

## **Provisions of UNTOC and the Smuggling of Migrants Protocol not addressed in the self-assessment questionnaires**

### **I. Introduction**

Following-up to the informal consultations on the harmonization of the self-assessment questionnaires of UNTOC and its Protocols, held by the Chair of the Open-ended intergovernmental expert group of the Conference of the Parties, established in accordance with resolution 9/1 on 27-30 April 2020, the Secretariat prepared, upon the Chair's request, for the convenience of the expert group, the below list of 34 provisions (a few articles and mostly paragraphs within certain articles) of the Convention and the Smuggling of Migrants Protocol which are not covered by the present self-assessment questionnaires.

Of these ~~33~~34 provisions, ~~22~~23 are paragraphs of articles 16 and 18 of the Convention on extradition and mutual legal assistance respectively.

The reason for this high percentage of provisions of both articles 16 and 18 of the Convention among the total number of provisions not covered in the self-assessment questionnaires, lies in the fact that even at very early stages of drafting the questionnaire on the UNTOC (for example, the work done within the Working Groups on International Cooperation and Technical Assistance of the Conference already in October 2017), the approach was not to include questions “paragraph by paragraph”, but, instead, to proceed with a coherent and streamlined set of questions covering the basic and important requirements of general applicability as set forth in articles 16 and 18 of the Convention. This approach was followed in subsequent drafts until today.

Some specific paragraphs of articles 16 and 18 (such as article 16(2)(3)(16)(17)) and article 18(30)) were covered by respective questions in earlier versions of the self-assessment questionnaires, but in the course of the negotiations these questions were removed.

For the convenience of the expert group, the list of provisions of UNTOC and the Smuggling of Migrants Protocol not covered by the self-assessment questionnaires, as cited below, is also available on the webpage of the expert group.

## **II. Provisions of UNTOC not addressed in the self-assessment questionnaires**

### **[CLUSTER I]**

#### **Article 5, paras. 2 and 3**

2. *The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.*

3. *States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.*

#### **Article 15, para. 5**

5. *If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

### **[CLUSTER II]**

#### **Article 24 para. 4 (Protection of witnesses)**

4. *The provisions of this article shall also apply to victims insofar as they are witnesses.*

## **[CLUSTER III]**

### **Article 11 paras. 2 and 4**

2. *Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this 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.*

4. *Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.*

## **[CLUSTER IV]**

### **Article 13, para. 5**

5. *Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.*

### **Article 16 para 2**

2. *If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.*

### **Article 16 para 3**

3. *Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.*

### **Article 16 para 9**

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

### **Article 16 para 13**

13. *Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.*

### **Article 16 para 14**

14. *Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

### ~~Article 16 para 16~~

~~16. — Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.~~

### **Article 16 para 17**

17. *States Parties shall seek to conclude bilateral and multi-lateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.*

#### **Article 18 paras 4-5**

4. *Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.*

5. *The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

#### **Article 18 paras 6 and 30**

6. *The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.*

30. *States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.*

#### **Article 18 paras 10-12**

10. *A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met: (a) The person freely gives his or her informed consent; (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

11. *For the purposes of paragraph 10 of this article: (a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred; (b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties; (c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person; (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

12. *Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

#### **Article 18 para 14**

14. *Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.*

#### **Article 18 paras 19-20**

19. *The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an*

*exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.*

20. *The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.*

#### **Article 18 para 23**

23. *Reasons shall be given for any refusal of mutual legal assistance.*

#### **Article 18 para 25**

25. *Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

#### **Article 18 para 26**

26. *Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.*

#### **Article 18 para 27**

27. *Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person 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.*

#### **Article 18 para 28**

*28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.*

#### **Article 18 para 29**

*29. The requested State Party:*

*(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

*(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

### **III. Provisions of the Smuggling of Migrants Protocol not addressed in the self-assessment questionnaires**

Four specific points are addressed below, each concerning a Protocol article or paragraph not currently explicitly addressed in the questions on the Smuggling of Migrants Protocol.

## [CLUSTER I]

### Article 5

*“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.”*

#### Background information:

- In an earlier version of the questionnaire, the following question addressing article 5 was included, discussed and then later removed:
  - “Does your domestic legislation provide for any measure (of a criminal or administrative nature) against smuggled migrants who have entered your country (articles 5 and 6, para. 4)?*
  - If the answer is yes, please specify and cite the applicable law(s) and/or other measure(s), including the applicable sanctions.”*

## [CLUSTER II]

### Article 9

*“1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:*

- (a) Ensure the safety and humane treatment of the persons on board;*
- (b) Take due account of the need not to endanger the security of the vessel or its cargo;*
- (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;*
- (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.*

*2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.*

*3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:*

*(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or*

*(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.*

*4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.*

Background information:

- The negotiated questionnaire currently refers to art. 9 in question 49 (Cluster II, harmonized version):

*“Has your country adopted specific legislative, administrative and other measures against smuggling of migrants at sea (article 8, in conjunction with articles 7 and 9)?*

Yes  No

*If the answer is “Yes”, please specify. Please also include information on operational challenges, successes and best practice.”*

- The question, as it stands, does not explicitly refer to the subject matter addressed in article 9, yet States agreed that this question would encompass it, perhaps through the follow-up question.

**Article 14, para. 3**

*3. “States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.”*

Background information:

- This provision of the Protocol requires States to consider providing technical assistance to countries of origin or transit for the smuggling of migrants. This

particular focus, on the provision, rather than receipt, of technical assistance/cooperation, is not covered elsewhere in the questionnaire, except for question 68 of Cluster IV, harmonized version, in relation to SOM at sea.

- The current general questions relating to the receipt of technical assistance (questions 64-67 of Cluster II, harmonized version), however, could suffice.

### **Article 15, para. 2**

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.”*

### Background information:

- This paragraph is not directly addressed in the current questions related to the Protocol, and an additional question might be framed to do so.

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6. *The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.*

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10. *A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met: (a) The person freely gives his or her informed consent; (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

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*2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.*

*3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:*

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