United Nations CTOC/COP/2006/3

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

Distr.: General
9 August 2006

Original: English

Third session
Vienna, 9-18 October 2006
Items 2, 3 and 4 of the provisional agenda*

Review of the implementation of the United Nations Convention against Transnational Organized Crime

Review of the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

Review of the implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Implementation of the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air and programme of work of the Conference of the Parties thereto: clarification from States parties on non-compliance for the first reporting cycle

Analytical report of the Secretariat

Contents

		Paragraphs	Page
I.	Mandate of the Conference of the Parties	1-8	3
II.	Reporting process	9-51	4
	A. Introduction	9-10	4

* CTOC/COP/2006/1.

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	B. Communications with States reporting non-compliance with specific requirements of the Convention	11-16	5
	C. Communications with States reporting non-compliance with specific requirements of the Trafficking in Persons Protocol	17-42	6
	D. Communications with States reporting non-compliance with specific requirements of the Migrants Protocol	43-44	14
	E. Communications with States reporting non-compliance with specific requirements of both the Trafficking in Persons and the Migrants Protocols	45-51	14
III.	Concluding remarks	52-53	17

I. Mandate of the Conference of the Parties

1. At its first session, held in Vienna from 28 June to 8 July 2004, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime agreed to move forward on a knowledge-based approach for reviewing the implementation of the United Nations Convention against Transnational Organized Crime (the "Organized Crime Convention"), as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the "Trafficking in Persons Protocol"), and the Protocol against the Smuggling of Migrants by Land, Sea and Air (the "Migrants Protocol"), both supplementing the parent Convention. In that context, the Conference adopted separate decisions for each of the instruments (decisions 1/2, 1/5 and 1/6) and approved its programme of work specifying priority areas for consideration, including:

(a) The basic adaptation of national legislation to the requirements of the Convention and the Protocols;

(b) The examination of criminalization legislation and the difficulties encountered in the implementation of such legislation;

(c) Enhancing international cooperation and developing technical assistance to overcome difficulties identified in the implementation of the Convention and the Protocols.

2. In the same decisions, the Conference of the Parties requested the Secretariat to collect information on the implementation of the Convention and the Protocols from States parties and signatories to the instruments. Furthermore, the Secretariat was requested to use for information-gathering purposes the questionnaires that had been developed in accordance with the programme of work of the Conference and approved by that body at its first session. The Conference also requested States parties to respond promptly to the questionnaires circulated by the Secretariat and further invited signatories to provide the required information.

3. The responses received in due time from Member States (States parties and signatories to the Convention and the two Protocols and some non-signatories in relation to the Protocols) were reflected in the analytical reports of the Secretariat, submitted to the Conference at its second session for its consideration.[1] In some of those responses, issues of non-compliance with specific mandatory requirements of the Convention and the two Protocols were reported.

4. At its second session, the Conference of the Parties took note of the analytical reports and noted with concern that a number of States parties had not complied with their obligations under the Convention and the Protocols. In its decision 2/1, the Conference urged those States parties that had not complied with their obligations under the Convention to take steps to do so as soon as possible and to provide information on those steps to the Secretariat for submission to the Conference at its third session.

5. In its decision 2/2, the Conference also urged States parties that had not complied with the requirements of article 16, in particular paragraphs 5, 6 and 15 thereof, and article 18, paragraph 8, of the Convention, to take steps to do so as soon as possible.

6. The Conference further requested the Secretariat to seek clarification from States parties that had indicated that they were not in compliance with the mandatory obligations set forth in article 16 of the Convention, in particular by asking for further information from States parties that had reported that they did not grant extradition on the basis of a treaty or on the basis of domestic law and from States parties that had reported that they refused extradition on the ground that the offence involved fiscal matters.

7. In the same decision, the Conference requested the Secretariat to seek clarification from States parties that had reported that they were not in compliance with the mandatory obligation set forth in article 18 of the Convention, in particular with respect to declining to render mutual legal assistance on the ground of bank secrecy.

8. In its decisions 2/3 and 2/4, the Conference of the Parties urged those States parties which had not complied with their obligations under the Trafficking in Persons and Migrants Protocols respectively to rectify that situation as soon as possible and to provide information on the measures taken to do so to the Secretariat for submission to the Conference at its third session.

II. Reporting process

A. Introduction

9. In compliance with the above-mentioned decisions, the Secretariat sent individual communications to a total of 31 States parties to the Convention and the two Protocols, seeking clarification on certain issues on which national legislation or practices had been reported to depart from, or not to be in full compliance with, the requirements of those instruments. The individual communications were sent to the following States: Algeria, Argentina, Azerbaijan, Belarus, Brazil, Bulgaria, Chile, Costa Rica, Ecuador, Egypt, El Salvador, Estonia, France, Honduras, Jamaica, Latvia, Mauritius, Mexico, Morocco, Myanmar, Namibia, New Zealand, Nigeria, Peru, Philippines, Portugal, Republic of Moldova, Romania, South Africa, Tunisia and Turkey. By means of an information circular,[2] the Secretariat called upon those of the above-mentioned States parties which had not done so to reply to the individual communications sent to them as soon as possible but not later than 10 July 2006. As at 24 July 2006, the Secretariat had received replies from the following States: Algeria, Argentina, Azerbaijan, Bulgaria, El Salvador, Estonia, Latvia, Portugal, Romania and Turkey.

10. Paragraphs 11-51 below present details of the communications with all the States that had reported national legislative gaps or practices not compatible with specific requirements set forth in the Convention and the two Protocols and further provide an overview of the issues on which clarification was requested by the Secretariat from each recipient State separately, as well as the replies received from the responding countries. The information is categorized by instrument and the countries are grouped accordingly, depending on whether the deficiencies or gaps refer to the provisions of the Convention, the Trafficking in Persons Protocol, the Migrants Protocol or both the Trafficking in Persons and Migrants Protocols.

B. Communications with States reporting non-compliance with specific requirements of the Convention

11. In its reply to the questionnaire on the implementation of the Convention, the Government of Myanmar had indicated that extradition was not granted by statute nor by treaty or other agreement but by virtue of reciprocity, on conditions agreed upon through bilateral consultation. It further indicated that its domestic legal framework did not permit extradition for offences involving fiscal matters. The Secretariat sent a note verbale on 15 March 2006 seeking clarification and further information on Myanmar's status of compliance with the mandatory provisions of article 16 of the Convention and on any step contemplated to bring Myanmar's legal system into compliance with them. At the time of preparing the present report, the Government of Myanmar had not responded to the Secretariat.

12. In its reply to the questionnaire on the implementation of the Convention, the Government of Honduras had indicated that extradition was in no case allowed and provided a negative response to all questions related to extradition, including the question on whether extradition could be granted for offences involving fiscal matters. The Secretariat sent a note verbale on 15 March 2006 seeking clarification and further information on the status of compliance of Honduras with the mandatory provisions of article 16 of the Convention and on any step contemplated to bring its legal system into compliance with them. At the time of preparing the present report, the Government of Honduras had not responded to the Secretariat.

13. In their replies to the questionnaire on the implementation of the Convention, the Governments of Morocco, New Zealand and the Philippines had indicated that their domestic legal framework did not permit extradition for offences involving fiscal matters. The Secretariat sent a note verbale on 15 March 2006 to each of those countries seeking clarification and further information on their status of compliance with the mandatory provision of article 16, paragraph 15, of the Convention and on any step contemplated to bring their legal system into compliance with that essential provision of the Convention. At the time of preparing the present report, the Governments of Morocco, New Zealand and the Philippines had not responded to the Secretariat, even though the Permanent Mission of New Zealand had sought clarifications to facilitate a timely response.

14. In their replies to the questionnaire on the implementation of the Convention, the Governments of Algeria, Belarus and El Salvador had indicated that under their domestic legal framework, bank secrecy was a ground for refusal of mutual legal assistance. The Secretariat sent a note verbale on 15 March 2006 to each of those countries seeking clarification and further information on their status of compliance with the mandatory provision of article 18, paragraph 8, of the Convention and on any step contemplated to bring their legal system into compliance with that essential provision of the Convention. At the time of preparing the present report, the Government of Belarus had not responded to the Secretariat.

15. In its response of 19 July 2006, the Government of Algeria reported that in the framework of its global justice reform efforts, it had strengthened national legislation to ensure compliance with the provisions of international treaties to which that country was a party, including the Organized Crime Convention. A law of 6 February 2005 on prevention of and combating money-laundering and the

financing of terrorism had been adopted, which provided in its article 22 that professional and bank secrecy could not be opposed to the Financial Treatment Unit. Algeria reported that article 25 of that law enabled the Unit to provide to foreign States' bodies with similar functions information on operations that appeared to aim at money-laundering or the financing of terrorism, subject to reciprocity. Article 26 of the same law provided that cooperation and exchange of information would take place in accordance with the provisions of the international conventions and of domestic law relevant to protection of private life and of protection of personal data. Algeria therefore considered that domestic legislation had been brought into compliance with the provision of paragraph 8 of article 18. It also stressed that bank secrecy could not be invoked towards judicial investigation authorities, which could order its lifting in the framework of judicial proceedings. Furthermore, Algeria considered that there was no obstacle to lifting bank secrecy in the framework of bilateral mutual legal assistance agreements.

16. In its response of 13 June 2006, the Government of El Salvador quoted article 232 of its Banking Law, which provided that bank secrecy shall not constitute an obstacle to the establishment of evidence of an offence or to the confiscation of the proceeds of crime. It stressed that bank secrecy could not be invoked towards judicial investigation authorities, which were governed by the public interest in discovering evidence on an offence. El Salvador concluded that mutual legal assistance was understood as a mechanism to investigate offences and to ensure the execution of sentences imposed abroad and therefore bank secrecy could not be invoked to deny cooperation.

C. Communications with States reporting non-compliance with specific requirements of the Trafficking in Persons Protocol

17. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Portugal had indicated, inter alia, that the definition of "trafficking in persons" in its domestic legislation did not provide for the action of recruitment of such persons; that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons included only the exploitation of the prostitution of others or other forms of sexual exploitation and not the other illegal acts mentioned in article 3, subparagraph (a), of the Protocol; and that despite the general rule of treating any person under 18 years of age as a minor from a victim's perspective, that age threshold dropped to 16 years with regard to trafficking in minors and the exploitation of prostitution. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraphs (a) and (d), of the Protocol.

18. In its letter dated 31 March 2006, the Government of Portugal informed the Secretariat that the task force created within the Ministry of Justice for the revision of its domestic legislation in criminal matters had proposed new wording for the offences against sexual freedom and sexual self-determination. In that context, the scope of the proposed provision on trafficking in persons was broader, including trafficking for the purpose of sexual exploitation, labour exploitation and removal of

organs. The same expanded exploitative purpose was also provided for the offence of trafficking in minors. Furthermore, the proposed provision contained the actions of recruitment, transportation, transfer, harbouring and receipt of persons in accordance with the definition of the Trafficking in Persons Protocol. Portugal also highlighted the special vulnerability that the national legislator accorded to persons of 14 and 16 years old and stated that those age thresholds were taken into account in some provisions related to sexual offences to indicate the gravity and seriousness of such offences. However, the wording of the new proposed provision on sexual exploitation of minors dropped the reference to "minor between 14 and 16 years old" in line with article 3, subparagraph (d), of the Trafficking in Persons Protocol, which defined as a child any person under 18 years of age. Finally, it was also reported that the proposal for the revision of the provisions of the Penal Code would be submitted to Parliament for further discussion and approval. The revision was expected to be approved during the second semester of 2006.

19. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of New Zealand had reported, inter alia, that the definition of "trafficking in persons" in its domestic legislation did not provide for the action of recruitment, transportation and transfer of such persons; that the definition of "trafficking in persons" in its domestic legislation did not include reference to the "giving or receiving of payments or benefits to achieve the consent of a person having control over another person" as a means of trafficking in persons; and that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons did not include slavery or practices similar to slavery. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements on the definition of trafficking in persons stipulated in article 3, subparagraph (a), of the Protocol. At the time of preparing the present report, the Government of New Zealand had not responded to the Secretariat, even though its Permanent Mission in Vienna had sought clarifications to facilitate a timely response.

20. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of France had indicated, inter alia, that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons did not include the removal of organs. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraph (a), of the Protocol. At the time of preparing the present report, the Government of France had not responded to the Secretariat.

21. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Turkey had reported, inter alia, that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons did not include servitude. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any

steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraph (a), of the Protocol.

22. In its letter dated 21 March 2006, the Government of Turkey informed the Secretariat that, although article 80 of the national Penal Code did not include a specific term corresponding to "servitude", the text of the same provision covered "forced labour or services", "slavery or practices similar to slavery" and "servitude" as purposes of exploitation. It was further explained that the provision was formulated in such a way as to avoid duplication that might arise from its linguistic interpretation and that it did cover servitude as mens rea.

23. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Azerbaijan had provided a negative response to the question on whether trafficking in persons was criminalized under its domestic legislation and further indicated that a draft law on trafficking in persons to amend the existing legislation was under consideration. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocol.

24. The Government of Azerbaijan did not respond officially to the note verbale mentioned above, but provided brief information on its domestic legislation to combat trafficking in persons when replying to the questionnaires for the second reporting cycle of the Conference of the Parties. In that context, Azerbaijan referred to the national law on "Suppression of the Traffic in Persons", as well as a relevant National Plan of Action approved by a Presidential Decree in 2004. Reference was also made to amendments to specific legislative provisions on "traffic in persons", "forced labour" and "information about the victim of traffic in persons". Furthermore, Azerbaijan listed three legal acts adopted by the Cabinet of Ministers which dealt with issues related to assistance to and protection of victims of trafficking in persons.

25. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Belarus had indicated that the definition of "trafficking in persons" in its domestic legislation did not include reference to the "giving or receiving of payments or benefits to achieve the consent of a person having control over another person" as a means of trafficking in persons. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements on the definition of trafficking in persons stipulated in article 3, subparagraph (a), of the Protocol. At the time of preparing the present report, the Government of Belarus had not responded to the Secretariat.

26. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Brazil had provided a negative response to the question on whether trafficking in persons was defined in its domestic legislation as a criminal offence in accordance with the Protocol definition. It further provided an overview of the domestic laws establishing related offences, which encompassed different components of the trafficking in persons definition. It also reported that the

domestic legislation identified a lower age threshold than that provided for in the Protocol to consider a person as a child (12 years). Persons between 12 and 18 years of age were considered as adolescents, without being clear whether their protection was equal to that provided to children. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraphs (a) and (d), of the Protocol. At the time of preparing the present report, the Government of Brazil had not responded to the Secretariat.

27. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Chile had reported, inter alia, that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons included only the exploitation of the prostitution of others or other forms of sexual exploitation and not the other illegal acts mentioned in article 3, subparagraph (a), of the Protocol. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraph (a), of the Protocol. At the time of preparing the present report, the Government of Chile had not responded to the Secretariat.

28. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Ecuador had indicated, inter alia, that the definition of "trafficking in persons" in its domestic legislation did not include reference to abduction as a means of committing the offence in accordance with article 3, subparagraph (a), of the Protocol; that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons did not include servitude and the removal of organs; and that, according to its domestic legislation, the consent of the victim of trafficking in persons was taken into consideration, even if the means of trafficking mentioned in article 3, subparagraph (a), of the Protocol were involved. In that connection, it was mentioned that a provision of the Penal Code established aggravating circumstances in cases where the victim was devoid of the capacity to consent; and that domestic legislation identified a lower age threshold than that provided for in the Protocol to consider a person as a child (12 years). The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraphs (a), (b) and (d), of the Protocol. At the time of preparing the present report, the Government of Ecuador had not responded to the Secretariat.

29. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Egypt had reported that the consent of the victim of trafficking in persons was taken into consideration under its domestic legislation even if the means of trafficking mentioned in article 3, subparagraph (a), of the Protocol were involved, and that the relevant penalties prescribed in the national laws were stricter in cases where such consent was absent. The Secretariat

sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocol, including the requirement stipulated in article 3, subparagraph (b). At the time of preparing the present report, the Government of Egypt had not responded to the Secretariat.

30. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Estonia had provided a negative response to the question on whether trafficking in persons was defined in the domestic legislation as a criminal offence in accordance with the Protocol definition. It further indicated that there were many different individual offences in the Penal Code which were related to different stages of the trafficking process (recruitment, transportation, exploitation and money-laundering). The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring its domestic legal system into full compliance with the requirements stipulated in articles 3, subparagraph (a), and 5, paragraph 1, of the Protocol (criminalization of trafficking in persons as a combination of its three constituent elements).

31. In its letter dated 10 May 2006, the Government of Estonia made reference to both legislative and institutional initiatives to curb trafficking in persons. It was noted, in that connection, that the amendments of the national Penal Code in order to enhance the penalties for inducing minors to engage in prostitution, including the imposition of pecuniary penalties in such cases, were planned to pass through the second review in the National Parliament in May 2006. Furthermore, it was reported that the legislator had prepared additional amendments to the Penal Code in order to modify article 133 on enslavement. The objective was to foresee the establishment of liability of legal persons for enslaving and to enable adding to the already existing elements of violence and deceit the act of taking advantage of the inability of a person to resist or comprehend, as well as of the dependency of the victim on the offender. As far as the institutional initiatives were concerned, Estonia highlighted the approval of a human trafficking action plan for the period 2006-2009. The plan stressed the need for problem mapping, raising awareness, enhancing the cooperation of specialists, strengthening the effectiveness of responses to the crimes related to trafficking in persons and supporting the victims and their rehabilitation. It was further reported that the Ministry of Justice was the coordinating agency for the anti-trafficking programme at the general level with the task to review every year the progress made, submit a performance report to the Government and also propose necessary amendments to the action plan. In August 2005, a declaration between the Ministries of Justice and Interior was signed indicating the fight against trafficking in persons as one of the priority areas for coordinated national action.

32. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Latvia had indicated that the consent of the victim of trafficking in persons was taken into consideration under the domestic legislation. It was reported, in particular, that "article 165 of the Criminal Law set out a criminal liability for trafficking of a person for sexual exploitation to a foreign State with his or her consent". Moreover, it was essential to establish whether the

person trafficked gave his or her consent to trafficking, "because this condition may change the grounds of criminal liability and, thus, the applicable penalty". The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocol, including the requirement stipulated in article 3, subparagraph (b).

33. In its response to the Secretariat of 27 April 2006, the Government of Latvia provided further clarification on the content of article 165 of its Criminal Law. It was reported, in that regard, that that specific provision was adopted on 18 May 2000 to ensure compliance with the requirements set forth in the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (General Assembly resolution 317 (IV), annex), and in particular its article 1, which criminalized the conduct of "any person, who, to gratify the passions of another", "procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person". Latvia also clarified that amendments had been adopted to the first part of article 165 on 16 December 2004, increasing the penalty from four to six years of imprisonment for leading away another person for purposes of prostitution.

34. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Mauritius had provided a negative response to the question on whether trafficking in persons was criminalized under its domestic legislation, indicating the following: "Section 253 (2) (b) of the Criminal Code criminalizes prostitution of persons for the purpose of being sent abroad. Section 262 A criminalizes child trafficking where a person causes parents to abandon their children or acts as an intermediary between these parents and those willing to adopt the child." The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocol. At the time of preparing the present report, the Government of Mauritius had not responded to the Secretariat.

35. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Mexico had provided a negative response to the question on whether trafficking in persons was defined in its domestic legislation as a criminal offence in accordance with the Protocol definition. It further reported on the provisions of the Penal Code establishing related offences which encompassed different components of the trafficking in persons definition. It also reported that the domestic legislation identified a lower age threshold than that provided for in the Protocol to consider a person as a child (12 years). Persons between 12 and 18 years of age were considered as adolescents, without being clear whether their protection was equal to that provided to children. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraphs (a) and (d), of the Protocol. At the time of preparing the present report, the Government of Mexico had not responded to the Secretariat.

36. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of the Republic of Moldova had reported that, according to its national legislation, the consent of the victim of trafficking in persons was taken into consideration even if the means of trafficking mentioned in article 3, subparagraph (a), of the Protocol were involved. No further explanation was provided on that issue. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocol, including the requirement stipulated in article 3, subparagraph (b). At the time of preparing the present report, the Government of the Republic of Moldova had not responded to the Secretariat.

37. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Peru had indicated, inter alia, that the definition of "trafficking in persons" in its domestic legislation did not provide for the action of harbouring or receipt of such persons; that the definition of "trafficking in persons" in its domestic legislation included references only to the "abuse of power" and "abuse of a position of vulnerability" and not to the other means of trafficking in persons described in article 3, subparagraph (a), of the Protocol; that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons included only the exploitation of the prostitution of others or other forms of sexual exploitation, as well as slavery or practices similar to slavery, and not the other illegal acts mentioned in article 3, subparagraph (a), of the Protocol; and that organizing or directing other persons to commit the offence of trafficking in persons was not criminalized under its domestic legislation. However, the process of reviewing the Penal Code was ongoing and it was expected that the issue would be dealt with; and that the domestic legislation identified a lower age threshold than that provided for in the Protocol to consider a person as a child (12 years). Persons between 12 and 18 years of age were considered as adolescents, without being clear whether their protection was equal to that provided to children. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in article 3, subparagraphs (a) and (d), of the Protocol. At the time of preparing the present report, the Government of Peru had not responded to the Secretariat.

38. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Romania had reported that its domestic legislation identified a lower age threshold than that provided for in the Protocol to consider a person as a child (14 years). Persons between 14 and 18 years of age were considered as minors, without being clear whether their protection was equal to that provided to children. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocol, including the requirement stipulated in article 3, subparagraph (d).

39. In its letter dated 25 July 2006, the Government of Romania referred to its recent (2004) law on the protection and promotion of the rights of children, which established an obligation to observe, promote and safeguard the rights of children, as set forth in the Constitution and domestic legislation, as well as in the United Nations Convention on the Rights of the Child (General Assembly resolution 44/25, annex), ratified by Romania in 1990. In that context, specific reference was made to article 4 of the above-mentioned law, in which the term "child" was defined as "a person under the age of eighteen who has not acquired the full exercise capacity of rights, according to the law". Romania also reported on domestic regulations regarding the age at which a person acquired full exercise capacity of rights, which was the age of 18, except for minors who married and thus obtained full capacity of exercise. Minors over the age of 14 years had a restricted capacity of exercise, as well as the right to conclude legal documents with the prior consent of their parents or guardian. Further information was provided in relation to the establishment of criminal liability of minors. The relevant provision of the Criminal Code stipulated that minors under the age of 14 years of age were presumed not to have the capacity to infringe the penal law; minors aged 14 to 16 years of age may be criminally liable only if it is proven that they committed the criminal act with discernment; and minors over the age of 16 years may be presumed to have the capacity to infringe the penal law.

40. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Tunisia had provided a negative response to the question on whether trafficking in persons was criminalized under its domestic legislation and further indicated that the introduction of a law criminalizing trafficking in human beings was under consideration. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocol. At the time of preparing the present report, the Government of Tunisia had not responded to the Secretariat.

41. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Argentina had provided a negative response to the question on whether trafficking in persons was criminalized under the domestic legislation and indicated that other individual offences which were related to trafficking in persons were established in the national laws. The Secretariat sent a note verbale on 10 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into full compliance with the requirements stipulated in articles 3, subparagraph (a), and 5, paragraph 1, of the Protocol (criminalization of trafficking in persons as a combination of its three constituent elements).

42. In its letter dated 5 July 2006, the Government of Argentina informed the Secretariat that three draft laws had been submitted to the Commission of Justice and Penal Affairs of the Senate for its consideration, all of which were related to the incorporation of the offence of trafficking in persons in the domestic Penal Code.

D. Communications with States reporting non-compliance with specific requirements of the Migrants Protocol

43. In its reply to the questionnaire on the implementation of the Migrants Protocol, the Government of South Africa had indicated that specific legislation to implement the Protocol was yet to be developed. The Secretariat sent a note verbale on 8 March 2006 seeking clarification and further information on that country's legislative status regarding the implementation of the Protocol and on any steps contemplated to bring its domestic legal system into compliance with the requirements set forth in the Protocol. At the time of preparing the present report, the Government of South Africa had not responded to the Secretariat.

44. In its reply to the questionnaire on the implementation of the Migrants Protocol, the Government of Nigeria had reported that the smuggling of migrants, as defined in the Protocol, was not criminalized under its domestic legislation and that constituent elements of that criminal activity were criminalized in other national laws. The Secretariat sent a note verbale on 8 March 2006 seeking clarification and further information on that country's legislative status regarding the implementation of the Protocol and on any steps contemplated to bring the domestic legal system into compliance with the requirements set forth in the Protocol. At the time of preparing the present report, the Government of Nigeria had not responded to the Secretariat.

E. Communications with States reporting non-compliance with specific requirements of both the Trafficking in Persons and the Migrants Protocols

45. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Bulgaria had not provided information on whether the underlying purpose of exploitation in trafficking in persons included, under its domestic legislation, slavery or practices similar to slavery. In addition, it was indicated that the national legislation did not establish as a criminal offence the conduct of organizing or directing other persons to commit the offence of trafficking in persons. Moreover, in its reply to the questionnaire on the implementation of the Migrants Protocol, the Government of Bulgaria provided a negative response to the question on whether the smuggling of migrants was defined as a criminal offence under the domestic legislation in accordance with the definition contained in article 3, subparagraph (a), of the Migrants Protocol. Furthermore, it was stated that the national laws did not criminalize the conduct of enabling illegal residence in the national territory, as well as the conduct of organizing or directing other persons to commit the offence of the smuggling of migrants and other related offences. In addition, it was reported that no aggravating circumstances to the Migrants Protocol offences were established under the domestic legislation in relation to any conduct endangering, or being likely to endanger, the lives or safety of the smuggled migrants or subjecting them to inhuman or degrading treatment. The Secretariat sent a note verbale on 13 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the Trafficking in Persons and Migrants Protocols and on any steps contemplated to

bring the domestic legal system into full compliance with the requirements set forth in the two Protocols.

46. In its response communicated to the Secretariat in July 2006, the Government of Bulgaria noted that the relevant provision of the national Penal Code "lists all forms of 'exploitation' as illegally using of persons for sexual activities, labour exploitation, dispossession of bodily organs or holding them in forceful subjection, which comprises practices of setting in slavery or in position similar to slavery". Moreover, it clarified that, under the national legislation, organizing or directing other persons to commit the offence of trafficking in persons fell under the general provision on abetting and accessory to commit a crime. Therefore "the person who intentionally incited another to commit a crime or who intentionally facilitated the perpetration of a crime shall be punished by the punishment provided for the perpetrated crime, with due consideration of the nature and degree of their participation". Bulgaria further quoted article 280 of the national Penal Code to indicate that its scope was broader than the definition of the smuggling of migrants contained in article 3, subparagraph (a), of the Migrants Protocol and included all elements of that definition. It also stated that the conducts of enabling illegal residence in the national territory and organizing or directing other persons to commit the offence of the smuggling of migrants and other related offences fell under the general provision of the national Penal Code on complicity. As far as the aggravating circumstances of article 6, paragraph 3, of the Protocol were concerned, Bulgaria reported that, under the national legislation, endangering or being likely to endanger the life and safety of a person and inhuman or degrading treatment and exploitation were criminal offences. In case those offences were committed together with that of smuggling of migrants, then the provision on multiple crimes would be applicable and the most severe punishment would be imposed. Finally, it was generally clarified that the national Constitution provided for the incorporation of any ratified international treaty into the domestic legal order and that any such treaty would take priority over any conflicting standards of national legislation.

47. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Jamaica had highlighted the lack of domestic legislation addressing the problem of trafficking in persons. Moreover, in its reply to the questionnaire on the implementation of the Migrants Protocol, the Government of Jamaica further indicated that there was no specific legislation dealing with the smuggling of migrants and that issues related to that criminal activity were addressed in other domestic legislation (Aliens Act and Immigration Act). The Secretariat sent a note verbale on 13 March 2006 seeking clarification and further information on that country's legislative status regarding the implementation of the Protocols and on any steps contemplated to bring the domestic legal system into compliance with the requirements set forth in the two Protocols. At the time of preparing the present report, the Government of Jamaica had not responded to the Secretariat.

48. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Myanmar had provided a negative response to the question on whether trafficking in persons was defined in its domestic legislation as a criminal offence in accordance with the Protocol definition. It further reported on certain provisions of domestic laws dealing with related offences (Penal Code, Child Law and Suppression of Prostitution Act). It also indicated that

its domestic legislation identified a lower age threshold than that provided for in the Protocol to consider a person as a child (16 years of age). Any person between 16 and 18 years of age was considered as a "youth", without being clear whether the protection of such a person was equal to that provided to children. Moreover, in its reply to the questionnaire on the implementation of the Migrants Protocol, the Government of Myanmar provided a negative response to the question on whether its domestic legislation made a distinction between the smuggling of migrants and trafficking in persons. The Secretariat sent a note verbale on 13 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the two Protocols and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocols. At the time of preparing the present report, the Government of Myanmar had not responded to the Secretariat.

49. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Namibia had provided conflicting information on whether the consent of the victim of trafficking in persons was taken into consideration where the means of trafficking mentioned in article 3, subparagraph (a), of the Protocol were involved. In particular, the Secretariat received two documents containing responses to the questionnaire and relevant information. In the first one, which had no indication of the responding officer or authority, it was reported that the domestic legislation appeared to be silent on the issue mentioned above. In the second document, sent by the Department of Legal Administration, Ministry of Justice, it was reported that the consent of the victim was considered where abduction and abuse of a position of vulnerability were used as means of trafficking. It was further clarified that this was done "in order to establish how exactly the consent was gained". Similarly, conflicting information was also contained in the reply of the Government of Namibia to the questionnaire on the implementation of the Migrants Protocol. Two documents were again received, of which the first had no indication of the responding officer or authority and the second was sent by the Department of Legal Administration, Ministry of Justice. In the first document, it was reported that the country's legislation was silent on whether aggravating circumstances to the Protocol offences were established in relation to any conduct endangering, or being likely to endanger, the lives or safety of the smuggled migrants or subjecting them to inhuman or degrading treatment. In the second document, the response to that question was affirmative. The Secretariat sent a note verbale on 13 March 2006 seeking clarification and further information on any progress made in that country's legislation regarding the implementation of the two Protocols and on any steps contemplated to bring the domestic legal system into full compliance with the requirements set forth in the Protocols. The Secretariat also asked for clarification on the competent national authority in charge of responding to the Conference of the Parties questionnaires. At the time of preparing the present report, the Government of Namibia had not responded to the Secretariat, even though its Permanent Mission had sought clarifications to facilitate its response.

50. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of Costa Rica had indicated that, according to its domestic legislation, the underlying purpose of exploitation in trafficking in persons did not include forced labour or services. In addition, it reported that the purpose of extraction of organs was stipulated only in the context of trafficking in minors, but

not generally in the context of trafficking in persons. Moreover, in its reply to the questionnaire on the implementation of the Migrants Protocol, the Government of Costa Rica reported that there was no domestic legislation establishing the offence of the smuggling of migrants, but amendments to the Penal Code were being considered to that effect. The Secretariat sent a note verbale on 13 March 2006 seeking clarification and further information on that country's legislative status regarding the implementation of the two Protocols and on any steps contemplated to bring the domestic legal system into compliance with the requirements set forth in the two Protocols. At the time of preparing the present report, the Government of Costa Rica had not responded to the Secretariat.

51. In its reply to the questionnaire on the implementation of the Trafficking in Persons Protocol, the Government of El Salvador had reported that the definition of "trafficking in persons" in its domestic legislation included references only to the "threat or use of force" and "the giving or receiving of payments or benefits to achieve the consent of a person having control over another person" and not to the other means of trafficking in persons prescribed in article 3, subparagraph (a), of the Protocol. Moreover, in its reply to the questionnaire on the implementation of the Migrants Protocol, the Government of El Salvador provided a negative response to the question on whether the smuggling of migrants was defined under its domestic legislation in accordance with the Protocol requirements, indicating that article 367 of the Penal Code established the criminal offence of illegal trafficking in persons regardless of the means and the purpose involved. For that reason and in addition to the clarifications requested from that country with regard to the implementation of the Convention (see above under para. 14), the Secretariat sent a separate note verbale on 13 March 2006 seeking clarification and further information on the country's legislative status regarding the implementation of the two Protocols and on any steps contemplated to bring the domestic legal system into compliance with the requirements set forth in the two Protocols. At the time of preparing the present report, the Government of El Salvador had not responded to the Secretariat.

III. Concluding remarks

52. The communications with States parties to the Convention and the Trafficking in Persons and Migrants Protocols that had reported deviations from or partial compliance with the requirements set forth in those instruments was an initiative taken by the Secretariat in accordance with the relevant decisions of the Conference of the Parties, adopted at its first session. The main objective was to establish a mechanism that would enable those States to provide further clarifications on non-compliance issues and/or assist them in better assessing whether the existing domestic legal framework was in conformity with the obligations and requirements contained in the Convention and Protocols. Moreover, this mechanism was perceived as a "follow-up" reporting process that would serve two basic purposes: first, to forestall rendering the information provided for the first reporting cycle of the Conference useless or non-utilizable; secondly, to assist the Conference in discharging its function to review periodically the implementation at the national level of the Convention and the Protocols.

53. Unfortunately, the Secretariat has been facing the same problem of underreporting encountered with the national responses to the basic questionnaires

during the first reporting cycle of the Conference of the Parties: only 10 countries out of 31 responded to the individual communications sent by the Secretariat and provided clarifications on the identified issues of non-compliance. This poor response rate obstructs the efforts of the Conference to acquire a better understanding of the deficiencies, gaps and difficulties existing at the national level in relation to the effective implementation of the Convention and the Protocols. It also places in jeopardy the efficiency of the knowledge-based approach adopted by the Conference when it first approved its programme of work and specified the priority areas for its consideration. The Conference of the Parties may wish to further consider this problem and provide relevant guidance and instructions as appropriate.

Notes

[1] CTOC/COP/2005/2 and Corr. 2, CTOC/COP/2005/3 and Corr. 1 and CTOC/COP/2005/4 and Corr.1.

[2] CU 2006/99 of 21 June 2006.