



# Economic and Social Council

Distr.: General  
27 February 2020

Original: English

## Commission on Crime Prevention and Criminal Justice

### Twenty-ninth session

Vienna, 18–22 May 2020

Item 5 of the provisional agenda\*

**Thematic discussion on effective measures to  
prevent and counter the smuggling of migrants,  
while protecting the rights of smuggled migrants,  
particularly women and children, and those of  
unaccompanied migrant children**

## **Guide for the thematic discussion on effective measures to prevent and counter the smuggling of migrants, while protecting the rights of smuggled migrants, particularly women and children, and those of unaccompanied migrant children**

### **Note by the Secretariat**

#### *Summary*

In its decision 2016/241, the Economic and Social Council decided that the prominent theme for the twenty-ninth session of the Commission on Crime Prevention and Criminal Justice would be “Effective measures to prevent and counter the smuggling of migrants, while protecting the rights of smuggled migrants, particularly women and children, and those of unaccompanied migrant children”.

The present note by the Secretariat presents, to guide the thematic discussion, background information on trends in the smuggling of migrants and the profiles of smugglers and those who use their services. It discusses promising practices and challenges in responding to the smuggling of migrants and current issues relating to the criminalization of the smuggling of migrants. It raises questions and issues that the Commission may wish to discuss.

\* E/CN.15/2020/1.



## I. Introduction

1. In its decision 2016/241, the Economic and Social Council decided that the prominent theme for the twenty-ninth session of the Commission on Crime Prevention and Criminal Justice would be “Effective measures to prevent and counter the smuggling of migrants, while protecting the rights of smuggled migrants, particularly women and children, and those of unaccompanied migrant children”.
2. At its reconvened twenty-eighth session, held on 12 and 13 December 2019, the Commission endorsed the proposal of the Chair on the organization of the thematic discussion at its twenty-ninth session.
3. The Secretariat has prepared the present note in accordance with Commission decision 18/1, entitled “Guidelines for the thematic discussions of the Commission on Crime Prevention and Criminal Justice”, in which the Commission decided that the discussion on the prominent theme would be based on a discussion guide including a list of questions to be addressed by participants.
4. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, entered into force on 28 January 2004. The purpose of the Protocol, as provided for in its article 2, 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. As of February 2020, 149 Member States were parties to the Protocol, which provides a comprehensive framework for preventing and combating the smuggling of migrants.
5. The smuggling of migrants has remained high on the political agenda of Member States. Resolutions relating to the smuggling of migrants have been adopted by several United Nations bodies, including the General Assembly, the Security Council,<sup>1</sup> the Economic and Social Council<sup>2</sup> and the Commission on Crime Prevention and Criminal Justice, either focused exclusively on the smuggling of migrants, or focused on the smuggling of migrants and trafficking in persons, or on migration generally, with references to the smuggling of migrants. The Global Compact for Safe, Orderly and Regular Migration (General Assembly resolution [73/195](#), annex) similarly affirms the commitment of the international community to tackling the smuggling of migrants as part of a broader strategy to address the challenges and opportunities arising from international migration. In objective 9 of the Global Compact, Member States committed themselves to, inter alia, strengthening capacities and international cooperation to prevent, investigate, prosecute and penalize the smuggling of migrants in order to end the impunity of smuggling networks.

## II. Definitions

6. The definition of the term “smuggling of migrants” included in article 3 of the Smuggling of Migrants Protocol provides the foundation for action against this crime. It provides that the “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.
7. In order to properly understand this definition, it is important to understand its constituent elements and the role they play in shaping the scope of the criminalization and other obligations under the Protocol.
8. The concept of “financial or other material benefit” is defined neither in the Smuggling of Migrants Protocol nor in the Organized Crime Convention, in which the

<sup>1</sup> See, for example, Security Council resolutions [2388 \(2017\)](#) and [2312 \(2016\)](#).

<sup>2</sup> Economic and Social Council resolution [23/2014](#).

phrase is used in the definition of the term “organized criminal group”. It is clear, however, from the interpretive notes on article 3 of the Smuggling of Migrants Protocol contained in the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Organized Crime and the Protocols Thereto*<sup>3</sup> that the drafters of these instruments intended the phrase to mean more than pecuniary benefit. The United Nations Office on Drugs and Crime (UNODC) has published a technical issue paper to elaborate practical guidance on the concept,<sup>4</sup> and the Secretariat prepared a detailed background paper on “the financial and material benefit” aspect of the definition of smuggling of migrants (CTOC/COP/WG.7/2017/4) to support a discussion by the intergovernmental Working Group on the Smuggling of Migrants of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime at its fourth meeting, in 2017.

9. It is also clear that the concept of “financial or other material benefit” was included in the Smuggling of Migrants Protocol to distinguish between the actions of groups who facilitate the illegal entry of others for humanitarian or familial reasons and those who do so for profit.<sup>5</sup> The profit motive was viewed as an important way to link the definition to the activities of organized crime, although it applies equally to acts of smuggling perpetrated by independent operators and to such acts perpetrated by two or more people working together.

10. The term “illegal entry” is defined in article 3 (b) of the Smuggling of Migrants Protocol as meaning “crossing borders without complying with the necessary requirements for legal entry into the receiving State”. Common examples of “necessary requirements” include the possession of authentic and valid identity documents (e.g., passport, visa) and presentation at a port of entry for inspection by a government official.

11. The term “fraudulent travel or identity document” is defined in article 3 (b) with the intention of covering a range of situations, including where a person uses another person’s legitimate documents without making any changes to those documents, where data in legitimate documents have been illegally altered, where documents are forgeries or where documents are legitimate but have been obtained fraudulently.

### III. Background

#### Available information

12. In 2018, UNODC published its first *Global Study on Smuggling of Migrants*.<sup>6</sup> The study is based on a comprehensive review of available data and information – both quantitative and qualitative – from both national and international sources.<sup>7</sup>

#### Smuggling routes<sup>8</sup>

13. Recent smuggling trends show that the main identified areas of origin for smuggled persons are the Horn of Africa, West Africa, North Africa, Central America, parts of the Middle East and areas in South, West, East and South-East Asia. Those coming from the Horn of Africa, for example, travel along one of three major identified routes, to the countries of the Gulf Cooperation Council, Southern Africa, or North Africa and/or Europe.

<sup>3</sup> United Nations publication, Sales No. E.06.V.5, p. 469.

<sup>4</sup> United Nations Office on Drugs and Crime (UNODC), *The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol: Issue Paper* (2017).

<sup>5</sup> United Nations publication, Sales No. E.06.V.5, p. 469.

<sup>6</sup> UNODC, *Global Study on Smuggling of Migrants 2018* (United Nations publication, Sales No.E.18.IV.9).

<sup>7</sup> See, for example, UNODC, *Migrant Smuggling in Asia: Current Trends and Related Challenges* (Bangkok, 2015).

<sup>8</sup> *Global Study on Smuggling of Migrants 2018*, pp. 33–36.

14. In Asia, various smuggling routes are used and include land, sea and air routes. Migrants from South Asia, for example, may be smuggled by air into Europe, South Africa, Australia or North America. Smuggling within the region is also common.

15. As a destination region, the European Union saw a significant number of smuggled migrants and refugees arriving from West and North Africa and the Horn of Africa between 2016 and 2017. For instance, 89 per cent of those who arrived in Italy by sea were from African countries, while in Spain, 94 per cent of migrants who arrived irregularly were from Africa. It is assumed that a significant proportion of those people were smuggled by sea to Europe.

16. In North America, the vast majority of smuggled migrants and refugees who arrived at the southern borders of the United States of America originated from Mexico and Central American countries.

### **Profiles of smuggled migrants and smugglers<sup>9</sup>**

17. Young men comprise the majority of those identified as smuggled migrants and they typically travel without family members. As an example, South Asian smuggled migrants were predominantly men between the ages of 18 and 30 years. This is similar to the trends observed on smuggling routes from the Horn of Africa to South Africa, where most of those smuggled were men between the ages of 18 and 35 years. Smuggling routes from Central America and Mexico into the United States primarily involve men, although it is estimated that between 20 and 25 per cent of those smuggled on those routes are women.

18. The profiles of those involved in the smuggling of migrants are varied. As with most forms of crime, the smuggling of migrants typically involves men, and their average age falls between 30 and 35 years. Often, smugglers have the same national and/or ethnic background as those they smuggle or they are from the regions that the smuggling routes lead through. More recent trends suggest that many smugglers may have themselves been previously smuggled. Smuggling enterprises can be sophisticated organized criminal groups or loosely affiliated groups that pool their skills and resources. More sophisticated groups have the ability to operate in larger areas and can make significant profits, while smaller, loosely based organizations are more closely tied to the demand for their services in their communities, and the profit available to them may be less significant.

### **Illicit profits<sup>10</sup>**

19. According to the available data,<sup>11</sup> in 2016, approximately 2.5 million people were smuggled worldwide, with the profits derived from the smuggling estimated at between \$5.5 billion and \$7 billion. Fees charged by smugglers ranged from \$60 to \$47,000 per person and the precise fee charged depended on identified factors such as the distance to be travelled, where the person would be smuggled to, the nationality, age, sex and family status of the smuggled person, the mode of transportation and the difficulty associated with the crossing of borders. It should be noted that this profit range represents a minimum estimate, owing to the limited data available in certain areas.

### **Crimes committed against people in the context of the smuggling of migrants**

20. Migrants and refugees are at risk of being victimized during smuggling operations. The *Global Study* notes that, in 2017, at least 382 migrants were recorded as victims of homicide (murder or manslaughter).<sup>12</sup> Additionally, reported crimes against migrants in the context of smuggling include all forms of assault,

<sup>9</sup> Ibid., pp. 36–37.

<sup>10</sup> Ibid., pp. 22–23.

<sup>11</sup> Ibid., p. 5.

<sup>12</sup> Ibid., p. 39.

sexual violence, robbery, fraud, inhuman or degrading treatment, deprivation of liberty, enforced disappearance and extortion. As outlined in the UNODC *Global Report on Trafficking in Persons 2016*,<sup>13</sup> there is a clear link between the broader migration phenomenon and trafficking in persons, as people who migrate and refugees escaping from conflict and persecution are particularly vulnerable to being trafficked. With information on more than 90,000 assisted trafficking victims, the Counter-Trafficking Data Collaborative of the International Organization for Migration (IOM) reports that nearly 80 per cent of transnational cases involved crossing at an official checkpoint, with 9 per cent involving the use of forged documents,<sup>14</sup> making it highly plausible that large numbers of those trafficked persons had employed the services of smugglers.

### Gender-based violence

21. Women and girls migrate to escape violence.<sup>15</sup> Tragically, women and girls fleeing violence face risks of sexual violence during their migration and may be more vulnerable to being trafficked.<sup>16</sup> As detailed in the 2019 report of the Secretary-General on violence against women migrant workers:<sup>17</sup>

Travelling along certain migration corridors poses great risks for women and girls, including the risk of sexual violence by criminal gangs, human traffickers, other migrants and corrupt officials. For example, it is estimated that 60 to 80 per cent of migrant women and girls travelling through Mexico to the United States of America are raped at some stage on their journey. Along the central Mediterranean route, estimates show that up to 90 per cent of women and girls are raped en route to Italy.

### Fatalities

22. In addition to the crimes committed against the persons mentioned above, smuggled migrants face a host of other situations that make them vulnerable to loss of life. The causes of death can be linked to many factors, including difficult terrain and weather conditions. Unsafe modes of transportation, including poorly ventilated cargo containers and unseaworthy vessels, pose particular risks. The Missing Migrants Project,<sup>18</sup> an initiative of IOM, tracks the deaths of migrants, and those who have gone missing in the process of migration, including in a smuggling context.

23. The Project began collecting data in 2014. According to the data, 2016 was the deadliest year on record, with 8,070 migrant deaths recorded. The highest number of migrant deaths recorded each year has been in the Mediterranean Sea, where the number reached its peak in 2016, with 5,143 deaths. Since then, the number of deaths in the Mediterranean and overall have decreased each year. In 2017, 6,280 migrant deaths were recorded around the world; in 2018, 4,737 migrant deaths were recorded; and in 2019, 3,437 migrant deaths were recorded. The year 2019 was significant because it was the first year in which the second highest number of migrant deaths recorded by region was not in Africa, but rather in the Americas, accounting for 810 deaths. As at 17 February 2020, 291 deaths have been recorded globally in 2020.

24. The fact that the lives of smuggled migrants are put at risk as a result of the actions of smugglers was well understood by the negotiators of the Smuggling of Migrants Protocol. In particular, article 6, paragraph 3, of the Protocol provides that

<sup>13</sup> United Nations publication, Sales No. E.16.IV.6, p. 13.

<sup>14</sup> UNODC, *Global Report on Trafficking in Persons 2018* (United Nations publication, Sales No.E.19.IV.2), p. 47.

<sup>15</sup> See United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), “Gender assessment of the refugee and migration crisis in Serbia and the former Yugoslav Republic of Macedonia” (Istanbul, Regional Office for Europe and Central Asia, 2016).

<sup>16</sup> *Global Study on Smuggling of Migrants 2018*, p. 41.

<sup>17</sup> A/74/235.

<sup>18</sup> See <https://missingmigrants.iom.int/>.

States parties must treat as aggravating (for the purpose of sentencing), circumstances that endanger, or are likely to endanger, the lives or safety of the smuggled migrants or that entail inhuman or degrading treatment. This ensures that, even in the absence of additional criminal conduct, such aggravated forms of smuggling will be punished in a manner that suits the seriousness of the conduct and the degree of responsibility of the offender.

### **Observatory on the Smuggling of Migrants**

25. The UNODC Observatory on the Smuggling of Migrants is a flagship project designed to assess the characteristics, drivers and impact of the smuggling of migrants in rapidly changing contexts. The Observatory collects and disseminates robust data, information and analyses specific to the smuggling of migrants. The information is gathered through regular fieldwork in countries of origin, transit and destination, in collaboration with people in the process of migration, law enforcement officials, civil society and other key actors, and is complemented with regular surveys in countries of origin focusing on prospective migrants' journey planning and potential engagement with smugglers. The information gathered for the Observatory will be freely accessible through an online platform that is expected to be made available in late 2020 and will be updated regularly.

26. In its pilot phase (2019–2020), the Observatory is focusing on West Africa, North Africa and Southern Europe. Robust and up-to-date evidence will be provided on the modus operandi of migrant smugglers, smuggling routes and profiles of smuggled migrants, the human costs of using smuggling services, and the level of general awareness of dangers along migration routes. The information and analysis provided will be essential for better understanding the phenomenon of the smuggling of migrants, and thereby for better preventing and countering smuggling and related human rights abuses and other crimes. It complements the Office's *Global Study on Smuggling of Migrants 2018*, and existing data collection efforts by IOM and the Office of the United Nations High Commissioner for Refugees. This work responds to the mandate given to UNODC by the General Assembly in its resolution [73/186](#), in which the Assembly invited the Office to systematically collect data and information from Member States on migrant smuggling routes, the modus operandi of migrant smugglers and the role of transnational organized crime.

### **Future opportunities**

27. Despite improvements, data collection, analysis and research relating to the smuggling of migrants remain limited at the national, regional and international levels. In that connection, the *Global Study* recommends the following priority actions:

(a) Improve data collection systems at the national, regional and international levels;

(b) Maintain adequate administrative records, conduct appropriate surveys, and apply statistical methodologies and qualitative studies to monitor migrant smuggling patterns and routes, as well as the profiles of smugglers and their modus operandi.

28. Other key research priorities include: (a) gaining access to more up-to-date information, as flows and dynamics are continuously adapting to policy, socioeconomic and security factors; (b) analysing the business models and types of actors involved, the power relations between those actors, and the means of perpetration used; and (c) assessing the human costs and gender dimensions of the smuggling of migrants, and the key factors influencing the incidence of extortive and abusive practices.

### Questions for consideration

29. The Commission may wish to discuss the following questions:

(a) What good practices exist at the national level to facilitate the collection of data and the conducting of research on the smuggling of migrants?

(b) What types of data and information can help to inform our understanding of the smuggling of migrants?

(c) Which regions should be the geographical focus of data collection and research activities relating to the smuggling of migrants, taking into account the relevant countries of origin, transit and destination?

(d) How can Member States work together to improve their cross-jurisdictional understanding of the smuggling of migrants in order to better prevent and counter the smuggling of migrants and crimes against persons in the context of smuggling?

(e) How can Member States develop a more comprehensive understanding of the financial dimensions of the smuggling of migrants?

(f) How can Member States improve the understanding of the age- and gender-specific dynamics of the smuggling of migrants?

(g) How can information-sharing be improved so that comprehensive, accurate and up-to-date information can inform policies and practices to prevent, counter and investigate the smuggling of migrants and crimes committed against them, including crimes of violence, in the context of smuggling?

## IV. Prevention, cooperation and other measures

30. The Smuggling of Migrants Protocol identifies prevention and cooperation as integral components of a comprehensive anti-smuggling response. Part III of the Protocol contains nine distinct articles setting out obligations of States parties relating to the prevention of the smuggling of migrants (but not to the prevention of migration). These articles are directed at measures to improve cooperation, strengthen the integrity of travel documents, improve border measures and support more effective policing efforts through training and awareness-raising.

31. Article 15 of the Protocol focuses on awareness-raising as a means of preventing the smuggling of migrants. It obligates States parties to take measures to increase public awareness, including among migrants and prospective migrants, as to the potential dangers associated with the smuggling of migrants and the risk of crimes against the person, and the alternatives for safe and regular travel. Article 15 further obligates States parties to promote or strengthen programmes and cooperation in order to combat the root socioeconomic causes of the smuggling of migrants, such as poverty, conflict, the lack of access to basic services, and the lack of safe and regular alternatives for travel. To support efforts to prevent the smuggling of migrants, in 2015, UNODC, in partnership with the Government of Mexico, launched the “Negocio Mortal” campaign (*#NegocioMortal*), to raise awareness of and alert migrant populations to the risks associated with the services provided by smugglers.

32. Significant attention has been paid at the international and national levels to implementing those provisions directed at the prevention of the smuggling of migrants through improved law enforcement, border integrity and policing measures that make it harder for migrant smuggling ventures to succeed. Among other efforts, a joint International Criminal Police Organization (INTERPOL)-UNODC operation against the smuggling of migrants, Operation Turquesa, was conducted throughout the Americas in 2019; authorities in 20 countries across three continents acted on leads and carried out nearly 1 million checks at air, land and sea borders in order to disrupt the organized crime groups responsible for the key smuggling routes to the

United States and Canada. The operation led to 53 arrests and the identification of more than 700 migrants from 30 different countries.

33. The Working Group on the Smuggling of Migrants has, to date, formulated more than 170 recommendations advising States parties on the implementation of the Smuggling of Migrants Protocol. In examining practical action to improve prevention and cooperation efforts, the Working Group's recommendations have repeatedly emphasized: (a) the importance of both formal and informal mechanisms for international cooperation; (b) the development and delivery of specialized training; and (c) the establishment of national structures to coordinate investigations, service delivery and information-sharing, and to address the root causes of the smuggling of migrants.

34. Through its Global Programme against the Smuggling of Migrants, UNODC supports efforts to strengthen the capacity of Member States to prevent and prosecute the smuggling of migrants, protect the rights of people who fall prey to smugglers and facilitate international cooperation. Since its initiation in 2010, the Global Programme has supported the development of technical assistance tools, such as the *International Framework for Action to Implement the Smuggling of Migrants Protocol*, the *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* and the *In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants*, and capacity-building efforts to address the smuggling of migrants and promote international cooperation, including the specialized training of more than 1,600 practitioners.<sup>19</sup> In the period 2018–2019 alone, UNODC organized or substantively contributed to 19 technical assistance activities aimed at combating the smuggling of migrants, reaching a total of 777 practitioners, government officials and civil society representatives. For example, UNODC has partnered with INTERPOL and its Specialized Operational Network against People Smuggling on the evaluation of the coordination model used in Operation Andes, which targeted migrant smuggling networks across the Americas and led to the arrest of 49 suspected migrant smugglers in 11 countries.

35. Since its launch in 2017, the UNODC Smuggling of Migrants Knowledge Portal remains the only such database globally, containing an unprecedented wealth of evidence-based data. With 792 cases from 43 jurisdictions and 245 pieces of legislation from 96 countries, the Portal continues to expand knowledge of how criminal groups operate and how key standards and norms are applied in criminal justice systems.

### **Addressing root causes**

36. Effective crime prevention efforts must encompass more than strengthening the ability to identify, investigate and hold smugglers accountable. Crime prevention measures require an appreciation of the wide range of factors and circumstances that influence the lives of individuals and families as they develop and mature, and of local environments and the situations and opportunities that facilitate victimization and offending.<sup>20</sup>

37. The prevention of the smuggling of migrants raises different issues than those raised by the prevention of other crime types. The smuggling of migrants is a crime that is based on providing various types of services to those who seek to migrate and who cannot or do not enter countries of transit and/or destination regularly. Some of these services are not, in and of themselves, criminal, such as driving a migrant from one place to another within one State. In many parts of the world, many aspects of the smuggling of migrants are viewed as legitimate in that the smuggling represents a valuable service that is provided to people who may be in desperate situations, including people who have been forcibly displaced, and who may not otherwise be

<sup>19</sup> See, for example, Mutual Legal Assistance Request Writer Tool.

<sup>20</sup> UNODC, *Handbook on the Crime Prevention Guidelines: Making Them Work*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.9).



able to migrate regularly or independently.<sup>21</sup> In other cases, the services offered by migrant smugglers may be seen as providing a quicker and cheaper way of migrating to another country.<sup>22</sup> The smuggling of migrants can serve as a form of industry, generating income in places where there may be few other opportunities to do so.<sup>23</sup> Moreover, for the families of those who successfully use the services of smugglers, the prospect of receiving remittances from their family members abroad is enticing.

38. Accordingly, efforts to successfully prevent the smuggling of migrants also require a focus on the demand for migrant smuggling services. As detailed in the *Global Study on Smuggling of Migrants 2018*, the factors that drive the demand for migration include socioeconomic conditions, family reunification, fear of persecution, instability and lack of safety in places of origin, while the demand for smuggling services is determined by the limited legal channels, which cannot satisfy the total demand for regular migration, or by the costs of legal migration that some migrants cannot afford.<sup>24</sup>

### Questions for consideration

39. The Commission may wish to discuss the following questions:

- (a) How effective are prevention efforts that primarily focus on the identification, interdiction and prosecution of migrant smuggling ventures?
- (b) How do standards and norms applied in efforts to prevent the smuggling of migrants differ from those applied more generally in crime prevention?
- (c) What good practices exist at the national level to prevent the smuggling of migrants, in line with human rights protection and gender- and age-sensitive standards?
- (d) What good practices exist that involve international cooperation to prevent the smuggling of migrants?
- (e) Are preventive efforts directed at educating the public on the potential harms associated with the smuggling of migrants effective?
- (f) How can the provision of viable alternatives for safe and regular migration contribute to the prevention of the smuggling of migrants?

## V. Criminal law measures to address the smuggling of migrants

40. The Smuggling of Migrants Protocol, together with the Organized Crime Convention, affirms the importance of robust criminal law measures to effectively deter and denounce the smuggling of migrants. The importance ascribed to criminal law responses to the smuggling of migrants is reflected in the significant extent of corresponding action at the national level.

<sup>21</sup> See Abdullah Mohammadi, Ruta Nimkar and Emily Savage, “*We Are the Ones They Come to When Nobody Can Help*”: *Afghan Smugglers’ Perceptions of Themselves and Their Communities*, International Organization for Migration (IOM) Migration Research Series, No. 56 (Geneva, 2019), examining perceptions of Afghan smugglers.

<sup>22</sup> See, for example, Benjamin Harkins, Daniel Lindgren and Tarinee Suravoranon, *Risks and Rewards: Outcomes of Labour Migration in South-East Asia* (Geneva, International Labour Organization and IOM, 2017).

<sup>23</sup> See, for example, Global Initiative against Transnational Organized Crime, “Understanding contemporary human smuggling as a vector in migration: a field guide for migration management and humanitarian practitioners” (Geneva, 2018).

<sup>24</sup> *Global Study on Smuggling of Migrants 2018*, pp. 6, 36–37.

41. Article 6, paragraph 1, of the Smuggling of Migrants Protocol requires States parties to criminalize the following activities, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) The smuggling of migrants;
- (b) Producing, procuring, providing or possessing a fraudulent travel or identity document for the purpose of enabling the smuggling;
- (c) Enabling a person who is not a national or a permanent resident of a State to remain in that State without complying with the requirements for doing so.

42. The activities described in subparagraphs (b) and (c) above represent separate types of criminal conduct: the types of conduct described in paragraph (b) enable the smuggling of migrants to occur, while the conduct described in paragraph (c) may further frustrate the ability of the State to investigate the smuggling of migrants and/or to manage the entry and stay of non-nationals within their borders.

43. The enactment of offences to criminalize these additional activities is further informed by additional definitions contained in the Smuggling of Migrants Protocol. For example, the term “fraudulent travel or identity document” is defined to include travel or identity documents used by a person other than the rightful holder. As such, article 6 also requires the criminalization of the use or possession of authentic travel documents by a person other than the rightful holder for the purpose of enabling the smuggling of migrants.

44. In addition, article 6, paragraph 2, requires States parties to criminalize attempts to commit the offence of smuggling of migrants and related offences, participation as an accomplice in such offences, and organizing or directing other persons to commit a smuggling offence.

45. Finally, article 6, paragraph 3, requires States parties to treat certain situations as aggravating, meaning that more stringent criminal law responses should be provided in the case of circumstances that:

- (a) Endanger, or are likely to endanger, the lives or safety of the migrants concerned;
- (b) Amount to inhuman or degrading treatment, including for the exploitation of the migrants affected.

46. The smuggling of migrants is frequently characterized by dangerous conduct and degrading, abusive or exploitative treatment; accordingly, criminal justice responses should reflect the seriousness of such conduct.

### **Trends in implementation**

47. A comprehensive report on how the smuggling of migrants has been criminalized at the national level does not exist. The forthcoming launch of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto will increase the sharing of information on implementation efforts; in particular, the first phase of the review process will focus on, *inter alia*, how States parties have implemented their criminalization obligations under those instruments. Such measures will complement other tools, including the UNODC Smuggling of Migrants Knowledge Portal.

48. Nevertheless, the available information demonstrates certain trends in that regard. Most countries have taken steps to ensure that their criminal laws prohibit the smuggling of migrants, although how this is accomplished varies greatly. Some countries have enacted specific migrant smuggling offences as part of their criminal codes, while others have relied upon offences established in the laws regulating the entry into, stay in and exit from the national territory.

49. The 2017 UNODC issue paper on the concept of “financial or other material benefit” in the Smuggling of Migrants Protocol<sup>4</sup> showed that, in a number of

countries, the “financial or other material benefit” element is omitted from the offences used to address the smuggling of migrants. There are a number of reasons why this might be the case, including the following:

- (a) The relevant offences address a broad range of conduct, not only the smuggling of migrants;
- (b) Proving that the accused persons organized the illegal entry for a financial or other material benefit is too onerous;
- (c) Once it is established that the offender obtained a financial or other material benefit, that can be addressed as an aggravating factor for the purposes of sentencing.

50. Notwithstanding these reasons, migrant smuggling offences that do not include the “financial or other material benefit” element have the effect of broadening their applicability to circumstances that are not the focus of the Smuggling of Migrants Protocol.

51. As a common example, such offences could criminalize the acts of individuals who render humanitarian aid to migrants. This possibility was specifically discussed during the negotiations of the Smuggling of Migrants Protocol. In particular, the negotiators stated the following:

The reference to “a financial or other material benefit” as an element of the definition [of migrant smuggling] was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.<sup>25</sup>

52. Another example of a situation that could potentially be captured by broadly defined offences is that in which migrants, including family members, mutually assist one another to reach another country.<sup>26</sup>

53. Recent media, civil society and research reports have highlighted situations where those providing humanitarian aid to migrants have been charged and prosecuted under broadly defined offences.<sup>27</sup>

54. Some Member States have taken measures to prevent those rendering humanitarian aid from being charged and prosecuted under broadly defined offences. Examples of such measures include:

- (a) The enactment of provisions that articulate specific statutory defences available to those who render humanitarian aid;
- (b) The enactment of “exemption clauses” that exclude, from the ambit of the offence, the conduct of those who render humanitarian aid;
- (c) The use of prosecutorial or police discretion, where such discretion exists.

55. Moreover, in 2018, the European Parliament adopted resolution 2018/2769(RSP), on guidelines for member States to prevent humanitarian assistance from being criminalized.

56. However, it is important to recall that article 6, paragraph 4, of the Smuggling of Migrants Protocol makes it clear that nothing in the Protocol prevents a State party from taking measures against a person whose conduct constitutes an offence under its

<sup>25</sup> United Nations publication, Sales No. E.06.V.5, p. 469.

<sup>26</sup> It should be recalled that article 5 of the Smuggling of Migrants Protocol makes clear that migrants cannot be liable to prosecution simply for having been the object of migrant smuggling; that is, being a smuggled migrant must not be a crime.

<sup>27</sup> See, for example, Carla Ferstman, “Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe member States” (December 2019); Norah Rast, “Criminalizing humanitarian aid”, 4 April 2019. Available at <https://harvardcrcl.org/>.

domestic law. This means that the Protocol does not obligate States parties to criminalize conduct related to the enabling of illegal entry. The smuggling of migrants is the act of facilitating the illegal entry of another person for a financial or other material benefit. The negotiators of the Smuggling of Migrants Protocol were clear that they did not want migrant smuggling offences to criminalize acts undertaken for other motives. At the same time, the negotiators also recognized that the Smuggling of Migrants Protocol should not prevent States from doing so. The ability of Governments to control the flow of people and goods across their national borders is traditionally associated to the notion of State sovereignty. The enactment of national laws that set out the rules of entry into a country is an expression of such sovereignty. How to address the intersection of these issues raises complex questions for Member States.

57. UNODC continues to support States' criminal justice efforts to address document fraud and misuse. This includes support for responses to common challenges such as the development of capacity for the forensic examination of documents, the enhancement of procedures at interception points and the tackling of corruption. The use of fraudulent documents and corruption play an important role, for example, in the smuggling of migrants by air, since the formal procedures involved in air travel require the possession of travel and identity documents at check-in, and immigration controls at both embarkation and destination points.

### **Questions for consideration**

58. The Commission may wish to discuss the following questions:

- (a) Do existing domestic migrant smuggling offences help to deter migrant smugglers? If so, how?
- (b) Should migrant smuggling offences that do not include the "financial or other material benefit" element be considered "migrant smuggling" offences?
- (c) Does criminalizing certain acts not contemplated by the definition of the smuggling of migrants in the Smuggling of Migrants Protocol create unintended adverse consequences?
- (d) Do migrant smuggling offences that do not include the "financial or other material benefit" element have a negative impact on mutual legal assistance?
- (e) Are defences or exemptions for those who render humanitarian aid a useful way of narrowing the scope of broadly defined offences?
- (f) If yes, are those defences and exemptions effective in protecting those who provide humanitarian aid from prosecution?
- (g) Is the notion of "humanitarian aid" sufficiently clear to provide guidance on the circumstances in which the defence or exemption would be applicable? Are there examples of other practices that prevent the prosecution of those who render humanitarian aid to migrants?
- (h) Would more clarity be provided by ensuring that provisions establishing migrant smuggling offences include the element of "financial or other material benefit"?

## **VI. Protection and assistance measures**

59. The Smuggling of Migrants Protocol recognizes and promotes the importance of safeguarding the rights of smuggled migrants. The Preamble to the Protocol emphasizes that the States parties recognize the need to provide migrants with humane treatment and full protection of their rights.

60. Specific obligations to protect are identified in article 16 of the Protocol, and general obligations to protect witnesses of offences are provided for in article 24 of the Organized Crime Convention. For example, States parties to the Protocol are obligated to provide appropriate assistance to migrants whose lives or safety are

endangered as a result of having been smuggled, to afford migrants appropriate protection against violence, and to take into account the special needs of women and children. These obligations are in addition to the protection obligations contained in other international instruments, including the Convention relating to the Status of Refugees and its Protocol of 1967, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of Persons with Disabilities, the Vienna Convention on Consular Relations, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Additional guidance can be found in the relevant recommendations, resolutions and decisions of international bodies.

61. For example, at each of its previous six meetings, the Working Group on the Smuggling of Migrants has made recommendations on how to safeguard the rights of smuggled persons. Those recommendations reflect certain general themes, including the following:

- (a) The human rights of migrants must always be respected, regardless of the migrants' status, nationality, gender, ethnicity, age or religion;
- (b) Consular and/or diplomatic assistance is critical in protecting and assisting smuggled migrants;
- (c) Smuggled migrants are often victims of crime and, as such, they have certain rights, including the right to be protected from retaliation and the right to be supported throughout the criminal justice process;
- (d) Smuggled migrants often require specialized support to ensure that their rights are protected. National focal points can help to coordinate the delivery of such services;
- (e) Addressing the needs of migrants has the benefit of contributing to more effective criminal justice responses against smugglers.

62. It is also clear that women and children, including unaccompanied children, have specific needs and face particular risks that contribute to migration. According to the UNODC *Global Study on Smuggling of Migrants 2018*, unaccompanied smuggled children tend to be predominantly boys between the ages of 14 and 18 who are travelling to join family members already in the destination country, or who, on other occasions, are being sent ahead as “pioneers” of the family. Women may migrate owing to systemic and entrenched biases that manifest in situations of poverty and lack of opportunity.<sup>28</sup> Among the most common barriers faced by women that can contribute to decisions to migrate are the lack of access to education, work or adequate housing, experiences or fear of sexual and gender-based violence and fear of gender-specific persecution.

63. Similarly, boys and girls may seek to migrate in order to escape violence or to obtain an education or work. In addition, they may be sent ahead by their family members or, conversely, may migrate to reunite with family members who have previously migrated. In situations where they travel without, or are separated from, their parents or guardians, girls and boys face particular risks.

64. Multiple and intersecting forms of discrimination and violence against migrant women can be hidden by the myths and stereotypes surrounding violence against women, which persist and are similar throughout the world. One of these myths is that gender-based violence only happens in certain segments of society. For example, a multi-country study on the criminal justice responses to sexual violence, undertaken

<sup>28</sup> United Nations Population Fund, “Five reasons migration is a feminist issue”, 9 April 2018.

jointly by UNODC, the United Nations Entity for Gender Equality and the Empowerment of Women and the United Nations Development Programme, revealed that some justice officials believed that rape was something which only happened to “low-class” people, uneducated people or migrants, and also believed that there was a prevailing suggestion that acts of sexual violence were more prone to occur in locations considered to be fraught with “complexities”, for example, where residents were from different social backgrounds or where there were significant numbers of migrant workers and ethnic minority populations.<sup>29</sup>

65. These push factors may result in situations where those migrating have unaddressed health needs, both physical and mental. They also create vulnerabilities that can make women and children more susceptible to harm during the migration journey.

66. Accordingly, effective and comprehensive measures to prevent the smuggling of migrants and protect and safeguard the rights of migrants must include strategies to address gender-based inequality with broader crime prevention and criminal justice responses, along with specialized services that address the particular needs of women and girls. In order to be effective, measures to protect the rights of smuggled migrants, particularly women and children, should be based on international human rights law and build on the specific provisions of relevant United Nations standards and norms in crime prevention and criminal justice, in particular the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 69/194, annex), the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 65/228, annex), the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (General Assembly resolution 65/229, annex) and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187, annex).

### **The importance of identification in supporting effective protection and assistance responses**

67. The ability of government officials or personnel of non-governmental organizations to provide support and services to smuggled migrants in need (including those who may be seeking asylum), in accordance with the measures contained in the Smuggling of Migrants Protocol and other relevant international frameworks, depends on the timely and accurate identification of such persons. In addition, it is critical to identify their specific needs so that they can be provided with access to appropriate services.<sup>30</sup>

68. Accurate identification of smuggled migrants and of their rights and needs can be enabled through the training of first responders, including on relevant human rights and other protection obligations, and clear standard operating procedures, as well as through effective referral mechanisms. This is particularly important in the case of children; a failure to properly identify children among smuggled migrants can result in a lack of age-appropriate responses and prevent adequate care.

### **Protection requires an appreciation of rights and available services**

69. Smuggled migrants need to be informed about their rights and about where and how they may access services specific to their needs. This includes, for instance, as provided for in article 16, paragraph 5, of the Smuggling of Migrants Protocol, information concerning their right to communicate with consular officers of their

<sup>29</sup> Eileen Skinnider, Ruth Montgomery and Stephanie Garret, *The Trial of Rape: Understanding the Criminal Justice System Response to Sexual Violence in Thailand and Viet Nam* (June 2017) [Error! Hyperlink reference not valid.](#)

<sup>30</sup> See, UNODC, E4J University Module Series, *Trafficking in Persons and Smuggling of Migrants*, “Module 2: Protection of the Rights of Smuggled Migrants”. Available at [www.unodc.org](http://www.unodc.org).

country of origin. Migrants should also be provided with information concerning any legal processes that they may have an interest in, including in respect of any charges against smugglers, or concerning their status in the country where they are found. This information should be communicated to them in a manner and language that they understand. In the criminal justice context, measures should be taken to ensure that migrants have meaningful access to legal aid services if they lack the means to pay for a lawyer,<sup>31</sup> in case they are facing criminal charges or police detention related to their status, as well as in their capacity as victims of crime.

### Questions for consideration

70. The Commission may wish to discuss the following questions:

(a) How can Member States improve the detection, investigation and prosecution of crimes committed against smuggled migrants during their journey?

(b) What potential unintended consequences do policies targeting migrant smuggling operations have in respect of access to services and support for smuggled migrants?

(c) What good practices exist concerning the training of officials who are likely to come into contact with smuggled migrants?

(d) What good practices exist concerning support and assistance to migrant children?

(e) What gender-responsive laws, policies and programmes exist that can be used to inform more effective protection measures in the context of the smuggling of migrants?

(f) How can UNODC and other international organizations support efforts to improve the provision of protection and assistance measures for smuggled migrants, in particular those in vulnerable situations and/or in need of special protection?

## VII. Information-sharing efforts

71. Information-sharing is a specific form of cooperation that has been consistently viewed as an integral component of national, regional and international responses to the smuggling of migrants.<sup>32</sup> For example, in 2013, in support of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, UNODC launched the Voluntary Reporting System on Migrant Smuggling and Related Conduct, an online system for the collection and sharing of data on the smuggling of migrants among member countries, of which there were 26 as of 2018. Designed to inform strategic analysis and policy development at all levels, the Voluntary Reporting System seeks to establish a shared pool of non-nominal quantitative and qualitative data.

72. Information-sharing is invaluable for many reasons, including the following:

(a) Prevention. Regular, accurate and comprehensive information-sharing between agencies working at the national level, between Member States and their institutions, including police and other criminal justice system personnel, and between regional and international organizations enables a more robust understanding of the smuggling of migrants, including the current trends in and root causes and

<sup>31</sup> See United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187, annex), principle 4 and guidelines 7 and 10, as well as principle 10 and guideline 9.

<sup>32</sup> Objective 9 of the Global Compact for Safe, Orderly and Regular Migration emphasizes the importance of using transnational, regional and bilateral mechanisms to share relevant information and intelligence on smuggling routes, *modi operandi* and financial transactions of smuggling networks, vulnerabilities faced by smuggled migrants, and other data, to dismantle the smuggling networks and enhance joint responses.

consequences of such smuggling, which in turn enables more effective and targeted prevention measures;

(b) Justice system responses. Formal and informal methods of cooperation, whether police-to-police, through mutual legal assistance or through networks of central authorities (i.e. judicial cooperation networks) acting as informal channels to facilitate mutual legal assistance, are almost always necessary in migrant smuggling investigations, given the transnational nature of the crime. Such cooperation facilitates the collection of information and evidence in one jurisdiction for use in another. Mutual legal assistance remains a cornerstone of the Organized Crime Convention and its Protocols;

(c) Enhanced technical capacity. Improving the capacity of all actors responsible for addressing the smuggling of migrants requires technical knowledge. Training and the development of tools based on previous experience and best practices are key measures for improving the capacity of all actors to respond to the smuggling of migrants;

(d) Strengthened legal and policy frameworks. Effective laws, programmes and policies are based on the best available information. The sharing of data on trends, and information on the effectiveness of existing responses is critical to improving such responses.

73. Successful migrant smuggling investigations and prosecutions, in particular those concerning financial aspects, are predicated on formal and informal methods of legal cooperation, both between Governments and among national agencies and responsible officials. Such cooperation can start with proactive information-sharing on potential migrant smuggling operations before they happen and continue throughout the indictment and prosecution process. Member States recognize the value of such measures and have developed a number of specialized networks to promote and support international cooperation.<sup>33</sup>

#### Questions for consideration

74. The Commission may wish to discuss the following questions:

(a) What good practices exist in the area of international police cooperation to coordinate investigations against migrant smuggling networks?

(b) What good practices exist in the area of international cooperation in criminal matters to coordinate cross-border investigations against migrant smuggling organizations? What challenges exist in relation to timely and effective international cooperation in migrant smuggling cases?

(c) How can international cooperation in criminal matters between origin, transit and destination countries be improved?

## VIII. Conclusion

75. Irregular migration continues to occur globally and the reasons for this are varied. In the absence of sufficient alternatives for safe and regular travel, the smuggling of migrants will continue to provide the means, and may be the only available method, by which certain people can travel to another country.

76. The smuggling of migrants poses unique challenges that cannot be addressed by the criminal justice system alone. As the former Special Rapporteur on the Human Rights of Migrants has said, “the reasons that set people on the go, with or without smugglers, are social, political and economic. The differences in prosperity,

<sup>33</sup> See, for example, the Ibero-American Network of Specialized Prosecutors against Trafficking in Persons and the Smuggling of Migrants; the West African Network of Central Authorities and Prosecutors against Organized Crime; and the European Migrant Smuggling Centre.



peace and respect for human rights are the driving force of these movements of persons, as they have been throughout the history of our ancestors.”<sup>34</sup>

77. Countering the demand for the services offered by migrant smugglers requires confronting the reasons why migrants turn to smugglers in the first place. Immigration, labour, asylum and other laws that restrict mobility need to be examined as means of preventing the smuggling of migrants.

78. The effective functioning of the criminal justice system remains, however, key.

79. A critical element of the investigation and prosecution of migrant smuggling operations is the capacity of criminal justice practitioners to effectively debrief and interview smuggled migrants and actively seek their cooperation. However, smuggled migrants are often reluctant to cooperate with the criminal justice system, either because they are inherently fearful of the authorities, given their irregular status, or because they fear retaliation from smugglers, directed against themselves or even against their families. Hence, it is important that State authorities provide the necessary protective measures and other incentives to migrants in order to build trust, provide reassurance and secure their collaboration.

80. The crime of smuggling of migrants occurs as a result of a mix of demand and supply factors, and addressing it requires a comprehensive strategy that takes into account the complexity of these factors. The development of effective strategies is hampered by the fact that many facets of the smuggling of migrants remain poorly documented and underresearched, with a corresponding gap in analytical material, for example, concerning the smuggling of unaccompanied children, as well as violent crime and serious human rights abuses occurring along migration routes.

81. The Smuggling of Migrants Protocol is the only internationally agreed legal instrument designed to prevent and combat the smuggling of migrants. To address the complexity of the smuggling of migrants, by whatever mode of transportation, it is important that States ratify or accede to the Organized Crime Convention and the Smuggling of Migrants Protocol and implement the corresponding obligations through their domestic law. There are still countries that do not have specific legislation, including offences, relating to the smuggling of migrants, which means that smugglers can operate with relative impunity. Criminalizing the smuggling of migrants, in line with the requirements set out in the Protocol, including the defining element “financial and other material benefit,” is a key prerequisite to effectively addressing the smuggling of migrants, including through enhanced international cooperation.

82. All States struggle to detect and prosecute the organizers and financiers of smuggling, who are usually not directly involved in bringing migrants across borders, a phenomenon that contributes to the smuggling of migrants remaining as a low-risk and high-profit crime. Intelligence-led investigative capacities need to be developed and fostered, with the aim of dismantling migrant smuggling networks and confiscating the proceeds of crime. At the same time, it is important to systematically tackle corruption at borders and within consular and migration authorities as a key enabler of the smuggling of migrants by land, sea and air.

83. The Commission’s deliberations during the thematic discussion will provide an important opportunity to promote holistic responses to the smuggling of migrants, share information and identify key challenges and promising practices.

84. The Commission may wish to identify areas of technical cooperation and evidence-based knowledge development that UNODC might undertake, including in partnership with other relevant entities, to support Member States in strengthening laws, programmes and policies to more effectively address the smuggling of migrants, its causes and consequences.

<sup>34</sup> François Crépeau, “The fight against migrant smuggling: migration containment over refugee protection”, in *The Refugee Convention at Fifty: A View from Forced Migration Studies*, Joanne van Selme and others, eds. (Lanham, Maryland, United States, Lexington Books, 2003), p. 182.