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**Determining who to charge with the crime of
migrant smuggling: who is and who is not a
migrant smuggler**

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Background paper prepared by the Secretariat

I. Introduction

1. The present background paper was prepared by the Secretariat to facilitate the discussions of the Working Group on the Smuggling of Migrants at its tenth meeting. It sets out a series of issues that the Working Group may wish to address in the course of its deliberations. It also provides background information and practical suggestions for actions that would have a positive impact on efforts to determine who to charge with the crime of migrant smuggling in line with the provisions of the United Nations Convention against Transnational Organized Crime and its supplementary Protocol against the Smuggling of Migrants by Land, Sea and Air. Through reference to best practices from recent court judgments and current practice, it tackles gaps and grey areas in current approaches to charging people with this offence and prompts reflection on how to charge more effectively.

II. Issues for discussion

2. Delegations may wish to consider the responses of their States to the following questions in preparing for the Working Group's deliberations:

(a) What is known about how migrant smugglers are organized and the types of services they provide?

(b) Who are the actors involved in the smuggling of migrants and what are their roles?

(c) Is the proportionality of a charge to the role played by an actor in the process of migrant smuggling a consideration in practice?

* [CTOC/COP/WG.7/2023/1](#).



(d) What actions involved in the commission of the crime of migrant smuggling (the actus reus element) are criminalized in national laws and how does this affect who is charged as a migrant smuggler?

(e) How is criminal intent (the mens rea element) in the crime of migrant smuggling reflected in national laws and interpreted in practice?

(i) Do national laws and policy consider the purpose of breach of State entry and immigration regulations the sole objective of the crime of migrant smuggling, or is the purpose of obtaining a financial or other material benefit also a required element of the crime (as per the Smuggling of Migrants Protocol)?

(ii) What is the impact of either approach on who is charged as a migrant smuggler?

(f) Are legal provisions on the smuggling of migrants understood more as a criminal justice tool or as a migration management tool in practice? What is the impact in terms of the approach to charging alleged perpetrators under provisions on the smuggling of migrants?

(g) What would a more detailed and nuanced approach to charging people with the crime of migrant smuggling entail?

(h) How can charging in the context of migrant smuggling be done to ensure that the focus is on disrupting organized criminal groups through criminal investigations and prosecutions rather than catching low-level actors? Why is this important?

(i) To what extent do considerations of international human rights law play a role in the decision to charge a person under provisions on the smuggling of migrants in practice, and what are key considerations in this regard?

(j) What good practices are there in the implementation of provisions on the non-liability of smuggled migrants for the fact of having been smuggled?

III. Overview of issues and guidance for response

A. Background

3. Countering the smuggling of migrants has become an increasingly pertinent global priority. In addition to people being abused and mistreated while being smuggled, and some losing their lives in this context, as widely reported in the media, there is money to be made by criminal networks and individual criminal actors. In 2016, an estimated 2.5 million people were smuggled globally along 30 migrant smuggling routes, and smugglers made an estimated total revenue of \$5.5–7 billion.¹

4. With regard to the smuggling of migrants on the Mediterranean routes, the United Nations Office on Drugs and Crime (UNODC) Observatory on Smuggling of Migrants has found that the number of smuggling incidents is higher than previously thought.² The Observatory has also found that on some routes, lower-level actors and groups are being displaced by more organized and sophisticated migrant smuggling syndicates.³

5. The demand for migrant smuggling arises from people's strong motivations to migrate, combined with a lack of access to legal pathways for regular migration and the difficulty of migrating independently. Obstacles to exercising free movement

¹ *Global Study on Smuggling of Migrants 2018* (United Nations publication, Sales No. E.18.IV.9).

² United Nations Office on Drugs and Crime (UNODC) Observatory on Smuggling of Migrants, "Incidence of migrant smuggling on Central Mediterranean Route in 2021 is twice what was thought", Update No. 1 (March 2022).

³ United Nations Network on Migration, "Mapping the landscape of smuggling of migrants: an overview of key concepts, trends, challenges and areas of action", policy brief (June 2023).

rights, corruption and safety concerns also contribute to the demand for smuggling in certain regions.⁴

6. Article 3 of the Smuggling of Migrants Protocol defines the crime of smuggling of migrants as the procurement of the illegal entry of a person into a State, in order to obtain a financial or other material benefit. Article 6 of the Protocol also sets out the following related offences: document fraud for the purposes of enabling the smuggling of migrants, for a financial or other material benefit; and enabling a person to irregularly remain in a State, for a financial or other material benefit. Article 6, paragraph 3, defines aggravated circumstances to smuggling offences as circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned, or that entail inhuman or degrading treatment, including for exploitation, of such migrants. The purpose of the Protocol, as set out in its article 2, is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States parties to that end, while protecting the rights of smuggled migrants.

7. To date, the Smuggling of Migrants Protocol has 151 States parties,⁵ demonstrating an almost universal commitment to addressing the crime. States parties have adopted different approaches to transposing the Protocol into domestic law. While some have adopted a legislative approach almost identical to the Protocol, others have only partially done so, and not included financial or other material benefit as an element of the criminal offence. Instead, they may include it as an aggravating factor, increasing the severity of punishment for the base offence, with other national legislative examples of aggravating factors being when the base offence is committed as an activity by a criminal organization or when it endangers the lives of smuggled migrants.⁶ In some circumstances, the non-liability of humanitarian actors has been totally excluded from domestic legislation or has been included separately on a discretionary basis.⁷

8. Before the smuggling of migrants can be accurately quantified and addressed, there has to be some level of uniformity in practice in deciding who has committed the smuggling crime.

B. Understanding the migrant smuggling enterprise (organization, actors, services and modus operandi)

9. Migrant smugglers are located somewhere along a spectrum, from unconnected or loosely connected individuals making a modest profit from a limited smuggling market, for example, from within their communities and operating only within specific areas, to large, sophisticated organizations making significant profits from migrant smuggling offences. They can be anything from full-time professionals belonging to organizations or individuals carrying out migrant smuggling activities on an ad hoc basis.⁸

10. Depending on the type of group or organization, various types of actors are involved in a single migrant smuggling operation (as summarized in the UNODC issue paper on a short introduction to migrant smuggling).⁹ More recent studies in

⁴ UNODC Observatory on Smuggling of Migrants, “Migrant smuggling from Nigeria: key findings”. Available at www.unodc.org/res/som; and UNODC, *Toolkit to Combat Smuggling of Migrants*, (Vienna, 2010).

⁵ Ibid.

⁶ UNODC, *The Concept of “Financial and Other Material Benefit” in the Smuggling of Migrants Protocol*, issue paper (Vienna, 2017).

⁷ Javier Escobar Veas, “Smuggling of migrants is and should be established as an autonomous offence”, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 27, No. 3 (July 2019).

⁸ *Global Study on Smuggling of Migrants 2018*, p. 43.

⁹ UNODC, “Issue paper: a short introduction to migrant smuggling”, (2010).

Asia and the Pacific region¹⁰ and in West and North Africa¹¹ have demonstrated that these roles, as listed below, are still applicable:

(a) Coordinators/organizers have overall responsibility for the migrant smuggling operation. A large syndicate might have at its helm a coordinator/organizer who oversees the whole migrant smuggling process, including employing or subcontracting individuals, selecting routes, and from his or her many contacts, coordinating transportation and accommodation. A full migrant smuggling operation might be organized by one coordinator or several working in partnership. It is usually challenging to gather evidence against coordinators/organizers;

(b) Recruiters advertise migrant smuggling services to potential clients. They may also have the role of collecting fees. They may work with more than one smuggler and are mostly resident in the country of origin or transit, with good knowledge of the migrants' language and even personal ties to the migrants at times;

(c) Transporters/guides are the feet on the ground for the migrant smuggling operation, guiding or accompanying migrants through one or more countries and across borders. Migrants may be passed from one transporter/guide to another. Transporters are usually easy to recruit, and if caught, their loss from the network does not affect the migrant smuggling operation much. They are not always part of the broader smuggling network and may provide services on an ad hoc basis (e.g. at bus stations, river or sea crossings, bridges or borders);

(d) Spotters, drivers, messengers and enforcers carry out ad hoc jobs during the smuggling process. For example, spotters provide information about specific law enforcement checks or travel ahead of a vehicle in which smuggled migrants are traveling to warn of possible checks in advance. Enforcers safeguard and keep order during the operation by, for example, preventing smuggled migrants from making noise or moving around, at times using threats and violence;

(e) Other ad hoc service providers and suppliers may have an established relationship with smugglers and receive a share of the proceeds. They often collaborate with more than one migrant smuggling group/network to maximize their earnings. They include owners or builders of boats, corrupt public officials, for example, corrupt border police, soldiers, immigration officers and embassy and consulate officers who may turn a blind eye to or otherwise facilitate the migrant smuggling process, hotel, house or apartment owners or residents, who are particularly useful for larger groups of smuggled migrants, train conductors, taxi drivers, travel agents, airline staff, vehicle maintenance and fuel supply personnel, and financiers/cashiers/money agents responsible for transferring money collected from smuggled migrants to smugglers. It is worth noting, however, that some individuals may facilitate migrant smuggling unknowingly, while others may be aware that they are playing an indirect role in the process.

11. The business model for a migrant smuggling operation depends on the needs and the means of the people who seek to migrate, as well as the difficulty of crossing borders, as determined by geographical conditions, seasons and enforcement in the transit and destination countries.¹² Some commonly used business models are:¹³

(a) The comprehensive package model, which is usually used to reach distant destinations in the shortest time possible. This model is used by the more organized criminal groups who are trusted and have a reputation of having efficient networks to arrange various border crossings, bribe officials and secure delivery. The whole trip

¹⁰ *Migrant Smuggling in Asia and the Pacific: Current Trends and Challenges*, vol. 2 (Bangkok, 2018).

¹¹ Mixed Migration Centre, "The many roles of migrant smugglers and movement facilitators" (July 2021).

¹² *Global Study on Smuggling of Migrants 2018*.

¹³ *Ibid.*

from country of origin to destination, including all transportation and border crossings, are well organized from the outset;

(b) The hub as a supermarket model, which consists of known smuggling hubs near departure or transit points where migrants can obtain all the services they need to continue their journey. Migrants may go to the hubs on their own or be taken there by local smugglers;

(c) The geographical monopoly model, in which smugglers have territorial control over a specific geographical area along a smuggling route or its departure or arrival points, or border areas. The control consists of either having local knowledge to aid a migrant smuggling operation or being in a position to allow or restrict movement in the area. In this model, smugglers may be a professional group surrounded by a loose, flexible network. They may also provide transportation for migrants and arrange border crossings;

(d) The travel agency model, in which migrants are offered travel and related services by a loosely organized network of smugglers, including opportunistic individual smugglers who are informally organized and work with each other flexibly. Taxi, bus and lorry drivers working under the supervision of a chief smuggler to move people from an origin to a destination country may be part of this kind of network;

(e) The “hop-on hop-off” along the smuggling route model, which is used where a smuggling route has many legs, some of which require the services of smugglers and some of which do not, and thus migrants use smuggling services on an ad hoc basis and depending on their financial means;

(f) The opportunistic smuggling model, which involves individuals or flexible chains of smugglers who seek to supplement their other sources of income with migrant smuggling when the opportunity arises, and do so on a casual, temporary and ad hoc basis. At times, they also offer other services such as accommodation or act as job brokers;

(g) The from one leg to another model, for situations where there are connected legs along a route and migrants travel from one leg to another using different methods. Smugglers hand the migrants over to the next smuggler, who arranges the next leg of the journey. Smugglers may also arrange temporary accommodation if needed to await suitable conditions for the next leg. In this set-up, the smuggling business may be small scale, part time and opportunistic, with loosely connected smugglers.

C. Criminalization and charging under provisions on the smuggling of migrants

Analysis of applicable international frameworks

12. On 15 November 2000, the Smuggling of Migrants Protocol established for the first time an internationally agreed and legally binding definition of the smuggling of migrants. Article 3 of the Protocol defines the crime as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident. This provision is the main reference for States parties in defining their own domestic offence of migrant smuggling. It has two main elements: an unlawful action (actus reus) of procurement of illegal entry; and a criminal intent (mens rea) to obtain a financial or other material benefit.

13. Article 6 enjoins States parties to criminalize the following acts, when done to obtain a financial or other material benefit: (a) the smuggling of migrants; (b) producing fraudulent travel and identity documents to enable the smuggling of migrants; (c) enabling the stay of someone who does not meet the necessary legal requirements to remain in a State; and (d) attempts, participating as an accomplice, and organizing and directing others to commit the crime. Endangering the lives and

safety of migrants and subjecting them to cruel, inhuman and degrading treatment are included as aggravating circumstances to these offences.

14. Scholars have bemoaned the lack of specificity and overly broad nature of the international definition of smuggling of migrants, which potentially encompasses a wide variety of migration facilitation activities.¹⁴ It makes the criminological understanding of migrant smuggling offences challenging in practice as a plethora of actors, with different structures, motivations and levels of significance to the perpetration of the crime, may engage in conduct that fits within the definition.

Unlawful action (actus reus)

15. With regard to the unlawful action (actus reus) in the definition of migrant smuggling in the Protocol for example, only “procurement [...] of the illegal entry” is specified. The term “procurement” is not legally defined in the Protocol. This gap is noted in the UNODC *Model Law against the Smuggling of Migrants*, which provides a dictionary definition of “procure” to assist in its understanding.¹⁵

16. When the Protocol was being negotiated, one of the country submissions to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime contained a list of proposed acts to be included in the definition of procurement, such as preparing and dealing with documents for entry and residence; planning, supervising or financing transfer and transportation; facilitating illegal entry or residence; and engaging in corruption to facilitate these actions.¹⁶ This would have been akin to the approach of article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which in defining the action element of the crime specifies recruitment, transportation, transfer, harbouring and receipt. However, these suggestions did not make it into the final text of the Protocol.

17. In defining who the author of the crime of migrant smuggling is, academics¹⁷ classify approaches to the actus reus element as: (a) a narrow approach, which confines the actus reus to cross-border actions at the final stages of the migrant smuggling process, excluding preparatory or facilitative actions; and (b) a wide approach, which includes preparatory and facilitative acts. Proponents of the narrow approach say it is closer to the provisions of the Protocol because if the intention of the drafters of the Protocol was to include preparatory and facilitative acts, the crimes enabling smuggling of migrants, such as fraudulent document crimes, enabling stay and complicity, would not have been criminalized separately from the principal offence in article 6 of the Protocol. In contrast, proponents of the wider approach argue that in order to achieve the ultimate purpose of the Protocol and effectively address the crime of migrant smuggling, the totality of the actions leading to the commission of the crime, committed by different actors playing different roles but with the same goal, should be considered.

18. Both approaches have their merits and demerits¹⁸ in deciding which charge to go with. The narrow approach is arguably more focused and simplifies the process of defining the author of the crime of migrant smuggling. However, it may also perpetuate the current practice of focusing counter-smuggling criminal justice action on the more visible, public-facing actors of a migrant smuggling operation, who may not be the most important actors. Actors who are easily replaceable and barely disrupt

¹⁴ Abdelnaser Aljehani, “The legal definition of the smuggling of migrants in light of the provisions of the migrant smuggling protocol”, *Journal of Criminal Law*, vol. 79, No. 2 (April 2015), pp. 122–137.

¹⁵ The UNODC *Model Law against the Smuggling of Migrants* (2010) suggests that the following definition could be used: “‘Procure’ shall mean to obtain something or to cause a result by effort”. This suggestion is based on the English language dictionary definition.

¹⁶ [A/AC.254/5/Add.27](#).

¹⁷ Aljehani, “The legal definition of the smuggling of migrants”; and Escobar Veas, “Smuggling of migrants is and should be established as an autonomous offence”, pp. 226–241.

¹⁸ *Ibid.*

the organized crime behind migrant smuggling, such as drivers, guides, spotters and enforcers (including migrants and refugees who are recruited or coerced into these roles), end up being the focus of investigations and prosecutions, since these are the most easily apprehended actors in a cross-border situation. The higher-level organized criminal actors who coordinate and direct the offence and make significant profits are rarely pursued, which defeats the purpose of the Protocol.¹⁹ The wider approach is more comprehensive and in line with the spirit of the Organized Crime Convention and the Protocol, as it makes it possible to hold accountable actors such as those involved in the supply chains for migrant smuggling (e.g. owners of boats and means of conveyance), in generating the illicit financial flows behind the crime (e.g. financial institutions), and in corruption and complicity with smugglers (e.g. actors in State institutions). It also facilitates the investigation of higher-level players, as it considers actions from the origin country, through transit countries up to the destination. When applied, measures should be taken in such a way as to minimize the risk of over-securitization of migration that blocks protected groups such as refugees from accessing international protection. Over-securitization also risks abuses and violations of refugees' and migrants' rights.

Criminal intent (mens rea)

19. The criminal intent (*mens rea*) in migrant smuggling according to the Protocol is “to obtain, directly or indirectly, a financial or other material benefit.” Therefore, to be considered an author of a migrant smuggling offence, in addition to procuring illegal entry, the person must have the subjective goal of obtaining a profit or another type of material gain.

20. “Financial or other material benefit” is another term that is not defined in the Protocol. There is a non-exhaustive indication of conduct it may entail in the interpretive notes²⁰ on article 2 of the Organized Crime Convention, which indicate that it should be understood broadly to include, for example, crimes motivated by sexual gratification, such as the receipt of and trade in child sexual abuse material.

21. The UNODC *Model Law against the Smuggling of Migrants*²¹ suggests that the term be understood as any type of financial or non-financial inducement, payment, bribe, reward, advantage, privilege or service (including sexual or other services). Where the material benefit is in the form of sexual services, the question of whether to go with migrant smuggling charges or trafficking in persons charges might arise, because requiring sex as payment for a migrant smuggling service may arguably entail some kind of abuse of the position of a migrant's vulnerability.

22. Also relevant is the definition of an organized criminal group in article 2 (a) of the Organized Crime Convention, which makes mention of financial and other material benefit. In the article, an “organized criminal group” is described as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

23. In the context of smuggling of migrants, it should be kept in mind that the definition of an organized criminal group is particularly important because, as noted above, there is a wide spectrum of actors who from a strictly legalistic interpretation of the definition of migrant smuggling can qualify as smugglers. However, some smugglers are opportunistic, working on an ad hoc basis or alone rather than as part of an organized criminal group. Therefore, in these cases, a nuanced approach is

¹⁹ See also United Nations Network on Migration, “Mapping the landscape of smuggling of migrants” (footnote 3).

²⁰ *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, (United Nations publication, Sales No. E.06.V.5).

²¹ UNODC *Model Law against the Smuggling of Migrants* (2010).

required when deciding whether the type of charge is proportional to the nature of the conduct.

24. In addition, the interpretative notes²² on article 6 of the Smuggling of Migrants Protocol highlight that the reference to a financial or other material benefit was included to ensure that only the activities of organized criminal groups acting for profit are criminalized, and not those of people assisting migrants for humanitarian reasons (such as non-governmental organizations or religious organizations) or because of close family ties.

25. There is also emerging discourse²³ from a human rights perspective that in practice, the mens rea element requires a lot more nuance, because smugglers, in reality, exist on a continuum, and it is not as simple as a humanitarian versus economic benefit dichotomy. Smugglers can be motivated by both humanitarian/empathetic reasons and economic benefit at the same time.²⁴ Proponents advocate that a distinction should be drawn between professional smugglers and people who facilitate migration.

D. Good practices and lessons learned from criminal law jurisprudence on the smuggling of migrants

26. A concerning trend that is increasingly being observed in recent studies on migrant smuggling is that the majority of “smugglers” who end up being charged in practice are low-level actors. For example, with regard to smuggling by sea to Spain along the north-west African route, the UNODC Observatory on Smuggling of Migrants²⁵ found that counter-smuggling investigations and prosecutions focused on people who navigate the boat; 150 such arrests were recorded on this route in 2021 alone. These were often refugees or migrants navigating the vessel in return for free passage or a reduced price for their own smuggling. Often these drivers were also vulnerable and potentially victims of trafficking for purposes of forced criminality.²⁶

27. However, despite these ongoing challenges, there have been precedents from courts attempting to understand the nuances around the perceived participation of migrants and refugees in the smuggling process. In the United Kingdom of Great Britain and Northern Ireland, for example, courts have begun to critically consider the prosecution of asylum seekers and migrants who steer small boats in the smuggling of migrants across the English Channel. This started with the case of *R v. Kakaei*²⁷ in 2021, and thereafter in the case of *R v. Bani*,²⁸ where the court overturned three of four convictions of asylum seekers who had been charged with assisting unlawful immigration because of their role in steering inflatable boats filled with a number of migrants from France to the United Kingdom. The Court of Appeal focused on the mens rea element of the crime in all the acquitted cases. It was apparent that the ultimate intention of the accused persons was not to smuggle migrants, but to be found by the United Kingdom Border Force and apply for asylum.

²² Ibid., p. 489.

²³ Alberto Aziani, “The heterogeneity of human smugglers: a reflection on the use of concepts in studies on the smuggling of migrants”, *Trends in Organized Crime*, vol. 26, No. 1 (March 2023), pp. 80–106.

²⁴ In Case No. 138-2017-03 from El Salvador, for example, a bricklayer met a domestic worker in a family home where they were both working. They developed a friendly relationship and talked about the difficult economic situation they were both going through. Their conversations progressed to the bricklayer offering to take her to the United States of America illegally in exchange for money, so that she could earn an income that was not possible in El Salvador. In this case altruistic and economic motivations were evident in the conduct of the smuggler.

²⁵ UNODC Observatory on Smuggling of Migrants, “Northwest African (Atlantic) route: key findings”. Available at <https://www.unodc.org/res/som/index.html>.

²⁶ Ibid.

²⁷ Referred to in *R v. Bani* [2021] EWCA Crim 1958 (UNODC, SHERLOC case law database). Available at <https://sherloc.unodc.org/cld/en/st/home.html>.

²⁸ *R v. Bani* [2021] EWCA Crim 1958.

28. Criminal justice measures against the smuggling of migrants must be implemented in a way that ensures that asylum seekers and migrants are not denied access to their internationally protected human rights in the name of combating organized crime.

29. In contrast, where an actual organized criminal group was concerned, courts in the United Kingdom took a different approach. For example, the case of *R v. Nica, Hughes and Others*²⁹ concerned 39 Vietnamese migrants (including children) who died while being smuggled across the English Channel inside an airtight container in temperatures of between 38 and 40 degrees Celsius. The migrant smuggling network was sophisticated and operated internationally. The investigation was massive and was conducted jointly by law enforcement authorities from the United Kingdom, Belgium, Ireland and France, with the support of the European Union Agency for Criminal Justice Cooperation and the European Union Agency for Law Enforcement Cooperation. It managed to identify various actors in the syndicate, who were subsequently prosecuted according to the significance of their role. For example, the organizers at the helm of the migrant smuggling operation and the controllers of the supply chain facilitating the operation, such as the owner of the haulage business that supplied the trailers and drivers used to transport the migrants, were given the heaviest charge, that is, manslaughter. The rest were all charged under provisions on assisting unlawful migration, with close attention paid to the proportionality of the sentence to the various roles played and the consequences. For example, the defendant whose role it was to recruit and pay drivers to collect migrants and deliver large sums of money to the main co-conspirator in London received a 27-year custodial sentence. In contrast, the drivers that transported migrants from drop-off points to a safe house or to a lorry drop-off spot were sentenced to terms of imprisonment of three to four and a half years. This prosecution was successful in comprehensively addressing a migrant smuggling operation in all its complexity and sophistication and effectively going after those who were truly making a significant profit while endangering the lives of migrants. It succeeded in identifying the authors and enablers of the crime and in dismantling the organization from the top.

30. Similarly, in Central America, in a case in Costa Rica,³⁰ 57 people from the Democratic Republic of the Congo sought to be smuggled from Costa Rica through Nicaragua, circumventing immigration controls, to Honduras. The first defendant approached them while they were in a border area, told them about his experience in organizing similar movements and offered them a migrant smuggling service in return for a fee of \$600. He directed the migrants to the second defendant, the son of the administrator of a certain hotel, where they would be given accommodation for several hours without any hotel record being kept. The plan thereafter was for other members of the organization to guide the group through the mountains to the border with Nicaragua to avoid immigration control. After making a down payment for the accommodation and the trip, the migrants were transported to a mountainous area and instructed to remain hidden and wait for the guide who would take them to Nicaragua. However, after waiting for two hours with the guide nowhere in sight, the migrants became afraid of being attacked by wild animals and returned to the hotel. Their presence at the hotel was conspicuous enough to attract law enforcement intervention and investigation. The first defendant was charged with aggravated smuggling of persons. He was accused of participating in an organized criminal group smuggling migrants from Costa Rica to Nicaragua with the role of recruiting migrants near the border with Panama. The second defendant was also charged with aggravated smuggling of persons because of his role in the organized criminal group of receiving migrants in a hotel and keeping them there until their transportation to Nicaragua by other members of the organization. Owing to evidentiary and jurisdictional issues, the case was remanded for a fresh trial. Although the case was not immediately concluded, the prosecution's approach of dealing with the constellation of unlawful

²⁹ UNODC, SHERLOC case law database, *R v. Nica, Hughes and Others*, United Kingdom of Great Britain and Northern Ireland, 2019.

³⁰ UNODC, SHERLOC case law database, Case No. 16-001420-0396-PE, Costa Rica, 2019.

actions making up the single incident of migrant smuggling by an organized criminal group was in line with the spirit of the Protocol. It was also in line with the Protocol's approach for the prosecution to proceed even though the offence was not completed, because there was a strong indication of the criminal intent.

31. There has also been some instances of good jurisprudence being used to tackle situations where humanitarian actors were accused of migrant smuggling. For example, in France,³¹ a French citizen who was a member of a humanitarian association dedicated to assisting migrants for free was charged with facilitating irregular migration by transporting four individuals from Libya and Mali to a French train station using his mother's car. This was despite the existence of a legislative provision in France providing immunity from criminal liability for assistance that was purely humanitarian in nature. The lower court felt that the accused's actions lacked the kind of spontaneity required for the immunity to apply, since the accused was a member of an activist group that consciously and systematically supported irregular migration. The Court of Cassation disagreed with the lower court's requirement of spontaneity for the humanitarian exception to apply and overturned the conviction. This is in line with the Protocol's above-mentioned stance that provisions on the smuggling of migrants are not meant to criminalize actors helping migrants for purely humanitarian reasons.

32. Similarly, in Canada, in the case of *R v. Appulonapa*,³² the Supreme Court held that the provision in section 117(1) of the Immigration and Refugee Protection Act, which defines the transnational offence of "organizing, inducing, aiding or abetting" the entry into Canada of persons without valid documentation, was inconsistent with the Canadian Constitution if interpreted to permit the prosecution of: (a) humanitarian aid to undocumented entrants; (b) mutual aid among asylum seekers; and (c) assistance to family entering without the required documents. The Court emphasized that the purpose of the provision was to prosecute smuggling of migrants in the context of organized crime and any punitive goal of prosecuting people with no connection to organized crime was inconsistent with the Parliament's purpose of fulfilling the international commitments of Canada.

Non-liability of smuggled migrants

33. The Smuggling of Migrants Protocol is primarily concerned with the criminal justice response to migrant smuggling, but it also includes in its statement of purpose (article 2) reference to protecting the rights of smuggled migrants. Notable provisions in this regard include article 16, which guarantees basic protection of the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment, and article 19, the saving clause, which guarantees the protection of other rights under international law, including refugee law.

34. Article 5 of the Protocol is also key to ensuring the protection of smuggled migrants' human rights. It protects migrants from being liable for prosecution for the fact of having been the object of the conduct set out in article 6 of the Protocol (for example, the smuggling of migrants, document fraud offences and enabling the stay of a migrant).

35. The UNODC *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*³³ note that article 5 of the Protocol ensures that nothing in the Protocol can be interpreted as requiring the criminalization of migrants or of the conduct they may engage in as opposed to organized criminal groups. However, the Protocol does not give blanket immunity to smuggled migrants. Article 6, paragraph 4, states that smuggled migrants may still be held liable for conduct that is a crime under a State's domestic law.

³¹ UNODC, SHERLOC case law database, Case No. 33 (19-81.561), France, 2020.

³² UNODC, SHERLOC case law database, *R. v. Appulonapa*, Canada, 2009.

³³ United Nations publication, Sales No. E.05.V.2., part three, para. 50.

36. Scholars³⁴ have highlighted that in implementing article 5 and article 6, paragraph 4, the principle of good faith in the law of treaties is particularly important to keep in mind. It is derived from article 26 of the Vienna Convention on the Law of Treaties, which states that every treaty in force is binding upon the parties to it and must be performed in good faith. This principle has been highlighted by the International Court of Justice, which stressed that it is the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application.³⁵ Therefore, with regard to article 5, measures that have the same detrimental impact as criminalization of smuggled migrants, such as certain types of punitive administrative detention measures³⁶ or criminalization of returnees, may go against the principle of good faith, bearing in mind that the objective of article 5 is to protect smuggled migrants.

IV. Conclusion

37. Determining who to charge with the crime of smuggling of migrants is a delicate affair. The breadth of the definition of the crime, if not considered from a human rights perspective, can perpetuate a pattern of gross injustice against vulnerable groups protected in other areas of international law. A focus on going after the money behind migrant smuggling and the organized criminal groups that are benefiting from the crime can guide investigation and prosecution choices and approaches that ultimately achieve the goals of the Smuggling of Migrants Protocol.

³⁴ Andreas Schloenhardt and Hadley Hickson, “Non-criminalization of smuggled migrants: rights, obligations, and Australian practice under article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air”, *International Journal of Refugee Law*, vol. 25, No. 1 (March 2013), pp. 39–64.

³⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, judgment, *I.C.J. Reports*, p. 7, para. 142.

³⁶ Schloenhardt and Hickson, “Non-criminalization of smuggled migrants”.