

Part Three

**LEGISLATIVE GUIDE FOR THE
IMPLEMENTATION OF THE PROTOCOL
AGAINST THE SMUGGLING OF MIGRANTS
BY LAND, SEA AND AIR, SUPPLEMENTING
THE UNITED NATIONS CONVENTION
AGAINST TRANSNATIONAL ORGANIZED CRIME**

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I. Background and general provisions

A. Introduction

1. Structure of the legislative guide

1. The present legislative guide for the implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex III), is very similar to the legislative guide for 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 (Assembly resolution 55/25, annex II), which appears in part two of the present document. Both contain substantive provisions that have parallel or overlapping elements and are likely to involve many of the same policy, legislative and administrative areas in the Governments of States that intend to become party to one or both Protocols. The first chapter of each of these two guides therefore begins with subject matter that is often common to both Protocols, such as technical provisions. Even if sometimes some parts may also be common, chapter II deals, for the present guide, with matters specific to the Migrants Protocol, and, for the other guide, with the Trafficking in Persons Protocol. To allow Governments to take maximum advantage of overlapping or parallel elements, cross reference is made at the end of each section to related provisions and instruments.

2. For ease of access and convenient reference, chapter II of the present legislative guide contains sections on criminalization; protection; prevention; and cooperation.

3. These general topics do not necessarily correspond to specific provisions of the Protocols, many of which have multiple aspects, including, for example, elements of prevention, protection and cooperation. Specific references to the relevant provisions of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/255, annex I) and the Protocols thereto have been included wherever possible.

4. To facilitate further the use of the legislative guide, a common format has been used for each section wherever feasible. Each section starts by quoting the relevant provisions of the Protocol and, where appropriate, the Organized Crime Convention. This is intended to provide faster, easier access to the language of the instruments. Each section also includes some or all of the following general elements:

- (a) Introduction;
- (b) Summary of main requirements;
- (c) Main elements of the articles;
- (d) Implementation of the articles;
- (e) Related provisions;
- (f) Optional elements;
- (g) Information resources.

5. The section entitled “Summary of main requirements” provides a check list of essential requirements of the article or articles under discussion.

6. The process by which the requirements of the Migrants Protocol can be fulfilled will vary from State to State. Monist systems could ratify the Protocol and incorporate its provisions into domestic law by official publication; dualist systems would require implementing legislation.

7. In sorting out the priorities and obligations under the Protocol, drafters of national legislation should take the guidelines presented below into consideration.

8. In establishing their priorities, drafters should bear in mind that the provisions of the Organized Crime Convention and its Protocols do not all have the same level of obligation. In general, provisions can be grouped into the following categories:

- (a) Measures that are mandatory (either absolutely or where specified conditions have been met);
- (b) Measures that States parties must consider applying or endeavour to apply;
- (c) Measures that are optional.

9. Whenever the words “States are required to” are used, the reference is to a mandatory provision. Otherwise, the language used in the legislative

guide is “required to consider”, which means that States are strongly asked to seriously consider adopting a certain measure and to make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the guide employs the phrase “may wish to consider”. Occasionally, States “are required” to choose one or another option (as in the case of offences established in accordance with article 5 of the Organized Crime Convention). In that case, States are free to opt for one or the other or for both options.

10. The exact nature of each provision will be discussed as it arises. As noted above, since the purpose of the legislative guide is to promote and assist in efforts to ratify and implement the Migrants Protocol, the primary focus will be on provisions that are mandatory to some degree and the elements of those provisions which are particularly essential to ratification and implementation efforts. Elements that are likely to be legislative or administrative or are likely to fall within other such categories will be identified as such in general terms, but appear in the guide based on the substance of the obligation and not the nature of actions that may be required to carry it out, which may vary to some degree from one State or legal system to another. (It should be noted, however, that the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime made it clear that it saw the obligation to establish criminal offences as being primarily legislative in nature (see A/55/383/Add.1, para. 69).)

2. Other materials to be considered in ratifying or acceding¹ to the Protocol

11. Legislators, drafters and other officials engaged in efforts to ratify or implement the Protocol should also refer to the following:²

(a) The text of the Organized Crime Convention (General Assembly resolution 55/25, annex I);

¹Those States which have signed the Organized Crime Convention and its Protocols by the date prescribed for each instrument may become parties by filing an instrument of ratification. Those which did not sign within that period may become parties at any time once the instrument is in force by acceding to the instrument. Information about the exact requirements may be obtained from the Office of Legal Affairs of the Secretariat. For the sake of simplicity, references in this guide are mainly to “ratification”, but the possibility of joining an instrument by accession should also be borne in mind.

²Texts of all of the documents in all official languages of the United Nations, as well as other information about the legislative history of the instruments and their present status, can be obtained from the web site of the United Nations Office of Drugs and Crime (<http://www.unodc.org/>).

(b) The text of the Protocols (Assembly resolutions 55/25, annexes II and III, and 55/255, annex);

(c) The interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1);

(d) The legislative guides for the Organized Crime Convention and the other two Protocols (parts one, two and four respectively of the present document).

12. In addition to the appeal for ratification contained herein, other international bodies have also urged States to ratify the Convention and the Migrants Protocol, including:

(a) The Conference of the Ministers of Justice and of the Interior of the Group of Eight, held in Milan, Italy, on 26 and 27 February 2001 (see http://www.mofa.go.jp/policy/i_crime/high_tec/conf0102.html);

(b) The Organization for Security and Cooperation in Europe, in its decisions 1, paragraph 2, adopted at the Eighth Meeting of the Ministerial Council, held on 27 and 28 November 2000, and 6, adopted at the Ninth Meeting of the Ministerial Council, held on 3 and 4 December 2001 (see <http://www.osce.org/docs/english/chronos.htm>);

(c) The Economic Community of West African States, in its Declaration on the Fight against Trafficking in Persons, adopted by the Heads of State and Government of the Community at the 25th ordinary session of the Authority, held in Dakar on 20 and 21 December 2001;

(d) The International Organization for Migration, in its Brussels Declaration on Preventing and Combating Trafficking in Human Beings, made at the European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenges for the 21st Century, held in Brussels from 18 to 20 September 2002 (see <http://www.belgium.iom.int/STOPConference/ConferencePapers/brudeclaration.pdf> (point 16));

(e) The Conference of Ministers on the Prevention of Irregular Migration in the Wider European Region, held in Rhodes, Greece, on 25 and 26 June 2003, in the framework of the Budapest Process (<http://www.icmpd.org/default.asp?alltext=Budapest&pubdatef=&pubdatet=&nav=results>).

B. Scope and technical provisions of the Protocol and its relationship with the Convention

Migrants Protocol

“Article 1

“Relation with the United Nations Convention against Transnational Organized Crime

“1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

“2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

“3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.”

Organized Crime Convention

“Article 37

“Relation with protocols

“1. This Convention may be supplemented by one or more protocols.

“2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

“3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

“4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”

Migrants Protocol

“Article 2

“Statement of purpose

“The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.”

“Article 4

“Scope of application

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

“Article 19

“Saving clause

“1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention³ and the 1967 Protocol⁴ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

“2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

³United Nations, *Treaty Series*, vol. 189, No. 2545.

⁴*Ibid.*, vol. 606, No. 8791.

“Article 22

“Entry into force

“1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

“2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.”

1. Main elements of the articles

*(a) Application of the Convention to the Protocol
(article 1 of the Protocol and article 37 of the Convention)*

13. Article 37 of the convention and article 1 of each of the Protocols thereto together establish the basic relationship between the Convention and the Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (e.g. extradition and mutual legal assistance) in the parent Convention and elements specific to the subject matter of the Protocols in each of the Protocols themselves (e.g. offences established in accordance with the Protocol and provisions relating to travel and identity documents). As the Protocols are not intended to be independent treaties, to become a party to any of the Protocols a State is required to be a party to the parent Convention. This ensures that, in any case that arises under a Protocol to which the States concerned are parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions were drafted on that basis: the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, for example, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm are found only in the appropriate Protocols. Additional

rules established by the relevant articles deal with the interpretation of similar or parallel provisions in each instrument and with the application of general provisions of the Convention to offences established in accordance with the Protocol and its other provisions. The Convention and its Protocols are all international treaties.

14. Article 1 of the Protocol and article 37 of the Convention establish the following basic principles governing the relationship between the two instruments:

(a) *No State can be a party to any of the Protocols unless it is also a party to the Convention* (art. 37, para. 2, of the Convention). Simultaneous ratification or accession is permitted, but it is not possible for a State to be subject to any obligation arising from the Protocol unless it is also subject to the obligations of the Convention;

(b) *The Convention and the Protocol must be interpreted together* (art. 37, para. 4, of the Convention and art. 1, para. 1, of the Protocol). In interpreting the various instruments, all relevant instruments should be considered and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the Protocols, the purpose of that Protocol must also be considered, which may modify the meaning applied to the Convention in some cases (art. 37, para. 4, of the Convention);

(c) *The provisions of the Convention apply, mutatis mutandis, to the Protocol* (art. 1, para. 2, of the Protocol). The meaning of the phrase “mutatis mutandis” is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application can be made to take account of the circumstances that arise under the Protocol, but modifications should not be made unless they are necessary and then only to the extent that is necessary. This general rule does not apply where the drafters have specifically excluded it;

(d) *Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention* (art. 1, para. 3, of the Protocol). This principle, which is analogous to the mutatis mutandis requirement, is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by each State in order to criminalize smuggling of migrants as required by article 6 of the Protocol will automatically be included within the scope of the basic provisions of the Convention governing forms of international cooperation

such as extradition (art. 16) and mutual legal assistance (art. 18).⁵ It also links the Protocol and the Convention by making applicable to offences established in accordance with the Protocol other mandatory provisions of the Convention. In particular, as discussed further in paragraphs 25-62 of the present guide on criminalization, obligations in the Convention concerning money-laundering (art. 6), liability of legal persons (art. 10), prosecution, adjudication and sanctions (art. 11), confiscation (arts. 12-14), jurisdiction (art. 15), extradition (art. 16), mutual legal assistance (art. 18), special investigative techniques (art. 20), criminalization of obstruction of justice (art. 23), protection of witnesses and victims (arts. 24 and 25), enhancement of cooperation (art. 26), law enforcement cooperation (art. 27), training and technical assistance (arts. 29 and 30) and implementation of the Convention (art. 34), apply equally to the offences established in accordance with the Protocol. Establishing a similar link is therefore an important element of national legislation in the implementation of the Protocol;

(e) *The Protocol requirements are a minimum standard.* Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all the obligations set forth in the Protocol have been fulfilled (art. 34, para. 3, of the Convention).

(b) *Interpretation of the Protocol (articles 1 and 19 of the Protocol and article 37 of the Convention)*

15. The interpretation of treaties is a matter for States parties. General rules for the interpretation and application of treaties are covered by the 1969 Vienna Convention on the Law of Treaties⁶ and will not be discussed in detail in the present guide. These general rules may be amended or supplemented by rules established in individual treaties, however, and a number of specific interpretative references appear in both the Convention and the Protocol. (See, for example, article 16, paragraph 14, of the Convention, which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders.) The dispute settlement provisions found in all four instruments also require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters (see article 35 of the

⁵In most cases, the drafters used the phrase “offences covered by this Convention” to make this link. (See, for example, article 18, paragraph 1, which sets forth the scope of the obligation to extradite offenders.)

⁶United Nations, *Treaty Series*, vol. 1155, No. 18232 (also available at <http://www.un.org/law/ilc/texts/treaties.htm>).

Convention and article 20 of the Protocol). Specific references will be raised in relation to the subject matter to which they apply, but there are also general interpretative provisions that apply to the Protocol. Pursuant to article 37 of the Convention and article 1 of the Protocol, elements of the Convention must be taken into consideration when interpreting the Protocol. These provisions involve the relationship between the two instruments and will therefore be covered in the following section. The second is found in article 19, paragraph 2, of the Protocol, which requires that the measures set forth in the Protocol be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of the Protocol.

2. Purposes of the Protocol (article 2 of the Protocol)

16. Three basic purposes of the Protocol are established by article 2: prevention and combating of smuggling of migrants; protection of the rights of smuggled migrants; and promotion of cooperation between States parties.

3. Scope of application (article 4 of the Protocol)

17. Article 4 applies the Protocol to the prevention, investigation and prosecution of the offences established in accordance with it, as well as to the protection of the rights of persons who have been the object of such offences. This is broader than the formulation used in article 3 of the Convention, in order to ensure that the Protocol will apply with respect to the rights of migrants. Article 4 then sets two basic limits on application based on the parallel provisions of articles 2 and 3 of the Convention. The Protocol only applies where the offences are transnational in nature and involve an organized criminal group, both of which are defined by the Convention (see below and articles 2, subparagraph (a), and 3, paragraph 2, of the Convention). As with the parent Convention, it was not the intention of the drafters to deal with cases where there was no element of transnationality or organized crime, but the relevant provisions of the Convention and the Protocols should be reviewed carefully, as they set relatively broad and inclusive standards for both requirements.

18. In considering transnationality, the nature of smuggling of migrants should also be taken into account. As discussed elsewhere (see paras. 25-62 below), the general principle governing transnationality is that any element

of foreign involvement would trigger application of the Convention and the relevant Protocols, even in cases where the offence(s) at hand are purely domestic. In the case of smuggling of migrants, however, without some element of cross-border movement, there would be neither migrants nor smuggling. It should be noted, however, that the same considerations do not apply to the other offences established in accordance with or provisions of the Protocol: falsification or misuse of travel or identity documents and the enabling of illegal residence would trigger application of the instruments whenever the basic requirements of articles 2 and 3 of the Convention and article 4 of the Protocol were met.

19. A further consideration is raised by the reference to “organized criminal group” in article 4 of the Protocol and by the reference to “financial or other material benefit” in article 6, paragraph 1. In developing the text, there was concern that the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers. The reference in article 4 to “organized criminal group” means that a profit motive or link is required because the words “financial or other material benefit” are used in the definition of that term in article 2, subparagraph (a), of the Convention, and this is further underscored by the specific inclusion of the same language in the criminalization requirement in article 6.

20. It is important for drafters of national legislation to note that the provisions relating to the involvement of transnationality and organized crime do not always apply. While in general the reader should consult the legislative guide for the implementation of the Convention for details of when these criteria apply and do not apply (see paras. 16-31 and 36-76), it is important to emphasize here that, for example, article 34, paragraph 2, of the Convention specifically provides that legislatures must not incorporate elements of transnationality or organized crime into domestic offence provisions.⁷ Together, these establish the principle that, while States parties should have to establish some degree of transnationality and organized crime with respect to most aspects of the Protocol, their prosecutors should not have to prove either element in order to obtain a conviction for smuggling of migrants or any other offence established in accordance with the

⁷The only exception to this principle arises where the language of the criminalization requirement specifically incorporates one of these elements, such as in article 5, paragraph 1, of the Convention, concerning the presence of an organized criminal group. These requirements are discussed in more detail in the legislative guide for the implementation of the Convention.

Convention or its Protocols. In the case of smuggling of migrants, domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved. As another example, the first paragraphs of the extradition and mutual legal assistance articles of the parent Convention (arts. 16 and 18, respectively) set forth certain circumstances in which one or both of those elements are to be considered satisfied. Regarding the definition of “organized criminal group”, it should be noted that, according to the interpretative note to article 2, subparagraph (a), of the Convention (A/55/383/Add.1, para. 3):

“The *travaux préparatoires* should indicate that the words ‘in order to obtain, directly or indirectly, a financial or other material benefit’ should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.”

4. *Implementation of the articles*

21. Generally, most of the articles in this section govern the interpretation and application of the other provisions. Thus they may provide assistance and guidance to Governments, drafters and legislatures but do not themselves require specific implementation measures.

22. However, requirements that the Convention be applied, *mutatis mutandis*, to the Protocol and that the offences established in accordance with the Protocol be regarded as offences established in accordance with the Convention, may give rise to a need for implementing legislation. The measures required as a result of these “*mutatis mutandis*” and offences established in accordance with the Protocol are to be regarded as “offences established in accordance with the Convention” requirements are described in detail in the next chapter.

5. *Information resources*

23. For a list of humanitarian, human rights and other instruments of general application, see paragraph 28 of the legislative guide for the Trafficking in Persons Protocol.

24. Drafters of national legislation may wish to refer to the following instruments:

1949 Convention concerning Migration for Employment (revised)
Convention No. 97 of the International Labour Organization
United Nations, *Treaty Series*, vol. 120, No. 1616
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>

1975 Convention concerning Migrations in Abusive Conditions and
the Promotion of Equality of Opportunity and Treatment of
Migrant Workers
Convention No. 143 of the International Labour Organization
United Nations, *Treaty Series*, vol. 1120, No. 17426
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>

1990 United Nations International Convention on the Protection of the
Rights of All Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm

1994 Programme of Action of the International Conference on Popu-
lation and Development
*Report of the International Conference on Population and Develop-
ment, Cairo, 5-13 September 1994* (United Nations publication,
Sales No. E.95.XIII.18), chap. I, resolution 1, annex
<http://www.iisd.ca/linkages/Cairo/program/p10000.html>
Chapter 10

II. Specific obligations of the Protocol

A. Definition and criminalization of the smuggling of migrants

“Article 3

“Use of terms

“For the purposes of this Protocol:

“(a) ‘Smuggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

“(b) ‘Illegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

“(c) ‘Fraudulent travel or identity document’ shall mean any travel or identity document:

“(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

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

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

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

“Article 5

“Criminal liability of migrants

“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.”

“Article 6

“Criminalization

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

“(a) The smuggling of migrants;

“(b) When committed for the purpose of enabling the smuggling of migrants:

“(i) Producing a fraudulent travel or identity document;

“(ii) Procuring, providing or possessing such a document;

“(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

“(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

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

“(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

“3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

“(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

“(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

“4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.”

1. Summary of main requirements

25. Each State party is required to criminalize, when committed intentionally and in order to obtain a financial or other material benefit:

(a) Conduct constituting the smuggling of migrants (the procurement for material gain of the illegal entry of a person into a State party of which the person is not a national or permanent resident) (art. 6, para. 1 (a));

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

(c) Enabling a person to remain in a country where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means (art. 6, para. 1 (c));

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

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

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

26. Each State party is also required:

(a) To establish as aggravating circumstances for the above offences conduct that is likely to endanger or does endanger the migrants concerned or that subjects them to inhumane or degrading treatment (art. 6, para. 3);

(b) To apply numerous provisions of the Convention to this conduct, as described in section 3 below (art. 1, paras. 2 and 3).

2. Main elements of the articles

(a) *Definition of "smuggling of migrants" and the distinctions between illegal migration, smuggling of migrants and trafficking in persons*⁸

27. The Trafficking in Persons Protocol can be seen as part of a continuum of instruments that deal with trafficking and related activities, in particular slavery. These reflect the basic facts that both trafficking and

⁸See also chapter II, sect. A, "Definition and criminalization of Trafficking in Persons", of the legislative guide for the implementation of the Trafficking in Persons Protocol, in particular, paras. 31-34, for a discussion of the definition of the term "trafficking in persons".

legal responses to it have been evolving for a very long time. The problem of smuggling of migrants, on the other hand, has similarities with that of trafficking in persons, but it is relevant in a legal sense to address the issue in a separate protocol. The Migrants Protocol is more novel and unique, reflecting relatively new concerns that have arisen about the smuggling of migrants as a criminal activity distinct from legal or illegal activity on the part of migrants themselves. The use of criminal and other laws to exercise control over immigration is not new and many States have offences relating to illegal entry or illegal residence. The criminal exploitation of migration and the generation of illicit profits from the procurement of illegal entry or illegal residence and the responses found in that Protocol, however, do represent a relatively new development.

28. Two basic factors are essential to understanding and applying the Migrants Protocol. The first is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned (see articles 5 and 6, paragraph 4, of the Protocol). Mere illegal entry may be a crime in some countries, but it is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or other material benefit), on the other hand, has been recognized as a serious form of transnational organized crime and is therefore the primary focus of the Protocol.

29. The second is the relationship between the conduct defined as trafficking in persons and the smuggling of migrants in the respective Protocols. These were defined separately and dealt with in separate instruments primarily because of differences between trafficked persons, who are victims of the crime of trafficking and, in many cases, of other crimes as well, and smuggled migrants. While it was seen as necessary to deal with smuggling and trafficking as distinct issues, there is actually a substantial overlap in the conduct involved in the two offences. In many cases, smuggled migrants and victims of trafficking are both moved from one place to another by organized criminal groups for the purpose of generating illicit profits.

30. The major differences lie in the fact that, in the case of trafficking, offenders recruit or gain control of victims by coercive, deceptive or abusive means and obtain profits as a result of some form of exploitation of the victims after they have been moved, commonly in the form of

prostitution or coerced labour of some kind. In the case of smuggling, on the other hand, migrants are recruited voluntarily and may be to some degree complicit in their own smuggling. While intended exploitation is a necessary element for the Trafficking in Persons Protocol, it is not the case for the Migrants Protocol; instead, intended exploitation may be considered one of the aggravating circumstances for the Migrants Protocol. In addition, the illicit profits are derived from the smuggling itself. One further difference is that, as a criminal offence covered by the Organized Crime Convention, trafficking must be criminalized whether it occurs across national borders or entirely within one country. Smuggling, on the other hand, contains a necessary element of transnationality, which requires illegal entry from one country to another.⁹

(b) *Fully mandatory requirements*

(i) *Offence of smuggling migrants (article 3, subparagraph (a), and article 6, paragraph 1)*

31. Article 6, paragraph 1 (a), requires States parties to criminalize the smuggling of migrants, which is defined in article 3, subparagraph (a). The definition of “smuggling” in turn subsumes procuring “illegal entry”, which is defined in article 3, subparagraph (b).

32. As noted above, the intention of the drafters was to require legislatures to create criminal offences that would apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-seekers (see A/55/383/Add.1, para. 92).

33. Incorporating these elements and exclusions, the conduct required to be criminalized is the procurement of the entry of a person into a country, where that person is not a national or permanent resident of the country and where any or all of the requirements for entry of persons who are not nationals or permanent residents have not been complied with. (The term

⁹It should also be noted that, while the Trafficking in Persons Protocol requires only that trafficking itself be criminalized, the Migrants Protocol requires also the criminalization of both the procurement of illegal entry (i.e. smuggling) and the procurement of legal residence by illegal means, even if the actual entry that preceded it was legal. The Protocol also establishes some further offences in relation to documents. (See the criminalization requirements in paras. 31-50), and articles 3, subparagraph (a), and 6 of the Protocol.)

“permanent” resident is also used in article 18 (Return of smuggled migrants) and its meaning is clarified in that context as meaning “long-term, but not necessarily indefinite residence” (see A/55/383/Add.1, para. 112).) Generally, this will involve cases where legal entry requirements such as obtaining visas or other authorizations have not been complied with, or where visas or similar documents had been obtained or used in some illegal manner that made them invalid. (Common examples may include the forgery or falsification of documents, obtaining genuine documents using false information, and the use of genuine and valid documents by persons to whom they were not issued.)

34. The drafters intended that cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence (art. 6, para. 1 (c), of the Protocol). The exact boundary between these offences may well vary from country to country, depending on laws such as those governing the validity of documents. (The most commonly occurring scenario is where smugglers obtain a visitor’s permit that is valid at the time of entry and the migrant remains illegally after it expires (illegal residence offence). In most countries, cases where a valid visa was used by a person other than the one for whom it was issued, on the other hand, would be treated as falling under the illegal entry offence.) In formulating the two offences, exactly how they are formulated or where the boundary is drawn is not critical for conformity with the Protocol. What is essential, both for conformity and effective enforcement, is that drafters ensure that no gaps are created and that no conduct covered by the Protocol is left uncriminalized.

35. As noted above, the general standard of the Convention and Protocols for offences is that they must have been committed intentionally. Applied to the smuggling offence, this actually entails two requirements: there must have been some primary intention to procure illegal entry and there must have been a second intention, that of obtaining a financial or other material benefit.

(ii) *Offence of enabling illegal residence*
(article 6, paragraph 1 (c))

36. The second principal offence required by the Protocol to be criminalized is that of enabling a person to remain in a State where the person is not entitled to remain by virtue of status (national or permanent resident) or by virtue of having met alternative requirements, such as the

issuance of a visa or permit of some kind by the means mentioned in article 6, paragraph 1 (*b*), or any other illegal means. As noted above, the intention in establishing this offence was to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors' permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorizations to enter.

37. The conduct required to be criminalized consists simply of committing any act that amounts to enabling illegal residence, where the resident or residents in question lack the necessary legal status or authorizations. The requirement specifically includes the document offences set forth in subparagraph (*b*), but could also include other conduct, to be determined by each State party by its domestic legislation.

38. The intent element is the same as for the previous offence: there must have been the intention to commit whatever act is alleged as having enabled illegal residence and the further intent or purpose of obtaining some financial or other material benefit.

*(iii) Offences in relation to travel or identity documents
(article 6, paragraph 1 (b))*

39. To support the two basic offences of smuggling and enabling illegal residence, article 6, paragraph 1 (*b*), of the Protocol also establishes a series of offences in relation to travel or identity documents. The term "fraudulent travel or identity document" is defined in article 3, subparagraph (*c*), and further clarified by the interpretative notes (A/55/383/Add.1, para. 89).

40. The conduct required to be criminalized is the producing and the procuring, providing or possessing of a fraudulent travel or identity document. (The separation of the requirements in article 6, paragraph 1, into subparagraphs (*b*) (i) (ii) was done to facilitate the drafting of paragraph 2, which distinguishes between fully mandatory and conditional obligations to criminalize attempts, participation as an accomplice and organizing or directing others to commit the offences. It has no bearing on the basic obligation to criminalize the principal conduct involved.) Drafters of national legislation could establish a separate offence in respect of each of these, or combine them in a single provision, leaving the specification of the actual conduct alleged for the drafters of criminal charges or indictments.

41. As above, the same basic element of intent applies: there must have been the intention to produce, procure, provide or possess the document, with the added intention or purpose of obtaining a financial or other material benefit. In the case of the document offences, however, there must also have been the intention or purpose of enabling the smuggling of migrants. This is an additional safeguard against criminalizing those who smuggle themselves (see A/55/383/Add.1, para. 93), but, taken literally, it also excludes those who commit the document offences for the purpose of enabling illegal residence as opposed to procuring illegal entry. It should be noted, however, that legislatures implementing the Protocol can apply the document offences to both of the principal offences if they wish, in accordance with article 34, paragraph 3, of the Convention. Apart from expanding the application of the legislation to additional conduct associated with smuggling of migrants, such an approach would have the advantage of reducing litigation on the issue of whether illicit entry or illicit residence was involved in specific cases, since the criminal liability would be the same in either case.

42. The definition of the term “fraudulent travel or identity document” then adds several further factual elements that must be taken into consideration when formulating the offence or offences:

(a) The document can either be “falsely made” from nothing or it can be a genuine document that has been “altered in some material way”;

(b) “Falsely made” should include both documents that are forged or fabricated from nothing and documents that consist of genuine document forms, but information that is not accurate and put onto the form by someone not authorized to do so or who is not authorized to issue the document in question;

(c) Whether a document is “falsely made” or “improperly issued” will depend in some cases on how national law treats cases where an official acts illegally or without authorization. If a consular official issues a travel document beyond his or her powers, systems that would treat this as non-issuance would consider the document as having been made by someone not authorized to do so, falling under subparagraph (i). Systems that considered the basic issuance to have occurred would see the same document as having been “improperly issued” under subparagraph (ii). What is important is that drafters of national legislation consider the approach taken by national law and ensure that all of the possible scenarios result in documents that are treated as “fraudulent” and that there are no gaps;

(d) Documents that have been altered must have been changed in some way that is material to the other offences established in accordance

with the Protocol, such as changing the identity or photograph of the holder or the dates for which it was valid. If the document is “altered”, this must have been by someone not authorized to do so;

(e) “Fraudulent” documents also include documents that are genuine, but improperly issued through misrepresentation, corruption or duress. Here also the approach of drafters will depend to some degree on how domestic law treats cases where an official acts illegally or without authority;

(f) Finally, “fraudulent” documents include papers that are formally valid and have been validly issued, but are being used by someone other than the person to or for whom they were issued, whether the document in question has been altered (e.g. by changing a photograph) or not;

(g) The interpretative notes clarify that the term “travel document” includes any document needed to enter or leave a State by the laws of that State (A/55/383/Add.1, para. 89). This could include the laws of any State involved in a specific case. For example, a passport issued by one State could contain a visa issued by another and either or both could be required to both leave one State and enter another, making the laws of both applicable. An “identity document” is a document used to identify persons by and in accordance with the laws of the State that issued or is purported to have issued it. It should be noted that article 13 of the Protocol, which is parallel to the same article of the Trafficking in Persons Protocol, requires States parties to verify within a reasonable time the legitimacy and validity of documents issued by or purported to have been issued by them. Drafters may wish to consider similar language in provisions implementing the offences in relation to documents under the Migrants Protocol.

(iv) Attempts, participation as an accomplice, organizing or directing others (article 6, paragraph 2)

43. Article 6, paragraph 2, also requires the extension of criminal liability to those who attempt to commit or organize or direct others to commit any offence established in accordance with the Protocol or who are accomplices to such offences. Some of these requirements parallel elements of the criminalization requirements of articles 5, 6 and 8 of the Convention and of the other two Protocols and drafters may wish to consider legislation implementing parallel requirements to ensure consistency where appropriate.

44. Not all legal systems incorporate the concept of criminal attempts, and the obligation to criminalize attempts to commit any offence established in

accordance with the Protocol is therefore subject to the qualification “subject to the basic concepts of its legal system”. Similarly, not all systems could provide for the criminalization of participation as an accomplice in an offence that amounted to procuring, providing or possessing a fraudulent document and that requirement was therefore limited in the same way. These subjects will therefore be discussed in paragraphs 51-53 below.

(v) *Aggravating circumstances (article 6, paragraph 3)*

45. Without adding further offences, States parties are also required to incorporate into some of the offences established in accordance with the Protocol specific circumstances that would ensure that cases in which they have occurred are taken more seriously. The obligation is fully mandatory for all offences except those of participating as an accomplice and organizing or directing others to commit offences, which are made subject to the basic concepts of the legal system of the implementing State party (see paras. 51-53 below).

46. Generally, legislatures are required to make smuggling offences that involve dangerous or degrading circumstances into aggravating circumstances. Depending on the legal system, this could take the form of either complete parallel offences, such as aggravated smuggling, or of provisions that require the courts to consider longer or more severe sentences where the aggravating conditions are present and the accused have been convicted of one or more of the basic offences established in accordance with the Protocol. The fundamental obligation is to ensure that, where the aggravating circumstances are present, offenders are subjected to at least the risk of harsher punishments.

47. In most systems subjecting offenders to a harsher punishment where the specified circumstances have existed will require that those circumstances be established as a matter of fact to a criminal standard of proof. Depending on domestic law, drafters may wish to consider making specific provision on what must be proved, to what standard and at what stage of the proceedings, as well as establishing any relevant inferences or legal or evidentiary presumptions.

48. The most common occurrence towards which this requirement is directed is the use of modes of smuggling, such as shipping containers, that are inherently dangerous to the lives of the migrants, but legislation should be broad enough to encompass other circumstances, such as cases where fraudulent documents create danger or lead to inhuman or degrading treatment.

49. “Inhuman or degrading treatment” may include treatment inflicted for the purposes of some form of exploitation. It should be noted that if there is no consent or if there is consent that has been vitiated or nullified as provided for in article 3, subparagraphs (b) or (c), of the Trafficking in Persons Protocol, the presence of exploitation in what would otherwise be a smuggling case will generally make the trafficking offence applicable if the State party concerned has ratified and implemented that Protocol. The interpretative notes indicate that the reference to exploitation here is without prejudice to that Protocol (A/55/383/Add.1, para. 96).

(vi) *Legal status of migrants (articles 5 and 6, paragraph 4)*

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

(c) *Conditional requirements*

(i) *Attempts (article 6, paragraph 2 (a))*

51. As noted above, not all legal systems make provision for the criminalization of cases in which an unsuccessful attempt has been made to commit the offence. Of those States that do criminalize attempts, most require that some fairly substantial course of conduct be established before there can be a conviction. In some cases one or more positive acts must be established, while in others prosecutors must establish that the accused has done everything possible to complete the offence, which failed for other reasons. The fact that the offence subsequently turns out to have been impossible (e.g. cases where the person being smuggled was deceased, non-existent or a law enforcement officer) is generally not considered a defence in cases of attempt. To assist in clarifying the range of approaches, the interpretative notes indicate that attempts should be “understood in some

countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law” (A/55/383/Add.1, para. 95; see also para. 70, concerning the Trafficking in Persons Protocol, and para. 6, dealing with the same issue for the Firearms Protocol). The option of prosecuting cases of attempt can be an effective measure, in particular with respect to crimes such as trafficking in persons and the smuggling of migrants, which are committed over relatively long periods and are sometimes interrupted by law enforcement or other authorities before completion. Where it is not possible to criminalize attempts, drafters and legislators may wish to consider other means of reinforcing the offence provisions, such as criminalizing individual elements of the offences that could still be prosecuted when the offence established in accordance with the Protocol was not complete. One example of this could be offences such as transporting or concealing migrants for the purpose of smuggling them, which could be prosecuted even where the smuggling was not completed or unsuccessful.

(ii) Participation as an accomplice in procuring, providing or possessing a fraudulent document (article 6, paragraphs 1 (b) (ii) and 2 (b))

52. Participating as an accomplice to some of the document offences was also made subject to the basic concepts of each State party’s legal system, primarily because of concerns in some systems about overly broad legislation and whether one could be made an accomplice to offences such as possession. There were also concerns about viability in view of some of the defined meanings of “fraudulent document” and whether one could, for example, be an accomplice to the possession of a document that only became a “fraudulent document” when actually used by a person to whom it was not issued (see art. 3, subpara. (c) (iii)). The same concerns did not arise with respect to the actual production of such documents and the obligation to criminalize being an accomplice to this offence is unqualified.

(iii) The designation of organizing, directing and participating as an accomplice as an aggravating circumstance to the principal offences (article 6, paragraphs 3 and 2 (b) and (c))

53. The intention in including article 6, paragraph 3, in the Protocol was to increase deterrence where offences established in accordance with the Protocol were committed in ways that either involved degradation or

danger to the migrants involved. Generally, there were concerns that, while the primary actors in the offence would be in a position to exercise control over whether dangerous or degrading conditions were present or not, accomplices and others not directly involved in the offences would in many cases not be in such a position. This in turn triggered constitutional and other concerns about the possibility of imposing aggravated offences or sanctions for circumstances beyond the control of those accused of the basic crime, and the obligation was therefore qualified to allow States in that position to avoid such problems.

(d) *Purpose of the articles*

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

55. More generally, the criminalization requirements are central to both the Protocol and the Convention, serving not only to provide for the deterrence and punishment of the smuggling of migrants, but as the basis for the numerous forms of prevention, international cooperation, technical assistance and other measures set out in the instruments. The purpose of the Protocol is expressly given (in part) as the prevention and combating of one offence—the smuggling of migrants—and the application of the Protocol is expressly directed at the prevention, investigation and prosecution of the offences established in accordance with the Protocol (see arts. 3 and 4). At the same time, as with the Trafficking in persons Protocol, it must be borne in mind that the “commodity” being smuggled or trafficked consists of human beings, raising human rights and other issues not associated with other commodities. In the case of the criminalization requirements of the Migrants Protocol, the major implications of this can be seen in the

language that ensures that offences should not apply to groups that smuggle migrants or asylum-seekers for reasons other than “financial or other material benefit”.

(e) Implementation of the articles

56. Implementation of the criminalization requirements will require legislative measures, except in cases where the necessary provisions already exist, a point underscored by the interpretative notes, which state that any other measures taken to implement the requirements presuppose the existence of a law (A/55/383/Add.1, para. 91; parallel requirements were established for the Convention and the other two Protocols). As noted above, the language of the Protocol itself is directed at States parties on the assumption that they will draft and adopt the necessary legislation to ensure that, taken as a whole, national laws will conform to the requirements of the Protocol. The language used was not intended for enactment or adoption verbatim, and will generally not be sufficiently detailed or specific to support effective investigations and prosecutions that are both effective and consistent with basic human rights and procedural safeguards. Identical terminology may be interpreted and applied differently in accordance with different legal systems and practices. Drafters and legislators should therefore bear in mind that it is the meaning of the Protocol and not the literal language that matters.

57. In developing the necessary offences, drafters should ensure that the full range of conduct covered by the relevant provisions is criminalized. This may be done using single offences or multiple offences, although where the latter approach is taken, care should be taken to ensure that no gaps or inconsistencies are created that might leave some conduct not covered. As noted above, drafters and legislators will also generally wish to take into consideration the formulation and application of any offences adopted to implement the Convention and the Trafficking in Persons Protocol, as well as other relevant offences, especially those directed at organized crime. Where pre-existing offences overlap with conduct covered by the Protocol, legislators will wish to consider whether such offences are adequate and, if not, whether to proceed by amendments to expand them, their repeal and replacement with entirely new offences or the adoption of supplementary offences that cover any conduct covered by the Protocol that has not already been criminalized. Generally, the use of supplementary offences will be the most complex option, but offers the advantage of leaving existing offences and, where applicable, case law based on those

offences intact. The option of creating entirely new offences offers the advantage of reforming and streamlining legislation, but also may lead to greater uncertainty as to how the new offences will be interpreted and applied.

58. Finally, as noted above, the Protocol sets only a minimum requirement for the range of conduct that must be criminalized and how seriously it should be punished, leaving it open to States parties to go further in both aspects. The adoption of further supplementary offences or offences that are broader in scope than those required may well enhance the effectiveness of prevention, investigation and prosecution in cases of smuggling of migrants or more general matters of organized crime. This is true not only in cases where domestic legal systems cannot deal with matters such as attempts (see above) but in other areas as well. In many cases, it may not be possible to prove all of the elements of offences such as smuggling, but more narrowly framed supplementary offences could still be prosecuted and used as the basis for domestic investigations. It should be borne in mind, however, that offences that go beyond the scope of the requirements of the Protocol would not be offences covered by the Convention such as to trigger the various requirements of the Convention and Protocol for international cooperation. States may cooperate voluntarily in such cases, but would not be required to do so by the instruments themselves.

59. The Protocol is silent as to the punishment or range of punishments that should be applied to the various offences, leaving the basic requirement of article 11, paragraph 1, of the Convention, to the effect that sanctions should take into account the gravity of the offence, intact. In the case of legal persons, the principle of article 10, paragraph 4, of the Convention that sanctions should be effective, proportionate and dissuasive, also applies. Beyond this, legislators will generally wish to consider the punishments applied in national law for other offences seen as being of equivalent seriousness and the seriousness of the specific problem of smuggling of migrants and the more general (and often more serious) problem of transnational organized crime into account. In cases where legislatures decide to apply mandatory minimum punishments, the possibility of excuse or mitigation for cases where offenders have cooperated with or assisted competent authorities should also be considered as a possible means of implementing article 26 of the Convention. In addition to the basic punishments of fines and imprisonment, drafters should also bear in mind that articles 12-14 of the Convention also require the availability of measures to search for, seize and confiscate property or assets that are the proceeds of offences established in accordance with the Protocol, equivalent assets or

property, or other property that was used in or destined for use in such offences. (See article 13, paragraphs 1-4, of the Convention for the full range of property covered; apart from basic proceeds, property used or destined for use in smuggling could include items such as air tickets, motor vehicles, aircraft or vessels.) As an example, the European Union has required its Member States to provide for maximum punishments of eight years' imprisonment (six years in some circumstances) for cases where smuggling was for financial gain, involved a criminal organization or endangered the lives of any persons, as well as for the confiscation of instrumentalities such as means of transport. (See the directive of the Council of the European Union 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (*Official Journal of the European Communities*, L 328, 5 December 2002), in particular its article 3, relating to sanctions.)

3. Application of mandatory provisions of the Convention to the Protocol

60. In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the parent Convention. As set forth in the prior section, the provisions of the Convention apply to the Protocol, *mutatis mutandis*, and among States parties to the Protocol the offences established in accordance with the Protocol are to be considered offences established in accordance with the Convention. Application of these provisions creates an obligation upon States parties, *inter alia*, to take the following measures with respect to the offences established in accordance with the Protocol, the implementation of which is discussed in greater detail in the legislative guide for the implementation of the Organized Crime Convention (part one of the present document):

(a) *Money-laundering*. States parties must criminalize the laundering of the proceeds of a comprehensive range of trafficking offences in accordance with article 6 of the Convention (see also paras. 77-162 of the legislative guide for the implementation of the Convention);

(b) *Liability of legal persons*. Liability for offences must be established both for natural or biological persons and for legal persons, such as corporations, in accordance with article 10 of the Convention (see also paras. 240-260 of the legislative guide for the implementation of the Convention);

(c) *Offences must be criminal offences (except for legal persons).* Each of the provisions on offences in the Convention and the Protocol states that offences must be established as offences in criminal law. This principle applies unless the accused is a legal person, in which case the offence may be a criminal, civil or administrative offence (arts. 5, 6, 8 and 23 of the Convention) (see also paras. 48-209 of the legislative guide for the implementation of the Convention);

(d) *Sanctions.* Sanctions adopted within domestic law must take into account and should be proportionate to the gravity of the offences (art. 11, para. 1, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(e) *Presence of defendants.* States parties are to take appropriate measures in accordance with domestic law and with due regard to the rights of the defence, to ensure that conditions of release do not jeopardize the ability to bring about the defendant's presence at subsequent criminal proceedings (art. 11, para. 3, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(f) *Parole or early release.* The gravity of offences established in accordance with the Protocol shall be taken into account when considering the possibility of early release or parole of convicted persons (art. 11, para. 4, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(g) *Statute of limitations.* A long domestic statute of limitations period for commencement of proceedings for the Convention offences should be established, where appropriate, especially when the alleged offender has evaded the administration of justice (art. 11, para. 5, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(h) *Asset confiscation.* To the greatest extent possible, tracing, freezing and confiscation of the proceeds and instrumentalities of these offences should be provided for in domestic cases and in aid of other States parties. (arts. 12-14 of the Convention) (see also paras. 287-340 of the legislative guide for the implementation of the Convention);

(i) *Jurisdiction.* The Convention requires States parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any of the Protocols to which the State in question is a party. Jurisdiction must be established over all offences committed within the territorial jurisdiction of the State, including its marine vessels and aircraft. If the national legislation of a State prohibits the extradition of its own nationals, jurisdiction must also be established over offences

committed by such nationals anywhere in the world, in order to permit the State to meet its obligation under the Convention to prosecute offenders who cannot be extradited on request owing to their nationality. The Convention also encourages the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders, but does not require this (arts. 15, para. 1 (mandatory jurisdiction); 15, para. 2 (optional jurisdiction); and 16, para. 10 (obligation to prosecute where no extradition due to nationality of offender); see also the discussion of jurisdictional issues in paras. 210-239 of the legislative guide to the Convention);

(j) *Extradition.* The obligations of the Convention require States parties to treat offences established in accordance with the Protocol as extraditable offences under their treaties and laws and to submit to competent authorities such offences for domestic prosecution where extradition has been refused on grounds of nationality (art. 16 of the Convention) (see also paras. 394-449 of the legislative guide for the implementation of the Organized Crime Convention);

(k) *Mutual legal assistance.* Mutual legal assistance shall be afforded to other States parties in investigations, prosecutions and judicial proceedings for such offences; numerous specific provisions of article 18 of the Convention apply (see also paras. 450-499 of the legislative guide for the implementation of the Organized Crime Convention);

(l) *Special investigative techniques.* Special investigative techniques shall be provided for to combat such offences, if permitted by basic principles of the domestic legal system of the State party concerned and, where deemed appropriate, other techniques such as electronic surveillance and undercover operations (art. 20 of the Convention) (see also paras. 384-393 of the legislative guide for the implementation of the Organized Crime Convention);

(m) *Obstruction of justice.* Obstruction of justice must be criminalized in accordance with article 23 of the Convention when carried out with respect to offences established in accordance with the Protocol (see also paras. 195-209 of the legislative guide for the implementation of the Organized Crime Convention);

(n) *Protection of victims and witnesses.* Victims and witnesses are to be protected from potential retaliation or intimidation under the provisions of articles 24 and 25 of the Convention (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(o) *Cooperation of offenders.* Article 26 of the Convention requires the taking of appropriate measures to encourage those involved in organized crime to cooperate with or assist competent authorities. The actual measures are not specified, but in many States they include the enactment of provisions whereby offenders who cooperate may be excused from liability or have otherwise applicable punishments mitigated. Some States have sufficient discretion in prosecution and sentencing to allow this to be done without legislative authority, but where such discretion does not exist, legislation that creates specific offences, establishes mandatory minimum punishments or sets out procedures for prosecution may require adjustment if the legislature decides to use mitigation or immunity provisions to implement article 26. This could be done either by establishing a general rule or on an offence-by-offence basis, as desired (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(p) *Law enforcement cooperation; training and technical assistance.* Channels of communication and police-to-police cooperation shall be provided for with respect to the offences established in accordance with the Protocol pursuant to article 27 of the Convention (see also paras. 500-511 of the legislative guide for the implementation of the Organized Crime Convention); and training and technical assistance shall be provided pursuant to articles 29 and 30 of the Convention.

4. Other general requirements for legislation criminalizing domestic smuggling offences

61. In addition to the above measures that must be provided for with respect to offences established in accordance with the Protocol, the Convention and Protocol contain specific requirements that are to be taken into account when drafting legislation establishing criminal offences in accordance with the Protocol, in particular:

(a) *Non-inclusion of transnationality in domestic offences.* The element of transnationality is one of the criteria for applying the Convention and the Protocols (art. 3 of the Convention). At the same time, article 34, paragraph 2, provides that transnationality must not be required as an element of domestic offences. Of course, the definition of smuggling of migrants in this Protocol provides for a crime that involves transborder smuggling. Thus, in general, domestic legislation implementing the Protocol will appropriately include an element of transborder activity. However, the specific transnationality criteria of article 3 of the Convention must not be incorporated into such domestic legislation;

(b) *Non-inclusion of “organized criminal group” in domestic offences.* As with transnationality, above, the involvement of an organized criminal group must not be required as an element of a domestic prosecution. Thus, the offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organized criminal group, and regardless of whether this can be proved or not (art. 34, para. 2, of the Convention; see also A/55/383/Add.1, para. 59);

(c) *Criminalization may use legislative and other measures, but must be founded in law.* Both the Convention and the Protocol refer to criminalization using “such legislative or other measures as may be necessary” in recognition of the fact that a combination of measures may be needed in some States. The drafters of those instruments were concerned, however, that the rule of law generally would require that criminal offences be prescribed by law, and the reference to “other measures” was not intended to require or permit criminalization without legislation. The interpretative notes therefore provide that other measures are additional to and presuppose the existence of a law. (The same principle is applied separately to the Convention and all of its Protocols: see A/55/383/Add.1, paras. 9, 69 and 91, and A/55/383/Add.3, para. 5; see also article 15 of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex));

(d) *Only intentional conduct need be criminalized.* All of the criminalization requirements of the Convention and Protocols require that the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards, such as negligence, need not be criminalized. Such conduct could, however, be made a crime under article 34, paragraph 3, of the Convention, which expressly allows for measures that are more strict or severe than those provided for by the Convention. Drafters should note that the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases, in particular where persons may have been ignorant or unaware of the existence of the law that establishes the offence;

(e) *Description of offences.* While article 11, paragraph 6, of the Convention states that the description of the offences is in principle reserved to the domestic law of a State party, drafters should consider the meaning of the provisions of the Convention and the Protocol concerning offences and not simply incorporate the language of the Protocol verbatim. In the drafting of the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent

authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters. In some cases, the intended meaning may have been clarified in the interpretative notes;¹⁰

(f) *Provisions of the Convention apply to the Protocol, mutatis mutandis, and should be interpreted together.* The application of article 37 of the Convention and article 1 of the Protocol is discussed in paragraphs 13 and 14 above.

5. Information resources

62. Drafters of national legislation may wish to refer to the related provisions and instruments listed below.

(a) Organized Crime Convention

Article 3 (Scope of application)

Article 5 (Criminalization of participation in an organized criminal group)

Article 10 (Liability of legal persons)

Article 11 (Prosecution, adjudication and sanctions)

Article 12 (Confiscation and seizure)

Article 13 (International cooperation for purposes of confiscation)

Article 14 (Disposal of confiscated proceeds of crime or property)

Article 15 (Jurisdiction)

Article 16 (Extradition)

Article 18 (Mutual legal assistance)

Article 20 (Special investigative techniques)

Article 23 (Criminalization of obstruction of justice)

¹⁰The formal *travaux préparatoires* for the Convention and its Protocols have not yet been published. Recognizing that this would take some time and seeking to ensure that legislative drafters would have access to the interpretative notes during the early years of the instruments, the Ad Hoc Committee drafted and agreed language for notes on many of the more critical issues during its final sessions. These were submitted to the General Assembly along with the finalized texts of the instruments, and can now be found in the Assembly documents annexed to its reports: A/55/383/Add.1 (notes on the Convention, the Trafficking in Persons Protocol and the Migrants Protocol, submitted to the Assembly with resolution 55/25) and A/55/383/Add.3 (notes on the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, submitted to the Assembly with resolution 55/255).

Article 24 (Protection of witnesses)

Article 26 (Measures to enhance cooperation with law enforcement authorities)

Article 27 (Law enforcement cooperation)

Article 29 (Training and technical assistance)

Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)

Article 34 (Implementation of the Convention)

Article 37 (Relation with protocols)

(b) Trafficking in Persons Protocol

Article 3 (Use of terms)

Article 5 (Criminalization)

(c) Migrants Protocol

Article 2 (Statement of purpose)

Article 4 (Scope of application)

Article 16 (Protection and assistance measures)

Article 18 (Return of smuggled migrants)

(d) Other instruments

1951 Convention relating to the Status of Refugees

United Nations, *Treaty Series*, vol. 189, No. 2545

Article 31

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

General Assembly resolution 45/158, annex

Article 19, paragraph 2

http://www.unhcr.ch/html/menu3/b/m_mwctoc.htm

2002 Framework decision of the Council of the European Union on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (2002/946/JHA)

Official Journal of the European Communities, L 238, 5 December 2002

Articles 1 and 3 (penalties and sanctions)

2002 Directive of the Council of the European Union defining the facilitation of unauthorized entry, transit and residence (2002/90/EC)

Official Journal of the European Communities, L 328, 5 December 2002

B. Providing assistance to and protection of victims of smuggling of migrants

Assistance to and protection of smuggled migrants and persons whose illegal residence has been procured (articles 5, 16, 18 and 19)

“Article 5

“Criminal liability of migrants

“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.”

“Article 16

“Protection and assistance measures

“1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

“2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

“3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

“4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

“5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations,¹¹ where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.”

“Article 18

“Return of smuggled migrants

“1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

“2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

“3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

“4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State

¹¹United Nations, *Treaty Series*, vol. 596, No. 8638-8640.

Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

“6. States Parties may cooperate with relevant international organizations in the implementation of this article.

“7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

“8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.”

“Article 19

“Saving clause

“1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention¹² and the 1967 Protocol¹³ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

“2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

¹²Ibid., vol. 189, No. 2545.

¹³Ibid., vol. 606, No. 8791.

Safeguards in relation to maritime vessels (article 9)

“Article 9

“Safeguard clauses

“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.”

1. Summary of main requirements

63. Each State party is required to take all appropriate measures:

(a) To protect smuggled persons from death, torture or other cruel, inhumane or degrading treatment or punishment (art. 16, para. 1);

(b) To provide appropriate assistance to persons endangered by smugglers, taking into account the special needs of women and children (art. 16, paras. 3 and 4).

64. Each State party is also required:

(a) To comply with its obligation under the Vienna Convention on Consular Relations to inform the person of the notification and communication obligations under that Convention (art. 16, para. 5);

(b) To accept without undue delay and facilitate the return of a smuggled person who is a national of the State party or has the right of permanent residence (art. 18, para. 1);

(c) To verify without unreasonable delay whether a smuggled person who is a national or has the right of permanent residence and issue the travel documents required for re-entry (art. 18, paras. 3 and 4);

(d) To carry out the return in an orderly manner with due regard for the safety and dignity of the person being returned (art. 18, para. 5).

65. When carrying out measures aboard vessels, States parties shall:

(a) Ensure the safety and humane treatment of passengers (art. 9, para. 1);

(b) Compensate the vessel for any loss or damage where enforcement grounds for measures against the vessel prove to be unfounded (art. 9, para. 2).

2. *Main elements of the articles*

66. Generally, the safeguard provisions were included to protect certain fundamental interests and to clarify the relationship or interaction between the Protocol and other areas of international law. As noted above, the major areas of concern were principles of humanitarian law governing the migration of refugees or asylum-seekers and principles of maritime law governing the detention, boarding and searching of vessels, and it is these which are most likely to be encountered by drafters developing legislation to implement elements of the Protocol. It should be borne in mind, however, that the framing of article 19, paragraph 1, covers all other rights, obligations and responsibilities under international law and that other issues could well arise, depending on the other global or regional instruments to which the implementing State is also a party and to individual characteristics of pre-existing domestic law.

67. The Protocol contains safeguard requirements in two major areas:

(a) The rights, legal status and safety of smuggled migrants and illegal residents, including those who are also asylum-seekers;

(b) The rights and interests of States and shipowners under maritime law.

68. In recognition that illegal or irregular migration and, in some cases, the criminal smuggling of migrants may involve the movement of legitimate refugees or asylum-seekers, precautions were taken to ensure that the implementation of the Protocol would not detract from the existing protections afforded by international law to migrants who also fell into one of these categories. Here the language is intended to ensure that the offences and sanctions established in accordance with the Protocol will apply to those who smuggle migrants, even if they are also asylum-seekers, but only if the smuggling involves an organized criminal group. As discussed in the previous section, several precautions were taken to ensure that altruistic or charitable groups who smuggle asylum-seekers for purposes other than financial or other material gain were not criminalized (see arts. 5 and 19).

69. There were also concerns about the basic safety, security and human rights of persons who have been the object of one of the major offences established in accordance with the Protocol, including migrants who have been smuggled and those who may have entered legally, but whose subsequent illegal residence has been made possible by an organized criminal group.¹⁴ Here the provisions are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter conduct on the part of offenders that involves danger or degradation to the migrants. At the same time, the formulation of the relevant provisions was intended to ensure that no additional legal status or substantive or procedural rights were accorded to illegal migrants, who are not subject to the offences established in accordance with the Protocol but may still be liable for other offences relating to illegal entry or illegal residence and to sanctions such as deportation (arts. 9, para. 1, and 16).

¹⁴The need to include both categories resulted in the formulation “persons who have been the object of conduct set forth in article 6 of this Protocol”. For simplicity, references in this guide will be to “smuggled migrants” and “illegal residents” with the understanding that the latter category refers to persons whose illegal residence has been procured or enabled by an organized criminal group contrary to domestic offence provisions that implement article 6, paragraph 1 (c), of the Protocol; see also the interpretative notes (A/55/383/Add.1), para. 107, in this regard.

70. The third area of concern was more specialized and arose from the relationship between the Protocol and pre-existing maritime law. Part II of the Protocol allows States parties that encounter vessels suspected of involvement in smuggling to board and search such vessels under some circumstances. This raised concerns about the basic safety and security of migrants and others on board such vessels, given the dilapidated conditions of vessels often used by smugglers and the fact that boarding may take place at sea and far from safe harbour conditions. Stopping and boarding vessels also raised concerns about the sovereignty of States to which such vessels were flagged or registered and about the commercial losses to ship-owners that might result. For this reason, it was also felt necessary to incorporate basic safeguard requirements to protect such interests before and during boarding and to make some provision for access to remedies later, in cases where the search proved to be unfounded (arts. 8 and 9).

*(a) Legal status, safety and rights of migrants
and illegal residents*

71. As noted in the preceding chapter, the various provisions of the Protocol have been formulated so as not to require the criminalization of migrants or illegal residents or of conduct likely to be engaged in only by such persons, while at the same time protecting the sovereign right of States parties to establish or maintain other offences that would apply to such persons. In addition, the Protocol requests the State party to apply such rights as are established in article 16, including general basic human rights (arts. 16, paras. 1 and 2, and 19, para. 2) and the right to consular assistance (art. 16, para. 5). Article 16, paragraph 3, does not create a new right, but does establish a new obligation in that it requires States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol. Particular attention is paid to ensuring that rights established by international humanitarian law, which primarily concern migrants or illegal residents who are also asylum-seekers, are preserved (art. 19, para. 1).

72. Article 18, which sets out conditions for the return of smuggled migrants and illegal residents to their countries of origin, also does not require the creation of any substantive or procedural rights for such persons, but paragraph 5 of that article does require measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person.

(b) *Provisions relating to maritime vessels*

73. As noted above, the provisions of part II (arts. 8 and 9) of the Protocol impose requirements intended to afford some protection both to illegal migrants and to other persons found on board vessels searched as a result of suspicions of involvement in smuggling and to the national and commercial interests of other States and shipowners in such cases. These are direct obligations imposed on States parties by the Protocol and will not generally require legislation to implement, but some legislative or administrative measures may be needed to ensure that the actions of officials meet the required standards and to establish a substantive and procedural basis for seeking remedies in cases where a search is conducted, where some form of loss or harm results and where the search proves to have been unfounded.

3. *Implementation of the articles*

74. Assuming national conformity with the basic pre-existing rights and the instruments in which they are established, none of the requirements to protect or preserve the human rights of migrants and illegal residents should raise legislative issues, although they should be carefully considered in developing administrative procedures and the training of officials. Where a State is not already in conformity with the pre-existing standards, they may have to be established to the extent necessary to conform to the Protocol. There is no obligation to go beyond this, however: the interpretative notes specify that the various cross-references to other international instruments, including those dealing with humanitarian law and asylum-seekers, do not mean that States that ratify and implement the Protocol are also bound by the provisions of those instruments (A/55/383/Add.1, para. 118; see also para. 117 relating to the status of refugees). Where existing national laws do not meet the basic requirements of the Protocol, the following amendments to the laws may be needed:

(a) To preserve and protect the basic rights of smuggled migrants and illegal residents (art. 16, para. 1);

(b) To protect against violence (art. 16, para. 2);

(c) To provide information on consular notification and communication (art. 16, para. 5).¹⁵

¹⁵This only applies where the Vienna Convention on Consular Relations has not been implemented and may not necessarily require legislation, provided that officials are directed to afford the necessary access when required or requested. (See also jurisprudence of the International Court of Justice.)

75. Drafters may also be required to adjust the language of other legislative provisions to ensure that they are not applied in a manner that discriminates against smuggled migrants or illegal residents by reason of their status as such (art. 19, para. 2).

76. As noted above, article 18 does not require the creation of any substantive or procedural rights for smuggled migrants or illegal residents to be returned to their countries of origin. Article 18, paragraph 5, does require measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person, which could be implemented administratively in most countries, but could involve legislation if this is necessary to ensure that it is implemented properly.

77. Drafters who are in the process of developing legislation to implement both the Migrants Protocol and the Trafficking in Persons Protocol should also note that the provisions of the other Protocol governing the safe and secure return of victims of trafficking are much more extensive in view of the additional jeopardy in which such victims usually find themselves (see para. 61 of the legislative guide for the implementation of the Trafficking in Persons Protocol), and that articles 24 and 25 of the Convention (concerning assistance and protection of victims and witnesses in all cases covered by the Convention) also apply with respect to victims of trafficking (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention). They do not apply to smuggled migrants or illegal residents and legislatures will therefore generally find it necessary to adopt separate provisions in this area.

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

4. Information resources

79. Drafters of national legislation may wish to refer to the related provisions and instruments listed below.

(a) *Organized Crime Convention*

Article 24 (Protection of witnesses)

Article 25 (Assistance to and protection of victims)

(b) *Trafficking in Persons Protocol*

Article 6 (Assistance to and protection of victims of trafficking in persons)

(c) *Migrants Protocol*

Article 2 (Statement of purpose)

Article 3 (Use of terms)

Article 4 (Scope of application)

Article 5 (Criminal liability of migrants)

Article 8 (Measures against the smuggling of migrants by sea)

Article 10 (Information)

Article 14 (Training and technical cooperation)

Article 15 (Other prevention measures)

(d) *Other instruments*

1974 International Convention for the Safety of Life at Sea
United Nations, *Treaty Series*, vol. 1184, No. 18961

1979 International Convention on Maritime Search and Rescue
United Nations, *Treaty Series*, vol. 1405, No. 23489
Annex

1982 United Nations Convention on the Law of the Sea
United Nations, *Treaty Series*, vol. 1833, No. 31363
Article 98, paragraph 1

1990 International Convention on the Protection of the Rights of All
Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
http://unhchr.ch/html/menu3/b/m_mwctoc.htm
Article 8

- 1994 Recommendation of the Council of the European Union of 30 November 1994 concerning a specimen bilateral readmission agreement between a member State and a third country
Official Journal of the European Communities, C 274, 19 September 1996
Annex to annex II.2, article 2, paragraph 1
- 1997 Conference of Ministers on the Prevention of Illegal Migration, held in the context of the Budapest Process in Prague on 14 and 15 October 1997
[http://www.icmpd.org/uploading/Recommendations%20Prague%20Ministerial%20Oct 97.pdf](http://www.icmpd.org/uploading/Recommendations%20Prague%20Ministerial%20Oct%2097.pdf)
Recommendations 24-38 (Return of migrants)
- 2002 General comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.9)
General comment no. 27 (67), paragraph 21 (on return of migrants)
- 2002 Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union (2002/C 142/02)
Official Journal of the European Communities, C 142, 14 June 2002
Part II, section E (Readmission and return policy)
- 2002 Recommended Guidelines on Human Rights and Human Trafficking
Document E/2002/68/Add.1
Guidelines 1 (Promotion and protection of human rights) and 6 (Protection and support for trafficked persons)

C. Prevention

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

“2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the

commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

“3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

“4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 12

“Security and control of documents

“Each State Party shall take such measures as may be necessary, within available means:

“(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

“(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.”

“Article 14

“Training and technical cooperation

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

“ . . . ”

“Article 15

“Other prevention measures

“1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

“2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

“3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.”

1. Summary of main requirements

80. Each State party is required:

(a) To strengthen border controls (art. 11, para. 1);

(b) To adopt measures to require commercial transportation carriers to ascertain that all passengers have the required travel documents, including sanctions for failure to do so (art. 11, para. 3);

(c) To ensure that travel and identity documents are of such quality that they cannot be altered or misused (art. 12, subpara. (a));

(d) To ensure the security of States parties' travel documents so they are not unlawfully issued (art. 12, subpara. (b));

(e) To provide or strengthen training to prevent smuggling and ensure humane treatment of smuggled persons (art. 14, para. 1);

(f) To provide or strengthen public information campaigns (art. 15, paras. 1 and 2);

(g) To provide or strengthen development programmes to combat the root causes of smuggling (art. 15, para. 3).

2. Main elements of the articles

81. Generally, the drafters of the Protocol and the parent Convention realized that various forms of prevention represented an important part of the effort against it. These have the potential to reduce or even avoid the high financial and institutional costs of conducting major multinational investigations and prosecutions. Perhaps more importantly, they can avoid many of the human costs suffered by victims and, by reducing the potential for the smuggling of migrants and trafficking in persons, they may reduce the illicit proceeds that organized criminal groups derive from such offences and often turn to other illegal purposes such as the corruption of officials or funding of other criminal activities.

82. Part III of the Protocol contains requirements to apply both social and situational prevention measures. Recognizing that a root cause of smuggling is the desire of people to migrate away from conditions such as poverty or oppression in search of better lives, article 15, paragraph 3, requires the promotion or strengthening of development programmes to address the socio-economic causes of smuggling. Article 15, paragraphs 1 and 2, seek to target potential migrants and others involved in smuggling more directly using public information about the evils of organized crime in general and the smuggling of migrants in particular. Articles 11-13 seek to prevent smuggling more directly, by making it more difficult and risky for offenders to commit. Article 11 requires measures to ensure that commercial carriers check their passengers' travel documents and other unspecified measures to enhance the effectiveness of border controls. Article 12 requires States parties to have travel documents that are more difficult to falsify or obtain improperly and article 13 seeks to decrease the risk of misuse and increase the probability of detection by requiring States parties to verify within a reasonable time whether a document purporting to have been issued by them is genuine and valid or not.

3. Implementation of the articles

(a) Increasing public awareness and addressing socio-economic causes (article 15)

83. As noted above, the drafters sought to require measures to increase public awareness of the nature of smuggling of migrants and the fact that much of the activity involved organized criminal groups. This is a mandatory obligation, but there is nothing in it that would require the use of

legislative measures. In conjunction with other information about smuggling, however, public information campaigns about the legislation used to establish the offences set forth in the Protocol and elements of the Convention in national law could be applied. This would serve to emphasize that the smuggling of migrants is a serious criminal activity, often harmful to the migrants themselves and with broader implications for community crime levels.

(b) Promotion or strengthening of development programmes to address root socio-economic causes of smuggling

84. As above, this is also a positive obligation, but not one that entails any legislative elements. Legislation in other areas may, however, form part of such development programmes. These include areas such as reforms to address problems of corruption and to establish elements of the rule of law, which stabilize social and economic conditions.

(c) Measures dealing with commercial carriers

85. The major legislative requirement set out in part III of the Protocol is that States parties must, to the extent possible, adopt legislative or other measures to prevent commercial carriers from being used by smugglers (art. 11, para. 2). The exact nature of such measures is left to the discretion of the legislature, except that cross-border carriers should be obliged to check the travel documents of passengers (art. 11, para. 3) and subjected to appropriate sanctions if that is not done (art. 11, para. 4). Drafters of legislation to implement these requirements should consider the following points:

(a) The basic obligation to be placed on carriers is to ascertain basic possession of whatever documents may be needed to enter the State of destination, but there is no obligation to assess the authenticity or validity of the documents or whether they have been validly issued to the person who possesses them (see A/55/383/Add.1, paras. 80 and 103);

(b) The obligation is to attach liability to the carriers for not having checked the documents as required. States may establish liability for having transported undocumented migrants, but the Protocol does not require this;

(c) States are also reminded of their discretion not to hold carriers liable in cases where they have transported undocumented refugees (see A/55/383/Add.1, paras. 80 and 103). This is not obligatory, however, and can be dealt with in the exercise of prosecutorial discretion where available and appropriate;

(d) The obligation in article 11, paragraph 4, is to provide for sanctions, the nature of which is not specified in either the Protocol or of the interpretative notes. If criminal liability is to be provided for, drafters should consider article 10 of the Convention regarding the obligation to provide for the liability of legal persons such as corporations;

(e) In the interpretative notes, there are several references to the meaning of the phrase “travel or identity document”, which includes any document that can be used for inter-State travel and any document commonly used to establish identity in a State under the laws of that State (see A/55/383/Add.1, paras. 78 and 83).

(d) *Measures relating to travel or identity documents*

86. As noted above, article 12 requires measures to ensure the adequacy of the quality and integrity and security of documents such as passports. The language makes it clear that this includes such measures as technical elements to make documents more difficult to falsify, forge or alter and administrative and security elements to protect the production and issuance process against corruption, theft or other means of diverting documents.¹⁶ These do not entail direct legislative obligations, except possibly to the extent that the forms of documents such as passports are prescribed by legislation that would have to be amended to raise standards or legally designate the enhanced versions as formally valid documents. Indirectly, additional supplementary offences to deal with theft, falsification and other misconduct in relation to travel or identity documents could be considered if more general offences do not already apply.

87. Several kinds of technology that are new or in the process of being developed offer considerable potential for the creation of new types of document that identify individuals in a unique manner, can be rapidly and accurately read by machines and are difficult to falsify because they rely on information stored in a database out of the reach of offenders rather than on information provided in the document itself. One example is the European Image Archiving System, called False and Authentic Documents (FADO),¹⁷

¹⁶The interpretative notes establish a relatively broad range of abuses in relation to documents. Drafters intended to cover not only the creation of false documents, but also the alteration of genuine ones and the use of valid and genuine documents by persons not entitled to do so (A/55/383/Add.1, para. 105).

¹⁷Council of the European Union Joint Action 98/700/JHA of 3 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO) (*Official Journal of the European Communities* L 333, 9 December 1998, available at <http://europa.eu/int/scadplus/leg/en/lvb/133075.htm>).

which makes possible the speedy verification of documents and fast, comprehensive notification of relevant law enforcement or immigration authorities in other participating countries when misuse of a document or a fraudulent document is detected. One concern raised during the negotiation of article 12 of the Protocol was the cost and technical problems likely to be encountered by developing countries seeking to implement such systems. The development of systems and technologies that minimize the amount of sophisticated maintenance and high-technology infrastructure needed to support and maintain such systems will be critical to the success of deployment in developing countries and, in some cases, technical assistance to be provided pursuant to article 30 of the Convention.

4. Related provisions of the Convention and the Trafficking in Persons Protocol

88. Legislators and drafters should note that these provisions should be read and applied in conjunction with article 31 of the Convention, which deals with the prevention of all forms of organized crime. Given the nature of migration and the smuggling of migrants, in article 31, paragraphs 5, of the Convention, on the promotion of public awareness of the problems associated with organized crime and 7, on the alleviation of social conditions that render socially marginalized groups vulnerable to organized crime, may be of particular interest in implementing the Protocol.

89. Legislators and drafters charged with implementing both the Migrants Protocol and the Trafficking in Persons Protocol may also wish to take into consideration the fact that many similarities exist between the origins of cases involving smuggling of migrants and those involving trafficking in persons. Therefore, prevention measures may in many cases be developed and implemented jointly. For example, awareness-raising programmes to caution potential victims, including migrants, about the dangers of smuggling, trafficking and general dealings with organized criminal groups and more general efforts to alleviate social or other conditions that create pressure to migrate may be efficiently and effectively implemented on a joint basis.

5. Information resources

90. Drafters of legislation may wish to refer to the sources of information listed below.

(a) Organized Crime Convention

Article 29, paragraphs 1 and 3 (Training and technical assistance)

Article 31 (Prevention)

(b) Trafficking in Persons Protocol

Article 10 (Information exchange and training)

Article 11 (Border measures)

Article 12 (Security and control of documents)

Article 13 (Legitimacy and validity of documents)

(c) Migrants Protocol

Article 2 (Statement of purpose)

Article 6 (Criminalization)

Article 13 (Legitimacy and validity of documents)

Article 14, paragraph 2 (Training and technical cooperation)

(d) Other instruments

1997 Conference of Ministers on the Prevention of Illegal Migration, held in the context of the Budapest Process in Prague on 14 and 15 October 1997

<http://www.icmpd.org/uploading/Recommendations%20Prague%20Ministerial%20Oct%201997.pdf>

Recommendation 13 (information campaigns)

2001 Twelve Commitments in the fight against trafficking in human beings, agreed upon at the meeting of the JHA Council of Ministers of the member States of the European Union (Justice and Home Affairs) and the candidate States, held in Brussels on 28 September 2001

Points 5, 8 and 12

(Cooperation, prevention campaigns and combating false documents)

2002 Brussels Declaration on Preventing and Combating Trafficking in Human Beings, made at the European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenge for the 21st Century, held in Brussels from 18 to 20 September 2002

<http://www.belgium.iom.int/STOPConference/Conference%20Papers/brudeclaration.pdf>

Points 8, 10 and 11

2002 Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union (2002/C 142/02)

Official Journal of the European Communities, C 142, 14 June 2002
Chapter II, section C.III (Awareness-raising campaigns)

2002 Recommended Guidelines on Human Rights and Human Trafficking Document E/2002/68/Add.1
Guideline 7 (Preventing trafficking)

D. Cooperation and assistance requirements

“Article 7

“Cooperation

“States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.”

“Article 8

“Measures against the smuggling of migrants by sea

“1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

“2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

“(a) To board the vessel;

“(b) To search the vessel; and

“(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

“3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

“4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

“5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

“6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

“7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.”

“Article 10

“Information

“1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

“(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;

“(b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;

“(c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;

“(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;

“(e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and

“(f) Scientific and technological information useful to law enforcement, so as to enhance each other’s ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.

“2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.”

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

“ . . .

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 13

“Legitimacy and validity of documents

“At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.”

“Article 14

“Training and technical cooperation

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

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

“(a) Improving the security and quality of travel documents;

“(b) Recognizing and detecting fraudulent travel or identity documents;

“(c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

“(d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

“(e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

“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.”

“Article 15

“Other prevention measures

“1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

“2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

“3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.”

“Article 17

“Agreements and arrangements

“States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

“(a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or

“(b) Enhancing the provisions of this Protocol among themselves.”

“Article 18

“Return of smuggled migrants

“1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

“2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

“3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

“4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

“6. States Parties may cooperate with relevant international organizations in the implementation of this article.

“7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

“8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.”

1. Summary of main requirements

91. Each State party is required:

(a) To cooperate to the fullest extent possible to prevent the smuggling of migrants by sea (art. 7);

(b) To render assistance to a State party that has the right to board a vessel flying its state flag (art. 8, para. 1);

(c) To inform the flag State if it has boarded its vessel (art. 8, para. 3);

(d) To respond expeditiously to a request for determination if a vessel is entitled to claim that State as the State of its registry (art. 8, para. 4);

(e) To respond expeditiously to a request for authorization to board, search and take other measures with respect to a vessel flying its flag (art. 8, para. 4);

(f) To designate an authority to assist or respond to requests for assistance concerning such vessels (art. 8, para. 6);

(g) To exchange information with other relevant States regarding the smuggling of migrants, consistent with domestic legal systems (art. 10, para. 1);

(h) To comply with conditions imposed upon it by States sending such information (art. 10, para. 2);

(i) To provide or strengthen specialized training to combat smuggling of migrants (art. 14, para. 1);

(j) To cooperate with each other and competent international organizations and non-governmental organizations to ensure adequate training to prevent and eradicate smuggling of migrants (art. 14, para. 2).

2. Main elements of the articles

Importance of considering elements of both the Convention and the Protocol together

92. Generally, the scope of cooperation under the Convention and its Protocols is governed by the scope of the Convention itself—general and specific forms of cooperation and assistance are established for the prevention, investigation and prosecution of offences covered by the Convention and any applicable Protocols, where the offence is transnational in nature and involves an organized criminal group. In formulating legislative and

administrative rules and procedures for cooperation under the Protocol, it is important that the Convention and the Protocol be read together. The Convention contains both general requirements for States parties to cooperate (arts. 27 (Law enforcement cooperation), 28 (Collection, exchange and analysis of information on the nature of organized crime), 29 (Training and technical assistance), 30 (Other measures: implementation of the Convention through economic development and technical assistance) and 31 (Prevention)) and a series of obligations focused on specific subject matter or forms of cooperation (arts. 12 (confiscation and seizure), 13 (international cooperation for purposes of confiscation), 16 (Extradition), 17 (Transfer of sentenced persons), 18 (Mutual legal assistance), 21 (Transfer of criminal proceedings) and 24 (Protection of witnesses)). It is particularly important to ensure that cooperative rules and practices under the Convention and Protocol are consistent with one another and that there are no gaps that could create areas in which assistance could not be rendered on request. Apart from forms of assistance, such as those in article 17 of the Protocol and cooperative measures set forth in its article 8, the Convention also recognizes that more general forms of assistance, in the form of both resources and technical or other expertise, will be needed by many developing countries if they are to fully implement the Convention and Protocols and to be in a position to render such assistance or cooperation as is requested of them once they are in force. Thus, article 29 of the Convention deals with the provision of training and technical assistance and articles 30 and 31 call for more general development assistance to help developing countries implement the Convention and address the underlying circumstances that render socially marginalized groups vulnerable to organized crime (see in particular art. 31, para. 7. Article 30, paragraph 2 (c), calls for voluntary contributions to support implementation, as does the resolution in which the General Assembly adopted the Convention and Protocol (resolution 55/25, para. 9)).

93. The specific areas in which some form of cooperation is required by the Protocol are the following:

(a) *Assistance in relation to maritime cases.* In cases where States parties suspect a maritime vessel flying their flag or a stateless vessel of involvement in smuggling, they may request general assistance of other States parties in suppressing such use of the vessel. Such assistance must be provided, within the means of the requested State party (art. 8, para. 1). Where States parties suspect a vessel registered or flagged to another State party, they may request that other State party to authorize boarding, searching and other appropriate measures. Such requests must be considered and responded to expeditiously (art. 8, paras. 2 and 4). In turn, the State party

that searches the vessel must promptly inform the authorizing State party of the results of any measures taken (art. 8, para. 3). Each State party is required to designate an authority or authorities to receive and respond to requests for assistance in maritime cases (art. 8, para. 6);

(b) *Border measures.* Generally, States parties are required to strengthen border controls to the extent possible and to consider strengthening cooperation between border control agencies, including by the establishment of direct channels of communication (art. 11, paras. 1 and 6);

(c) *Travel and identity documents.* States parties are required to ensure the integrity and security of their travel documents, which may include informing other States parties of measures taken to make documents resistant to tampering and of measures that can be used to verify that the documents are authentic (art. 12). They are also required to verify within a reasonable time the legitimacy and validity of documents purported to have been issued by them at the request of another State party (art. 13);

(d) *Training and technical assistance.* In addition to training their own officials, States parties are required to cooperate with one another in training to prevent and combat smuggling and in appropriate methods for dealing with smuggled migrants. The obligation to cooperate also includes cooperation with intergovernmental and non-governmental organizations, a number of which are active in matters related to migration (art. 14, para. 2). The Protocol also calls for relevant technical assistance to countries of origin or transit, in addition to the more general call for such assistance in articles 29 and 30 of the Convention (art. 14, para. 3);

(e) *Prevention.* The Protocol requires each State party to promote or strengthen development programmes that combat the root socio-economic causes of the smuggling of migrants (art. 15, para. 3);

(f) *Return of smuggled migrants.* Generally, States parties are required on request to accept the repatriation of their nationals and to consider accepting those who have or have had rights of residence. This includes verifying status as a national or resident without unreasonable delay, re-admitting the person and, where necessary, providing any documents or authorizations needed to allow that person to travel back to the requested State party (art. 18, paras. 1-4);

(g) *Information exchange.* States parties are required, consistent with existing legal and administrative systems, to exchange a series of categories of information ranging from general research and policy-related material about smuggling and related problems to more specific details of methods used by smugglers (art. 10);

(h) *Other agreements or arrangements.* As with the parent Convention, States parties are encouraged to consider entering into other agreements of a bilateral or regional nature to support forms of cooperation and assistance that may go beyond those required by the Protocol (art. 17).

3. *Implementation of the articles*

94. Generally, the provision of cooperation and assistance will be a matter for administrative rules and practices and will not require legislation, but there are some exceptions.

(a) Cooperation and assistance in maritime matters (articles 7-9)

95. These articles require States parties to cooperate to suppress smuggling of migrants by sea. Establishment of jurisdiction over smuggling at sea is a prerequisite for effective implementation of articles 7-9. Article 15 of the parent Convention requires States parties to establish jurisdiction when offences have been committed on board a vessel flying their flag. In addition and although not a requirement under the Convention or the Protocol, States parties may wish also to establish their jurisdiction over vessels on the high seas flying the flag of another State party as well as over those without nationality, as this will ensure the proper functioning of the measures provided for under part II of the Protocol.

96. The main focus of article 8 is to facilitate law enforcement action in relation to smuggling of migrants involving the vessels of other States parties. The enactment of implementing legislation providing for enforcement powers in respect of foreign flag vessels may therefore be necessary. Issues to be addressed in such legislation include the provision of powers to search and obtain information, powers of arrest and seizure, the use of reasonable force, the production of evidence of authority and the provision of appropriate legal protection for the officers involved.

97. Drafters should note that the meaning of the phrase “engaged in the smuggling of migrants by sea” is discussed in the interpretative notes (A/55/383/Add.1, para. 102). It includes both direct and indirect engagement, including cases where a mother ship has already transferred migrants to smaller vessels for landing and no longer has any on board or else has picked up migrants while at sea for the purposes of smuggling them. It

would not include a vessel that had simply rescued migrants who were being smuggled by another vessel.

98. Article 8, paragraph 6, requires that each State party designate a central authority to deal with maritime cases, which may require legislative action establishing an authority and providing for the necessary powers, in particular the power to authorize another State party to take action against vessels flying its flag. In determining the appropriate location for their designated authority, States parties should consider factors such as ease of access to the national shipping registry in order to provide confirmation of registry, ease of coordination with other domestic agencies, including maritime law enforcement authorities, and the existence of arrangements for the conduct of business on a round-the-clock basis. The designated authority should also be responsible for outgoing requests to other States parties. It should therefore be able to receive requests from domestic authorities—customs, police and other law enforcement agencies—and be in a position to assist in transmission to foreign States.

99. Article 8, paragraph 6, further requires States parties to notify their designated authority to the Secretary-General to permit a list of contact points to be maintained and circulated to all States parties. Governments responding to this should consider providing essential contact information (addresses, telephone and facsimile numbers, hours of operation and the language or languages in which requests can be processed).

100. The law enforcement and cooperation regime defined by articles 7-9 has been inspired to a large extent by the set of measures included in article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,¹⁸ to combat illicit traffic by sea. However, because of the fundamental difference between trafficking in drugs and smuggling of persons, there will be specific factors in judging the appropriateness of intervening at sea against smuggling of persons and in ensuring that adequate safeguards regarding safety and humane treatment of persons on board. The focus of articles 7 and 8 on suppression of a criminal activity should not lead law enforcement officers to overlook the duty established under maritime law and custom to rescue those in peril at sea. Vessels used for smuggling may be confiscated if apprehended and smugglers often use dilapidated vessels as a result. In some cases, such vessels are encountered at sea overloaded with migrants and in imminent danger of sinking. Legislation should be drafted and

¹⁸United Nations, *Treaty Series*, vol. 1582, No. 27627.

implemented so as to ensure that officials are aware that the duty to effect a rescue has priority in such circumstances and that where there is evidence of peril at sea, vessels should be boarded whether there is a suspicion of smuggling or not. Domestic powers and safeguards, if needed, should consider the safeguards set out in article 9 and the interests of maritime rescue and safety. They should not, however, limit the duty or power of authorities to act in cases where lives or safety may be at risk or in cases where there was reason to believe migrants or other persons were being trafficked or held on board against their will.

101. The Protocol does not limit the class or status of officials who can exercise maritime search powers to warships and military aircraft, leaving it open to legislatures to extend them to any official or agency with appropriate law enforcement activities. It should be noted, however, that any boats, ships or aircraft used must be clearly marked and identifiable as being on government service and authorized to that effect (art. 9, para. 4). Given the risks and difficulty associated with boarding and searching vessels at sea, legislatures may also wish to consider limiting the authority to exercise powers created pursuant to the Protocol to a relatively small number of officials or officers who have the necessary training, competence and equipment.

(b) Border measures (article 11)

102. The requirement to strengthen basic border controls does not necessarily involve cooperation with other States and such cooperation or coordination of border controls as may be needed will not generally require legislation. The strengthening of cooperation between agencies and establishment of direct channels of communication may require some legislation to establish that the agencies concerned have the authority to cooperate and to allow the sharing of information that may otherwise be protected by confidentiality laws. Many of the issues raised by cooperation between border control agencies will be similar to those raised by cooperation between law enforcement agencies and article 27 of the Convention, the part of the legislative guide concerning that article (paras. 500-511) and domestic legislation used to implement it might therefore be considered.

(c) Travel or identity documents (articles 12 and 13)

103. The establishment of specific forms or the setting or amendment of technical standards for the production of documents such as passports may

be a legislative matter in some States. In such cases, legislators will generally need to consult technical experts, either domestically or in other States parties, to determine what basic standards are feasible and how they should be formulated. Understanding technologies such as biometrics and the use of documents containing electronically stored information, for example, will be essential to the drafting of legal standards requiring the use of such technologies. Implementing the requirement to verify travel or identity documents will generally not require legislation, since virtually all States already do this on request, but may require resources or administrative changes to permit the process to be completed in the relatively short time frames envisaged by the Protocol.

(d) Technical assistance, cooperation and training (article 14)

104. The establishment of programmes of training for domestic officials will not generally require legislative measures, but the materials and personnel used to deliver such training will rely heavily on domestic legislation, the international instruments and in many cases the legislation of other States with whom a particular State party is likely to find it necessary to cooperate on a frequent or regular basis. To ensure efficient and effective cooperation with other States parties in administering the treaties, cooperation in the development and application of training programmes and the rendering of assistance to other States by providing resources and/or expertise, will also be important.¹⁹

(e) Information exchange (article 10)

105. As with other areas of cooperation, the mere exchange of information is not likely to require legislative action. Given the nature of some of the information that may be exchanged, however, amendments may be needed to domestic confidentiality requirements to ensure that it can be disclosed and precautions may be needed to ensure that it does not become public as a result. The interpretative notes also raise the need for prior consultations in some cases, especially before sensitive information is shared spontaneously and not on request (A/55/383/Add.1, para. 37, which refers to art. 18, para. 15, of the Convention). These may involve changes to

¹⁹Art. 14, paras. 2 and 3, of the Protocol. For an example, see also the Proposal for a Comprehensive Plan to combat illegal immigration and trafficking in human beings in the European Union, points 64-66 (see sect. 4, Information resources, below). Point 54 stresses the need for these programmes to take account of the specific features of each national training system.

media or public access-to-information laws, official secrecy laws and similar legislation to ensure an appropriate balance between secrecy and disclosure.

(f) Return of smuggled migrants (article 18)

106. As outlined above, States parties are required to cooperate in the identification or determination of status of their nationals and residents. They are required to cooperate in (“facilitate and accept”) the return of nationals and to consider cooperation in the return of those with some rights of residency short of citizenship, including by the issuance of documents needed to allow the travel of such persons back from countries to which they have been smuggled (for the exact obligations, see above and art. 18 of the Protocol). In most States, conformity with these requirements would involve primarily the issuance of administrative instructions to the appropriate officials and ensuring that the necessary resources are available to permit them to provide the necessary assistance.

107. Legislative amendments might be required in some States, however, to ensure that officials are required to act (or in appropriate cases, to consider acting) in response to requests and that they have the necessary legal authority to issue visas or other travel documents when a national or resident was to be returned. In drafting such legislation, officials should bear in mind that any obligations in international law governing the rights or treatment of smuggled migrants, including those applicable to asylum-seekers, are not affected by the Protocol or the fact that the State concerned has or will become a party to it (art. 18, para. 8, of the Protocol and the interpretative notes (A/55/383/Add.1), para. 116). Legislatures may wish also to consult the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Assembly resolution 45/158, annex) which provides for measures that go beyond those set out in the Protocol. (In particular, article 67 calls for cooperation “with a view to promoting adequate economic conditions for . . . resettlement and to facilitating . . . durable social and cultural reintegration in the State of origin”.)

108. The requirements to accept the return of nationals and to consider accepting the return of those with some right of residency turn on the status of those individuals at the time of return. Paragraph 111 of the interpretative notes should be taken into account:

“The *travaux préparatoires* should indicate that this article is based on the understanding that States parties would not deprive persons of their nationality contrary to international law, thereby rendering them stateless.”

109. The notes also indicate that return should not be carried out until any relevant nationality or residency status has been ascertained (A/55/383/Add.1, para. 113).

110. Where feasible, States should also consider training for officials likely to be involved in the return of smuggled migrants, bearing in mind the requirement of article 16 to ensure that basic rights are preserved and respected and the requirement of article 18, paragraph 5, that returns must involve any measures necessary to ensure that they are carried out in an orderly manner and with due regard for the safety and dignity of the person.

(g) *Other agreements or arrangements (article 17)*

111. As with the Convention, the Protocol is intended to set a minimum global standard for various measures to deal with the smuggling of migrants, return and other related problems. The drafters specifically envisaged that some States would wish to proceed with more elaborate measures, in particular in response to problems that have arisen or are seen as particularly serious only in the context of bilateral or regional situations. Two States parties with a specific cross-border smuggling problem might find it appropriate to develop a bilateral treaty or arrangement to expedite cooperation between them, for example, or States with similar legal systems, such as those in Europe, might be able to adopt streamlined procedures to take advantage of this. The legal or legislative requirements to implement this provision—which is not mandatory—will vary from country to country. In some cases, legislative or executive authority is required to enter into discussions or negotiations, while in others legislation may be needed only to ratify or adopt the resulting treaty or to implement it in domestic law. The words “agreements or operational arrangements” are used to ensure that options ranging from formal legal treaties to less formal agreements or arrangements are included.

4. Information resources

112. Drafters of national legislation may wish to refer to the related provisions and instruments listed below.

(a) *Organized Crime Convention*

- Article 11 (Prosecution, adjudication and sanctions)
- Article 12 (Confiscation and seizure)
- Article 13 (International cooperation for purposes of confiscation)
- Article 15 (Jurisdiction)
- Article 16 (Extradition)
- Article 17 (Transfer of sentenced persons)
- Article 18 (Mutual legal assistance)
- Article 21 (Transfer of criminal proceedings)
- Article 24 (Protection of witnesses)
- Article 27 (Law enforcement cooperation)
- Article 28 (Collection, exchange and analysis of information on the nature of organized crime)
- Article 29 (Training and technical assistance)
- Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)
- Article 31 (Prevention)

(b) *Trafficking in Persons Protocol*

- Article 8 (Repatriation of victims of trafficking in persons)
- Article 10 (Information exchange and training)
- Article 11 (Border measures)

(c) *Migrants Protocol*

- Article 2 (Statement of purpose)
- Article 7 (Cooperation)
- Article 8 (Measures against the smuggling of migrants by sea)
- Article 9 (Safeguard clauses)
- Article 10 (Information)
- Article 11 (Border measures)
- Article 12 (Security and control of documents)

- Article 13 (Legitimacy and validity of documents)
- Article 14 (Training and technical cooperation)
- Article 15, paragraph 3 (Other prevention measures)
- Article 17 (Agreements and arrangements)
- Article 18 (Return of smuggled migrants)

(d) *Other instruments*

- 1949 Convention concerning Migration for Employment (revised)
Convention No. 97 of the International Labour Organization
United Nations, *Treaty Series*, vol. 120, No. 1616
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>
- 1975 Convention concerning Migrations in Abusive Conditions and
the Promotion of Equality of Opportunity and Treatment of
Migrant Workers
Convention No. 143 of the International Labour Organization
United Nations, *Treaty Series*, vol. 1120, No. 17426
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>
- 1988 United Nations Convention against Illicit Traffic in Narcotic
Drugs and Psychotropic Substances
United Nations, *Treaty Series*, vol. 1582, No. 27627
http://www.unodc.org/pdf/convention_1988_en.pdf
- 1990 International Convention on the Protection of the Rights of All
Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm
- 1994 Programme of Action of the International Conference on Popu-
lation and Development
*Report of the International Conference on Population and Develop-
ment, Cairo, 5-13 September 1994* (United Nations publication,
Sales No. E.95.XIII.18), chap. I, resolution 1, annex
<http://www.iisd.ca/linkages/Cairo/program/p10000.html>
Paragraphs 10.1 and 10.2 (a)
- 1997 Conference of Ministers on the Prevention of Illegal Migration,
held in the context of the Budapest Process in Prague on 14 and
15 October 1997
<http://www.icmpd.org/uploadimg/recommendations%20prague%20Ministerial%20Oct%2097.pdf>
Recommendations 14 (Cooperation relative to effective practices for
control of persons at external frontiers) and 17 (Training)

1999 Bangkok Declaration on Irregular Migration, adopted at the International Symposium on Migration: Towards Regional Cooperation on Irregular/ Undocumented Migration, held in Bangkok from 21 to 23 April 1999

Document A/C.2/54/2, annex

2000 Recommendation 1467 (2000) of the Parliamentary Assembly of the Council of Europe on clandestine immigration and the fight against traffickers

Paragraph 11

2001 Twelve Commitments in the fight against trafficking in human beings, agreed upon at the Meeting of the JHA Council of Ministers of the member States of the European Union (Justice and Home Affairs) and the candidate States, held in Brussels on 28 September 2001

Point 5 (Cooperation)

2002 Proposal 2002/C 142/02 for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, adopted by the JHA Council of Ministers of the European Union (Justice and Home Affairs) in Brussels on 28 February 2002

Official Journal of the European Communities, C 142, 14 June 2002
Chapter II.E (points 64-66)

2002 Recommended Guidelines on Human Rights and Human Trafficking

Document E/2002/68/Add.1

Guideline No. 11 (Cooperation and coordination between States and regions)

Annex. Reporting requirements under the Migrants Protocol

The following is a list of the notifications States parties are required to make to the Secretary-General of the United Nations:

Article 8. Measures against the smuggling of migrants by sea

“6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.”

Article 20. Settlement of disputes

“4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.”

Article 21. Signature, ratification, acceptance, approval and accession

“3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

“4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.”

Article 23. Amendment

“1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this

Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.”

“4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.”

Article 24. Denunciation

“1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.”