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UNODC support in the field of migrant smuggling and human trafficking legislation

Bali Process on People Smuggling, Trafficking in Persons and related
Transnational Crimes

Ad Hoc Group Senior Officials' Meeting

Bali

9 March 2011

Sebastian Baumeister

UNODC Regional Centre for East Asia and the Pacific

**Trafficking in Persons Protocol and Migrant Smuggling Protocol
both supplementing
the United Nations Convention against Transnational Organized Crime**





- **Smuggling of migrants (SoM) is defined as** “ 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 of which the person is not a national or a permanent resident.” (Art. 3)
- Article 6 of the Migrant Smuggling Protocol requires the criminalization of this conduct, as well as that of:
- “enabling a person to remain in a country where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means” in order to obtain a financial or other material benefit.

Art. 3 of the Trafficking Protocol defines the crime of **human trafficking** through a combination of **three constituent elements**:



- **Act:** The recruiting, transporting, transferring, harbouring or receiving a person;
- **Means:** use of force; or threat of force; or coercion; or abduction; or fraud; or deception; or abuse of power; or of a position of vulnerability; or giving or receiving of benefits
- **Purpose:** exploitation which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs




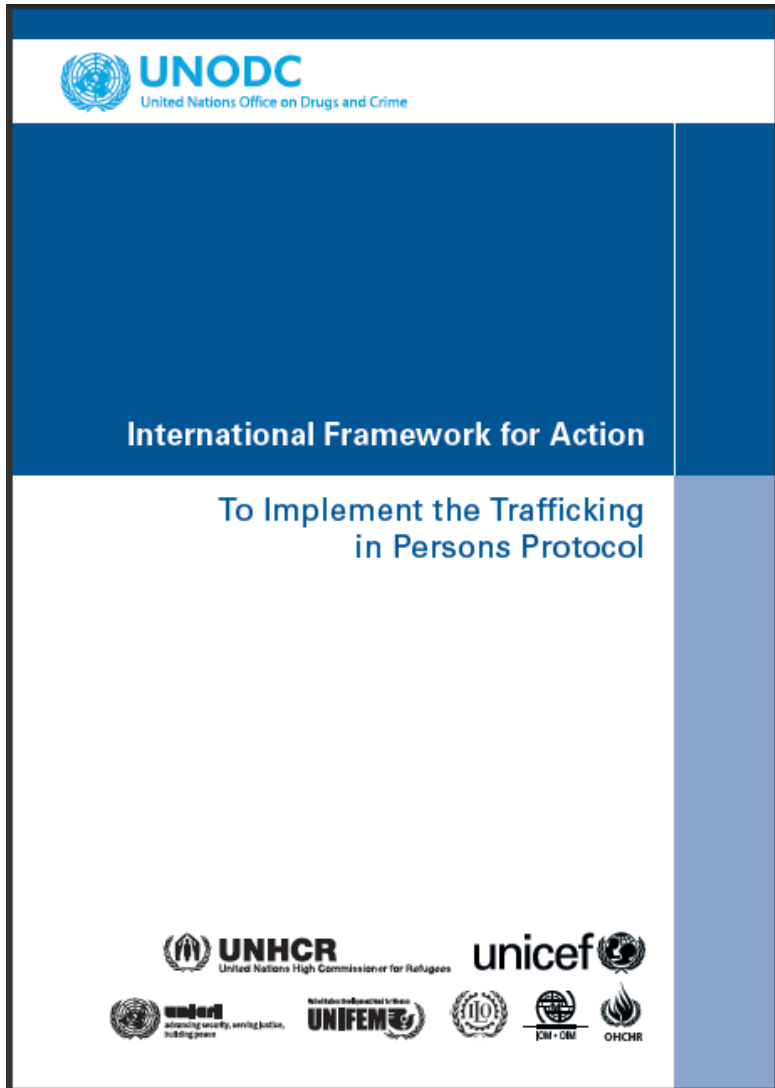
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Purpose of the presentation

 UNODC United Nations Office on Drugs and Crime		 UN.GIFT Global Initiative to Fight Human Trafficking
Model Law against Trafficking in Persons		


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Model Law against the Smuggling of Migrants		





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International Framework for Action


To Implement the Trafficking
in Persons Protocol


 **UNHCR**
United Nations High Commissioner for Refugees


 **unicef**

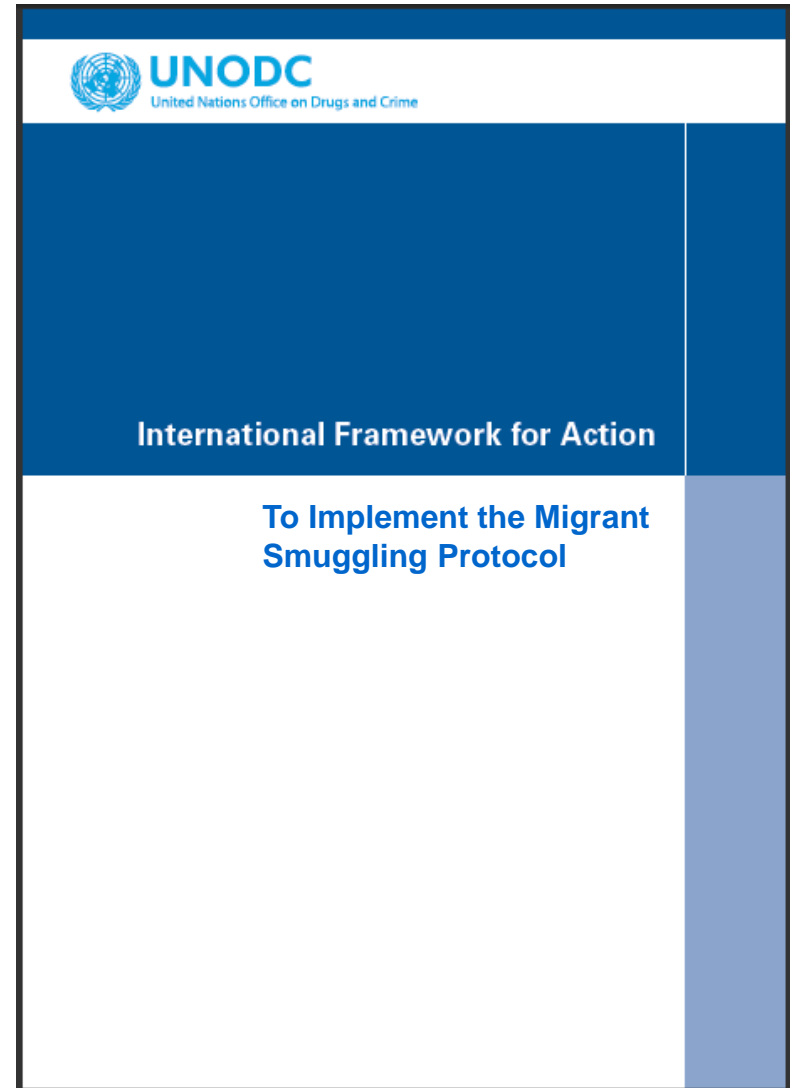
 **unwomen**
advancing security, serving justice,
building peace


 **UNIFEM**
United Nations Development Fund

 **ILO**

 **IOM**

 **OHCHR**



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International Framework for Action

To Implement the Migrant
Smuggling Protocol

Being finalized soon



UNODC Model Law against Smuggling of Migrants (SOM)– Development

- Development of Model Law on SOM follows UNODC practice in developing Model Laws
 - Informal Expert Working Group (EWG): meetings held in Vienna (March 2009), Vienna (October 2009) and Cairo (December 2009)
- Reflecting other international legal obligations: the Model Law received input from other UN agencies
- Adaptable to various legal systems: the Model Law received input from experts from various jurisdiction
- Designed to be adaptable to the needs of each State, whatever its legal tradition and social, economic, cultural and geographical conditions



UNODC Model Law on SoM - Basis

- United Nations Convention against Transnational Organized Crime (UNTOC), 2000
 - Entry into force: 29 September 2003
 - Parties: 158 (1st December 2010)
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UNTOC, 2000
 - Entry into force 24 January 2004
 - Parties: 126 (1st December 2010)
- Other international instruments; and
- Good practices from national legislation



UNODC Model Law on SoM - Purpose

- Prevent the smuggling of migrants
 - Prosecute the smugglers
 - Promote cooperation among States to this end
 - Protect the rights of smuggled migrants
- **closely follows the purpose of the SoM Protocol (Art. 2)**



UNODC Model Law on SoM – Aim

- Assist States in implementing the Protocol:
 - by transposing requirements of the Protocol into their domestic legislation;
 - By facilitating review and amendment of existing legislation and adoption of new legislation
- Ensure provision of legal assistance in a consistent way;
- Harmonize the definitions of the smuggling of migrants crime;



UNODC Model Law on SoM - Means

- The Model Law contains **all the provisions that the Protocol requires or recommends** that States introduce in their domestic legislation;
- The Model Law proposes **drafting options** that States shall pick according to their legal system and adapt
- States shall ensure that new/amended legislation is in line with their constitutional principles, the basic concepts of their legal system, their existing legal structure and their enforcement arrangements.
- They shall also ensure that definitions they use in the new/amended legislation is consistent with similar definitions used in other domestic laws.



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UNODC Model Law on SoM - Scope

Six chapters touching upon:

- Criminalization of the offence;
- Protection and assistance of smuggled migrants;
- Coordination and cooperation among/between agencies (including the creation of a national coordination committee)
- Specific issue of Cooperation on SOM at sea
- Process related to return of smuggled migrants



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UNODC Model Law on SoM - Structure

- Mandatory and optional provisions
- Several options offered to the drafter
 - to fit the requirements of the various legal systems
 - to suit drafters preferences
- Supporting commentary includes other international instruments, existing legislations and case law to guide States

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.

Example – Criminalization Art. 6 Migrant Smuggling Protocol

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.



Example – Criminalization Art. 6 Migrant Smuggling Protocol

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.

Article 6. Aggravating circumstances

Commentary

Under article 6, paragraph 3 (a) and (b), of the Protocol, States parties are required to ensure that the following circumstances are circumstances of aggravation: circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned; and circumstances that entail inhuman or degrading treatment, including for exploitation, of such migrants.

There are a variety of drafting options that might be used to comply with this obligation. For example, in some contexts it may be appropriate to refer to “factors to be taken into account in sentencing” rather than “aggravating circumstances.” In other contexts, it may be appropriate to establish “aggravated offenses.” The

1) Introductory commentary



Example – Aggravating circumstances Art. 6 Model Law Provisions

If any of the following circumstances are present, the offences under this chapter shall be punishable by [*insert penalty greater than that for core offences*]:

(a) The offence involved circumstances that endangered or were likely to endanger the life or safety of the smuggled migrant;

Commentary

Mandatory

Source: Smuggling of Migrants Protocol, article 6, paragraph 3 (a).

Unfortunately, there are numerous examples of smuggled migrants having been subjected to danger in the smuggling process. This includes, for example, instances of migrants being transported in unseaworthy vessels where there was a risk of death by drowning, in sealed containers (such as shipping containers and lorries) where there was insufficient oxygen or the migrants were exposed

2) Concrete drafting proposals

3) Specific commentary to drafting proposal



Example – Aggravating circumstances Art. 6 Model Law Provisions

Example 4

5. If one of the offences described in the first and third paragraphs results in severe bodily injuries or it is feared that a person's life may be in jeopardy, a penal sentence of a maximum of 12 years or a pecuniary penalty of the fifth category will be awarded.

6. If one of the offences described in the first and third paragraphs results in death, a penal sentence of a maximum of 15 years and a pecuniary penalty of the fifth category will be awarded.

(Criminal Code, article 197a, Smuggling of Human Beings, Netherlands.)

4) Concrete examples

(h) The offence involved [a large number of] smuggled migrants;

Commentary

Subparagraph *(h)* is optional.

Depending on local conditions, it may be relevant to consider adding a circumstance of aggravation for offences involving large groups or large numbers of smuggled migrants. Offences that involve smuggling a large number of migrants may result in a heavier burden on the receiving State, and such offences may provide a greater profit for offenders. Some States, such as the United Kingdom, have sought to differentiate between situations where the

5) Optional drafting proposals

Basic offences: Option C

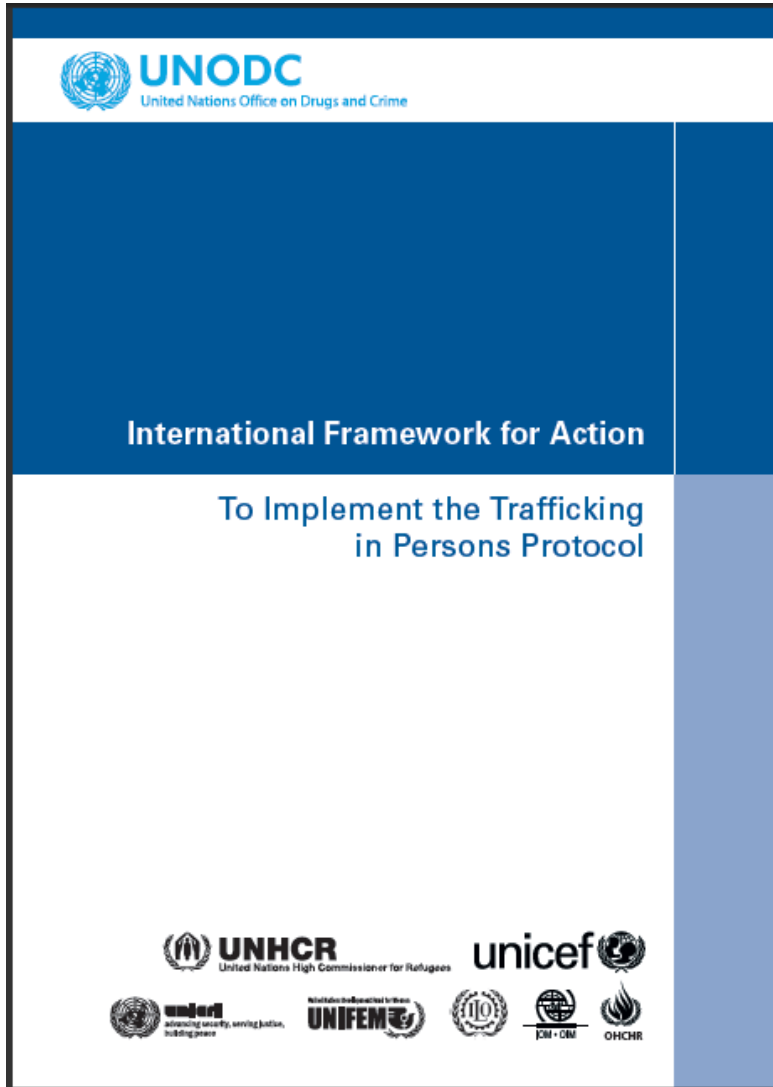
Commentary


This option combines all the elements of article 6 of the Protocol into one omnibus offence provision. Prosecutors would need to specify the conduct to be charged on any charge sheet or indictment. The omnibus approach may have practical advantages:

Article 5.1. Offences in relation to smuggling of migrants

1. Any person who, in order to obtain directly or indirectly a financial or other material benefit, intentionally engages in conduct for the purpose of [facilitating or] enabling a person who is not a national or a permanent resident of [name of State] or of a Protocol State to enter, transit across or be in that State in breach of immigration law, commits an offence.


6) Alternative options for drafting proposals





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International Framework for Action


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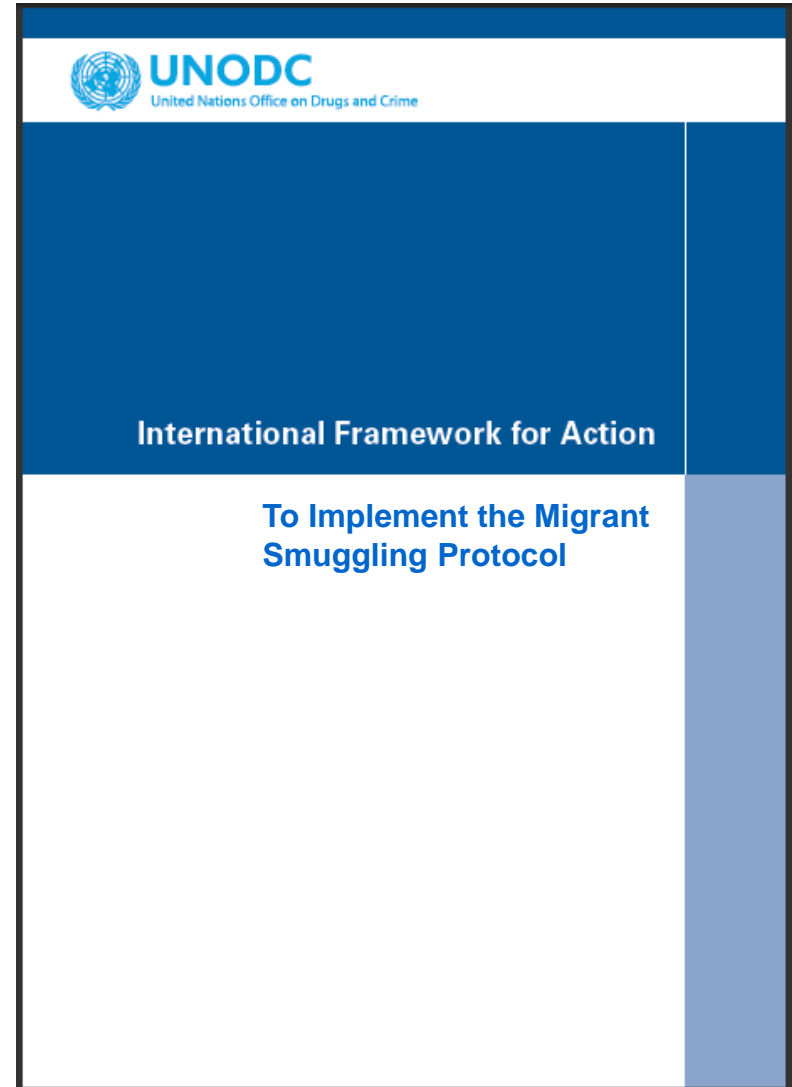
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advancing security, serving justice,
building peace


 **UNIFEM**
United Nations Development Fund

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 **ICM - CIM**

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International Framework for Action

To Implement the Migrant
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Being finalized soon



What are the Frameworks for Action and Who is it for?

- Technical assistance tool to facilitate implementation of the Migrant Smuggling and Trafficking in Persons Protocols
- To assist Member States to identify and address gaps in their response to migrant smuggling and human trafficking, and against international standards
- To provide indicators to monitor and evaluate
- To assist non-state actors to align their work in respect of these Protocols

Why elaborate the Framework for Action on Migrant Smuggling?

- High ratification but low implementation
- Main cross-cutting challenges
 - Insufficient prevention and awareness
 - Lack of data and research
 - Lack of legislation
 - Inadequate policies
 - Weak criminal justice system response
 - Inadequate protection and support
 - Limited International cooperation

Why elaborate the Framework for Action on Human Trafficking?

- Trafficking in Persons Protocol entered into force December 2003
- 142 States Parties
- Majority of States have implemented at least minimal legislation
- However, effective implementation needs to be strengthened
- Low conviction rates

Structure of the Framework for Action

- **Narrative** elaborates principles and provides commentary
- **Tables**
 - Prosecution
 - Protection
 - Prevention
 - Cooperation
- **Annexes**
 - Resources to support each table

Structure of the Tables

- The **protocol requirements** list the provisions set out in the UN Trafficking Protocol
- The **specific objectives** describe the intent of the provisions
- The **framework indicators** reflect the minimum standards required for the implementation of the Protocol provisions
- The **implementation measures** specify recommended actions to achieve effective implementation
- The **operational indicators** help monitor change over time

TABLE 1. PROSECUTION

PROTOCOL REQUIREMENTS	SPECIFIC OBJECTIVES	FRAMEWORK INDICATORS (Minimum standard)	IMPLEMENTATION MEASURES	OPERATIONAL INDICATORS	RESOURCES
<p>Definition and criminalization of trafficking in persons and related crimes</p>	<p>Ensure common norms in all member states</p> <hr/> <p>Ensure appropriate criminal justice response and legal framework</p> <hr/> <p>Facilitate international cooperation</p>	<p>Ratification or accession to TOCC AND TIPP</p> <hr/> <p>Comprehensive national legal framework on trafficking in persons in place</p> <hr/> <p>Relevant institutional framework dedicated to trafficking in persons in place</p>	<p>Analyse and assess existing legislation and needs in relation to the TOCC and TIPP</p> <hr/> <p>Adopt appropriate legislation and regulations</p> <hr/> <p>Establish specialized police units and judicial structures</p>	<p>Evidence of implementation of comprehensive legislation in line with international standards by practitioners</p> <hr/> <p>Number of investigations and prosecutions carried out in line with international standards</p> <hr/> <p>Number of specialized units established</p> <hr/> <p>Number of specialized criminal justice practitioners</p> <hr/> <p>Committed budget allocation</p>	<p>UNODC Toolkit to Combat Trafficking in Persons, 2008 (chapter 1, 2, 3 and 4)</p> <p>UNODC, Assessment Toolkit on the Criminal Justice Response to Human Trafficking (to be published)</p> <p>ILO, Human trafficking and forced labour exploitation, Guidelines for legislation and law enforcement, Special action programme to combat forced labour, 2005</p> <p>DAW/DESA, Handbook for legislation on violence against women, 2009</p> <p>ILO, Combating trafficking in children for labour exploitation: A resource kit for policy-makers and practitioners, 2008 (book 1 and 2 in particular tool 2.17)</p> <p>CoE, The Council of Europe Convention on Action against Trafficking in Human Beings. Handbook for parliamentarians, 2007</p>



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All UNODC publications on migrant smuggling and human trafficking are available at:

<http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuseide>



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Thank you!

Questions?

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