Article 29, paragraph 1, of the United Nations Convention against Transnational Organized Crime.

Article 29, paragraph 1, of the United Nations Convention against Transnational Organized Crime, which applies to the offences established under the Smuggling of Migrants Protocol, broadly requires States parties to develop or improve training programmes for law enforcement personnel, including investigating magistrates. The article sets out a range of matters that should form the focus of such programmes. Not all of these matters are relevant to the smuggling of migrants or the training of the judiciary who deal with the crime. It is important, however, that training programmes cover issues related to the collection of evidence and methods used in the protection of victims and witnesses.



VIII.B ASSESSMENT QUESTIONS

Training of the judiciary: availability

- What foundation training is given to new judges and to other employees?
 - Are they trained on substantive matters?
 - Is specialized training on the smuggling of migrants offered to new staff members and/or to existing staff?
 - What general and specialized training is given to judges involved in smuggling of migrants and organized crime cases?
- How often do judges and other court personnel receive refresher training?
 - What ongoing and specialized training courses are available?
 - How are training needs assessed?
 - How is the training delivered?
- Are there mechanisms in place to provide judges who come across cases of smuggling of migrants only occasionally with access to relevant expertise?

⁹⁵Ibid., Tool 2, entitled: “The independence, impartiality and integrity of the judiciary”, p. 12.

Training of the judiciary: contents and participation

- Where a training programme is offered: what are the contents of the training programme?
 - Does it cover issues related to the collection of evidence in smuggling of migrants cases and is there guidance on the appropriate protection of victims and witnesses in such cases?
 - Does it cover international cooperation issues such as mutual legal assistance and extradition?
- Is joint training of judges and other criminal justice practitioners and officials (domestic and foreign) such as the police, prosecutors and relevant government departments possible?
- Are international or regional organizations, non-governmental organizations and/or academic institutions with expertise in the smuggling of migrants involved in this training?
- Do judges and their staff have access to relevant legislation and jurisprudence, including criminal laws, smuggling of migrants offences and case law?



VIII.C ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*, sector on access to justice, Tool 2, entitled “The independence, impartiality and integrity of the judiciary”, p. 12; Tool 1, entitled “The courts”, pp. 8-9.

C. Sentencing

The sentencing phase is an important part of the criminal justice response to the smuggling of migrants. In some systems the sentence may be prescribed, while in others there is judicial discretion in the imposition of the sentence. In the latter situation, investigators and prosecutors are usually permitted to provide the court with evidence for the judiciary to consider in determining the appropriate sentence. The judge, depending on the jurisdiction, will rely on the evidence presented at the hearing to determine the appropriate sentence and reasons for the decision. In some jurisdictions the sentencing result will be based on applicable legislation, legislative history, doctrine and jurisprudence.

In some jurisdictions there are panels of investigators, experts, prosecutors, representatives of political parties and judges who discuss specific legislation, such as that pertaining to smuggling of migrants, in order to create a report. Such reports can assist judges who have had no exposure to certain types of cases and have persuasive authority in court. The judge may review the report prior to the sentencing hearing in order to become more familiar with the most recent views and guidelines on sentencing.⁹⁶

⁹⁶*In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 15, pp. 11-12. Available upon request from www.unodc.org/unodc/en/human-trafficking/request-for-restricted-materials.html.

Regardless of the differences in national practices and policy objectives in different legal traditions, the penalty imposed should accurately reflect the gravity of the offences committed and the impact that such crimes have had on the migrants, victims, families, communities in countries of origin, transit and destination and society as a whole. The culpability or blameworthiness of the offender is generally reflected in his or her mental state at the time the offence was committed. Generally, higher penalties are reserved for those acting intentionally, knowingly or recklessly, while lower penalties (or no punishment) are appropriate for offenders acting negligently.

The severity of the sentence will further be determined by evidence of mitigating or aggravating circumstances presented to the judge or judges. For example, the commission of an offence for financial gain or on behalf of a criminal organization are common circumstances that may aggravate a sentence. Evidenced humanitarian motives on the part of the smuggler of migrants might be considered a mitigating circumstance. Recurrent offenders may also face higher penalties. As further outlined in section I.D of the present *Assessment Guide*, article 6, paragraph 3, of the Smuggling of Migrants Protocol obliges States parties to establish circumstances “that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or that entail inhuman or degrading treatment, including for exploitation, of such migrants” as circumstances aggravating the offences established by the Protocol. This can be achieved by creating aggravated smuggling of migrants offences or by inserting provisions that require courts to consider more severe penalties where there has been an aggravating circumstance.⁹⁷



VIII.C JUDICIARY: SENTENCING

International requirements

- Article 6, paragraph 3, of the Smuggling of Migrants Protocol.
- Article 11, paragraphs 1, 2 and 4, of the United Nations Convention against Transnational Organized Crime.

Article 11, paragraph 1, of the United Nations Convention against Transnational Organized Crime, which applies to the offences established under the Smuggling of Migrants Protocol, obliges States parties to make such offences liable to sanctions that take into account the gravity of those offences. Article 11, paragraph 2, requires each State party to endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of the smuggling of migrants are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences. Article 11, paragraph 4, further obliges each State party to ensure that “its courts or other competent authorities bear in mind the grave nature of the offences covered by [the] Convention when considering the eventuality of early release or parole of persons convicted of such offences.”

⁹⁷Legislative Guides, p. 346.



VIII.C ASSESSMENT QUESTIONS

Sentencing

- What sentences does the current law provide for smuggling of migrants offences?
 - What are the maximum terms of imprisonment and maximum fines for relevant offences?
- Are there minimum penalties for smuggling of migrants offences?
 - Do they appear to be proportional and reflective of the gravity of the offence?
- Does a penalties and sentencing actor similar legislation exist?
 - Are there additional sentencing guidelines?
- Is it possible to impose higher penalties on repeat offenders?
- What aggravating circumstances influence the sentence (such as endangering the lives and safety of smuggled migrants)?
- What mitigating circumstances influence the sentence?
- Are there formal or informal sentencing guidelines and policy? How do they apply to offences related to smuggling of migrants offences?
- Is there any available data on sentencing patterns in cases involving smuggling of migrants offences?



VIII.D ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*, sector on custodial and non-custodial measures, Tool 3, entitled “Alternatives to incarceration”, pp. 9-11.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 67-69.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 15*, entitled “Sentencing”.

IX. International cooperation

While law enforcement is generally confined to one country, the smuggling of migrants is not. The globalization of trade and travel and, more specifically, the emergence and expansion of transnational crime create new challenges for law enforcement systems. Criminal offenders are mobile and often seek to evade detection, arrest and punishment by operating across international borders. They avoid being caught by taking advantage of those borders and of the frequent reluctance of law enforcement authorities to engage in complicated and expensive transnational investigations and prosecutions. The weak capacity of any one country to address some of these threats effectively translates into an overall weakness in the international regime of criminal justice cooperation. For countries with a relatively weak criminal justice capacity, these challenges can sometimes appear insurmountable.⁹⁸ Accordingly, many instances of smuggling of migrants remain undetected and many offenders on the loose.

This is why comprehensive, multi-agency and flexible cross-border cooperation is essential to ensure the appropriate investigation and prosecution of the smuggling of migrants. International cooperation is the agreement between States (and/or their authorities) to work together towards a common end. International cooperation in criminal justice occurs when States share information, resources, investigators and prosecutors to achieve the common goal of combating criminal activities, including the smuggling of migrants.⁹⁹

The basis of international criminal justice cooperation may be formal or informal. Formal cooperation in addressing the smuggling of migrants can be based on treaties, such as the United Nations Convention against Transnational Organized Crime or other international, regional or bilateral treaties. Informal cooperation generally involves direct officer-to-officer or agency-to-agency contact across borders. It generally is not dealt with by legislation but may sometimes be based on a memorandum of understanding between the cooperating States or their agencies.¹⁰⁰

Both formal and informal cooperation have their advantages and challenges, many of which are highlighted throughout the present chapter of the *Assessment Guide*.¹⁰¹ International cooperation should, however, be seen as an opportunity rather than an obstacle. If implemented and executed properly, it enables countries to seek legal assistance, extradition, transfer of prisoners, transfer of proceedings in criminal matters and cooperation for the purposes of confiscation of criminal proceeds and asset recovery.¹⁰² It opens avenues to obtain additional evidence, access information, recover assets, freeze funds, confiscate property, and arrest and return fugitives who would otherwise be immune to prosecution.

⁹⁸*Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, p. 1.

⁹⁹*In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 7, p. 1; *International Framework for Action to Implement the Smuggling of Migrants Protocol*, p. 11.

¹⁰⁰*International Framework for Action to Implement the Smuggling of Migrants Protocol*, p. 48.

¹⁰¹See further *Toolkit to Combat Smuggling of Migrants*, Tool 6, entitled “International criminal justice cooperation”, pp. 8-13.

¹⁰²*Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, p. 1.

The following sections examine a range of ways in which effective international cooperation can be achieved. The first section examines how agreements in relation to international cooperation are incorporated into domestic frameworks and procedures. The subsequent sections relate to various mechanisms of effective international cooperation: extradition, mutual legal assistance, law enforcement cooperation, transfer of proceedings and sentenced persons and the provision of technical assistance and aid. The final section provides a basis for the assessment of procedures and legislation relating to the return of smuggled migrants to other countries. Additional measures pertaining to international cooperation to combat the smuggling of migrants by sea are set out in section VI.C of the present *Assessment Guide*.

A. Domestic frameworks and procedures for international cooperation

International cooperation may be conducted on the basis of multilateral or bilateral agreements, or on the basis of specific provisions relating to international cooperation that are contained in international treaties such as the United Nations Convention against Transnational Organized Crime. The Convention can thus serve as a basis for international cooperation if there is no other agreement between the States involved or, if there is an agreement, the Convention can complement it. In some instances, international cooperation may also be granted on the basis of reciprocity and governed solely by domestic legislation.

International cooperation requires domestic frameworks that provide a legal basis and articulate the ways in which assistance from another country may be sought. Most jurisdictions have domestic laws that identify the requirements and mechanisms for mutual legal assistance in criminal matters, extradition, transfer of prisoners and the like.¹⁰³ Bilateral treaties may be in place to make requests to or take requests from particular countries. The United Nations Convention against Transnational Organized Crime and its Protocols may also serve as platforms to seek assistance in matters involving the smuggling of migrants and other forms of organized crime, especially between countries that have no other specific bilateral agreements.¹⁰⁴

The absence of domestic frameworks for cooperation may encourage some offenders to relocate themselves, their activities and/or their assets to specific countries. This may protect them from prosecution and shelter their assets from confiscation. An assessment of law enforcement measures pertaining to smuggling of migrants should therefore not only involve an inquiry into existing cooperation arrangements, but also identify those jurisdictions between which no avenues for formal cooperation exist.

Effective and efficient international cooperation also requires a consistent and clear operational and administrative system to issue and receive requests for cooperation to and from foreign jurisdictions.¹⁰⁵ In most countries, departments of justice and attorney general act as the central authority to manage criminal justice cooperation with other countries.

Below the central level of government, individual agencies should have mechanisms to prepare and manage cases involving international cooperation. Larger agencies may have designated staff

¹⁰³Ibid., sector on policing, Tool 3, entitled “Crime investigation”, p. 7.

¹⁰⁴See further section I.3.

¹⁰⁵*Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, p. 3.

to prepare international requests before transferring them to the central authority. For these mechanisms to function properly, investigators and other front-line staff need to be aware of the possibilities and opportunities involved in international cooperation.¹⁰⁶

In the absence of a treaty or agreement, letters rogatory (sometimes called commissions rogatoire or rogatory letters) are the customary method of obtaining assistance from abroad. Letters rogatory are requests from courts in one country to the judiciary of a foreign country requesting the performance of an act. Letters rogatory may be used in countries where multilateral or bilateral treaties on assistance are not in force to effect service of process or to obtain evidence if permitted by the laws of the foreign country.¹⁰⁷ As mentioned previously, in some instances, international cooperation may also be granted on the mere basis of reciprocity or central authorities may request international cooperation from another State in the absence of a treaty.



IX.A INTERNATIONAL COOPERATION: DOMESTIC FRAMEWORKS AND PROCEDURES

International requirements

- Article 17 of the Smuggling of Migrants Protocol.
- Articles 13, 16, 18, 19 and 27 of the United Nations Convention against Transnational Organized Crime.

The provisions relating to international cooperation under the United Nations Convention against Transnational Organized Crime apply *mutatis mutandis* to the Smuggling of Migrants Protocol.^a This includes provisions on international cooperation for purposes of confiscation (article 13), extradition (article 16), mutual legal assistance (article 18), joint investigations (article 19), and law enforcement cooperation (article 27).^b Some of these provisions are discussed in more depth throughout chapter IX of the present *Assessment Guide*.

Article 17 of the Smuggling of Migrants Protocol provides that States parties should consider the conclusion of bilateral and multilateral frameworks “in response to problems that have arisen or are seen as particularly serious only in the context of bilateral or regional situations”.^c It should be noted that the measures provided for in the Protocol are intended to represent a global minimum standard. The drafters specifically envisaged that some States would wish to implement more elaborate measures, in particular in response to problems that have arisen or are seen as particularly serious in certain bilateral or regional contexts. For example, two States parties with a specific cross-border smuggling problem might find it appropriate to develop a bilateral treaty or arrangement to expedite cooperation between them. States with similar legal systems might be able to adopt streamlined procedures to take advantage of this. The legal or legislative requirements to implement this provision—which is not mandatory—will vary from country to country. In some cases, legislative or executive authority is required to enter into discussions or negotiations, while in others, legislation may be needed only to ratify or adopt the resulting treaty or to implement it in domestic law.^d

^a Article 1, paragraph 2, of the Smuggling of Migrants Protocol.

^b *Legislative Guides*, pp. 383-384; see further *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 8.

^c *Legislative Guides*, p. 391.

^d *Issue Paper: Smuggling of Migrants by Sea*, pp. 53-54.

¹⁰⁶ *Ibid.*, sector on policing, Tool 3, entitled “Crime investigation”, p. 19.

¹⁰⁷ *Ibid.*



IX.A ASSESSMENT QUESTIONS

Domestic frameworks and procedures for international cooperation

- Does the country have special legislation concerning the investigation and prosecution of crimes with international components?
- Is the country party to any bilateral and/or multilateral treaties concerning international law enforcement cooperation or that make it possible to request international cooperation from another country?
- Is the country party to any international agreement concerning international law enforcement cooperation (for example, a bilateral agreement based on the INTERPOL model [bilateral] police cooperation agreement)?
 - If so, how is the agreement implemented in the domestic legal framework?
- Is there anything that might hinder the capacity of the country or its agencies to cooperate with another country in the field of the smuggling of migrants?
- Are there other countries with which there is a need to engage in cooperation to combat the smuggling of migrants but with which there are currently no formal (and informal) avenues for international cooperation?
- Is there a central authority that deals with international cooperation?
 - If so, has it been notified to the relevant international body?



IX.A ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 6.17, entitled “Other agreements or arrangements for cooperation”, pp. 69-79.
- *Issue Paper: Smuggling of Migrants by Sea*, pp. 53-54.
- *Handbook on Mutual Legal Assistance and Extradition*, parts 2-4.

B. Extradition

Extradition is the surrender by one State of a person present on its territory to another State that seeks that person either for the purpose of prosecution, or for the purpose of enforcing a sentence. Multilateral conventions dealing with extradition or including extradition provisions, such as the United Nations Convention against Transnational Organized Crime, have been developed within the framework of various regional and other international organizations. These conventions provide the legal basis and set basic minimum standards for extradition for the offences they cover, and also encourage the adoption of a variety of mechanisms designed to streamline the extradition process.¹⁰⁸ Furthermore, most jurisdictions have numerous bilateral treaties that enable extradition

¹⁰⁸ *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, p. 8.

to and from selected countries. Domestically, extradition acts or similar laws set out the requirements for the administration of extradition requests to and from other countries. It should be noted, however, that in the absence of a binding treaty, there is no international obligation to extradite.

Nevertheless, there are numerous situations where existing legal instruments—domestic and international—are insufficient. Even when available, extradition processes can be cumbersome and there remain numerous obstacles to quick and predictable extradition. In order to address these issues, model treaties such as the United Nations Model Treaty on Extradition (resolution 45/116) have been made available to countries wishing to enter into new bilateral agreements.¹⁰⁹

Designating a single central authority for all incoming and outgoing extradition requests and strengthening its effectiveness is crucial to the success of international criminal justice cooperation. This is one of the ways in which a country can coordinate its own requests for extradition and stand ready to respond expeditiously to requests it receives from other countries.¹¹⁰



IX.B INTERNATIONAL COOPERATION: EXTRADITION

International requirements

→ Article 16 of the United Nations Convention against Transnational Organized Crime.

Article 16 of the United Nations Convention against Transnational Organized Crime contains extradition provisions that may be utilized in relation to smuggling of migrants offences. More specifically, article 16 applies when an offence covered by the Convention involves an organized criminal group and the person sought for extradition is “located in the territory of the requested State party”. There is no need to prove that the offence was transnational in nature for the purposes of extradition under the Convention.

Dual criminality

The requesting State must prove that the criminal offence involving the person who is the subject of the request for extradition is punishable under the domestic law of both the requested and requesting States. This rule has come to be applied less strictly as a result of the so-called conduct-based test that deems that dual criminality shall be fulfilled irrespective of whether the laws of the requested State party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States parties.^a

Non-extradition of nationals

In cases where the requested State refuses to extradite a person on the grounds that the person is its own national, the State is often seen, under binding international legal instruments, to have an obligation to submit the person for prosecution upon request. The reluctance of States to extradite their own nationals appears to be lessening in many cases. The United Nations Convention against Organized Crime includes a provision that reflects this development. Article 16, paragraph 11, refers to the possibility of temporary surrender of the person on condition that he or she will be returned to the requested State party for the purpose of serving the sentence imposed.

¹⁰⁹Ibid., pp. 8-10.

¹¹⁰Ibid., p. 3.

This is an illustration of the principle of extradite or prosecute (commonly referred to as “aut dedere aut judicare”) and requires the establishment of an appropriate jurisdictional basis.^b Where extradition is requested for the purpose of enforcing a sentence, the requested State rather than extraditing the national may choose to enforce the sentence itself.

Evidentiary issues

The differences between the prosecutorial practices under common law and civil law systems can make effective interregional and international cooperation difficult. In the field of extradition, such differences are even more acute in relation to the documents to be presented to the requested State and the evidentiary requirements for granting an extradition request, especially in complex cases involving the smuggling of migrants. Advance research on evidentiary requirements as well as close coordination with foreign counterparts can make a significant contribution to simplifying extradition procedures.

^a Compare with article 43, paragraph 2, of the United Nations Convention against Corruption.

^b See section I.H above.



IX.B ASSESSMENT QUESTIONS

Extradition framework and procedures

- Is there a national law governing extradition?
 - What is it?
 - Does it recognize smuggling of migrants as an extraditable offence?
- What bilateral and/or multilateral extradition treaties has the country entered into with other countries? What international, regional and bilateral agreements containing extradition provisions has the country ratified?
 - Is there a conspicuous absence of such treaties with countries with which it would be important to have a treaty in place?
- Do existing treaties cover offences relating to the smuggling of migrants, as well as offences under the United Nations Convention against Transnational Organized Crime?
- Who or what agency deals with extradition requests? Is there a designated central authority to coordinate and receive requests?
 - How is this process coordinated?
 - Have the relevant personnel been trained in the legal requirements of extradition?
- What specific issues has the country encountered in obtaining extradition of the accused from other countries?
- What kind of response does the country provide when requested to extradite?
- Has the country acceded to the request in cases involving the smuggling of migrants?
 - If not, on what basis?
- Is the country typically able to ensure that requests for extradition are executed within a reasonable time or within timelines specified by the requesting State?
 - How long does it generally take to execute extradition requests?
- Does the country recognize requests for provisional arrest of persons sought by a requesting State?
 - Does the country recognize INTERPOL Red Notices as a request for provisional arrest?

Extradition requirements

- Does the country require a treaty, under domestic law, to extradite an individual?
 - Does the country recognize multilateral treaties?
 - Is a lawful extradition of an individual to another country possible without a treaty on the basis of reciprocity?
- What are the main requirements for granting an extradition request?
 - Is there a dual criminality requirement in domestic law and bilateral treaties?
- Does national law have jurisdiction if the offender is a national of that State or habitual resident and extradition is refused on grounds of nationality?
 - Does national law provide for the prosecution of the alleged offender if extradition is refused on grounds of nationality?
- Does the country recognize arrest warrants of other countries?

Refusal of extradition

- Does the country extradite its own nationals?
 - If it does not, why not?
 - If the country refuses extradition of its own nationals, what are the consequences? Does national law provide for prosecution of such cases? Would the country allow for temporary surrender? Would the country enforce a foreign judgement when extradition is refused?
- On what other grounds, according to national legislation, can extradition be refused?
 - Are exceptions based on certain types of offences or punishment, political exceptions or other grounds?



IX.B ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 193-210.
- *Toolkit to Combat Smuggling of Migrants*:
Section 6.5, entitled “Extradition”, pp. 15-21;
Section 6.6, entitled “Request for extradition: checklist”, pp. 22-24.
- *Criminal Justice Assessment Toolkit, sector on cross-cutting issues*, Tool 4, entitled “International cooperation”, pp. 8-10.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 7.4, entitled “Extradition”, pp. 7-12.
- *Handbook on Mutual Legal Assistance and Extradition*, part 5.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, p. 109.

C. Mutual legal assistance

Mutual legal assistance is a vital tool of international criminal justice cooperation in addressing the smuggling of migrants; through a request for such assistance, one State authorizes another State to take particular measures on its behalf. The mechanism allows for States to receive and provide assistance for gathering evidence for investigations and criminal prosecutions, including where coercive measures are required. Information-sharing and agency-to-agency communication are also important to facilitate mutual legal assistance and may make it possible to provide assistance without a formal request.¹¹¹

Mutual legal assistance is generally based on bilateral and multilateral treaties, as well as on national legislation that either gives full effect to the relevant treaties or enables mutual assistance in the absence of such treaties. Mutual assistance is, however, often hindered by the fact that procedural laws of cooperating countries can vary considerably. Further action is often required to minimize obstacles to the provision of effective assistance.



IX.C INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE

International requirements

→ Article 18 of the United Nations Convention against Transnational Organized Crime.

Article 18 of the United Nations Convention against Transnational Organized Crime contains detailed provisions concerning mutual assistance. It sets out types of mutual legal assistance and procedures in detail. If the parties are not bound by a treaty, then the procedures in article 18 of the Convention apply. If there is a treaty, the parties can still agree to apply the procedures in article 18 where it is simpler to do so. The article applies to all offences set out in the United Nations Convention against Transnational Organized Crime and the Smuggling of Migrants Protocol, if ratified, where there are reasonable grounds to suspect that the offence is transnational in nature and involves an organized criminal group.

Article 18, paragraph 1, provides that States parties shall “afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings” in relation to the offences covered by the Convention as provided for in article 3. Pursuant to article 18, paragraph 3, mutual legal assistance may be requested for any of the following purposes:

- Taking evidence or statements from persons
- Effecting service of judicial documents
- Executing searches and seizures, and freezing
- Examining objects and sites
- Providing information, evidentiary items and expert evaluations
- Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records
- Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes

¹¹¹See further section IX.D below.

- Facilitating the voluntary appearance of persons in the requesting State party
- Any other type of assistance that is not contrary to the domestic law of the requested State party.

Mutual legal assistance may also involve the transfer of sentenced persons to another country, for instance, where a person is needed as a witness in another country, or where that country is pursuing other charges against that person.^a

Central authorities

States should designate a central authority competent to receive and execute requests or transmit them to the competent authorities for execution. The role of central authorities is to ensure the speedy execution or transmission of requests, and best practices include:

- Dissemination of up-to-date contact information to other States
- Ensuring that the central authority is available round the clock
- Ensuring that the central authority has the responsibility and power to receive requests made under different treaties
- Quality control and follow-up on requests received or made
- Issuing guidelines for domestic and international use

Making a request for mutual legal assistance

Article 18, paragraph 15, of the United Nations Convention against Transnational Organized Crime is designed to provide common ground and set out minimum requirements when it comes to the form of mutual legal assistance requests pursuant to the Convention. These requirements include:

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

To facilitate the making of requests for mutual legal assistance, the General Assembly has adopted the Model Treaty on Mutual Assistance in Criminal Matters and UNODC has created a Mutual Legal Assistance Request Writer Tool (www.unodc.org/mla/index.html) to assist States in drafting requests with a view to facilitating and strengthening international cooperation.

Executing a request for mutual legal assistance

In executing a request for mutual legal assistance, the requested State party should:

- Ensure the speedy execution of the request
- Respect any deadlines suggested by the requesting State party
- Consult on progress
- Clarify what limitations apply to the use of information or evidence (the best practice in this situation is for the requested State party to impose as few limitations as possible)
- Ensure the confidentiality of requests where the requesting State party requires that the matter be treated confidentially (or inform the requesting State party where confidentiality is not possible)
- Bear the ordinary costs of execution, but consult with the requesting State party where there are substantial extraordinary costs. In such situations, the best practice is for the requesting State party to provide assistance if the requested State lacks resources.

When executing a request, the State is to respect the procedures of the requesting State to make the assistance provided admissible in that country.^b

Refusing a request for mutual legal assistance

Requests for mutual legal assistance can be refused if requirements are not met or if the execution of the request would be prejudicial to the essential interests of the requested State. Where a request for mutual legal assistance is refused, reasons must be given. There is an obligation to consult with the requesting State party to consider whether a request may be granted subject to terms and conditions. Pursuant to the United Nations Convention against Transnational Organized Crime, States parties may not refuse a request for legal assistance on the sole ground that the offence is also considered to involve fiscal matters. Where dual criminality does not exist, a State may still choose to assist, but it has the right to refuse to render mutual legal assistance.

^a Article 17, of the Organized Crime Convention; see further section IX.F below.

^b Article 18, paragraph 17, of the Organized Crime Convention.



IX.C ASSESSMENT QUESTIONS

Mutual legal assistance framework and procedures

- Is there a national law governing mutual assistance in criminal matters?
 - What is it?
 - Does it cover relevant smuggling of migrants offences?
- Is the country using multilateral treaties, such as the United Nations Convention against Transnational Organized Crime, as a basis to request and/or provide mutual legal assistance?
- What bilateral treaties on mutual legal assistance does the country have with other countries?
 - Is there a conspicuous absence of such treaties with countries with which it would be important to have a treaty in place?
 - Alternatively, is mutual legal assistance based on informal contacts?

- Do existing treaties cover all the offences relating to smuggling of migrants as well as offences under the United Nations Convention against Transnational Organized Crime (if the country is a State party)?
- Has the country made requests for mutual legal assistance in cases involving the smuggling of migrants?
 - If so, were they executed; if not, why not?
- Has the country received requests for mutual legal assistance in cases involving the smuggling of migrants?
 - If so, were they executed; if not, why not?
- Who or what agency deals with mutual legal assistance requests?
 - How is this process coordinated?
 - Have the relevant personnel been trained in the necessary legal requirements?
 - Do staff speak various languages or have access to translation services?
- How are the costs of executing and responding to requests for mutual legal assistance dealt with?
- Is the country typically able to ensure that requests for mutual legal assistance are executed within a reasonable time or within timelines specified by the requesting State?
 - How long does it generally take to execute mutual legal assistance requests?

Mutual legal assistance requirements

- Does the country require a treaty, under domestic law, for mutual assistance in criminal matters?
 - Is assistance possible without a treaty?
- What are the main requirements for granting an assistance request?
- According to national legislation, on what grounds can mutual legal assistance be refused?



IX.C ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 210-232.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 6.7, “Mutual legal assistance”, pp. 25-33;
 - Section 6.8, “Request for mutual legal assistance: checklist”, pp. 34-36.
- *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, pp. 10-13.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*: Module 7.3, entitled “Mutual legal assistance”, pp. 2-7.
- *Handbook on Mutual Legal Assistance and Extradition*, part 6.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 109-110.

D. Law enforcement cooperation and information-sharing

The fact that smuggling of migrants is a crime that crosses borders means that law enforcers are often required to investigate, share information, collect evidence and prosecute in more than one jurisdiction. International law enforcement cooperation can be enhanced through the development of more effective systems of communication at the bilateral, regional and international levels. Conversely, international cooperation is hindered by the absence of clear channels of communication. In other instances, channels exist but their inefficiency prevents the timely exchange of both operational information (useful in responding to specific offences, offenders or criminal groups) and general information (on criminal networks, trends and patterns of trafficking, extent of known criminal activity in a particular sector and typical *modi operandi*).

Joint investigations

One emerging trend is the establishment of joint investigation teams in the development of an effective capacity to investigate and prosecute transnational crimes of all sorts, including smuggling of migrants. Joint investigations may be reactive or proactive, established on a small or large scale, and created to combat smuggling of migrants in general or in a specific context. The use of joint investigations offers one of the most promising new forms of international cooperation, even if there are still some remaining issues in terms of making it fully functional on a broad scale. There are legal issues, as well as issues of attitude and trust among law enforcement agencies, and procedural questions. There are also some practical problems in the organization of joint investigations, including the lack of common standards and accepted practices, issues around the supervision of the investigation, and the absence of mechanisms for quickly solving these problems. For joint investigation teams to become an effective tool for international cooperation, States must put in place the required legal framework, at both the national and the international level, although such a framework need not be very complicated.

Another effective method of strengthening international law enforcement cooperation is to engage in regional or international joint operations for a certain period of time with the smuggling of migrants as the specific target. Apart from increasing the number of arrests, participating agencies may also benefit from enhanced mutual understanding, trust, establishment of effective mechanisms of cooperation and capacity-building of officers.

Law enforcement liaison officers

More and more countries also have law enforcement officials stationed in their embassies and high commissions around the world. Such officials may be called customs, drugs or police liaison officers or legal attachés. Law enforcement liaison officers provide direct contact with the law enforcement and government authorities of the host State. They can develop professional relationships, build confidence and trust, and generally facilitate liaison between the law enforcement agencies in the States involved. When the legal systems of the States concerned are very different, liaison officers can also advise law enforcement and prosecutorial authorities, both in their own State and in the host State, on how to formulate a request for assistance.¹¹² The role of such liaison officers can be enhanced by ensuring that they have access, in accordance with the law of the host country,

¹¹²See also section IX.C above.

to all agencies in that country with relevant responsibilities.¹¹³ At the same time, they can be a good resource for training activities held in the host countries as many of them are very experienced officers in their respective areas.

Information-sharing

Information-sharing is an essential prerequisite to preventing and combating the smuggling of migrants. As the smugglers of migrants form closely meshed networks that transcend national and regional borders, so too must criminal justice responses. New routes and *modi operandi* used by smugglers of migrants demonstrate the continuing evolution and growing complexity of smuggling networks and their operations, and highlight the importance of strong national and international cooperation in the investigation, prevention and prosecution of the smuggling of migrants. A crucial element of this approach is the development of effective information-sharing relationships within and among States, particularly those that share borders.



IX.D INTERNATIONAL COOPERATION: LAW ENFORCEMENT COOPERATION

International requirements

- Article 10 of the Smuggling of Migrants Protocol.
- Articles 19, 27 and 28 of the United Nations Convention against Transnational Organized Crime.

Article 27 of the United Nations Convention against Transnational Organized Crime obliges States parties to cooperate with each other:

- To enhance the effectiveness of law enforcement action (paragraph 1)
- To enhance and, where necessary, establish channels of communication between competent authorities, agencies and services to facilitate information exchange (paragraph 1, subparagraph (a))
- To conduct inquiries with respect to persons and movements of the proceeds and instrumentalities of crime (paragraph 1, subparagraph (b))
- To provide items or substances for analytical or investigative purposes (paragraph 1, subparagraph (c))
- To facilitate effective coordination and promote exchange of personnel and other experts including posting liaison officers (paragraph 1, subparagraph (d))
- To exchange information on the means and methods used by organized criminal groups (paragraph 1, subparagraph (e))
- To exchange information and coordinate measures for the purpose of early identification of offences (paragraph 1, subparagraph (f))
- To consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies (paragraph 2).

¹¹³ *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, pp. 18-19.

Article 19 of the United Nations Convention against Transnational Organized Crime also provides for States parties to consider entering into agreements or arrangements to conduct joint investigations, prosecutions and proceedings, possibly on a case-by-case basis. The domestic laws of most States permit such joint activities and for those few States whose laws do not so permit, this provision will be a sufficient source of legal authority for case-by-case cooperation of this sort.

Article 10 of the Smuggling of Migrants Protocol sets out the requirements in relation to information-sharing between States parties. Article 28, paragraph 2, of the United Nations Convention against Transnational Organized Crime also requires States parties to consider “developing and sharing analytical expertise concerning organized criminal activities with each other and through international and regional organizations.”



IX.D ASSESSMENT QUESTIONS

Law enforcement cooperation

- Is the country a party to any international, regional or multilateral agreements on law enforcement cooperation?
- Have relevant agencies in the country established well-functioning channels of communication with the relevant authorities in other countries to facilitate the exchange of information and intelligence?
 - If so, which agencies?
 - With which countries?
 - By which channels?
 - How regularly are these channels used?
- Do relevant agencies cooperate with other relevant countries' agencies to share information on means and methods used by organized criminal groups as well as coordinate measures for the purpose of early identification of offences?
- Are evidential exhibits shared with or transferred to other national law enforcement agencies? If yes, what procedures are in place to regulate this exchange?
- Are there cases where other countries assist in the analysis of evidence?
- Is the country part of a regional law enforcement organization?
- Are there arrangements to facilitate the exchange of investigative personnel and liaison police or immigration officers?
 - If so, how does this arrangement work?

Joint investigation teams

- Is the country capable of establishing joint investigation teams with other countries?
 - Does domestic law permit it?
 - Is this possible in relation to the smuggling of migrants? If not, what are the obstacles?
- Have law enforcement agencies been involved in international or regional joint investigation teams?
 - If yes, did this involve cases of smuggling of migrants?
 - What was the experience; what were the challenges?

Law enforcement liaison officers

- Does the country have law enforcement or immigration liaison officers in other countries?
- Does the country maintain an INTERPOL liaison office?
- Are there foreign law enforcement or immigration liaison officers dealing with smuggling of migrants issues in the country?
 - From which countries?
 - How do they work with the police?
 - What is their view on the quality of existing law enforcement cooperation with the host country?

Information-sharing

- Does the country have a system of information-sharing with respect to the smuggling of migrants?
- Does the country always look for opportunities to share information that may help stop or disrupt the smuggling of migrants in other jurisdictions?
- Is the country a member of any regional information-sharing networks?
- What types of information are shared with other countries?
- Are procedures in place that regulate the exchange of information with other countries?
- Does domestic legislation require amendment to ensure that confidential information can be shared and that information received is adequately protected?
- Under what circumstances and through what channels can information be shared informally?

**IX.D ADDITIONAL GUIDELINES AND TOOLS**

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 232-241 and 389-390.
- *Toolkit to Combat Smuggling of Migrants*:
Section 6.9, entitled “Joint investigation teams”, pp. 37-40;
Section 6.16, entitled “Information exchange”, pp. 64-68.
- *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, pp. 18-19.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 49 and 110-114.
- *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 8.H, entitled “Information-sharing”, pp. 14-17.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 8, entitled “Law enforcement cooperation and information-sharing”.

E. Transfer of proceedings

The possibility of transferring criminal proceedings from one country to another can be used to increase the likelihood of the success of a prosecution, when, for example, another country appears to be in a better position to conduct the proceedings. It can also be used to increase the efficiency and effectiveness of the prosecution in a country that is initiating proceedings in lieu of extradition. Furthermore, it can be a useful method for concentrating the prosecution in one jurisdiction and thereby increasing its efficiency and the likelihood of its success in cases involving several jurisdictions.¹¹⁴



IX.E INTERNATIONAL COOPERATION: TRANSFER OF PROCEEDINGS

International requirements

- Article 21 of the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime provides for consideration of the transfer of criminal proceedings for the prosecution of offences under the conventions “in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular where several jurisdictions are involved, with a view to concentrating the prosecution.”^a

^a Article 21 of the Organized Crime Convention.



IX.E ASSESSMENT QUESTIONS

Transfer of proceedings

- Is the country a party to any treaties—multilateral and/or bilateral—that enable the transfer of proceedings in criminal matters to and from another country?
- Is the transfer of criminal proceedings to a foreign jurisdiction possible and permissible under domestic law?
 - What restrictions does domestic law impose on such transfers?
- Does the country receive and make requests for transfers of criminal proceedings?
 - Do any of these requests involve smuggling of migrants offences?
 - How are these requests processed?
 - Is there a requirement for notification of the outcome of the proceedings?
 - What difficulties have been encountered?
- Are there limitations regarding the transfer of proceedings against the country’s own nationals?

¹¹⁴Ibid., 13.



IX.E ADDITIONAL GUIDELINES AND TOOLS

- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*: Module 7.6, entitled “Transfer of sentenced persons”, pp. 14-17.
- *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, p. 13.

F. Transfer of sentenced persons

Transfer of sentenced persons allows for a person who is convicted and sentenced to a term of imprisonment involving deprivation of liberty in one State to serve his or her sentence in another country. This may be done at the request of the person who has been sentenced so that he or she may be able to serve his or her sentence in another State to which he or she has ties, usually by virtue of being a national of that State. Rehabilitation and reintegration are also generally more likely to occur in a country in which the person has family and ties. The decision may also be made to transfer a sentenced person on the basis of humanitarian or compassionate grounds including medical or mental health needs, or where the conditions in the institution in which the person was convicted and sentenced fall below minimum international standards. International relations may also play a role with mutual respect for sovereignty and jurisdiction.



IX.F INTERNATIONAL COOPERATION: TRANSFER OF SENTENCED PERSONS

International requirements

→ Article 17 of the United Nations Convention against Transnational Organized Crime.

Article 17 of the United Nations Convention against Transnational Organized Crime states that States parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with the Convention. A model agreement providing simple procedures for the transfer of sentenced persons was adopted in 1985 by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in the form of the Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners.

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

The general principle of the transfer of sentenced persons requires that the administering State maintain the sentence that was imposed by the sentencing State; some exceptions may apply where the sentence is incompatible in the administering State. The understanding between the States is that the sentence will still be reasonably similar to that originally imposed.



IX.F ASSESSMENT QUESTIONS

Transfer of sentenced persons

- Is the transfer of sentenced persons to a foreign jurisdiction allowed under domestic law?
- Is the country a party to any treaties—multilateral and/or bilateral—that enable the transfer of sentenced persons to and from another country?
- Does the country receive and make requests for transfers of sentenced persons?
 - Do any of these requests involve persons sentenced for smuggling of migrants offences?
 - How are these requests processed?
 - What difficulties have been encountered?
 - How frequent are transfers of sentenced persons?



IX.F ADDITIONAL GUIDELINES AND TOOLS

- *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “International cooperation”, p. 12.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 7.6*, entitled “Transfer of sentenced persons”, pp. 14-17.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, p. 110.
- UNODC, *Handbook on the International Transfer of Sentenced Persons*.

G. Return of smuggled migrants

In many cases, smuggled migrants reside in the destination country unlawfully. Domestic and international laws usually require irregular migrants to leave the host country unless they seek asylum, are refugees or have other grounds to apply for a visa or residence. The removal from the receiving country may often occur against the will of the smuggled migrant and may in some cases require the use of force.

It is for that reason that best practice guidelines articulate basic standards that on the one hand facilitate the removal and return of smuggled migrants while on the other hand ensure that their rights and dignity are respected at all times.¹¹⁵

¹¹⁵ A/AC.254/4/Add.1/Rev.5, footnote 89.



IX.G INTERNATIONAL COOPERATION: TRANSFER OF SENTENCED PERSONS

International requirements

→ Article 18 of the Smuggling of Migrants Protocol.

International frameworks pertaining to the return of smuggled migrants create obligations for both the country in which the person is currently residing and the State to which the migrant will be returned. Relevant international provisions require cooperation between those two countries to enable and accelerate the return of smuggled migrants.

The Smuggling of Migrants Protocol sets out a range of mechanisms relating to the return of smuggled migrants in article 18. That article provides mechanisms to facilitate the return of smuggled migrants; it does not make the return mandatory. The principal elements of the article are designed to facilitate the relocation of smuggled migrants to countries of which they are nationals or permanent residents. In this context, “the term ‘permanent residence’ is understood [...] as meaning long-term, but not necessarily indefinite residence.”^a The *Interpretative Notes* explain that:

Paragraph 1 deals with the case of a person who is a national or has the right of permanent residence at the time of return. Paragraph 2 is supplementary to paragraph 1 and deals with the case of a person who had the right of permanent residence at the time of entry, but no longer has it at the time of return.^b

The *Interpretative Notes* also state that article 18 “is based on the understanding that States parties would not deprive persons of their nationality contrary to international law, thereby rendering them stateless.”^c Moreover, “[t]his article is understood not to prejudice national legislation regarding the granting of the right to residence or the duration of residence.”^d

The process envisaged by article 18 is one where the current host country contacts the country of origin (or return) in order to establish the status of the smuggled migrant and subsequently returns that person to that country. Such return must, however, “not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.”^e Accordingly, the country of origin (or return) is required to cooperate with the requesting country and facilitate the migrant’s return by verifying the status of the migrant without undue or unreasonable delay.^f For persons without proper travel documents, article 18, paragraph 4, requires the country of nationality or permanent residence to issue those documents to enable the return of the smuggled migrants.

Article 18 does not require the creation of any substantive or procedural rights for smuggled migrants, but article 18, paragraph 5, “does require measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person.”^g In managing the return of smuggled migrants, countries may choose to seek the support of international organizations, which is recognized by article 18, paragraph 6.

The removal of smuggled migrants can potentially frustrate criminal proceedings against their traffickers. Migrants who have agreed to testify against their smugglers are often the best resource for prosecutors and should be used where possible. If there are legal requirements to remove smuggled migrants from the country, it may be necessary to explore avenues to allow smuggled migrants to stay temporarily for the duration of the smugglers' trial, to bring smuggled migrants back after they have been removed to testify in court or to obtain video or written testimony from smuggled migrants after they have been removed to their home country.

^a A/55/383/Add.1, para 112.

^b Ibid., para 114.

^c Ibid., para 111.

^d Ibid., para 112.

^e Ibid., para 113.

^f Article 18, paragraph 3, of the Smuggling of Migrants Protocol.

^g *Legislative Guides*, p. 35.



IX.G ASSESSMENT QUESTIONS

Return of smuggled migrants

- What procedures are in place to facilitate the return of the country's own nationals who have been smuggled to another State?
 - Is the process implemented without unreasonable delay?
 - Are procedures in place to facilitate the return of a person who had a right of permanent residence in the country being assessed but was then smuggled to another State?
- What capacity is there to verify that a person is a national or had a right of permanent residence?
- What procedures are in place to issue travel documents or other authorization to facilitate the return on the request of another State?
- Are smuggled migrants who are returned to another country through this procedure charged with a criminal offence in that other country?
 - If yes, which one(s)?
- Are smuggled migrants who are returned to the country without documentation accepted?
- Are smuggled migrants returned in an orderly manner and with due regard for their safety and dignity?
- Are there any agreements with relevant international organizations with respect to the return of smuggled migrants?
- What avenues exist to allow smuggled migrants to remain in or return to the country to testify against their smugglers?



IX.G ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 360-367 and 382-393.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 6.15, entitled “Cooperation for the return of smuggled migrants”, pp. 58-63;
 - Section 7.23, entitled “Return of smuggled migrants”, pp. 72-81;
 - Section 8.9, entitled “Human rights of smuggled migrants”, pp. 30-37;
 - Section 8.10, entitled “Protection of smuggled migrants who are refugees”, pp. 38-41;
 - Section 8.11, entitled “Non-refoulement”, pp. 42-43.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 33-34, 51-53, 83-85 and 119-122.
- *Model Law against the Smuggling of Migrants*, pp. 99-108.

X. Identity and travel documents

Document fraud is a considerable business for the smugglers of migrants. New technologies mean that false documents can be produced more easily and criminal networks are able to provide smuggled migrants with fraudulent or fraudulently obtained travel or identity documents. Smugglers of migrants are also known to pay bribes to corrupt immigration and consular officials to unlawfully obtain documents.

Many States have already developed a high level of expertise in combating document fraud. However, a number of others continue to lack such capacity, a situation that is exploited by organized crime groups. Given the transnational nature of the production, procurement and distribution of fraudulent or fraudulently obtained documents, it is clear that any lack of capacity in origin and transit countries has a major impact on destination countries. It is thus crucial that States have adequate document fraud offences and measures to ensure that identity and travel documents are valid and legitimate.

A. Document fraud offences

The use of fraudulent travel or identity documents is often critical to the smuggling of migrants process. Adequate document fraud offences allow authorities to prosecute those who facilitate the smuggling process by producing, procuring, possessing or providing fraudulent travel or identity documents.



X.A IDENTITY AND TRAVEL DOCUMENTS: DOCUMENT FRAUD OFFENCES

International requirements

→ Article 6, paragraph 1, subparagraph (b), of the Smuggling of Migrants Protocol.

Criminalization

Article 6, paragraph 1, subparagraph (b) of the Smuggling of Migrants Protocol provides that “producing a fraudulent travel or identity document”^a and “procuring, providing or possessing such a document”^b should be criminalized, but only when intentionally committed for the purpose of the smuggling of migrants. The reference to smuggling of migrants means that the document offences must relate to the procurement of illegal entry into a State party where that person is not a national or a permanent resident. There is also the requirement that the smuggling of migrants, and therefore the document offence, is committed for “financial or other material benefit”.^c

The *Interpretative Notes* state that article 6, paragraph 1, subparagraph (b)

was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included.^d

This is an important aspect of the principle of non-criminalization of migrants enshrined in article 5 of the Smuggling of Migrants Protocol, which is discussed further in section I.F above.

It should be noted that these legislative requirements can be drafted in a variety of ways and there is no ideal option. The *Model Law against the Smuggling of Migrants* provides a number of useful model provisions that demonstrate how the required document fraud offences might be framed.^e

Terminology

According to the *Interpretative Notes* on the Smuggling of Migrants Protocol the term

“travel document” includes any type of document required for entering or leaving a State under its domestic law and the term “identity document” includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.^f

According to article 3, subparagraph (c), a fraudulent travel or identity document is a 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; or
- (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.

“Producing a false travel or identity document”, means making or creating the fraudulent document, or causing it to be created. For example, a smuggler could obtain an authentic or genuine passport, remove the photograph on the passport and substitute a picture of the migrant. Or, the smuggler could be running a criminal enterprise such as a fraudulent passport factory. “Procuring” means obtaining or causing a result by effort. For example, the smuggler could obtain the document for someone else. “Providing” means giving. For example, the smuggler could give the document to the migrant or to another smuggler in the smuggling network.^g

The *Interpretative Notes* provide 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 ... [and] that 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.^h

The *Legislative Guides* further state that:

(c) Whether a document is “falsely made” or “improperly issued” will depend in some cases on how national law treats cases where an official acts illegally or without authorization. If a consular official issues a travel document beyond his or her powers, systems that would treat this as non-issuance would consider the document as having been made by someone not authorized to do so, falling under subparagraph (i). Systems that considered the basic issuance to have occurred would see the same document as having been “improperly issued” under subparagraph (ii). What is important is that drafters of national legislation consider the approach taken by national law and ensure that all of the possible scenarios result in documents that are treated as “fraudulent” and that there are no gaps;

(d) Documents that have been altered must have been changed in some way that is material to the other offences established in accordance with the Protocol, such as changing the identity or photograph of the holder or the dates for which it was valid. If the document is “altered”, this must have been by someone not authorized to do so;

(e) “Fraudulent” documents also include documents that are genuine, but improperly issued through misrepresentation, corruption or duress. Here also the approach of drafters will depend to some degree on how domestic law treats cases where an official acts illegally or without authority;

(f) Finally, “fraudulent” documents include papers that are formally valid and have been validly issued, but are being used by someone other than the person to or for whom they were issued, whether the document in question has been altered (e.g. by changing a photograph) or not.ⁱ

The purpose of these complex explanations is to ensure that countries comprehensively proscribe and criminalize any form of travel and identity document fraud, ranging from creating new documents, altering existing documents, to using another person’s document, and obtaining documents fraudulently, corruptly or coercively.

^a Article 6, paragraph 1, subparagraph (b) (i), of the Smuggling of Migrants Protocol.

^b Article 6, paragraph 1, subparagraph (b) (ii), of the Smuggling of Migrants Protocol.

^c Ibid.

^d A/55/383/Add.1, para. 93.

^e *Model Law against the Smuggling of Migrants*, pp. 15-17, 32 and 37-38.

^f Article 3, subparagraph (c), of the Smuggling of Migrants Protocol; A/55/383/Add.1, paras. 89, 104 and 106.

^g *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 1, p. 8.

^h A/55/383/Add.1, paras. 90 and 106.

ⁱ *Legislative Guides*, pp. 344-5.



X.A ASSESSMENT QUESTIONS

Document fraud offences

- Is the production of a fraudulent travel or identity document criminalized?
 - Does the offence contain an element relating to the smuggling of migrants?
 - Does the offence include an element pertaining to a financial or material benefit?
 - What is the criminal intent or mens rea for this offence?

- Is procuring, providing or possessing a fraudulent travel or identity document criminalized?
 - Does the offence contain an element relating to the smuggling of migrants?
 - Does the offence include an element pertaining to a financial or material benefit?
 - What is the criminal intent or mens rea for this offence?
- Are the terms “fraudulent”, “travel document”, “identity document”, “falsely made”, “falsely altered” and “improperly issued” given specific meaning in the legislation?
- What are the penalties for document fraud offences?
- Are there separate document fraud offences and/or penalties for public officials?



X.A ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 343-345.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 2.4, entitled “The role of document abuse”, pp. 18-21;
 - Section 5.2, entitled “Criminalization of smuggling of migrants”, pp. 5-10;
 - Section 5.12, entitled “Promising practices: legislation criminalizing smuggling of migrants”, pp. 34-60.
- *Model Law against the Smuggling of Migrants*, pp. 5-17, 32 and 37-38.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
 - Module 1, entitled “Understanding migrant smuggling and related conduct”, pp. 6-9.

B. Validity and legitimacy of identity documents

The inspection of travel and identity documents by government authorities, especially at border control points, is an important tool to detect and prevent the smuggling of migrants. Accordingly, it is essential that government authorities have the skills, procedures and equipment in place to properly examine identity documents and detect cases of document fraud. Furthermore, to prevent the forgery of identity and travel documents it is important that official documents are of a quality and contain security features so that they cannot be easily forged or altered.

Several kinds of technology that are new or under development offer considerable potential for the creation of new types of document that identify individuals in a unique manner, can be rapidly and accurately read by machines and are difficult to falsify because they rely on information stored in a database out of the reach of offenders, rather than on information provided in the document itself.¹¹⁶

¹¹⁶*Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, pp. 39-42.



X.B IDENTITY AND TRAVEL DOCUMENTS: VALIDITY AND LEGITIMACY OF IDENTITY DOCUMENTS

International requirements

→ Articles 3, paragraph (c), 12 and 13 of the Smuggling of Migrants Protocol.

Article 12 of the Smuggling of Migrants Protocol requires signatories to ensure that their travel and identity documents are of such quality that they cannot easily be falsified or misused and to prevent their unlawful creation, issuance and use. This includes such measures as technical elements to make documents more difficult to falsify, forge or alter, and administrative and security elements to protect the production and issuance process against corruption, theft or other means of diverting documents.^a Article 13 obliges States parties to verify within a reasonable time frame the legitimacy and validity of travel and identity documents as requested by other States parties.

^a *Legislative Guides*, p. 374.



X.B ASSESSMENT QUESTIONS

Validity and legitimacy of identity documents

- Have measures been implemented to ensure the quality, integrity and security of travel or identity documents and prevent their unlawful production, issuance or use?
- Have measures been implemented to verify the legitimacy and validity of travel or identity documents issued in the State's name and suspected of being used for the smuggling of migrants?
 - How are requests for verification from other States handled?
 - What is the average processing time for a request?
 - Are there central records of travel or identity documents issued by the State?
- Is equipment used to create and verify identity and travel documents current and effective?
- Is there any legislation pertaining to technical standards for the production of documents?



X.B ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 374-375, 385 and 388-389.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 2.4, entitled "The role of document abuse", pp. 18-21;
 - Section 6.13, entitled "Cooperation in relation to travel and identity documents", pp. 53-56;

Section 7.13, entitled “Travel and identity documents”, pp. 39-42;

Section 9.5, entitled “Measures relating to security and control of documents”, pp. 17-21.

- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 44 and 99-101.
- *Model Law against the Smuggling of Migrants*, pp. 15-17 and 102.
- *Issue Paper: Migrant Smuggling by Air*, p. 18.
- *UNODC, Guide for the development of forensic document examination capacity*, pp. 1-30.

XI. Assistance and protection measures

The smuggling of migrants involves the movement of human beings whose lives, freedom and safety are frequently at risk and who are vulnerable to exploitation, abuse, coercion and fraud, by their smugglers and others, especially if their presence in the host country is unlawful. Accordingly, it is important that international and domestic frameworks protect the fundamental rights and liberties of smuggled migrants, and that any action taken against the smuggling of migrants adhere to the principles of international human rights law.¹¹⁷

A. Assistance available to smuggled migrants

When apprehended by authorities, smuggled migrants may be in urgent need of shelter, food and basic medical care. In many instances smuggled migrants are found in situations of emergency, exposure to the elements, dehydration, suffocation or drowning. Many smugglers of migrants expose their passengers to life-threatening risks. Thousands of people have suffocated in containers, died of thirst in deserts or perished at sea.



XI.A ASSISTANCE AND PROTECTION: ASSISTANCE AVAILABLE TO SMUGGLED MIGRANTS

International requirements

- Article 16, paragraphs 2, 3 and 4 of the Smuggling of Migrants Protocol.
- Articles 24-26 of the United Nations Convention against Transnational Organized Crime.

Article 16 of the Smuggling of Migrants Protocol contains several provisions relating to assistance measures. Article 16, paragraph 2, requires States parties to protect smuggled migrants from physical violence. The paragraph contains no specific guidelines about the way in which such protection shall be provided. For example, there is no explicit requirement that the host country provide safe accommodation or other types of physical protection. While the provisions of article 16, paragraph 2, are mandatory, States parties have discretion to provide assistance as they consider appropriate.

Article 16, paragraph 3, calls on States parties to provide assistance to smuggled migrants whose lives or safety may be at risk. Article 16, paragraph 4, recognizes the particular vulnerability of women and children. Neither paragraph contains mandatory requirements relating to specific assistance measures.

¹¹⁷See also *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 10-11.

The United Nations Convention against Transnational Organized Crime contains a number of provisions requiring States parties to take measures to assist and protect victims and to cooperate with other enforcement authorities to offer protection to victims and witnesses.^a

While international law does not mandate the provision of specific support and services to victims of smuggling of migrants, it may be desirable to explore, in conjunction with international organizations, non-governmental organizations and civil society, the feasibility of offering smuggled migrants temporary protection and basic access to accommodation, food, medical care and legal assistance. In the medium and long term it is desirable to develop a set of standards pertaining to the treatment of smuggled migrants to ensure they obtain basic assistance. In dealing with smuggled migrants, the special needs of children, women and persons with disabilities should also be recognized.^b

^a Articles 24-26, of the Organized Crime Convention.

^b See further *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 9, pp. 8-9.



XI.A ASSESSMENT QUESTIONS

Assistance measures

- Do smuggled migrants have access to urgent medical care?
- What measures are in place to protect smuggled migrants from violence and other forms of threats and retaliation?
- What measures are in place to cater for the special needs of children, women and other vulnerable persons who have been smuggled?
- What training do first responders and investigators receive in relation to assisting smuggled migrants?
- Are smuggled migrants offered temporary protection and basic access to accommodation, food, medical care, legal assistance and opportunity to communicate with relatives, when appropriate?
 - By whom is this assistance provided?



XI.A ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 359-367.
- *Toolkit to Combat Smuggling of Migrants*:
Tool 8, entitled “Protection and assistance measures”;
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 25-26, 28-33, 41, 71, 76-79, 91 and 93.

- *Model Law against the Smuggling of Migrants*, pp. 65-75.
- *Issue Paper: Smuggling of Migrants by Sea*, pp. 42-43.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants: Module 6*, entitled “Protection and assistance issues”.

B. Protection of the rights of smuggled migrants

Smuggled migrants are vulnerable to exploitation, deception, threats and violence. They are particularly vulnerable if they reside in the host country illegally or clandestinely and if they do not speak the local language and are unfamiliar with local procedures and customs. Often they fall victim to gangs and other criminals, and sometimes they engage in petty crimes as they cannot engage in legitimate ways to earn money to support themselves and their families. For these reasons it is important that domestic laws provide basic protection and support to smuggled migrants. This also increases the likelihood that smuggled migrants will cooperate with government authorities and assist in the prosecution of their smugglers.

Regardless of their immigration status, smuggled migrants have the right to expect that their human rights and dignity will be upheld and prioritized at all stages by those who intercept and identify them, those who detain them and those who remove them from the country. Furthermore, it is a fundamental principle of international human rights law that all persons have a right to be recognized as a person before the law, are to be treated as equal before the law and are entitled without any discrimination to equal protection of the law.¹¹⁸

Measures aimed at protecting smuggled migrants are mostly reliant on legislative implementation and rules of the judicial process. The following section focuses on the role of law enforcement in achieving effective protection for smuggled migrants.



XI.B ASSISTANCE AND PROTECTION: PROTECTION OF THE RIGHTS OF SMUGGLED MIGRANTS

International requirements

- Article 16, paragraphs 1 and 5 of the Smuggling of Migrants Protocol.
- Articles 24-26 of the United Nations Convention against Transnational Organized Crime.

Article 16 of the Smuggling of Migrants Protocol contains several provisions relating to the protection of the rights of smuggled migrants. In summary, “the provisions are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter conduct on the part of offenders that involves danger or degradation to the migrants.”^a These provisions equally apply to the destination State and the country of origin or habitual residence of smuggled migrants.

¹¹⁸Ibid., p. 2.

Article 16, paragraph 1, contains a general statement to protect the basic human rights of smuggled migrants:

In implementing this Protocol, each State party shall take, consistent with its obligations under 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 this 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.

While this paragraph refers to specific rights such as life and protection from torture or other cruel, inhuman or degrading treatment or punishment, article 16, paragraph 1, is generally seen as emphasizing the protection of all fundamental human rights and freedoms as accorded in relevant international treaties, especially the International Covenant on Civil and Political Rights (United Nations, *Treaty Series*, vol. 999, No. 14668) and the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 A (XXI), annex).^b The paragraph does not create any new obligations for States parties.^c Accordingly, the *Legislative Guides* note:

Assuming national conformity with the basic pre-existing rights and the instruments in which they are established, none of the requirements to protect or preserve the human rights of migrants and illegal residents should raise legislative issues, although they should be carefully considered in developing administrative procedures and the training of officials.^d

As a general point, it is recommended:

Where a State is not already in conformity with the pre-existing standards, they may have to be established to the extent necessary to conform to the Protocol. [...] Where existing national laws do not meet the basic requirements of the Protocol, the following amendments to the laws may be needed:

- (a) To preserve and protect the basic rights of smuggled migrants and illegal residents (art. 16, para. 1);
- (b) To protect against violence (art. 16, para. 2);
- (c) To provide information on consular notification and communication (art. 16, para. 5).^e

The *Interpretative Notes* further stress that article 16, paragraph 1, refers only “to migrants who have been smuggled ... [and] ... is not intended to refer to migrants who do not fall within the ambit of article 6”.^f

Some countries detain persons who are suspected of illegal entry in order to investigate their situation or facilitate their removal to their home country or another place. Article 16, paragraph 5, seeks to ensure that smuggled migrants who have been placed in detention have access to consular assistance as mandated by the 1963 Vienna Convention on Consular Relations.^g

^a *Legislative Guides*, p. 364.

^b A/55/383/Add.1, para. 108.

^c *Ibid.*, para. 109; *Legislative Guides*, p. 365.

^d *Legislative Guides*, p. 366.

^e *Ibid.*

^f A/55/383/Add.1, para. 107.

^g United Nations, *Treaty Series*, vol. 596, No. 8638.



XI.B ASSESSMENT QUESTIONS

Protection of the rights of smuggled migrants

- Are measures in place to ensure the basic rights of smuggled migrants are protected?
 - If yes, what are these measures, where are they articulated and how do they operate?
- What measures are available to protect smuggled migrants from intimidation and physical violence, from inhuman and degrading treatment?
 - Is the intimidation of smuggled migrants criminalized?
- What capacity is there to offer effective physical protection to smuggled migrants?
- Are the personal details of smuggled migrants kept confidential?
- Are smuggled migrants provided with information about their rights and do they have due access to legal counsel and/or consular services?



XI.B ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 359-367.
- *Toolkit to Combat Smuggling of Migrants*:
Tool 8, entitled “Protection and assistance measures”;
Section 7.22, entitled “Detention of smuggled migrants”, pp. 70-71.
- *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 4, entitled “Victims and witnesses”, pp. 14-15.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 11-16, 25-41, 70, 72-76 and 79-82.
- *Model Law against the Smuggling of Migrants*, pp. 65-75.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 6, entitled “Protection and assistance issues”.
- *Basic training manual on investigating and prosecuting the smuggling of migrants*:
Module 9, entitled “Human rights”, pp. 8-9.

C. Protection of witnesses

It is well recognized that witnesses are a strong resource in the prosecution of smuggling of migrants, but that the rights and safety of witnesses need to be taken into account throughout the

criminal justice process.¹¹⁹ Witnesses can be either simple observers of a crime or victims of the crime. Witnesses can also be individuals who formerly belonged to an organized criminal group or who committed a crime and then decided to collaborate with the justice system. The need for witness protection may arise as a result of a police initiative or at the witness's initiative.¹²⁰ In the case of smuggling of migrants, it is important to note that smuggled migrants themselves are witnesses and, in addition to the protection outlined in the present section, may require the special assistance and protection measures outlined in sections XI.A and XI.B above.

As with other forms of crime, witnesses of the smuggling of migrants often fear intimidation and retaliation if they cooperate with law enforcement agencies or testify in court. These fears are particularly acute when there is a close relationship between the witness and the offender, or when the offender is part of an organized criminal group. Hence it is vital that effective measures be taken to protect the safety and privacy of witnesses and their families.¹²¹



XI.C ASSISTANCE AND PROTECTION: PROTECTION OF WITNESSES

International requirements

- Articles 18, 23, 24 and 29, paragraph 1, subparagraph (i) of the United Nations Convention against Transnational Organized Crime.

The United Nations Convention against Transnational Organized Crime includes a number of provisions requiring States parties to take measures to protect witnesses and to cooperate with other enforcement authorities to offer protection to witnesses.^a These requirements apply to offences within the Protocols and are thus relevant to the smuggling of migrants. There is nothing further in the Smuggling of Migrants Protocol specific to the protection of witnesses of smuggling of migrants.

Article 24 of the United Nations Convention against Transnational Organized Crime is the principal article dealing with the protection of witnesses:

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

¹¹⁹ *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled "Law enforcement and prosecution", p. 55.

¹²⁰ *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 6, pp. 13-17.

¹²¹ *Criminal Justice Assessment Toolkit*, sector on cross-cutting issues, Tool 3, entitled "Victims and witnesses", pp. 14-15; and Tool 4, entitled "International cooperation", pp. 16-17.

[...]

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

The term “witnesses” is not defined, but article 24, paragraph 1, limits the scope of witnesses to whom the obligations apply to “witnesses in criminal proceedings who give testimony concerning offences covered by this Convention, and, as appropriate, for their relatives or other persons close to them”. The obligation to provide protection also arises only where such protection is within the means, such as available resources and the technical capabilities, of the State party concerned.

Further to these requirements, article 29, paragraph 1, subparagraph (i) of the Convention requires States parties to initiate, develop or improve specific training programmes that, inter alia, deal with “methods used in the protection of victims and witnesses.”

Obstruction of justice

Article 23 of the United Nations Convention against Transnational Organized Crime provides for the criminalization of the obstruction of justice. It should therefore be ensured that witnesses are protected from those who attempt to influence them through both corrupt means (such as bribery) as well as intimidation or the use of threats or violence. Ideally offences criminalizing such conduct should be established.

Protecting witnesses requested from other States parties

Article 18 of the United Nations Convention against Transnational Organized Crime, which deals with issues of mutual legal assistance, has an important requirement directed at protecting witnesses who are foreign nationals. Relevant to law enforcement is paragraph 27 of this article, which requires witnesses from other States parties who,

at the request of the requesting State party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State party or, having left it, has returned of his or her own free will.

Principles of protection

In implementing these requirements, the *Toolkit to Combat Smuggling of Migrants* suggests that there are three key principles to bear in mind. These include physical protection, psychological protection and protection from unfair treatment.^b It is suggested that physical protection can range from simple measures such as giving a witness a mobile phone to more complicated and resource-intensive measures, such as relocation or identity changes. Other types of physical protection can include police protection from intimidation or threats made by offenders or their accomplices, police escorts to and from the courtroom, protection within the courtroom and physical protection for family and close associates.

Psychological protection can be provided by ensuring the witness avoids further stress, remains informed throughout proceedings, is allowed access to counsellors and specially trained law enforcement experts sensitive to the specific needs of the witness, and the prevention of encounters between the witness and suspects or defendants.

The principle of protection from unfair treatment involves ensuring witnesses have their rights and dignity respected throughout the criminal justice process. The provision of adequate legal services from an early stage, even before they have agreed to serve as a witness, is useful in this regard.

Protection programmes after trial

In some cases, participation in extended police witness protection programmes following the conclusion of a trial may be needed to ensure the safety of the witness. Such programmes are intended to prevent offenders or their accomplices from approaching or intimidating witnesses. The nature of organized crime and the involvement of criminal organizations in smuggling of migrants make this a particularly pertinent consideration for law enforcement.

International cooperation in the protection of witnesses

Smuggling of migrants occurs across borders. In such cases, the danger faced by witnesses and collaborators of justice is not confined to national borders. The physical and psychological intimidation of witnesses and their relatives can take place in a variety of contexts. Furthermore, witnesses often need to move to another country during lengthy criminal proceedings and, among them, migrants who were smuggled by criminals will have been repatriated to their own country. For all these reasons, cooperation in the protection of witnesses and their relatives including returned smuggled migrants and of collaborators of justice becomes a necessary component of cooperation between prosecution services. Effective protection of witnesses includes legislative and practical measures to ensure that witnesses testify freely and without intimidation: the criminalization of acts of intimidation, the use of alternative methods of providing evidence, physical protection, relocation programmes, permitting limitations on the disclosure of information concerning their identity or whereabouts, and in exceptional circumstances, protecting the anonymity of the person giving evidence.

^a Articles 24-26, of the Organized Crime Convention.

^b *Toolkit to Combat Smuggling of Migrants*, Tool 7, entitled “Law enforcement and prosecution”, p. 56.



XI.C ASSESSMENT QUESTIONS

Protection of witnesses

- What measures are available to protect witnesses of smuggling of migrants and their relatives or close associates?
 - Do these include relatives located outside the territory?
- Which agencies are involved in providing protection to witnesses?
- Are relevant officers trained in the methods or principles of witness protection?
- What capacity is there to offer effective physical protection, psychological protection and protection from unfair treatment to witnesses?

- Does national law establish limitations on the disclosure of information concerning witnesses' identity or whereabouts, and in exceptional circumstances, protecting the anonymity of the person giving evidence?
 - Are courts able to restrict the publishing of a witness's photo and name?
 - Is disclosure of the identity of a protected witness criminalized?
- Is the intimidation of witnesses criminalized and investigated?
- Are there specially trained officers to deal with child witnesses?
- What witness protection programme or measures are in place to ensure the safety of witnesses, at all stages of the criminal proceedings?
 - How do these measures and protection programmes apply to smuggled migrants?
- Can witnesses of a crime be compelled by law to assist the police?
 - Are there exceptions?
 - Are witnesses paid expenses for appearing in court?
 - Do they receive other payments?
 - Are their identities concealed from the suspect?



XI.C ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 162-182.
- *Toolkit to Combat Smuggling of Migrants*:
 - Section 7.18, entitled "Protection of witnesses", pp. 55-57;
 - Section 7.19, entitled "Ethnic, cultural, religious and linguistic considerations in using witnesses", pp. 58-59;
 - Section 7.20, entitled "Special considerations related to the protection of child witnesses", p. 60;
 - Section 8.8, entitled "Access to information and legal representation", pp. 27-29.
- Convention of the Rights of the Child, art. 22.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 39-41 and 91-92.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*: Module 6, section 6, entitled "Witness protection and assistance", pp. 13-20.
- *Handbook for Professional and Policymakers on Justice in Matters Involving Child Victims and Witnesses of Crime*.
- *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*.

D. Refugees and asylum seekers

The smuggling of migrants frequently involves persons fleeing from political upheavals, war, natural disasters, economic hardship, discrimination, torture, environmental degradation, unemployment, poverty, starvation and other situations of emergency that cause them to seek asylum, a safer existence and a better life abroad. Among smuggled migrants are often refugees and asylum seekers who have been persecuted or fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. International law awards refugees with special rights that need to be protected. The term “asylum seekers” refers to those who are seeking international protection but whose status has not been finalized, while the term refugee is used for those who have been recognized according to international law.



XI.D ASSISTANCE AND PROTECTION: REFUGEES AND ASYLUM SEEKERS

International requirements

→ Article 19 of the Smuggling of Migrants Protocol.

Article 19, paragraph 1, of the Smuggling of Migrants Protocol recognizes existing international law concerning migrants who are refugees or asylum seekers. The paragraph draws particular attention to the specific obligations stemming from the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees:^a

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

The Convention relating to the Status of Refugees is the key instrument to protect refugees and safeguard their rights and liberties. The Convention recognizes a person as a refugee if he or she

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.^b

The Convention relating to the Status of Refugees places obligations on States parties to provide refuge for persons who fear persecution in another country. The key aspect of the protection granted under the Convention relating to the Status of Refugees is that a refugee^c must neither be expelled nor returned^d to “the frontiers of territories where his [or her] life or freedom would be threatened”.^e A country is in breach of this non-refoulement obligation if its authorities fail to properly identify and protect persons who are entitled to the benefits of refugee status.^f Moreover, States parties are asked not to penalize refugees for their illegal entry and presence,^g to give them free access to courts of law^h and to assist in their naturalization.ⁱ Finally, the Convention provides that States parties should provide refugees with welfare, including housing, public education^j and opportunity for employment.^k

In addition to the Convention relating to the Status of Refugees and the 1967 Protocol, the non-refoulement obligation also arises from a number of other international human rights and humanitarian law treaties. For example, article 7 of the International Covenant on Civil and Political Rights implies that no one shall be returned to a country where she or he may be “subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Article 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949^l contains the following provision regarding a protected civilian, as defined in article 4: “In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs”. Also, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment^m states in article 3, paragraph 1, that no one shall be returned to a country “where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture”. A similar provision can be found in article 22 of the 1989 Convention on the Rights of the Child.ⁿ Although not binding, article 3, paragraph 1, of the 1967 Declaration on Territorial Asylum^o and article 14 of the Universal Declaration of Human Rights provide that every person has a right to seek and enjoy in other countries asylum from persecution.

Article 19 of the Smuggling of Migrants Protocol seeks to ensure that the obligations under the Convention relating to the Status of Refugees and other relevant international treaties are not infringed by any provisions contained in the Protocol (in countries that are States parties to the Protocol as well as the international refugee law instruments). Article 19 does not create any new rights or obligations.^p In addition, article 19, paragraph 2, seeks to ensure that domestic laws pertaining to smuggling of migrants are not designed or applied in a manner that discriminates against smuggled migrants or irregular residents by reason of their status as such.^q

^a United Nations, *Treaty Series*, vol. 606, No. 8791.

^b Article 1, section A, paragraph 2, of the Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.

^c See the definition in article 1, section A, and the exemptions clauses in article 1, sections C-F, of the Convention relating to the Status of Refugees.

^d Article 32 of the Convention relating to the Status of Refugees: “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order”.

^e *Ibid.*, article 33.

^f See further *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, Module 9, p. 6.

^g Article 31 of the Convention relating to the Status of Refugees.

^h *Ibid.*, article 16.

ⁱ *Ibid.*, article 34.

^j *Ibid.*, articles 20-24.

^k *Ibid.*, articles 17-19.

^l United Nations, *Treaty Series*, vol. 75, No. 973.

^m *Ibid.*, vol. 1465, No. 24841.

ⁿ *Ibid.*, vol. 1577, No. 27531.

^o General Assembly resolution 2312 (XXII).

^p *Legislative Guides*, pp. 364-365.

^q *Legislative Guides*, p. 367.



XI.D ASSESSMENT QUESTIONS

Refugee protection

- Does national law ensure that the fact of having been smuggled cannot jeopardize a person’s asylum claim?

- Is the country a State party to the Convention and Protocol relating to the Status of Refugees?
 - If so, how are the obligations under those treaties implemented in domestic law?
 - How does national law protect the rights of refugees?
- Does the Office of the United Nations High Commissioner for Refugees have access to smuggled migrants who are asylum seekers and to other persons of concern to the Office?
- What material, personal (medical, psychological and so forth) and legal assistance is available to persons seeking asylum?
- Are persons seeking asylum referred to relevant government agencies and non-governmental organizations?
- Are first responders and investigators aware of and trained on the rights and protection of refugees?
- Does the country recognize the non-refoulement principle in other international treaties, including the International Covenant on Civil and Political Rights, the 1949 Geneva Convention relative to the Protection of Civilians in Time of War, the Convention against Torture, and the Convention on the Rights of the Child?
 - If so, does the country comply with this principle?



XI.D ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 359-369.
- *Toolkit to Combat Smuggling of Migrants*:
Section 8.10, entitled “Protection of smuggled migrants who are refugees”, pp. 38-41;
Section 8.11, entitled “Non-refoulement”, pp. 42-43.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 37-39 and 89-90.
- *Model Law against the Smuggling of Migrants*, pp. 100-101.
- *Issue Paper: Smuggling of Migrants by Sea*, pp. 43-45.
- *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*:
Module 6, entitled “Protection and assistance issues”, pp. 6-7.

XII. Prevention and awareness

The use of measures that raise awareness about the causes and consequences and warn would-be migrants about the associated risks and dangers can assist in preventing the smuggling of migrants. Effective campaigns may also deter would-be offenders by communicating the criminality of smuggling of migrants and consequences of offending.¹²²



XII PREVENTION AND AWARENESS

International requirements

- Article 15 of the Smuggling of Migrants Protocol.
- Article 31, paragraph 5, of the United Nations Convention against Transnational Organized Crime.

Article 15 of the Smuggling of Migrants Protocol advocates public awareness-raising and cooperation between States parties to prevent smuggling of migrants:

1. Each State party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.
2. In accordance with article 31 of the Convention, States parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

Article 15, paragraph 2, makes specific reference to article 31 of the United Nations Convention against Transnational Organized Crime, which, inter alia, recommends the dissemination of information through the mass media and the promotion of public participation in preventing and combating all forms of organized crime.^a It should be noted that although the provisions of article 15 are mandatory and it addresses an issue that is central to any strategy to combat the smuggling of migrants, it has largely aspirational meaning, creates no binding measures and proposes no specific domestic or international action.

The involvement of law enforcement in awareness campaigns, when designed properly, can be a very effective tool in the fight against the crime of the smuggling of migrants. It is suggested that law enforcement can tackle the phenomenon by teaching and raising awareness among potential smuggled migrants, or it can warn offenders of increased police vigilance or improved police practices. It is recommended that law enforcement agencies should not blindly resort to publicity campaigns or rely on them to replace proper law enforcement interventions. Furthermore, it is important that a campaign be founded on accurate and informed research; a poorly designed publicity campaign may inadvertently increase fear of crime, with undesired consequences such as vigilantism.^b

¹²²See further *International Framework for Action to Implement the Smuggling of Migrants Protocol*, p. 8.

The *Toolkit to Combat Smuggling of Migrants* and the *Model Law against the Smuggling of Migrants* contain additional recommendations regarding the content of awareness and information campaigns.^c The *Legislative Guides* also note that public information campaigns about the legislation used to establish smuggling of migrants offences can “serve to emphasize that the smuggling of migrants is a serious criminal activity, often harmful to the migrants themselves and with broader implications for community crime levels.”^d

^a Article 31, paragraph 5, of the Organized Crime Convention.

^b *Toolkit to Combat Smuggling of Migrants*, Tool 9, entitled “Prevention of the smuggling of migrants”, sect. 9.10, p. 35.

^c *Ibid.*, see Tool 9.6, entitled “Raising awareness among potential smuggled migrants”, pp. 22-23; *Model Law against the Smuggling of Migrants*, p. 80.

^d *Legislative Guides*, p. 373.



XII ASSESSMENT QUESTIONS

Prevention and awareness measures

- Have specialized awareness-raising campaigns on smuggling of migrants been carried out?
 - Have they been carried out in the country or in other countries of interest?
 - Has this been done through a cooperative process?
- What has been the message of the campaign?
 - Does the campaign warn against the risks of smuggling of migrants as well as the consequences of offending?
 - Does the campaign highlight the involvement of organized criminal groups operating for profit?
 - Has the campaign also addressed other risks such as becoming victims of trafficking in persons?
- What was the target audience of specialized awareness-raising campaigns on smuggling of migrants?
 - Has the awareness-raising campaign reached the target audience?
- How are such campaigns designed and disseminated?
- Have awareness-raising campaigns been evaluated?
 - Have the results of such an evaluation been made accessible to all relevant actors?
- Do the relevant law enforcement agencies have any involvement in awareness campaigns?
- Have the media been involved in communicating about the smuggling of migrants in the country and in other countries of relevance?



XII ADDITIONAL GUIDELINES AND TOOLS

- *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 372-375.

- *Toolkit to Combat Smuggling of Migrants:*
 - Section 9.6, entitled “Raising awareness among potential smuggled migrants”, pp. 22-24;
 - Section 9.7, entitled “Designing a communication strategy to raise awareness”, pp. 25-28;
 - Section 9.9, entitled “Role of the media in raising awareness”, pp. 33-34;
 - Section 9.10, entitled “Role of the police in raising awareness”, pp. 35-36.
- *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 45-47, 51, 94 and 103-107.
- *Model Law against the Smuggling of Migrants*, p. 80.
- *Issue Paper: Smuggling of Migrants by Sea*, pp. 47-49.

XIII. Research and data collection

Information and statistics about the prevalence and patterns of the smuggling of migrants and the criminal justice system's response to this crime are essential to the proper planning of justice reforms and capacity-building, as well as technical assistance initiatives. The sharing of this information between States, particularly those that share borders, allows for a coordinated response to the issue.

Assessing a criminal justice system can be quite challenging, particularly when there is very little quantitative information available on the system itself, on the problems and the types of crime that it is confronted with or on the resources at its disposal. The present chapter will provide guidance on the assessment of a country's capacity to produce, analyse, use and share reliable and timely crime data and statistics, prosecution and sentencing data, performance measures, operational databases and independent scholarly research relevant to the smuggling of migrants and use these findings to develop evidence-based responses to smuggling of migrants and related issues.

A. Data collection

In the absence of reliable data, efforts to estimate the prevalence of the smuggling of migrants and the number of smuggled migrants involved are reduced to guesswork. Without reliable data on this type of crime, the criminal justice response to it can hardly become strategic and the relative success of current efforts cannot be measured.

The absence of comprehensive and reliable data on the prevalence and characteristics of the smuggling of migrants has a direct impact on the ability of those charged with enforcing relevant laws. If the scale and nature of the problem are not known, it is unlikely that effective strategies will be developed and appropriate resources will be allocated to prevent and suppress it. Without accurate information about the smuggling of migrants, prevention strategies cannot be identified, and suppression activities remain ineffective.¹²³ Without such data, it is nearly impossible to evaluate the efficiency and impact of existing policies, legislation and enforcement programmes, and to provide useful feedback to policymakers and legislators. Without defensible and realistic baseline data, claims concerning the operation and impact of strategies for combating the smuggling of migrants cannot be verified, and thus the credibility and commitment of government programmes are left subject to question. Information gleaned from detection measures can also be used to make effective campaigns against illegal activities.

Remarkably, few Governments have systematic—if any—statistics on the smuggling of migrants. In many countries, statistics about the smuggling of migrants are not collected at all, and even if they are collected they are often fed into broad categories and become indistinguishable from other crimes. Few countries collect data on the number of investigations, prosecutions and convictions

¹²³See further *International Framework for Action to Implement the Smuggling of Migrants Protocol*, pp. 8-9.

relating to different types of offences connected with the smuggling of migrants. Fewer countries still can produce data on the number of offences by type of offender, geographic location, countries involved or severity of the crime. Even when statistics exist, they are rarely published or otherwise openly available, which further hampers efforts to analyse and understand the levels and patterns of the smuggling of migrants and design adequate strategies to fight it.

However, if collected and reported consistently, such information makes it possible to review investigation and prosecution processes and identify potential weaknesses in the criminal justice system that cause cases to collapse. Data collection should be followed by timely data analysis to identify and understand trends and patterns in the smuggling of migrants, and data dissemination.

Crime statistics generally count only those criminal offences that come to the attention of the police or other law enforcement agencies. However, for a variety of reasons, smuggled migrants and witnesses of the smuggling of migrants do not report offences to the authorities. The reporting rate, as it is usually referred to, may be affected by a number of factors, including access to law enforcement agencies and confidence (or lack thereof) in the police. The difference between how much crime actually occurs and how much crime is reported to or detected by the authorities is usually referred to as the “dark figure” of crime. Crime statistics are therefore an imperfect measure of the number of crimes actually committed, but usually the best available.



XIII.A RESEARCH AND DATA COLLECTION: DATA COLLECTION

International requirements

- Article 10 of the Smuggling of Migrants Protocol.
- Articles 27, paragraphs (e)-(f), and 28 of the United Nations Convention against Transnational Organized Crime.

There are no specific provisions in the Smuggling of Migrants Protocol or the United Nations Convention against Transnational Organized Crime that require States parties to collect data about the smuggling of migrants. There are, however, a number of relevant provisions that provide a justification for doing so.

States parties are required, consistent with existing legal and administrative systems, to exchange with other States parties a range of information ranging from general research and policy-related material about the smuggling of migrants and related problems to more specific details of methods used by smugglers (see article 10 of the Smuggling of Migrants Protocol). Article 27, paragraph (e), of the United Nations Convention against Transnational Organized Crime creates a similar obligation. The specifics of these requirements are further detailed in section XIII.B, below. The standardized collection of data can facilitate effective information-sharing among States.

Article 28, paragraph 1, of the United Nations Convention against Transnational Organized Crime also requires that States parties shall:

consider analysing, in consultation with the scientific and academic communities, trends in organized crime in its territory, the circumstances in which organized crime operates, as well as the professional groups and technologies involved.



XIII.A ASSESSMENT QUESTIONS

Data collection

- Are crime statistics collected?
 - Which agencies collect crime statistics?
 - Are crime statistics centrally gathered and analysed (are there coverage issues)?
 - How regularly are crime statistics collected (periodicity)?
 - How often and where are crime statistics published?
 - Are crime statistics publicly available?
 - Do crime statistics include all offences relating to the smuggling of migrants and are these offences distinguished clearly from other types of crime?
- Are statistics on regular and irregular migration collected?
 - To which level of detail are these statistics available?
- Are other data collected and statistics produced by specialized agencies on smuggling of migrants?
 - Who collects them and what do they include?
 - Do the data distinguish between types of smuggling of migrants offences?
 - Do the data include the number of migrants being smuggled, the place of origin and their destination?
- Do any of the data collected by government agencies contain information about the perpetrators, location of the offence and any harm or damage caused?
- Are data on the smuggling of migrants analysed centrally?
 - If so, which agency conducts the analysis?
 - Are analyses published; are they (fully or partially) available to the public?
- Have any estimates been produced in the country of the frequency of smuggling of migrants, the number of smuggled migrants, the number of migrant smugglers and so forth? If so, how reliable are these estimates?
- Are court and prosecution data pertaining to smuggling of migrants offences available?
 - How are data from these records collected and compiled?
 - Is sentencing data on cases of smuggling available?
- Are international or regional organizations or non-governmental organizations collecting and/or analysing data relating to smuggling of migrants relevant to the country?
 - If yes, which organizations collect or analyse the data?
 - Are analyses published; are they (fully or partially) available to the public?



XII ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 9.8, entitled “Use of standardized data collection instruments”, pp. 29-31.

B. Databases

Information-sharing between national agencies and across international borders is crucial in combating the smuggling of migrants as a transnational crime. A variety of tools designed to initiate and facilitate cooperation within and among countries are identified in other sections of the present *Assessment Guide*.¹²⁴ In addition, the creation and management of national and international databases can provide platforms to report and record information pertaining to the smuggling of migrants in standardized ways, and share it with domestic and international partners.

Some countries—albeit a very small number—maintain national databases that record all incidents of smuggling of migrants, as well as the details of all successful and unsuccessful prosecutions mounted.¹²⁵ Databases such as these provide an effective tool for further analysis and sound policy development.



XIII.B RESEARCH AND DATA COLLECTION: DATABASES

International requirements

- Article 10 of the Smuggling of Migrants Protocol.
- Articles 27, paragraphs (e)-(f) and 28 of the United Nations Convention against Transnational Organized Crime.

There are no specific provisions in the Smuggling of Migrants Protocol or the United Nations Convention against Transnational Organized Crime that require States parties to implement databases that record relevant information about the smuggling of migrants. There are, however, a number of relevant provisions that provide a justification for doing so.

States parties are required, consistent with existing legal and administrative systems, to exchange with other States parties a range of information ranging from general research and policy-related material about smuggling and related problems to more specific details of methods used by smugglers (see article 10 of the Smuggling of Migrants Protocol). Article 27, paragraph (e), of the United Nations Convention against Transnational Organized Crime creates a similar obligation on States parties. The implementation of databases would clearly assist in such analysis, particularly in relation to identifying smuggling of migrants trends and routes.



XIII.B ASSESSMENT QUESTIONS

Databases

- Does the country maintain a national database on immigration patterns (including, for example, known cases of undocumented migrants)?

¹²⁴See sections II.B and IX.D.

¹²⁵See, for example, *Toolkit to Combat Smuggling of Migrants*, Tool 9, entitled “Prevention of the smuggling of migrants”, pp. 29-31.

- Does the country maintain a national database of asylum seekers and refugees?
- Does the country maintain a national database that records incidents of smuggling of migrants?
 - If so, how is the data collected and what does it cover?
 - Which agency maintains the database?
 - Who has access to it?
- What information is recorded?
 - How is information recorded and disseminated?
- How are the data analysed?
 - Which agency analyses the data?
 - Are analyses of data (fully or partially) available to the public?



XIII.B ADDITIONAL GUIDELINES AND TOOLS

- *Toolkit to Combat Smuggling of Migrants*:
Section 9.8, “Use of standardized data collection instruments”, pp. 29-31.

C. Research and analysis

Independent, scholarly research is a crucial step in understanding the smuggling of migrants. It can also assist in assessing existing and proposed government policies, legislation and administrative and enforcement measures, and in developing recommendations for law reform and policy change.

It is encouraging that a growing number of research institutions, universities, individual scholars and other experts are developing an interest in researching the many aspects and facets of the smuggling of migrants and are making their findings available to relevant audiences and the public at large. Such research can also give greater legitimacy to relevant government initiatives. Only with a proper knowledge base can Governments be encouraged and held accountable to take evidence-based policy action that would lead to altering the dynamics of the smuggling of migrants.



XIII.B RESEARCH AND DATA COLLECTION: RESEARCH AND ANALYSIS

International requirements

- Articles 10 and 15 of the Smuggling of Migrants Protocol.
- Article 28 of the United Nations Convention against Transnational Organized Crime.

Article 10 of the Smuggling of Migrants Protocol requires States to exchange with other States parties information ranging from general research and policy-related material about the smuggling of migrants and related issues to more specific details of methods used by smugglers. The specifics of those requirements are further detailed in section IX.D above.

Independent and scholarly research is also important in contributing to prevention measures such as information programmes to increase public awareness of the smuggling of migrants, efforts to prevent potential migrants from falling victim to organized criminal groups and promoting or developing programmes to combat the root causes of the smuggling of migrants (see article 15 of the Smuggling of Migrants Protocol). Article 28 of the United Nations Convention against Transnational Organized Crime further highlights the importance of independent research and analysis.



XIII.C ASSESSMENT QUESTIONS

Research and analysis

- What independent research on any aspect of the smuggling of migrants has been undertaken in the country?
 - What aspects have been researched and by whom?
 - What are the key findings of such research as it relates to the country?
- Are there research institutions specializing in research on the smuggling of migrants and related issues (immigration, trafficking in persons, organized crime)?
- How are relevant government agencies supporting and facilitating independent research on the smuggling of migrants?
- Have any of the research findings generated by independent research institutions or non-governmental organizations had an impact on policies and practices relating to the smuggling of migrants?



XIII.C ADDITIONAL GUIDELINES AND TOOLS

- *Issue Paper: Smuggling of Migrants by Sea*, pp. 50 and 60.

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