

2

**WORKING
PAPERS ON
MIGRATION**

RECOMMENDATIONS FOR STRENGTHENING

THE REGIONAL STRATEGY AGAINST THE
SMUGGLING OF MIGRANTS AND
TRAFFICKING IN PERSONS



International Organization for Migration (IOM)

The UN Migration Agency

Recommendations for the strengthening of the regional strategy against migrant smuggling and trafficking in persons.

This document is the result of a collective effort of a team of collaborators and the editorial team.

The International Organization for Migration is the leading intergovernmental organization in the field of migration and is committed to the principle that humane and orderly migration benefits migrants and society. IOM works with its partners in the international community to assist in meeting the growing operational challenges of migration, advance understanding of migration issues, encourage social and economic development through migration and uphold the well-being and human rights of migrants.

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Presentation

This document represents an effort made by the International Organisation for Migration (IOM) to introduce tools for public policy makers as well as those responsible for programs addressing people smuggling and trafficking in persons. The IOM, in its role as the United Nations organization for migration, works in coordination with its partners and the international community to ensure the respect of human equality and the well-being of migrants.

IOM's interest in governing migratory flows involves, among other things, preventing and fighting migrant smuggling of migrants and trafficking in persons; promoting the development of legislation and effort synergies among regional governments.

In the region, the IOM has focused its efforts related to migrant smuggling on supporting states to develop procedures and processes that would allow public order agencies to more efficiently identify migrant smugglers under the scope of following fundamental pillars:

- Providing protection and assistance to migrants victims of smuggling
- Addressing the causes of migrant smuggling.
- Supporting states' capabilities to eradicate the activities of migrant smugglers.
- Promote research and the collection of data on migrant smuggling.

Further, on the issue of human trafficking, the IOM stands by the argument that trafficking must be addressed within the overall context of migration management, therefore, the recommendations developed in this document are based on the three principles that govern all activities meant to combat trafficking in persons:

- The respect for human rights
- The physical, mental and social well-being of the individual and his/her community
- Sustainability through the institutional strengthening of governments and the civil society

This document provides a series of recommendations for public policy makers and those responsible for programs aimed at the prevention, investigation and sanction of the crime of migrant smuggling and trafficking in persons.

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Conferencia Regional sobre Migración
Regional Conference on Migration

Recommendations for the strengthening of the regional strategy against migrant smuggling and trafficking in persons.

Acronyms and abbreviations

SoM	Smuggling of migrants
TiP	Trafficking in Persons
MSS	Migrant subject to smuggling
PTIM	Protocol against the smuggling of migrants by land, sea and air
PPSPT	Protocol to prevent, suppress and punish trafficking in persons, especially women and children
CTOC	Convention against Transnational Organized Crime
PC	Penal Code

I. Smuggling in Migrants

I. Introduction

Historically, human beings have moved from one place to another in search of better living conditions for their family or social groups. This exchange has favoured the cultural and economic development of different regions of the world. From that perspective, migration and development are concepts that are closely linked. On the other hand, the right to freedom of migration arises from two fundamental principles that are expressly protected by the international humanitarian law, the freedom of choice and the freedom of transit or movement. The causes of migration vary over a large range. Experts highlight the three main factors, namely, impulse, expulsion and attraction. People may be motivated to migrate for an improvement of their general living conditions, as a response to their personal interests and for that purpose they choose a destination country where they can fulfil these objectives or, they may be expelled from their place of birth or residence either by some unforeseen circumstances or due to a much greater force, such as: natural catastrophes, war, epidemics, schisms in the economy or in politics, etc..

In principle, the right to migrate has been limited, although not impeded, by the system of society we have chosen. The division of the world into independent states sought the emergence of two inherent principles: sovereignty and territoriality. The first determines the autonomy and the second, the division of territory or material space that in turn derives the concept of boundary or border. The independent states are generally aimed at creating a series of regulations to protect their territories, resources, way of life, customs and development. These regulations are reflected in the so-called state migration policy that determines the valuation parameters for the entry and stay of people in a given territory. Relating these concepts to the principle of migratory freedom, it can be interpreted that any person can migrate to a country other than that of his/her birth or permanent residence if and only if it complies with all the regulations of entry and stay in the destination country. These regulations are determined by two main instruments, namely: the international instruments on the subject ratified by the receiving state; and its internal regulations.

The entrance / exit and / or residence regulations are varied and pertain exclusively to the principles of the best interest of the State and its protection.

The application of the two principles creates both, a series of shields and avenues that allow, regulate or prevent the migration of certain individuals or groups of people. For example, the use of visas, permits and other regulations in labour and academic matters, among others; and the application of the factors for rejection and deportation. This is where irregular migration becomes evident. People who want to travel and / or stay in a particular country, but do not meet or cannot meet the necessary entry or residence requirements often incur on themselves an irregular immigration status. Thus, to summarize, faced with the dilemma or urgent need to migrate to a certain predetermined place of destination where it is not possible to enter or stay legally, migrants use two routes of action: irregular migration on their own, wherein they take the personal risk of traveling through different countries until they reach the entry points where they use unregulated means to enter a specific country, or they contact migrant traffickers who, for a price, carry out a series of illegal actions with the purpose that the migrant obtains the entrance to and exit from the countries of transit and the entrance and residence in the country of destination. Historically, a trafficker has been considered as a guide to transit through long and intricate routes, countries or regions and is referred and understood as the "coyote", "cuervo" or pollero and "one who offers or facilitates the service of transportation, entry, exit or irregular stay to the migrants for a price. "

On the other hand, and from the perspective of transnational organized crime, the smuggling of migrants has become a lucrative business which, according to the United Nations Office on Drugs and Crime (UNODC), generates an estimated 6,000 millions of dollars per year (\$ 6 trillion USD per year) with continental and extracontinental migratory flows that are constantly increasing despite the dangers these criminal activities bring to the life and integrity of the irregular migrants. Currently,

the system of the smuggling of migrants uses the structure of “criminal corporations” with members and contacts at the local and international level. The so-called “coyotes” once operating individually, are now “incorporated” irrespective of their desire to be part of the great international network. Similarly, this new guardianship of organized crime on the smuggling of migrants facilitates the “use” of irregular migrants for other criminal purposes such as kidnapping, extortion, drug trafficking and trafficking in persons. Coupled with this and other aspects, mainly related to the economic order, human displacement has increased in the last decades. In reality, irregular migration increases or decreases according to the political, economic and social dynamics at the local or global level. The traffickers take advantage of this circumstance to obtain an economic benefit without being concerned about the welfare of the migrant, even if many migrants die on the road. Irregular migration coupled with transnational organized crime increases the invisibility of the crime because it breaches the traditional system of “coyotaje” that had a definite origin and a destination of migration. Many migrants are now forced to take a new destination on the road. Recent cases of massive migrations from Asian and African countries to Europe and the Americas in the last decade (2006 to 2016) have led to an exponential increase in the illegal network of migrant smuggling due to the profits gained with the smuggling of the migrants and the multiple “uses” derived from the migration in a situation of extreme vulnerability.

Fortunately, the international community is well aware of the problem. Countries have developed their plans and methods to encounter the criminality of this criminal modality and have taken seriously the development of the smuggling of migrants as an international crime controlled by the organized crime. All that the international community needs at this time, is to establish

actions that are realistic, effective, comprehensive and from a less reactive perspective. The Palermo Protocol against the Smuggling of Migrants is an important reference point, as is the Model Law against the Smuggling of Migrants, designed by the UN on the basis of its content. A very sensitive type of crime, involving human beings as the subject of smuggling, calls for an in-depth study while developing legislation, provisions on protection, assistance to migrants and preventive policies, all in accordance with an aim to strengthen and respect fundamental human rights.

The region of the Regional Conference on Migration (comprised of Canada, the United States of America, the United Mexican States, Guatemala, Belize, Honduras, El Salvador, Nicaragua, Costa Rica, Panama and the Dominican Republic), forms one of the most exploited routes for irregular migration to the United States and Canada. This “migratory corridor” has been populated by migrant smuggling networks that both locally and internationally carry out a coordinated activity for the smuggling of regional, continental and extra-continental migrants from their countries of origin, which are currently extended to African and Asian countries, to their final destination. This involves setting up an entire infrastructure of contacts, means of transport, places of concealment, fraudulent documentation and logistical means throughout the route and of course, fine-tuning the mechanisms of corruption. Faced with the build up, diversity and complexity of this criminal modality, state agencies were led to develop a series of preventive and criminal prosecution measures and establish concrete actions that specially focused on the migratory groups detected in their territories. As a next step, analysis groups have been set up at the inter-institutional and regional levels to establish a more consistent structural, normative and operational framework that regulates the activities of traffickers.

2. Human development:¹

The Protocol against the Smuggling of Migrants by Land, Sea and Air, which complements the Convention against Transnational Organized Crime, stipulates in Article 15:

"Art. 15. Other prevention measures (...)

*Each State Party shall promote or strengthen, as appropriate, **development programs and cooperation at the national, regional and international levels**, taking into account the socioeconomic realities of migration and paying particular attention to economically and socially deprived areas, in order to combat the fundamental socioeconomic causes of the smuggling of migrants, such as poverty and underdevelopment. "*

(The above statement is not from the original)

According to the above statement, each State ratifying the aforementioned Protocol undertakes to promote or strengthen measures to promote the human development of its citizens or residents in order to reduce the smuggling of migrants. That is, to reduce the demand of the illicit services of traffickers. For a more concrete analysis, we must start from the fact that the irregular migratory movements assisted by traffic networks are born of the desire of the inhabitants of a country of origin to travel to a destination country where they will not be able to enter legally due to various reasons. This is due to the so-called "impulse factors" that motivate the migrants at the individual level to travel to another country where he or she has to enter irregularly or "expulsion factors" when the migrant or group of migrants need to be displaced for reasons related to their personal safety and that of their relatives. In this second scenario, we can speak of a "state of necessity" that determines the obligation of displacement without another solution in the short or medium term. From this perspective and in line with the lessons learned during the last decades, the possible lines of action of the State should be oriented towards the following:

1. Carry out a **national level "mapping" exercise of the causes of irregular migration facilitated by traffickers**, one of the main sources being the interview of migrants who are detected leaving the country in these circumstances or returned by other countries under the same condition. In these types of interviews, the questions that are addressed to the migrant should include the time period when he/ she left, who took him/her and where he/she was going. Likewise, as they are very similar elements, the interviews should be established in a format that can be used in all the countries of the region. This type of diagnosis, based on their *life experience*, together with the data obtained from population indexes, range of educational and employment opportunities, among others, allows to determine if people travel irregularly with the support of traffickers by *factor of personal impulse* so as to obtain better living conditions or being integrated with their families or friends who are already in the destination country, among others, or by *factors of expulsion* that are produced by the manifestation of various forms of violence or natural disasters that oblige them to move in a forced manner.
2. The information obtained from above diagnosis can be oriented to the **design of profiles**, specifically: a "*migrant profile*" (who migrates?) and a "*vulnerability profile*" (why migrate?). These profiles can facilitate decision making and taking concrete actions by the State to reduce trafficker led irregular migration.

¹ **United Nations Development Program (UNDP):** <http://desarrollohumano.org.gt/desarrollo-humano/concepto/>

"Human Development is a development paradigm that is about much more than the rise and fall of national incomes. It is about creating an environment in which people can develop their full potential and lead productive, creative lives in accordance with their needs and interests. People are the real wealth of nations. Development is thus about expanding the choices people have to lead lives that they value. It is much more than economic growth, which is only a means of enlarging people's choices."

3. Disclosure of information:

In relation to the above theme, the Protocol against the Smuggling of Migrants by Land, Sea and Air refers:

"Article 15. Other prevention measures

1. Each State Party shall take measures to ensure that information programs are implemented or reinforce existing ones in order to make the public aware of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity which is frequently carried out by the criminal groups organized for profit and which pose serious risks for affected migrants.

2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information in order to prevent potential migrants from becoming victims of organized criminal groups. "

(The above statement is not from the original)

Parallel to the actions that States can take to promote the human development of their citizens and residents (see point i.a), it is fundamental to consider the application of information programs aimed at reducing the supply and demand of the services provided for the smuggling of migrants. Specifically:

1. Design or improve **permanent and differentiated programs of information** that alert the population about the dangers of irregular migration, especially those that are carried out under the umbrella of criminal networks. The community at large should receive a clear and direct message, taking into account their age, sex, place of residence, culture, educational level, etc.
2. Design or improve **an information program** that informs the irregularly migrating population, **why they should stay**. That is, what are the advantages of staying in the country. For this purpose, the migrant and vulnerability profiles obtained in situational mappings at the internal level must be taken as a basis (See point i.b).
3. Establish a program that uses the most used **cybernetic means** to disseminate information, especially at the cellular telephones level. This includes disseminating telephone numbers for inquiry or reporting.

4. Training:

With regard to the presence of criminal activity in the smuggling of migrants, specialized training related to a comprehensive approach to crime must be designed for civil servants and other civilian actors such as, police and immigration officials, criminal justice operators and officials in international cooperation. The training must be with regard to the investigation and prosecution of trafficking and must be imparted to entities and institutions that have some level of participation in the care and protection of trafficked migrants. It would be worthwhile to add to the list of the above designated persons, officials (both in public and private sector), civil society and the general public so as to inform and instruct them about the approaches and strategies that have been designed to curb migrant smuggling, through direct and personal communication.

The Anti-Trafficking Protocol refers to this type of commitment by the signatory States to take up the challenge of structured training in this area:

"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 or reinforce such training, as appropriate.*
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, inter alia: (...) "*

(The above statement is not from the original)

From this perspective, the experience and best practices have indicated the importance of having:

1. A **program that is structured (with thematic objectives and information differentiated according to the target population), permanent (included in the curriculum of academic institutions such as schools, colleges and centres of higher learning)** and designed to impart training to concerned public official in the prevention and prosecution of crime, care and protection of trafficked migrants. These programs have usually been carried out with the support of international organizations based on their regional cooperation projects and have occasionally been included in training manuals of police and prosecutors. The objective of the proposal is to suggest having programs that are permanent and form a part of the professional training process of criminal justice operators; as well as, form a structural part in the formation of communal leaders.
2. A **program oriented towards the training of trainers** such as, teachers, community leaders and other institutional or civil actors who can provide useful and up-to-date information to the population about smuggling of migrants in order to reduce the demand of the services of traffickers for irregular migration. One can take advantage of the lessons learned from the programs aimed towards preventing the use of illicit drugs.
3. In these **training programs**, it is important to **explore new methodologies and new technologies**, for example, learnings that reduces or eliminates the conventional techniques and the use of "*Mobile learning*" (virtual courses by cell phone or tablet)

5. Identification of possible cases of SoM

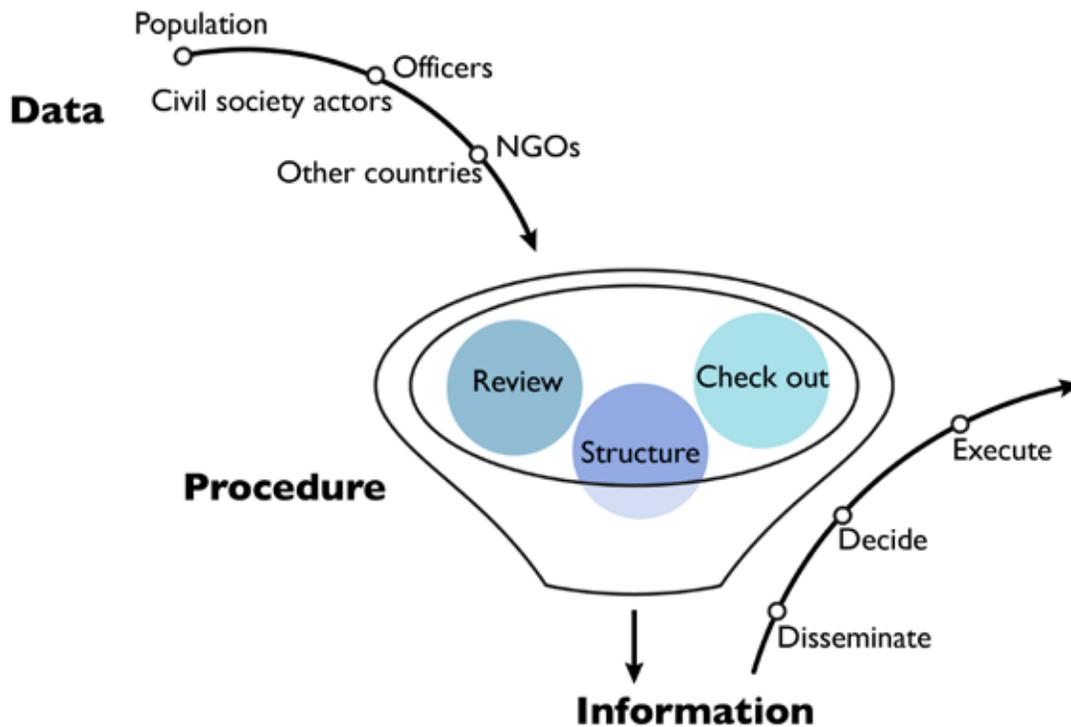
Regarding this theme, the anti-trafficking protocol, mentioned above, makes the following reference, among other provisions aimed at identifying altered identity and travel documents or identity theft and suspicious means of transport, with an emphasis on transport by boats. (Art. 10.1.dyf, Article 11, paragraphs 2 to 6, Art. 12, Art. 14.2.d):

"Article 11. Border measures

1. Without prejudice to international commitments relating to the free movement of persons, States Parties shall, as far as possible, strengthen border controls necessary to prevent and detect smuggling of migrants. "

(The above statement is not from the original)

The means of detecting the smuggling of migrants, as well as other acts of organized crime, come from the application of measures based on *criminal intelligence techniques and specific objectives*, as established in Article 10 of the Protocol that specifies a series of important aspects that must be known to the authorities while formulating plans or operational actions to investigate and prosecute trafficking (such as, places of loading and unloading, modus operandi, types of altered documents, places of concealment, means of transport employed, among others). Without such information, a defense strategy against the smuggling of migrants can hardly be considered, let alone take concrete positions regarding the distribution and location of structural, human, technical or logistical resources that have a positive effect on the detection of criminal activities associated with this crime.



The Criminal intelligence plays a key role in detecting the smuggling of migrants and is based on techniques and instruments that have already been proven successful in tackling other forms of crime such as illicit drug trafficking and human trafficking. As shown in the above chart, the primary data received by the authorities from various sources are subjected to a process of verification, analysis and structural design so that it is eventually disseminated to end users (decision makers) who then decide the most effective actions. In the absence such of an intelligence process, both the police and the prosecutors become "reactive" organisms that are dedicated to "putting out the fire", or in other words, are dedicated to investigating or prosecute criminal actions that are detected by accident and /or by random inspections at the border or highway areas. This process, in itself exhausting, limits the activity of police forces and criminal prosecution and promotes the rapid expansion of criminal networks that in some sense have "free way" in the absence of duly established detection mechanisms.

In 2015, the European Union adopted an Action Plan² which included a series of measures to combat the smuggling of migrants. Among these, were actions aimed at crime prevention through mechanisms of “*identification of objectives*”. In other words, the determination of possible smuggling scenarios by using tactical intelligence and consequently determination of the human, technical and logistical resources for their detection and identification. The most important part of the content of this Action Plan is that the proposed actions are more regional rather than local. Although, as far as the European Union is concerned, the approach applies to the countries constituting the E.U, it is also possible to extend this approach for accomplishing the purposes of the countries constituting the Regional Conference on Migration (RCM). The measure taken to deal with the smuggling of migrants should bring together all the countries that are part of the RCM, on the basis of two premises: 1. That all the countries are directly aligned with the migration route towards the United States, (including the Dominican Republic) for both continental and transcontinental migratory flows. 2. That the smuggling of migrants has been active in each of the countries that make up the RCM.

Each country has refined the intelligence processes to learn more about criminal activity in their territories and joint operations have been organized to handle specific cases. Nevertheless, it seems important to create or improve a permanent regional platform with combined resources to obtain updated information in “real time” a share it with the entire region. For this purpose, it is recommended:

- a) Create **a Regional Action Plan against the smuggling of migrants** incorporating targeted detection tools. This means allocating human, technical and logistical resources to obtain data related to the activity of the smuggling networks and submitting them to the intelligence process to produce useful and reliable information that allows authorities to take decisions about the positions and actions of the police forces and criminal investigation units to initiate the corresponding investigations on “*subjects of interest*” located in the different functions and the ranks of the criminal grouping. This includes, the disclosure of the funding sources of these criminal groups used either to fund their illicit transportation or to save or invest their profits. For this purpose, the objectives proposed in Article 14.2.c of the Protocol against the Smuggling of Migrants by Sea and Air:

“Article 14:

(...)

2.

(...)

(b) The compilation of information procured from criminal intelligence, particularly with respect to the identification of organized criminal groups involved or suspected of being involved in the conduct set forth in article 6 of this Protocol, the methods used to transport migrants subjected to smuggling, the misuse of travel or identity documents for the purposes of the conduct enunciated in article 6 and the means of concealment used in the smuggling of migrants; “

(The above statement is not from the original)

Similarly, the use of **strategic and tactical** mapping is recommended as a reliable tool for collecting information at the national or regional level about the activities of migrant smuggling networks.

- b) The **design and use of profiles** that not only identify possible irregular migrants who are trafficked and the traffickers who are part of criminal networks, but also the suspicious locations, routes, documents and means of transport used for smuggling.
- c) **Create / improve an Early Warning System that incorporates online, relevant information about “subjects of interest” in the region, namely: traffickers, organizations, modus operandi, altered identity or travel documents, suspicious means of transportation or other important events that facilitate the anticipation of events related to the smuggling of migrants. For example, expulsion factors that have led to irregular migratory movements in other countries may affect the region and / or reports of authorities in other countries, thereby warning the mobilization of traffickers or irregular migrants towards one of the countries of the RCM. Of course, the implementation of such systems requires coordination with other countries and / or Interpol, Europol, etc.**
- d) Assessing the costs and other necessary aspects, it is important to exploit the use of **technological means of detection**, both fixed and mobile, taking advantage of the experience of countries that have used them and are acquainted with their capabilities, benefits and limitations.

² European Commission. “Global action to prevent and address trafficking in persons and the smuggling of migrants”, Brussels, 2015. https://www.google.co.cr/?gws_rd=ssl#q=action+plan+against+trafficking+in+persons+2015+bruselas

6. Organizational aspects:

Local and regional bodies are required to coordinate and implement the initiatives for the creation, improvement and implementation of policies, plans and concrete actions for combating the smuggling of migrants. For the past five years or so, there has been an increase in the activities of the criminal groups engaged in the smuggling of migrants. Apparently, secretariats, coalitions and committees created to address the crime of trafficking in persons in the region have often assumed the issues of migrant smuggling and human trafficking to be “associated” or related crimes. The same has been assumed by the prosecutors and police units that were originally created to combat trafficking. Although both crimes have certain degrees of similarities due to their relationship with irregular migration and exploitation; the approaches, prevention, prosecution, as well as measures required to care for and protect trafficked migrants are very different from those of smuggled migrants. At the same time, migrant smuggling presents a series of challenges that human trafficking does not encompass or approaches them in a different way. If we start from the premise that trafficking is the exploitation of people while smuggling is transporting them for a price, we can determine the subsequent differences between the two. Consequently, it is recommended:

1. Create / restructure ***differentiated internal agencies*** between the units of trafficking in persons and smuggling of migrants and that are in charge of the steering and coordination of entities related to both themes in each country and / or separate commissions within the same agency in charge of both, trafficking and smuggling of migrants. Thus, the criminal-humanitarian policy that generates a series of actions to address these crimes determines the areas of difference and coincidence in its execution.
2. o create / restructure ***police and prosecutorial units***, specialized in addressing trafficking in persons and smuggling of migrants in such a way that human, technical and logistical resources are allocated to the care of both offences, as well as to the training of the assigned officials. Especially in countries of high incidence, differentiation and specialization can bring greater effectiveness in the rate of investigations, prosecutions and convictions.
3. Create ***a Standing Committee against Smuggling of Migrants at the regional level*** to coordinate regional efforts in tackling this crime and to make proposals on harmonization of standards and procedures based on best practices and the proposals submitted by the different countries in the region. In addition, facilitate the exchange of information, international crime cooperation and the care and protection of migrants among the countries. This commission could be integrated into the RCM.
4. As established by the Points 5.2 and 5.4 of the guidelines of the aforementioned coalition, ***request the Presidency of the Regional Coalition against Trafficking in Persons and Migrant Smuggling*** to include in RCM, the representatives of related agencies in the United States and Canada, as invitees and / or regional observers. The same representatives of these countries can also be nominated in the RCM. In this way, the entire region related to the irregular migration routes will be adequately represented by a regional body (RCM) that is already well established and is fully functional. Mexico and Belize were already integrated into RCM by the aforementioned “Guidelines for action”, through the agreements of the XVI Vice-Ministerial Meeting of the RCM wherein the articulation of the Regional Coalition was approved. However, they are not yet part of the Memorandum of Understanding signed by the countries of Central America and the Dominican Republic on trafficking in persons.

7. Normative:

A. Concept

Although difficult to believe, one of the most important aspects of defining the standards to combat smuggling of migrants is the correct and the consensual determination of the concept of smuggling, in other words, what is smuggling of migrants? According to the Protocol against the Smuggling of Migrants by Land, Sea and Air, the concept of smuggling consists of:

"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; (...)"

(The above statement is not from the original)

However, as indicated in the subsequent articles of the same protocol, the smuggling of migrants is associated with a series of actions that culminate in the facilitation of "illegal entry" of the migrant into a State without complying with the legal requirements established for that effect. These behaviours are part of the dynamics of smuggling and relate to: facilitating transportation, irregular stay, use of altered identity and travel documents or using documents of another holder, which are also covered by Article 6 of that document. In addition, more recently, in the operational reality of criminal networks, there have been other behaviours associated with smuggling, for example, "promotion" where traffickers flock to villages, towns and cities to offer the advantages of a destination land such as, a better condition of living, work, etc. However, without losing sight of the definition of Article 3, mention should be made of the new forms of smuggling that are based on long journeys between the country of origin and destination in which migrants pass through different countries (transit), often with all the legal documents, thereby fulfilling all the established immigration standards. This implies that if we were simply to adhere to the definition, the traffickers would be engaging in smuggling of migrants only when they facilitate the the migrants irregular entry into the destination country and thus could be prosecuted in that country alone. Hence, the new typifications of the crime have resorted to what is established in Article 6.1.b of the protocol, namely:

"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:(...)"

(The above statement is not from the original)

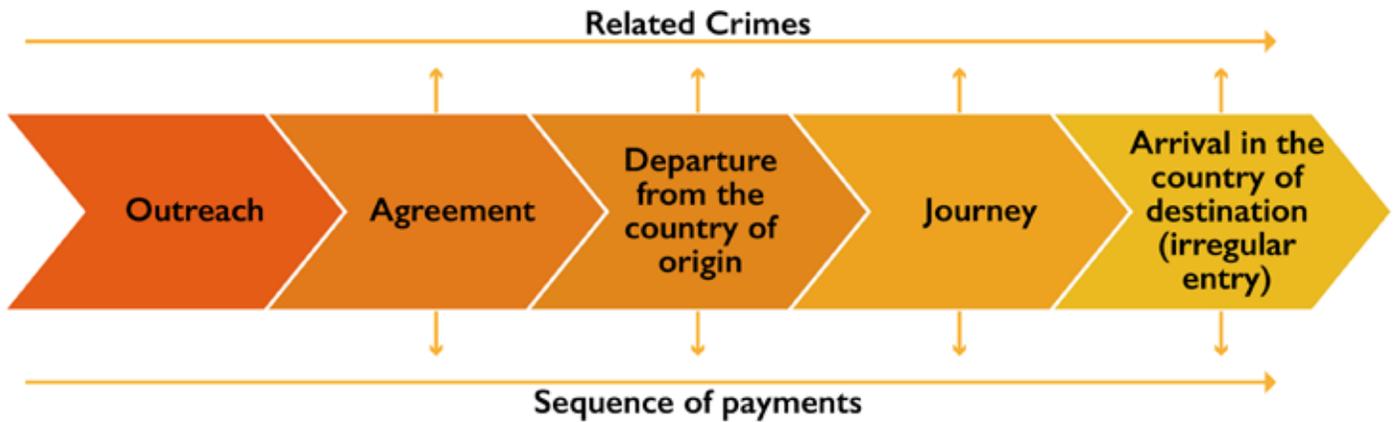
From this analytical perspective, acts carried out with the purpose of smuggling of the migrants constitute trafficking and can therefore be penalized. Thus, if a group of migrants travel through a specific country with legitimate documents and in compliance with all the legally established immigration requirements, but with the help of a trafficker, and if the domestic legislation so provides, the trafficker may be prosecuted for the offence of smuggling of migrants.

Most importantly, this new conception of trafficking is part of a regional consensus and the individual country's legislation must be aligned with that vision.

Similarly, as part of the conceptual approach to the smuggling of migrants, there has been a gradual shift in the primary conception of smuggling as a crime that damages only the sovereignty of the State. In recent years, some countries in the region have included criminal smuggling of migrants as a crime against human rights in the corresponding chapter of the Criminal Code (El Salvador³) or in specialized laws, as in Panama⁴. This new conception provides the lawmakers with the possibility of redimensioning the crime in terms of penalty, prescription, among other essential regulatory aspects. Note that the legal right protected in this particular case, fixes or determines the moment of consummation of the crime. If we define it as a matter of "sovereignty of the State", smuggling is accomplished at the time when the trafficker facilitates the illegal or irregular entry of the migrant into a particular country. On the contrary, if the legally protected entity is "human dignity" or "human rights of the migrant," the offence is consummated at a time when the legal entity is endangered or concretely affected and this can occur at any of the phases of the smuggling.

³ El Salvador. Criminal Code. Title XIX : "Crimes against humanity"

⁴ Law N. 36 on trafficking in persons and related activities adopted on 24 May 2013, and published in the Official Gazette 27295, on 27 May 2013.



By all means, smuggling of migrants is a crime that affects people, since, as has been shown in multiple criminal investigations throughout the world, traffickers do not regard migrants as "clients", but as disposable objects who can be abandoned or eliminated depending on the circumstances. Thus, the conditions in which the migrant travel or stay is irrelevant as long as the traffickers are obtaining a profit. Therefore, it is recommended:

Establish a *concept and an approach that is unique to smuggling of migrants* for all countries in the region to facilitate the harmonization of regulations and joint operational actions.

B. Policy development

On legislative issues, we have understood that smuggling of migrants is a complex crime that has been subjected to manifold changes, especially since it became one of the principal elements of organized crime. Therefore, its definition has not been simple and has required an in-depth analysis of typical behaviours and, in particular, the overcoming of the retribution barriers in order to ensure greater space to manoeuvre in its criminal prosecutions. Hence, in some countries, migrant smuggling has become a *crime of danger*⁵ rather than the conventional, *crime of result*⁶. Recent initiatives aim at the harmonization of the terminology in different regions of the continent, that is, the adoption of a single penal code, which contemplates the same behaviours and possibly the same penalties.

Likewise, the creation of specialized legislation on the smuggling of migrants, based on the Model⁷ Law created by the United Nations and / or a regional consensus instrument, has been proposed. The reason for creating a specialized law on the smuggling of migrants, lies in the multiple administrative, procedural and migratory processes and provisions that require the prevention and prosecution of the crime, as well as national coordinations and mechanisms for international criminal cooperation, and the service platforms for the care and protection of smuggled migrants.

In addition, regulatory provisions have been fine-tuned to include the smuggling of migrants as an organized crime and thus obtain the procedural benefits of this criminal modality and, as with other similar crimes, greater attention has been paid to the figures of early testimonial evidences (the proof advances), effective collaboration and redressals of the grievance caused.

Based on the above, it is recommended.

1. Support and continue the process of harmonizing the regulations for creating a *unique penal code* that is based on new behaviours and approaches on smuggling of migrants.
2. Analyze the possibility of creating *specialized laws on smuggling of migrants* in all countries of the region under a reference model. In this instrument, a list of possible dispositions that require some degree of harmony to guarantee a more efficient prosecution can be included, by the well-established judgement of the prosecutors in charge of the investigation in the region. For example: attempt, complicity, anticipated proof, non-criminalization of the migrant for certain behaviors that constitute infraction or crime, application of conspiracy, categorization of organized crime in terms of SoM, prescription, etc. The first analysis was carried out between 2014 and 2015 on the framework and specific requirements of the Central American countries for a specialized legislation on the smuggling of migrants.
3. Create an *updated and online legal library on regulations* against smuggling of migrants. Currently, several regional or international organizations include electronic pages with general regulations. However, it is not always up-to-date and does not include a compendium of normative texts containing the specific provisions on this crime. Likewise, it is not possible to have access to information related to new initiatives aimed at prevention, care and protection of migrants, among other key intervention aspects in combating SoM.

⁵. For criminal and civil purposes, the crime of danger is placed to the momento prior to the harm to the legally protected interest. In the case of smuggling on migrants, this moment can be achieved in the trafficking process, that is to say, during the beginning of the criminal activity which begins with the agreement between the migrant and the smuggler, and continues with the travel/journey, until an eventual facilitation of the irregular entry of the migrant into a particular country.

⁶. In crimes of result, the harm to the legally protected interest, must be pursued, in respect of smuggling on migrants, at the moment the smuggler facilitates the irregular entry of the migrant into a particular country "to obtain a financial or other material benefit".

⁷. United Nations Office on Drugs and Crimes (UNODC). Model Law against the Smuggling on Migrants, 2010 https://www.unodc.org/documents/human-trafficking/Model_Law_SOM_S_ebook_V1052718.pdf

8. Investigation and prosecution of the crime:

Much progress has been made in these areas with specialized units for investigation and prosecution of the crime of migrant smuggling and the development of standards that are more closely aligned with the new modalities and trends in this criminal activity. However, it is necessary to strengthen some areas that remain grey. For instance, the practice of “instant resolution of the problem” still exists. In other words, the reactive actions taken by the authorities on the basis of cases that are incidentally detected. This does not imply that they should not be attended to. However, this practice, in the absence of an effective criminal intelligence mechanism, is exhausting and has no major impact on the identification and dismantling of criminal networks. In fact, it is retrogressive. In addition, the practice of “restrictive investigation” is also still being used. This involves the resolution of cases based solely on the clues found at a particular crime scene. For instance, often when a vessel or vehicle carrying irregular migrants are located, the crew or the driver is interrogated and the investigation is terminated. In short, other hypotheses or areas of investigation that may lead to disclosure of the larger criminal group are not explored.

However, beyond the above approach, advanced and elaborated research techniques, based on operational planning are currently being used. Both the prosecutors and the police have learned to work in partnership with other institutions and non-governmental organizations in the area of care and protection of migrants. Migrants, who are victims, witnesses or have been impacted by the smuggling beyond all humanitarian aspects, are primary eyewitnesses who can provide the criminal prosecutors and the police with evidences and important information, necessary for the effective prosecution of the criminals. Similarly, in some countries, victim and witness protection programs are part of the prosecution process, thereby involving additional liability. From this perspective, those in charge of investigating a case of smuggling of migrants should pay particular attention to the location and conditions of migrants and their recorded interviews, testimonial evidences, forensic analysis, immigration procedures, etc.

In addition, joint operations have been carried out between countries at the regional and continental levels to carry out coordinated or simultaneous operations with the aim of capturing local units of the migrant smuggling networks. These operations aim to follow the migratory route initiating from the countries of origin to the countries of transit and destination. Despite their complexity, these operations have managed to establish an efficient communication channel between the different authorities, specialized in the investigation of this crime and the recent dismantling of international networks.

Finally, in terms of prosecution, offences related to the smuggling of migrants have been identified and accredited. For example: homicide, rape and other sexual offences, extortion, kidnapping, money laundering, including, the active role played by the transport and lodging companies to support these crimes.

1. To encourage and establish **communication and training modules to harmonize techniques and processes in the field of criminal investigation at the regional level** through the exchange of experiences, as established in Article 10.1 (e) and (f) of the aforementioned Protocol against smuggling.
2. Establish **permanent procedures for the exchange of police information on smuggling of migrants** through rapid, reliable and secure channels at the regional level (Articles 10 and 27 of the Protocol)
3. Establish **standardized procedures at the normative and operational level** for the execution of **joint investigations** in specific cases. (Article 19 of the CDOT)
4. Analyze the possibility of creating **joint migratory stations** between neighboring countries that facilitate border patrol and address investigative cases of migrants. (Articles 10 and 11.1 and 6 PTIMs)
5. Establish permanent and standardized procedures for requesting reciprocal legal assistance in the area of smuggling of migrants. This includes the harmonization of the specialized units of international criminal cooperation operating in each country and reporting to the Attorney General or to the Office of the Attorney General regarding procedures, channels of communication, dispatch of evidence, response times, etc. See to what effect Article 18 of the CDOT.
6. In the detection and investigation of crime, it is essential to reinforce and improve “**cybercrime units**” with specialized officers and technological means that can facilitate the identification and follow-up of cases developed in the cyber world such as, the communication channels that the traffickers set up to mobilize the migrants and the capital.

9. Care and protection of migrants:

Comprehensive care process of smuggled migrants has lately presented several challenges. Firstly, in the integration of the interdisciplinary care groups in charge of providing basic services, medical and psychological care, immigration and international assistance and adequate and safe housing to the migrants, which calls for an effective coordination between multiple entities, both state and private. Secondly, in the allocation of human, technical and financial resources to these groups. In fact, many countries are still in the process of consolidating these efforts, which have been structured similar to those for trafficked victims.

Almost all the trafficker guided migratory flows, present a series of peculiarities that demand a greater attention from the entities in the country where they are detected. However, the *intracontinental irregular migrations*, irrespective of their origin and final destination, already have mechanisms in place, to identify individuals and, in most cases, ensure their safe return due to supportive consular representations and regional agreements. The above attention is facilitated by the knowledge or access to the original language and the customs of the migrants, especially when indigenous populations are concerned, thanks to the integrated nature of the Americas. Another issue demanding attention is the *extracontinental migratory flow*. In this field, we still have a long way to go. The huge number of people, variations in their language, culture, physical and emotional state, etc., creates an initial barrier that requires more training, dedication and care on the part of all members of integral care groups. A simple process of establishing a basic conversation going among the groups, can be challenging, especially, if the country of origin and the language of the migrants is not known. In addition to all the above, consideration should also be given to the migrant identification process which, without proper and legal documents, calls for the assistance of the authorities of the origin country or its consular representatives, who in some cases may not be existing in the transit or destination country.

With past lessons learned and having known the nationalities that are most frequently displaced to the American continent, we have refined the process of attending to irregular migration and explored the international mechanisms for the return of migrants. However, there is still a long way to go in determining solutions, which are not related to the investigation and prosecution of traffickers, but rather to the procedures to be followed for the short-, medium- and long-term fate of migratory flows resulting from smuggling.

Finally, another fundamental aspect, which is also part of the lessons learned is "Risk Assessment". In dealing with migratory flows resulting from smuggling, all necessary and appropriate humanitarian measures must be taken, including the security aspects that need to be considered. This can prevent **health crises, infiltration of criminality or situations of violence** among the migrants. Leaving migrant populations on the streets, roads or border areas without proper assistance can lead to multiple situations of danger for both, the migrants and the local population. Likewise, it is opportune to apply the necessary identification mechanisms to identify the smuggled migrants as well as the criminals, including the traffickers who mix themselves with the migrant population. *Biosafety protocols*, counselling and support to migrants, identification sheets and other similar mechanisms have facilitated the assessment process and the timely and necessary decision-making process.

Both the Protocol against the Smuggling of Migrants and the Convention against Transnational Organized Crime include multiple provisions for the care of persons affected by the crime. As far as the Protocol is concerned, the measures are primarily oriented towards human rights (Art. 9.1.a, 14.1 and 16). In terms of care and protection, note what is stated in the aforementioned article 16 of the PTIM:

*" 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.** (...)"*

The above statement is not from the original.

1. Create or strengthen a **program of “risk assessment and approach”** of migrants smuggled at local and regional level. The main objective of this program is to detect potential risks for both, the migrants who are the subject of smuggling and the population of the country where the migrants are detected. It includes the creation of procedures, protocols of action and the integration of multidisciplinary work teams provided with all technical and logistical resources to address possible emergencies. See the provisions of Art. 15.1 and 16.2 of the PTIM).
2. Create or strengthen **programs of care, protection and referral** of smuggled migrants at local and regional level. Care and protection programs must act in a coordinated way among the countries of the region and therefore must contain common elements in terms of procedures and external links. It is common for migrants to be “stuck” in posts or border areas, and therefore attention should be paid to both.
3. Create an **“immigration identification card”** to collect information about the migrants detected in transit that may be related to irregular migration directed by the criminal networks. This form with details such as, personal information, photographs and fingerprints could be used in a common database to identify irregular migrants who are repeat offenders and who may have disappeared on the routes. It would also be helpful in establishing a more efficient control in terms of nationalities, ages, sex and other characteristics that determine the profile of migrants traveling through the region guided by traffic networks.
4. Create a **common database** with information on migrants, traffickers, vehicles, places, etc. based on the previous program, to form an online database that facilitates the enquiry about migrants, as well as of places, suspicious vehicles, modus operandi, etc.
5. To standardize **the procedure of inspection and interview of the migrants who are subjected to smuggling**. The diverse and dispersed nature of existing procedures hinders the possibility of obtaining information that is relevant and consistent with the objectives of intelligence and criminal investigation. Hence, it is suggested to consult the formats established by the General Directorate of Migration and Aliens in Costa Rica in its TSMS (Team of Special Migratory Situations) program, among other regional initiatives.
6. Establish **regional agreements and procedures for the process of repatriation of smuggled migrants to their countries of origin or residence**. Regardless of the domestic legislation of each country, the return processes require a scheme of action of the entities involved internally and the necessary links with the countries of return. See the provisions established in Article 18 of the PTIM.
7. Plan the creation and implementation of an **integrated program** at a national and regional level for migrants who are smuggled and who, for various reasons would prefer staying in a given country. This type of process implies the implementation of measures that would guarantee integrating the migrant and his/ her dependents, in the community where they live.

II. Trafficking In Persons

1. Introduction:

In the last decade, countries around the world have made significant progress in developing tools to address situations related to trafficking in persons. The Normative specialization is a clear example, with some exceptions. Likewise, the procedures for investigation and criminal prosecution of the offence have been improved and, in particular, the level of awareness regarding their effect on the victims and on the states involved in origin, transit or destination of the victims. Nevertheless, there is still a long way to go in the standardization of these instruments, which, by the transnational nature of the crime, or at least when it manifests itself in that modality, determines the joint and coordinated participation of the efforts of various entities in different countries. Likewise, the "unequal" growth or progress of the mechanisms of approach, establishes possible "grey" zones that facilitate an increased activity of the criminal networks in some countries and in others not. Hence, it has become widespread, worldwide, the use of "regional" policies, strategies and plans, where experiences, good and bad practices, provide a real and effective resource for aligning structures, norms and procedures on all interventions, be it, prevention, prosecution, care or protection of victims. From this new vision, proactivity has been equipped with reactivity. That is, specific actions have been analysed and implemented to detect and identify trafficking in persons and to prevent entities and the population in general, in order to improve the mechanisms of investigation, prosecution and processing of the cases. In this way, with the dissemination of information, it is possible to prevent the entrapment or "hitching up" of the victims and promote the denunciation of these crimes. At the same time, initiatives have been strengthened to create regional bodies that, by agreement, plan and carry out joint activities. This does not imply that the national development of the methods of approach should be relegated, but all the more be gradually adjusted to the best growth initiatives and the best experiences in seeking to establish a local front that at the same time represents the regional level. The Regional Conference on Migration (RCM), the Regional Coalition Against Trafficking in Persons and the Central American and Caribbean Council of Public Ministries, among other regional organizations that have a relationship with this issue in North, Central America

2. Concept:

With regards to the concept of trafficking in persons, all countries have agreed on the use of the definition of trafficking as given in the article 3, subsection a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime, as a reference text.

That definition states:

"Article 3⁸

Definitions

For the purposes of this Protocol:

"Trafficking in persons" means ***the recruitment, transportation, transfer, reception or reception of persons, by means of the threat or use of force or other forms of coercion, abduction, fraud, Deception, abuse of power or a situation of vulnerability or the granting or receipt of payments or benefits to obtain the consent of a person having authority over another for the purpose of exploitation.*** Such exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or organ harvesting;

⁸ Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime: Article 3

The consent given by the victim of trafficking in persons to any form of intentional exploitation described in subparagraph (a) of this article shall not be taken into account when any of the means set out in that section has been used;

The recruitment, transportation, transfer, reception or reception of a child for the purpose of exploitation shall be deemed to be "trafficking in persons" even where none of the means set forth in subparagraph (a) of this article are used;

d) "Child" shall mean any person under the age of 18 years. "

The above statement is not from the original.

One of the most important uses for the definition of the protocol has been the creation of criminal penalties. To the extent that, in the first decade of the present century, the text was used verbatim in the design of the criminal definitions related to the trafficking in persons. This may be a questionable act, especially if one takes into account that a definition, whatever it may be, requires a whole process of technification and adjustment to become a criminal form that meets the parameters required by the process of creating standards in that area. However, the urgency to comply with the international commitment established in article 5 of the PTiP⁹, led to the generation of this technical and normative vacuum that in turn led to problems in the premises of this crime. On the same hand, the developments in the dynamics of trafficking, demonstrated to the prosecutors, a series of regulatory elements that required adjustments so as to avoid impunity, due to the gaps and inconsistencies between the wordings of the protocol, criminal types that fit that definition and the reality of human trafficking. In short, the way in which some criminal definitions were drafted in relation to trafficking cases, limited or impeded the efficient investigation and prosecution. Some of the clearest examples were: 1. The futility of linking the actions and means of committing the crime that often limited the accusatory action. 2. The gap between the consent of adults and minors and, 3. The limitation in the catalogue of the end purposes of trafficking in accommodating the evolutionary reality of the criminal networks, among others.

Thus, in accordance with the above, countries in Latin America and in different parts of the world over the past 16 years of the adoption of the protocol, have been fine tuning the content of the aforementioned definition to a more precise normative text according to the protocols to prosecute the crime of trafficking in persons. For instance, 1. The actions are separated from the means of commission of the crime, pushing the last ones to an aggravated state, 2. The consent of the adult victim, NO longer exempts them from criminal responsibility and 3. The catalogue of the end purposes of trafficking has been expanded and modified according to the requirements of each country as per their criminal policy. This does not imply that all countries in the region have identical criminal definitions. In fact, there are marked differences in the order and quantity of elements exposed, whether typical actions, end purposes or aggravating circumstances.

For example, the US Department of State's report on human trafficking in 2016, which contains a global summary of the achievements and challenges of all countries in combating trafficking in persons and individual classification according to the progress made by each of them, establishes the parameters that define the trafficking of people in that country:

"Human trafficking defined¹⁰

The TVPA defines "severe forms of trafficking in persons" as:

- sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
- the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

A victim need not be physically transported from one location to another for the crime to fall within these definitions."

On the basis of a non-literal translation, note that the cases of trafficking in persons are divided into two forms of crime, which in turn conform to different behaviors:

A) Sex trafficking is where the commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform the act has not attained 18 years of age

B) El reclutamiento, transporte, provisión u obtención de una persona para trabajo o servicios, a través del uso de la fuerza, fraude o coerción con el propósito de someterla a servidumbre involuntaria, peonaje, servidumbre por deudas o esclavitud.

⁹ Protocol to prevent, suppress and punish trafficking in persons:

"Article 5

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally."

¹⁰ United States. Department of State: "Trafficking in Persons Report, June 2016", p. 9. This definition is provided in the document "TRAFFICKING VICTIMS PROTECTION ACT OF 2000", Sec. 103: "Definitions":

"(8) SEVERE FORMS OF TRAFFICKING IN PERSONS.—The term

"severe forms of trafficking in persons" means—

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."

Note the differences in relation to the conception of trafficking in persons with other countries in the region, especially those with a codified Roman legal system. With reference to the point (a), the descriptor used for "sex trafficking" in the general criminal law of the region is framed in the criminal categories against "pimping" and "aggravated pimping"¹¹, and may even be associated with rape or sexual abuse against adults. As for persons under age, it includes sexual exploitation, corruption of minors, rape, sexual abuse against minors, among other crimes of a sexual nature. With regard to the point (b), the wordings of the definition of article 3 (a) of the anti-trafficking protocol is indicated with some changes. The text is geared closer towards slavery and practices similar to slavery, such as debt bondage and serfdom, which are defined in the "Slavery Convention"¹² of 1926 and the "Supplementary Convention on the Abolition of Slavery, The Slave Trade and Institutions and Practices Similar to Slavery" of 1956.¹³

With regard to the expression: "A victim need not be physically transported from one location to another for the crime to fall within these definitions", the truth is that, in general terms, "movement" is an implicit component of human trafficking. Traders are merchants and for several centuries have been engaged in acquiring "products" (*people*) in different parts of the world to sell them in markets or to private clients. This implies that trafficking always includes the trafficker's movement towards the victim or the victims towards the trafficker through deception. Hence, the definition of article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, emphasizes that trafficking in persons is a criminal process carried out in phases: recruitment, relocation, transportation, harboring, and reception. In turn, and for further reference, this definition was taken in part from the concept of "slave trade" contained in Article 7, paragraph c, of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery that says:

"c) "Slave trade" means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him/her to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him/her; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

Another example is Costa Rica, which developed a criminal type against trafficking that does not fit the parameters of the definition of the Palermo Protocol. Article 172 of the Penal Code states:

"Article 172. - Trafficking in persons

*A person who **promotes, facilitates or favours the entry or exit from the country, or the movement within the national territory, of persons of any sexual orientation, to carry out one or more acts of prostitution or subject them to exploitation, sexual or labour servitude, slavery or practices similar to slavery, forced labour or services, servile marriage, begging, illicit extraction of organs or illegal adoption, shall be punished with an imprisonment from six to ten years.***

LThe penalty of imprisonment shall be from eight to sixteen years, if one of the following circumstances also applies:

- a) The victim is under eighteen years of age or is in a situation of vulnerability or disability.*
- b) Deception, violence or any means of intimidation or coercion.*
- c) The perpetrator is a spouse, cohabiting partner or relative of the victim to the third degree of consanguinity or affinity.*
- d) The perpetrator takes precedence over his relationship of authority or trust with the victim or his/her family, even if he is not related by kinship.*
- e) The perpetrator takes advantage of the exercising of his profession or the role he performs.*
- f) The victim suffers serious damage to his/her health.*
- g) The offence is committed by a criminal group composed of two or more members. "*

¹¹ Mexico: Articles 204 and 205bis of the Federal Criminal Code and from 13 to 20 of the Law to prevent, suppress and punish trafficking in persons and for the protection and assistance for victims of human trafficking; Guatemala: Articles 191 to 193 of the Criminal Code; El Salvador: 169 and 170 of the Criminal Code; Costa Rica: 169 and of the Criminal Code; Nicaragua: 175, 178 and 179 of the Criminal Code; Republica Dominicana: Articles 186 to 197 of the new of the Criminal Code, Canadá 286.3 Criminal Code and Belize Article 49 Criminal Code .

¹² **Slavery Convention**

Article 1

For the purpose of the present Convention, the following definitions are agreed upon:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

¹³ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

"(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status; (...)"

In this case, it should be noted that typical behaviours, even if formed by a wide-range of guiding verbs (for instance, to promote, facilitate and favour), do not follow the definition of the protocol in relation to the criminal process that identifies human trafficking.

Last but not the least, the remaining countries in the region, including Canada (2014)¹⁴ and Belize (2013) with their recent reforms, have referred to the definition of trafficking as given in the Palermo Protocol, as a “penal model”, with some changes and adjustments, in order to develop their own criminal definitions.

STAGES



Solely as a reference, these are the stages of trafficking currently considered by some South American countries in their investigation and prosecution protocols. Note that the prosecution barrier has shifted the anticipated scenarios to recruitment (requirements and preconditions) and subsequently to reception (disposal). The definition of the Protocol to Prevent, Suppress and Punish Trafficking in Persons is always taken as a reference.¹⁵

In relation to the above arguments it is recommended:

Unify the **concept of trafficking in persons** in the region based on the definition of Article 3 (a) of the Protocol to prevent, suppress and punish trafficking in persons. This concept is considered significant, as already indicated, as the model for the design of the criminal categories that sanction human trafficking and also the evaluation parameter used by the United States government in the Global Reports on Trafficking in Persons.

¹⁴ Canada Criminal Code: Sec. 279 y Belice “Trafficking in Persons Prohibition Act” (2013)

¹⁵ Ministry of Interior and IOM: Training Manual for the Judiciary in the Investigation and Processing of Cases of Trafficking in Persons, Ecuador, 2015.

3. Identification of cases:

Eventhough considerable development has been achieved at a regional level in terms of the “first hand” information about the activities of criminal groups engaged in trafficking in persons, the truth is that, due to the transnational nature of the crime, we are often surprised about the presence of victims of trafficking in our territory or national victims in other regions of the world (for example, the female victims of Central America in Spain, July and August 2016). From this perspective, it seems necessary to have a greater and a unified development of tools that helps in better detection of possible victims, perpetrators, places, routes and modus operandis in the region that permit identification of a possible scenario of trafficking in urban, rural, border and other spaces such as the cyber world and mass media. Similarly, the increase in trafficking cases over the last three years, at least as reported by the media and the criminal investigation authorities, demands the use of a preventive policy on detection of the above entities that amplifies the information resources of both the police and migration bodies and the agencies in charge of the criminal prosecution, and in particular of the governing bodies in charge of the creation, execution and coordination in this area. Based on these considerations, it is recommended to:

1. Create and develop a **map at the regional level** that determines the presence of criminal networks operating in the region, modes of operation, routes, profile of victims and perpetrators with the objective of establishing a more effective criminal policy in relation to state actions against trafficking and organization of resources. The process of mapping should be based on the collected data that has been subjected to the process of tactical and strategic intelligence. Mapping, in turn, helps generating the *technical profiles* of suspects, possible smuggled migrants, vessels and suspicious land vehicles, among others, that are presently operating in some countries of the region. The development of these specific profiles, facilitates the implementation of an *Early Warning System* that acts as a “warning” signal when a trafficking situation is detected and send it to the corresponding response units.
2. Create a **regional database** with intelligence that can be used by those responsible for the investigation and prosecution of the crime of trafficking in persons with the necessary controls, security and levels of confidentiality. Technological platforms can be employed at the regional level, while in general, structures, similar to that used by Interpol in the handling of broadcasts and information can be tapped on.

4. Institutional organization:

With regard to trafficking in persons, all the countries in the RCM region have a state agency in charge of the creation and implementation of coordinated anti-trafficking actions under different names: "secretariat", "committee", "council", "coalition", etc. These entities, with some exceptions, were created within the specialized laws based on the anti-trafficking theme, Nicaragua being the most recent. Without entering into the area of administrative law, there are two aspects that have been extremely relevant in the functional activity of these entities, firstly, the ease, the speed and the efficiency to take decisions and secondly, the speed to access the funds that sustain the actions of prevention, prosecution and attention of the victims. However, for both the above aspects, the existing structures have demonstrated some shortcomings, especially for those aspects that go on for a considerable time. Probably the first bottleneck in the decision-making process is, the large number of entities that make up the governing body, in some cases more than 20, and the second obstacle is in the system of voting chosen for the decisions to become valid, that is a majority of votes or half plus one. Since, these are high profile entities with executive and judiciary controls, it is extremely difficult to take an effective call. This leads to voting by delegation, which is not always approved by the regulations. Secondly, even if it is approved, sometimes it is very difficult to gather all the substitutes and because these bodies are so extensive, the discussion on some issues can become endless and agreements very difficult to arrive to. Based on this premise, it is important, with the experience of all the countries of the region, to identify a structural model that is functional and that facilitates decision making processes. In addition, as the agreements on human trafficking are largely based on the best interests of the victims who require assistance, it is important to speeden up the state actions. Otherwise, the authorities in charge of the cases and care of the victims will have to resort again to alternative routes of settlement, thereby making the governing bodies ineffective or unnecessary.

Likewise, the methods of acquiring resources, which are most often established in and have access to, the specialized anti-trafficking laws, present certain degrees of difficulty, especially when the administrative and financial mechanisms are intricate or unfeasible for these methods that call for maximum control but minimum bureaucracy. From that perspective, the terms such as, "specific items" "donations", and "product of confiscated goods", must guarantee some flow of funds in order to address the most urgent aspects of the human trafficking approach. For that purpose, it is important to emphasize the exchange of experiences and the advice of management experts (of each country) to design a fast, safe and efficient route.

Therefore, it is recommended:

That the Regional Coalition against Trafficking in Persons in coordination with the Regional Conference on Migration must establish the necessary mechanisms of agreement to include in their agenda, **the proposal of a more dynamic and efficient organizational and financial model** for the state bodies in charge of the creation and execution of the measures to deal with the trafficking in persons. The main tool to achieve this objective is the exchange of experiences and the advice of specialists from different countries on the issue of creation and management of these type of administrative bodies and their financial resources. For the above to come into effect, one can invoke the agreements of the Memorandum of Understanding between the Governments of El Salvador, Guatemala, Honduras, Nicaragua, Panama and the Dominican Republic, that establishes the implementation of the "Regional Action Framework for the Comprehensive Approach to the Crime of Trafficking in Persons", 2015 and other instruments of the regional agreement on the subject.

5. National Policies and Plans of Action:

These tools are fundamental because they define the criminal and humanitarian policy of the State, firstly, in the area of trafficking in persons (Policy) and secondly, in planning the concrete actions to be implemented (Plan). Most of the special legislation of the region, already consist of a national policy and a strategic plan. However, with the exception of El Salvador, in relation to the policies and Costa Rica, in relation to the action plan, without harming each others existence in the process of implementation or updating, these instruments have not been materialized and as a result, the political-strategic lines and operational actions are yet not clearly defined. However, these countries have relied on their national action plans while planning actions against trafficking in persons. The important thing, beyond creating instruments is that they must be effective. The policy must be permanent with clear lines of action and should be consistent with the reality of the country and the region. Plans, whether five or more years, should establish responsible entities and monitoring mechanisms to ensure the execution of actions. In addition, it is essential for the region to be integrated into strategic lines and joint operative actions that facilitate regional growth in the combat against trafficking in persons and thus facilitate the coordination and implementation of joint actions.

Based on the above it is recommended:

That the Regional Coalition against trafficking in persons, in coordination with the Regional Conference on Migration, include in their agendas the issue of the creation and implementation of a **Regional Strategic Plan against trafficking in persons with actions, deadlines and monitoring systems** that is based on the foundations established in the Memorandum of Understanding between the Governments of El Salvador, Guatemala, Honduras, Nicaragua, Panama and the Dominican Republic, which establishes the implementation of the "Regional Framework for the Comprehensive Approach to the Crime of Trafficking in Persons ", 2015.

6. Disclosure of information:

As far as trafficking in persons is concerned, there are many initiatives for the effective dissemination of information to the public on prevention under a differentiated approach by age, sex, nationality, occupation, educational and cultural level, etc. In principle, the "*campaign*" tool was used, which in most cases worked well. However, the limitation of the campaigns is the sustainability of the message and in these subjects this requirement is essential to guarantee a structural and prolonged armour. A closer and lasting resource, which can also be complemented by campaigns, is direct communication with communities or what is called in marketing "*proximity communication*". It has been demonstrated that the rapprochement with people, especially vulnerable populations with clear and precise messages that fit their level of understanding, generates a much more assertive response in terms of community knowledge and training and additionally stimulates reporting by creating an empathic link with the issuer.

Therefore, it is recommended:

That the Regional Coalition against trafficking in persons in coordination with the Regional Conference on Migration, put in their agendas the theme of the creation and implementation of a **regional outreach program** with the approach of "communication of proximity" and with the Use of the experiences acquired by several countries of the region such as Guatemala, El Salvador and Nicaragua, among others.

7. Normative:

At the normative level the progress in the matter of trafficking in persons is significant. Each country in the region has categorised trafficking in persons as a serious crime and has designed and approved specific laws in this area. However, experiences and policy reforms have not been “socialized” in the regional community, except in the expert meetings. Hence, these changes have not been analysed and harmonized in the area of best practice so as to fine-tune the harmonization and especially, the efficiency in the investigation and prosecution of this crime. Hence, some countries require a reform process in their criminal types or in procedural provisions embodied in their anti trafficking laws. For example, what has been the experience of some law enforcement bodies in the region with the provision on the “non-punishability of the victims”, or with “mechanisms for redressal of grievances”, the anticipated testimonial evidence, the application of the form of the conspiracy and the imprescriptibility /non applicability of the trafficking offence? As well as, in migratory matters and victim assistance mechanisms, how has the special category of human trafficking been implemented? and what is the best procedure to for applying repatriation, among others.

region with the provision on the “non-punishability of the victims”, or with “mechanisms for redressal of grievances”, the anticipated testimonial evidence, the application of the form of the conspiracy and the imprescriptibility /non applicability of the trafficking offence? As well as, in migratory matters and victim assistance mechanisms, how has the special category of human trafficking been implemented? and what is the best procedure to for applying repatriation, among others.

In addition, an endemic issue in legislative matters related to trafficking in persons, is to have up-to-date texts on criminal, migratory, constitutional law, etc. Eventhough considered less relevant, the law is an important tool for justice operators, researchers, students, etc. As well, a necessary resource, although not indispensable in international cooperation. There are many “sites” on the internet where texts can be located but they are hardly complete and kept up to date (legal and procedural texts). Therefore, it is recommended:

That the Regional Conference on Migration in coordination with the Regional Coalition against Trafficking in Persons, encourage meetings of regional crime prosecutors to analyse the options for:

1. **Harmonize the criminal types** in terms of conduct and penalties based on the definition of article 3, subsection a) of the Protocol to prevent, suppress and punish trafficking in persons.
2. Analyse the normative framework related to trafficking in persons in relation to **the related offences**, especially those that have been generated for the purpose of trafficking in persons (labour exploitation, forced labour or services, servile marriage, sexual exploitation, trafficking of human organs, tissues and fluids, among others, in order to establish harmonization parameters in regional legislation.
3. Review specialized legislation with the aim **of aligning the essential procedural forms in the investigation of the crime of trafficking in persons and the migratory and administrative provisions that favor the handling of the victim’s migratory protection and the processes of care.**
4. To take the necessary steps to promote **the reform processes** in the cases where they are required.
5. To create or improve a **regional database** or web site where the complete and up-to-date regulations of each country related to trafficking in persons can be accessed. It is important to designate one or more persons in charge of the updating the process.

8. Investigation and prosecution of crime:

Most countries in the region have police units specialized in the investigation of trafficking in persons and prosecutors assigned to the criminal prosecution of this crime. Moreover, Guatemala has reached a much more advanced level in the judicialization with specialized tribunals in the prosecution of cases of trafficking and with a specialized prosecution unit with subdivisions according to the purposes of trafficking that are of greater interest in that country. All chiefs of police and the police units are acquainted with each other and have held meetings and operations together, so that formal and informal communication has improved both the exchange of intelligence and the transit (request-response) of legal aid. The next step seems to be focused on better technology in crime investigation procedures with the use of new methodologies and technical equipment. As well as, establishing, for all countries, standardized communication protocols in international cooperation that further improve the effectiveness of the process applicable to mutual legal assistance. However, the aspects that seem to require more refining and that were raised in the previous point, are those that refer to detection. There is a maxim in criminalistics that says: "without detection there is no investigation" and indeed, intelligence information provides the necessary elements to initiate investigations and to be able to lead them through a better structured and efficient routes to achieve the desired objective. In these cases, the objective must be focused on the dismantling of criminal networks and not on the care and prosecution of "nodes" or members of these groups that are identified and detained, sometimes by accident, in isolated operations that are not related to a planned investigative process aimed at the disintegration of the group. Clearly, when a place of exploitation is identified, the investigation can lead us to other scenarios where the criminal network operates, be it national or international. However, with the support of criminal intelligence, investigative time is reduced and the investigative hypotheses is more consistent. According to the above, it is recommended to:

Promote meetings between heads and managers of the investigative units and that of the specialized prosecutors, together, with the aim of establishing, through the exchange of experiences:

1. A framework to facilitate harmonization in the development of research techniques best suited to deal with cases of trafficking in persons.
2. An inventory of the best resources needed to amplify the positive results in the investigation of trafficking in persons and other related offences.
3. An initial agreement to share experiences, training and resources that can support research in all countries.
4. An analysis of the framework to detect and identify the cases of trafficking that the research units require in order to achieve better results and implement it in each of the countries.
5. Establish mechanisms to improve the communication channels between countries, especially for the transit of sensitive information that cannot be handled by conventional means that may subject it to planned or accidental "hacking".
6. Standardize the process of requesting and responding to legal assistance related to cases of trafficking in persons, by establishing Public Ministries as the sole Central Authority in the most widely used international instruments and a unique format for requesting assistance that includes the English speaking countries. It is extremely important to strengthen the appointment and maintenance of "liaison officers" that facilitate the communication of information and providing professional advice on solving the wide variety of situations related to this type of cooperation.

9. Care and protection of victims of trafficking in persons:

As it has been established in previous issues, there has been a notable increase in the aspects related to the care and protection of victims in the region, especially in the area of training of the officials of different specialities. As a result, a high level of “awareness” has been created about the exploitations experienced by the victims of trafficking, including a shift in the perspective that they do not remain in exploitation by volition, although it has been sometimes interpreted like that. With this significant achievement of the different local and international entities, schemes and stereotypes have been broken that facilitate the approach of cases, their investigation and prosecution and of course a better training and sensitivity at the moment of starting the care of a trafficked victim. The advances in the models of primary and secondary care, non-revictimization, humanitarian treatment, among other aspects, have been remarkable. In addition, in the area of policy development, provisions specific to care and protection of victims have been included as a specialized legislation. This helps establish an indispensable legal framework for allocating personnel and resources as well as, establishing directives with the necessary procedures. However, as this is a sensitive issue, there is still room for other elements, such as expanding the spectrum of care for the adult male population, respecting family integration (not separating victims and their families), the designation of more appropriate facilities to provide care services, accommodation, among others. Similarly, the variation in the victim care approach in the different countries of the region, shows an imbalance in their experience, knowledge, procedures and allocated resources. This brings us to a stage of growth that demands greater attention from the structural, logistic and operational aspects at a national and regional level. From this perspective, we must start from the fact that the victims of the same case may have been detected in different countries of the region and therefore, beyond the humanitarian issue, we are faced with a legal-regional scenario that requires the same focus on care and protection issues. Finally, within this same framework of action, the issue of migration security is still a limiting factor. Each country has a vision on the issue of temporary residence permits or humanitarian visas. The truth is that the victims, as long as they remain in the territory where they were found or rescued, first require care services and second, some level of immigration security, especially if they are foreigners. Based on the above, we recommend:

Based on the existing provisions found in the international conventions and the specialized standards:

1. Establish a frame of reference by consensus of the representatives of each country to establish a catalogue of services that a victim requires from time “o” along with all the variables that their experience has determined in real cases. If some or several countries already have this information and have worked it out practice, these elements can be taken as a basis for discussion. Similarly, if doctors, psychologists, social workers, experts in managing victim care can be invited, they can provide a broader perspective. The objective is to create, first, a base model of a **“manual of procedures”** directed to the personnel in charge of the attention and second, a **petition** directed to the authorities who are in charge of taking decisions about the essential resources needed to handle these type of processes. Recall and this is always said, that in a single case we can have an average of 5 to 70 victims, although statistically there have been cases with a much larger amount.
2. Standardize **the model of approaching the victims of trafficking**, be it women, men or minors, especially with regard to interview models and the use of interpreters.
3. Create a regional level bank of “interpreter” who can communicate with victims in different languages or even participate in criminal proceedings as experts through video conference or visual call. For this purpose, it is very important that each country has at least one centre or facility that has video conference equipment.
4. Analyse the best options for implementing the repatriation process, especially in the
5. area of financial resources and make the necessary proposals to the respective authorities at the national and regional level.
6. Analyze and propose the best options for handling victim care services (for example,
7. the institutional model where the State institutions provide care in different places) and the best options for housing , food, clothing, etc. (For example: a business support model, offers commercial establishments, according to prior agreement, provide places and services for the maintenance of victims). Each of the options must be evaluated in terms of their cost and effectiveness and calls for analysts, expert in financial matters, care, accommodation, etc.

Annexes

Table of ratifications / accessions

“Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organized Crime”

Member countries of the Regional Conference on Migration (RCM)¹⁶

Country	Ratification (1)	Accession (2)
 Belize		14.09.2006
 Canada	13.05.2002	
 Costa Rica	07.08.2003	
 El Salvador	18.03.2004	
 The United States	03.11.2005	
 Guatemala		01.04.2004
 Honduras		18.02.2006
 Mexico	04.03.2003	
 Nicaragua		15.02.2006
 Panama	18.08.2004	
 The Dominican Republic		10.12.2007

- **“Ratification”** means the international act by which a State indicates its consent to be bound by a treaty, provided that the parties have agreed to it as the manner of expressing their consent. In the case of bilateral treaties, ratification is usually effected by the exchange of instruments required. In the case of multilateral treaties, the normal procedure is for the depositary to collect the ratifications of all States and to keep all parties informed of the situation. The need for signature subjected to ratification gives States the time necessary to achieve the approval of the treaty at the national level and to adopt the necessary legislation for the internal implementation of the treaty. (Article 2, paragraph 1, point (b), art. 14, paragraph 1 and art. 16, Vienna Convention on the Law of Treaties of 1969)
- **“Accession”** is the act by which a State accepts the offer or the possibility of being part of a treaty already negotiated and signed by other States. It has the same legal effects as ratification. In general, adherence occurs once the treaty has entered into force. However, the Secretary-General of the United Nations has accepted, as depositary, accession to certain conventions prior to its entry into force. The conditions under which membership can be achieved and the procedure to be followed depend on the provisions of the treaty. A treaty may provide for accession by all other States or by a limited and defined number of States. In the absence of provisions in this regard, accession will only be possible if the negotiating States have subsequently agreed or agree to accept the accession of the State concerned. (Article 2, paragraph 1, ap b) and art. 15, Vienna Convention on the Law of Treaties of 1969)

¹⁶ Official Website of the Regional Conference on Migration (RCM) <http://www.crmsv.org/>