



Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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Working Group on the Smuggling of Migrants

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Good practices in special investigative techniques

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Background paper by the Secretariat

I. Introduction

1. Pursuant to resolution 5/3, adopted by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime at its fifth session, an open-ended intergovernmental interim working group on the smuggling of migrants was established to advise and assist the Conference in the implementation of its mandate with regard to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

2. In its resolution 6/3, the Conference of the Parties to the Organized Crime Convention decided that the Working Group should continue to perform its functions and should hold at least one intersessional meeting prior to the seventh session of the Conference.

3. In that resolution, the Conference also welcomed the report on the meeting of the Working Group held from 30 May to 1 June 2012,¹ which contained recommendations adopted by the Group on criminalization, investigation and prosecution, prevention, protection and assistance, as well as international cooperation and proposed areas for future work. In one of the recommendations, reference is made to a request to the Secretariat to, inter alia, organize a technical panel discussion on good practices involving the use of special investigative techniques in cases of the smuggling of migrants for the next meeting of the Working Group.

* CTOC/COP/WG.7/2013/1.

¹ CTOC/COP/WG.7/2012/6.



4. Furthermore, the Working Group recommended that, in efforts aimed at the detection and investigation of the smuggling of migrants, including efforts involving the use of special investigative techniques, States parties should take into account the safety and rights of the persons involved.

5. The present background paper was prepared by the Secretariat to aid in the discussion of the Working Group.

II. Issues for discussion

6. The Working Group may wish to consider the following issues as a basis for its deliberations:

(a) Which special investigative techniques are most effective in disrupting the smuggling of migrants, while also protecting migrants' safety and security?

(b) What are good practices related to the management of special investigative techniques in the context of migrant smuggling investigations that do not compromise the rights and freedoms of smuggled migrants and third parties?

(c) What are the challenges in the implementation of proactive investigation methods, according to the provisions regulating special investigative techniques in the United Nations Convention against Transnational Organized Crime, when applied to migrant smuggling cases?

(d) What are the most effective safeguards against abuse of special investigative techniques in the context of the smuggling of migrants? What safeguards are required in different jurisdictions and how strict are they?

(e) What are good practices in ensuring the admissibility of evidence in smuggling of migrants cases collected through the use of special investigative techniques in other jurisdictions?

III. Overview of issues and guidance for response

7. 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, as is the case for other provisions of the Organized Crime Convention, apply *mutatis mutandis* to the Smuggling of Migrants Protocol, unless otherwise provided therein.

8. Special investigative techniques, also known as "covert investigation techniques" differ from routine investigation methods, and include both covert techniques and the use of technology. They are particularly useful in dealing with sophisticated organized criminal groups in view of the dangers and difficulties inherent in gaining access to criminal operations and gathering information and evidence for use in domestic prosecutions.

9. On the other hand, the use of covert investigation techniques (such as the use of informants and undercover officers; different forms of electronic surveillance utilizing various techniques and technical equipment; as well as the deployment of controlled delivery techniques) may have serious implications for the safety of smuggled migrants. Accordingly, a key consideration in using such techniques in operations is the level of risk posed to smuggled migrants. Accordingly, where the use of special investigative techniques might potentially result in a migrant being harmed, an intervention plan should be put into place. Covert investigation techniques may also impinge upon the basic rights and freedoms of the persons under surveillance and may result in the acquisition of private information that is unrelated to any criminal act.

10. The collection of evidence in smuggling of migrants cases through special investigation techniques requires, in most jurisdictions, strict adherence to a number of safeguards against potential abuses of authority. In most jurisdictions, judicial or independent oversight of the use of these techniques is a common practice, requiring strict observance of principles of legality, subsidiarity and proportionality. These restrictions require investigators to consider less intrusive investigative techniques prior to special investigative techniques.

11. Respect for the rights and freedoms of individuals, when using special investigative techniques in smuggling of migrants cases, should be balanced against the need to investigate the crime. For example, when using electronic surveillance, information other than that related to an instance of smuggling of migrants could be collected. Consultation with prosecuting authorities may be useful in balancing law enforcement objectives against the rights of individuals affected by a smuggling of migrants' investigation.

12. When considering the use of special investigative techniques, the specific vulnerabilities of the migrants who are the object of the smuggling, must be addressed in all responses to migrant smuggling in countries of origin, transit and destination. In addition to the applicable Protocol provisions, the General Assembly, in its resolution 64/139, on violence against women migrant workers, highlighted gender considerations. In that resolution, the Assembly encouraged Member States to sign or ratify and accede to the Smuggling of Migrants Protocol, as well as to all human rights treaties that contributed to the protection of the rights of women migrant workers, and called upon Governments to take several measures to protect women from violence. Such measures could also include the protection of the rights of migrant women, who are the object of smuggling, when using special investigative techniques.

13. In September 2010, the Office of the United Nations High Commissioner for Human Rights published a study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration.² The study noted that there were serious gaps in the protection of migrant children in all regions of the world and called on countries of origin, transit and destination to adopt child-sensitive and rights-based approaches, in which the "best interests" of the child are the primary consideration with respect to all measures taken concerning children. The Special Rapporteur on the human rights of migrants, in his report to the Human Rights Council, drew

² A/HRC/15/29.

particular attention to the plight of migrant children and recommended that States, especially those of transit and destination, should devote special attention to the protection of undocumented, unaccompanied and separated children, as well as to the protection of children seeking asylum and child victims of transnational organized crime, including smuggling.³ Accordingly, attention should be paid to the gaps in protection of migrant children, who are also smuggled and are particularly vulnerable, when considering the use of special investigative techniques, thereby ensuring that the protection of their safety and security remains a primary concern for investigating authorities at all times.

A. Undercover operations

1. Informants

14. Although the word “informant” may have different meanings in different jurisdictions, for the purpose of this paper, the term refers to a human source providing intelligence. The informant may be a member of the public, a victim or object of crime, a perpetrator or a police officer. Many informants are themselves criminals with a variety of motivations for providing information and, therefore, require very careful management. Motivating factors may include altruism, financial reward, retaliation or the elimination of criminal competition, among others. More efficient informants in smuggling of migrants cases are either smuggled migrants, criminals involved in the smuggling of migrants or persons who offer services (e.g. employees or owners of travel agencies, transport companies, hotels and guesthouses, telecommunication shops or translation services) that could be used by smugglers and/or smuggled migrants. Such persons are in a position to facilitate access to a closed community or a specific ethnic group or culture.

15. Different categories of informants are used in criminal investigations. Non-confidential informants provide information with the understanding that the statements they provide will be disclosed, and that testimony at trial may be required. On the other hand, confidential informants provide information in the expectation that their identity will be protected. Finally, anonymous informants provide tips to law enforcement anonymously via the public, media, different organizations or hotlines. The credibility of such information is often difficult to establish but, in all cases, it requires the corroboration and consideration of the motives involved, which might be unethical, unlawful or prejudicial to the success of the operation. In recruiting and using informants in smuggling of migrants cases, as in many other cases, special attention should be paid to the safety of the informants and the protection of their identity. It should be noted that, in some jurisdictions, national legislation requires the disclosure of the identity of informants to the defence in advance of the trial.

16. To ensure the protection of and support to informants, carefully regulated mechanisms for using, managing and supervising, as well as paying, informants should be in place. The relationship between informants and the police officers who handle them, poses some challenges, such as a higher risk for corruption and a potential for a relationship to become personal. In addition, courts and defence

³ A/HRC/17/33.

counsel will often challenge the motives of informants. Moreover, understanding the difference between confidential and non-confidential information and disclosure of the identity of informants is essential, especially where the informant is close to the criminal activity. In any case, advice from a senior officer, prosecutor or the judiciary should be sought in governing the use of informants, thereby ensuring the admissibility of the evidence collected. The transnational nature of the smuggling of migrants requires that investigators should be familiar with their own legislation as well as the legislation of countries with which they cooperate.

2. Undercover officers

17. Article 20, paragraph 1, of the Organized Crime Convention provides for a number of special investigative techniques, including the use of undercover operations when permitted and under the conditions prescribed by national law. An undercover agent or undercover officer is a law enforcement officer, who pretends to be a criminal in order to obtain information, typically by infiltrating a criminal group. Utmost care should be taken to assess the risks due to the serious danger and difficulties inherent to the task and only suitably trained officers should be deployed in such a capacity.

18. All information collected by an undercover officer could be used as potential evidence. However, in most jurisdictions, undercover officers are not allowed to encourage suspects to commit crimes that they would not ordinarily commit, either as an agent provocateur or through entrapment. Rather, their role is usually to become part of an existing conspiracy.

19. Using undercover officers presents several advantages over the use of informants such as obtaining first-hand information, as well as better managing personal safety and controlling activities. It also allows for the corroboration of evidence through audio/video recordings, where permitted by domestic legislation. Yet, the deployment of undercover officers entails high risk and difficulties inherent to infiltration. It is also time and resource intensive, and evidence gathered by undercover officers may be potentially inadmissible, hence, specific considerations should apply in deploying undercover officers in smuggling of migrant investigations. For example, when placing an undercover officer in a safe house, an operational plan, supervision, risk assessment, exit strategy and rescue team should be put in place. Officers involved in the operation should be specially trained to run undercover operations. In smuggling of migrants operations, training should include additional safety measures, such as becoming acquainted with the language and slang used, as well as the particularities of the culture of the group of migrants or smugglers under surveillance. There have been cases of undercover officers' exchange programmes between jurisdictions.

20. Deployment of undercover officers should be subject to strict confidentiality and prior risk assessment. The objectives of investigation should be clearly defined, with necessary authorization sought, and with the well-being and safety of migrants considered to be of paramount importance.

B. Electronic surveillance

21. Article 20, paragraph 1, of the Organized Crime Convention also refers to the use of electronic or other forms of surveillance. 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 pose an unacceptable risk to the investigation or the safety of the investigators.

22. Technical surveillance may include interception of telecommunications and telephone data; the use of listening devices; closed-circuit television (CCTV); number-plate recognition systems; heartbeat monitors; CO₂ detectors; and X-rays. Investigators of smuggling of migrants cases use these techniques and technical equipment for different purposes. For example, heartbeat monitors, CO₂ detectors and X-rays can assist in detecting the presence of migrants in a concealed vehicle. It should be noted, however, that smugglers may be quick to adapt to detection techniques and develop counter-surveillance measures to mitigate the effects of the former.

23. Techniques and technical equipment used for investigations of cell phones and Internet, as well as devices for tachographs and satellite navigation systems, play an essential role in investigating smuggling of migrants cases. Not only do they assist in intercepting communications between smugglers, service providers and migrants, as well as among migrants and smugglers themselves, including communications relating to the orders of payments connected to the smuggling of migrants. However, the language barrier, frequent changes of phone number or Internet address by those under surveillance, as well as the use of informal financial systems, may hinder investigators in their efforts to secure evidence through electronic surveillance.

24. Most of these techniques are very resource-intensive and the more electronic surveillance is used, the more criminals will become aware of it, thus lessening its effectiveness. As technology changes rapidly, criminal justice practitioners should familiarize themselves with the types of technical equipment used by migrant smugglers, as well as keep abreast of advances in technology which may aid their investigations.

25. Given its intrusiveness and its potential to undermine privacy rights, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse. A full risk assessment and the definition of clear objectives for its application should be a prerequisite to any use of electronic surveillance. As with other forms of covert investigation techniques, the admissibility of the evidence collected via electronic surveillance may be questioned in other jurisdictions.

C. Controlled delivery

26. In article 20, paragraph 1, of the Convention it is stipulated, *inter alia*, that each State party should, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery for the purpose of combating organized crime. The decision on

when or whether to use this technique in a specific circumstance is left to the discretion and resources of the State concerned. In some jurisdictions, the use of controlled delivery is prohibited.

27. In the context of smuggling of migrants cases, the term “controlled delivery” is used to describe the method by which a criminal enterprise is allowed to move migrants, while law enforcement agencies watch the operation or are aware of it being carried out, in order to discover the identity of offenders or identify premises used in the course of their criminality. Controlled delivery can also be used, for example, to allow the delivery of passports or with people who are not at risk, such as cash couriers, or by allowing the clandestine or non-clandestine movement of people. In the migrant smuggling context, controlled deliveries are often conducted through joint investigations because of the cross-border nature of the offences, where cooperation among immigration and law enforcement authorities is essential and where appropriate authorization must be obtained. The fundamental principle, when considering the use of controlled deliveries, is to ensure that the lives or safety of people involved will not be put at risk.

D. International cooperation

28. Since controlled deliveries and undercover operations targeting smuggling of migrants frequently require cooperation and coordination among multiple judicial authorities and law enforcement agencies of different countries, international cooperation is essential to facilitating the smooth conduct of such operations.

29. In article 20, paragraph 2, of the Organized Crime Convention, States parties are encouraged to conclude arrangements in the form of bilateral and multilateral accords. It is important to note that, while some forms of covert investigations may be legal in some jurisdictions, they may be unacceptable in others.

30. Article 20, paragraph 3, of the Convention provides that, in the absence of an agreement or arrangement, decisions to use special investigative techniques at the international level should be made on a case-by-case basis, and may take financial aspects into consideration.

Annex

Key tools and recommended resources

Toolkit to Combat Smuggling of Migrants

The UNODC *Toolkit to Combat Smuggling of Migrants* has been designed to assist countries to implement the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The Toolkit provides guidance, offers promising practices and recommends resources in thematic areas. Tool 7, on law enforcement and prosecutions, offers criminal justice practitioners a basic overview of the considerations relevant to investigating and prosecuting the smuggling of migrants and related crimes. Tool 7.9 introduces special (or covert) investigative techniques that may be used in investigations into the smuggling of migrants.

www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/toolkit-to-combat-smuggling-of-migrants.html

Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants

The UNODC *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* is a practical guide and training tool for criminal justice practitioners around the world. Individual modules are designed to be adapted to the needs of different regions and countries, and can serve as a basis for upgrading or supplementing additional training programmes of national training institutes. Module 5 addresses covert investigative techniques.

www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/electronic-basic-training-manual-on-investigating-and-prosecuting-smuggling-of-migrants.html

In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants

The UNODC *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants* builds on the *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* to promote common understanding of relevant concepts and encourages States parties to adopt a mutually reinforcing approach in their responses to the transnational organized crime of smuggling of migrants. The manual offers a practical approach to the investigation and prosecution of the smuggling of migrants, offering promising practices relevant to all countries of origin, transit and destination, regardless of their legal system. Module 10 addresses covert investigative planning, techniques and tactics.

www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/in-depth-training-manual-on-smuggling-of-migrants.html

International Framework for Action to Implement the Smuggling of Migrants Protocol

The *International Framework for Action to Implement the Smuggling of Migrants Protocol* is a technical assistance tool that aims to support effective implementation

of the Smuggling of Migrants Protocol. Its purpose is to assist States parties and non-State actors to identify and address gaps in their response to smuggling of migrants in accordance with international standards.

International instruments, political commitments, guidelines and best practices are drawn upon towards elaborating a comprehensive approach to preventing and combating the smuggling of migrants. The International Framework is comprised of four tables addressing prosecution (and investigation), protection (and assistance), prevention, and cooperation (and coordination).

www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf

Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto

The main purpose of the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* is to assist States seeking to ratify and implement the United Nations Convention against Transnational Organized Crime and its Protocols. The Legislative Guides address special investigative techniques in the context of procedural and other legislative amendments to ensure effective criminalization (chapter IV).

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html#_Full_Version_2

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

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

The Assessment Guide, in its chapter IV, on criminal intelligence, dedicates a special section to covert investigation techniques.

www.unodc.org/documents/human-trafficking/Migrant-Smuggling/UNODC_2012_Assessment_Guide_to_the_Criminal_Justice_Response_to_the_Smuggling_of_Migrants-EN.pdf

Criminal justice assessment toolkit

The “Criminal justice assessment toolkit” is a standardized and cross-referenced set of tools designed to enable United Nations agencies, government officials engaged in criminal justice reform, as well as other organizations and individuals, to conduct comprehensive assessments of criminal justice systems; to identify areas of technical assistance; to assist agencies in the design of interventions that integrate United Nations standards and norms on crime prevention and criminal justice; and to assist in training on these issues.

The tools have been grouped within criminal justice system sectors, with the first four sectors as follows: policing; access to justice; custodial and non-custodial measures; and cross-cutting issues. The covert techniques are specifically addressed in the policing sector of the Toolkit, under the crime investigation segment.

www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Crime_Investigation.pdf
