# Legislative Guide for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*

United Nations Centre for International Crime Prevention (UNODC)

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# Part I:

# Background, general and interpretative provisions

# Chapter 1 - background of the Convention, Protocols and this Guide

## Purpose of the legislative guide

This document is intended for use as a guide for governments seeking to ratify or accede to the *Protocol against the Smuggling of Migrants by Land, Sea and Air,* supplementing the United Nations Convention against Transnational Organized Crime. Countries are reminded that they must become a Party to the *United Nations Convention Against Transnational Organized Crime* before they may ratify or accede to the Protocol.

The guide is drafted to accommodate different legal traditions, varying levels of institutional development and provides, and where available, implementation options. As the guide is for use primarily by legislative drafters in countries preparing for the ratification of the Protocols, not every provision of the Protocols is addressed in the guide. Mainly those which will require legislative change have been addressed.

It should be noted that this legislative guide is not intended to provide definitive legal interpretation of the Articles of the Protocol. The content is not authoritative, and in assessing each specific requirement, the actual language of the Protocol provisions should be consulted. Caution should also be used in incorporating provisions from the Protocol verbatim into national law, which generally requires higher standards of clarity and specificity to permit enforcement in courts of law. It is also recommended that drafters check for consistency with other offences and definitions in existing domestic legislation before relying on Protocol formulations or terminology.



The United Nations Centre for Crime Prevention is available to provide assistance in implementing the Convention and its Protocols. The Centre is based in Vienna and can be contacted by telephone at +431-26060-4269 or e-mail at *uncicp-hq@cicp.un.or.at*.

The text of the Convention, Protocols and other relevant information can also be obtained from the website of the United Nations Office for Drugs and Crime (UN-ODC) at: *http://www.odccp.org/odccp/crime_cicp_convention.html*

## Format of the legislative guide

This Guide is partly the same as the Guide of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, also supplementing the United Nations Convention against Transnational Organized Crime. These contain substantive provisions which have parallel or overlapping elements and are likely to involve many of the same policy, legislative and administrative areas in the governments of countries which intend to become States Parties to one or both Protocols. Part I of each of these two guides therefore begins with subject-matter which is often common to both Protocols, such as interpretative

and technical provisions. Even if sometimes some parts can also be common, Part II deals, for this Guide, with matters specific to the Protocol against the smuggling of migrants, and, for the other Guide, deals with the Protocol trafficking in persons. To allow governments to take maximum advantage of overlapping or parallel elements, these segments have been cross-referenced to one another wherever possible, and further cross references to the Legislative Guide for ratification of the parent Convention have also been included.

For ease of access and convenient reference, the substantive contents of Part II of this Guide have generally been broken down into the following chapters, with headings and sub-headings intended to give quick access to specific information as required.

- General, interpretative and technical provisions
- Criminalization
- Protection
- Prevention
- Cooperation

These general topics do not necessarily correspond to specific provisions of the Protocols. Many Protocol provisions have multiple aspects, including for example, elements of prevention, protection and co-operation. Specific references and cross-references to the relevant Convention and Protocol provisions have been included wherever possible.



To further facilitate the work of users of this Guide and cross-references with the other two Guides in this series, a common format for each chapter has also been used. Each chapter is laid out using, when necessary, the following elements:

- Introduction or explanation of the subject-matter of the chapter
- Summary of the major requirements of the Chapter
- What are the main elements of each Article
- How can each Article be implemented
- What are the related provisions
- Optional requirements, including those set out in the Protocol and in some cases, others likely to emerge in domestic law

Each segment also contains texts of the relevant provisions of the Protocol, and where appropriate, the parent Convention, even though this duplicates materials available elsewhere. This has been done to provide faster, easier access to the language of the instruments themselves and to support cross-referencing to other provisions and extrinsic materials.

The Convention and its Protocols use language which establishes varying degrees of obligation on the part of States Parties. Obligations may be:

- fully mandatory in the sense that both the obligation to act and the nature of the action to be taken are specified[1];
- partly mandatory in the sense that there is an obligation to act, but the exact nature of the action is left to the discretion of the State Party; [2]
- mandatory but conditional in the sense that the obligation imposed need only be discharged if certain conditions are met;[3]
- mandatory but conditional in the sense that there is an obligation to consider some course of action, but no further obligation to act if the consideration renders this unnecessary;[4] or,
- optional in the sense that a course of action is identified, and possibly recommended, but is fully optional.[5]

The exact nature of each provision will be discussed as it arises. As noted above, as the purpose of this Guide is to promote and assist in efforts to ratify, the primary focus will be on provisions which are mandatory to some degree and the elements of those provisions which are particularly essential to ratification efforts. Elements which are likely to be legislative, administrative or likely to fall within other such categories will be identified as such in general terms, but appear in the Guide based on the substance of the obligation and not the nature of actions which may be required to carry it out, which may vary to some degree from one country or legal system to another.[6]



**Reasons why the Protocol was developed**

The Protocol was negotiated and adopted in the context of a broader effort by the international community to prevent and combat transnational organized crime, and it is therefore limited in its application, not only to the problem of smuggling of migrants as defined, but also to cases where there is some element of transnationality and some degree of involvement of an organized criminal group. It reflects a concerted effort which began in the early 1990s, culminated with the finalisation and adoption of the United Nations Convention against Transnational Organized Crime

[1] For example, Protocol Art. 6 (1): "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences…."
[2] For example, Protocol Art. 12: "Each State Party shall take such measures as may be necessary…."
[3] For example Protocol Art. 6 (2) (a), which limits the basic obligation to the extent which it can be met within existing legal constraints: "Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences…Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this Article".
[4] For example, Protocol Art. 18 (6): "States Parties may cooperate with relevant international organizations in the implementation of this Article".
[5] This formulation only appears in the technical provisions of the Protocol (Art. 24), but is illustrated by Convention Art. 15 (2), which lists fully optional areas of jurisdiction which States Parties may establish: "Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when…"
[6] Note, however, that the Ad Hoc Committee made it clear that it saw the obligation to establish criminal offences as being primarily legislative in nature. See Interpretative Notes A/55/383/Add. 1, para. 69.

and three Protocols in late 2000, and which continues with the efforts of U.N. Member States to ratify and fully implement the new international legal instruments.[7]

**Reasons why this Legislative Guide was developed**

This Guide has been developed in response to requests by the General Assembly that the Secretary General promote and assist the efforts of Member States to ratify and implement the Convention and its Protocols.[8] It is intended to provide information to Governments which will outline the justifications and advantages for becoming a State Party to the Protocol dealing with Smuggling of Migrants, as well as to provide helpful and practical information which can be used to develop the legislative, administrative and other measures needed to conform to its requirements. Beside the Protocol about Trafficking in Persons, as mentioned before, the other two instruments, the parent Convention and the Protocol dealing with illicit trafficking in firearms, are the subjects of other Legislative Guides in this series. The focus of this Guide will be on the major requirements which countries will have to meet prior to or at the time they become a State Party. Other information or assistance with matters of ongoing implementation of the treaties will be developed once they are in force.

**Disclaimer**



As noted above, this Guide has been prepared by the United Nations Secretariat in response to the request of the General Assembly to the Secretary General to promote and assist the efforts of Member States to become States Parties to the UN Convention against Transnational Organized Crime and the Protocols thereto. It is not intended to provide analysis or interpretative commentaries beyond the extent necessary to directly assist national legislators, legislative drafters and other appropriate officials in their efforts to develop the legislative and other measures needed for each country to become a State Party to these instruments. The interpretation of the instruments, as well as the exercise of any discretion set out in any provision thereof, is a matter for the States Parties themselves, individually and in the context of the Conference of States Parties to each instrument. For authoritative information about the content of each provision, the appropriate official text should be consulted. Interpretative information on some provisions was also provided to the General Assembly by the Ad Hoc Committee for the Elaboration of a Convention against Transnational Organized Crime and can be found in the Report of the Committee on the work of its first to eleventh sessions.[9]

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[7] A brief history can be found in the series of resolutions of the General Assembly leading up to the Convention and its Protocols. See resolutions: 49/159 of 23 December 1994; 51/120 of 12 December 1996; 52/85 of 12 December 1997; 53/111 of 09 December 1998; 55/25 of 15 November 2000 and resolution 55/255 of 31 May 2001. The instruments were actually drafted by an open-ended intergovernmental Ad-Hoc Committee established by resolution 53/111 between January 1999 and November 2000, although the third Protocol, dealing with illicit trafficking in firearms, was not finalised until March of 2001.

[8] GA/RES/55/25, para. 12 ; GA/RES/56/120, para. 4, and GA/RES/57/168, para. 6.

[9] A/55/383 and A/55/383/Add. 1. Subsequently, the full *travaux préparatoires* of the Committee have been published and are available as [Add citation of *travaux prépartoires* when published].

In addition to the appeal to ratification contained in this Guide, other international bodies also encourage the States to ratify the Convention and the Protocol, including:

- The Organization for Security and Cooperation in Europe (OSCE) by its Decision No. 1, point 2 of 28 November 2000, and by its Decision No. 6 of 4 December 2001 during the Eighth and Ninth Meeting of Ministerial Council;[10]
- The Economic Community of West African States (ECOWAS) by its Declaration A/DC12/12/01 on the Fight against Trafficking in Persons, adopted at Dakar on 20-21 December 2001;
- The Budapest Process by the fourth Recommendation of Athens submitted for adoption in June 2003;[11]
- The International Organization of Migrations, by its "Brussels Declaration on Preventing and Combating Trafficking in Human Beings" of September, 2002;[12] and,
- The Conference of the G8 held in Milan on 26 and 27 February 2001.[13]

**Other materials which should be considered in ratifying or acceding[14] to the Protocols**

Legislators, drafters and other officials engaged in efforts to ratify or implement the Protocol should also refer to the following documents:[15]

- The text of the Convention (GA/RES/55/25, Annex I),
- The text of the Protocols (GA/RES/55/25, Annexes II and III);
- Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add. 1 - Addendum to the Report of the Ad Hoc Committee to the General Assembly, A/55/383).
- The Guides relating to the Convention and to other two Protocols.



[10] http://www.osce.org/docs/english/chronos.htm
[11] http://www.icmpd.org/default.asp?alltext=Budapest&pubdatef=&pubdatet=&nav=results
[12] http://www.belgium.iom.int/STOPConference/Conference%20Papers/brudeclaration.pdf. See Point #16.
[13] http://www.mofa.go.jp/policy/i_crime/high_tec/conf0102.html
[14] Countries which had signed the Convention and Protocols by the date (12 December 2002) prescribed in each instrument may become Parties by filing an instrument of ratification. Those which did not sign within this period may become Parties at any time once the instruments are in force by acceding to the instruments. Information about the exact requirements may be obtained from the Office of the Legal Advisor, Treaty Affairs Section, at UN Headquarters in New York. For the sake of simplicity, references in this Guide are mainly to "ratification" only, but the possibility of joining an instrument by accession should also be borne in mind.
[15] Texts of all of these documents in all official languages of the United Nations as well as other information about the legislative history of the instruments and their present status can be obtained from the website of the UN Centre for International Crime Prevention (Office of Drugs and Crime) at: http://www.odccp.org/odccp/crime_cicp_convention.html.

# Chapter 2 - Interpretation and technical provisions of the Protocol

**Relevant Convention and Protocol provisions**

*[Protocol ] Article 1*
*Relation with the United Nations Convention against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.

*[Convention] Article 37*
*Relation with protocols*

1. This Convention may be supplemented by one or more protocols.
2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.
3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.
4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.



*[Protocol] Article 2*
*Statement of purpose*

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

*[Protocol] Article 19*
*Saving clause*

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention[16] and the 1967 Protocol[17] relating to the Status of Refugees and the principle of non-refoulement as contained therein.
2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

[16] United Nations, *Treaty Series*, vol. 189, No. 2545.
[17] Ibid., vol. 606, No. 8791.

*[Protocol] Article 22*
*Entry into force*

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.
2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

## 1. Interpretation of the Protocol (Protocol Art. 1 and 19, Convention Art. 37)

The interpretation of treaties is a matter for Member States. General rules for the interpretation and application of treaties are covered by the 1968 *Vienna Convention on the Law of Treaties*, Part III,[18] and will not be discussed in detail in this Guide. These general rules may be amended or supplemented by rules established in individual treaties, however, and a number of specific interpretative references appear in both the Convention and Protocol.[19] The dispute-settlement provisions found in all four instruments also require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters.[20] Specific references will be raised in relation to the subject-matter to which they apply, but there are also two general interpretative provisions which apply to the Protocol. The first, established by Convention Article 37 and Protocol Article 1, is elements of the parent Convention must be taken into consideration when interpreting the Protocol. These involve the relationship between the two instruments and will therefore be covered in the following segment. The second is found in Protocol Article 19 (2), which requires that all measures set out in the Protocol be interpreted and applied in a way which is not discriminatory to persons on the ground that they are victims of trafficking.



## 2. Relationship between the Convention and Protocols (Convention Art. 37, Protocols Art. 1)

Protocols Article 1 and Convention Article 37 establish the basic relationship between the Convention and its Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (e.g., extradition and mutual legal assistance) in the parent Convention, and elements specific to the subject-matter of the Protocols in each of the Protocols themselves (e.g., protocol

[18] Adopted on 22 May 1969 and in force 27 January 1980, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331. The text of the Vienna Convention is made available by the International Law Commission on-line at:
http://www.un.org/law/ilc/texts/treaties.htm - top

[19] See for example Convention Art. 16 (14), which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders.

[20] The relevant provisions for this Protocol are Convention Article 35 and Protocol Article 20.

offences and provisions relating to travel and identity documents). As the Protocols are not intended as independent treaties, each country is required to be a State Party to the parent Convention in order to become a Party to any of the Protocols. This ensures that in any case which arises under a Protocol to which the countries concerned are Parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions are drafted on this basis: the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, for example, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm are found only in the appropriate Protocols. Additional rules established by the relevant Articles then deal with the interpretation of similar or parallel provisions in each instrument, and the application of general Convention provisions to the Protocols offences and other provisions.

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

*No country can be a Party to any Protocol unless it is also a Party to the Convention.*[21] Simultaneous ratification or accession is permitted, but no country can become a party to any Protocol unless it is also a Party to the parent Convention. This is to ensure that it is not possible for a country to be subject to any Protocol obligation unless it is also subject to the obligations of the Convention.

*The Convention and the Protocol must be interpreted together.*[22] In interpreting the various instruments, all relevant instruments should be considered, and provisions which use similar or parallel language should be given generally similar meaning. In interpreting a Protocol, the purpose of that Protocol must also be considered, which may modify meanings applied to the Convention in some cases.[23]

*The provisions of the Convention apply to the Protocol, mutatis mutandis.*[24] The meaning of "*mutatis mutandis*" is clarified in the agreed notes for the *travaux préparatoires* as "with such modifications as circumstances require" or "with the necessary modifications". This means that, in applying Convention provisions to the Protocol, minor modifications of interpretation or application can be made to take account of the circumstances which arise under the Protocol, but that modifications should not be made unless necessary, and then only to the extent that is necessary. This general rule does not apply where the drafters have specifically excluded it.[25]



[21] Convention Art. 37, (2).
[22] Convention Art. 37 (4) and Protocol, Art. 1 (1).
[23] Convention Art. 37 (4).
[24] Protocol Art. 1 (2). On the meaning of *mutatis mutandis*, see A/55/383/Add. 1, para. 62
[25] Article 11 (6) of the Protocol, for example, states that "without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication."

*Protocol offences shall also be regarded as offences established in accordance with the Convention.*[26] This is a critical link between the Protocol and Convention. It ensures that any offence or offences established by each country in order to criminalize trafficking in human beings as required by Protocol Article 6 will automatically be included within the scope of the basic Convention provisions governing forms of international cooperation such as extradition (Art.16) and mutual legal assistance (Art.18), which use language such as "This article shall apply to *offences covered by this Convention*…" Establishing a similar link may be an important element of national legislation, particularly where it is intended to use a parallel structure to that of the Convention and Protocols.

### 3. Purpose and scope of application of the Protocol

All of the instruments include a provision which gives the basic purpose of the instrument in order to further guide and assist interpretation and application. In this Protocol, Article 2 specifically includes both preventing and combating the smuggling of migrants and as protecting the rights of smuggled migrants.

Article 4 applies the Protocol to the "prevention, investigation and prosecution" of the offences it establishes, as well as to the protection of the rights of persons who have been the object of such offences. This is broader than the formulation used in Article 3, in order to ensure that the Protocol will apply not only in respect of the rights of migrants who have actually been smuggled, but also those who may have entered legally, but whose subsequent illegal residence has been procured or enabled.[27] Article 4 then sets two basic limits on application based on the parallel provisions of Convention Articles 2 and 3. The Protocol only applies where the offences are "transnational in nature" and involve an "organised criminal group", both of which are defined by the Convention (see following segment).[28] As with the parent Convention, it was not the intention of the drafters to deal with cases where there was no element of transnationality or organised crime, but the relevant Convention provisions should be reviewed carefully, as they set relatively broad and inclusive standards for both requirements.

In considering transnationality, the nature of migrant-smuggling should also be taken into account. As discussed elsewhere (see criminalisation requirements, below), the general principle governing transnationality is that any element of foreign involvement would trigger application of the Convention and relevant Protocols, even in cases where the offence(s) at hand are purely domestic. In the case of migrant-smuggling, however, without some element of cross-border movement, there would be neither "migrants" nor "smuggling". Note, however, that the same considerations do not apply to the other offences or provisions of the Protocol: falsification or misuse of travel or identity documents and the enabling of illegal residence would trigger application of the instruments whenever the basic requirements of Convention Articles 2 and 3 and Protocol Article 4 were met.



[26] Protocol Art.1, para.(3).
[27] The two categories are established by the formulation of the Protocol offences set out in Article 6, sub-paragraphs (1)(a) and (1)(c).
[28] See Convention Art.2, subpara.(a) and Art.3, para. (2).

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

## 4. Involvement of transnationality and organized crime

Convention Article 3 provides that the Convention only applies "…where the offence is transnational in nature and involves an organized criminal group". As noted above, both of these provisions set relatively open and inclusive standards to ensure the application of the Convention and any relevant Protocol in any case where it might reasonably be needed by investigators or prosecutors. Under the Convention,

an offence is "transnational in nature if:[29]

- It is committed in more than one State;
- It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- It is committed in one State but has substantial effects in another State



and an "organized criminal group" is involved where:[30]

- there is a structured group of three or more persons;
- it exists for a period of time;
- it acts in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention (including the Protocol);
- some actions of the group are done in order to obtain, directly or indirectly, a financial or other material benefit.

The degree to which such involvement must be established is then set by the various specific articles of the Convention and Protocols, but is generally not very high.[31] It is important for legislative drafters to note that the provisions of these

[29] See Convention Art. 3 (2).
[30] See Convention Art. 2 (a).
[31] Convention Art. 18 (1), for example, sets the standard of "reasonable grounds to suspect" transnationality and organized crime for obtaining mutual legal assistance because foreign assistance is often needed to establish whether suspicions of such involvement are valid or not. Extradition, which has more serious implications for both governments and those accused of crimes, sets a higher standard.

Articles govern the scope of application of the Convention and Protocol as international instruments between sovereign States Parties and do not necessarily govern the application of domestic offences or other legal provisions to individuals. Article 34, paragraph (2) of the Convention specifically provides that legislatures should not incorporate elements of transnationality or organized crime into domestic offence provisions. Together, these establish the principle that, while States Parties should have to establish some degree of transnationality and organized crime when requesting cooperation or assistance from other States Parties, their prosecutors should not have to prove either element in order to obtain a conviction for smuggling of migrants or any other offence established by the Convention or its Protocols.

In the case of smuggling of migrants, domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proven.[32] There is no specific requirement in either the Convention or Protocol for provisions other than criminal offences, and legislators may find it appropriate to incorporate references to transnationality and the involvement of organized criminal groups into some provisions dealing with forms of international cooperation, bearing in mind that the basic standard set by Convention Article 18 is only that of "reasonable suspicion" and that the language of the Convention and Protocols set only minimum standards. In this case, it would generally be open to drafters to set a lower requirement in domestic laws governing cooperation, but not a higher one, except where the relevant Convention or Protocol provision specifically authorises this.



## 5. Why were these Articles adopted

The Convention and Protocol provisions outlined in this segment provide general guidance to drafters and governments which applies to all of the other elements of the instruments and the legislative and other measures taken to implement them. The stated purpose of the Protocol establishes the basis for the interpretation and application of its other provisions; other Articles are intended to ensure interpretation which is consistent between the two instruments, and with other relevant areas of international law. Also included in this segment are technical provisions governing the coming into force and application of the Protocol, which establish a clear formula for each State Party to determine when the Convention and Protocol will become binding on it, and hence the dates on which critical legislative and other measures may be called upon by other States Parties.

The most important interpretative provisions are those which govern the relationship between the Convention and each Protocol, Convention Article 37 and Protocol Article 1.[33] As noted above, the Protocol is not intended as a separate legal instrument, but as part of a package of instruments against transnational organized crime. Once it has become a Party to the parent Convention, it is open to each country

[32] The only exception to this principle arises where the language of the criminalization requirement specifically incorporates one of these elements, such as Convention Art. 5 (1) (presence of organized criminal group) or the criminalization requirements of this Protocol or the Protocol dealing with illicit trafficking in firearms, in which some of the offences specifically require elements of transnationality.
[33] Article 37 applies to all Protocols, and the text of Article 1 of each of the Protocols is the same, which means that the relationship is the same for all Protocols.

to also ratify or accede to any of the Protocols. When the country becomes a Party to each Protocol, that Protocol forms an integral package with the Convention. The Protocol contains specific measures dealing with its own subject-matter, such as smuggling of migrants, supported by the broader and more general powers and mechanisms of the Convention. Some measures are more or less exclusive to a Protocol (e.g., the offence of smuggling); some areas may involve elements of both instruments (e.g., measures for law enforcement cooperation); and some elements are exclusive to the Convention (e.g., the 4 Convention offences and extradition). In drafting domestic legislation, it is important that the individual measures implementing the instruments be integrated on a similar basis, to ensure effective measures against smuggling of migrants both as a distinct crime, and in the more general context of the organized criminal groups which traffick in human beings and the other areas of criminal activity in which they may be engaged. No relationship between the Protocols is established except indirectly through the Convention, but States Parties are free to establish such linkages where they wish.[34]

## 5. How can these Articles be implemented?

Generally, the Articles in this segment govern the interpretation and application of the other provisions. Thus they may provide assistance and guidance to governments, drafters and legislatures but do not themselves require specific implementation measures



[34] One area where this may prove desirable is the provisions of the one area where this may prove desirable is the provisions of the Protocols dealing with trafficking in persons and the smuggling of migrants which govern border security and travel documents (Articles 11-13), which are identical in each Protocol and which will probably overlap in many areas of domestic law and administration.

# Chapter 3 - Criminalization of the smuggling of migrants

## 1. Relevant Protocol provisions

*Article 3*
*Use of terms*

For the purposes of this Protocol:

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

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

(c) "Fraudulent travel or identity document" shall mean any travel or identity document:

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

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

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

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



*Article 5*
*Criminal liability of migrants*

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

*Article 6*
*Criminalization*

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

   (a) The smuggling of migrants;

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

      (i) Producing a fraudulent travel or identity document;

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

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

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

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

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

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

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

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

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

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

## 2. Meaning of "smuggling of migrants" and the distinctions between illegal migration, the smuggling of migrants and trafficking in human beings

The Protocol against trafficking in persons can be seen as part of a continuum of instruments which deal with trafficking and related activities, particularly slavery. These reflect the basic facts that both trafficking and legal responses to it have been evolving for a very long time. The Protocol against the smuggling of migrants, on the other hand, is more novel and unique, reflecting relatively new concerns which have arisen about the smuggling of migrants as a form of organised crime activity distinct from legal or illegal activity on the part of migrants themselves. The use of criminal and other laws to excercise control over immigration are not new, and many countries have offences relating to illegal entry or illegal residence. The criminal exploitation of migration and the generation of illicit profits from the procurement of illegal entry or illegal residence, and the responses found in that Protocol, however, do represent a relatively new development.

Two basic factors are essential to understanding and applying the Protocol against the smuggling of migrants. The first is the intention of the drafters that the sanctions established by the Protocol should apply to the smuggling of migrants by organised criminal groups, and not to mere migration or migrants, even in cases where it involves entry or residence which is illegal under the laws of the country concerned.[35] Mere illegal entry may be a crime in some countries, but it is not recognised as a form of organised crime, and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an "organised criminal group" (a term which includes an element of financial or other material benefit), on the other hand, has been recognised as a serious form of transnational organised crime, and is therefore the primary focus of the Protocol.



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

The major differences lie in the fact that, in the case of trafficking, offenders recruit or gain control of victims by coercive, deceptive or abusive means and obtain profits as a result of some form of exploitation of the victims after they have been moved, commonly in the form of prostitution or coerced labour of some kind. In the case of smuggling, on the other hand, migrants are recruited voluntarily and may be to some degree complicit in their own smuggling. There is no subsequent exploitation, and the illicit profits are derived from fees paid by the migrants themselves. One further difference is that as a criminal offence covered by the Convention against Transnational Organized Crime, trafficking must be criminalised whether it occurs across national borders or entirely within one country. Smuggling, on the other hand,

[35] See Protocol Article 5 and Article 6, paragraph (4).

contains a necessary element of illegal migration, which requires illegal entry from one country to another.[36]

## 3. Basic principles of criminalization established by the Convention

In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the parent Convention. Several general principles of criminalization are established in the Convention which apply to its Protocols. It may also be important in some legal systems to ensure that criminal offences under the Convention and the other Protocols are formulated in a manner which is sufficiently coherent to support the investigation and prosecution of organized criminal groups and their members for any offence, or combination of offences, established by the instruments. Migrant-smuggling and other offences covered by the Convention are seldom carried on in isolation: in most cases organized criminal groups involved in one form of crime will also be involved in others. This creates opportunities for law enforcement and prosecutorial agencies to investigate and disrupt their operations, and national legislatures will generally wish to ensure that the formulation of the relevant criminal offences under the Convention and its Protocols will support coordinated efforts to investigate and prosecute all of these activities together, where appropriate. Organised criminal groups will also often be involved in other illicit activities such as trafficking in narcotic drugs or other commodities, and legislatures may wish to consider ensuring that offences adopted pursuant to this Protocol are consistent with other relevant domestic offences as well.



The following specific principles from the Convention should be taken into account in formulating criminal offences under the Protocol:

*Minimum standard.* Domestic crimes may be broader in scope or more severe than those required by the Protocol, as long as all conduct specified by the Protocol is made a crime.[37]

*Liability of legal persons*. Liability for offences must be established both for "natural" or biological persons and for "legal" persons, such as corporations.[38]

*Offences must be "criminal" offences (except for legal persons)*. Each of the offence provisions in the Convention and the Protocol state that offences must be established as offences in criminal law. This principle applies unless the accused is a legal person in which case the offence may be a criminal, civil or administrative offence.[39]

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[36] It should also be noted that, while the Protocol against trafficking in persons requires only that trafficking itself be criminalised, the Protocol agaimst smuggling of migrants requires also the criminalisation of both the procurement of illegal entry (i.e., smuggling) and the procurement of illegal residence, even if the actual entry which precedes it was legal. The Protocol also establishes some further offences in relation to documents. See criminalisation requirements, below, and Protocol Article 3, subparagraph (a) and Article 6.

[37] Convention Art.34, para. (3).
[38] Convention Art.10.
[39] Convention Art.5, 6, 8 and 23

*Sanctions*. Sanctions adopted within domestic law must take into account and should be proportionate to the gravity of the offences.[40]

*Non-inclusion of transnationality in domestic offences*. As noted above, the element of transnationality is one of the criteria for applying the Convention and Protocols (Convention Article 3), and would have to be established before international assistance was requested, but transnationality should not have to be proved in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences. The exception to this principle is any offence which expressly requires transnationality as an element of the offence. In the case of this Protocol, for example, the offence of smuggling migrants can only apply where the migrants are moved from one country to another, whereas the offences relating to documents and enabling illegal residence should have no element of transnationality.[41]

*Non-Inclusion of "organized criminal group" in domestic offences*. As with transnationality, above, the involvement of an "organized criminal group" would have to be established to the satisfaction of another State Party to invoke the obligations for international cooperation but should not have to be proved as an element of a domestic prosecution. Thus, the Protocol offences should apply equally, regardless of whether the offence was committed by an individual, or was committed by individuals associated with an organized criminal group, and regardless of whether this can be proven or not.[42]



*Criminalization may use "…legislative or other measures", but must be founded in law*. Both the Convention and the Protocol refer to criminalization using "such legislative or other measures as may be necessary…" in recognition that a combination of measures may be needed in some countries. Drafters were concerned, however, that the rule of law generally requires that criminal offences be prescribed by law, and the reference to "other measures" was not intended to require or permit criminalization without legislation. The agreed Notes for the Travaux Préparatoires therefore provide that other measures are additional to, and presuppose the existence of a law.[43]

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

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[40] Convention Art.11, para.(1).
[41] Convention Art.3, para.(2) and Art.34, para.(2).
[42] Convention Art.34, para.(2) and Interpretative Notes, A/55/383/Add. 1, para. 59.
[43] Interpretative Notes A/55/383/Add. 1, para. 9, and A/55/383/Add. 3, para. 5. See also Art. 15 of the International Covenant on Civil and Political Rights, GA/RES/2200A of 16 December 1966.

*Meaning of terms*. As with all requirements of the Convention and Protocol, drafters should consider the meaning of the offence provisions and not simply incorporate the literal language of the Protocols verbatim. In drafting the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters. In some cases, the intended meanings have been clarified by the Interpretative Notes which were drafted and adopted by the Ad Hoc Committee which drafted the Convention and Protocol.[44]

*Convention definition of "serious crime"*. Article 2, subparagraph (b) of the Convention defines "serious crime", but this is a criterion for applying the Convention and Protocols and not for domestic law. There is no need for States Parties to define "serious crime" or to make reference to the term "serious crime" in any legislation which implements the Protocol. Indeed, attempts to do so could create problems of conformity, if inconsistent with the Convention definition, or if so interpreted by domestic courts. Legislatures may wish to consider, however, whether the definitions of existing criminal offences relating to weapons and organized crime, meet the requirements of the Convention definition of "serious crime", thereby extending the application of the Convention to them. If application is desired, amendments to existing offences may be needed to bring them within the scope of the definition. Usually this will involve adjusting the maximum sentence for an offence to four years or more as indicated by the definition.[45]



*Jurisdiction*. The Convention requires States Parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any Protocols to which the country in question is a State Party. Jurisdiction must be established over all offences committed within the territorial jurisdiction of the country, including its marine vessels and aircraft. If the national legislation prohibits the extradition of its own nationals, jurisdiction must also be established over offences committed by such nationals anywhere in the world to permit the country to meet its Convention obligation to prosecute offenders which cannot be extradited on request due to nationality. The Convention also encourages the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders, but does not require this.[46]

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[44] The formal *Travaux Préparatoires* for the Convention and its Protocols have not yet been drafted. Recognising that this would take some time, and seeking to ensure that legislative drafters would have access to the interpretative notes during the early years of the instruments, the Ad Hoc Committee drafted and agreed language for interpretative notes on many of the more critical issues during its final sessions. These were submitted to the General Assembly along with the finalised texts of the instruments, and can now be found in the General Assembly documents annexed to its reports: A/55/383/Add. 1 (notes on the Convention and first two Protocols, submitted to the General Assembly with resolution 55/25 of 15 November 2000) and A/55/383/Add. 3 (Notes on the *Protocol against Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, submitted to the General Assembly with resolution 55/255 of 31 May 2001).

[45] Convention, Art.2, subpara.(b).

[46] Convention, Art.15 paras.(1) (mandatory jurisdiction) and (2) (optional jurisdiction) and Art.16 para.(10) (obligation to prosecute where no extradition due to nationality of offender). See also Chapter 9 of the Legislative Guide to the Convention.

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

*Other drafting considerations*. Convention Article 11 sets out a series of other general factors which drafters should consider in formulating specific offences. These include matters such as the applicability of established criminal defences, the application of appropriate limitation periods, if any, and the requirement to enact punishments which take into account the gravity of the offence. Drafters are advised to review Article 11 in its entirety. As noted above, additional principles which apply to offences committed by legal persons are also found in Article 10 of the Convention.

In considering the foregoing principles, as well as any other elements of the Convention which may arise, drafters should bear in mind that, as noted in the preceding chapter, provisions of the Convention apply to the Protocol*, mutatis mutandis*.[47] The Protocol must be read as supplementary to the Convention and interpreted together with it. For this reason, drafters developing legislation which implements the Protocol are also advised to consult the Convention and national laws which implement it as a matter of general principle.



## 4. What are the main elements of these Articles?

### Fully mandatory requirements

*Offence of smuggling migrants (Article 3, subparagraph (a) and Article 6, paragraph (1)).*

Article 6, subparagraph (1)(a) requires States Parties to criminalize the "smuggling of migrants", which is in turn defined in Article 3, subparagraph (a). The definition of "smuggling" in turn consists of procuring "illegal entry", which is defined in Article 3, subparagraph (b).

As noted above, the intention of the drafters was to require legislatures to create criminal offences which would apply to those who smuggle others for gain, but not those who procure only their own illegal entry, or who procure the illegal entry of

[47] The term *mutatis mutandis* should be interpreted to mean "with the necessary modifications" or "with such modifications as the circumstances require". See Interpretative Notes A/55/383/Add. 1, para. 26. Similar notes were adopted with respect to the other two Protocols.

others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-claimants.[48]

Incorporating these elements and exclusions, the conduct required to be criminalised is the procurement of the entry of a person into a country, where that person is not a national or permanent resident[49] of the country, and where any or all of the requirements for entry of persons who are not nationals or permanent residents have not been complied with. Generally, this will involve cases where legal entry requirements such as obtaining visas or other authorisations, have not been complied with, or where visas or similar documents had been obtained or used in some illegal manner which made them invalid.[50]

The drafters intended that cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence (Protocol Art.6, subpara.(1)(c)). The exact boundary between these offences may well vary from country to country, depending on laws such as those governing the validity of documents.[51] In formulating the two offences, it is not critical for conformity with the Protocol exactly how the two offences are formulated or where the boundary is drawn. What is essential, both for conformity and effective enforcement, is that drafters ensure that no "gaps" are created and that no conduct covered by the Protocol is left uncriminalised.

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



*Offence of enabling illegal residence (Article 6, subparagraph (1)(c))*

The second principal offence required by the Protocol is that of enabling a person to remain in a State where the person is not entitled to remain by virtue of status (national or permanent resident) or by virtue of having met alternative requirements, such as the issuance of a visa or permit of some kind. As noted above, the intention in establishing this offence was to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors' permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorizations to enter.

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[48] See Notes for *travaux préparatoires*, A/55/383/Add.1, para.92.

[49] The term "permanent" resident is also used in Art 18 (return of smuggled migrants), and its meaning is clarified in that context as meaning "long term but not necessarily indefinite residence". See Notes for *travaux préparatoires*, A/55/383/Add.1, para.112.

[50] Common examples may include the forgery or falsification of documents, obtaining genuine documents using false information, and the use of genuine and valid documents by persons to whom they were not issued.

[51] The most commonly-occuring scenario is where smugglers obtain a visitor's permit which is valid at the time of entry and the migrant remains illegally after it expires (illegal residence offence). In most countries cases where a valid visa was used by a person other than the one for whom it was issued, on the other hand, would be treated as falling under the illegal entry offence.

The conduct required to be criminalised consists simply of doing any act which amounts to enabling illegal residence, where the resident(s) in question lack the necessary legal status or authorizations. The requirement specifically includes the document offences set out in subparagraph (b), but could also include other conduct, such as the physical concealment or shelter of illicit migrants, illegal employment, or the use of fraudulent means to obtain documents needed for illegal residence which are not "travel or identity documents" within the ambit of subparagraph (b).

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

Unlike the other offences established by the Protocol, legislators dealing with this offence may find it necessary to consider whether offences should apply to scenarios where some ongoing course of conduct which began before the Protocol or implementing legislation took effect and which enables ongoing illegal residence, continues after a new offence created by the implementing legislation has taken effect. Legislatures seldom seek to apply a new offence *retroactively*, which would include conduct completed before the offence provision took effect, as this violates the fundamental principle of most legal systems that there can be no criminal liability for conduct which was not illegal when it was done.[52] Legislators may, however, consider applying the offence *retrospectively*, which would extend liability to cases where some past action has the effect of enabling illegal residence which still continues. In this scenario, some of the same concerns may still arise, particularly if the offence would apply even if no further action of any kind took place after the law amendments took effect.[53]



Legislators may wish, however, to make provision for cases where some ongoing course of conduct, including specific acts committed after the new offence takes effect, enabled illegal residence. This could apply, for example, to employers who employ undocumented workers, if the provision of work and the payment of wages or other fees took place after the amendments and was done with the intention or had the effect of enabling illegal residence.

*Offences in relation to travel or identity documents (Article 6, subparagraph (1)(b))*

To support the two basic offences of smuggling and enabling illegal residence, Article 6, subparagraph (1)(b) of the Protocol also establishes a series of offences in relation to "travel or identity documents". The term "fraudulent travel or identity document" is defined in Article 3, subparagraph (c), and further clarified by the Notes for the *travaux préparatoires*.[54]

[52] *Nulla poena sine lege*. In international law, this is found in Art.15, para.1 of the *International Covenant on Civil and Political Rights*.
[53] An example would be a case in which action taken to illegally obtain a resident's permit was completed in the past, but the illegal residence itself was still ongoing.
[54] A/55/383/Add.1, para.89.

The conduct required to be criminalised is the "producing" and the "procuring, providing or possessing" of a "fraudulent travel or identity document".[55] Legislative drafters could establish a separate offence in respect of each of these, or combine them in a single provision, leaving the specification of the actual conduct alleged for the drafters of criminal charges or indictments.

As above, the same basic element of intent applies: there must have been the intention to "…produce, procure, provide or possess…" the document, with the added intention or purpose of obtaining a financial or other material benefit. In the case of the document offences, however, there must also have been the intention or purpose of enabling the smuggling of migrants. This is an additional safeguard against criminalising those who smuggle themselves,[56] but, taken literally, it also excludes those who commit the document offences for the purpose of enabling illegal residence as opposed to procuring illegal entry. Note, however that legislatures implementing the Protocol can apply the document offences to both of the principal offences if they wish, in accordance with Convention Article 34 paragraph (3). Apart from expanding the application of the legislation to additional conduct associated with migrant-smuggling, such an approach would have the advantage of reducing litigation on the issue of whether illicit entry or illicit residence was involved in specific cases, since the criminal liability would be the same in either case.

The definition of "fraudulent travel or identity document" then adds several further factual elements which must be taken into consideration when formulating the offence(s).



- The document can either be "falsely made" from nothing, or it can be a genuine document which has been "altered in some material way…".
- "Falsely made" should include both documents which are forged or fabricated from nothing and documents which consist of genuine document forms, but information which is not accurate and put onto the form by someone not authorized to do so, or not authorized to issue the document in question.
- Whether a document is "falsely made" or "improperly issued" will depend in some cases on how national law treats cases where an official acts illegally or without authorization. If a consular official issues a travel document beyond his or her powers, systems which would treat this as non-issuance would consider the document as having been made by someone not authorized to do so, falling under subparagraph (i). Systems which considered the basic issuance to have occurred, would see the same document as having been "improperly issued" within subparagraph (ii). What is important is that legislative drafters consider the approach taken by national law, and ensure that all of the possible scenarios result in documents which are treated as "fraudulent" and that there are no gaps.
- Documents which have been altered must have been changed in some way which is material to the other Protocol offences, such as changing the identity or

[55] The separation of the requirements into subparagraphs 6(1)(b)(i) and (ii) was done to facilitate the drafting of paragraph (2), which distinguishes between fully-manadatory and conditional obligations to criminalise attempts, participation as an accomplice and organising or directing others to commit the offences. It has no bearing on the basic obligation to criminalise the principal conduct involved.
[56] See A/55/383/Add.1, para.93.

photograph of the holder, or the dates for which it was valid. If the document is "altered", this must have been by someone not authorized to do so.

- "Fraudulent" documents also include document which are genuine, but improperly issued thorough misrepresentation, corruption or duress. Here also the approach of drafters will depend to some degree on how domestic law treats cases where an official acts illegally or without authority.
- Finally, "fraudulent" documents include papers which are formally valid and have been validly issued, but which are being used by someone other than the person to or for whom they were issued, whether the document in question has been altered (e.g., by changing a photograph) or not.
- The Notes for the *travaux préparatoires* clarify that "travel document" includes any document needed to enter or leave a State by the laws of that State. This could include the laws of any State involved in a specific case. For example, a passport issued by one country could contain a visa issued by another, and either or both could be required to both leave one country and enter another, making the laws of both applicable. An "identity document" is a document used to identify persons by and in accordance with the laws of the State which issued, or is purported to have issued it. Note that Article 13 of the Protocol, which is parallel with the same Article of the Protocol against trafficking in persons, requires States Parties to verify within a reasonable time the legitimacy and validity of documents issued by, or purported to have been issued by them. Drafters may wish to consider similar language in provisions implementing the offences in relation to documents under this Protocol.



*Attempts, participation as an accomplice, organizing or directing others (Article 6, paragraph (2))*

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

Not all legal systems incorporate the concept of criminal attempts, and the obligation to criminalise attempts to commit any Protocol offence are therefore subject to the qualification phrase "…subject to the basic concepts of its legal system…" Similarly, not all systems could provide for the criminalisation of participation as an accomplice in an offence which amounted to "procuring, providing or possessing" a fraudulent document and this requirement was therefore limited in the same way. These subjects will therefore be discussed as conditional obligations, below.

*Aggravating circumstances (Article 6, paragraph (3)).*

Without adding further offences, States Parties to the Protocol are also required to incorporate into some of the Protocol offences specific circumstances which would ensure that cases in which they have occurred are taken more seriously. The obligation is fully mandatory for all offences except those of participating as an accomplice and organising or directing others to commit offences, which are made subject to the basic concepts of the legal system of the implementing State Party (see conditional requirements, below).

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

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



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

"Inhuman or degrading treatment" may include treatment inflicted for the purposes of some form of exploitation. Note that if there is no consent or there is consent which has been vitiated or nullified as set out in Art.3, subparagraphs (b) or (c) of the Protocol against trafficking in persons, the presence of exploitation in what would otherwise be a smuggling case will generally make the trafficking offence applicable if the State Party concerned has ratified and implemented that Protocol. The Notes for the *Travaux Préparatoires* indicate that the reference to exploitation here is "without prejudice" to that Protocol.[57]

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

As noted above, the fundamental policy set by the Protocol is that it is the smuggling of migrants, and not migration itself, which is the focus of the criminalization and other requirements. The Protocol itself takes a neutral position on

[57] See A/55/383/Add.1, para.96.

whether those who migrate illegally should be the subject of any offences: Article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalisation of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organised criminal groups. At the same time, Article 6, paragraph (4) ensures that nothing in the Protocol limits the existing rights of each State Party to establish or maintain offences which do primarily apply to mere migrants, such as illegal entry, illegal residence and the possession or use of fraudulent documents in circumstances beyond those covered by the Protocol.

In formulating the Protocol offences themselves, States Parties are free to extend any of these offences to mere migrants, provided it is clear that they are doing so on their own and not in compliance of the Protocol. This is further clarified by Convention Art.34(3), which states that countries may adopt provisions which "…more strict or severe…", provided that this is "…for preventing or combatting transnational organized crime…". As a policy matter, legislators may wish to consider an issue more commonly raised in the context of trafficking in human beings, the question of whether criminalising the conduct of mere migrants may interfere with the larger struggle against organised crime by making the migrants themselves less likely to co-operate with authorities. In countries where the obligation to take measures to enhance cooperation with authorities (Convention Article 26) cannot be covered by prosecutorial or other forms of discretion, legislators may wish to ensure that any mandatory offences or sanctions applied to mere migrants can be mitigated or varied in cases where the migrants assist or cooperate with competent authorities.[58]



**Conditional requirements**

*Attempts (Protocol Article 6, subparagraph (2 (a))*

As noted above, not all legal systems make provision for the criminalisation of cases in which an unsuccessful attempt has been made to commit the offence. Of those countries which do criminalise attempts, most require that some fairly substantial course of conduct be established before there can be a conviction. In some cases one or more positive acts must be established, and in others, prosecutors must establish that the accused has done everything possible to complete the offence, which failed for other reasons. The fact that the offence subsequently turns out to have been impossible (e.g., cases where the person being trafficked was deceased, non-existent or a law enforcement officer) is generally not considered a defence in cases of attempt. To assist in clarifying the range of approaches, the Notes for the *travaux préparatoires* indicate that attempts should be: "…understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law".[59] The option of prosecuting cases of attempt can be an effective measure, particularly in respect of crimes such as

[58] This actually goes beyond the strict obligation of Art.26, which deals only with those who have actually participated in organised crime activities.
[59] See Notes for *Travaux Préparatoires*, A/55/383/Add.1, para.95. See also para.70 and A/55/383/Add.3, para.6, dealing with the same issue for the other Protocols.

trafficking in persons and the smuggling of migrants, which are committed over relatively long periods and are sometimes interrupted by law enforcement or other authorities before completion. Where it is not possible to criminalise attempts, drafters and legislators may wish to consider other means of reinforcing the offence provisions, such as criminalising individual elements of the offences which could still be prosecuted when the Protocol offence was not complete. One example of this could be offences such as transporting or concealing migrants for the purpose of smuggling them, which could be prosecuted even where the smuggling was not completed or unsuccessful.

*Participation as an accomplice in "procuring, providing or possessing" a fraudulent document (Article 6, subparagraphs (1)(b)(ii) and (2)(b))*

Participating as an accomplice to some of the document offences was also made subject to the basic concepts of each State Party's legal system, primarily because of concerns in some systems about over-breadth and whether one could be made an accomplice to offences such as possession. There were also concerns about viability in view of some of the defined meanings of "fraudulent document" and whether one could, for example, be an accomplice to the possession of a document which only became a "fraudulent document" when actually used by a person to whom it was not issued.[60] The same concerns did not arise with respect to the actual production of such documents, and the obligation to criminalise being an accomplice to this offence is unqualified.



*The designation of organising, directing and participating as an accomplice as an aggravating circumstance to the principal offences (Article 6, paragraph 3 and subparagraphs (2)(b) and (c))*

The intention in including Article 6, paragraph (3) in the Protocol was to increase deterrence where Protocol offences were committed in ways which either involved degradation or danger to the migrants involved. Generally, there were concerns that, while the primary actors in the offence would be in a position to exercise control over whether dangerous or degrading conditions were present or not, accomplices and others not directly involved in the offences would in many cases not be in such a position. This in turn triggered constitutional and other concerns about the possibility of imposing aggravated offences or sanctions for circumstances beyond the control of those accused of the basic crime, and the obligation was therefore qualified to allow countries in this position to avoid such problems.

[60] See Article 3, subparagraph (c)(iii).

*Offences and sanctions applicable to "common carriers" of passengers (Article 11, paragraphs (2),(3),(4) and (5))*

**Relevant Protocol provisions**

*[Article 11]*

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

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

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

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



**What are the main elements of this Article?**

Generally, Articles 11-13 of the Protocol deal with the enhancement of the security and effectiveness of border controls and travel or identification documents, and these will be dealt with in the chapter covering prevention measures, below. Article 11, paragraphs 2-4, however, also require States Parties to impose a requirement on all "commercial carriers" who transport passengers from one country to another to ascertain that such passengers are in possession of such travel documents as are necessary to enter the receiving State under the laws of that State. This requirement is not mandatory and need only be applied "where appropriate". Subparagraph (4) further requires the taking of measures to provide for sanctions in cases where this obligation is not met. Article 11, paragraph (5) also requires States Parties to consider measure which would permit the denial of entry or revocation of visas in cases where a person was "implicated" in the commission of a Protocol offence.

**Why was this Article adopted?**

Generally, the drafters of the Protocols against trafficking in persons and the smuggling of migrants were aware that common methods of smuggling and trafficking include scenarios in which undocumented passengers board commercial vehicles, vessels or aircraft, hoping to avoid detection entirely or take advantage of

legal provisions such as those governing claims of asylum in the destination country. This has already been dealt with to some degree in the case of air-travel by a rule established by the International Civil Aviation Organization (ICAO) to the effect that air carriers must check that passengers are in possession of the necessary documents before allowing them to board aircraft.[61] As with the pre-existing ICAO rule, tow major concerns were raised with respect to this requirement. The first was that such pre-clearance of passengers might adversely affect the ability of legitimate asylum-seekers to reach a jurisdiction from which asylum could safely be claimed. The second was that the employees of commercial carriers would be competent to check for the existence or possession of basic travel documents, but could not be expected to make any technical or forensic assessment as to whether documents were genuine, or to have any detailed knowledge of exactly what documentation might be required under the laws of the destination State. These are addressed in the agreed notes for the *travaux preparatoires*, which limit the scope of the obligation to be imposed on carriers and their employees and consequently on the scope of the offence and sanctions to be applied in cases of violation.[62]

**How can this Article be implemented?**

In implementing this requirement, drafters and legislators should bear in mind that Articles 11-13 of this Protocol parallel the same Articles of the Protocol against trafficking in persons, and that measures which implement one can also be used to implement the other, with relatively minor modifications.



The basic requirement is to take such measures as are necessary to be able to apply "sanctions" in cases of violation, but the Protocol does not specify the nature of the sanctions or whether these should be applicable against the commercial carrier, its employees or both. Generally, the imposition of sanctions will require the establishment of an offence, although the requirement of Protocol Article 6 that offences under that Article be "criminal" offences does not apply to this provision. Here the underlying offence may be either a criminal or an administrative or regulatory offence, bearing in mind that offences applicable to legal persons such as commercial carriers must be administrative in many countries and that this option is covered by Article 10 of the Convention. As noted above, these requirements only need be applied "where appropriate" which preserves some degree of flexibility to ensure that they do not unduly impede legitimate travel[63] or the flow of legitimate asylum-seekers.

Sanctions against individual employees could take the form of monetary penalties, imprisonment, or in cases where the employee was not acting within the scope of his or her duties, disciplinary measures (e.g., dismissal). Sanctions against legal persons are most commonly of a monetary nature, but in this case could also include measures such as the revocation or suspension of licenses to carry passengers

[61] Chicago Convention on International Civil Aviation of 07 December 1944, Annex 9 note #1 (obligation for commercial carriers to ascertain that the passengers are in possession of documents required by the country of entry).
[62] A/55/383/Add.1, para.103.
[63] For example, several small countries raised concerns about the feasibility of checking documents on road or rail carriers in areas where small local modes routinely crossed borders.

or denial of access to routes or destinations in which the smuggling of migrants or trafficking in persons was seen as a particularly high risk.

As noted above, the extent of both the obligation to be imposed on carriers and the corresponding offence and sanctions is limited to some extent by the agreed Notes for the *travaux preparatoires*. Thus, for example, since carriers are obliged only to check for the basic possession of documents, the corresponding offence should not apply where the documents existed but were forged, falsified or invalid. As with other offences, however, this requirement sets a minimum standard which States Parties are free to exceed if they wish. While it would generally not be reasonable or feasible to require a detailed examination of documents, legislators could consider requiring basic checks of *prima facie* validity, verifying for example that photographs corresponded to the person using the document and that expiry dates of passports and visas had not elapsed.

Unlike the sanctions to be imposed on carriers, making provision for the denial of entry or revocation of visas to persons "implicated" in a Protocol offence will not require an offence provision in most countries. Generally, nationals or citizens have a legal right to enter their own country, making any offence or exclusion requirement vulnerable to legal challenges based on domestic constitutions or international law. In the case of persons who are not nationals or citizens, national sovereignty requires that each State has the right to deny or revoke visas or to deny entry. Where this is the case, implementation will usually only require the promulgation of regulations or administrative instructions to officials governing the conditions under which action should be taken and the criteria for structuring their discretion to act. Given that being "implicated" in an offence does not necessarily entail the proof of guilt in criminal or administrative proceedings, natural justice may require the establishment of some form of judicial or quasi-judicial review to allow those denied entry or visas.



An example of requirements imposed and sanctions for breach can be found in several European instruments. Within the European Union, Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985[64] requires carriers to take all necessary measures to ensure that foreigners are in possession of valid documents and to take into custody foreigners who are refused entry.
EU Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26[65] also provides for a certain number of pecuniary sanctions against carriers who do not meet their obligations.

In reference to this Protocol:
Art. 4 (Scope of application)
Art. 8 (Measures against the smuggling of migrants by sea)
Art. 10 (Information)
Art. 14 (2) (c) and (d) (Training and technical cooperation)

In reference to the Protocol relative to trafficking:

[64] at website: http://www.unhcr.bg/euro_docs/en/_schengen_en.pdf (text available in *Official Journal*, L 239, 22/9/2000, p. 0019-0062.)

[65] at website: http://www.bundesgrenzschutz.de/allgem/service/befunter/Richtlinie26SD_e.pdf (text available in *Official Journal* L 187, 10/07/2001, p. 0045-0046)

Art. 11 (Border Measures)

In reference to this Protocol:
Art. 4 (Scope of application)
Art. 12 (Security and control of documents)

In reference to the Protocol relative to trafficking:
Art. 5 (2) (Criminalization)

In reference to other international instruments:
Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (19 June 1990), at website: http://www.unhcr.bg/euro_docs/en/_schengen_en.pdf
The EU Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, at website: http://www.bundesgrenzschutz.de/allgem/service/befunter/Richtlinie26SD_e.pdf
Recommendation No. 18 in Conference of Ministers on the Prevention of Illegal Migration held in the context of the Budapest Process in Prague on 14-15 October 1997 (liability of commercial carriers), at website:
http://www.icmpd.org/uploadimg/Recommendations%20Prague%20Ministerial%20Oct%2097.pdf
Annex 9 (Facilitation) of the Chicago Convention on International Civil Aviation of 07 December 1944 (obligation for commercial carriers to ascertain that the passengers are in possession of a title of transport required by the country of entry) at website:
http://www.icao.int/cgi/eshop_anx.pl?GUESTguest



**Why were these Articles adopted?**

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

More generally, the criminalisation requirements are central to both the Protocol and the parent Convention, serving not only to provide for the deterrence and punishment of the smuggling of migrants, but as the basis for the numerous forms of prevention, international cooperation, technical assistance and other measures set out in the instruments. The purpose of the Protocol is expressly given (in part) as the prevention and combatting of one offence – the smuggling of migrants – and the application of the Protocol is expressly directed at the "prevention, investigation and

prosecution" of the offences established by the Protocol.[66] At the same time, as with the Protocol against trafficking in persons, it must be borne in mind that the "commodity" being smuggled or trafficked consists of human beings, raising human rights and other issues not associated with other commodities. In the case of the criminalisation requirements of this Protocol, the major implications of this can be seen in the language which ensures that offences should not apply to groups which smuggle migrants or asylum-seekers for reasons other than "financial or other material benefit".

**How can these Articles be implemented?**

Implementation of the criminalisation requirements will require legislative measures, except in cases where the necessary provisions already exist, a point underscored by the agreed notes for the *travaux preparatoires* which state that any "other measures" taken to implement the requirements "presuppose the existence of a law".[67] As noted above, the language of the Protocol itself is directed at States Parties on the assumption that they will draft and adopt the necessary legislation to ensure that, taken as a whole, national laws will conform to the requirements of the Protocol. The language used was not intended for enactment or adoption *verbatim*, and will generally not be sufficiently detailed or specific to support effective investigations and prosecutions which are both effective and consistent with basic human rights and procedural safeguards. Identical terminology may be interpreted and applied differently in accordance with different legal systems and practices. Drafters and legislators should therefore bear in mind that it is the meaning of the Protocol and not the literal language which matters.



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

[66] Protocol, Articles 3 and 4.
[67] A/55/383/Add.1, para.91. Parallel requirements were established for the Convention and the other two Protocols.

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

The Protocol is silent as to the punishment or range of punishments which should be applied to the various offences, leaving the basic requirement of Convention Article 11, paragraph (1) to the effect that sanctions should take into account the gravity of the offence, intact. In the case of legal persons, the principle of Convention Article 10, paragraph (4), that sanctions should be "effective, proportionate and dissuasive" also applies. Beyond this, legislators will generally wish to consider the punishments applied in national law for other offences seen as being of equivalent seriousness, and the seriousness of the specific problem of migrant-smuggling and the more general (and often more serious) problem of transnational organised crime into account. In cases where legislatures decide to apply mandatory minimum punishments, the possibility of excuse or mitigation for cases where offenders have cooperated with or assisted competent authorities should also be considered as a possible means of implementing Convention Article 26. In addition to the basic punishments of fines and imprisonment, drafters should also bear in mind that Articles 12-14 of the Convention also require the availability of measures to search for, seize and confiscate property or assets which are the proceeds of Protocol offences, equivalent assets or property, or other property which was used in or destined for use in such offences.[68] As an example, the European Union has required its Member States to provide for maximum punishments of eight years' imprisonment (six years in some circumstances) for cases where smuggling was for financial gain, involved a criminal organization pr endangered the lives of any persons, as well as for the confiscation of instrumentalities such as means of transport.[69]



References:

Protocol against the smuggling of migrants

Art. 2 (Statement of purpose)
Art. 4 (Scope of application)
Art. 16 (Protection and assistance measures)
Art. 18 (Return of smuggled migrants)

[68] See Convention Art.13, paras.1-4 for the full range of property covered. Apart from basic proceeds, property used or destined for use in smuggling could include items such as air tickets, motor vehicles, aircraft or vessels.

[69] See EU Council Directive of 28 November 2002 defining the Facilitation of Unauthorized Entry, Transit and Residence (2002/90/EC), particularly Article 3 relating to sanctions.

Protocol against trafficking in persons:
Art. 3 (Use of Terms)
Art. 5 (Criminalization)

Convention against Transnational Organized Crime:
Art. 3 (Scope of application)
Art. 5 (3) (Criminalization of participation in an organised criminal group)
Art. 10 (Liability of legal persons)
Art. 11 (Prosecution, adjudication and sanctions)
Art. 12 (Confiscation and seizure)
Art. 14 (Disposal of confiscated proceeds of crime or property)
Art. 37 (Relation with protocols)

Other international instruments
Art. 1 and 3 of the Council Framework Decision of the European Union of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence (2002/946/JHA), *Official Journal,* L 328, 05/12/2002, p. 0001-0003 (Penalties and sanctions)
EU Council Directive of 28 November 2002 defining the Facilitation of Unauthorized Entry, Transit and Residence (2002/90/EC), *Official Journal,* L 328, 05/12/2002, p. 0017-0018
Art. 31 of The United Nations Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, UN, *Treaty Series,* vol.189, No. 2545, p. 137
Article 19, paragraph (2) of the international Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, adopted by General Assembly resolution 45/158 of 18 December 1990 (coming into force on July 1, 2003)

# Chapter 4 – Protection and assistance requirements

## 1. Relevant Protocol provisions

### A. - Protection and assistance of smuggled migrants and persons whose illegal residence has been procured (Articles 5, 16, 18 and 19)

*Article 5*
*Criminal liability of migrants*

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

*Article 16*
*Protection and assistance measures*

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

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

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

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

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

*Article 18*
*Return of smuggled migrants*

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

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

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

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

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

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

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

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



*Article 19*
*Saving clause*

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention[3] and the 1967 Protocol[4] relating to the Status of Refugees and the principle of non-refoulement as contained therein.

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

## B. Safeguards in relation to maritime vessels

*Article 9*
*Safeguard clauses*

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(a) Ensure the safety and humane treatment of the persons on board;

(b) Take due account of the need not to endanger the security of the vessel or its cargo;

(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.



**2. What are the main elements of these Articles?**

The Protocol contains safeguard requirements in two major areas:

- the rights, legal status and safety of smuggled migrants and illegal residents, including those who are also asylum-seekers, and
- the rights and interests of countries and ship-owners under maritime law.

In recognition that illegal or irregular migration, and in some cases the criminal smuggling of migrants, may involve the movement of legitimate refugees or asylum-seekers, precautions were taken to ensure that the implementation of the Protocol would not detract from the existing protections afforded by international law to migrants who also fell into one of these categories. Here the language is intended to ensure that the Protocol offences and sanctions will apply to those who smuggle migrants, even if they are also asylum-seekers, but only if the smuggling involves an "organised criminal group". As discussed in the previous chapter, several precautions were taken to ensure that altruistic or charitable groups who smuggle asylum-seekers for purposes other than "financial or other material gain" were not criminalised.[70]

There were also concerns about the basic safety, security and human rights of persons who have been the object of one of the major Protocol offences, including migrants who have been smuggled and those who may have entered legally, but whose subsequent illegal residence has been enabled by an organised criminal

[70] Art.5 and 19.

group.[71] Here the provisions are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents, and to deter conduct on the part of offenders which involves danger or degradation to the migrants. At the same time, the formulation of the relevant provisions was intended to ensure that no additional legal status or substantive or procedural rights were accorded to illegal migrants, who are not subject to the Protocol offences but may still be liable for other offences relating to illegal entry or illegal residence and to sanctions such as deportation.[72]

The third area of concern was more specialised, and arises from the relationship between the Protocol and pre-existing maritime law. Part II of the Protocol allows States Parties who encounter vessels suspected on involvement in smuggling to board and search such vessels under some circumstances. This raised concerns about the basic safety and security of migrants and others on board such vessels, given the dilapidated conditions of vessels often used by smugglers and the fact that boarding may take place at sea and far from safe harbour conditions. Stopping and boarding vessels also raised concerns about the sovereignty of States to which such vessels were flagged or registered and about the commercial losses to ship owners which might result. For this reason it was also felt necessary to incorporate basic safeguard requirements to protect these interests before and during boarding, and to make some provision for access to remedies later, in cases where the search proved to be unfounded.[73]



*Legal status, safety and rights of migrants and illegal residents.*

As noted in the preceding chapter, the various provisions of the Protocol have been formulated so as not to require the criminalisation of migrants or illegal residents, or of conduct likely to be engaged in only by such persons, while at the same time protecting the sovereign right of States Parties to establish or maintain other offences which would apply to such persons. Nothing in the Protocol is intended to create any substantive or procedural rights for migrants or illegal residents, but precautions were taken, particularly in Articles 16 and 19 to ensure that such rights as already existed were preserved. This includes general basic human rights,[74] and the right to consular assistance.[75] Article 16, paragraph (3) does not create a new right, but does establish a new obligation, requiring States Parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of Protocol offence. Particular attention is paid to ensuring that rights established by international humanitarian law, which

[71] The need to include both categories resulted in the formulation " …person who has been the object of conduct set forth in article 6 of this Protocol…". For simplicity references in this guide will be to "smuggled migrants" and "illegal residents" with the understanding that the latter category refers to persons whose illegal residence has been procured or enabled by an organised criminal group contrary to domestic offence provisions which implement Protocol Art.6, subpara. (1)(c). See also A/55/383/Add.1, para.107 in this regard.
[72] Art.9, para.(1), and Art.16.
[73] Art.8 and 9.
[74] Art.16, paras.(1) and (2) and Art.19, para.(2).
[75] Art.16, para.(5).

primarily concern migrants or illegal residents who are also asylum-seekers, are preserved.[76]

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

*Provisions relating to maritime vessels*

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



**Why were these Articles adopted?**

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

**How can these Articles be implemented?**

Assuming national conformity with the basic pre-existing rights and the instruments in which these are established, none of the requirements to protect or preserve the human rights of migrants and illegal residents should raise legislative issues, although they should be carefully considered in developing administrative procedures and the training of officials. Where a country is not already in conformity with these pre-existing standards, they may have to be established to the extent

[76] Art.19, para.(1).

necessary to conform to the Protocol. There is no obligation to go beyond this, however: the agreed notes for the *travaux préparatoires* specify that the various cross-references to other international instruments, including those dealing with humanitarian law and asylum-seekers, do not mean that countries which ratify and implement the Protocol are also bound by the provisions of those instruments.[77] Where existing national laws do not meet the basic Protocol requirements, the following changes may be needed:

- amendments to preserve and protect the basic rights of smuggled migrants and illegal residents;[78]
- protection against violence;[79] and,
- access to consular assistance.[80]

Drafters may also be required to adjust the language of other legislative provisions to ensure that they are not applied in a manner that discriminates against smuggled migrants or illegal residents by reason of their status as such.[81]

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



Drafters who are in the process of developing legislation to implement both the Protocols against the smuggling of migrants and trafficking in persons should also note that the provisions of the other Protocol governing the safe and secure return of victims of trafficking are much more extensive in view of the additional jeopardy in which such victims usually find themselves, and that Articles 24 and 25 of the Convention (assistance and protection of victims and witnesses in all cases covered by the Convention) also apply in respect of victims of trafficking. These do not apply to smuggled migrants or illegal residents, and legislatures will therefore generally find it necessary to adopt separate provisions governing this subject-matter.

The provisions of Part II which impose requirements intended to afford some protection both to illegal migrants and other persons found on board vessels being searched at sea are direct obligations imposed on States Parties by the Protocol and will not generally require legislation to implement. However, some legislative or administrative measures may be needed to ensure that the actions of officials meet the required standards, and to establish a substantive and procedural basis for seeking remedies in cases where a search is conducted, some form of loss or harm results, and

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[77] A/55/383/Add.1, para.118. See also para.117 relating to the status of refugees.
[78] Art. 16, para.(1).
[79] Art. 16, para.(2). Arguably, the existence of basic criminal offences such as common assault would be sufficient to meet this requirement.
[80] Art. 16, para.(5). This only applies where the Vienna Convention has not been implemented, and may not necessarily require legislation, provided that officials are directed to afford the necessary access when required or requested.
[81] Art. 19, para.(2).

the search later proves to have been unfounded. The major legislative or other requirements and considerations are the following:

- Article 8 creates authority under international law to board and search vessels suspected of engaging in the smuggling of migrants, either with the consent of States of flagging or registry or unilaterally if this is unknown. Legislatures may find it necessary to amend domestic provisions governing search and seizure to ensure that law enforcement powers to conduct such searches and any related safeguards apply to maritime searches. This may include changes to legislation governing criminal procedure or the admissibility of evidence to ensure that evidence seized can be used in criminal prosecutions, and ensuring that powers of arrest or detention allow for the detention of persons and vessels under appropriate circumstances. The International Maritime Organisation and the United Nations High Commissioner for Refugees have expressed concerns that unnecessary searches or detention of vessels may deter masters of vessels from meeting fundamental humanitarian requirements, including the rescue of migrants from small vessels found in distress at sea. In establishing and implementing powers to stop and search vessels and to detain vessels or crew members who may be witnesses (but not criminal suspects) legislators should bear in mind that such procedures should be carefully considered and used with as much restraint as possible.
- While the Protocol requires measures to ensure that each State Party has adequate powers to board and search vessels based on the suspicion that a criminal offence (the smuggling of migrants) is occurring, these powers should not be confused with the duty established under maritime law and custom to rescue those in peril at sea. Vessels used for smuggling may be confiscated if apprehended, and smugglers often use dilapidated vessels as a result. In some cases, such vessels are encountered at sea overloaded with migrants and in imminent danger of sinking. Legislation should be drafted and implemented so as to ensure that officials are aware that the duty to effect a rescue has priority in such circumstances, and that where there is evidence of peril at sea, vessels should be boarded whether there is a suspicion of smuggling or not. Domestic powers and safeguards, if needed, should consider the safeguards set out in Article 9 and the interests of maritime rescue and safety. They should not, however, limit the duty or power of authorities to act in cases where lives or safety may be at risk, or in cases where there was reason to believe migrants or other persons were being trafficked or held on board against their will.
- The Protocol does not limit the class or status of officials who can exercise maritime search powers, leaving it open to legislatures to extend them to any official or agency with appropriate law enforcement activities. Note, however, that any boats, ships or aircraft used must be "…clearly marked and identifiable as being on government service and authorized to that effect…"[82] Given the risks and difficulty associated with boarding and searching vessels at sea, legislatures may also wish to consider limiting the authority to exercise powers created pursuant to the Protocol to a relatively small number of officials or officers who have the necessary training, competence and equipment.

[82] Art.9, para.(4).

- Drafters should note that the meaning of "engaged in the smuggling of migrants by sea" is discussed in the agreed notes for the *travaux préparatoires*.[83] It includes both direct and indirect engagement, including cases where a "mother-ship" has already transferred migrants to smaller vessels for landing and no longer has any on board or have picked up migrants while at sea for the purposes of smuggling them. It would not include a vessel which had simply rescued migrants who were being smuggled by another vessel.
- Legislation may be needed to designate a central authority to deal with maritime assistance requests pursuant to Article 8, paragraph (6). For efficiency, such authorities should be the same as those designated for mutual assistance requests under Convention Article 18, paragraph (13), if possible, but separate authorities may be used for maritime matters if necessary, and countries with federal systems may designate separate authorities for each region.

**References:**

Protocol against the smuggling of migrants

- Art. 2 (Statement of purpose)
- Art. 3 (d) (Use of terms)
- Art. 4 (Scope of application)
- Art. 5 (Criminal liability of migrants)
- Art. 8 (Measures against the smuggling of migrants by sea)
- Art. 10 (Information)
- Art. 14 (Training and technical cooperation)
- Art. 15 (Other prevention measures)



Protocol against trafficking in persons

- Art. 6 (Assistance to and protection of victims of trafficking in persons)

Convention against Transnational Organized Crime

Art. 24 (Protection of witnesses)

Art. 25 (Assistance to and protection of victims)

Other international instruments:

- Guidelines Nos. 1, 6 *(Promotion and protection of human rights Protection and support for trafficked persons)* of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, adopted on 20 May 2002 (United Nations E/2002/68/Add. 1)
- Article 98-1 of the UN Convention on the Law of the Sea, concluded at Montego Bay, Jamaica, on 10 December 1982, United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3
- Article 1 of the International Convention for the Safety of Life at Sea (SOLAS) of 01 November 1974
- International Convention on Maritime Search and Rescue adopted at Hamburg on 27 April 1979, Annex

[83] A/55/383/Add.1, para.102.

- Recommendations Nos. 24-38 of the Conference of Ministers on the Prevention of Illegal Migration held in the context of the Budapest Process in Prague on 14-15 October 1997 (Return of migrants)
- Proposal for a Comprehensive Plan to combat illegal immigration and trafficking in human beings in the UE , Council of Europe, 15 February 2002, II.E (politique de réadmission et de rapatriement)
- Recommendation of the Council of Europe of 30 November 1994 (model bilateral agreement governing re-admission of nationals), Art. 2-1
- UN Commission on Human Rights general obligation No. 27/CCPR/C/21/Rev 1/Add 9 , para. 21 (return of migrants)
- Article 8 of the international Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, adopted by General Assembly resolution 45/158 of 18 December 1990 (in force 1 July 2003)

# Chapter 5 - Prevention

**Relevant Protocol provisions**

*Article 11*
*Border measures*

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

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

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

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

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

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



*Article 12*
*Security and control of documents*

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

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

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

*Article 14*
*Training and technical cooperation*

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol

and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

*Article 15*
*Other prevention measures*

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

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

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



**Related provisions of the Convention and Protocol against trafficking in persons**

Legislators and drafters should note that these provisions should be read and applied in conjunction with Convention Article 30, which deals with the prevention of all forms of organised crime. Given the nature of migration and the smuggling of migrants, Article 30 paragraphs (5) (promotion of public awareness of the problems associated with organised crime) and (7) (alleviation of social conditions which render socially marginalised groups vulnerable to organised crime) may be of particular interest in implementing the Protocol.

Legislators and drafters charged with implementing both the Protocols against the smuggling of migrants and trafficking in persons may also wish to take into consideration the fact that many similarities exist between the origins of smuggling and trafficking cases, to the point where some are indistinguishable until it becomes apparent whether the migrants will be exploited (trafficking) or not (smuggling). A critical factor in both cases is the desire to migrate, which exploited both buy smugglers and traffickers, and this means that prevention measures may in many cases be developed and implemented jointly. For example, programmes such as media efforts to caution potential migrants and victims about the dangers of smuggling, trafficking and general dealings with organized criminal groups and more general efforts to alleviate social or other conditions which create pressures to migrate may be efficiently and effectively implemented on a joint basis.

**What are the main elements of these Articles?**

Part III of the Protocol contains requirements to apply both social and situational prevention measures. Recognising that a root cause of smuggling is the desire of people to migrate away from conditions such as poverty or oppression in search of better lives, Article 18, paragraph (3) requires the promotion or strengthening of development programmes to address the socio-economic causes of smuggling. Article 18, paragraphs (1) and (2) seek to target potential migrants and others involved in smuggling more directly using public information about the evils of organised crime in general and the smuggling of migrants in particular. Articles 11, 12 and 13 seek to prevent smuggling more directly, by making it more difficult and risky for offenders to commit. Article 11 requires measures to ensure that commercial carriers check their passengers' travel documents, and other unspecified measures to enhance the effectiveness of border controls. Article 12 requires that States Parties have travel documents which are more difficult to falsify or obtain improperly, and Article 13 seeks to increase the risk of misuse and probability of detection by requiring States Parties to verify within a reasonable time whether a document purporting to have been issued by them is genuine and valid or not.

**Why were these Articles adopted?**

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



**How can these Articles be implemented?**

*Increasing public awareness and addressing socio-economic causes (Article 15)*

As noted, the drafters sought to require measures to increase public awareness of the nature of migrant-smuggling and the fact that much of the activity involves organised criminal groups. This is a mandatory obligation, but there is nothing in it that would require the use of legislative measures. In conjunction with other information about smuggling, however, public information campaigns about the legislation used to establish the Protocol offences and elements of the Convention in national law could be applied. This would serve to emphasize that the smuggling of migrants is a serious criminal activity, often harmful to the migrants themselves, and with broader implications for community crime levels.

*Promotion or strengthening of development programmes to address root socio-economic causes of smuggling*

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

*Measures dealing with commercial carriers (see also criminalisation, above)*

The major legislative requirement set out in Part III is that States Parties must "to the extent possible" adopt legislative or other measures to prevent commercial carriers from being used by traffickers.[84] The exact nature of such measures is left to the discretion of legislatures, except that cross-border carriers should be obliged to check the travel documents of passengers,[85] and subjected to appropriate sanctions where this is not done.[86] Legislative drafters implementing these requirements should consider the following points.

- The basic obligation to be placed on carriers is to ascertain basic possession of whatever documents may be needed to enter the State of destination, but there is no obligation to assess the authenticity or validity of the documents or whether they have been validly issued to the person who possesses them.[87]
- The obligation is to attach liability for the carriers for not having checked the documents as required. States may establish liability for having transported undocumented migrants, but the Protocol does not require this.
- Countries are also reminded of their discretion not to hold carriers liable in cases where they have transported undocumented refugees.[88] This is not obligatory, however, and can be dealt with in the exercise of prosecutorial discretion where available and appropriate.
- The obligation in Article 11, paragraph (4) is to "…provide for sanctions…", the nature of which is not specified in either the Protocol or *Travaux Préparatoires*. If criminal liability is to be provided for, drafters should consider Convention Article 10 regarding the obligation to provide for the liability of legal persons such as corporations.
- The Notes for the *Travaux Préparatoires* in several places discuss the meaning of "travel or identity document", which include any document which can be used for inter-State travel and any document commonly used to establish identity in a State under the laws of that State.[89]

*Measures relating to travel or identity documents*

As noted above, Article 12 requires measures to ensure the adequacy of the "quality" and "integrity and security" of documents such as passports. The language

[84] Art.11, para.(2).
[85] Art.11, para.(3).
[86] Art.11, para.(4)
[87] See notes for *travaux préparatoires*, A/55/383/Add.1, paras. 80 and 103.
[88] See notes for the *travaux préparatoires*, A/55/383/Add.1, paras. 80 and 103.
[89] See notes for the *travaux préparatoires*, A/55/383/Add.1, paras.78 and 83.

of the Articles makes it clear that this includes such measures as technical elements to make documents more difficult to falsify, forge or alter and administrative and security elements to protect the production and issuance process against corruption, theft or other diversion of documents.[90] These do not entail direct legislative obligations, except possibly to the extent that the forms of documents such as passports are prescribed by legislation which would have to be amended to increase standards or legally designate the enhanced versions as formally-valid documents. Indirectly, additional supplementary offences to deal with theft, falsification and other misconduct in relation to travel or identity documents could be considered if more general offences do not already apply.

A number of new and developing technologies offer considerable potential for the creation of new types of document which uniquely identify individuals, which can be rapidly and accurately read by machines, and which are difficult to falsify because they rely on information stored in a database out of the reach of offenders rather than on the face of the document itself. One example is the European Image Archiving System (FADO: False and Authentic Documents).[91] This allows speedy verification of documents against those in possession of them and fast, comprehensive notification of relevant law enforcement or immigration authorities in other participating countries when misuse of a document or a fraudulent document is detected. One concern raised during the negotiation of Protocol Article 12 was the costs and technical problems likely to be encountered by developing countries seeking to implement such systems. The development of systems and technologies which minimise the amount of sophisticated maintenance and high-technology infrastructure needed to support and maintain such systems will be critical to the success of deployment in developing countries, and technical assistance under Article 30 of the Convention may be needed in some cases.



**References:**

Protocol against the smuggling of migrants

- Art. 2 (Statement of purpose)
- Art. 6 (Criminalization)
- Art. 14 (2) (Training and technical cooperation)
- Art. 13 (Legitimacy and validity of documents)

Protocol against trafficking in persons

- Art. 11 (Border Measures)
- Art. 12 (Security and control of documents)

[90] The agreed notes for the *travaux préparatoires* establish a relatively broad range of abuses in relation to documents. Drafters intended to cover not only the creation of false documents, but also the alteration of genuine ones and the use of vlaid and genuine documents by persons not entitled to do so. See : A/55/383/Add. 1, para. 105.

[91] Developed under the Joint Action 98/700/JHA of 3 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union of 3 December 1998*Official Journal* L 333, 09/12/1998. At website: http://europa.eu.int/scadplus/leg/en/lvb/l33075.htm

- Art 13 (Legitimacy and validity of documents)
- Art. 10 (Information exchange and training*)*

## Convention against transnational organised crime

- Art. 30 (Prevention)
- Art. 29 (1) and (3) (Training and technical assistance)

## Other international instruments:

- Guideline No. 7 *(Preventing trafficking)* of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, adopted on 20 May 2002 (United Nations E/2002/68/Add. 1)
- Points 8 and 10 of the UE Recommendations of the "Brussels Declaration on Preventing and Combating Trafficking in Human Beings" of September, 2002
- Points 5 and 12 in "12 Commitments in the fight against trafficking in human beings ", Meeting of JHA Ministers of the EU Member States and the candidate States, Brussels, 2001 (Prevention campaigns and combatting false documents);
- Recommendation n°13 in Conference of Ministers on the prevention of illegal migration held in the context of the Budapest Process in Prague on 14-15 October 1997 (information campaigns);
- Proposal for a Comprehensive Plan to combat illegal immigration and trafficking in human beings in the UE , Council of Europe, 15 February 2002, II.E (public awareness campaigns).
- Point 11 of the UE Recommendations of the "Brussels Declaration on Preventing and Combating Trafficking in Human Beings" of September, 2002 (Administrative controls)

# Chapter 6 – Co-operation and assistance requirements

**Relevant Protocol provisions**

*Article 7*
*Cooperation*

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

*Article 8*
*Measures against the smuggling of migrants by sea*

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

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

(a) To board the vessel;

(b) To search the vessel; and

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

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

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

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

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such

designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

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

*Article 10*
*Information*

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

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

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

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

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

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

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

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

*Article 11*
*Border measures*

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

2. *[Paras. 2-4 deal with requirements and sanctions for commercial carries of passengers]*

3. ---

4. ---

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

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

*Article 13*
*Legitimacy and validity of documents*

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

*Article 14*
*Training and technical cooperation*

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

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

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

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

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

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

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

3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

*Article 15*
*Other prevention measures*

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

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

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

*Article 17*
*Agreements and arrangements*

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

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

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



*Article 18*
*Return of smuggled migrants*

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

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

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

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

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

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

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

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

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

**What are the main elements of these Articles?**

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



Generally, the scope of cooperation under the Convention and its Protocols is governed by the scope of the Convention itself – general and specific forms of cooperation and assistance are established for the "prevention, investigation and prosecution" of offences covered by the Convention and any applicable Protocols, where the offence is transnational in nature and involves an organised criminal group. In formulating legislative and administrative rules and procedures for cooperation under the Protocol, it is important that both the Convention and the Protocol be read together. The Convention contains both general requirements for States Parties to cooperate,[92] and a series of obligations focused on specific subject-matter or forms of cooperation.[93] It is particularly important to ensure that co-operative rules and practices under the Convention and Protocol are consistent with one another, and that there are no gaps which could create areas in which assistance could not be rendered on request. Apart from forms of assistance, such as mutual legal assistance, which could also be considered as cooperation, the Convention also recognises that more general forms of assistance, in the form of both resources and technical or other expertise, will be needed by many developing countries if they are to fully implement the Convention and Protocols and be in a position to render such assistance or cooperation as is requested of them once it is in force. Thus, Convention Article 29 deals with the provision of training and technical assistance, and Articles 30 and 31 calls for more general development assistance to help developing countries implement

[92] Convention Art.27 (law enforcement cooperation), 28 (exchange of information), 29 (training and technical assistance), 30 (economic development and other assistance) and 31 (cooperation in the prevention of organised crime).

[93] Convention Art.12-13 (cooperation in confiscation of proceeds and instrumentalities of organised crime), 16 (extradition of offenders), 18 (mutual legal assistance), 17 and 21 (transfer of proceedings and sentences), and 24 (cooperation to protect witness).

the Convention and address the underlying the circumstances that render socially-marginalised groups vulnerable to organised crime.[94]

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

- *Assistance in relation to maritime cases.* In cases where a maritime vessel is suspected of involvement of smuggling, States Parties may request general assistance of other States Parties in suppressing such use of the vessel. Such assistance must be provided, within the means of the requested State Party.[95] Where the vessel is or appears to be registered or flagged to a State Party, that country may also be requested to authorise boarding, searching and other appropriate measures. Such requests must be considered and a responded to "expeditiously".[96] In turn, the State Party which searches the vessel must "promptly inform" the authorising State Party of the results of any measures taken.[97] Each State Party is required to designate an authority or authorities to receive and respond to requests for assistance in maritime cases.[98]
- *Border measures*. Generally, States Parties are required to strengthen border controls to the extent possible and to consider strengthening cooperation between border control agencies, including by the establishment of direct channels of communication.[99]
- *Travel and identity documents.* States Parties are required to ensure the integrity and security of their travel documents, which may include informing other States Parties of measures taken to make documents resistant to tampering, and of measures which can be used to verify that the documents are authentic.[100] They are also required to "verify within a reasonable time" the legitimacy and validity of documents purported to have been issued by them at the request of another State Party.[101]
- *Training and technical assistance.* In addition to training their own officials, States Parties are required to cooperate with one another in training to prevent and combat smuggling and in appropriate methods for dealing with smuggled migrants. The obligation to cooperate also includes cooperation with intergovernmental and non-governmental organisations, a number of which are active in matters related to migration.[102] The Protocol also calls for relevant technical assistance to countries of origin or transit, in addition to the more general call for such assistance in Convention Article s 29-30.[103]



[94] See in particular Art.31, paragraph (7). Article 30, subparagraph (2)(c) calls for voluntary contributions to support implementation, as does the resolution in which the General Assembly adopted the Convention and Protocol. See GA/RES/55/25 of 15 November 2000, para.9.
[95] Art.8, para.(1).
[96] Art.8, paras.(2) and (4).
[97] Art.8, para.(3).
[98] Art.8, para.(7).
[99] Art.11, paras.(1) and (6).
[100] Art.12.
[101] Art.13.
[102] Art.14, para.(2).
[103] Art.14, para.(3).

- *Prevention*. The Protocol requires each State Party to promote or strengthen development programmes that combat the "root socio-economic causes" of the smuggling of migrants.[104]
- *Return of smuggled migrants.* Generally, States Parties are required on request to accept the repatriation of their nationals and to consider accepting those who have or have had rights of residence. This includes verifying status as a national or resident without unreasonable delay, re-admitting the person, and where necessary, providing any documents or authorisations needed to allow that person to travel back to the requested State Party.[105]
- *Information exchange*. States Parties are required, consistent with existing legal and administrative systems, to exchange a series of categories of information ranging from general research and policy-related material about smuggling and related problems, to more specific details of methods used by smugglers.[106]
- *Other agreements or arrangements.* As with the parent Convention, States Parties are encouraged to consider entering into other agreements of a bilateral or regional nature to support forms of cooperation and assistance which may go beyond those required by the Protocol.[107]

**How can these Articles be implemented?**

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



*Cooperation and assistance in maritime matters (Articles 7-9)*

Generally, information about the status of vessels and permission to board and search vessels flagged or registered to a State Party will not require legislation, but amendments may be needed where there are existing legal limits on disclosure, such as confidentiality provisions. Legislatures may also wish to implement basic safeguards similar to those applied to domestic searches and seizures, bearing in mind that these may not be practicable in many maritime cases, where vessels may move out of reach of the requesting State Party before permission to board and search can be given. One possible response might be a form of the "exigent circumstances" practices standards applied by some countries, in which prior judicial approval of a search is not required, but the search, its outcome and the manner in which it was carried out is subject to review by the courts afterward. Drafters considering this option should also note Article 9, paragraph (2) which provides for compensation in cases where a search generated costs or damages and later proved to have been unfounded.

Article 8, paragraph (6) requires that each State Party designate a "central authority" to deal with maritime cases, which may require legislative action establishing an

[104] Art.15, para.(3).
[105] Art.18, paras. (1)-(4).
[106] Art.10.
[107] Art.17.

authority and giving it the necessary powers to obtain the information needed to respond to requests from other States Parties. The language reflects the intention of the drafters that this should be the same authority as the one established to handle general mutual legal assistance requests under Article 18, paragraph (13) of the Convention where this is feasible, and drafters will generally be able to rely on legislation implementing that provision as a precedent if further legislation is needed under this Protocol. Flexibility to establish a separate authority was provided because of the different legislative and administrative regimes already established in some countries to handle requests under maritime law and the fact that information kept about maritime vessels is not usually kept by agencies with criminal justice mandates. Whether a separate authority is established or not, it will be important to ensure that the agency is clearly identified and able to obtain the necessary information quickly for transmission to requesting States Parties.

Legislatures which establish separate authorities should note that Article 8, paragraph (6) also requires that the Secretary General be notified of this fact, to permit a list of contact points to be maintained and circulated to all States Parties. Governments responding to this could also consider providing other important information, notably the language(s) in which requests can be processed. This is a requirement for principal central authorities under Convention Article 18, paragraph (14), but a parallel requirement was not included in the Protocol.



*Border measures (Article 11).*

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

*Travel or identity documents (Articles 12-13)*

The establishment of specific forms or the setting or amendment of technical standards for the production of documents such as passports may be a legislative matter in some countries. In such cases, legislators will generally need to consult technical experts, either domestically or in other States Parties to determine what basic standards are feasible and how they should be formulated. Understanding technologies such as biometrics and the use of documents containing electronically stored information, for example, will be essential to the drafting of legal standards requiring the use of these technologies. Implementing the requirement to verify travel or identity documents will generally not require legislation, since virtually all States already do this on request, but may require resources or administrative changes to

permit the process to be completed in the relatively short time-frames envisaged by the Protocol.

*Technical assistance, cooperation and training (Article 14)*

The establishment of programmes for training domestic officials will not generally require legislative measures, but the materials and personnel used to deliver such training will rely heavily on domestic legislation, the international instruments, and in many cases the legislation of other countries with whom a particular State Party is likely to find it necessary to cooperate on a frequent or regular basis. To ensure efficient and effective cooperation with other States Parties in administering the treaties, cooperation in the development and application of training programmes, and the rendering of assistance to other countries by providing resources and/or expertise, will also be important.[108]

*Information exchange. (Article 10)*

As with other areas of cooperation, the mere exchange of information is not likely to require legislative action. Given the nature of some of the information which may be exchanged, however, amendments may be needed to domestic confidentiality requirements to ensure that it can be disclosed, and precautions may be needed to ensure that it does not become public as a result. The notes for the *travaux préparatoires* also raise the need for prior consultations in some cases, especially before sensitive information is shared spontaneously and not on request.[109] These may involve changes to media or public access-to-information laws, official secrecy laws and similar legislation to ensure an appropriate balance between secrecy and disclosure. One issue which may arise in countries with constitutional or other obligations to disclose potentially-exculpatory information to defence counsel in criminal cases is that absolute confidentiality cannot always be guaranteed. The negotiators of the Convention worked out a compromise formula for dealing with this scenario, found in Article 18, paragraphs (5) and (19), and those provisions and officials confronted with this issue may wish to review those provisions and the corresponding legislative guide.[110]



*Return of smuggled migrants (Article 18)*

As outlined above, countries are required to cooperate in the identification or determination of status of their nationals and residents. They are required to cooperate in ("facilitate and accept") the return of nationals and to consider cooperation in the return of those with some rights of residency short of citizenship, including by the issuance of documents needed to allow the travel of such persons

[108] Protocol Art.14, paras. (2) and (3). For an example, see also "Proposal for a Comprehensive Plan to combat illegal immigration and trafficking in human beings in the UE" , Council of Europe, 15 February 2002, points 64 to 66. Point 54 stresses the need for these programmes to take account of the specific features of each national training system.

[109] A/55/383/Add.1, para.37, which refers to Convention Art.18, para.(5).

[110] Similar language is also used in Art.12, para.(5) of the Protocol against Illicit Trafficking in Firearms, Their Parts and Components, and Ammunition, GA/RES/55/255, annex.

back from countries to which they have been smuggled.[111] In most countries, conformity with these requirements would involve primarily the issuance of administrative instructions to the appropriate officials and ensuring that the necessary resources are available to permit them to provide the necessary assistance.

Legislative amendments might be required in some countries, however, to ensure that officials were required to act (or in appropriate cases, to consider acting) in response to requests, and that they had the necessary legal authority to issue visas or other travel documents when a national or resident is to be returned. In drafting such legislation, officials should bear in mind that any obligations in international law governing the rights or treatment of smuggled migrants, including those applicable to asylum-seekers, are not affected by the Protocol or the fact that the country concerned has or will become a Party to it.[112] Legislatures may wish also to consult the provisions of the *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* (1990),[113] which provides for measures which go beyond those set out in the Protocol.

The requirements to accept the return of nationals and to consider accepting the return of those with some right of residency turn on the status of those individuals at the time of return, which raises the possibility that such status might be revoked in order to prevent the return. This problem is dealt with in paragraph 111 of the agreed notes for the *travaux préparatoires*, which state:[114]

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



The notes also indicate that return should not be carried out until any relevant nationality or residency status has been ascertained.[115]

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

*Other agreements or arrangements (Article 17)*

As with the parent Convention, the Protocol is intended to set a minimum global standard for various measures to deal with the smuggling of migrants, return and other

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[111] For the exact obligations, see above and Protocol Art.18.

[112] Protocol Art.18, para.(8) and notes for the *travaux préparatoires*, A/55/383/Add.1, para.116.

[113] *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, adopted by General Assembly resolution 45/158 of 18 December 1990 (coming into force on July 1, 2003). See in particular Art.67 of that instrument which calls for cooperation "…with a view to promoting adequate economic conditions for … resettlement and to facilitating … durable social and cultural reintegration in the State of origin.".

[114] A/55/383/Add. 1, para.111. See also para.122, which clarifies the meaning of "permanent resident".

[115] A/55/383/Add. 1, para.113.

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

**References:**

Protocol against the smuggling of migrants

- Art. 2 (purpose)
- Art. 7-9 (maritime provisions)
- Art.10 (information exchange)
- Art.11 (border measures)
- Art. 12-13 (travel and identity documents)
- Art. 14 (training and technical cooperation)
- Art. 15, para.(3) (prevention)
- Art.17 (other agreements and arrangements)
- Art.18 (return of smuggled migrants and illegal residents)



Protocol against trafficking in persons:

- Art. 11 (border measures)
- Art. 10 (information exchange and training)
- Art. 8 (repatriation of victims)

Convention against transnational organized crime

- Art. 11 (prosecution adjudication and sanctions)
- Art.12-13 (cooperation in confiscation of proceeds and instrumentalities of organised crime),
- Art.16 (extradition of offenders),
- Art.18 (mutual legal assistance),
- Art. 17 and 21 (transfer of proceedings and sentences),
- Art. 24 (cooperation to protect witness)
- Art.27 (law enforcement cooperation)
- Art.28 (exchange of information)

- Art.29 (training and technical assistance)
- Art.30 (economic development and other assistance)
- Art.31 (cooperation in the prevention of organised crime).

## Other international instruments

- Guideline No. 11 (*Cooperation and coordination between States and regions*) of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, adopted on 20 May 2002 (United Nations E/2002/68/Add. 1)
- Point 5 in " 12 Commitments in the fight against trafficking in human beings ", Meeting of JHA Ministers if the EU Member States and the candidate States, Bruxelles, 2001(Co-operation );
- Recommendation n°14 in Conference of Ministers on the prevention of illegal migration held in the context of the Budapest Process in Prague on 14-15 October 1997 (Co-operation relative aux pratiques efficaces de contrôle);
- Recommendation n°17 in Conference of Ministers on the prevention of illegal migration held in the context of the Budapest Process in Prague on 14-15 October 1997 (Training);
- Programme of action adopted at the International Conference on population and development of 5-13 September 1994 , Articles 10-1 et 10-2(a); Bangkok Declaration on irregular migration of 26 February 1999 (development aid);
- International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, adopted by General Assembly resolution 45/158 of 18 December 1990 (coming into force on July 1, 2003)
- Proposal for a Comprehensive Plan to combat illegal immigration and trafficking in human beings in the UE , Council of Europe, 15 February 2002, II.E (points 64 - 66);
- Recommendation 1467 (2000) of the Council of Europe, "Clandestine immigration and the fight against traffickers", point 11.