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Non-criminalization of smuggled migrants

(Notes on the interpretation of article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air)

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The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime[1] (hereinafter, the Smuggling Protocol) "is more novel and unique" than the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, "reflecting relatively new concerns that have arisen about the smuggling of migrants as a criminal activity distinct from legal or illegal activity on the part of migrants themselves" [2].

Combatting the smuggling of migrants and promoting international cooperation - while protecting the rights of smuggled migrants - is the explicit triple purpose of the Smuggling Protocol (article 2).

The Kindred Protocol to Prevent, Suppress and Punish trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (hereinafter, Trafficking Protocol) is also committed to combat trafficking and promote international cooperation, and its protecting purpose is articulated in terms of protection and assistance to "victims" of trafficking (article 2).

Articles 5 and 6 of the Smuggling Protocol are two sides of the same coin. Article 6 concerns criminalization. It lists the offences the States Parties are

[1] Hereinafter, the United Nations Convention against Transnational Organized Crime and the Protocols thereto are quoted as per United Nations Office on Drugs and Crime (UNODC), "United Nations Convention against Transnational Crime and the Protocols thereto", United Nations, New York, 2004.
Available at: https://www.unodc.org/documents/middleeastandnorthafrica//organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOL S_THERETO.pdf.

[2] United Nations Office on Drugs and Crime, (UNODC), "Legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto", (hereinafter UNODC, "Legislative guides…"), United Nations, New York, 2004, p.340.
Available at:
http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf

bound to include in their domestic legislation: The crime of smuggling of migrants and certain related offences. Article 5 regards non-criminalization. A person who was smuggled cannot be charged with the crime of smuggling of migrants, or other conduct described in article 6.

Normally, it is assumed that on the side of the Trafficking Protocol, the persons protected are "victims" of trafficking, whereas on the side of the Smuggling Protocol, the protected persons are those who have been "the object" of smuggling of migrants and other related conduct (article 5, Smuggling Protocol).

However, the notion of victims of trafficking is not categorically opposed to that of persons being the object of smuggling:

The official records affirm that "**there was consensus that migrants were victims** and should therefore not be criminalized"[3], all the while nuancing that the "notion of victims", as incorporated in the corresponding article of the Trafficking Protocol, "was not appropriate" in the context of the statement of purpose of the Smuggling Protocol[4]. Besides other articles related to the protection of the rights of smuggled migrants, one provision of the Smuggling Protocol talks about preventing migrants from "falling victim to organized criminal groups"[5].

An acceptable interpretation of article 5 of the Smuggling Protocol is advanced here, by building upon publications of the United Nations Office on Drugs and Crime (UNODC), while bringing up that UNODC seems to be too restrictive concerning conduct excluded from criminalization, without affording ordinary, systematic, or historical interpretations of the law to support its stance.

This paper will propose a distinction: In clear-cut situations it is contrary to article 5 to *initiate* criminal proceedings against a person being the object of conduct described in article 6. In other cases, article 5 should be read as a *non-penalization* provision.

Such distinction implies, as we will see, an effort to balance different approaches to articles 5 and 6 of the Smuggling Protocol in function of the type of interpretation resorted to. Somewhat conflicting results are rendered by an

[3] United Nations Office on Drugs and Crime, "Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Organized Crime and the Protocols thereto", United Nations, New York, 2006 (emphasis added), (hereinafter UNODC. "Travaux Préparatoires…"), Notes by the Secretariat, p. 483. Available at: http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf.

[4] UNODC. "Travaux Préparatoires…", p. 461 (emphasis added).

[5] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter, the Smuggling Protocol), article 15.2. "In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups" (emphasis added).

ordinary meaning interpretation, a systematic interpretation, or an invocation of the official records of the negotiations.

We will observe some features of article 6 ("criminalization") of the Smuggling Protocol; its "statement of purpose "(article 2); a number of its articles directing the protection of the rights of smuggled migrants as a core principle; and UNHCR's determination during the negotiations that the Protocol preserve and uphold the fundamental rights of smuggled migrants.

Later, this paper will put in relation article 31.1 of the 1951 Convention relating to the Status of Refugees[6], non-penalization for illegal entry or presence, with article 5 of the Smuggling Protocol; namely, the principle of immunity from penalties for refugees entering or present without authorization (as characterized by an eminent scholar), in relation to non-criminalization of persons being the object of smuggling of migrants.

It is well known that the rights of refugees are not affected by the Smuggling Protocol. Let us to go further with the protection of refugees and smuggled migrants in mind. Asylum seekers who have been the object of smuggling of migrants or related conduct foreseen in article 6 of the Smuggling Protocol, are entitled to protection on account of *both* article 31.1 of the 1951 Refugee Convention and article 5 of the Smuggling Protocol.

1. Article 5 of the Smuggling Protocol.

Our inquiry is anchored on article 5 of the Smuggling Protocol:

> "Article 5. Criminal liability of migrants.
>
> Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol".

Ordinary meaning interpretations, as well as systematic and historical interpretations of this provision will be presented in this paper. Article 5 itself calls on a balancing exercise on the part of the interpreter, since it purports to combat smugglers and, at the same time, to protect the rights of smuggled migrants.

UNODC´s publications comment on article 5 of the Smuggling Protocol as follows:

> "In other words, a person cannot be charged with the crime of smuggling solely on the grounds of having been smuggled. This does not mean that

[6] Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954, (hereinafter, 1951 Convention).

such persons cannot be prosecuted for having smuggled others, or for the commission of any other offences. **The intention of the drafters of the Smuggling Protocol was that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to migration itself**, even in cases involving entry or residence that is illegal under the laws of the State concerned (see art. 5 and art. 6, para. 4 of the Protocol)"[7].

"**In accordance with article 5 of the Protocol, a person cannot be charged with the crime of smuggling for having been smuggled**. This does not mean that they cannot be prosecuted for having smuggled others, or for the commission of any other offences. For example, many countries have laws that criminalize conduct such as possession of fraudulent travel documents or illegal entry"[8].

As will be stated below, a person cannot be charged with the crime of smuggling for having enabled their own smuggling; however, a person can be prosecuted for having smuggled others, excepting the activities of those who provide support to migrants for humanitarian reasons, or on the basis of close family ties.

In keeping with the aforementioned UNODC's comments, an individual can be prosecuted for the commission of "any other" offences. Puzzlingly, such comments seem to presume that article 5 only mandates the non-criminalization of one of the several offences described in article 6.1.b) i) and ii) of the Smuggling Protocol. We will come back to this core issue.

2. Article 6 (criminalization).

[7] United Nations Office on Drugs and Crime (UNODC), "Toolkit to combat Smuggling of Migrants", United Nations, New York, 2010, Tool 5.3 Non-criminalization (article 5 of the Smuggling of Migrants Protocol) (emphasis added). Available at: file:///C:/Users/UNHCRuser/Desktop/UNODC%20Toolkit_E-book_english_Combined.pdf

[8] United Nations Office on Drugs and Crime (UNODC), "Model Law against the Smuggling of Migrants", United Nations, New York, 2010 (hereinafter "Model Law against the Smuggling of Migrants") p.56 (emphasis added). Available at: http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf. See also "UNODC, "In-depth training manual on investigating and prosecuting the smuggling of migrants", Module 2, United Nations, New York, 2011: "The Smuggling of Migrants Protocol does not intend to criminalize migrants themselves. Indeed, by virtue of article 5, smuggled migrants must not be held responsible for the crime of smuggling for the fact of having been smuggled (…). The Smuggling of Migrants Protocol does not prevent States Parties from taking measures against persons whose conduct constitutes an offence under its domestic law. Accordingly, it is acknowledged that migrants may be charged with other offences, such as illegal entry, in some jurisdictions. However, like the Smuggling of Migrants Protocol, this Manual is focused on the crime of migrant smuggling, which article 5 clarifies smuggled migrants should not be liable to criminal prosecution" (p.16). Available at: http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/InDepth_Training_Manual_SOM_en_wide_use.pdf.

For the sake of brevity and clarity, in this paper the respective offences sometimes are often just outlined; for their description at length, see article 6 of the Smuggling Protocol[9]. Following article 6, the States Parties shall establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a material benefit, the following conduct:

- The procurement of the illegal entry of a person into a State, of which the person is not a national or a permanent resident (crime of smuggling of migrants, as defined in article 3 a).

- When committed for the purpose of enabling the smuggling of migrants:

[9] "Article 6. Criminalization. 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

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

(i) Producing a fraudulent travel or identity document;

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

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

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

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

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

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

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

and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

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

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

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

Producing, procuring, providing or possessing a fraudulent travel or identity document.

- Enabling a person, who is not a national or a permanent resident, to remain in the State concerned without complying with the necessary legal requirements.

Each State Party will adopt such legislative or other measures as may be necessary to establish as criminal offences attempting to commit, participating as an accomplice, organizing or directing the said offences (article 6.2). In article 5 of the United Nations Convention against Transnational Organized Crime we find a detailed description of the "criminalization of participation in an organized criminal group". The Smuggling Protocol supplements the United Nations Convention against Transnational Organized Crime, and should be interpreted together with the Convention (Smuggling Protocol, article 1.1.)

Circumstances that are likely to endanger the lives and safety of the migrants concerned, or entail inhuman or degrading treatment, "including for exploitation", are to be established as aggravating circumstances (Smuggling Protocol, article 6.3).

The Smuggling Protocol applies where the offences are transnational in nature and involve an organized criminal group (article 4)[10] [11].

[10] UNODC, "Travaux préparatoires…", p. 472, in the context of the discussion about the scope of application of the Smuggling Protocol: "Notes by the Secretariat. 3. After the finalization and approval of the text of the transnational organized crime convention at its tenth session, at its eleventh session the Ad Hoc Committee considered, finalized and approved article 5 of the migrants protocol, as amended (a) on the basis of a proposal submitted by Azerbaijan (see A/AC.254/5/Add.38) and (b) with the inclusion of a specific reference to "the protection of the rights of persons who have been the object of such offences" to ensure consistency with the content of article 3 (finally article 2) of the protocol (Statement of purpose). The general agreement was to adopt mutatis mutandis the approach adopted in the corresponding article 4 of the trafficking in persons protocol" (emphasis added).

[11] United Nations Convention against Transnational Organized Crime, "article 2. Use of terms. For the purposes of this Convention: (a) "Organized criminal group" shall mean 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 this Convention, in order to obtain, directly or indirectly, a financial or other material benefit"
"Article 3. Scope of Application. 2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:
(a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State".

Article 5 forbids the criminalization of persons being the object of conduct set forth in article 6 of the Protocol. A State Party therefore violates the Smuggling Protocol if an individual is criminalized for having been the object of smuggling of migrants or related offences.

Take note that "nothing in this Protocol shall prevent a state from taking measures against a person whose conduct constitutes an offence under its domestic law" (Smuggling Protocol, article 6.4). Hence, one could envisage a State establishing conduct which is not transnational in nature or does not involve an organized criminal group as a criminal offense. Absent such requirements (the transnational nature of the crime and the involvement of an organized criminal group), unless otherwise stated in the domestic legislation, an individual being the object of smuggling of migrants or related offences will not benefit from article 5 of the Protocol.

3. The object and purpose of a treaty. The interpreter should not substitute the drafters.

It is said that the object and purpose of the law as a whole govern its interpretation. But a teleological approach (a search for the object and purpose of the law) claiming to be independent from an analysis of the text and context of a treaty, risks, in fact, ignoring the treaty, a document designed to achieve at least certain precision with regard to the rights of its beneficiaries and the rights and duties of the State Parties to it.

Interpreting a treaty "in the light of its object and purpose" is pivotal, as stated in the Vienna Convention on the Law of Treaties[12]. This involves responding, step by step, to the following questions:

[12] Vienna Convention on the Law of Treaties, 1155 UNTS 331, done May 23, 1969, entered into force Jan. 27, 1980: "Article 31 - General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended" (emphasis added).

"Article 32 Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the

What is the object and purpose of article 5 of Smuggling Protocol, as determined by an ordinary reading of its provisions (namely, an interpretation according to their plain wording and ordinary meaning)?

What is its object and purpose having resort to a systematic interpretation (a reading of its provisions in their context)?

What is its object and purpose as rendered by a historic interpretation, that means by examining its preparatory work and the circumstances of its conclusion?

This paper advocates for a search of the purposes of the Smuggling Protocol as rendered by the responses to each of the above questions, the role of a reasonable interpreter being that of balancing conflicting responses transparently.

4. Object and purpose of the Smuggling Protocol in accordance with the ordinary meaning of its provisions.

On occasions it is assumed that the Smuggling Protocol is just concerned with the repression of smugglers, but its article 2, entitled "statement of purpose", actually sets forth a triple purpose, which is an invitation to a balanced approach:

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

5. Object and purpose of the Smuggling Protocol, as rendered by interpreting each provision concerned in conjunction with other pertinent provisions.

A systematic approach to the object and purpose of the Smuggling Protocol - each provision concerned interpreted in conjunction with other pertinent provisions - renders the picture of an instrument largely concerned with the rights of smuggled migrants:

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meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

The Preamble shows that the Parties are convinced "of the need to provide migrants with humane treatment and full protection of their rights".

Article 4[13], "Scope of application", states that the Protocol applies to offences transnational in nature and involving an organized criminal group, "as well as to the protection of the rights of persons who have been the object of such offences".

Training and technical cooperation to be provided by the Parties include "the humane treatment of migrants who have been the object of (the conduct described in article 6), while respecting their rights as set forth in this Protocol" (Article 14.1).

Article 16 is entitled "Protection and assistance measures". States shall "preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of the Protocol" (paragraph 1). In "case of detention of a person who has been the object of conduct set forth in article 6 of this Protocol" States "shall comply with (their) obligations under the Vienna Convention on Consular Relations, where applicable" (paragraph 5).

The return of smuggled migrants "shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party" (article 18, paragraph 7).

Humanitarian workers use to recall article 19 -the well-known "saving clause", which forbids a discriminatory interpretation or application of the Protocol on the ground that a person has been the object of conduct foreseen in article 6- and states that nothing in the Protocol should affect, in particular, where applicable, "the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement…"[14].

[13] "Article 4. Scope of application. This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences".

[14] "Article 19. Saving clause. 1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol3 relating to the Status of Refugees and the principle of non-refoulement as contained therein.

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

6. Object and purpose of the Smuggling Protocol, following the official records. UNHCR's intervention.

UNHCR and other international organizations declared that the Smuggling Protocol should preserve and seek to uphold "the fundamental human rights of smuggled migrants":

In the context of the debate about protection and assistance measures (article 16):

> "Notes by the Secretariat
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> 1. At the fourth session of the Ad Hoc Committee, the United Nations High Commissioner for Human Rights submitted an informal note, in which it was stressed that the protocol must commit itself to preserving and protecting the fundamental rights to which all persons, including illegal
>
> migrants, were entitled. It was also highlighted that the respect for basic rights of migrants did not prejudice or otherwise restrict the sovereign right of all States to decide who should enter their territories (see A/AC.254/16, para. 5). At the same session, the representative of Ecuador made a statement on behalf of the Group of Latin American and Caribbean States. The Group expressed its appreciation to the United Nations High Commissioner for Human Rights for the above-mentioned informal note and recalled that the protocol should be directed at combating illegal trafficking of migrants and protecting the rights of migrants. The Group also shared the view expressed by the High Commissioner that respect for the basic rights of migrants did not prejudice or otherwise restrict the sovereign right of all States to decide who should or should not enter their territories. **According to the Group, the protocol could not be used as an instrument for criminalizing migration**, which was a social and historical phenomenon, nor should it stimulate xenophobia, intolerance and racism (see A/AC.254/30-E/CN.15/2000/4, para. 39)"[15].

In the context of the discussion of the purposes of the Smuggling Protocol:

> "Notes by the Secretariat
>
> 4. At the eighth session of the Ad Hoc Committee, the Office of the United
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> Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund and the International Organization for Migration submitted a note, arguing, inter alia, that the protocol should preserve and seek to uphold the fundamental human rights of smuggled migrants, as one of its primary objectives (see A/AC.254/27 and Corr.1, para. 15).

[15] United Nations Office on Drugs and Crime, "Travaux Préparatoires…", p. 537 (emphasis added).

5. At its eleventh session, the Ad Hoc Committee considered, finalized and approved article 3, as amended after extensive discussion. The protection of the rights of migrants was again in the forefront of the debate, while it was agreed that the notion of "victims", as incorporated in the corresponding article of the trafficking in persons protocol, was not appropriate in the context of the present article" [16].

UNHCR and other international organizations also stressed "the need for including a specific and explicit provision for the protection of smuggled children"[17].

7. A restrictive approach to non-criminalization is not warranted.

Even the most restrictive comments of articles 5 and 6 of the Smuggling Protocol consider that the offences foreseen in article 6 do not include:

- The activities of those who provide support to migrants for humanitarian reasons, or on the basis of close family ties.
- A migrant who possesses a fraudulent travel or identity document to enable his or her own smuggling.
- A migrant who enables his or her own smuggling.

The Protocol's definition of "Smuggling of migrants"[18] requires the perpetrator to directly or indirectly obtain a financial or other material benefit.

Following an ordinary meaning interpretation, enabling one´s own smuggling or procuring the illegal entry of a person on account of close family ties or for humanitarian reasons, does not fit into the definition of smuggling of migrants.

Other conduct shall not be criminalized:

The offence of producing, procuring, providing or possessing a fraudulent travel or identity document, shall be committed "for the purpose of enabling the smuggling of migrants". Hence, if an individual possesses a fraudulent identity or travel document to enable their own smuggling, they would not be included in an ordinary meaning interpretation of article 6, which requires

[16] UNODC. "Travaux Préparatoires…" p. 461 (emphasis added).
[17] United Nations Office on Drugs and Crime, "Travaux Préparatoires…", Article 16 (…) Notes by the Secretariat", (emphasis added), p. 538.
[18] Smuggling Protocol, article 3 (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 intention to obtain directly or indirectly a financial or other material benefit.

Let us rely now on a systematic interpretation.

The Smuggling Protocol applies to offences "transnational in nature" and involving "an organized criminal group" (art. 4.). Ignoring the aforesaid interpretation of "smuggling of migrants" would lead to an absurd result:

The person who has been the object of smuggling or related offences would be indicted as an accomplice, or as a participant in an organized criminal group…The result is said to be absurd because it clashes with an ordinary interpretation of article 5, and with the purpose of the Protocol to protect the rights of smuggled migrants (article 3).

The official records foresee the case of individuals possessing a fraudulent travel or identity document, but unfortunately there are no explicit references to other conduct described in article 6.1.b i) and ii): The case of individuals producing, procuring, or providing such a document in order to obtain their own smuggling:

> "The interpretative notes on article 6 of the protocol approved by the Ad Hoc Committee and contained in its report on the work of its first to eleventh sessions (see A/55/383/Add.1, paras. 91-97) are as follows:
> (…)
>
> Paragraph 1
>
> (b) The offences set forth in article 6 should be seen as being part of the activities of organized criminal groups. In this article, the protocol follows the precedent of the convention (art. 34, para. 2). The reference to 'a financial or other material benefit' as an element of the offences set forth in paragraph 1 was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.
> (c) Subparagraph 1 (b) was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included"[19].

[19] UNODC, "Travaux Préparatoires…" p. 489, emphasis added.

8. The drafters introduced article 5 of the Smuggling Protocol to ensure consistency with article 2 if the Smuggling Protocol, and with a provision on the scope of application of the Trafficking Protocol (article 4[20]).

The official records underscore the consistency of article 5 with the protecting purposes of the Smuggling Protocol. In the context of the discussion about its scope of application the official records read as follows:

> "Notes by the Secretariat. 3.
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> After the finalization and approval of the text of the transnational organized crime convention at its tenth session, at its eleventh session the Ad Hoc Committee considered, finalized and approved article 5 of the migrants protocol, as amended (a) on the basis of a proposal submitted by Azerbaijan (see A/AC.254/5/Add.38) and (b) with the inclusion of a specific reference to "the protection of the rights of persons who have been the object of such offences" to ensure consistency with the content of article 3 (finally article 2) of the protocol (Statement of purpose). The general agreement was to adopt mutatis mutandis the approach adopted in the corresponding article 4 of the trafficking in persons protocol" (emphasis added)[21].

Therefore, in conformity with the official records, the reference to the protection of the rights of persons who have been the object of smuggling of migrants and related conduct was to ensure consistency in two regards:

A corresponding provision in the Trafficking Protocol (article 4[22], which respects protection of victims of offences established in the latter), and the triple purpose of the Smuggling Protocol.

9. UNODC's "Legislative Guides…" look too restrictive concerning the scope of conduct excluded from criminalization.

The "Legislative Guides…" explicitly talk about the case of an individual *possessing* a fraudulent document. Unfortunately, the following conduct is not also excluded from criminalization:

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[20] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: "Article 4. Scope of application. This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences" (emphasis added), hereinafter, Trafficking Protocol.

[21] UNODC, "Travaux Préparatories…", p. 472, (emphasis added).

[22] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: "Article 4. Scope of application. This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences".

An individual *producing, procuring, or providing* such document in order to obtain their own smuggling, or a person who enables their own *remaining* in the State concerned without complying with the necessary legal requirements.

> "54. The specific rationales underlying most of the foregoing provisions have been set out in the course of the explanations of the provisions themselves. Generally, the purpose of the Protocol is to prevent and combat the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration, even if illegal under other elements of national law. This is reflected both in article 5 and article 6, paragraph 4, as noted above, and in the fact that the offences that might otherwise be applicable to mere migrants, and especially the document related offences established by article 6, paragraph 1 (b), have been formulated to reduce or eliminate such application. Thus, for example, a migrant caught in **possession** of a fraudulent document would not **generally** fall within domestic offences adopted pursuant to paragraph 1 (b), whereas a smuggler who possessed the same document for the purpose of enabling the smuggling of others would be within the same offence"[23].

As will be pointed out below, at least in the above quoted paragraph, the words "for example" seem to indicate that other conduct might could be implicitly excluded from criminalization in article 6; nonetheless the scope of the word "generally" is unclear.

10. Other remarks in UNODC's "Legislative Guides…"

> "(vi) Legal status of migrants (articles 5 and 6, paragraph 4)
>
> 50. As noted above, the fundamental policy set by the Protocol is that it is the smuggling of migrants and not migration itself that is the focus of the criminalization and other requirements. The Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences: article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalization of mere migrants or of conduct likely to be engaged in by **mere migrants** as opposed to members of or those linked to organized criminal groups. At the same time, article 6, paragraph 4, ensures that nothing in the Protocol limits the existing rights of each State party to take measures against persons whose conduct constitutes an offence under its domestic law[24].

It is not correct to say that the Smuggling Protocol "takes a neutral position on whether those who migrate illegally should be the subject of any offences". If

[23] UNODC, "Legislative guides…" p. 349 (emphasis added).
[24] UNODC, "Legislative guides…" p. 347 (emphasis added).

such assertion were accurate, article 5 would be, either meaningless or redundant *vis-à-vis* article 6.

We are not afforded any systematic or historical argument to (in fact!) reject the ordinary meaning interpretation of article 5: "migrants should not become liable to criminal prosecution under the Protocol for the fact of having been the object of conduct set forth in article 6".

Furthermore, nothing seems to indicate that the words "mere migrants", used by UNODC, would include the following:

A migrant who enables their own smuggling; who –in order to enable their own smuggling- produces, procures, provides or possesses a fraudulent travel or identity document; or who enables their own remaining in the State concerned without complying with the necessary legal requirements.

11. This paper stresses that a migrant who enables their own smuggling or who – in order to enable their own smuggling- produces, procures, provides or possesses a fraudulent travel or identity document, or a person who enables their own remaining in the State concerned without complying with the necessary legal requirements, is not included within article 6 ("criminalization") of the Smuggling Protocol.

The official records of the Smuggling Protocol only talk about the case of a migrant *possessing* such a document to procure their own smuggling. However, a historical (official records) interpretation in and by itself does not necessarily demand brushing aside an ordinary or systematic reading. In our case, it does not request a restrictive approach to articles 5 and 6.

Article 32 of the Vienna Convention on the Law of Treaties reads:

> "Supplementary means of interpretation.
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

An ordinary reading of the words in article 5 of the Protocol does not seem to leave the meaning ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable. Moreover:

A) The drafting history shows that "there was consensus that migrants were victims and should therefore not be criminalized. It was also agreed, however, that migrants should not be given full immunity"[25].

B) The drafting history itself, as said above, excludes from criminalization a migrant who possesses a fraudulent document to enable their own smuggling, and underscores the consistency of article 5 with the protection purposes of the Smuggling Protocol as a whole.

Certainly, there is ambiguity between the reference in the heading of article 5 to the "criminal liability" of migrants", and the mandate that migrants shall not be "liable to criminal prosecution" in the text of the same article, the latter looking like a provision on non-penalization and the former like a bar to the initiation of criminal proceedings.

But such ambiguity may be resolved, as will be suggest below, by distinguishing two types of cases, in function of the available criminal evidence: Cases in which article 5 is *a bar to the initiation* of proceedings, and cases in which article 5 should be read as *non-penalization* provision.

Let us reiterate, UNODC does not offer any ordinary meaning or systematic interpretation to explain why its comments exclude from criminalization "possessing" but omit to exclude "producing", "procuring" or "providing" a fraudulent travel or identity document (to enable one´s own smuggling), or illegally enabling oneself to "remain" in the State concerned.

12. **UNODC's "Legislative guides…" do not establish once and for all that producing, procuring, or providing a fraudulent travel or identity document, in order to enable one`s own smuggling, or illegally enabling oneself to remain in the State, without complying with the necessary legal requirements, is included or is not included in articles 5 and 6 of the Smuggling Protocol.**

UNODC`s "Legislative guides…" articulate - just as an "example"- that a migrant caught in the possession of a fraudulent document would not "generally" be criminalized; that the sanctions established in keeping with the Protocol do not apply to "mere migration or migrants", and that "mere illegal entry" is beyond the scope of the Convention, but we lack any ordinary meaning, systematic or historical reasoning about the use of words like "generally", "mere migration" or "mere illegal entry" in the "Legislative guides…":

> "28. Two basic factors are essential to understanding and applying the Migrants Protocol. The first is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to **mere migration or**

[25] United Nations Office on Drugs and Crime, "Travaux Préparatoires…", article 6 (criminalization), Notes by the Secretariat, p. 483.

migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned (see articles 5 and 6, paragraph 4, of the Protocol). **Mere** illegal entry may be a crime in some countries, but it is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or other material benefit), on the other hand, has been recognized as a serious form of transnational organized crime and is therefore the primary focus of the Protocol".

"Purpose of the articles

54. The specific rationales underlying most of the foregoing provisions have been set out in the course of the explanations of the provisions themselves. Generally, the purpose of the Protocol is to prevent and combat the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration, even if illegal under other elements of national law. This is reflected both in article 5 and article 6, paragraph 4, as noted above, and in the fact that the offences that might otherwise be applicable to mere migrants, and especially the document related offences established by article 6, paragraph 1 (b), have been formulated to reduce or eliminate such application. Thus, for example, a migrant caught in possession of a fraudulent document would not generally fall within domestic offences adopted pursuant to paragraph 1 (b), whereas a smuggler who possessed the same document for the purpose of enabling the smuggling of others would be within the same offence"[26].

13. **Distinction between clear and evident cases, and other type of cases**

A) It is contrary to article 5 of the Smuggling Protocol to *initiate* criminal proceedings against a person being the object of conduct described in article 6, in rather clear-cut situations:

- clear and evident cases; or
- where the investigation prior to the initiation of the criminal proceedings is enough to clear him or her.

B) In other cases, article 5 could be read as a *non-penalization* provision.

As such, it would eventually exclude conviction, but would not impede the initiation and development of criminal proceedings.

Not making the above distinction could lead to an absurd result: The eventual conferral of immunity upon smugglers because, save in clear-cut situations, it is not always easy to separate migrants from smugglers.

[26] UNODC, "Legislative guides…" p. 340 and p. 349 (emphasis added).

To sum up, a person enabling their own smuggling, producing, procuring, providing or possessing a fraudulent travel or identity document (in order to enable their own smuggling), or enabling their own illegal remaining in the State concerned, is protected by article 5 of the Smuggling Protocol:

> "Article 5. Criminal liability of migrants.
>
> Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol".

As per an ordinary meaning interpretation, a first approach to the text seems to convey that it is always contrary to the Protocol to initiate criminal proceedings against a person being the object of conduct set forth in article 6.

But such an interpretation could lead to the absurd result of the non-criminalization of an eventual smuggler; this would be contrary to the purpose of the Smuggling Protocol to combat the smuggling of migrants. Besides, the heading of article 5 regards "criminal liability of migrants", whereas the text of the article excludes liability to "criminal prosecution".

The distinction between non-initiation of criminal proceedings in rather clear-cut situations, and non-penalization of migrants in other cases, relies on the absurd consequences to which an ordinary meaning interpretation of article 5 could lead.

An argument regarding the absurd consequences of an assertion is a systematic argument in this case, because it refers to other provisions of the Smuggling Protocol -the protection of smuggled migrants being balanced by the need to punish the smugglers-.

Looking closely, an ordinary meaning interpretation of article 5 could also uphold the suggested distinction. When confronting other than the above mentioned clear-cut situations, we would be following the heading of article 5 "criminal liability" of migrants, which looks like an expression equivalent to non-penalization of migrants, as distinct from non-initiation of criminal proceedings, which is in the text of article 5. This understanding does not lead to a result manifestly absurd or unreasonable[27].

[27] Vienna Convention on the Law of Treaties, "article 32 Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

14. A State Party criminalizing (by way of enacting laws, or by misinterpreting the Smuggling Protocol) a migrant who

- **enables his own smuggling; or**
- **enables himself or herself to illegally remain in the State concerned; or**
- **–in order to enable his own smuggling- produces, procures, provides or possesses a fraudulent travel or identity document**

violates article 5 of the Smuggling Protocol.

Regarding situations where the evidence is not clear-cut [28], we should not react by simply brushing aside article 5. Doing so would mean a refusal to take into account a reasonable distinction which is consistent, as we have seen, with the ordinary meaning of the heading of article 5, and with the protection purposes of the Smuggling Protocol.

The official records suggest that a middle ground approach, like the one outlined in this paper, is reasonable. The official records show that the drafters were avoiding the establishment of "full immunity" for persons who had been the object of smuggling of migrants, as we have seen above. The meaning of an immunity which is not "full" is technically eccentric, and, anyway, seems to be distinct from the notion of "immunity from prosecution" as designed in the parent United Nations Convention against Transnational Organized Crime (article 26.3[29], covering persons providing substantial cooperation in the investigation or prosecution of an offence).

15. Hypothetically the drafters of the Smuggling Protocol could have envisioned an optional immunity from prosecution like the one found in article 26.3 of the United Nations Convention against Transnational Organized Crime, but they did not. Nevertheless, they wanted article 5 to be a provision upon non-criminalization.

The fifth session of the Ad Hoc Committee reads:

[28] By situations of clear-cut evidences, it is understood here clear and evident cases, or cases where the investigation prior to the initiation of the criminal proceedings is not sufficient to ascertain whether someone is a smuggler of migrants or, on the contrary, a smuggled person who deserves the protection provided for in article 5.

[29] United Nations Convention against Transnational Organized Crime, article 26.3:
"Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention".

> "(…) there was consensus that **migrants were victims and should therefore not be criminalized**. It was also agreed, however, that migrants should not be given **full immunity**"[30].

A proposed provision in the rolling text reads:

> "A person whose illegal entry and/or illegal residence is procured or intended by the smuggling of migrants shall not become punishable under this Protocol".

Regarding such optional provision, the official records state:

> "Some delegations expressed concern that this paragraph might interfere with the operation of national immigration laws. At the fourth session of the Ad Hoc Committee, several delegations stressed that, in their view, this provision was important, and that all other provisions of the protocol should therefore be consistent with this provision. It was emphasized that the goal of the protocol was to function as an instrument that would enable States to prosecute smugglers effectively. In that context, it was evident that criminalization of the migrant would not be intended or desirable. However, several delegations were apprehensive about the possibility of the protocol granting immunity to

[30] United Nations Office on Drugs and Crime, "Travaux Préparatoires…", article 6 (criminalization) Notes by the Secretariat, p. 483:
"1. At the informal consultations held during the fifth session of the Ad Hoc Committee, with regard to article 4, paragraph 1, many delegations agreed with the proposal submitted by Canada and the United States (see A/AC.254/L.76), except for certain wording such as the words "international travel" in subparagraph (b) (i), the words "possessing" and "involved" in subparagraph (b) (ii) and the words "acting on" in subparagraph (b) (iii). Some delegations suggested that merely "possessing" the document should not be criminalized. In addition, there was a discussion on whether the words "organized criminal group" should be in square brackets. One delegation suggested that the words "transnational organized crime" should be kept in square brackets and that the words "organized criminal group" should be inserted in square brackets next to those words. Several delegations suggested that the criminal conduct should be linked to the organized criminal group so that the migrants would not be criminalized and therefore preferred a proposal submitted by the Russian Federation that read "States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as criminal offences the activities of organized criminal groups relating to the organization, procuring and actual effectuation of the smuggling of migrants". The proposal submitted by India (A/AC.254/L.58) was also supported. Mexico strongly suggested retaining option 1. However, the majority of delegations were in favor of deleting option 1, while one delegation suggested retaining paragraph 1 of that option. One delegation suggested rephrasing subparagraph (b) (iii) to read as follows: "Causing a third party to use, possess, deal with or act on such a document for the purpose of smuggling migrants". With regard to paragraph 3, there was a convergence of views on subparagraphs (a), (b) and (c). One delegation suggested combining those subparagraphs. Many delegations were of the view that subparagraph (d) needed to be clarified. There was no objection to paragraph 4. With regard to paragraph 5 (and, in the case of option 1, paragraph 6), most delegations preferred option 2, while the Syrian Arab Republic strongly suggested adding the words "and smuggling of" after the word "treatment" in subparagraph 5 (b) of option 2. One delegation suggested that the element of "exploitation" in option 1 should be included in option 2. Regarding paragraph 7**, there was consensus that migrants were victims and should therefore not be criminalized. It was also agreed, however, that migrants should not be given full immunity**" (emphasis added).

> illegal migrants, especially if they had committed a crime, including the smuggling of other illegal migrants"[31]

A State Party criminalizing a migrant who enables their own smuggling, who – in order to enable their own smuggling- produces, procures, provides or possesses a fraudulent travel or identity document, or who enables their own illegal remaining in the State concerned, infringes on article 5 of the Smuggling Protocol.

We read in article 6.4 that "nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law". This provision is not to be interpreted as rendering article 5 of the Smuggling Protocol nugatory! This provision is located as a paragraph of the article mandating the establishment of criminal offences, that is, article 6; it is not a paragraph relative to non- criminalization (article 5).

Therefore, States Parties may establish offences under their domestic *laws as long as* such offences are not in breach of article 5 of the Smuggling Protocol. (UNODC's "Model Law against the Smuggling of Migrants" apparently suggests otherwise[32]).

16. **Article 5 of the Smuggling Protocol does not require States Parties to enact implementing legislation**.

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences conduct set forth in article 6. But, to the contrary, article 5 is immediately and directly applicable (at least in Civil Law legal orders). It is not a list of offences, and it does not establish a duty to pass implementing legislation.

17. **Reading article 5 in conjunction with article 16:**

In line with article 16 of the Smuggling Protocol, the States Parties should "preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of the Protocol" (paragraph 1), and "in the case of detention of a person who has been the object of conduct set forth in article 6 of this Protocol" States "shall comply with (their) obligations under the Vienna Convention on Consular Relations, where applicable (paragraph 5).

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[31] United Nations Office on Drugs and Crime, "Travaux Préparatoires…" footnote 20, p. 482 (emphasis added).

[32] United Nations Office on Drugs and Crime (UNODC), "Model Law against the Smuggling of Migrants", p. 56: "In accordance with article 5 of the Protocol, a person cannot be charged with the crime of smuggling for having been smuggled. This does not mean that they cannot be prosecuted for having smuggled others, or for the commission of any other offences. For example, many countries have laws that criminalize conduct such as possession of fraudulent travel documents or illegal entry" (emphasis added).

Hence, the Protocol itself recognizes the possibility of detention of individuals having been the object of conduct described in its article 6.

Of course, "it is clear that detaining people for non-compliance with migration laws should never involve punitive purposes", writes the Inter-American Court of Human Rights[33]. Article 5 of the Smuggling Protocol continues to be pertinent because it is concerned with *something more* than non-compliance with migration laws: It regards a migrant who has been the object of conduct set forth in article 6 of the Protocol.

In order to be consistent with what has been said about article 5, detention would breach the Smuggling Protocol where it is clear and evident that someone has been the object of smuggling or related conduct, or in cases where the investigation prior to the initiation of the criminal proceedings is sufficient to clear him or her. Furthermore, detention is to be consistent with international human rights law.

18. Article 31 of the Convention relating to the Status of Refugees with respect to article 5 of the Smuggling Protocol.

Article 31 of the Convention relating to the Status of Refugees reads:

> ¨1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

By virtue of its "saving clause" nothing in the Smuggling Protocol shall affect the 1951 Convention and its Protocol (article 19). The drafting history goes the same way:

> "The interpretative notes on article 16 of the protocol approved by the Ad Hoc Committee and contained in its report on the work of its first to eleventh sessions (see A/55/383/Add.1, paras. 107-110) are as follows:
> Paragraph 1
>
> (a) In accordance with articles 3 and 4, the phrase "persons who have been the object of conduct set forth in article 6 of this Protocol" refers only to migrants who have been smuggled as set forth in article 6. It is not intended

[33] Inter-American Court of Human Rights, Case of Velez Loor v. Panama, November 23th, 2010, paragraph 171. Available at: http://www.refworld.org/category,LEGAL,,,PAN,4d2713532,0.html

to refer to migrants who do not fall within the ambit of article 6. This is clearly set forth in article 19 (Saving clause), which provides that nothing in the protocol shall affect the rights of individuals under international law, including humanitarian law and international human rights law"[34].

"At the eighth session of the Ad Hoc Committee, the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund and the International Organization for Migration emphasized that the strengthening of border controls and other measures foreseen in the draft protocol to prevent the smuggling of migrants should be implemented in such a manner that would not undermine the rights of individuals to seek asylum or put refugees and asylum seekers at risk of refoulement"[35].

The UNHCR Executive Committee recommended that asylum seekers should not become liable to criminal prosecution under the Smuggling Protocol[36].

On the subject of non-penalization for illegal entry or presence of refugees, a number of countries in Latin America have an interesting good legislative practice. Once an asylum seeker is charged with illegal entry or presence, criminal proceedings are suspended until a final decision is pronounced regarding whether the asylum seeker is formally recognized as a refugee: Brazilian, Argentina and Uruguayan refugee laws; Costa Rican, Ecuadorian and Chilean refugee regulations[37].

Asylum seekers who have been compelled by the circumstances to use the "services" of individuals engaged in smuggling of migrants deserve special consideration.

In the authorized opinion of Goodwin-Gill, "the meaning of 'illegal entry or presence' has not generally raised any difficult issue of interpretation. The former would include arriving or securing entry through the use of false or

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[34] UNODC, "Travaux préparatoires…" p. 540.
[35] UNODC, "Travaux préparatories…", p.519.

[36] Executive Committee, Conclusion on Protection Safeguards in Interception Measures, N. 97 (LIV)-2003, recommends that "(i)ntercepted asylum-seekers and refugees should not become liable to criminal prosecution under the Protocol Against the Smuggling of Migrants by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met". Available at: http://www.unhcr.org/3f93b2894.html.

[37] ACNUR, Protección de refugiados en América Latina: Buenas Prácticas Legislativas. Available at: http://www.acnur.org/t3/que-hace/proteccion/proteccion-de-refugiados-en-america-latina-buenas-practicas-legislativas/, See especially, "3. Buena práctica. La legislación nacional prescribe que no se rechazará en frontera al solicitante y que no se le penalizará por entrada o presencia ilegales". Available at: http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/Proteccion/Buenas_Practicas/9279

falsified documents, the use of other methods of deception, clandestine entry (for example, as a stowaway), and entry into State territory with the assistance of smugglers or traffickers. The precise method of entry may nevertheless have certain consequences in practice for the refugee or asylum seeker. 'Illegal presence' would cover lawful arrival and remaining, for instance, after the elapse of a short, permitted period of stay"[38].

"The principle of immunity from penalties for refugees entering or present without authorization" continues Mr. Goodwin Gill, "is confirmed in the national legislation and case law of many States party to the 1951 Convention or the 1967 Protocol, by the jurisprudence of the European Court of Human Rights, and in the practice of States at large"[39].

Nonetheless, such "immunity from penalties for refugees" requires a person fleeing a territory on account of well-founded fear of persecution, presenting themselves to the authorities without delay, and showing good cause for their illegal entry or presence.

What should we do if one of the requirements set forth in article 31.1 of the 1951 Refugee Convention is not present in an extant case?

Article 5 of the Smuggling Protocol could be pertinent for an asylum seeker who has been the object of conduct set forth in its article 6. For example:

There is no domestic provision mandating the suspension of criminal proceedings against the asylum seeker pending the verification of his status, and we are confronting a clear and evident case, or a case where the investigation prior to the initiation of the criminal proceedings is enough to clear the asylum seeker who has allegedly been the object of smuggling or related offences.

In the said hypotheses, a defendant asylum seeker could take advantage of article 5 of the Smuggling Protocol read as a provision stating that smuggled migrants should not become liable to criminal prosecution, whereas article 31.1 of the 1951 Refugee Convention is definitely a non-penalization provision, which, as such, in principle does not bar the initiation of criminal proceedings.

Other examples are the following: The asylum seeker is engaged in illegal entry or presence without (as required by article 31.1 of the Convention relating to

[38] Goodwin-Gill, Guy S. (a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations), "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection", (2001), p. 196 (emphasis added). Available at http://www.unhcr.org/refworld/pdfid/470a33b10.pdf.

[39] Goodwin-Gill, Guy S. (a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations), "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection", (2001), p. 197 (emphasis added).

the Status of Refugees) presenting themselves to the authorities, without showing good cause for their illegal entry or presence, or without coming directly from a territory where they have a well-founded fear of persecution.

In these hypotheses, it is worth the effort to invoke article 5 of the Smuggling Protocol. Take note that the Smuggling Protocol requires neither presentation to the authorities, nor good cause or directly coming from a territory where the asylum seekers had well-founded fear of persecution.

Concluding remarks:

1. A migrant who

   - enables their own smuggling; or
   - enables themselves to illegally remain in the State concerned; or
   - – in order to enable their own smuggling - produces, procures, provides or possesses a fraudulent travel or identity document

is not included within article 6 (“criminalization”) of the Protocol.

(For the sake of brevity, we are only outlining the offences, which are set forth in detail in article 6).

2. The activities of those who provide support to migrants for humanitarian reasons, or on the basis of close family ties, are not included in article 6 of the Protocol.

3. A State Party is in breach of article 5 if it establishes as criminal offences, by way of enacted legislation or by misinterpreting the Smuggling Protocol, the conduct set forth above in concluding remarks 1 and 2.

4. It is contrary to article 5 to initiate criminal proceedings against a person being the object of conduct set forth in article 6, when we confront a clear and evident case, or a case where the investigation prior to the initiation of the criminal proceedings is enough to clear him or her.

   In other cases, article 5 should be read as a non-penalization provision, which, by itself, does not bar the initiation of criminal proceedings.

5. Apart from international human rights law requirements, detention violates the Smuggling Protocol where it is clear and evident that someone has been the object of smuggling of migrants or related conduct, or in cases

where the investigation prior to the initiation of the criminal proceedings is sufficient to clear him or her.

6. Each State Party shall adopt such legislative and other measures as may be necessary to establish conduct described in article 6 as criminal offences. However, article 5 of the Protocol is immediately and directly applicable; it is not a list of crimes, and it does not establish a duty to pass implementing legislation.

7. Following article 6.4, “nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law”. Article 6 (criminalization) is hereby of concern, not article 5 (non-criminalization). Article 6.4 shall not be interpreted as rendering article 5 of the Smuggling Protocol nugatory!

Therefore, States Parties may establish offences under their domestic laws *as long as* such offences do not infringe article 5 of the Smuggling Protocol.

8. We may invoke article 5 when an asylum seeker has been the object of conduct set forth in its article 6. For example, there is no domestic provision mandating the suspension of criminal proceedings against the asylum seeker pending the verification of his status, and we confront a clear and evident case, or a case where the investigation prior to the initiation of the criminal proceedings is enough to clear the person.

In the said hypotheses, a defendant asylum seeker would take advantage of article 5 read as provision stating that smuggled migrants should not become liable to criminal prosecution, whereas article 31.1 of the 1951 Refugee Convention is definitely a non-penalization provision, which, as such, in principle does not bar the initiation of criminal proceedings.

Other examples are the following:

The asylum seeker is engaged in illegal entry or presence without (as required by article 31.1 of the Convention relating to the Status of Refugees), presenting himself without delay to the authorities, without showing good cause for his illegal entry or presence, or without coming directly from a territory where he had a well-founded fear of persecution.

In these hypotheses, it could be worth the effort to invoke article 5 of the Smuggling Protocol