Court File Nos. 35677, 35685, 35688
35388, 35958

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN: **Court File No. 35677**

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PART I - OVERVIEW

1. The Court's decision in this case will have a profound impact. It will influence whether friends, family, and good Samaritans will be willing to risk criminal prosecution for their humanitarian efforts to assist those fleeing persecution. It will also determine if refugees will be exposed to a greater risk of being returned to persecution for having assisted others to reach safety. If this Court interprets "people smuggling" to include those who assist others in fleeing persecution for no financial or other material gain, their inadmissibility and/or criminalization will act as a powerful deterrent to assisting refugees. Ironically, such an expansive interpretation might increase the likelihood that exploitative smugglers become the only option for desperate people fleeing persecution.
2. In fleeing persecution, refugees may incidentally assist others in their collective flight. Other individuals also help refugees for humanitarian reasons. These appeals raise two important questions: whether such actions should render refugee claimants inadmissible to Canada, thereby barring them from protection under the *Convention Relating to the Status of Refugees*[1] (*Refugee Convention*); and whether assisting refugees for reasons other than financial or other material gain should constitute an offence. Amnesty International respectfully urges these questions be answered in the negative.
3. Sections 37(1)(b) and 117 of the *Immigration and Refugee Protection Act*[2] (*IRPA*) must be interpreted in accordance with Canada's international legal obligations under the *United Nations Convention against Transnational Organized Crime*[3] (*CATOC*), the *Protocol against the Smuggling of Migrants by Land, Sea and Air*[4] (*Protocol*), and the *Refugee Convention*. An interpretation that fails to distinguish between refugees and those who assist them in reaching safety for no financial or other material gain, and smugglers who exploit and profit from this human suffering, is inconsistent with international law. Such an interpretation has severe consequences: it denies refugees the ability to seek and enjoy asylum by penalizing them for having assisted others in fleeing persecution, and exposes them to a risk of *refoulement* and expulsion. Such an interpretation goes against the object

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[1] 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 [*Refugee Convention*].
[2] SC 2001, c 27 [*IRPA*].
[3] 15 November 2000, 2225 UNTS 209, 40 ILM 335 [*CATOC*].
[4] 15 November 2000, 2241 UNTS 507, 40 ILM 384 [*Migrant Smuggling Protocol*]

and purpose of the *Refugee Convention*, the *Protocol*, the *IRPA* and this Court's jurisprudence.[5]

PART II – QUESTION IN ISSUE

4. How should "people smuggling" and "human smuggling" in sections 37(1)(b) and 117 of the *IRPA* be interpreted in light of Canada's international human rights obligations?

PART III - ARGUMENT

A. Domestic legislation such as the IRPA must be interpreted and applied in conformity with international human rights law

5. Canada has long recognized that the values and principles enshrined in its international legal obligations are "relevant and persuasive" sources of law for the purpose of interpreting domestic statutes.[6] Absent express, unequivocal, contrary legislative intent, this Court has applied a presumption of conformity, requiring domestic law to be interpreted so as to avoid violations of Canada's international law obligations.[7]

6. Canada's obligations under international human rights law come from a variety of sources. They are set out in binding treaties that Canada has ratified or acceded to, including the *Refugee Convention*, the *CATOC*, and the *Protocol*.

7. Those obligations are also found in the principles of customary international law which form part of Canadian common law.[8] Also relevant are the views of the United Nations (UN) treaty bodies and agencies charged with reviewing the implementation of treaties, such as the UN High Commissioner for Refugees (UNHCR), the UN Office on Drugs and Crime (UNODC), and the UN Human Rights Committee. Canadian courts have relied on these bodies in determining the content and scope of Canada's international obligations.[9]

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[5] *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paras 32, 68, [2013] 2 SCR 678 [*Ezokola*], **(Amnesty International Book of Authorities (hereinafter "AI BOA), Tab 5)**; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 57, 150 DLR (4th) [*Pushpanathan*], **(AI BOA, Tab 7)**.

[6] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348-350, 38 DLR (4th) 161 (per Dickson CJ, dissenting on other grounds) **(AI BOA, Tab 10)**; *R v Hape*, [2007] 2 SCR 292 at paras 35-39, 53-56, 280 DLR (4th) 385 [*Hape*] **(AI BOA, Tab 8)**; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22-28, [2013] 3 SCR 157 [*Divito*] **(AI BOA, Tab 4)**; *R v Sharpe*, 2001 SCC 2 at paras 175-176, [2001] 1 SCR 45, **(AI BOA Tab, 9)**.

[7] *R v Hape*, *supra* note 6 at paras 53-54, 56, **(AI BOA, Tab 8)**.

[8] *Ibid* at para 39 **(AI BOA Tab 8)**.

[9] The views of the UNHCR have assisted this Court in several cases, e.g. *Ezokola*, *supra* note 5 at paras 35, 76-77 **(AI BOA, Tab 5)**; *Divito*, *supra* note 6 at para 26, **(AI BOA, Tab 4)**; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 713-714, 103 DLR (4th) 1, **(AI BOA, Tab 1)**; *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paras 46-48, 54, 56-58, 72, 74-75, 92, 128 DLR (4th) 213, **(AI BOA, Tab 2)**; *Pushpanathan*, *supra* note 5 at paras 53-54, 61-62, 68, **(AI BOA, Tab 7)**.

8. These international commitments and principles of customary international law are legally binding on Canada.[10] Moreover, Parliament affirmed its intention to abide by Canada's international commitments in section 3(3)(f) of the *IRPA*, which provides: "This Act is to be construed and applied in a manner that [...] complies with international human rights instruments to which Canada is signatory."[11]

B. The dual purpose of the *CATOC* and the *Protocol* must be reflected in the interpretation of sections 37(1)(b) and 117 of the IRPA

9. The *CATOC* and the *Protocol* are products of careful negotiations between States Parties and an Inter-Agency Group comprised of the UNHCR, the Office of the UN High Commissioner for Human Rights, the International Organization for Migration, and UNICEF, which wanted to ensure that in addressing people smuggling, the vulnerabilities of smuggled persons was recognized, and the protection of their human rights guaranteed.[12]

10. The resulting *CATOC* and *Protocol* aim to achieve two complementary goals: combatting transnational organized crime, including people smuggling, while protecting the human rights of smuggled persons. Article 2 of the *Protocol* explicitly states that its dual purpose is "[t]o prevent and combat the smuggling of migrants [...] while protecting the rights of smuggled migrants."[13] Accordingly, the *CATOC* and the *Protocol* contain a number of Articles requiring States Parties to criminalize transnational organized crime, including people smuggling,[14] and provisions to protect and assist smuggled persons rather than impose penalties for their manner of arrival.[15] The obligation to protect smuggled persons "reinforces a notion that smuggled people are also victims of human rights abuses, and [...] has the effect of redirecting smuggling into a human rights discourse."[16]

11. Article 19 of the *Protocol* emphasizes States Parties' obligations towards refugees:

> 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

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[10] *R v Hape supra* note 6 at para 39, **(AI BOA, Tab 8)**.
[11] *IRPA, supra* note 2, s 3(3)(f).
[12] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, 8th Sess, UN Doc A/AC.254.27 (8 February 2000), **(AI BOA, Tab 15)**; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (New York: Cambridge University Press, 2014) at 37-38 [Gallagher and David] **(AI BOA, Tab 22)**.
[13] *Migrant Smuggling Protocol, supra* note 4, art 2 [emphasis added].
[14] *CATOC, supra* note 3, art 5(1); *Migrant Smuggling Protocol, supra* note 4, art 6(1)-(2)
[15] *Ibid*, arts 5, 16, 19; *CATOC, supra* note 3 art 25.
[16] Tom Obokata, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law" (2005) 17:2 Int'l J Refugee L 394 at 408 [Obokata] **(AI BOA, Tab 27)**.

> Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.[17]

12. The interpretation of people smuggling and human smuggling under sections 37(1)(b) and 117 of the *IRPA* must conform to Canada's international human rights obligations. Fulfilling the dual purpose of combatting people smuggling and protecting human rights requires States Parties to adopt a definition of smuggling that clearly distinguishes between persons, including refugees, who assist others to reach safety for no financial or other material gain, and smugglers who profit from human suffering. According to the UNODC[18], it was

> 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 of migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned.[19]

13. The international community has recognized that in seeking asylum, individuals might need to resort to unlawful acts. Professor Sharon Pickering notes that "most asylum-seekers require smugglers at some, if not all, stages of their journey[.]"[20] Further, the UNODC emphasizes that "the criminal smuggling of migrants may involve the movement of legitimate refugees or asylum-seekers."[21] The complex relationship between asylum-seeking and smuggling requires States Parties to adopt a definition of people smuggling that ensures the protection of refugees.

14. To distinguish smugglers from refugees, and to ensure protection for those legitimately in need of it, the international definition of people smuggling requires (a) the intentional procurement of illegal entry, in order to (b) obtain a financial or other material benefit.[22] The *Protocol* does not "criminalize altruistic or charitable groups who smuggle people for purposes other than financial or other material gain."[23] Thus, the exploitative *purpose* behind

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[17] *Migrant Smuggling Protocol, supra* note 4, art 19.
[18] The Agency charged with monitoring the implementation of the *CATOC* and the *Protocol*.
[19] United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York: United Nations, 2004) at 340 para 28 [*Legislative Guides*] **(AI BOA, Tab 19)**.
[20] Sharon Pickering, "Transnational Crime and Refugee Protection" (2007) 34:2 Social Justice 47 at 53, **(AI BOA, Tab 28)**.
[21] *Legislative Guides, supra* note 19 at 364, para 68, **(AI BOA, Tab 19)**. See also Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Addendum: Interpretative notes for the official records (*travauxpréparatoires*) of the negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto*, 55th Sess, UN Doc A/55/383/Add.1 (3 November 2000) at paras 88, 92 [*Interpretative Notes*] **(AI BOA, Tab 14)**.
[22] *Legislative Guides, supra* note 19 at 340, para 28 **(AI BOA, Tab 19)**.
[23] United Nations Office on Drugs and Crime, *Toolkit to Combat Smuggling of Migrants: Tool 8: Protection and assistance measures* (Austria: United Nations, 2010) at 38, **(AI BOA, Tab 21)**.

assisting individuals to cross borders illegally is central to the definition of people smuggling.

15. By requiring financial or material profit as a defining feature of people smuggling, the drafters intended "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."[24] Professor Andreas Schloenhardt and Hadley Hickson add that the *Protocol* "appears to preclude states parties from criminalizing smuggled migrants who, directly or indirectly, assist in their own smuggling journey."[25] Thus, individuals whose primary purpose is to seek protection should also not be penalized for assisting others while collectively fleeing persecution. An interpretation of sections 37(1)(b) and 117 of the *IRPA* that allows for the prosecution and penalization of family, friends, humanitarian workers, and refugees themselves for aiding other refugees will discourage people from assisting refugees. Ironically, this will reduce the options available to people fleeing persecution, and increase the demand for criminal smuggling. Such an outcome undermines both the *Protocol* and the *Refugee Convention*.

C. Canada's obligations under the *CATOC*, the *Protocol*, and the *Refugee Convention* must all be given full effect

16. The universal principle of *pacta sunt servanda*[26] set out in the *Vienna Convention on the Law of Treaties* (*VCLT*) – which codifies customary international law[27] – provides that Canada's obligations under the *CATOC*, the *Protocol*, and the *Refugee Convention* must all be given full effect. Article 31(1) of the *VCLT* further requires treaties to 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 light of its object and purpose."[28] The duty of good faith requires States to refrain from acts that have "the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeat the object and purpose of a treaty."[29]According to the International Law Commission, "[w]hen a treaty is open to two interpretations one of which

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[24] *Interpretative Notes, supra* note 21 at paras 88, 92, **(AI BOA, Tab 14)**.
[25] 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" (2013) 25:1 Int'l J Refugee L 39 at 55-56, [Schloenhardt and Hickson] **(AI BOA, Tab 29)**.
[26] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS preamble, art 26, Can TS 1980 No 37 [*VCLT*].
[27] *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at para 46, **(AI BOA, Tab 12)**.
[28] *VCLT, supra* note 26, art 31(1).
[29] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3d ed (New York: Oxford University Press, 2007) at 387 [Goodwin-Gill and McAdam] **(AI BOA, Tab 23)**.

does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[30] Where norms appear to conflict, "they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."[31]

17. Thus, while Article 34(3) of the *CATOC* permits States Parties to "adopt more strict or severe measures [...] for preventing and combating transnational organized crime[,]"[32] the UN General Assembly, the UNODC, and the European Court of Human Rights have all stated that such measures cannot be undertaken at the expense of States Parties' human rights obligations, which must be given full effect.[33] As in the United Kingdom, any laws imposing penalties on smuggling should be accompanied by exemptions for refugees and those who assist them for reasons other than profit or other material gain.[34] As noted by Professor Anne Gallagher and Fiona David, while the human rights guaranteed in Article 19 of the *Protocol* may appear to collide with efforts to combat people smuggling,

> the correct outcome has been clearly articulated: a State that acts against the letter or spirit of international law, including international refugee law, in implementing its obligations under the Migrant Smuggling Protocol is in violation of one of [the latter's] central provisions.[35]

D. The human rights consequences of interpreting people smuggling to include refugees and those who assist refugees amount to violations of international refugee law

18. While States have sovereign control over their borders, they also have binding legal obligations towards refugees and asylum-seekers. Gallagher and David note, "the entitlement of a State to control the entry of aliens into its territory must be filtered through the lens of international rules that the State has in one way or another agreed to."[36] In ratifying the *Refugee Convention*, States Parties crafted a careful compromise, carving out a

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[30] International Law Commission, *Yearbook of the International Law Commission: 1966*, vol II (UN Doc A/CN.4/SER.A/1966/Add.1) at 219, **(AI BOA, Tab 17)**.
[31] "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" in *Yearbook of the International Law Commission, 2006*, vol 2, part 2 (New York: United Nations, 2006) at para 4 (UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2)) [emphasis added] **(AI BOA, Tab 16)**.
[32] *CATOC*, *supra* note 3, art 34(3).
[33] United Nations General Assembly, *Resolution Adopted by the General Assembly: Prevention of the smuggling of aliens*, 48th Sess, UN Res A/RES/48/102 (8 March 1994) **(AI BOA, Tab 18)**; *Hirsi Jamaa and others v Italy*, [2012] ECHR 27765/09 at para 179, **(AI BOA, Tab 13)**; United Nations Office on Drugs and Crime, *Model Law against the Smuggling of Migrants* (Vienna, UN Office on Drugs and Crime, 2010) at 8 [*Model Law*] **(AI BOA, Tab 20)**.
[34] *Immigration Act 1971* (UK), c 77, s 25A(3).
[35] Gallagher and David, *supra* note 12 at 65 **(AI BOA, Tab 22)**.
[36] *Ibid* at 209, **(AI BOA Tab 22)**.

category of individuals to which they committed to provide legal status and protection. As noted by the House of Lords,

> the *Refugee Convention* represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other.[37]

According to Hathaway, that compromise "was to refrain from challenging the right of states to control most immigration, but to require governments to ensure that refugees are not caught by exclusionary rules."[38]

19. States Parties to the *Refugee Convention* must pay special attention "to situations where the system of administration may produce results incompatible with the applicable principle or standard of international law."[39] The consequences of a section 37(1)(b) inadmissibility finding are severe. They constitute a penalty on refugees for having assisted others in fleeing persecution, and expose them to a risk of *refoulement* and expulsion.[40]

20. Refugee claimants found to be inadmissible to Canada for people smuggling are permanently barred from accessing protection under the *Refugee Convention* and section 96 of the *IRPA*. They are issued a mandatory deportation order and receive no statutory stay of removal pending judicial review.[41] The only recourse to protection is a Pre-Removal Risk Assessment (PRRA) during which refugees are not entitled to a hearing as required by this Court in *Singh v. Minister of Employment and Immigration*,[42] nor to have the risks they face upon removal assessed on the basis of the persecution factors set out in the *Refugee Convention* and section 96 of the *IRPA*.[43] Therefore, a person with a well-founded fear of persecution for any of the grounds enumerated in section 96 will not receive refugee protection, including protection from expulsion or *refoulement* to persecution or other

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[37] *European Roma Rights Centre v Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 AC 1, para 15, **(File No. 35685 (*B306*), Respondent's Book of Authorities (hereinafter "RBOA"), Tab 35)**, relied on in by this Court in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 29, 376 DLR (4th) 387, **(File No. 35685 (*B306*), RBOA Tab 35)**.

[38] James C. Hathaway, "Why Human Smuggling is Vital" *The National Post* (13 September 2010) [Hathaway, 2010] **(AI BOA, Tab 25)**.

[39] Guy S Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection" (paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001) at 218 online: <http://www.refworld.org/docid/470a33b10.html> [Goodwin-Gill] **(File No. 35958 (*Appulonappa*), Appellants' Joint Book of Authority (hereinafter "AJBOA"), Vol III, Tab 96)**.

[40] The prohibition against expulsion and *refoulement* is codified in articles 32 and 33 of the *Refugee Convention*, *supra* note 1.

[41] *IRPA*, *supra* note 2, ss 45(d); *Immigration and Refugee Protection Regulations*, SOR /2002-227, reg 229(1)(e) [*IRPA Regulations*].

[42] [1985] 1 SCR 177 at 231, 17 DLR (4th) 422, **(AI BOA, Tab 11)**.

[43] *IRPA*, *supra* note 2, ss 101(1)(f), *Ibid* s 113(d); *Hernandez v Canada (Public Safety and Emergency Preparedness*, 2012 FC 1417 at para 53, 13 Imm LR (4th) 175, **(AI BOA, Tab 6)**.

serious human rights violations.[44] A positive PRRA does not result in refugee protection but rather a stay of removal, which can be cancelled at the discretion of the Minister of Citizenship and Immigration if he or she is of the opinion the circumstances surrounding the stay have changed.[45] Even where a danger of torture or other ill-treatment exists, under PRRA, refugee claimants are still exposed to expulsion or *refoulement* if it is determined that their actions were sufficiently severe or that they constitute a danger to Canada.[46]

21. As with a section 37(1)(b) finding of inadmissibility, the maximum penalty for human smuggling under section 117 renders the person ineligible to access refugee protection in Canada.[47]

22. An interpretation of people smuggling that exposes refugee claimants to a risk of *refoulement* and expulsion simply for having assisted others in fleeing persecution is a significant curtailment of rights, amounting to a penalty prohibited by Article 31 of the *Refugee Convention*.[48] The prohibition against penalizing refugees recognizes that in seeking asylum, refugees may need to enter countries of refuge irregularly.[49] Hathaway affirms the applicability of Article 31 to smuggled refugees:

> So long as a refugee is seeking [...] access to protection, the incidental entry or presence of others arising from the same actions should be viewed simply as that: incidental to the primary and legally protected goal of ensuring that migration control laws do not impede a refugee from vindicating her or his rights under the Refugee Convention.[50]

23. According to Hathaway, "there is no sound basis to interpret the notion of a 'penalty' narrowly."[51] Rather, the prohibition against penalization must be construed broadly in order to encompass any detriment to seeking asylum for reasons of illegal entry, including administrative sanctions.[52] The UNHCR has stressed that

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[44] *IRPA, supra* note 2, s 112(3); *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365 at para 18, [2007] 3 FCR 169, **(AI BOA, Tab 3)**.
[45] *IRPA, supra* note 2, s 114(2).
[46] *Ibid*, s 113(d)(ii).
[47] *Ibid*, ss 36(1), 117(2); *IRPA Regulation, supra* note 41, reg 229(1)(c)-(d)
[48] *Refugee Convention, supra* note 1, art 31(1).
[49] *R v Uxbridge Magistrates Court & Another, ex parte Adimi et al v Secretary of State for the Home Department*, [1999] EWHC Admin 765, [2001] QB 667 (UK: High Court [England and Wales]) at para 15 [*Adimi*] **(File No. 35958 (*Appulonappa*), AJBOA, Vol. I, Tab 25)**.
[50] James C Hathaway, "Prosecuting a Refugee for 'Smuggling' Himself" (2014) 15:81 LSN Immigration, Refugee & Citizenship Law eJournal 1 at 4, **(AI BOA, Tab 24)**.
[51] James C Hathaway, *The Rights of Refugees under International Law* (New York: Cambridge University Press, 2005) at 412 [Hathaway, 2005] **(File No. 35958 (*Appulonappa*), RBOA, Vol II, Tab 69)**.
[52] *Ibid* at 410-412 **(File No. 35958 (*Appulonappa*), RBOA, Vol II, Tab 69)**; *Adimi, supra* note 49 at paras 15-16, **(File No. 35958 (*Appulonappa*), AJBOA, Vol. I, Tab 25)**; Goodwin-Gill, *supra* note 39 at 194-195, **(File No. 35958 (*Appulonappa*), AJBOA, Vol III, Tab 96)**; James C Hathaway and Michelle Foster, *The Law of Refugee Status*, 2d ed (Cambridge: Cambridge

> [a]ny punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by States against refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as a penalty.[53]

24. The UNODC stated "it is essential that smuggled migrants who are in need of international protection are given a genuine opportunity to seek it."[54] Similarly, the drafters of the *Refugee Convention* assumed "that governments would not exercise their authority to penalize those assisting refugees to enter an asylum country absent evidence that they had acted in an exploitative way, or otherwise in bad faith."[55] Penalizing individuals for assisting refugees impedes refugees' ability to exercise their rights under the *Refugee Convention.*[56] Much like "[a]s a matter of principle [...] a carrier should not be penalized for bringing in an 'undocumented' passenger, where that person is subsequently determined to be a refugee[,]"[57] States should refrain from penalizing individuals who help refugees flee persecution in a non-exploitative manner.

25. A treaty interpretation that defeats the object and purpose of that treaty undermines the *VCLT*'s good faith principle.[58] The *Refugee Convention*'s "overarching and clear human rights object and purpose[,]"[59] and the international community's "profound concern for refugees"[60] and commitment to grant them the widest scope of protection possible – as this Court has recognized[61] – require sections 37(1)(b) and 117 to be interpreted to distinguish legitimate refugees and those who assist them in fleeing persecution, from organized criminals who profit from and exploit refugees.

26. It is often difficult to draw a clear line between smuggler and smuggled, for "smuggling can be both the cause and consequence of human rights violations."[62] Professors David Kyle and Rey Kosłowski add that "much migrant smuggling [...] operates in an ambiguous area that

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University Press, 2014) at 28-29 **(File No. 35958 (*Appulonappa*) AJBOA, Vol. III, Tab 97)**; Goodwin-Gill and McAdam, *supra* note 29 at 266, **(AI BOA, Tab 23)**.

[53] UNHCR Department of International Protection, internal note, May 2000, as cited in Goodwin-Gill, *supra* note 39 at 9, footnote 14, **(File No. 35958 (*Appulonappa*), AJBOA, Vol III, Tab 96)**.

[54] *Model Law*, *supra* note 33 at 100, **(AI BOA, Tab 20)**.

[55] Hathaway, 2005, *supra* note 51 at 405 **(File No. 35958 (*Appulonappa*), RBOA, Vol II, Tab 69)**.

[56] Hathaway, 2010, *supra* note 38, **(AI BOA, Tab 25)**.

[57] Goodwin-Gill, *supra* note 39 at 219, **(File No. 35958 (*Appulonappa*), AJBOA, Vol III, Tab 96)**.

[58] *VCLT*, *supra* note 26, art 31(1). See also para 16 of this factum.

[59] *Pushpanathan*, *supra* note 5 at para 57, **(AI BOA Tab 7)**; *Ezokola*, *supra* note 5 at para 32, **(AI BOA, Tab 5)**.

[60] *Refugee Convention*, *supra* note 1, preamble.

[61] *Ibid*; *IRPA*, *supra* note 2, s 3(2); *Ezokola*, *supra* note 5 at para 32, **(AI BOA, Tab 5)**.

[62] Obokata, *supra* note 16 at 395, **(AI BOA, Tab 27)**.

is neither purely voluntary nor involuntary from the perspective of the migrant."[63] In other jurisdictions, scholars have drawn attention to the "often artificial distinction between passengers and crew"[64] in people smuggling.

27. For this reason, any blanket non-admission of all individuals assisting refugees to access protection should be rejected.[65] As stated by Hathaway, "[w]hen Canada single-mindedly demonizes all smuggling, it runs roughshod over [the] carefully crafted compromise"[66] that States Parties made by developing the *Refugee Convention*. Such an application of Canada's inadmissibility and criminal provisions would be contrary not only to the object and purpose of the *Refugee Convention*,[67] but also the *IRPA*, which recognizes that Canada's obligations towards refugees are "in the first instance about saving lives and offering protection."[68] As stated by Gallagher and David, "[t]he international system of refugee protection is not reserved solely for the virtuous: it is only under exceptional circumstances that entitlement to seek and receive asylum from persecution may be peremptorily withheld."[69]

PART IV – REQUEST FOR ORAL ARGUMENT

28. The Intervener requests permission of the Court to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd day of February, 2015, BY:

Chantal Tie | Laïla Demirdache | Michael Bossin

Counsel for Amnesty International[70]

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[63] David Kyle and Rey Koslowski, eds, *Global Human Smuggling: Comparative Perspectives* (Baltimore: The Johns Hopkins University press, 2001) at 9, **(AI BOA, Tab 26)**.
[64] Schloenhardt and Hickson, *supra* note 25 at 56, **(AI BOA, Tab 29)**.
[65] Gallagher and David, *supra* note 12 at 171, **(AI BOA, Tab 22).**
[66] Hathaway, 2010, *supra* note 38, **(AI BOA, Tab 25)**.
[67] Gallagher and David, *supra* note 35 at 171, **(AI BOA, Tab 22)**.
[68] *IRPA, supra* note 2, s 3(2)(a) [emphasis added].
[69] Gallagher and David, *supra* note 35 at 169, **(AI BOA, Tab 22)**.
[70] Counsel for Amnesty International acknowledge the tremendous work done by AI Canada's articling student, Anna Kwadrans

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Immigration Act 1971 (UK), c 77.

25A. Helping asylum-seeker to enter United Kingdom

(1) A person commits an offence if—

(a) he knowingly and for gain facilitates the arrival in, or the entry into, the United Kingdom of an individual, and

(b) he knows or has reasonable cause to believe that the individual is an asylum-seeker.

(2) In this section "asylum-seeker" means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under—

(a) the Refugee Convention (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (c. 33) (interpretation)), or

(b) the Human Rights Convention (within the meaning given by that section).

(3) Subsection (1) does not apply to anything done by a person acting on behalf of an organisation which—

(a) aims to assist asylum-seekers, and

(b) does not charge for its services.

(4) Subsections (4) and (6) of section 25 apply for the purpose of the offence in subsection (1) of this section as they apply for the purpose of the offence in subsection (1) of that section.

Immigration and Refugee Protection Act, SC 2001, c 27.

3. (2) The objectives of this Act with respect to refugees are

(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for human rights and fundamental freedoms of all human beings;

(*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

3. (2) S'agissant des réfugiés, la présente loi a pour objet:

a) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;

b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté international pour venir en aide aux personnes qui doivent se réinstaller;

c) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;

d) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;

e) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;

f) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada;

g) de protéger la santé des Canadiens et de garantir leur sécurité;

h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

3. (3) This Act is to be construed and applied in a manner that

...

(*f*) complies with international human rights instruments to which Canada is signatory.

3. (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet:

...

f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

...

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

37. (1) Emportent interdiction de territoire pour criminalité organisée faits suivants:

...

b) se livrer, dans the cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

96. A qualité de réfugié au sens de la Convention – le réfugié – la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

a) soit au risqué, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risqué de traitements ou peines cruels et inusités dans le cas suivant:

i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

ii) elle y est exposée et tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

iii) la menace ou le risqué ne résulte pas de sanctions légitimes – sauf

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

celles infligées au mépris des normes internationales – et inhérents à celles-ci ou occasionnés par elles,

iv) la menace ou le risqué ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

...

(*f*) the claimant has been determine to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).

101. (1) La demande est irrecevable dans les cas suivants:

...

f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux – exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)(*c*) – , grande criminalité ou criminalité organisée.

113. Consideration of an application for protection shall be as follows:

...

(*d*) in the case of an applicant described in subsection 112(3) – other than one described in subparagraph (*e*)(i) or (ii) – consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant,

113. It est dispose de la demande comme il suit:

...

d) s'agissant du demandeur visé au paragraphe 112(3) – sauf celui visé au sous-alinéa *e*)(i) ou (ii) – sur la base des éléments mentionnés à l'article 97 et, d'autre part:

i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

ii) soit, dans the cas de tout autre

whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada[.]

demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passes ou du danger qu'il constitue pour la sécurité du Canada[.]

Immigration and Refugee Protection Regulations, SOR /2002-227

229. (1) For the purposes of paragraph 45(d) of the Act, the applicable removal order to be made by the Immigration Division is

[...]

(c) a deportation order, in the case of a permanent resident inadmissible under subsection 36(1) of the Act on grounds of serious criminality or a foreign national inadmissible under paragraph 36(1)(b) or (c) of the Act on grounds of serious criminality;

(d) a deportation order, if they are inadmissible under subsection 37(1) of the Act on grounds of organized criminality;

(e) a deportation order, if they are inadmissible under subsection 37(1) of the Act on grounds of organized criminality;

[...]

229. (1) Pour l'application de l'alinéa 45d) de la Loi, la Section de l'immigration prend contre la personne la mesure de renvoi indiquée en regard du motif en cause:

[...]

c) en cas d'interdiction de territoire pour grande criminalité du resident permanent au titre du paragraphe 36(1) de la Loi ou de l'étranger au titre des alinéas 36(1)b) ou c) de la Loi, l'expulsion;

d) en cas d'interdiction de territoire pour criminalité au titre des alinéas 36(2)b), c) ou d) de la Loi, l'expulsion;

e) en cas d'interdiction de territoire pour criminalité organisée au titre du paragraphe 37(1) de la Loi, l'expulsion;

[...]

***United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6.**

Preamble

The high contracting parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Préambule

Les hautes parties contractantes,

Considérant que la Charte des Nations Unies et la Déclaration universelle des droits de l'homme approuvée le 10 décembre 1948 par l'Assemblée générale ont affirmé ce principe que les êtres humains, sans distinction, doivent jouir des droits de l'homme et des libertés fondamentales,

Considérant que l'Organisation des Nations Unies a, à plusieurs reprises, manifesté la profonde sollicitude qu'elle éprouve pour les réfugiés et qu'elle s'est préoccupée d'assurer à ceux-ci l'exercice le plus large possible des droits de l'homme et des libertés fondamentales,

Considérant qu'il est désirable de réviser et de codifier les accords internationaux antérieurs relatifs au statut des réfugiés et d'étendre l'application de ces instruments et la protection qu'ils constituent pour les réfugiés au moyen d'un nouvel accord,

Considérant qu'il peut résulter de l'octroi du droit d'asile des charges exceptionellement lourdes pour certains pays et que la solution satisfaisante des problèmes dont l'Organisation des Nations Unies a reconnu la portée et le caractère internationaux, ne saurait, dans cette hypothèse, être obtenue sans une solidarité internationale,

Exprimant le vœu que tous les Etats, reconnaissant le caractère social et humanitaire du problème des réfugiés, fassent tout ce qui est en leur pouvoir pour éviter que ce problème ne devienne une cause de tension entre Etats,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

have agreed as follows:

Article 1. Definition of the Term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

...

(2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Prenant acte de ce que le Haut Commissaire des Nations Unies pour les réfugiés a pour tâche de veiller à l'application des conventions internationales qui assurent la protection des réfugiés, et reconnaissant que la coordination effective des mesures prises pour résoudre ce problème dépendra de la coopération des Etats avec le Haut Commissaire,

Sont convenues des dispositions ci-après :

Article premier. Définition du Terme "Réfugié"

A. Aux fins de la présente Convention, le terme "réfugié" s'appliquera à toute personne:

...

(2) Qui, ... craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays ; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels événements, ne peut ou, en raison de ladite crainte, ne veut y retourner.

Article 31. Refugees Unlawfully in the Country of Refuge

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.

Article 32. Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 31. Réfugiés en Situation Irrégulière dans le Pays d'Accueil

1. Les Etats Contractants n'appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers, aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières.

Article 32. Expulsion

1. Les Etats Contractants n'expulseront un réfugié se trouvant régulièrement sur leur territoire que pour des raisons de sécurité nationale ou d'ordre public.

2. L'expulsion de ce réfugié n'aura lieu qu'en exécution d'une décision rendue conformément à la procédure prévue par la loi. Le réfugié devra, sauf si des raisons impérieuses de sécurité nationale s'y opposent, être admis à fournir des preuves tendant à le disculper, à présenter un recours et à se faire représenter à cet effet devant une autorité compétente ou devant une ou plusieurs personnes spécialement désignées par l'autorité compétente.

3. Les Etats Contractants accorderont à un tel réfugié un délai raisonnable pour lui permettre de chercher à se faire admettre régulièrement dans un autre pays. Les Etats Contractants peuvent appliquer, pendant ce délai, telle mesure d'ordre interne qu'ils jugeront opportune.

Article 33. Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 33. Défense d'Expulsion et de Refoulement

1. Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

***United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6.**

Article 1. Definition of the Term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

...

(2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article premier. Définition du Terme "Réfugié"

A. Aux fins de la présente Convention, le terme "réfugié" s'appliquera à toute personne:

...

(2) Qui, ... craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays ; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels événements, ne peut ou, en raison de ladite crainte, ne veut y retourner.

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1. Les Etats Contractants n'appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers, aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières.

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1. Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

***Protocol against the Smuggling of Migrants by Land, Sea and Air*, 15 November 2000, 2241 UNTS 507, 40 ILM 384.**

Article 2. Statement of purpose

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

Article 5. Criminal liability of migrants

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

Article 6. Criminalization

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

(*a*) The smuggling of migrants;

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

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document

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

Article 2. Objet

Le présent Protocole a pour objet de prévenir et combattre le trafic illicite de migrants, ainsi de promouvoir la coopération entre les États Parties à cette fin, tout en protégeant les droits des migrants objet d'un tel trafic.

Article 5. Responsibilité pénale des migrants

Les migrants ne deviennent pas passibles de poursuites pénales en vertu du présent Protocole du fait qu'ils ont été l'objet des actes énoncés à sonarticle 6.

Article 6. Incrimination

1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale, lorsque les actes ont été commis intentionnellement et pour en tirer, directement ou indirectement, un avantage financier ou autre avantage matériel:

a) Au trafic illicite de migrants;

b) Lorsque les actes ont été commis afin de permettre le trafic illicite de migrants:

i) À la fabrication d'un document de voyage ou d'identité frauduleux;

ii) Au fait de procurer, de fournir ou de posséder un tel document;

c) Au fait de permettre à une personne, qui n'est ni un ressortissant ni un résident permanent, de demeurer dans l'État concerné, sans satisfaire aux conditions nécessaires au séjour légal dans ledit État, par les moyens mentionnés à l'alinéa b du présent paragraphe ou par tous autres moyens illégaux.

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 of this article;

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

2. Chaque État Partie adopte également les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale:

a) Sous réserve des concepts fondamentaux de son système juridique, au fait de tenter de commettre une infraction établie conformément au paragraphe 1 du présent article;

b) Au fait de se rendre complice d'une infraction établie conformément à l'alinéa a, à l'alinéa b i ou à l'alinéa c du paragraphe 1 du présent article et, sous réserve des concepts fondamentaux de son système juridique, au fait de se rendre complice d'une infraction établie conformément à l'alinéa *b* ii du paragraphe 1 du présent article;

c) Au fait d'organiser la commission d'une infraction établie conformément au paragraphe 1 du présent article ou de donner des instructions à d'autres personnes pour qu'elles la commettent.

Article 16. Protection and assistance measures

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

2. Each State Party shall take appropriate measures to afford migrants appropriate

Article 16. Mesures de protection et d'assistance

1. Lorsqu'il applique le présent Protocole, chaque État Partie prend, conformément aux obligations qu'il a contractées en vertu du droit international, toutes les mesures appropriées, y compris, s'il y a lieu, des mesures législatives, pour sauvegarder et protéger les droits des personnes qui ont été l'objet des actes énoncés à l'article 6 du présent Protocole, tels que ces droits leur sont accordés en vertu du droit international applicable, en particulier le droit à la vie et le droit de ne pas être soumis à la torture ou à d'autres peines ou traitements cruels, inhumains ou dégradants.

2. Chaque État Partie prend les mesures appropriées pour accorder aux migrants une

protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

protection adéquate contre toute violence pouvant leur être infligé, aussi bien par des personnes que par des groupes, du fait qu'ils ont été l'objet des actes énoncés à l'article 6 du présent Protocole.

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

3. Chaque État Partie accorde une assistance appropriée aux migrants dont la vie ou la sécurité sont mises en danger par le fait qu'ils ont été l'objet des actes énoncés à l'article 6 du présent Protocole.

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

4. Lorsqu'ils appliquent les dispositions du présent article, les États Parties tiennent compte des besoins particuliers des femmes et des enfants.

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

5. En cas de détention d'une personne qui a été l'objet des actes énoncés à l'article 6 du présent Protocole, chaque État Partie respecte les obligations qu'il a contractées en vertu de la Convention de Vienne sur les relations consulaires, dans les cas applicables, y compris l'obligation d'informer sans retard la personne concernée des dispositions relatives à la notification aux fonctionnaires consulaires et à la communication avec ces derniers.

Article 19. Saving clause

Article 19. Clause de sauvegarde

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 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

1. Aucune disposition du présent Protocole n'a d'incidences sur les autres droits, obligations et responsabilités des États et des particuliers en vertu du droit international, y compris du droit international humanitaire et du droit international relative aux droits de l'homme et en particulier, lorsqu'ils s'appliquent, de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés ainsi que du principe de non-refoulement qui y est énoncé.

***United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209, 40 ILM 335.**

Article 5. Criminalization of participation in an organized criminal group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(*a*) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(*b*) Organizing, directing, aiding, abetting, facilitating or counselling the commission of

Article 5. Incrimination de la participation à un groupe criminel organise

1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale, lorsque commis intentionnellement:

a) À l'un ou l'autre des actes suivants ou aux deux, en tant qu'infractions pénales distinctes de celles impliquant une tentative d'activité criminelle ou sa consommation:

i) Au fait de s'entendre avec une ou plusieurs personnes en vue de commettre une infraction grave à une fin liée directement ou indirectement à l'obtention d'un avantage financier ou autre avantage matériel et, lorsque le droit interne l'exige, impliquant

un acte commis par un des participants en vertu de cette entente ou impliquant un groupe criminel organisé;

ii) À la participation active d'une personne ayant connaissance soit

du but et de l'activité criminelle générale d'un groupe criminel

organisé soit de son intention de commettre les infractions en question:

a. Aux activités criminelles du groupe criminel organisé;

b. À d'autres activités du groupe criminel organisé

serious crime involving an organized criminal group.

lorsque cette personne sait que sa participation contribuera à la réalisation du but criminel susmentionné;

b) Au fait d'organiser, de diriger, de faciliter, d'encourager ou de favoriser au moyen d'une aide ou de conseils la commission d'une infraction grave impliquant un groupe criminel organisé.

Article 25. Assistance and protection of victims

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 25. Octroi d'une assistance and d'une protection aux victimes

1. Chaque État Partie prend, dans la limite de ses moyens, des mesures appropriées pour prêter assistance et accorder protection aux victimes d'infractions visées par la présente Convention, en particulier dans les cas de menace de représailles ou d'intimidation.

2. Chaque État Partie établit des procédures appropriées pour permettre aux victimes d'infractions visées par la présente Convention d'obtenir réparation.

3. Chaque État Partie, sous réserve de son droit interne, fait en sorte que les avis et préoccupations des victimes soient présentés et pris en compte aux stades appropriés de la procédure pénale engagée contre les auteurs d'infractions, d'une manière qui ne porte pas préjudice aux droits de la défense.

Article 34. Implementation of the Convention

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

Article 34. Application de la Convention

3. Chaque État Partie peut adopter des mesures plus strictes ou plus sévères que celles qui sont prévues par la présente Convention afin de prévenir et de combattre la criminalité transnationale organisée.

***Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331art 26, Can TS 1980 No 37.**

Preamble	**Préambule**
The States Parties to the present Convention,	*Les Etats Parties à la présente Convention,*
Considering the fundamental role of treaties in the history of international relations,	*Considérant* le rôle fondamental des traités dans l'histoire des relations internationales,
Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,	*Reconnaissant* l'importance de plus en plus grande des traités en tant que source du droit international et en tant que moyen de développer la coopération pacifique entre les nations, quels que soient leurs régimes constitutionnels et sociaux,
Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,	*Constatant* que les principes du libre consentement et de la bonne foi et la règle *pacta sunt servanda* sont universellement reconnus,
Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,	*Affirmant* que les différends concernant les traités doivent, comme les autres différends internationaux, être réglés par des moyens pacifiques et conformément aux principes de la justice et du droit international,
Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,	*Rappelant* la résolution des peuples des Nations Unies de créer les conditions nécessaires au maintien de la justice et du respect des obligations nées des traités,
Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,	*Conscients* des principes de droit international incorporés dans la Charte des Nations Unies, tels que les principes concernant l'égalité des droits des peuples et leur droit de disposer d'eux-mêmes, l'égalité souveraine et l'indépendance de tous les Etats, la non-ingérence dans les affaires intérieures des Etats, l'interdiction de la menace ou de l'emploi de la force et le respect universel et effectif des droits de l'homme et des libertés fondamentales pour tous,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

Article 26. "*Pacta sunt servanda*"

Every treaty in force is binding upon the parties to it and must be performed by them in food faith.

Article 27. Internal law and observances of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Article 53. Treaties conflicting with a peremptory norm of general international law ("*jus cogens*")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Convaincus que la codification et le développement progressif du droit des traités réalisés dans la présente Convention serviront les buts des Nations Unies énoncés dans la Charte, qui sont de maintenir la paix et la sécurité internationales, de développer entre les nations des relations amicales et de réaliser la coopération internationale,

Affirmant que les règles du droit international coutumier continueront à régir les questions non réglées dans les dispositions de la présente Convention,

Sont convenus de ce qui suit:

Article 26. "*Pacta sunt servanda*"

Tout traité en vigueur lie les parties et doit être exécuté par elles de bonne foi.

Article 27. Droit interne et respect des traités

Une partie ne peut invoquer les dispositions de son droit interne comme justifiant la non-exécution d'un traité. Cette règle est sans préjudice de l'article 46.

Article 53. Traités en conflit avec une norme impérative du droit international général ("*jus cogens*")

Est nul tout traité qui, au moment de sa conclusion, est en conflit avec une norme impérative du droit international général. Aux fins de la présente Convention, une norme impérative du droit international général est une norme acceptée et reconnue par la communauté internationale des Etats dans son ensemble en tant que norme à laquelle aucune dérogation n'est permise et qui ne peut être modifiée que par une nouvelle norme du droit international général ayant le même caractère.

Article 64. Emergence of a new peremptory norm of general international law ("*jus cogens*")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 64. Survenance d'une nouvelle norme impérative du droit international général ("*jus cogens*")

Si une nouvelle norme impérative du droit international général survient, tout traité existant qui est en conflit avec cette norme devient nul et prend fin.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) bring their mutual relations into conformity with the peremptory norm of general international law

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 71. Conséquences de la nullité d'un traité en conflit avec une norme impérative du droit international général

1. Dans le cas d'un traité qui est nul en vertu de l'article 53, les parties sont tenues :

a) d'éliminer, dans la mesure du possible, les conséquences de tout acte accompli sur la base d'une disposition qui est en conflit avec la norme impérative du droit international général; et

b) de rendre leurs relations mutuelles conformes à la norme impérative du droit international général.

2. Dans le cas d'un traité qui devient nul et prend fin en vertu de l'article 64, la fin du traité :

a) libère les parties de l'obligation de continuer d'exécuter le traité;

b) ne porte atteinte à aucun droit, aucune obligation, ni aucune situation juridique des parties, créés par l'exécution du traité avant qu'il ait pris fin; toutefois, ces droits, obligations ou situations ne peuvent être maintenus par la suite que dans la mesure où leur maintien n'est pas en soi en conflit avec la nouvelle norme impérative du droit international général.