

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, AIR AND SEA, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME: A TOOL FOR CRIMINAL JUSTICE PERSONNEL

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I. INTRODUCTION

This paper will present the main characteristics of the United Nations Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime. I will focus briefly on the phenomenon of smuggling of migrants and the background to the Protocol. I will then go into detail with the Protocol and its articles and comment on the main provisions. Finally, I will briefly discuss some implications for implementation.

II. SMUGGLING OF MIGRANTS

A. Reasons for Smuggling of Migrants

The smuggling of persons involves the illegal movement of migrants across international borders. The smuggling of migrants is a form of illegal migration.

The smuggling of migrants take place when three basic conditions are met:

- there are persons interested in (or lured into) international migration, be it for economic or other reasons
- who have no legal ways of migrating, hence they contact or are contacted by
- one or more persons who organise the movement of these migrants for profit

The reasons for migration include both push and pull factors. These factors are to a large extent related to the different socio-economic situations as compared between the country of origin of the migrant and the country of destination. The push factors include e.g. lack of education or job opportunities, poverty, and the disappearance of traditional livelihoods. The pull factors include e.g. higher salaries and better job opportunities in the country of destination or existing organised means of migration. The pull factors also include the possible existence of ethnic groups and communities in the country of destination into which it is easy for a migrant to integrate.

When the push and pull factors are attractive enough, a person may decide to migrate. In many instances, however, migration is difficult to undertake. Nation States cautiously regulate and control the entry and exit of people into or from their territory. This has been the case since nations started to pose duties and privileges on their nationals or residents. Although migration can be both positive and negative it nevertheless disrupts the traditional composition of the nation state. In cases where no legal means of migration are available, a person interested in migrating will have to take to illegal means.

It seems that there is a trend that illegal migrants increasingly use professional smugglers in order to migrate. It has been estimated that today more than half of all illegal migrants in the world are assisted by smugglers¹.

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¹ See Report of the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime.

B. Involvement of Organised Criminal Groups and the Development of the Protocol

It seems that illegal migration is increasing in the world today. In the European Union the estimated number of persons smuggled into the territory has increased from about 50 000 entries in 1993 to more than 400 000 entries in 1999. These figures are only estimates, based on doubling the number of persons caught at border control².

In the United States, annually more than 500 000 migrants enter the country legally. Additionally, a large number of people enter illegally. For example, the U.S. Coast Guard made over 4000 migrant interdictions at sea in 2001. This figure only includes undocumented migrants travelling by sea and does not include illegal entry across the land border or at airports. Most of the migrants entering illegally come from the south of the U.S., including from Caribbean countries. There also seems to be an increase in the number of migrants to the U.S. from Asia, especially from China³.

When control of illegal migration becomes harsher, it opens up the way for organised smuggling of migrants. When border controls are tightened, the previously simple illegal practice of crossing a border becomes a complex criminal activity, involving professional smugglers. This is the case, for example, across the U.S.-Mexican border where the migrant smuggling business is thriving.

The paradox related to the smuggling of migrants is that the more measures there are to prevent illegal entry, the more the arrangement of illegal entry becomes organised. Under current circumstances with tightened border control measures and tightened sanctions on illegal residence, there does not necessarily exist many ways for migrants interested in residence or labour to enter without the involvement of smuggling organisations.

Some researchers argue that the smuggling of migrants, especially in Europe, does not necessarily involve highly organised, large criminal groupings. Instead, it seems that the smugglers can consist only of highly professionalised, loosely grouped individuals⁴. However, there exists a clear link to organised criminal activities in human smuggling although not all smuggling organisations are highly organised or involved in transnational activities. Many known organised criminal groups, such as the Chinese, Albanian, North African and Russian organised crime groups, are involved in arranging the illegal smuggling of migrants⁵.

Migration in search of better prospects is an accepted custom. As long as there is supply in the form of groups of people who wish to migrate and demand fostering migration, people will migrate. Migration as such is thus not a problem of organised crime or a negative phenomenon as such. But, since the ways of legal migration are so few, transnational criminal groups are continuing to develop means to smuggle migrants. These organisations smuggle migrants for large profits, and do not refrain from exploiting the misery or desperation of the migrants.

Recently there has been increasing focus on the prevention of the illegal practices related to migration. The new UN Protocol to Prevent the Smuggling of Migrants⁶ stemmed from the need to develop measures to combat the organised crime that orchestrate the smuggling of migrants. The Protocol is criminal justice centred although it recognises that migration itself is not a crime and the human rights of the migrants should be protected.

The Declaration adopted at the meeting of the Ministers of Interior and Justice in Naples in 1996 called for actions to combat organised crime. As a result, Poland drafted a first outline for a convention against organised crime. The first meeting for the development of the convention took place in Warsaw, Poland in February 1998. Later that year, the General Assembly of the UN founded an Ad-hoc

² Conference Report of the two Transatlantic Workshops on Human Smuggling.

³ <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#2000>

<http://usinfo.state.gov/regional/ea/chinaaliens/puleostory.htm>

⁴ Conference Report of the two Transatlantic Workshops on Human Smuggling.

⁵ Bruggeman, W. (2002).

⁶ Henceforth the United Nations Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime is referred to as "the Protocol".

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Committee with the aim to elaborate the international convention against transnational organised crime and three additional international legal Protocols. Austria and Italy presented a joint draft of the Migrants Protocol at the first session of the Ad Hoc Committee in Vienna in January 1999. The instrument was elaborated as one of the three optional Protocols to the UN Convention against Transnational Organised Crime⁷.

The Committee convened at the United Nations in Vienna eleven times. Some 120 countries participated in the negotiations together with representatives of civil society. The negotiations for the Migrants Protocol were finalised in October 2000. The General Assembly of the United Nations adopted the Convention together with the Migrants Protocol and the Trafficking Protocol on 15 November 2000⁸. The Migrants Protocol was opened up for signatories at the Signing Conference in Palermo, Italy in December 2000. Some eighty states signed the Protocol at that occasion. Currently (as of 15 August 2002) there are 102 signatories to the Protocol and 13 ratifications. The Protocol enters into force when forty Member States have ratified it.

C. Difference Between the Smuggling of Migrants and Trafficking in Persons

Smuggling of migrants and trafficking in persons are both forms of illegal migration. There are thus both some basic similarities and differences between the two concepts.

The similarities between trafficking and smuggling are that both involve recruiting and transportation arranged by criminal networks⁹. Both phenomena include e.g. recruiters who promise better lives in countries of destination, ways of transport that utilise weak links in border control measures, corruption, and links between local and international organisers. The same organisations can be involved in both smuggling and trafficking and they often co-operate both nationally and internationally in order to facilitate their activities.

The main difference between smuggling of migrants and trafficking in persons is that trafficking is by definition for exploitative purposes. Trafficking is thus a more long-lived criminal activity than is the smuggling of migrants. The profit of smuggling in migrants comes mainly from the organisation of entry into another country while the profit of trafficking comes from both the transportation of the person being trafficked, and from the exploitation the person is subjected to. It is this long-term exploitation that yields the largest profit. Persons being smuggled often share a mutual interest with their smugglers, i.e. they wish to enter another country. This is, however, sometimes also the case in trafficking. Although the victim of trafficking might originally have consented to the trafficking, it is the exploitative characteristics that differentiates trafficking from smuggling. Trafficking in persons is thus a crime against a person, while smuggling can be regarded as a crime against state sovereignty.

III. OUTLINE OF THE PROTOCOL ON SMUGGLING OF MIGRANTS¹⁰

The Protocol covers the illegal migration taking place through sea, land or air. The aim of the Protocol is to prevent illegal migration and to punish the procurers. The Protocol, however, does not aim at limiting the free movement of people, nor does it regulate the legal entry of people. The Protocol does not either aim at criminalising the illegal migrants for being the object of smuggling.

The Protocol is divided into three main parts besides the preamble:

⁷ The three Protocols are: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime; and, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

⁸ The Firearms Protocol was adopted in May 2001.

⁹ For further comparison, see e.g. the International Human Rights Network's joint NGO submission to the eight session of the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime.

¹⁰ For the full document as well as for the interpretative notes and reports of the ad-hoc group, please visit the website of the United Nations Office of Drug Control and Crime Prevention at: www.odccp.org

Part I - General provisions (articles 1-6)

- relation with the Convention on organised Crime (art. 1)
- purpose (art. 2)
- terminology and definition (art. 3)
- scope of application (art. 4)
- criminal liability of migrants (art. 5)
- criminalisation (art. 6)

Part II - Smuggling of migrants by sea (articles 7-9)

- co-operation (art. 7)
- measures against the smuggling of migrants by sea (art. 8)
- safeguard clauses (art. 9)

Part III - Prevention, co-operation and other measures (articles 10-18)

- information (art. 10)
- border measures (art. 11)
- security and control of documents (art. 12)
- legitimacy and validity of documents (art. 13)
- training and technical co-operation (art. 14)
- other prevention measures (art. 15)
- protection and assistance measures (art. 16)
- agreements and arrangements (art. 17)
- return of smuggled migrants (art. 18)

The final part (art. 19-25) of the Protocol deals with the technicalities of the document.

IV. PRESENTATION OF THE PROTOCOL¹¹

A. General Provisions (articles 1-6)

The first article of the Protocol deals with the relation between the Convention on organised Crime and the Protocol. This relation is the same for all three optional Protocols to the Convention¹².

- 1)The Protocol supplements the Convention and shall be interpreted together with the Convention
- 2)The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein
- 3)The offences established in article 6 of the Protocol shall be regarded as offences as established in accordance with the Convention

The Protocol is implemented together with the Convention. The principle of *mutatis mutandis* means that the criminalisations that are covered by the Protocol shall be applied as such, e.g. regardless of whether they fulfil the definitions of organised crime as stated in the Convention. In implementing the Protocol, the Convention is thus subordinate to the Protocol if the Protocol states something additional to the Convention.

The purpose of the Protocol as stated in article 2 is to prevent and combat the smuggling of migrants, promote co-operation among States Parties to that end, while protecting the rights of smuggled migrants. Similarly to the Trafficking Protocol, the Protocol on Illegal Migrants contains a special reference to the protection of the human rights of illegal migrants.

¹¹ For the full document as well as for the interpretative notes and reports of the ad-hoc group, please visit the website of the United Nations Office of Drug Control and Crime Prevention at: www.odccp.org

¹² In order to become a party to the Protocol, a State must first be a party to the Convention (Convention article 37).

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During negotiations of the Protocol, State Parties underwent discussions on the aim of the Protocol. Some States were of the opinion that the main aim of the Protocol should be to prevent crime and not to promote human rights. However, other participants stated that some reference to the protection of migrants should be included. Especially human rights advocates were worried about the human rights violations that may face migrants in vulnerable positions. As a consequence, the Protocol includes the need to protect the rights of the migrants. However, a major difference between trafficking in persons and smuggling of migrants can be spotted in the second article. The Trafficking Protocol puts equal weight on the need to prevent the crime of trafficking and the need to protect the victims. The Migrants Protocol, on the other hand, mainly aims at preventing crime. Additionally, it does not refer to “victims” but to “smuggled migrants”.

Article 3 outlines the use of terms of the Protocol.

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

b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

The Protocol thus defines illegal migration as gaining benefit through the procuring from the illegal entry of a person into a State of which the person is not a national or a permanent resident. The definition only includes “illegal entry” as a ground for defining the smuggling of migrants. Originally some States wanted to include also “illegal residence” in the definition. The definition of smuggling of migrants was therefore thoroughly discussed during negotiations for the Protocol. It can be difficult to prove illegal entry of a person afterward, especially if the documents of entry have been destroyed after entry. In such cases illegal residence would be easier to prove. However, it was agreed that it is the illegal entry into, not the stay in, another State that forms the basis for the understanding of smuggling of migrants.

The criminalisation only covers those who gain profit from organising smuggling. The interpretative notes for the official records of the negotiations highlight that the criminalisation of gaining financial or other material benefit referred to in article 3 should not cover family-members or non-governmental or religious groups who support migrants for humanitarian reasons.

Article 3 also defines “fraudulent travel or identity documents”. The fraudulent travel or identity document includes documents that have been falsely made or altered, documents that have been improperly issued, or used by someone else than the rightful holder. During negotiations there was also a discussion on the need to include only documents meant for international travel. However, the current definition includes all types of documents that are required for entering or leaving a State, or documents used for identifying a person in a State. According to the interpretative notes the fraudulent documents shall also include the filling in of stolen blank documents, forged documents and documents that were validly issued but are used by someone else than the lawful holder.

Article 4 deals with the scope of application of the Protocol and is similar to article 4 of the Trafficking Protocol.

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

The Protocol shall be used for preventing illegal migration and for punishing those who procure it. Similarly to the Trafficking Protocol, the Protocol on Illegal Migrants highlights the need to simultaneously protect the rights of the persons who are the object of these offences. However, contrary to the Trafficking Protocol, the persons who are smuggled are not defined as victims, but as “objects of offences”. During negotiations it was agreed that it is not necessary to define the persons as victims,

although it was agreed to be necessary to include specific reference to the safeguarding of their human rights.

Furthermore, according to article 4 the Protocol is applied in a manner similar to the Trafficking Protocol. That is, the Protocol is applied to cases that involve transnational crimes and organised criminal groups according to the definition of the Convention on Organized Crime¹³. However, article 1 of the Protocol defines that the Protocol is applied *mutatis mutandis* to the Convention. Thus the criminalisations in the Protocol are applicable in their own right. When it comes to the criminalisation of the smuggling of migrants, State Parties can in their domestic legislation implement a broader scope of criminalisation and also criminalise acts that are committed by single persons within the boundaries of one State, without the involvement of any organised criminal group or transnational nature of the crime. However, when it comes to the application of the Protocol in international co-operation, State Parties can ask for assistance and co-operation from other State Parties only if the conditions of transnationality and involvement of an organised criminal group are met.

Article 5 clearly states that the illegal migrants themselves must not be held responsible for the crime of smuggling that they are object to:

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

This article was included to make it explicit that no-one who has been illegally smuggled should be penalised with reference to this Protocol for the fact that they are objects of smuggling. However, the Protocol leaves it open for States in their domestic legislation to cover the possibility of criminalising smuggled migrants. The smuggled migrants themselves should not be accused of the specific crime of smuggling as defined in this Protocol. Instead, it is the smugglers who should be faced with that charge. However, most domestic legislation criminalize, for example illegal entry, use of falsified documents, possession of falsified documents, or illegal residence. A smuggled migrant can, and in most cases will, be charged domestically based on these domestic criminalisations¹⁴. However, the main problem of interpretation will arrive if a smuggled migrant is charged, for example, for aiding in the offence of smuggling or for inciting to commit the offence of smuggling. In these situations the active role of the migrant in the smuggling has to be assessed - as the safeguarding of the migrant in article 5 only defines the smuggled migrant as an object of smuggling. Once the Protocol is ratified we will have more information on how this article is implemented in practice.

Article 6 defines the scope of criminalisation, including:

- The smuggling of migrants;
- Producing, procuring, providing or possessing a fraudulent travel or identity document for the purpose of smuggling of migrants;
- Enabling a person to remain illegally

Although smuggling of migrants is defined only as the illegal entry into, not the stay in, another State, article 6 also criminalises the enabling of a person to remain illegally. Hence, the organisation or procuring of the offence of smuggling covers not only entry but also illegal stay. The interpretative notes highlight that the offences set forth in article 6 should be seen as being part of the activities of organised criminal groups. In this respect, the Protocol follows the precedent of subparagraph 34.2 of the Convention which outlines that offences “shall be established independently of the transnational nature or the involvement of an organized criminal group”. Furthermore the Protocol does not

¹³ The definition of transnational in nature, and organised criminal group can be found in articles 2 and 3 of the Convention on Organized Crime. An organised criminal group is a structured group of three or more persons (also 2 is enough) with the aim of committing one or more serious offences in order to gain financial or other material benefit. A transnational offence should be committed in more than one State, or planned in more than one State, or involving an organised criminal group, or has effects in another State.

¹⁴ It is important to note here that the reference to the criminalisation of possession of falsified documents in the Protocol only covers the act of smuggling of migrants, not illegal entry as such.

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criminalise any humanitarian support groups or family members, only organised criminal groups acting for profit.

The criminalisation of possession of fraudulent documents shall apply only to the organisers of smuggling, not to smuggled migrants who might hold fraudulent documents in order to enable his or her own smuggling.

Subparagraph 6.2 includes additional acts that shall be established as criminal offences attempting, participating as an accomplice, organising or directing others to commit an offence established in accordance with paragraph 1 of this article.

In some countries attempt can be understood as acts perpetrated in preparation for an offence, and also those acts carried out in an unsuccessful attempt to commit the offence, when those acts are punishable under domestic law. The implementation of article 6 should simultaneously consider the rights of the migrants as outlined in article 5. With reference to the earlier discussion on the possible criminalisation of the smuggled migrant, it is necessary to note that “participating as an accomplice” should not, ideally, criminalise the participation of the smuggled person as merely an object in the smuggling operation.

Subparagraph 6.3 deals with aggravating circumstances to the smuggling offences. These include circumstances that:

- endanger or are likely to endanger the lives or safety of the migrants concerned
- entail inhumane or degrading treatment, including for exploitation

The aggravating factors refer to not only the principal offence of smuggling of migrants but also to the producing of fraudulent travel documents, and to enabling a person to remain illegally in a State. During negotiations for the Protocol, a number of State Parties wished to include exploitation of the migrants as an aggravating factor. This was thoroughly discussed, as exploitation is so closely linked to the definition of trafficking in persons and the scope of the Trafficking Protocol. As a compromise, exploitation was included through referring to inhuman or degrading treatment, including certain forms of exploitation. This exploitation can be interpreted to include e.g. sexual violence targeted at female migrants which takes the form of exploitation. The exploitation is supposedly short-term and is perhaps not as systematic as the exploitation taking place in trafficking crimes. It was agreed that the inclusion of exploitation should be without prejudice to the exploitation outlined in the Trafficking Protocol. In some situations it might be difficult to establish the difference between exploitation of smuggled migrants and trafficking. However, States combating the smuggling of migrants will most likely also work towards the prevention of trafficking in persons. Hence both Protocols can and will be implemented in parallel.

The final paragraph of article 6 states that State Parties shall have the right to take measures against persons who commit acts that are offences in domestic law. Hence also smuggled migrants can, and will, be charged for crimes that are defined as a crime in the domestic legislation. This provision thus recognises that States have the right to act on their own territory according to domestic legislation. The interpretative notes furthermore highlight that the measures should be interpreted to include both criminal and administrative sanctions.

B. Part II - Smuggling of Migrants by Sea (articles 7-9)

Part II of the Protocol deals extensively with measures related to the smuggling of migrants by sea. The smuggling of migrants by sea is often more unsafe and risky for migrants than other forms of transportation. On sea, hygiene can be poor and the vessels may lack sufficient reservoirs of drinking water and food. Additionally, the treatment of the migrants by the smugglers or operators can be very violent. The smuggling by sea also places States in difficult situations when they try to take measures towards cases of smuggling. Border control for migrants arriving via land is easier as there are control points at both sides of the border. When migrants arrive by sea, the control is only in the hands of the receiving state. Furthermore, migrants may land anywhere, not just at formal points of border crossings. Additionally, in dealing with migration by sea, states must consider and respect several

international laws and regulations. The second part of the Protocol hence obliges States to adopt new provisions dealing particularly with smuggling of migrants by sea.

Articles 7, 8 and 9 in the second part of the Protocol are largely based on the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea of the International Maritime Organization (IMO). The negotiations for this section of the Protocol focused largely on maritime law and the articles were scrutinised by experts in maritime law¹⁵.

One of the main aims of the Protocol is to facilitate and encourage international co-operation so that the smuggling of migrants can be prevented and combated. This co-operation is especially necessary when dealing with smuggling by sea. According to article 7 States shall co-operate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea in accordance with international maritime legislation.

Article 8 deals with direct measures against the smuggling of migrants by sea. This provision covers both indirect and direct smuggling. Thus also larger ships that transport migrants on the open sea and later transfer them to smaller vessels that take them to the shore shall be included within this paragraph. This is often the case, for example, in the U.S. where there are several instances of smuggling where the migrants are transferred from larger ships to smaller pick up vessels offshore for the final ride to the U.S.

States can ask for assistance from other states in stopping a vessel which is under its flag, being used or suspected of being used for the smuggling of migrants. Furthermore, if a State suspects that a vessel under some other State's flag is engaged in the smuggling of migrants it can notify the flag State and if authorised, it can board and search the vessel and take measures with respect to the vessel and persons and cargo on board. Similarly, if a vessel is without nationality, State Parties may board and search the vessel.

The meaning of the word "board a vessel" was discussed at the negotiations for the Protocol as some delegates wondered whether it authorises the boarding of a vessel against the will of the person in charge of it. The Protocol does allow the boarding of a vessel against the will of the person in charge if the flag state authorises the measure. However, in implementing article 8 it is crucial to observe article 9 dealing with safeguard clauses.

The rest of article 8 deals with different duties, such as the duty to inform about any measures taken, the duty to respond immediately to requests concerning the registry of vessels, and the duty not to take any unauthorised measures. However, states may take measures to relieve imminent danger to the migrants themselves, or the crew members on board and the boarding parties. The use of force is excluded from this paragraph as delegations could not reach consensus. It was also feared that the reference to use of force would encourage rather than limit the use of force.

Article 9 deals with the safeguard clauses related to the measures taken in accordance with article 8 of the Protocol. Article 9 is important for ensuring that the measures are humane and legal.

The actions shall:

- ensure the safety and humane treatment of the persons on board
- take due account of the need not to endanger the security of the vessel or its cargo
- take due account of the need not to prejudice any commercial or legal interests
- ensure that any measure taken with regard to the vessel is environmentally sound.

Thus when boarding and searching a vessel in accordance with the Protocol, the persons on board shall be guaranteed their human rights. This should apply to all persons on board, regardless of

¹⁵ The interpretative notes outline that these provisions of the Protocol should not prejudice the principles, rights, obligations or responsibilities under international instruments of maritime law.

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whether they are organisers of smuggling or smuggled migrants. The environmentally sound measures that should be taken can be interpreted to refer, for example to situations where the vessel is worn-out and there is risk that it may sink, thus causing not only environmental hazards (e.g. oil leakage) but also a risk to sea traffic.

The further safeguard clauses outline the right to compensation for vessels that are damaged when no justification for the measures taken can be found (para 9.2). The responsibility of compensation should be understood to lie on the State that took the measure that damaged the vessel.

Furthermore, the measures taken in accordance with article 9 shall not interfere or affect:

- the rights and obligations of coastal States in accordance with the international law of the sea
- the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel

Hence, although another State can take penal action against the illegal smuggling of migrants, the flag State keeps any other authority and obligations over the vessel, its passengers and crew.

Finally, subparagraph 9.4 determines that any measures taken at sea in accordance to the smuggling of migrants by sea shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service.

C. Part III - Prevention, Co-operation and Other Measures (articles 10-18)

The third part of the Protocol deals mainly with measures directed towards immigration and border control. This focus is due to the fact that the smuggling of migrants is most efficiently exposed and stopped at immigration.

Article 10 deals extensively with the information duties of State Parties in order to facilitate the prevention of smuggling of migrants. Those States with common borders or located on routes along which migrants are smuggled, shall exchange relevant information on:

- Embarkation and destination points and routes, carriers and means of transportation
- Identity and methods of organisations engaged or suspected of being engaged in smuggling
- Authenticity and proper form of travel documents
- Means and methods of concealment and transportation of persons, including unlawful alteration of travel documents
- Legislative experiences and practices
- Scientific and technological information useful to law enforcement

Additionally, States shall comply with any restrictions placed on information they receive from other States (para 10.2).

Article 11 of the Illegal Migrants Protocol deals with border measures. The wording is almost exactly the same as in the Trafficking Protocol.

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

The implementation of this paragraph calls for a careful balance between freedom of movement and border controls. While States strengthen border control measures to detect the smuggling of migrants, it should not happen at the expense of people's rights of freedom of movement. Nor should it compromise the human rights of migrants or other people moving across borders. At the same time, however, border control is the spot where States have the greatest chance of revealing cases of migrants smuggling. Thus States need to improve measures to detect the smuggling of migrants and to hinder the crime while simultaneously avoiding any unnecessary inconveniences to people moving across

borders, or any human rights infringements. One key to improved practice in this regard is increased and continuous training of officials.

Article 11 furthermore requires States to adopt measures to prevent transport operated by commercial carriers. States shall also oblige such commercial carriers or companies to ascertain that all passengers have necessary travel documents and provide for sanctions in case of violations of this obligation. States can also permit the denial of entry or revocation of visas of persons involved in organising smuggling. Finally, States shall consider strengthening co-operation among border control agencies by establishing and maintaining direct channels of communication.

The interpretative notes to the Protocol highlight that commercial carriers only have an obligation to determine whether the passengers have valid travel documents, not to judge the validity or authenticity of the documents. Additionally, in implementing these regulations, carriers shall not overly hinder the free movement of legitimate passengers.

Article 12 deals with the security and control of documents, and similarly to the Trafficking Protocol, it obliges States to ensure that their travel or identity documents cannot easily be misused, falsified or unlawfully altered, replicated or issued and to ensure the integrity and security of these documents and to prevent their unlawful creation, issuance and use.

Article 13 of the Protocol deals with the legitimacy and validity of documents. At the request of another State, a State Party shall verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for smuggling of migrants.

Article 14 covers training of authorities and technical co-operation between States. First of all, specialised training shall be directed to immigration and other officials. The aim of the training is both to prevent smuggling and to make sure that the officials respect the rights of the migrants and treat them in a humane way (para 14.1). As already noted, this is important in the implementation of the border measures. Additionally, States shall co-operate with each other and with other organisations and civil society to ensure that the training is adequate. The training itself is quite technical and shall include:

- Improving the security and quality of travel documents
- Recognising and detecting fraudulent travel or identity documents
- Gathering criminal intelligence - on identifying criminal groups, methods of transportation used, misuse of travel documents and means of concealment used
- Improving procedures for detecting smuggled persons
- The humane treatment of migrants and the protection of their rights as set forth in this Protocol

The training for preventing and combating the smuggling of migrants largely focuses on immigration related measures and on measures of the criminal justice system. The humane treatment of migrants is included at the very end. Contrary to the Trafficking Protocol, the Migrants Protocol does not in this article highlight the need for gender- or child-sensitive training and treatment. This reflects the understanding that the smuggling of migrants is not, contrary to trafficking, a problem that specifically affects women and children. However, it is important to note that women migrants might have special needs, e.g. medical needs, that should be covered in both the training and treatment of the migrants.

The final provision of article 14 declares that those States that have relevant expertise in the field of combating the smuggling of migrants shall consider providing technical assistance to countries of origin or transit. This provision reflects the idea that the fight against human smuggling is a shared global problem which requires international co-operation and sharing of expertise.

In article 15 the Protocol deals with other preventive measures besides those focusing on border and immigration control. Similarly to the Trafficking Protocol, the Migrants Protocol calls for awareness-raising among the public. The awareness-raising shall focus on informing the public about the criminal

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character of smuggling of migrants and about the impacts of organised criminal groups who smuggle for profit. The awareness-raising should also outline the risks such smuggling poses to the migrants themselves. The main aim with the awareness-raising is to prevent potential migrants from falling victim to organised criminal groups. It should not aim at preventing migration as such.

Article 15 also reflects some views presented during the negotiations that the problem of illegal migration should be combated at its origin. Hence countries are asked to strengthen co-operation and programmes, especially in deprived areas, to combat the socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

The provisions on the protection of and assistance to migrants are perhaps the most interesting paragraphs of the Protocol. Article 16.1 declares that all State Parties shall take all appropriate measures to preserve and protect the rights of persons who have been the object of smuggling. More specifically, migrants shall have the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment. The right for protection only refers to those migrants that have been the object of smuggling as outlined in the Protocol. It excludes any other migrants. However, the Protocol should not be interpreted to exclude any existing obligations or rights that are not explicitly listed in the Protocol. Hence the Protocol does not limit any other obligations that States have towards the protection of migrants as outlined in other international agreements.

Additionally, States shall protect migrants from violence that may be inflicted upon them. After all, there is the danger that the organisers of the smuggling might inflict violence on migrants who, for example, reveal who was responsible for the smuggling. This provision should also include the protection from violence by state officials.

Similarly to the Trafficking Protocol, States shall give appropriate assistance to migrants whose lives or safety are endangered. This protection clause is thus not as broad as the protection clause in the Trafficking Protocol according to which protection should be offered to any victims of trafficking. Additionally, States shall take into account the special needs of women and children in implementing these measures of protection and assistance. During negotiations, some non-governmental organisations called for the need to recognise the specific protection needs of smuggled women and children. Although the Protocol does include women and children in this subparagraph, the focus is quite weak. In implementing all provisions of the Protocol it would thus be important to cover the special needs of children and women as smuggled migrants.

The final provision of article 16 refers to the Vienna Convention on Consular Relations as a guideline for dealing with smuggled persons who have been detained. According to this Convention, States must always inform the consular authority of the State of the detained person about the measures taken.

Additionally, States shall also utilise bilateral and regional agreements to prevent and combat the smuggling of migrants and enhance the Protocol (article 17).

In addition to protection of smuggled persons and assistance, the Protocol deals with repatriation of smuggled migrants. The Protocol facilitates the repatriation of migrants through article 18. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a smuggled person who is a national or has the right of permanent residence in its territory at the time of return (para 18.1). Contrary to the Trafficking Protocol, the Migrants Protocol does not cater for smuggled persons to stay in the country of destination or transit. According to general understanding, established during negotiations of the Protocol, migrants are not regarded as victims in the same manner as trafficked persons are.

Furthermore, States shall, when possible, facilitate and accept the return of smuggled migrants who had the right of permanent residence in the country of origin at the time of entry in the receiving State (para 18.2). The difference between paragraphs 1 and 2 is that the former deals with persons who still have the nationality or permanent residence of a State upon return. The latter deals with the case of a person who had the right upon entry to the receiving State but no longer has it.

Additionally, States shall verify the nationality or residenceship upon request (para 18.3), issue travel documents for persons without proper travel documents who are being returned (para 18.4), and carry out the return of a person in an orderly, safe and decent manner (para 18.5). Additionally, States may co-operate with relevant international organisations in implementing article 18.

Finally, the savings clause (article 19) states that the Protocol shall not affect any other rights, obligations or responsibilities of States and individuals under international law, including humanitarian, human rights and refugee laws. Many asylum seekers, also those with genuine claims for asylum, are being transported by means that are covered by this Protocol. Hence they enter the State illegally, and are thus covered by, for example, the measures of repatriation as outlined in the Protocol. At the request of mainly human rights organisations the notion of non-refoulement was included in the Protocol¹⁶. That is, illegal entrance to a State shall not negatively affect a person's claim for asylum in that State. Furthermore, the Protocol shall not be interpreted in a way that is discriminatory to smuggled migrants. During negotiations it was also agreed that the Protocol shall not cover the status of refugees.

The final articles cover the usual provisions, including settlement of disputes, ratification measures, entry into force, amendment, and denunciation.

V. REQUIREMENTS AND SUMMARY

A. Main Ratification Requirements

The four main requirements for ratification of the Migrants Protocol involve the following:

State parties shall:

- Criminalise the smuggling of migrants and the other acts outlined in article 6
- Undertake legislative or other measures to prevent the misuse of commercial carriers for the smuggling of migrants (article 11)
- Give legal obligation for commercial carriers to check passenger travel documents (article 11)
- Prepare travel documents that are difficult to misuse, falsify, alter or replicate (articles 12-13)

B. Summary of the Aims

The main aims of the Protocol are to:

- While not compromising the human rights of the smuggled migrants, to
 - prevent and combat the smuggling of migrants through:
 - hindering the smuggling of migrants through commercial carriers
 - guaranteeing the quality and security of travel and identity documents
 - providing information to the public to prevent potential migrants of falling victim to organised criminal groups, and
- increase co-operation among States in:
 - preventing smuggling by sea
 - improving exchange of information
 - verifying travel documents
 - training officials
 - providing technical assistance, and
 - enhancing the underlying socio-economic causes of migration.

¹⁶ See the International Human Rights Network's joint NGO submission to the eight session of the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime.

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In order to prevent and combat the smuggling of migrants it is thus necessary to reveal more cases of smuggling and to sanction the smugglers. Although there are many good examples of sharing of information there is need for intensified co-operation among law enforcement agencies to combat the use and producing of falsified documents. There is also the need for prosecution guidelines and multiagency working groups, both nationally and internationally.

As to the preventive measures, economic incentives and information campaigns can have an effect in preventing the smuggling of migrants in the first place. Some argue that legal immigration programmes could be one solution for curbing smuggling. There are different experiences of this approach. In Germany, there exists very little smuggling of persons from Poland as compared to other countries in the vicinity of Germany. Polish citizens can obtain legal entry quite easily in German. However, counter arguments from the U.S. and Canada claim that despite means of legal migration, these two countries continue to attract large numbers of illegal migrants¹⁷.

In implementing the Protocol it is crucial to focus both on the organisations procuring the smuggling, and the people being smuggled. We can all agree that organised crime must be combated since it poses a national security problem to all states. However, the smuggling of migrants is not just a problem of transnational organised crime, but also a problem of human security, that is, of the security of the persons being smuggled¹⁸. Hence any criminal justice measures need to, ideally, also recognise the point of view of the persons being smuggled. The major global threat is not the high number of potential migrants being smuggled. The major threat is instead the organised criminal networks that operate around the globe. With delicate implementation of the Protocol to Prevent the Smuggling of Migrants the international community can both ward off some of the threats of transnational organised crime, and protect the security of those who are less fortunate.

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¹⁷ Conference Report of the two Transatlantic Workshops on Human Smuggling.

¹⁸ See Goodey, J. (2000).