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Working Group on the Smuggling of Migrants

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Smuggling of migrants by sea

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Note by the Secretariat

I. Introduction

1. Pursuant to resolution 5/3, adopted by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime at its fifth session, an open-ended intergovernmental interim working group on the smuggling of migrants was established to advise and assist the Conference in the implementation of its mandate with regard to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.
2. In its resolution 6/3, the Conference encouraged States parties to exchange information on best practices to promote cooperation to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea, in order to implement article 7 of the Smuggling of Migrants Protocol.
3. Also in resolution 6/3, the Conference welcomed the report of the first session of the Working Group, held from 30 May to 1 June 2012, which contained recommendations on criminalization, investigation and prosecution, prevention, protection and assistance, as well as international cooperation and proposed areas for future work. At its first session, the Working Group also recommended that, taking into account chapter II of the Smuggling of Migrants Protocol, States parties should give special attention to dangers to the life and safety of migrants smuggled by sea and should prioritize the preservation of life and safety upon detection of a vessel used to smuggle migrants.¹

* CTOC/COP/WG.7/2015/1.

¹ CTOC/COP/WG.7/2012/6.



4. In resolution 7/1, the Conference decided that the Working Group on the Smuggling of Migrants will be a constant element of the Conference, forwarding its reports and recommendations to the Conference.
5. At its second session, held from 11 to 13 November 2013, the Working Group recommended to the Conference that smuggling of migrants by sea should be one of the topics considered at future sessions of the Working Group.²
6. The present background paper was prepared by the Secretariat to aid in the discussions of the working group at its third session.

II. Issues for discussion

7. The Working Group may wish to consider the following issues for discussion.
8. What are the current trends, patterns and modi operandi of migrant smuggling by sea?
9. How can knowledge be enhanced on the routes, modi operandi and methods used by criminal networks engaging in migrant smuggling by sea?
10. What are the jurisdictional powers of States against smuggling of migrants at the different maritime zones?
11. How can coastal States be supported, including small island States, to detect smuggling of migrants at sea?
12. What action should be taken to ensure that all elements and aspects of migrant smuggling by sea are investigated, including the activities of land-based organizers of the journey by sea?
13. How can States ensure that all persons on board intercepted boats receive appropriate assistance and their protection needs are addressed, in line with the provisions of the Smuggling of Migrants Protocol and other relevant international instruments?
14. What are the appropriate measures to be taken in order to effectively investigate smuggling of migrants by sea?
15. How can it be ensured that intercepted or rescued migrants are disembarked to a place of safety?
16. How can international cooperation to prevent and suppress smuggling of migrants by sea be reinforced?

III. Overview of issues and guidance for response

A. Routes, patterns and trends of smuggling of migrants by sea

17. Smuggling of migrants by sea is often an inexpensive way to move people irregularly from one country to another. It can be one of the stages of a longer

² CTOC/COP/WG.7/2013/5.

stage-to-stage journey that also often involves smuggling by land and less commonly by air. The persons that are the object of migrant smuggling by sea are usually part of mixed migration flows and have different profiles, backgrounds and needs. Some are seeking to escape economic hardship, lack of opportunities for social mobility or poor governance. Others are fleeing war and persecution and have a valid claim to international protection under international refugee or humanitarian law. A number of them may be victims of human trafficking and move along routes used by criminal networks engaging in both migrant smuggling and trafficking in persons. Unaccompanied minors, disabled or sick persons or families with very young children may also be the object of migrant smuggling by sea and face increased risks due to their vulnerable situation.

18. The *modus operandi* of migrant smugglers at sea depends largely on the conditions prevailing in the maritime regions concerned. Smuggling networks rapidly adapt their methods in reaction to the response of law enforcement agencies to their activities. Routes may also shift as a result of changes in the security situation in specific countries, or political and economic developments affecting countries.

19. Recent events in several regions of the world, such as the Mediterranean, the Bay of Bengal and the Gulf of Aden, show that sea journeys along smuggling routes are extremely perilous and undertaken in dire conditions. They typically involve unseaworthy vessels that are ill-equipped for the passages they attempt. In these conditions, even where the distances to be covered are short, the risks of accidents at sea are great. The increasing number of casualties reported among migrants smuggled by sea has become a source of grave concern in recent years.

20. The methods and conduct smugglers use in their pursuit of maximizing profits are the major cause of accidents claiming the lives of migrants smuggled at sea. Knowing that vessels will be seized or destroyed by law enforcement and border control agencies if the journey is detected, smugglers typically use old and inexpensive vessels. Engine failures, water leaks and capsizing is common, not least due to the overcrowding of boats. In some cases, smugglers embark and initially pilot boats engaged in smuggling of migrants but subsequently abandon the boat at sea in order to avoid arrest during interception or rescue operations, instructing one of the passengers to steer the vessel to the destination coast. Instances of self-induced accidents, whereby smugglers on board damage the boat to provoke a rescue operation, have also been reported.

21. Similarly, the safety and security of persons transported is commonly disregarded by smugglers. Boats are not equipped with safety mechanisms or life jackets, lack maps or other navigational equipment, and do not carry sufficient water, food or fuel, and threatening weather conditions are often overlooked. Migrants are frequently restrained in compartments below deck and therefore have very limited chances of surviving in case of shipwreck.

22. The information available on smuggling of migrants by sea at the global level is often fragmented, incomplete and inconsistent. Where data are collected, it often concerns irregular migration and not specifically journeys facilitated by smugglers.

Moreover, available data are often collected following divergent methodologies and are not always disaggregated according to sea, land and air routes.³

Main maritime routes used for the smuggling of migrants

23. In the Mediterranean region, smuggling of migrants has increased significantly since 2013. Currently, the main maritime routes of irregular movement in the region are the Central Mediterranean route, leading to Italy and Malta through the Mediterranean, and the eastern Mediterranean route, leading to the shores of Greece, Italy and Cyprus.⁴ According to figures published by Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, more than 170,000 migrants arrived irregularly in the European Union through the Central Mediterranean route in 2014, while 43,377 persons were detected while irregularly crossing the sea border between Turkey and Greece.⁵ In 2015, according to the Office of the United Nations High Commissioner for Refugees (UNHCR), the total number of persons that have crossed the Mediterranean as of 14 August reached some 264,500, including 158,456 to Greece, approximately 104,000 to Italy, 1,953 to Spain and 94 to Malta.⁶

24. The number of casualties during irregular crossings in the Mediterranean has risen dramatically in recent years. UNHCR estimates that 3,500 persons have perished or gone missing in 2014. According to the International Organization for Migration (IOM), in the first seven months of 2015, more than 2,000 people are believed to have died during their attempt to cross the Mediterranean and reach European shores.⁷

25. Methods of migrant smuggling in the Mediterranean depend on the route and the length of the journey. The means of transport used include different types of small inflatable boats able to carry only a limited number of persons, larger wooden fishing or sailing boats which carry up to approximately 100 persons on board, as well as, since late 2014, big cargo vessels transporting from 250 to 800 migrants.

26. Cargo vessels are used for longer journeys with Italy as a destination. The departing location varies, but the vessels would typically be waiting in front of coastlines until migrants are transported to them on board smaller boats. The electronic tracking systems of these cargo vessels are often turned off and they can be detected at the high seas only after sending a distress signal via satellite phone. The crew would typically abandon the boat before detection, leaving it and its passengers unguided and adrift, like a “ghost ship”.

27. The use of “mother ships” is another method employed by smugglers in the Mediterranean. Under this practice, a 15-20 meter long vessel, also known as the

³ UNODC, Issue Paper — Smuggling of Migrants by Sea, p. 8 (available at www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf).

⁴ The eastern Mediterranean route also refers to smuggling of migrants by land from Turkey to Bulgaria and Greece.

⁵ Frontex, Annual Risk Analysis 2015.

⁶ UNHCR, Briefing Note “Numbers of refugee arrivals to Greece increase dramatically”, 18 August 2015, www.unhcr.org/55d32dcf6.html.

⁷ IOM Press Release “Deadly Milestone as Mediterranean Migrant Deaths Pass 2,000”, 4 August 2015, www.iom.int/news/deadly-milestone-mediterranean-migrant-deaths-pass-2000.

mother ship, which is usually a fishing boat, sails with smuggled migrants on board and towing or followed by a smaller boat. At some point on the high sea, the passengers would be transferred into the smaller boat, the mother ship would sail away and the smuggled migrants on the small boat would call for help in order to be rescued.

28. In South-East Asia, a major maritime route for the smuggling of migrants goes through the Bay of Bengal and the Andaman Sea. According to figures published by UNHCR, an estimated 63,000 and 25,000 persons would have moved irregularly within the Bay of Bengal in 2014 and the first quarter of 2015 respectively. Irregular movements have tripled between 2012 and 2015.⁸ Three hundred persons are believed to have perished at sea in the Bay of Bengal in the first quarter of 2015.⁹

29. Smuggled migrants in the Bay of Bengal report that being packed in their hundreds on board boats with a much lower carrying capacity, and paying between \$90 to \$370 for their journey. However, smuggled migrants are often requested to pay up to \$2,000 upon disembarkation, otherwise they would risk detention in transit camps on land run by smugglers. Their maritime journey may last in some cases more than 40 or 50 days, during which time they face starvation, dehydration and violence inflicted by boat crews.¹⁰ Often migrants sail adrift at sea for several days before being rescued and brought to land, and in some cases passengers are transferred several times between boats before reaching shore.¹¹

30. Another maritime route for migrant smuggling was leading from South-East Asian countries, mainly Indonesia, to Australia, and in particular Australian islands geographically remote from the Australian mainland. While incidents of migrant smuggling by sea from Eastern Asia across the Pacific to Canada and the United States of America have also been reported, especially in previous decades, this route is no longer frequently used.

31. In the Horn of Africa, smuggling of migrants by sea typically occurred across the Gulf of Aden to Yemen and the Arabic peninsula. Conditions of travel along this route are particularly severe: the journey is estimated to have a mortality rate of 5 per cent.¹² In 2014, almost 250 deaths at sea in this area were reported.¹³

32. Irregular movements by sea are also frequent in the Caribbean. According to UNHCR, in 2014, 152 maritime incidents involving a total of 5,215 migrants were recorded, mostly migrants of Haitian and Cuban origin, with 25 reported deaths and 48 persons missing. The United States is the main destination country for irregular crossings by sea in the Caribbean. Other States in the region are mainly transit

⁸ UNHCR, Bay of Bengal and Andaman Sea Initiative, Enhancing Responses and Seeking Solutions, 4 June 2015.

⁹ UNHCR, Irregular Maritime Movements in South-East Asia, January-March 2015.

¹⁰ UNHCR, Irregular Maritime Movements in South-East Asia, January-March 2015.

¹¹ UNHCR, Irregular Maritime Movements in South-East Asia, January-March 2015.

¹² UNODC, Issue Paper — Smuggling of Migrants by Sea, p. 14 (available at www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf).

¹³ Regional Mixed Migration Secretariat, End of Year: regional mixed migration thematic summary (2014), [www.regionalmms.org/index.php?id=55&tx_ttnews\[tt_news\]=309&cHash=fb17fd49b5c536be5e9dc6c5d640f1e6](http://www.regionalmms.org/index.php?id=55&tx_ttnews[tt_news]=309&cHash=fb17fd49b5c536be5e9dc6c5d640f1e6).

points en route to the United States, but are increasingly becoming final destinations.

33. In order to enhance knowledge of patterns and trends of smuggling by sea, States may wish to consider making use of all available mechanisms for reporting incidents at sea, such as the inter-agency platform for information sharing on smuggling of migrants by sea. The platform, launched in July 2015, is a joint database on migrant incidents and on suspected smugglers and vessels, developed to better understand unsafe mixed migration by sea and to take measures to address it. The platform has been jointly set up by IOM, the United Nations Office on Drugs and Crime (UNODC) and the International Maritime Organization (IMO), and is accessible to their member States.

34. The Voluntary Reporting System on Migrant Smuggling and Related Conduct (VRS-MSRC) is another tool that States can use to collect, exchange and analyse information on migrant smuggling by sea, and was developed by UNODC at the regional level in support of the Bali Process and was launched in 2013. The VRS-MSRC is an Internet-based data collection system on all forms of migrant smuggling that helps members identify emerging trends and patterns and develop knowledge-based responses and targeted cooperation against migrant smuggling, including on migrant smuggling by sea.

B. The relationship between the Smuggling of Migrants Protocol and the United Nations Convention on the Law of the Sea

35. Chapter II of the Smuggling of Migrants Protocol contains three articles dedicated to the Smuggling of Migrants by Sea. Article 7 of the Protocol requires States parties to cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants. Article 8 of the Protocol specifies a series of measures that States can take in cooperation to suppress the use of vessels suspected of engaging in the smuggling of migrants by sea, and focuses on facilitating law enforcement action in relation to smuggling of migrants involving the vessels of other States parties. Article 9 of the Protocol contains a number of “safeguard clauses” requiring States that take measures at sea against a vessel in accordance with article 8 to ensure the safety of persons on board and respect for the marine environment, as well as to take due account of the security of the vessel and its cargo and the commercial or legal interests of other States. Article 9 also stipulates the need to take due account of the rights and obligations of coastal States and the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving vessels subjected to measures taken in accordance with Chapter II.

36. The provisions of the Protocol on smuggling of migrants by sea do not depart from the established principles of the international law of the sea. The Protocol is in line with the principles enshrined in the United Nations Convention on the Law of the Sea (UNCLOS), which codified, to a large extent, existing customary rules. In particular, the Protocol does not contain any derogatory provision on jurisdiction or capacity to act at sea, which is dependent on the location of the vessel engaging or suspected to engage in illicit activities. Furthermore, the safeguard provisions of article 9 were included to protect, in addition to the rights and safety of smuggled migrants, the rights and interests of flag and coastal States and to clarify the

relationship or interaction between the Protocol and other areas of international law.¹⁴

C. Jurisdiction

37. According to the international law of the sea, vessels have the nationality of the State whose flag they are entitled to fly (UNCLOS, art. 91(1)). Ships are subject to the exclusive jurisdiction of the flag State on the high seas (UNCLOS, art. 92(1)), with the exception of a number of circumstances provided for in UNCLOS and other international instruments. The flag State has a duty to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (UNCLOS art. 94).

38. Coastal States enjoy sovereignty and full jurisdictional powers over their territorial sea subject to the limitations established by UNCLOS and other rules of international law.¹⁵ Their jurisdictional powers include criminal justice response with respect to vessels engaging in the smuggling of migrants. Consent of the flag State to actions against its vessels is not required in the territorial sea.

39. The jurisdictional powers of the coastal State in its territorial seas are limited by the right of foreign vessels to innocent passage, which is defined by UNCLOS and relevant rules of international customary law. Coastal States are entitled to prevent passage that is not innocent through their territorial waters. Under UNCLOS, passage will not be considered “innocent” if the vessel engages in the loading or unloading of any person contrary to the immigration laws and regulations of the coastal State.¹⁶

40. Coastal States may also act against the smuggling of migrants performed by foreign vessels in their contiguous zone. According to UNCLOS, they may exercise the control necessary to prevent or punish infringements of their immigration laws and regulations committed or anticipated within their territory or territorial sea.¹⁷ Again, in such cases the consent of the flag State is not required.

41. Freedom of navigation on the high seas is a long-standing customary principle of international law. On the other hand, international law also provides for a number of exceptions in situations endangering international order. Accordingly, the exclusive jurisdiction of the flag State at the high seas is limited by the exercise of the right of hot pursuit and the right of visit by warships and other duly authorized ships on government service of another State when a ship is suspected of engaging in certain activities.

42. According to article 111 of UNCLOS, the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulation of that State. The pursuit must commence when the foreign ship is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may

¹⁴ UNODC, Legislative guide for the implementation of the Protocol against the smuggling of migrants by land, sea and air, pp. 363-364.

¹⁵ UNCLOS, art. 2(3).

¹⁶ UNCLOS, art. 19.2 (g).

¹⁷ Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling*, p. 240.

continue outside the territorial sea or the contiguous zone if it has not been interrupted.¹⁸ Therefore, coastal states may take action against vessels engaging in the smuggling of migrants in the maritime zones under their jurisdiction even beyond the limits of these zones, provided that the pursuit of the vessels started in these zones and as long as it remains uninterrupted. The right of hot pursuit ceases as soon as the ship that is being pursued enters the territorial sea of its own State or of a third State.

43. The right of visit in the high seas, which includes the right to board and search the ship, is regulated by article 110 of UNCLOS. According to UNCLOS, the right to visit can only be exercised when a ship is suspected of engaging in certain activities, such as piracy, slave trade, or unauthorized broadcasting. While UNCLOS does not list smuggling of migrants among the suspected activities that can justify the right of visit, it can be exercised in respect of ships without nationality, which is often the case of ships engaging in migrant smuggling.

44. The Smuggling of Migrants Protocol contains provisions on action to be taken by States with respect to stateless vessels engaging in migrant smuggling by sea. Article 8, paragraph 1, of the Protocol provides explicitly that States parties may request the assistance of other States parties in suppressing the use of vessels without nationality reasonably suspected of engaging in the smuggling of migrants. In addition, article 8, paragraph 7, provides that 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 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.

45. The Protocol does not define what “suppressing the use of a vessel for the purpose of smuggling of migrants” or “appropriate measures” are. States may envisage the establishment of enforcement jurisdiction on the basis of these provisions. Further, under article 8, paragraph 2, of the Smuggling of Migrants Protocol, States parties may request the authorization of a flag State that is party to the Protocol to search, board, and take appropriate measures as authorized by that flag State, with regard to vessels reasonably suspected of engaging in the smuggling of migrants. Article 8 of the Protocol further provides the framework for cooperation between the flag State and the State party taking measures, including the designation of an authority to receive and respond to requests for authorization to take appropriate measures. As at 20 July 2015, 82 States parties to the Smuggling of Migrants Protocol had designated authorities under article 8.¹⁹ The coordination

¹⁸ UNCLOS, art. 111.1.

¹⁹ Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Benin, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Cameroon, Central African Republic, Chad, Comoros, Costa Rica, Croatia, Cyprus, Czech Republic, Djibouti, Egypt, El Salvador, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea-Bissau, Guyana, Iraq, Italy, Jamaica, Kiribati, Kuwait, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Mauritius, Mexico, Montenegro, Morocco, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Panama, Peru, Portugal, Republic of Moldova, Romania, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Serbia, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, the former Yugoslav Republic of Macedonia, Trinidad and Tobago,

regime between flag States and States parties established by article 8 of the Protocol may prove instrumental in fighting migrant smuggling, especially in view of the lack of resources and capacity of some flag States to fulfil their obligations of enforcement under international law.

D. Detection and investigation

46. Detecting migrant smuggling by sea presents a number of important challenges. The vastness of the maritime surface of the Earth makes locating vessels engaging in the smuggling of migrants very difficult, even where a coastal State of departure informs destination States that a vessel has left its shores. Some small coastal States do not have the means and resources to conduct effective surveillance and patrol of the maritime areas under their jurisdiction. Moreover, law enforcement authorities frequently treat vessels carrying migrants in an irregular situation as instances of mere irregular migration, and do not try to establish the link with the migrant smuggling network that organized the journey from land.

47. Smuggling of migrants by sea is usually only a segment of a broader smuggling venture, in which land-based smugglers in the origin, transit and destination countries are involved. Almost invariably, the organizers of the smuggling operation will remain ashore. The investigation to be launched against these individuals might be very complex, extending over several countries. Collecting strong evidence at the point of first contact and linking irregular movements at sea with the smuggling stages that take place on land is essential for any sustainable and effective law enforcement response aiming at dismantling smuggling networks.

48. The starting point of any evidence-gathering activity should be the vessel transporting the smuggled migrants and its occupants. Vessels should be searched thoroughly and swiftly, taking into account their poor condition and other circumstances that may very rapidly cause them to sink. The authorities should endeavour to promptly identify smugglers on board who were piloting the boat or escorting the passengers, in order to investigate them and their links to smuggling networks. Identifying smugglers among the passengers might prove to be difficult due to the disorderly situation on board or the unwillingness of the passengers to assist the authorities.

49. Evidence to substantiate aggravating circumstances should also be collected at an early stage. The conditions on board, the number, age and gender of the passengers, and the treatment inflicted to smuggled migrants might be decisive elements in the determination of aggravating circumstances provided for in domestic legislations. Moreover, the identification of missing or deceased persons during the journey will not only lead to more severe sanctions for the smugglers involved in the venture, but would also assist investigations in countries of origin on the fate of missing persons.

50. The debriefing of smuggled migrants is essential to collect evidence against smuggling networks. Once their basic needs are attended to, smuggled migrants

Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

should be debriefed carefully by skilled and adequately trained investigators. Such debriefing would allow for the obtaining of information on the conditions of the journey both at sea and on land, as well as on smugglers present on board or middlemen in the country of embarkation and arrival. Smugglers on board and middlemen may in turn provide information ultimately leading to the identification and arrest of high-level organizers of the smuggling venture.

51. A thorough and comprehensive investigation should use the boat and its passengers as a starting point to collect information and evidence on the land-based activities of smugglers, as several elements of the crime of smuggling are perpetrated on land. To that effect, officials should endeavour to build confidence with migrants rescued in order to gather pertinent information on their journey and smugglers they have interacted with. Criminal justice practitioners should aim at collecting information on the routes prior to departure and methods of organizing the journey by sea. Intelligence on recruiters, ways to contact potential smuggled migrants, safe houses where the smuggled migrants are accommodated in view of their embarkation, means of transport by land towards the coast, and places of embarkation will typically provide leads in furthering the investigation into the smuggling venture. Such intelligence would also make it possible to understand and address changing modus operandi of the smuggling networks.

52. Other avenues of land-based investigations include the means by which smugglers steal, buy or procure the old and unsafe boats they use for their criminal endeavour, which should not be neglected by investigators. Investigations should also be conducted into the financial operations through which smugglers obtain payment for transport and launder their profits.

53. Another land-based link of the migrant smuggling chain that should be thoroughly investigated are the aides and abettors operating in the countries of disembarkation and destination. These persons are involved in the reception, accommodation, procurement of fraudulent travel or identity documents and onward transport of smuggled migrants. In case smuggled migrants are intercepted and placed in reception facilities, land-based criminals may assist them to flee the reception facilities and proceed to their final destination.

E. Rescue at sea and disembarkation

54. Rescue of persons in distress at sea is an obligation under international law, regardless of the status of people on board and their reasons for undertaking the journey. The boats transporting smuggled migrants frequently face situations of distress because they are unseaworthy, poorly maintained and overloaded. On some occasions, smugglers attempt to take advantage of States' rescue obligation by deliberately sabotaging boats or otherwise creating situations of distress.

55. The paramount consideration when encountering endangered vessels carrying smuggled migrants at sea is to save as many lives as possible by ensuring timely rescue. International law equally obliges States and shipmasters of commercial and private vessels to prioritize this obligation over any other consideration, such as law enforcement or interdiction objectives. The duty to preserve life at sea is acknowledged in article 8, paragraph 5, of the Protocol, which provides that States parties are entitled to take measures with respect to vessels not flying their flag and

suspected of engaging in migrant smuggling that are “necessary to relieve imminent danger to the lives of persons”, even where those measures are not explicitly authorized by the flag State.

56. The safeguard clause of article 9, paragraph 1 (a), and the saving clause of article 19 of the Protocol are also of relevance to rescue at sea. Article 9, paragraph 1 (a) provides that in taking measures against a vessel under article 8, States shall ensure the safety and humane treatment of persons on board. The saving clause states that, in applying the provisions of the Protocol, States parties need to comply with their obligations and responsibilities under international law, which include the obligation to assist persons in distress at sea.

57. Article 98 of UNCLOS and chapter V, regulation 33, of the International Convention for the Safety of Life at Sea (the SOLAS Convention) embody the obligation for shipmasters to render assistance to those in distress at sea. Accordingly, States have the obligation to cooperate in rescue situations and ensure that those rescued are delivered to a place of safety with minimal inconvenience to the assisting ship and minimum deviation from its intended voyage.

58. Despite the prominence and clarity of the international obligation to rescue persons in distress, there have been reports of private shipmasters showing reluctance to render assistance to smuggled migrants at sea.²⁰ Explanations for such an attitude may include cost implications for private operators of a potential diversion from the intended route to engage in a rescue operation and concerns that State authorities may not promptly accept rescued persons for disembarkation.²¹

59. Another concern that may influence the decision of private parties to rescue smuggled migrants at sea consists in fearing potential investigative action and prosecution by States whose legislation does not clearly exclude criminal charges for facilitating irregular migration against private actors involved in rescue operations. Against this background, it is clear that the Smuggling of Migrants Protocol does not target persons who rescue smuggled migrants in distress at sea. Accordingly, States should ensure that the legislative frameworks in place provide sufficient clarity to avoid that charges may not be pressed against those who fulfil their obligation of rescue and preservation of life.

60. On the other hand, intentional failure to rescue persons in distress, refusal of assistance and push-backs at sea are a serious breach of international law. States should therefore endeavour to investigate in a timely and comprehensive manner any such allegations, and provide for sanctions for substantiated allegations of refusing assistance or ignoring distress calls. States should also consider raising the awareness of all persons that may become involved in rescue operations by disseminating relevant provisions, guidelines and information materials to all parties concerned.

²⁰ See for instance, Council of Europe, Parliamentary Assembly, Report of the Committee on Migration, Refugees and Population, “Europe’s ‘Boat-people’ mixed migration flows by sea into Southern Europe”, 11 July 2008, Doc. 11688, p.11 (available at www.unhcr.org/refworld/docid/487c61f616.html).

²¹ UNODC, Issue Paper — Smuggling of Migrants by Sea, pp. 38-39 (available at www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf).

61. Beyond the duty to assist smuggled migrants in distress, issues may arise regarding the country where the rescued migrants should be disembarked. Divergent interpretations of the international legal framework among concerned States have often resulted in hesitations and disputes as to the solution to be adopted. In any event, disembarkation procedures should be governed by the maritime regime and not by immigration control procedures and should aim at delivering rescued individuals to a place of safety where their access to adequate assistance and protection measures, including against refoulement, is secured.

F. Assistance and protection of migrants smuggled by sea

62. The protection of the rights of smuggled migrants, and primarily their right to life, is one of the stated objectives of the Smuggling of Migrants Protocol. Article 16 of the Protocol contains mandatory provisions on protection and assistance to smuggled migrants, including migrants smuggled at sea. Additional duties of assistance and protection are reflected in article 8, paragraph 5; article 9, paragraph 1 (a); and the saving clause of article 19.

63. Article 16 of the Protocol requires States to provide assistance to “migrants whose lives or safety are endangered by reason of being smuggled”. Smuggled migrants intercepted at sea would frequently fall within this category. Being on board unseaworthy and poorly equipped vessels may endanger their lives or safety at any moment. Moreover, once rescued, they may require urgent medical care, food and clothing as a consequence of the conditions of their journey.

64. It is therefore of paramount importance that the vessels rescuing migrants smuggled at sea are adequately equipped and their crews adequately trained to carry out these tasks. In particular, States should endeavour to increase, through specialized training, the capacity of front-line officers to adequately address protection and assistance issues faced by smuggled migrants. Furthermore, issuing legislative or administrative guidelines on protection and assistance to the attention of law enforcement and maritime response units constitutes a good practice to be followed.

65. Ideally, the crews of rescuing vessels should include qualified professionals able to provide assistance and medical help. Government vessels responding to distress signals should have adequate room and safety equipment, such as life vests to accommodate those rescued. Particular attention and care should be given to the special needs of women and children, and other vulnerable persons.

66. States should endeavour to make available adequate facilities for rescued migrants. States facing significant and repeated disembarkations of migrants rescued at sea should consider establishing reception facilities at land where migrants can be referred and receive assistance. In this context, cooperation with international organizations, civil society organizations and/or other service providers is key to successfully fulfilling the obligation of assistance. Providing adequate assistance to smuggled migrants rescued at sea would also serve long-term law enforcement objectives, as individuals whose basic needs are met are more likely to cooperate with the criminal justice system and provide potentially valuable information to investigators about the criminal actors behind their journey.

67. The Smuggling of Migrants Protocol focuses on two sets of protection measures to be taken by States parties with respect to migrants: first, States parties shall take “appropriate measures” to protect migrants from violence inflicted on them by reason of being the object of smuggling. Second, by virtue of the savings clause of article 19, smuggled migrants should be afforded humanitarian protection, and States parties shall ensure that any action undertaken under the provisions of the Protocol is in accordance with their protection obligations under international law, in particular the principle of non-refoulement and, where applicable, the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

68. For officials in charge of protecting sea borders, it might prove challenging to reconcile the obligation to prevent irregular entry through maritime borders and the duty to respect the right of persons smuggled at sea to seek asylum. However, in order to fulfil their protection obligations, States parties should ensure that interception operations intending to prevent vessels carrying smuggled migrants from reaching or entering the territory of States by sea take into account human rights obligations and the right of all persons to seek asylum. Interception measures should not result in persons in need of protection being directly or indirectly refouled.²²

69. Identification of persons in need of humanitarian and refugee protection should preferably not be done at sea. Adequate screening mechanisms should be in place on dry land to identify potential asylum seekers among disembarked smuggled migrants and initiate the processing of their claims; processing asylum claims on board intercepted vessels should be avoided as it may result in procedural injustices. Moreover, law enforcement officials patrolling sea borders and intercepting vessels carrying smuggled migrants would not be expected to have the training and skills required to carry out screening procedures. In addition, the number of intercepted migrants will often be too high to allow for a sound processing of asylum claims on board, even when qualified personnel are present.

70. States should also keep in mind that appropriate assistance and protection measures are conducive to effective investigations and prosecutions. Catering for the needs of rescued migrants will create a climate of trust and encourage them to cooperate with criminal justice practitioners. Any decision or action relating to the removal of smuggled migrants from the countries of transit or destination should take into account the benefit of the participation of smuggled migrants in procedures against smugglers.

G. International cooperation to address the smuggling of migrants by sea

71. International cooperation is key to effectively addressing smuggling of migrants by sea. In addition to the specific framework of collaboration established by article 8 of the Protocol, article 10 on information exchange between States parties and article 14 on training and technical cooperation are of particular relevance to fighting smuggling of migrants by sea. States parties are also expected

²² UNODC, Issue Paper — Smuggling of Migrants by Sea, p. 42 (available at www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf).

to make full use of the provisions on international cooperation of the Convention against Transnational Organized Crime, which apply, *mutatis mutandis*, to the Protocol.

72. In order to effectively address migrant smuggling by sea, international cooperation should not be limited to the framework of cooperation established by article 8 of the Protocol to address smuggling activities at sea. The smuggling venture by sea is usually only a segment of the whole journey and should be considered as such in investigations. The complex nature of criminal migrant smuggling networks and their *modus operandi* means that smugglers who use sea routes cannot be identified purely by looking to the sea: the criminal network itself must be traced from a smuggling vessel, back to the coast of embarkation, and from there back to countries of transit and origin.

73. The wide range of migrant smuggling operations that extend beyond coastal States of embarkation and disembarkation is limiting the effectiveness of bilateral cooperation. Bilateral cooperation agreements to enhance operational efficiency at sea, such as ship-rider agreements for joint patrols at sea, may reduce the numbers of disembarkation of smuggled migrants in a specific country, but criminal networks may adapt by diverting the smuggling route to where cooperation is weaker. The adaptability of smuggling networks can be better addressed through regional cooperation, which would also ease the burden put on coastal States.

74. The key to an effective and comprehensive response to migrant smuggling by sea lies in strengthened multilateral cooperation in investigations along smuggling routes leading to or commencing at the coast. States concerned should be encouraged to regularly exchange information and expertise as provided for in article 10 of the Protocol, and to facilitate direct communication between law enforcement actors in countries along the same smuggling routes. Regional and trans-regional initiatives to enhance cooperation in investigations against smuggling of migrants along common routes should be encouraged and multiplied. Such initiatives may also assist in identifying and establishing channels of cooperation when instability in countries involved creates doubts as to the relevant interlocutors.

75. A good example of regional cooperation and information sharing in investigations into smuggling of migrants by sea is offered by the UNODC project on the development, mentoring and joint training of multi-agency Port Intelligence Units (PIUs) in Cambodia, Indonesia and Thailand. PIUs aim at disrupting smuggling of migrants by sea within, through and from South-East Asia, through intelligence-led investigations. Partner agencies involved in the project are the Cambodian National Police, the Indonesian Immigration and the Royal Thai Police. The joint trainings for law enforcement officers of PIUs would facilitate the sharing of information and intelligence, including by the signing of memorandums of understanding between the concerned agencies.

76. International cooperation in investigations relating to the tracing, freezing, seizure and confiscation of criminal assets and proceeds of crime is also essential to adequately punish and deter organized criminal groups engaging in smuggling of migrants by sea. Proceeds of crime would often be hidden in countries other than those where they were produced, and in some cases they may even transit through one or more countries in the process. Cooperation at the international level among competent authorities and law enforcement agencies is therefore required to uncover the origin, movement and

location of the criminal assets. To this end, articles 13 and 14 of the Convention against Transnational Organized Crime, which apply to smuggling of migrants by sea, set forth provisions covering the international aspects of identifying, freezing and confiscating the proceeds and instrumentalities of crime. Implementation of these provisions would enable States to increase the efficiency of their actions towards depriving smugglers of their criminal proceeds.
