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**International cooperation, including at the regional level,
to combat transnational organized crime**

Workshop 2: Trafficking in persons and smuggling of migrants: successes and challenges in criminalization, in mutual legal assistance and in effective protection of witnesses and trafficking victims**

Background paper

Summary

The present background paper describes recent developments and practices in combating both trafficking in persons, especially for forced labour, and the smuggling of migrants. More specifically, the paper discusses key challenges and examples of promising practices in criminalization, international law enforcement and judicial cooperation, and protection of rights of victims of trafficking and smuggled migrants.

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I. Introduction

1. Trafficking in persons and the smuggling of migrants pose serious challenges in today's globalized world. They are complex crimes that affect virtually every country in the world and generate massive illicit profits. The criminal networks involved abuse the vulnerability of those in search of a better life, often seriously harming them in the process.

2. The distinction between the two crimes is subtle and, at times, trafficking in persons and the smuggling of migrants may overlap. At the regional preparatory meeting for Asia and Pacific and the regional preparatory meeting for Western Asia it was highlighted that trafficking in persons and the smuggling of migrants share some common features. Nevertheless, the meetings recommended that Member States consider the two crimes distinctly and adopt, as appropriate, separate legal, operational and policy responses.¹

3. Trafficking in persons occurs when people are recruited, transported, transferred, harboured or received by means such as the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, or of the abuse of a position of vulnerability, for the purpose of exploitation (article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime). The smuggling of migrants involves the procurement of the illegal entry of a person into another country in order to obtain a financial or other material benefit (article 3 (a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime). While trafficking in persons is a crime against human beings, the smuggling of migrants is a crime against States, violating their sovereignty. The smuggling of migrants is by definition always transnational, whereas trafficking in persons may not be: it can occur regardless of whether the victim is moved to another State for the purpose of exploitation, or exploited within a State's borders. The smuggled person is neither the perpetrator nor the victim, but the mere object of the smuggling. However, despite not being victims of crime per se, smuggled migrants often face many forms of harm or even death during their journey.² It is also important to understand that smuggled migrants are particularly vulnerable to being trafficked. So in order to effectively combat trafficking in persons, the smuggling of migrants needs to be addressed as well.

4. Over the last decade, the United Nations Convention against Transnational Organized Crime and the Protocols thereto has guided national and international action. While the Trafficking in Persons Protocol and the Smuggling of Migrants Protocol are the only universal instruments that address those crimes in an integrated manner, they must not be considered in isolation but rather as part of a synergy with complementary international instruments under human rights law,

¹ See A/CONF.222/RPM.1/1, para. 25 and A/CONF.222/RPM.2/1, para. 28.

² Global Initiative against Transnational Organized Crime, "Smuggled futures: the dangerous path of the migrant from Africa to Europe, a research report" (Geneva, May 2014), pp. 14-19; United Nations Office on Drugs and Crime, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (Vienna, 2012), pp. 21 and 39. See also article 14 of the Trafficking in Persons Protocol and article 19 of the Smuggling of Migrants Protocol.

humanitarian law, refugee law, migration law, labour law, anti-discrimination law and criminal law.³

5. The United Nations Office on Drugs and Crime (UNODC), as guardian of the Convention and the Protocols thereto, has assisted States in their efforts to implement them, developing a wide range of resources and tools.⁴ Yet, despite the growing number of ratifications and accessions⁵ and States' efforts to translate their provisions into laws, policies and practices, a number of key challenges remain.

6. One such key challenge is the continued lack of facts, which is a reflection of the clandestine nature of both crimes. In fact, the number of people who are smuggled each year and the routes and methods used to smuggle them are only partly known. With regard to trafficking in persons, while the overall picture remains incomplete, some progress has been made. In particular the UNODC Global Report on Trafficking in Persons informs about patterns and trends at the global, regional and national levels. It is published every two years pursuant to General Assembly resolution 64/293 and the Global Plan of Action to Combat Trafficking in Persons and is based on data gathered from national institutions and international and non-governmental organizations. In addition, current efforts to draw up and propose measurable indicators on both trafficking in persons and the smuggling of migrants in the context of the sustainable development goals that are being considered as part of the United Nations post-2015 development agenda may further enhance knowledge about both crimes.

7. Because not enough distinction is made in law, policy and practice between trafficking in persons and the smuggling of migrants, responses in all four key areas of action, namely prosecution, protection, prevention and partnerships, are less effective than they could be. The fight against trafficking in persons and the smuggling of migrants is still characterized by stereotypes and misconceptions. Furthermore, the lack of comprehensive and coherent policies largely leaves traffickers and smugglers unpunished and the victims and smuggled migrants unprotected.

II. Trafficking in persons

A. Features and trends

8. The UNODC Global Report on Trafficking in Persons of 2014 provides useful insights into the current state of trafficking patterns around the globe. Among the detected cases of trafficking in persons, trafficking for sexual exploitation remains the most prevalent form (53 per cent). It overwhelmingly affects women and girls. There has been a growth in the detection rate for trafficking for forced labour (40 per cent) compared with the period from 2007 to 2010. Here the victims are mostly male, although one third of detected victims are female. The number of child

³ Inter-Agency Coordination Group against Trafficking in Persons, "The international legal frameworks concerning trafficking in persons", ICAT paper series, No. 1 (Vienna, 2012).

⁴ See the knowledge management portal known as SHERLOC and other tools and materials on trafficking in persons and smuggling of migrants available at www.unodc.org.

⁵ As at November 2014, there were 183 States parties to the Organized Crime Convention, 164 to the Trafficking in Persons Protocol and 141 to the Smuggling of Migrants Protocol.

victims continues to grow, accounting for about one third of all trafficking victims identified. This represents a five per cent increase compared with 2007-2010. In 17 per cent of cases information was not available.

9. The apparent impunity of offenders persists. UNODC reports that 15 per cent of the 128 countries covered by the report recorded no trafficking convictions between 2010 and 2012, 26 per cent recorded fewer than 10 convictions, and another 26 per cent recorded between 10 and 50 convictions. Only 16 per cent recorded more than 50 convictions.

B. Criminalization and prosecution

10. A considerable number of States have introduced legal provisions criminalizing trafficking in persons. However, a number of countries have adopted legislation that does not fully comply with the requirements of the Protocol. For example, they criminalize only some forms of trafficking, such as trafficking for sexual exploitation, or they classify only children or women as potential victims.

11. In order to comply with the Trafficking in Persons Protocol, States parties are to criminalize, at a minimum, those forms of exploitation mentioned in it. That includes: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs. When giving effect to the concepts contained in the Protocol, States parties are not required to follow its precise language but to effectively translate its requirements into their legal systems.

12. Practitioners struggle with the fact that key elements of the Protocol, including the definition of trafficking in persons, are unclear and therefore may not be consistently applied. UNODC has analysed key concepts of the Trafficking in Persons Protocol and, in a consultative process involving States parties representing different regions and legal systems, has prepared a series of technical and issue papers that explore the key concepts of abuse of a position of vulnerability, consent and exploitation.

13. Another conceptual challenge in the implementation of the Trafficking in Persons Protocol is to distinguish between forced labour as a stand-alone offence, and trafficking in persons for forced labour or services. In particular, it is often difficult to draw the line between poor working conditions and exploitation of workers serious enough to amount to trafficking in persons.

14. The problems related to identifying trafficking for forced labour or services are compounded by the fact that this form of trafficking is often hidden at the end of long and complex labour supply chains. That hinders the detection and prosecution of the whole range of perpetrators, which includes recruiters, transporters, controllers and exploiters. Another level of complexity is added in the case of fraudulent recruitment practices and debt-bondage schemes. Here victims may for example be trapped by being made to pay extortionate recruitment fees to fraudulent or dishonest agencies and middlemen who often reside in jurisdictions other than where the exploitation takes place. Such cases also make effective inter-agency cooperation more challenging, for example to verify the legitimacy of private employment agencies and their conduct.

15. Because of its complexity, detecting and prosecuting trafficking in persons and reducing and tackling its coercive and exploitative practices can best be achieved through multidisciplinary and holistic enforcement, which means utilizing the whole spectrum of criminal law, criminal procedure law, labour law, tax law and human rights law. Some countries have developed advanced multidisciplinary practices to combat trafficking for forced labour. For example, Brazil has set up a special mobile inspection unit, comprising labour inspectors and federal police officers who swiftly arrive on the scene to investigate allegations of forced labour. Occasionally judges join those teams to allow for faster adjudication.⁶

16. Such holistic approaches are complemented by the adoption of preventive measures, such as to regulate, register, license and monitor private employment agencies, which includes prohibiting recruitment fees being charged to workers to prevent debt bondage.⁷ Other promising initiatives include the creation of the Gangmasters Licensing Authority in the United Kingdom of Great Britain and Northern Ireland, and the introduction in 2012 of anti-trafficking legislation by the Philippines that requires the Philippine Overseas Employment Administration to create a blacklist of recruitment agencies, illegal recruiters and persons facing administrative, civil or criminal complaints for trafficking filed in the receiving country and/or in the Philippines.⁸ An executive order issued in 2012 by the President of the United States of America prohibits federal contractors and subcontractors from using misleading or fraudulent recruitment practices, charging employees recruitment fees and destroying, concealing, confiscating, or otherwise denying employees access to their identity documents.⁹

C. Victim and witness protection

17. A comprehensive and successful response to trafficking in persons requires the adoption of a human rights and victim-centred approach to ensure that victims of trafficking are recognized as such and that their dignity is restored throughout the course of criminal proceedings and beyond.¹⁰ Victims of trafficking should be assisted and protected, regardless of their ability or willingness to cooperate with the authorities, and have access to justice and remedy for the harm inflicted on them. Such an approach needs to be gender and child-sensitive. Accurate and timely identification is a prerequisite for the protection of victims' rights, as are referral to unconditional medical, psychological and material assistance, to counselling, and to housing services.¹¹ Victims should also be protected from prosecution and punishment for offences committed as a consequence or in the course of their being trafficked.¹²

⁶ Beate Andrees, *Forced Labour and Human Trafficking: A Handbook for Labour Inspectors* (Geneva, International Labour Office, 2008).

⁷ See CTOC/COP/WG.4/2013/5, para. 22.

⁸ The Philippines, Expanded Anti-Trafficking in Persons Act of 2012 (Republic Act No. 10364).

⁹ United States, Strengthening Protections Against Trafficking In Persons In Federal Contracts (Executive Order 13627 of 25 September 2012).

¹⁰ A/CONF.222/RPM.4/1, para. 47.

¹¹ See articles 6-8 of the Trafficking in Persons Protocol and articles 24 and 25 of the Organized Crime Convention.

¹² Organization for Security and Cooperation in Europe, "Policy and legislative recommendations

18. Global and national data indicate that trafficking victims are routinely misidentified, especially in cases of exploitation for forced labour or services. They are frequently treated as offenders and irregular migrants. They are detained, punished and deported without due respect for their rights, and without the possibility of reporting the abuse or claiming compensation for harm suffered, including unpaid wages.

19. Failure to identify victims makes it difficult for law enforcement agencies to prosecute traffickers, as victims' testimony is often decisive for successful prosecutions.¹³ Experience suggests that countries with more comprehensive measures to assist victims achieve better results in prosecuting traffickers, because well-assisted victims tend to be more willing to cooperate in legal proceedings against their traffickers.¹⁴

20. A number of factors hinder victim identification, for example a restrictive interpretation of international obligations and conditional as well as limited access to support services. Victims often do not come forward as they may fear for their personal safety and that of their loved ones, or be afraid of being detained, deported or losing the source or the prospect of even a minimal income. Victims of trafficking for forced labour often do not seek help until their situation deteriorates, for example because of physical violence or accidents at work. Promising practices in some countries show that victim identification is most effective when it is a proactive, multi-agency effort and when civil society organizations are involved at a very early stage.¹⁵

21. In most countries, support services for victims of trafficking for labour exploitation are limited in scope, underresourced and not tailored to address the specific needs of men, women and children. For example, in many cases access to services for victims of labour trafficking is granted through residential facilities. In the case of shelters for women that precludes access for male victims. However, some countries, including Thailand, have established support facilities or services for male victims of trafficking for forced labour.

22. Only few countries assist victims in regaining their independence by giving them access to the labour market and the possibility of receiving permanent resident

towards the effective implementation of the non-punishment provision with regard to victims of trafficking" (Vienna, 2013).

¹³ See CTOC/COP/WG.4/2011/4.

¹⁴ Elaine Pearson, *Human Traffic, Human Rights: Redefining Victim Protection* (London, Anti-Slavery International, 2002), p. 35.

¹⁵ Anti-Slavery International, *Protocol for Identification and Assistance to Trafficked Persons and Training Kit* (London, 2005); Isabella Orfano, "Protection of the Rights of Migrant Workers Trafficked for Labour Exploitation through Support Measures and Access to Social Inclusion and Remedies" in *An Agenda for Prevention: Trafficking for Labour Exploitation* (Vienna, OSCE, 2011).

status. Permanent resident status is often conditional on cooperation with the authorities in the criminal proceedings.¹⁶

23. Effective access to remedies, assistance and regularization of status are crucial for victims of trafficking. A promising practice in this area is the project European Action for Compensation for Trafficked Persons, which has worked in 13 countries to promote and support trafficked persons' access to compensation for their suffering and unpaid labour. The project has shown that providing comprehensive legal assistance through multidisciplinary teams of lawyers specialized in criminal, civil, labour and immigration law, coupled with cooperation across borders, has proven crucial for effective victim assistance.

24. Victims of trafficking in persons are also witnesses to serious crimes. In this role they are entitled to protection from secondary victimization, that is victimization through the response of institutions and individuals to the victim. Among the most frequently used witness protection measures to prevent this type of victimization are the protection of the victim's identity, physical protection, the use of video testimony, closed hearings, limited contact with the defendants, limitations on media coverage during court proceedings, non-disclosure of the victim's identity, use of voice distortion and facial disguise, attendance of support persons, sealing records of the trial and contempt provisions enabling judges to prevent threatening behaviour in the courtroom.¹⁷ As a promising practice, the Economic Community of West African States has adopted regional guidelines on protection, support and assistance to witnesses.

25. Full-fledged witness protection programmes in trafficking cases are generally considered as a last resort, as victims may be reluctant to enter such programmes because they put them under additional strain.

26. It is important to use a combination of prevention and protection measures and make full use of complementary legal frameworks to respond to abuse, exploitation and trafficking for forced labour. Crucial in this context are multidisciplinary partnerships, such as among labour, tax, social, judiciary and law enforcement authorities, trade unions, civil society organizations and business associations.¹⁸ Such partnerships are also valuable for monitoring sectors that are vulnerable to exploitation, and thereby help to prevent abuse, exploitation and trafficking.

27. Building on the research into the connection between abusive recruitment and trafficking in persons in the Baltic region,¹⁹ the European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), has recently

¹⁶ Anette Brunovskis and Fafo, *Balancing Protection and Prosecution in Anti-Trafficking Policies: A Comparative Analysis of Reflection Periods and Related Temporary Residence Permits for Victims of Trafficking in the Nordic Countries, Belgium and Italy* (Copenhagen, Nordic Council of Ministers, 2012); Sarah Craggs and Razayda Martens, *Rights, Residence, Rehabilitation: A Comparative Study Assessing Residence Options for Trafficked Persons* (Geneva, International Organization for Migration, 2010).

¹⁷ UNODC, *Model Legislative Provisions against Organized Crime* (New York, 2012), p. 113.

¹⁸ See A/CONF.222/RPM.1/1, para. 27.

¹⁹ Natalia Ollus, Anniina Jokinen and Matti Joutsen (eds.), *Exploitation of Migrant Workers in Finland, Sweden, Estonia and Lithuania: Uncovering the Links Between Recruitment, Irregular Employment Practices and Labour Trafficking*, HEUNI Publication Series No. 75 (Helsinki, HEUNI, 2013).

developed multi-stakeholder guidelines to prevent the abusive recruitment and exploitative employment practices that are conducive to trafficking.²⁰ Other promising practices include a Brazilian multi-stakeholder initiative of public organizations, non-governmental organizations and businesses, entitled the National Pact for the Eradication of Slave Labour. The initiative known as the Dhaka Principles for Migration with Dignity provides a good standard for ethical recruitment and protection of the rights of migrant workers. It is supported by businesses, governments, trade unions and civil society organizations.

28. Two recently adopted texts, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organization (ILO), and the ILO Forced Labour (Supplementary Measures) Recommendation, 2014, seek to complement the measures in the Trafficking in Persons Protocol by establishing new obligations to prevent forced labour, protect victims, and, regardless of victim status or cooperation in legal proceedings, provide access to remedies such as compensation for material and physical harm. The texts include enhanced measures to prevent fraudulent and abusive recruitment and employment practices, and measures to protect workers, in particular, migrant workers, from being subjected to them. They also include measures that support employers' and workers' organizations in tackling forced labour. Furthermore there is a provision to support due diligence by the public and private sectors to prevent and respond to risks of forced labour.

III. Smuggling of migrants

A. Features and trends

29. Knowledge about the smuggling of migrants is at best incomplete. There are no comprehensive assessments or reliable estimates about the proportion of migrants using the services of smugglers. However, existing regional assessments provide some insight into the ever-changing smuggling patterns and trends.²¹

30. Smuggling routes are very fluid and change rapidly to circumvent law enforcement responses. They keep up with changes in the visa and migration regimes, the political, socioeconomic and environmental context, and the availability of corrupt officials. In many cases, a mix of air, land and sea routes is used, and long journeys are often split into segments that cross several continents.

31. Certain routes are particularly hazardous. The International Organization for Migration estimates that, since 2000, about 40,000 migrants have died while attempting to cross land and sea borders. The route to Europe is considered the most dangerous, with over 22,000 migrant fatalities since 2000, mainly during the

²⁰ Liliana Sorrentino and Anniina Jokinen, *Guidelines to Prevent Abusive Recruitment, Exploitative Employment and Trafficking of Migrant Workers in the Baltic Sea Region*, HEUNI Publication Series No. 78 (Helsinki, HEUNI, 2014).

²¹ Transnational organized crime threat assessments available at www.unodc.org.

crossing of the Mediterranean Sea. At the border between the United States and Mexico, more than 6,000 migrants have died since 1998.²²

32. Lack of opportunities for legal migration renders migrants more dependent on smugglers. Both hierarchically organized criminal groups and loosely organized criminal networks are involved in the smuggling of migrants. They expand and contract to fit the circumstances and generate significant profits that may in turn be laundered. They increasingly use information and communication technologies to keep contact with smugglers and migrants.²³

33. The smugglers adjust their fees according to, inter alia, the type of service provided, the distance covered, the risks of detection, and the mode of transport. As smuggled migrants frequently lack the resources for financing their journey, they often contract debts for themselves and their families or pay for their journey in instalments, thereby exposing themselves to debt bondage. This often results in longer journeys in which migrants have stopovers to finance the remainder of their journey. During those stopovers they are particularly vulnerable to trafficking in persons and other forms of abuse and crime.

B. Criminalization and prosecution

34. Implementation of the Smuggling of Migrants Protocol remains challenging, with national measures usually focusing on border control rather than the involvement of organized crime in the facilitation of irregular migration. Often efforts concentrate on disrupting the journey of the migrant without aiming to target the organizers of the irregular migration and their illicit profits. In the context of mixed migration flows this often means that persons with protection claims are denied proper assessment of their situation, and that the principle of non-refoulement is not respected.

35. There is no comprehensive analysis of how States have implemented the Smuggling of Migrants Protocol in their national legislation, but several studies show that only few have defined and criminalized the smuggling of migrants and related conduct in compliance with it.²⁴

36. Although the Smuggling of Migrants Protocol gives latitude to States parties to take measures against a person whose conduct constitutes an offence under their domestic law, smuggled migrants are not to be held criminally liable for having been smuggled.²⁵ Refugees who rely on smugglers to flee persecution, serious human rights violations or violent conflict are exempted altogether from liability related to their illegal entry.²⁶

²² International Organization for Migration, *Fatal Journeys: Tracking Lives Lost During Migration* (Geneva, 2014).

²³ UNODC, *Migrant Smuggling in Asia: A Thematic Review of Literature* (Bangkok, 2012) pp. 45-50 and 57.

²⁴ See the UNODC SHERLOC knowledge management portal. See also European Union Agency for Fundamental Rights, "Criminalisation of migrants in an irregular situation and of persons engaging with them" (Luxembourg, Publications Office of the European Union, 2014).

²⁵ See article 5 and article 6 (4) of the Smuggling of Migrants Protocol.

²⁶ Convention relating to the Status of Refugees, article 31.

37. The Smuggling of Migrants Protocol aims to address the facilitation of the smuggling of migrants by organized criminal groups and networks for a profit, not to regulate and criminalize mere migration.²⁷ When the smuggling of migrants is dealt with under immigration law rather than criminal law, there is a risk that the conduct of the smuggled migrant — the unlawful entry — becomes the main offence, while the facilitation of the unlawful entry becomes only an accessory offence. As a consequence, smugglers are exposed to far fewer risks and lighter sentencing than the smuggled migrants themselves. That ensures the impunity of the criminals, while exacerbating the vulnerability of migrants. That, in turn, makes it more difficult to prosecute and prevent the smuggling of migrants effectively and to protect the migrants.

38. Furthermore, the Smuggling of Migrants Protocol does not criminalize support given to migrants by individuals or non-governmental organizations for humanitarian or familial reasons.²⁸ Yet, practice has shown that States have, at times, investigated and prosecuted individuals who had rescued and assisted smuggled migrants for humanitarian reasons. Investigations and prosecutions of that kind were usually based on legislation that omitted the element of financial or other material benefit contained in the definition of the smuggling of migrants as set forth in the Protocol.²⁹

39. Smuggled migrants can become victims of crime in the course of being smuggled, for instance if they are subjected to inhuman or degrading treatment, or to violence, or if their lives and safety are endangered at the hands of smugglers, be it on purpose or through recklessness. The Smuggling of Migrants Protocol acknowledges the vulnerability of smuggled migrants to those crimes and requires States to establish such conduct as an aggravating circumstance that exposes smugglers to harsher punishment.³⁰ Yet many States parties have not included this mandatory provision in their legislation. The criminal conduct does not need to amount to exploitation within the definition of trafficking in persons, but may constitute one or more distinct crimes, such as fraud, extortion, rape and serious bodily injury, that need to be investigated as such.³¹

40. Very few countries have developed specialized policies against the smuggling of migrants, set up inter-agency cooperation mechanisms, established specialized units to counter the smuggling of migrants or trained specialized prosecutors and judges. Measures against the smuggling of migrants often focus on border management without being embedded in a wider policy framework. Furthermore, efforts to counter the smuggling of migrants are often undermined by the lack of effective multi-agency mechanisms for the sharing of information and the

²⁷ *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2), part three, chap. II, paras. 27 and 28, p. 340.

²⁸ *Ibid.*, part three, para. 32, p. 341.

²⁹ European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg, Publications Office of the European Union, 2011), pp. 63 and 64.

³⁰ Article 6 (3) of the Smuggling of Migrants Protocol.

³¹ UNODC, Model Law against the Smuggling of Migrants (New York, 2010) p. 43; Global Migration Group, *Exploitation and Abuse of International Migrants, Particularly Those in an Irregular Situation* (Vienna, 2013), p. 21.

coordination of operations among authorities and other actors at the national and international levels.³²

41. Nevertheless, some promising national practices are in place. Examples include the office of the attorney-general of El Salvador, which has a unit specializing in trafficking in persons and the smuggling of migrants, the national coalition against trafficking in persons and the smuggling of migrants in Costa Rica, and the special advisor on human smuggling and illegal migration in Canada, who is tasked with coordinating the national response to the smuggling of migrants through a multi-agency approach.³³

42. The smuggling of migrants is often linked to corruption, which plays a key role at border crossings and in document fraud.³⁴ One of the common techniques used by smugglers is to provide fraudulent supporting documents (e.g. a forged job contract or birth certificate) in order to obtain genuine identification or travel documents. Organized criminal groups involved in the smuggling of migrants may use identity-related crime to protect their members and operations from surveillance not only during illicit activities, but also during routine, non-criminal activities such as international travel. There is also evidence that certain criminal groups treat identity documents and information as an illicit commodity. Such groups may develop expertise in producing increasingly sophisticated forgeries of identity documents or exploiting weaknesses in issuance schemes by deceiving or corrupting authorities in order to obtain genuine documents. Those genuine documents can then be sold to others for use in the smuggling of migrants.

43. Establishing jurisdiction for the smuggling of migrants at sea is a particular challenge. To effectively investigate and prosecute this type of smuggling, a broad jurisdictional basis needs to be established for territorial waters and, in some cases, the high seas, the latter through extraterritorial jurisdiction. Whenever authorities intercept a vessel with smuggled migrants on board, or any other vessel encounters one and rescues the persons on board because they are in distress, many challenges need to be addressed. What determines the port of disembarkation and, hence, the country that will be bound to assist the migrants and initiate an investigation? How to secure evidence incriminating the smugglers found on board? How to identify the smugglers among the migrants, separate them and ensure that the persons on board are dealt with adequately? Under the United Nations Convention on the Law of the Sea, States are obliged to promote the establishment, operation and maintenance of an adequate and effective search and rescue service. A promising practice in this regard is Operation Mare Nostrum, a multidisciplinary rescue operation in the southern Mediterranean Sea carried out by Italy with the specific objective of rescuing lives at sea and bringing to justice those who profit from the smuggling of migrants.

³² See A/CONF.222/RPM.4/1, para. 50.

³³ See CTOC/COP/WG.7/2013/3.

³⁴ UNODC, "Issue paper: corruption and the smuggling of migrants" (Vienna, 2013).

C. Protection of witnesses and smuggled migrants

44. Protection of the rights of smuggled migrants is one of the four objectives of the Smuggling of Migrants Protocol. In other words, protection of the rights of migrants forms an integral part of an effective response to the smuggling of migrants. The rights of smuggled migrants are to be safeguarded and their needs addressed at the time of their detection by front-line officers, but also throughout the investigation and prosecution of the smugglers. Smuggled migrants are a precious source of information about the smuggling process and the criminal networks involved, and are hence valuable witnesses. Treating migrants with respect, addressing their basic needs and respecting their rights, especially when they have become victims of crimes during the smuggling process, may also benefit investigators and prosecutors who need their cooperation as witnesses against the smugglers.

45. The extent to which smuggled migrants provide evidence in criminal proceedings also depends on the capacity of States to take appropriate measures to protect them and their relatives from intimidation and retaliation.³⁵

46. States have the obligation to protect the human rights of smuggled migrants. This implies, in particular, a prohibition against discrimination and the protection of the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and the right to access justice and effective remedies and the protection from violence. States are also obliged to comply with their international obligations in relation to detention, return and international protection.³⁶ Protection policies and measures are enshrined, for example, in the Convention relating to the Status of Refugees, the United Nations Convention on the Law of the Sea, the Trafficking in Persons Protocol, and the United Nations Convention on the Rights of the Child. In 2014, the Office of the High Commissioner for Human Rights issued a paper entitled “Recommended principles and guidelines on human rights at international borders” to support States in the fulfilment of those obligations.³⁷

47. With regard to children, and especially unaccompanied and separated children, who are particularly vulnerable, the policies and actions of States should be guided by the best interests of the child and afford special protection measures in accordance with their specific rights and needs.

48. It remains a challenge to identify smuggled migrants who have experienced abuse and violence during their journey or who, at their destination, find themselves working in exploitative conditions.³⁸ Front-line officers may not be properly trained or equipped to screen mixed migration flows for vulnerable migrants and refer such migrants to appropriate assistance. A good practice is the introduction of a manual on fundamental rights training for border guards by the European Agency for the

³⁵ Article 24 of the Organized Crime Convention.

³⁶ See UNODC, *International Framework of Action to Implement the Smuggling of Migrants Protocol* (New York, 2011), pp. 25-41 and part two, table 2.

³⁷ A/69/CRP.1.

³⁸ See A/CONF.222/RPM.4/1, para. 45.

Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).³⁹

49. Some countries have established promising practices to protect the rights of migrants who have been smuggled under aggravating circumstances. For example, Belgium offers the same protection to smuggled migrants who have been the victims of crime as to victims of trafficking, i.e. a reflection period, assistance and a temporary residence permit conditional on cooperation with the authorities. Under certain conditions that permit may be converted into a permanent residence permit.

50. Upon first contact, States should ensure that smuggled migrants have their basic needs covered and receive adequate information about their rights. This requires having interpreters and trained and knowledgeable front-line officers and criminal justice practitioners. In practice, however, detected smuggled persons tend to be referred to screening facilities, which are usually detention facilities. Civil society organizations are often denied access, which limits the opportunity to provide legal counselling and to detect protection needs for various types of smuggled migrants, including refugees and victims of crime. States still have difficulty ensuring that their policies and measures to protect the rights of smuggled women and children, including separated and unaccompanied children, are gender-sensitive and child-friendly. They could remedy this in part by cooperating with specialized service providers, in particular civil society organizations, immigration lawyers and lawyers specialized in counselling crime victims, and allowing them to assist in the identification of particularly vulnerable groups and their referral to appropriate assistance.

51. Some promising practices exist in these areas. For example, the Praesidium project in Italy is an initiative to set up an innovative reception system for irregular migrants arriving by sea. Those migrants receive information and assistance and are then referred to the appropriate legal and administrative procedure to apply for protection. The project is based on a partnership between the United Nations High Commissioner for Refugees, the International Organization for Migration, Save the Children, and the Italian Red Cross, and has the support of the Italian ministry of the interior and the European Commission.

IV. International law enforcement and judicial cooperation

52. International law enforcement and judicial cooperation, combined with solid regimes to combat money-laundering, are key elements in the combat against both trafficking in persons and the smuggling of migrants.

53. The smuggling of migrants is by definition a transnational crime, requiring a transnational response. Also, a significant number of cases of trafficking in persons involve organized criminal groups that operate in multiple jurisdictions, thus requiring rapid and effective international law enforcement and judicial cooperation. Still, investigations and prosecutions often tend to focus on some elements of the trafficking or smuggling chain, while leaving out others. The reluctance to expand the remit of investigation and prosecution abroad is brought about by multiple factors, including a lack of specialization in dealing with complex cases, lengthy

³⁹ Frontex, *Fundamental Rights Training for Border Guards, Trainers' Manual* (Warsaw, 2013).

and complicated procedures for mutual legal assistance, and challenges in cooperating with other jurisdictions to obtain the testimony of repatriated victims and smuggled migrants. Language barriers and a shortage of effective bilateral or multilateral information-sharing mechanisms further compound the problem. Some experts refer to a lack of incentives for police and prosecutors to cooperate internationally. Yet, to disrupt the whole trafficking and smuggling chain and to bring to justice those who organize and direct it, cooperation with other countries is essential.⁴⁰

54. Notwithstanding these challenges, some promising practices exist. For example, in the European Union, joint investigation teams have been established to handle cases of trafficking in persons and the smuggling of migrants with the support and coordination of the judicial cooperation unit of the European Union (Eurojust) and the European Police Office (Europol). Joint investigations conducted by the United States and Mexico have contributed to the dismantling of networks operating across their common border. Some States have established channels for direct cross-border communication, and for informal cross-border cooperation and information-sharing. For example, the United States and Canada have established integrated border enforcement teams. Another prime example of an innovative approach to information-sharing is the voluntary reporting system on the smuggling of migrants and related conduct (VRS-MSRC), developed with support from UNODC as part of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime. VRS-MSRC is a secure Internet-based system that State authorities can and do use to collect and share data about the smuggling of migrants.

55. The prosecution of and international cooperation in both trafficking and smuggling cases is faced with new challenges that stem from the growing use by criminals of information and communication technologies. For example, suspects make use of encryption, or they transfer and exchange data using cloud computing technologies and anonymous networks, and store data on servers located in different geographic locations in multiple jurisdictions. Investigation and prosecution in such cases require expedited international law enforcement and judicial cooperation and specialized investigative actions to preserve electronic evidence, which by its nature is volatile and easily contaminated. However, evidentiary rules on electronic evidence, together with resources and capacities to handle such evidence, vary significantly among countries. Traditional means of international cooperation risk being too lengthy and might compromise prosecutions.⁴¹

56. A number of tools and practices have been developed to foster international cooperation in tackling both trafficking in persons and the smuggling of migrants, for example the UNODC online directory of competent national authorities, the UNODC mutual legal assistance request writer tool, the UNODC Manual on Mutual Legal Assistance and Extradition, and the UNODC Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime. At the regional

⁴⁰ Cornelius Friesendorf (ed.), *Strategies Against Human Trafficking: The Role of the Security Sector* (Vienna and Geneva, National Defence Academy and Austrian Ministry of Defence and Sports in cooperation with the Geneva Centre for the Democratic Control of Armed Forces, 2009), p. 347.

⁴¹ UNODC, *Comprehensive Study on Cybercrime (Draft)* (Vienna, 2013).

level, the Heads of Specialist Trafficking Units Process of the Association of Southeast Asian Nations (ASEAN) facilitates international cooperation within the South-East Asian region. Furthermore, the ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases provides guidance on using mutual legal assistance and extradition in the prosecution of trafficking in persons. UNODC has also supported the development of the Guidelines of International Cooperation on Trafficking in Persons and Smuggling of Migrants, intended for criminal justice practitioners in the Western Balkans.

57. Several international and regional organizations have established platforms and multilateral processes to strengthen criminal justice responses to both trafficking in persons and the smuggling of migrants. There are many examples of law enforcement and judicial cooperation initiatives that support sharing criminal intelligence, law enforcement cooperation and coordination of multilateral operations. Those initiatives include the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, the Central Asian Regional Information and Coordination Centre, the joint planning cell of Afghanistan, Iran (Islamic Republic of) and Pakistan, Europol, and the Southeast European Law Enforcement Centre with its “Mirage” task force on countering trafficking in human beings and illegal migration. There are also regional judicial networks and platforms such as the Ibero-American Network for International Legal Cooperation, Eurojust, the European Judicial Network, and the coordinating council of prosecutors-general of members of the Commonwealth of Independent States. A judicial network for Asia is under development. The international and regional platforms often provide opportunities for training and exchange programmes that are, in turn, occasions for developing relationships and trust among criminal justice practitioners. Trust and good relationships are critical to police and judicial cooperation, which uses both formal and informal methods of sharing information and evidence. Cooperation is most effective when it is based on mutual interest.

58. International law enforcement and judicial cooperation are particularly important for the purposes of tracing, seizing and confiscating criminal assets. The Organized Crime Convention requires States parties to establish both trafficking in persons and the smuggling of migrants as predicate offences for money-laundering. The rationale for systematically leveraging regimes to combat money-laundering is to enhance detection and to broaden and deepen the investigations by making use of additional special investigative techniques and resources to secure strong evidence that corroborates statements by victims, and thus to determine how networks are organized, who their leaders are, and how they operate. Financial investigations serve to identify, freeze and confiscate the criminal proceeds and assets kept by traffickers, smugglers and their accomplices, thus effectively disrupting their criminal operations. Such confiscated assets can be used to compensate victims for damage that they have suffered.

59. Some promising practices exist. For example, the United States Department of Homeland Security has launched a law enforcement initiative named Smuggler and Trafficker Assets, Monies and Proceeds, whose purpose is to attack criminal organizations involved in the smuggling of migrants and trafficking in persons using techniques to combat money-laundering. It aims at identifying key members of

criminal organizations and tracking down, seizing and confiscating assets, monies, and proceeds derived from or used in support of their criminal activity.⁴²

60. Member States of the European Union have established joint investigative teams with the support of Eurojust and Europol to specifically tackle trafficking in persons, the smuggling of migrants and the subsequent money-laundering activities. For example, in 2014, operation Archimedes saw the participation of law enforcement officers from 34 countries in an intelligence-led coordinated operation against smuggling and trafficking and other forms of organized crime in the European Union. The operation resulted, inter alia, in 1,027 arrests, the rescue of 30 children from trafficking, and the checking of over 10,000 irregular migrants.

61. While such joint operations are capable of launching and coordinating investigative efforts across multiple countries that result in numerous arrests and the freezing of assets, they sometimes display a focus on detecting irregular migrants without giving due attention to identifying vulnerable migrants in need of protection, refugees, and victims of crime, and, once identified, referring them to appropriate support.

62. The repatriation of victims of trafficking in persons and the return of smuggled migrants pose further challenges and require international cooperation. All processes and procedures relating to the return of smuggled migrants and victims must be coordinated and must comply with international law, in particular human rights, refugee and humanitarian law. Return and repatriation policies and programmes are most effective and sustainable when they are carried out in a safe, humane and orderly manner, so as to maximize the possibilities for returned persons to reintegrate into their home country. Furthermore, reintegration assistance can support migrants' successful and sustainable return.⁴³

V. Conclusions and recommendations

63. Trafficking in persons and the smuggling of migrants need to be addressed in a coherent and holistic manner, involving various policy fields that include migration management, border control and human rights protection, and through measures intended to enhance the rule of law, prevent and control corruption, and promote and strengthen social and economic development. However, policies dealing with trafficking in persons and the smuggling of migrants are often fragmented and inadequate. Considerations relating to immigration control often still prevail over the need to dismantle the organized criminal groups involved in trafficking in persons and the smuggling of migrants. The need to protect victims of trafficking and smuggled migrants is often overlooked, which hampers effective investigation and prosecution. As a consequence, despite the progress made in the criminalization of trafficking in persons and, to a lesser extent, the smuggling of migrants, there have been few prosecutions and convictions of traffickers and smugglers. As a result, organized criminal groups continue to generate enormous illicit profits, which further fuel corruption and other forms of organized crime.

⁴² OSCE, *Leveraging Anti-Money Laundering Regimes to Combat Trafficking in Human Beings* (Vienna, 2014).

⁴³ *International Framework for Action*.

64. The protection frameworks developed in connection with trafficking in persons and the smuggling of migrants, and the broader human rights protection framework should be used in a complementary manner in order to ensure that the continuum of abuse, exploitation and rights violations is adequately addressed.

65. Finally, trafficking in persons and the smuggling of migrants cannot be effectively addressed without effective partnerships across borders and continents that are based on a sense of shared responsibility for combating organized crime, upholding the rule of law, protecting human rights, and promoting development.⁴⁴

66. Bearing this in mind, and taking into account the recommendations of the regional preparatory meetings, the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice may wish to consider the following recommendations:

(a) Member States should establish comprehensive policies and programmes to combat trafficking in persons and the smuggling of migrants, to screen mixed migration flows for victims of trafficking in persons and smuggled migrants, and to protect the fundamental rights of victims of trafficking in persons and of smuggled migrants and allow them access to assistance, justice and protection in accordance with the Trafficking in Persons Protocol, the Smuggling of Migrants Protocol and other relevant instruments of international law;

(b) Where appropriate, Member States should adopt separate policy, legislative and operational responses to trafficking in persons and the smuggling of migrants, taking into account their differences and common features;

(c) Member States should establish comprehensive legislative frameworks to criminalize trafficking in persons and the smuggling of migrants in all their manifestations. Their legislative frameworks against trafficking in persons should include all forms of trafficking, especially in women and girls, but also in men and boys. Their legislative frameworks against the smuggling of migrants should recognize that organized criminal groups engage in the smuggling of migrants for financial or other material benefit. They should also criminalize document fraud and the offence of enabling the illegal stay of migrants. Finally, the national frameworks against both crimes should uphold the principle of non-refoulement and other recognized principles of international human rights and humanitarian law, and recognize as aggravating circumstances conduct that endangers, or is likely to endanger, the lives or safety of the migrants, or that entails inhuman or degrading treatment;

(d) Competent authorities should be trained to identify and protect the rights of all victims of trafficking, including for less prevalent forms of exploitation, in particular in mixed migration flows. Criminal justice agencies should recognize that victims of trafficking and smuggled migrants may also be witnesses to those crimes, and should treat them accordingly;

(e) Member States should focus their efforts on dismantling the organized criminal groups behind trafficking in persons and the smuggling of migrants, and ensure that victims of trafficking are not held liable for offences committed by them as a consequence or in the course of their being trafficked;

⁴⁴ Ibid., pp. 7-11. See also “Smuggled Futures”, pp. 18-20, and A/68/L.5.

(f) Member States should adopt preventive regulatory measures, such as to regulate, register, license and monitor private employment agencies to prevent debt bondage, including by prohibiting recruitment fees being charged to workers. Member States should also ensure that appropriate due-diligence procedures are in place to guarantee respect for human rights and to prevent trafficking in persons;

(g) Member States should support and promote multidisciplinary partnerships, including among law enforcement agencies, prosecution services, labour authorities, tax authorities, social authorities, civil society organizations, trade unions and the private sector to prevent trafficking in persons for labour exploitation;

(h) Member States should strengthen the provision of legal counselling and legal assistance to all victims of trafficking in persons, and to smuggled migrants to the extent that they have been victimized while being smuggled, to enable them to seek justice and gain access to remedies, in particular the right to claim compensation.
