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## **Committee on Migration, Refugees and Displaced Persons**

# **A shared European approach to address migrant smuggling**

**Draft report<sup>1</sup>**

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### *Summary*

At the 4<sup>th</sup> Summit of the Heads of States and Government of the Council of Europe in 2023 in Reykjavík, European leaders recommitted to the importance of international co-operation in fighting against the smuggling of migrants. This transnational crime intersects with other serious criminal activities. Most people opt for smuggling routes because they lack effective access to legal mobility channels, including to escape persecution and conflict. Some smugglers have no mercy in their search for profit, putting the lives of men, women and children at risk. The complexity, scale and seriousness of this crime challenges States' ability to control their borders, to regulate international financial flows while exercising to their absolute responsibility to safeguard the rights of people on the move.

Based on a careful analysis of current policies and practices across member States, this report argues that their understanding and interpretation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, has been inconsistent. There has often been a conflating between irregular border crossing and migrant smuggling, sometimes resulting in the criminalisation of humanitarian assistance - and even migrants themselves - instead of reinforcing legal and judicial co-operation to prevent and fight the root criminal activities.

The Parliamentary Assembly argues that a policy response that is aligned with the Council of Europe's normative framework will complement the UN framework and benefit all member States, including members of the European Union, in reconciling two aspects often considered erroneously as mutually exclusive: States' sovereign right to control their borders, and the rights of people on the move.

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<sup>1</sup> Reference to committee: Doc. 15963, Reference 4808 of 19 April 2024.

## A. Draft resolution<sup>2</sup>

1. Referring to the [Reykjavik Declaration](#) and the renewed commitment by the Heads of States and Governments during the 4<sup>th</sup> Summit to fight against the smuggling of migrants, the Parliamentary Assembly considers that the smuggling of migrants is a transnational criminal activity challenging the State's sovereign right to control its borders and increasing the vulnerability of people on the move.
2. The Assembly considers that one of the keys to combating migrant smuggling is to make the business of smugglers unprofitable and to increase effective access to safe and legal pathways for labour migration, for family reunion, and for people seeking international protection. A State-led approach should aim to regulate and protect human mobility on the one hand, while enhancing the means dedicated to investigating and sanctioning organised cross-border criminal groups involved in the smuggling of migrants, on the other.
3. The Assembly believes that an effective strategy against the smuggling of migrants should involve a multidisciplinary approach across competent administrations within and across member States. Equally, co-operation between source, transit and destination countries of migration movement should be structured around a response covering both the criminal and the human aspects, aiming to address the drivers of migrant smuggling through information campaigns and through the effective increase of safe and legal migration pathways, and at the same time to protect the fundamental rights of people on the move, including smuggled migrants.
4. The Assembly highlights that the crime of migrant smuggling is transnational and that only through international co-ordination and co-operation will source, transit and destination countries be able to ensure that the response to this crime is rooted in the rule of law and international human rights frameworks, thus allowing to defend both the States' sovereign right to control their borders and the rights of people on the move.
5. The Assembly welcomes the fact that the vast majority of States across the globe have endorsed the [Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime](#) (hereunder the **Palermo Protocol**), which provides for the harmonisation of legislations through an internationally recognised definition, according to which migrant smuggling is "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" (Article 3).
6. The Assembly considers that any initiatives taken by the Council of Europe, including through the adoption of a regional instrument on the matter of migrant smuggling, should not aim to create new crimes but should instead complement the Palermo Protocol, facilitating its unambiguous and consistent interpretation in the light of the challenges faced today.
7. The Assembly recalls that the crime of migrant smuggling is not equal in nature to irregular border crossing. Moreover, pursuant to Article 31 of the [Convention related to the Status of Refugees](#), States shall not impose penalties, on account of their irregular entry or stay, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their irregular entry or presence. The need for international protection of each person should be examined in a fair and individualised manner. States should also not impose penalties on individuals who were coerced into committing an illegal act pursuant to Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings ([CETS 197](#)).
8. The Assembly highlights that the crime of migrant smuggling and of trafficking in human beings are different and distinct in nature. The Assembly warns against the conflating of these crimes which hinders the ability of States to provide an effective response and to put an end to these criminal activities.
9. The Assembly notes, with concern, the lack of consistency in the legislation of member States aiming to combat the smuggling of migrants, which can lead to negative human rights consequences. It recalls that laws or actions on migrant smuggling should never be used to intimidate or criminalise migrants and migrants' rights defenders. Such practices do not increase the efficiency of policy action to prevent and tackle the crime of migrant smuggling and put moreover the rights enshrined in the European Convention on Human Rights at risk, in particular Article 11 and Article 3, for instance when they result in the obstruction of humanitarian assistance.

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<sup>2</sup> Draft resolution adopted unanimously by the committee on 27 June 2024.

10. The Assembly reiterates its view as expressed in [Resolution 232 \(2020\)](#) and [Recommendation 2171 \(2020\)](#) “Concerted action against human trafficking and the smuggling of migrants” that a Council of Europe instrument would usefully complement the international standards set in the Palermo Protocol, and recommends that a strict definition should be adopted and transposed into domestic law by member States with a view to ensuring as much consistency as possible in the understanding of and interpretation of this crime. Such instruments should in particular:

10.1. comply with the definition of the crime of migrant smuggling and the scope of criminalisation as defined in Article 3 and in Article 6 of the Palermo Protocol, including aggravating circumstances;

10.2. acknowledge the heterogeneous profile of people involved in the perpetration or the facilitation of the crime of migrant smuggling and the necessity for prosecutors to sanction perpetrators according to a proportionate, gradual and nuanced approach to criminal sanctions.

10.3. recall that the “procurement” of illegal entry is not tantamount to crossing a border irregularly and that the crime of migrant smuggling necessarily involves that the smuggler is making a material or non-material profit;

10.4. expressly state that migrants are not the perpetrators of the crime of smuggling and that reducing or waiving the smuggling fee in return for facilitating the unauthorised crossing of a border should not be considered as a criminal act committed by the smuggled migrant in question if this was done under coercion or threat, nor if s/he is found as being in need of a form of protection (refugee, person in need of humanitarian protection, person at risk of being a victim of trafficking, victim of trafficking);

10.5. clarifies that people in need of protection should never be criminalised or administratively sanctioned for crossing a border unauthorised pursuant to Article 31 of the Convention related to the Status of Refugees and pursuant to Article 26 of the European Convention on Action against Trafficking in Human Beings ([ETS 197](#));

10.6. explicitly exempts humanitarian assistance and any support to migrants in accessing their fundamental rights from any form of criminal liability, when such acts are conducted without the seeking of any financial benefit;

10.7. clarifies that member States are legally bound by the obligation to protect and safeguard the right to leave any country, including one’s own, as enshrined in Article 2 Protocol No. 4 of the European Convention on Human Rights ([ETS No. 046](#)), and in Article 12 of the [International Covenant on Civil and Political Rights](#).

11. The Assembly recognises the particularly complex challenges associated with the investigation and sanctioning of migrant smugglers and strongly recommends that European co-operation efforts be primarily geared towards the strengthening of criminal justice efforts to address the crime in a way that disrupts the criminal organisations and removes the financial incentive for migrant smuggling. In this respect, the Assembly welcomes the establishment of the Council of Europe’s Network of Prosecutors on migrant smuggling and the co-operation between this network and the Eurojust’s Focus group on migrant smuggling.

12. The Assembly takes note of the dense fabric of regional and international cooperation initiatives already involved in supporting member States and their international partners to combat the smuggling of migrants. It is convinced that such co-operation would strongly benefit from the engagement of the Council of Europe’s member States through a jointly agreed definition. The Assembly suggests that such definition be mainstreamed in the use and in the monitoring of standards such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ([CETS N° 198](#)); the European Convention on Mutual Assistance in Criminal Matters and its protocols ([ETS N° 30, 99](#) and [182](#)); the Criminal and Civil Law Conventions on Corruption ([ETS N° 173](#) and [174](#)), and the Convention on Cybercrime ([ETS No. 185](#)), the Modernised Convention for the Protection of Individuals with Regard to the Protection of Personal Data ([Convention 108+](#)).

13. The Assembly stresses the obligations of member States to protect the fundamental rights of smuggled migrants, including children, whose vulnerability may be heightened during their passage through smuggling channels.

13.1. Such instruments should be fully used in the context of border management and in the context of migration policies, in particular, the Convention on Action against Trafficking in Human Beings ([CETS No. 197](#)), the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment ([ETS 126](#)), the Convention on Preventing and Combating Violence Against

Women and Domestic Violence ([CETS No. 210](#)), and the [Convention on Protection of Children against Sexual Exploitation and Sexual Abuse](#).

13.2. The Assembly recalls the obligations deriving from the European Social Charter in its original version ([ETS No. 035](#)) and the European Convention on the Legal Status of Migrant Workers ([ETS No.093](#)) providing for the protection of migrant workers who are nationals of a contracting party in particular Articles 4 and 5. It recalls the Recommendation [CM/Rec\(2022\)211](#) of the Committee of Ministers to member States on preventing and combating trafficking in human beings for the purpose of labour exploitation and the importance of ensuring that labour inspections are carried out to ensure that all migrants, including migrant workers, are treated with dignity.

13.3. On the protection of smuggled migrants, the Assembly also recalls the relevance of the Conventions of the International Labour Organization, in particular its [Convention No.143](#) on Migrant Workers, [No. 105](#) on the Abolition of Forced Labour, and the [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#). The Assembly strongly encourages member States to ratify these Conventions.

14. The Assembly stresses the important strategic role of the European Union. It considers that the harmonisation of norms along commonly shared human-rights standards is paramount, not only for the sake of coherence in the laws within the European Union member States which are also members of the Council of Europe, but also because of the influence which EU law exerts on non-EU member States, especially in the field of migration and border management. Such norms should conform, moreover, to the Council of Europe's standards and it is paramount that the Council of Europe is proactive in enhancing coordination with the European Union on this front.

15. In the context of the recent proposal by the European Commission aiming to revise the so-called "Facilitation Package", the Assembly warns against the excessively large scope of the crimes falling under the definition of migrant smuggling entailed in the proposed Directive aiming to replace [Directive 2002/90/EC](#). This exacerbates the risk of lack of consistency across European States as regards their understanding and interpretation on what the crime of migrant smuggling should and should not entail.

16. The Assembly endorses the concerns expressed by the European Data Protection Supervisor on the Proposal for a Regulation on Enhancing Police Cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings ([Opinion 4/2024](#)). It agrees that proposal fails to demonstrate its alignment with international data protection and fundamental rights standards, possibly leading to the adoption of conflicting norms in EU member States bound by the Council of Europe's norms. The Assembly considers that this proposal may be premature and touches on policy areas which are broader than the issue of migrant smuggling. It recommends that discussions on this piece of legislation be disconnected from the discussions around the revision of the [Directive 2002/90/EC](#).

## B. Draft recommendation <sup>3</sup>

1. The Parliamentary Assembly refers to its Resolution XXXX (2024) “A shared European approach to address migrant smuggling” and to the [Reykjavík Declaration](#), adopted on 16 and 17 May 2023 at the 4<sup>th</sup> Summit of the Heads of States and Government, and the commitment by member States to fight against the trafficking and the smuggling of migrants through international co-operation “while continuing to protect the victims and respect the human rights of migrants and refugees, as well as supporting frontline States, within the existing Council of Europe frameworks.”

2. The Assembly welcomes the decision by the Committee of Ministers to entrust the European Committee on Crime Problems (CDPC) with an additional task in accordance with its terms of reference for 2024-2027 to be implemented until the end of 2024, namely: “within the existing Council of Europe frameworks, consider and explore concrete ways to improve international co-operation in fighting the smuggling of migrants, thereby also considering the protection from aggravated instances of migrant smuggling, with full respect for their human rights and taking into account the relevant legal framework, and prepare a report assessing the need for and feasibility of a possible instrument in this field” ([CDPC \(2023\)09](#)).

3. The Assembly recommends that an instrument be prepared and adopted by the Committee of Ministers on the smuggling of migrants which will ensure as much consistency as possible in the understanding and in the interpretation of this crime, and which:

3.1. endorses the definition contained in the [Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime](#), and which explicitly restricts the definition to “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”;

3.2. recalls that the “procurement” of illegal entry is not tantamount to crossing a border irregularly and that the crime of migrant smuggling necessarily involves that the smuggler is making a material or non-material profit;

3.3. expressly state that migrants are not the perpetrators of the crime of smuggling and that reducing or waiving the smuggling fee in return for facilitating the unauthorised crossing of a border should not be considered as a criminal act committed by the smuggled migrant in question if this was done under coercion or threat, nor if s/he is found as being in need of a form of protection (refugee, person in need of humanitarian protection, person at risk of being a victim of trafficking, victim of trafficking);

3.4. clarifies that people in need of protection should not be criminalised or administratively sanctioned for the unauthorised crossing of a border pursuant to Article 31 of [the Convention related to the Status of Refugees](#) and pursuant to Article 26 of the European Convention on Action against Trafficking in Human Beings ([ETS 197](#));

3.5. explicitly exempts humanitarian assistance and any support to migrants in accessing their fundamental rights from any form of criminal liability, when such acts are conducted without the seeking of any financial or material benefit;

3.6. clarifies that member States which have ratified the [International Covenant on Political and Civil Rights](#) (Article 12) and the Protocol No. 4 to the European Convention for Human Rights ([ETS No. 046](#)) are legally bound by the obligation to protect and safeguard the right to leave any country, including one’s own, and that restrictions to such fundamental right should always be lawful and proportionate in line with the conditions enounced in Article 2 of this Protocol.

4. The Assembly considers that the mandate, expertise, tools, experience and geographical scope of the Council of Europe justify for the Organisation to play a leading role in helping to define a shared European approach on the smuggling of migrants which is supportive of European member States. It strongly encourages the Committee of Ministers to ensure that any discussions on an instrument about migrant smuggling that involves the European Union will enhance coordination and ensure the alignment of legislation and policies with Council of Europe standards and international human rights law.

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<sup>3</sup> Draft recommendation adopted unanimously by the committee on 27 June 2024.



## C. Explanatory memorandum

### 1. Introduction

1. In 2020, the Parliamentary Assembly adopted [Resolution 2323 \(2020\)](#) “Concerted action against human trafficking and the smuggling of migrants”, based on the report by my colleague Mr Vernon Coaker (United Kingdom, SOC). Since then, a series of initiatives have been taken by the Committee of Ministers to support member States in coordinating their approach on migrant smuggling, summarised in the [Council of Europe Action Plan on Fostering International Co-operation and Investigative Strategies in Fighting the Smuggling of Migrants](#).

2. Contrary to the [Council of Europe Convention on Action against Trafficking in Human Beings](#) (CETS No. 197), which provides a complementary legal framework to the existing international instruments on preventing and countering trafficking in human beings, no instrument on the smuggling of migrants has as yet been adopted by the Council of Europe which would cover the various necessary human rights protections and the fight against crime aspects which the reality of the smuggling of migrants involves.

3. At the 4<sup>th</sup> Summit of the Heads of States and Government on 16 and 17 May 2023, European leaders recommitted to the importance of fighting against the trafficking and the smuggling of migrants through international co-operation “while continuing to protect the victims and respect the human rights of migrants and refugees, as well as supporting frontline States, within the existing Council of Europe frameworks” ([Reykjavík Declaration](#)).

4. In 2023, the European Committee on Crime Problems (CDPC) was mandated by the Committee of Ministers to assess the need and feasibility of possible instruments which may “improve international co-operation in fighting the smuggling of migrants, thereby considering also human rights aspects linked to the protection of and assistance to victims of smuggling” ([CDPC \(2023\)09](#)).

5. Against the background of the discussions among the EU institutions on the revised “Facilitators’ Package” and ahead of the CDPC’s feasibility study to be published by the end of 2024, I was honoured to be appointed Rapporteur on this issue. This report aims to contribute the Assembly’s political input in a timely fashion to the current discussions on migrant smuggling across Europe.

6. This report does not aim to be exhaustive but to draw together the main elements of the elements to be considered in shaping a rational and pragmatic political and legal response to the smuggling of migrants. It will aim to demonstrate that preparing this response in alignment with the rule of law and with the Council of Europe’s framework of related standards will allow all member States to reconcile the two aspects often considered – erroneously- as mutually exclusive or even in conflict: States’ sovereign right to control their borders, and the rights of people on the move.

## 2. Conceptualising migrant smuggling: shaping the scope of a criminal act

### 2.1. A crime intersecting with many others: procedural and co-operation challenges

7. Taking action against the smuggling of migrants requires a transversal approach, both to ensure that preventive measures are effective against the main drivers of this crime and also because the committing of this criminal offence is enabled and facilitated through the perpetration of many interrelated crimes such as money laundering, document fraud, counterfeiting and illegal attempts to obtain citizenship of a State.

8. One of the challenges at stake is to stop this business from being profitable: co-operation is needed to allow for the freezing and even the seizing of assets in a context where the benefits may be financial or non-financial, and which may be kept or invested in a way that may not be easily traceable by State authorities. Indeed, the role of corrupt officials in facilitating the conduct of this act has unfortunately been documented in some instances.<sup>4</sup>

9. Another challenge is the confusion which is often evident between the smuggling of persons and the trafficking in human beings. Although both are considered as a form of international organised crime in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and although the two crimes may be interrelated in some instances (smuggled migrants are at risk of being victims of human trafficking), these crimes are distinct in nature. Contrary to the trafficking

<sup>4</sup> United Nations Office on Drugs and Crime (UNODC), [Issue Paper: Corruption and the Smuggling of Migrants](#), 2013.

in human beings, which does not necessarily involve the crossing of an international border, and where victims are persons subjected to deceit, violence and exploitation for the purpose of profit-making, it is the State which is affected by the smuggling of migrants.

10. In its latest General Report, the Group of Experts on Action against Trafficking in Human Beings (GRETA) regretted that trafficking in human being cases “are requalified as other offences which carry lighter penalties, such as pimping, procurement, facilitation of irregular migration (migrant smuggling) or labour law violations, either due to a lack of evidence or to the fact that the alternative offences are easier to prove.”<sup>5</sup>

11. In the case of an investigation of an instance of migrant smuggling with aggravated circumstances, a protection-oriented environment may help restore the rights of the migrant who is the victim of such abuse and help build trust with potential witnesses during the investigation and possible prosecution process.

12. The crime of migrant smuggling is, by its very nature, a cross-border matter and any attempt by nation States to solve this issue individually is therefore likely to fail. A clearly articulated and legally sound definition that would ensure a common understanding and interpretation of what the crime of migrant smuggling does and does not entail is therefore highly desirable to facilitate and encourage cross-border cooperation on this phenomenon.

## **2.2. International standards**

13. In 2000, the United Nations adopted the Convention against Transnational Organized Crime (UNTOC) which was complemented by three protocols, targeting specific areas and manifestations of organised crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition; and the [Protocol against the Smuggling of Migrants by Land, Sea and Air](#) (hereafter the Palermo Protocol or the Protocol).

14. The Palermo Protocol entered into force in 2004 to support State parties to prevent, investigate and prosecute the crime of migrant smuggling, understood as a form of organised crime which is transnational in nature and involves organised criminal groups (Article 4). It provided the first international response to the “significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities set forth in this Protocol, which bring great harm to the States concerned” and “can endanger the lives or security of the migrants” (Preamble of the Protocol).

15. It defines the crime of migrant smuggling as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (Article 3).

16. Migrants are not considered victims of smuggling but as “objects” of criminal acts which challenge the sovereignty of States and whose safety and rights are put at risk when such criminal acts are committed. This rationale provides justification for Article 16 of the Protocol to focus on the protection and assistance measures to safeguard the rights of persons who have been the object of the conduct criminalised pursuant to Article 6 of the Protocol. It also explains why the Protocol considers that a criminal law response to the crime of migrant smuggling should be more severe if the life, the dignity, or the safety of migrants are deliberately put at risk during or for the purpose of the conduct of the criminal act, including for exploitation. These are thus to be considered as aggravating circumstances (Article 6.3).

17. In the same logic, Article 5 clarifies that smuggled migrants shall not be liable to prosecution “for the fact of having been the object of conduct set forth in article 6 of this Protocol.” State parties should cooperate to ensure the prompt return of smuggled migrants who have no legal leave to remain, exercised in compliance with international refugee law and in particular the fair assessment that return would not infringe on the rights of the person returned, in line with the principle of *non-refoulement*.

18. Article 17 of the Palermo Protocol encourages State parties to conclude bilateral or regional agreements or operational arrangements or understandings aimed at implementing the Palermo Protocol, and also at “enhancing the provisions of this Protocol among themselves” if they so wish. This is the case for example with the Bali Process on people smuggling, trafficking in persons and related transnational crime, established in 2002: co-operation between 45 countries is structured in working

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<sup>5</sup> Group of Experts on Action against Trafficking in Human Beings (GRETA), [13<sup>th</sup> General Report](#), April 2023.

groups, one of them dedicated, for instance, to the “Disruption of Criminal Networks involved in People Smuggling and Human Trafficking.”<sup>6</sup> As of January 2024, 45 member States of the Council had signed the Palermo Protocol (Andorra has not) and 43 have ratified it (Iceland and Ireland have only signed up to it).<sup>7</sup>

19. On connected crimes but also on protection standards that have some relevance to preventing and addressing the crime of migrant smuggling, international standards offer a wide range of instruments and tools such as the UN Convention against Corruption, to which all member States of the Council of Europe have party, and the International Labour Organization’s Conventions protecting the rights of migrant workers (Convention No.143 and No.105), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, as well as the UN Convention Against Torture, the UN Convention related to the Status of Refugees, and the UN Convention on the Rights of the Child.

20. States parties to the 1951 Convention relating to the Status of Refugees cannot impose penalties, on account their irregular entry or stay, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (Article 31(1) of the 1951 Convention). Indeed, the right to leave any country, including one’s own, is recognised in international human rights law under Article 13 of the Universal Declaration of Human Rights , in Article 12 of the International Covenant on Civil and Political Rights ) and under Article 2 of Protocol No. 4 to the European Convention on Human Rights which has a binding force for all State Parties.

### **2.3. The Council of Europe’s standards**

21. The European Convention on Human Rights imposes positive as well as negative obligations on all State Parties which, if fulfilled, should ensure that smuggled migrants are not criminalised for a crime that they have not committed (Article 6) and that any situation of vulnerability arising from being smuggled may be prevented or addressed so they can fully enjoy their right to liberty (Article 5), be protected from labour exploitation, inhuman and degrading treatment (Article 3).

22. In 2017, a conference was convened<sup>8</sup> which laid the ground for the adoption of the Action plan on fostering international co-operation and investigative strategies in fighting the smuggling of migrants ([CDPC\(2019\)9fin](#)) by the European Committee on Crime Problems (CDPC) in 2020. The Action Plan clearly states that “criminal justice measures in response to smuggling must ensure that the human rights of smuggled migrants are protected at all times while present in Council of Europe member States and during their return to countries of origin or transit countries, in compliance with Articles 2, 3, 5, 8, 13 of the ECHR and Article 4 of Protocol 4 of the ECHR.”

23. As of today, two of these activities have been realised: the establishment of [the Council of Europe Network of Prosecutors on Migrant Smuggling](#) in December 2021, composed of 26 country representatives; and the publication of country profiles on the legal and judicial framework on migrant smuggling across member States. The Network has met twice since its establishment, mostly providing a forum for experts to exchange on their practices and challenges faced. As to the country profiles, 25 member States have contributed their input, available online.<sup>9</sup>

24. The Action Plan refers to the Council of Europe’s “instruments of MLA” (instruments of mutual legal assistance). Each of these tools provides the ability for exchange and monitoring by committees of experts. Prominent among these MLAs is the [Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism](#) which has been ratified by 39 member States so far.

<sup>6</sup> International Organization for Migration (OIM), [“Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime”](#), last accessed on 13 June 2024.

<sup>7</sup> United Nations Treaty Collection, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, [Status of signatures and ratifications](#) as at 13 June 2024.

<sup>8</sup> Council of Europe, European Committee on Crime Problems, [“Conference on smuggling of migrants: final observations for Council of Europe Further Action on the Smuggling of Migrants”](#), 23 June 2017.

<sup>9</sup> Council of Europe, European Committee on Crime Problems, [“Country-profiles on Migrant Smuggling”](#), last accessed on 13 June 2024.



25. Other MLAs include the [Civil Law Convention on Corruption \(2000\)](#) (CETS 174) ratified by 33 member States so far and [Criminal Law Convention on Corruption \(2000\)](#) (CETS 173) ratified by 44 member States.

26. The European Social Charter in its original version ([ETS 35](#)) and the European Convention on the Legal Status of Migrant Workers ([ETS No.093](#)) provide for the protection of migrant workers who are nationals of a contracting party. The latter Convention, signed by 11 member States, posits that “every migrant worker accepted for employment [to] be provided prior to departure for the receiving State with a contract of employment or a definite offer of employment” (Article 5) and the issuance of emigration papers in a prompt fashion and which are “free of charge or on payment of an amount not exceeding their administrative cost” (Article 4).

27. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ([ETS 126](#)) ratified by all member States, and the Council of Europe Convention on preventing and combating violence against women and domestic violence ([CETS No. 210](#)) which 35 member States have ratified so far, lie at the crossroads between the available preventive tools and sanction mechanisms for human rights violations. Their enforcement is reinforced by the ability of the European Court of Human Rights to act in cases of claimed breach of Article 3 of the European Convention on Human Rights.

28. Finally, it is important to highlight the recent Recommendation [CM/Rec\(2022\)211](#) of the Committee of Ministers to member States on preventing and combating trafficking in human beings for the purpose of labour exploitation. Indeed, the risk of abuse of smuggled migrants, including for the purpose of labour exploitation, is greater if the risks of exploitation are not prevented, and if victims of exploitation are not identified.

#### **2.4. The European Union’s standards**

29. In 2002, the Council Directive [2002/90/EC](#) defining the facilitation of unauthorised entry, transit and residence (the 2002 Directive) was adopted to “combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings”, together with the framework Decision [2002/946/JHA](#) on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

30. Article 1 of the 2002 Directive does not limit the offence to the making of profit by smugglers from the facilitation of entry or stay of migrants; it also considers as a crime the intentional assisting “of a person to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens” (Article 1(1)).

31. Although the EU has signed the Palermo Protocol in 2000 (and approved it in 2006), no reference is made to the UN framework in these instruments. Pursuant to Article 1(2), the 2002 Directive leaves it to EU member States to decide whether to criminalise humanitarian assistance or not.

32. In 2015, the European Commission adopted the first EU Action Plan against migrant smuggling (2015 – 2020) ([COM\(2015\) 285 final](#)). Two of the main outcomes of this Action Plan were the establishment of the European Migrant Smuggling Centre and its Information Clearing House, inside Europol, as well as the structuring of inter-agency co-operation between Europol, Eurojust, Cepol, OLAF, EU-Lisa and Frontex on organised and serious international crime through the EU Policy Cycle. It led to the formal establishment of the European Multidisciplinary Platform Against Criminal Threats (EMPACT) which became a permanent instrument in 2021.<sup>10</sup>

33. A renewed action plan was adopted for the period 2021-2025 ([COM\(2021\)591 final](#)) in the context of what the European Commission described as “the increasing role of State actors in facilitating irregular migration and using human beings to create pressure at the EU’s external borders.” The aim of the plan is mainly to reinforce the means dedicated to stop the employment of illegally-staying third-country nationals, and to collect intelligence on irregular migration routes through external co-operation.

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<sup>10</sup> General Secretariat of the Council of the European Union, “Council conclusions on the permanent continuation of the EU Policy Cycle for organised and serious international crime: EMPACT 2022 + - Council Conclusions (9 March 2023)” ([7100/23](#)), 9 March 2023.

### 3. Overview of the situation in Europe

#### 3.1. Migrant smuggling in Europe

34. The magnitude of migrant smuggling in Europe is difficult to assess. First, there is usually a confusion between the number of irregular migrants in Europe and the number of people who entered irregularly. Fact-based research has demonstrated for some time now that most irregular migrants have entered Europe legally and subsequently overstayed their visa.<sup>11</sup> Second, not all people who entered irregularly were smuggled into Europe.

35. As to the statistics available, a figure often put forward is that “over 90% of irregular migrants and asylum seekers are being smuggled to the EU”. However, this figure is an estimate based on 1,500 debriefings of migrants collected by Frontex and EU Member States in 2015<sup>12</sup> which is methodologically insufficient to draw an analysis on all irregular arrivals in Europe. Regarding the trends, in 2023, Eurojust investigated 425 cases of migrant smuggling compared to 217 cases in 2019. Over these five years, new investigated cases open each year represented approximately 40% of the cases investigated and 60% ongoing investigations from the previous years (except in 2021 where 58% of the cases were newly opened).<sup>13</sup> According to the UN Office on Drugs and Crime, Europe is both a destination and a transit point for transit routes.<sup>14</sup>

36. Smugglers are very diversified in their profile, from structured organised criminal rings to individuals paid for the crossing of a border in an irregular fashion. In the worst-case scenario, smugglers do not hesitate to lower their costs as much as possible to maximise their profits, including by providing malfunctioning lifejackets on unseaworthy vessels, thus putting the lives of men, women, and children even more at risk. Since 2015, the UNODC and the European Union have joined efforts to tackle this issue.<sup>15</sup>

37. The profile of smuggled migrants is equally diversified and may include families and unaccompanied children. Many smuggled migrants will find work in the informal sector, which is why many experts and organisations providing services to undocumented migrants call for any action to combat smuggling to be articulated with protection-sensitive measures.<sup>16</sup>

38. The country profiles compiled by the CDCP provide some information, albeit not exhaustively. It is striking to note that many smuggled migrants come from war-torn countries from which they are most likely refugees including Afghans, Syrians and Ukrainians, who benefit from temporary protection.<sup>17</sup>

39. Calculating how much profit is made through migrant smuggling is very challenging because the money flows are particularly hard to follow. Besides, not all financial transactions involve criminal organisations: they can involve money remittances, channelled through registered companies, or which are used to launder the proceeds of crime.<sup>18</sup> Evidence-based research also shows that profits may be “immediately recirculated into the communities of smuggling facilitators –often working-class, elderly, disabled, native and indigenous men, women and children.”<sup>19</sup>

40. The UNODC provided low estimates in a 2018 study according to which at least 2.5 million migrants were smuggled for an economic return of up to 7 billion US dollars in 2016. This study estimated that at least 375,000 migrants were smuggled into Europe through the Mediterranean, generating a profit for the migrant smuggling business of at least 320 - 550 million US dollars.<sup>20</sup>

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<sup>11</sup> Hellenic Foundation for European and Foreign Policy et al., “[Clandestino project: final report. Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe](#)”, 23 November 2009.

<sup>12</sup> Eurojust, “[Annual reports](#)” (see “migrant smuggling” sections), last accessed on 13 June 2024.

<sup>13</sup> Eurojust, “[Legal Definition of Migrant Smuggling and/or Facilitation of Irregular Migration](#)”, 31 January 2024.

<sup>14</sup> UNODC, “[Global Study on Smuggling of Migrants](#)”, June 2018.

<sup>15</sup> United Nations, “[UNODC and EU working together against migrant smuggling](#)”, 16 May 2024.

<sup>16</sup> European Commission, “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Renewed EU action plan against migrant smuggling (2021-2025)” ([COM \(2021\) 591 final](#)), 29 September 2021.

<sup>17</sup> Council of Europe, European Committee on Crime Problems, “[Country factsheet: smuggling of migrants. Legal and judicial information on migrant smuggling - Lithuania](#)”, last updated 20 October 2023; and “[Country factsheet: smuggling of migrants. Legal and judicial information on migrant smuggling - Serbia](#)”, last updated 31 October 2023.

<sup>18</sup> Cellule de Traitement des Informations Financières, “[Migrant Smuggling](#)”, 31 March 2022.

<sup>19</sup> Gabriela Sanchez, “Five Misconceptions About Migrant Smuggling”, [Policy Briefs, 2018/07](#), Migration Policy Centre, European University Institute, 2018.

<sup>20</sup> UNODC, op. cit.

### 3.2. Legal and judicial responses across member States

41. Legislation aiming to counter the smuggling of migrants varies across the globe.<sup>21</sup> In many member States, the crime of migrant smuggling is not singled out as a specific offence but is part of a broader offence aiming to sanction any unauthorised crossing into the territory in either criminal or administrative law. The same problem is sanctioned in different ways: some countries do not single out migrant smuggling from illegal immigration, others conflate facilitation of entry for the purpose of humanitarian support with the act of making material or financial benefit in exchange for the facilitation of irregular entry into a State's territory. Two country examples epitomize such lack of consistency. The Slovak Republic refers to the notion of "unconscious smuggling" for example where carriers are unaware that they are transporting migrants irregularly, which is a contradiction in terms (smuggling is the conscious facilitation of the entry, transit or stay in a country irregularly to make profit out of it). In the Republic of Ireland, the criminalisation of irregular entry rather than migrant smuggling itself is used because arresting smugglers is too difficult.<sup>22</sup>

42. Few countries refer to "migrant smuggling" in their legislation and rather refer to the support to illegal entry or stay. Most countries foresee gradual sanctions depending on the severity of the offence. In cases involving the abuse of the rights of migrants, aggravating circumstances usually apply.

43. In 18 cases, the definition of migrant smuggling makes the element of profit-making a constitutive element of the crime, in line with the definition in the Palermo Protocol. In at least six member States, this notion is absent from the definition of the act aiding irregular entry or stay, with the very crossing of a border without authority being itself criminalised in some instances; in at least nine member States, the notion of profit is part of the elements justifying for the aiding of irregular border crossing or irregular stay to be sanctioned. However, across these 15 legislations, no reference is made to exemptions for humanitarian assistance.

44. Assistance for humanitarian purpose with no profit induced is safeguarded and exempted from criminal liability in only nine member States (Belgium, Croatia, Finland, France, Greece, Italy, Malta, Poland, and Spain). Most of these countries thus criminalise any facilitation of irregular entry, even if not for profit.

45. The general strategy to counter migrant smuggling falls under the aegis of either the Ministry of Interior or the Ministry of Justice, or the two combined. Conversely, some member States have established a horizontal approach to the issue of migrant smuggling, leaning on the competences of various administrations. In Armenia, cases of smuggled migrants are redirected to the Social Affairs Ministry when required.<sup>23</sup>

46. On vulnerable profiles at the border, at least three countries have explicitly protected asylum seekers from any sanction related to irregular-border crossing. None of the cases of legislation available in the country profiles shared with the CDPC indicate the need for particular safeguards with respect to the identification and non-criminalisation of unaccompanied children or victims of trafficking.

47. Reviews conducted by the UNODC have indicated that it is usually low-profile smugglers who are charged rather than the instigators heading the most structured rings.<sup>24</sup> Besides, it may also be that migrants themselves end up criminalised for having driven the vehicle or boat carrying irregular migrants across a border illegally. A nuanced approach is therefore required. In the UK, the Court of Appeal "overturned three of four convictions of asylum seekers who had been charged with assisting unlawful immigration because of their role in steering inflatable boats filled with a number of migrants from France" in 2021. By contrast, cases involving aggravating circumstances leading to death were heavily

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<sup>21</sup> UNODC, "[Issue paper: The Concept of 'Financial or Other Material Benefit' in the Smuggling of Migrants Protocol](#)", 2017.

<sup>22</sup> Eurojust, op.cit. The Irish authorities have decided to "repeal section 2 of the Illegal Immigration (Trafficking) Act 2000 which required proof that the alleged smuggler had made a financial gain by assisting entry into the State. Such gain was often difficult to prove."

<sup>23</sup> Council of Europe, European Committee on Crime Problems, "[Country factsheet: smuggling of migrants. Legal and judicial information on migrant smuggling - Cyprus](#)", last updated 3 November 2023; and "[Country factsheet: smuggling of migrants. Legal and judicial information on migrant smuggling - Armenia](#)", last updated 5 September 2023.

<sup>24</sup> UNODC, "[Observatory on Smuggling of Migrants](#)", last accessed on 13 June 2024.

sanctioned.<sup>25</sup> In 2019 in Belgium, individuals accused of migrant smuggling because they had provided accommodation to irregular migrants for free were eventually found not guilty in appeal.<sup>26</sup>

### 3.3. Counter-intuitive policies and their consequences

48. The adverse consequences of applying anti-smuggling legislation to ill-suited situations are many. Most of the time, border management measures aiming to counter the smuggling of migrants result in a restriction of access to the territory for all migrants, including refugees. This trend is common to many if not all European countries, as documented in the report by my colleague Ms Stephanie Krisper (Austria, ALDE) on “Ensuring human rights compliant asylum procedures.”<sup>27</sup>

49. Stopping the business of smugglers cannot be equated with making the journey of migrants impossible. Not only do such measures fail to counter the very profit-making of smugglers (usually the fares have been paid, at least partly, before departure), but they put the security, if not the life, of migrants at risk. Recent measures by nation States to discourage migrants from crossing the border irregularly and to ruin the business of smugglers are having a very limited effect on the persistence, and even growth,<sup>28</sup> of irregular border crossings into member States. There has even been an increase in the number of deaths at border-crossing points where such co-operation has been deployed (see for instance in the Channel<sup>29</sup>).

50. The absence of any safe and regular means to travel internationally, couple with economic, environmental and political push factors are the main drivers of irregular migration from which smugglers are profiting. In the 2021-2025 Renewed action plan on migrant smuggling, the European Commission recalled that “there is emerging evidence that smugglers are facilitating the unauthorised movements of beneficiaries of international protection.”<sup>30</sup>

51. Undue criminalisation against migrants<sup>31</sup> and their defenders, or against people providing migrants in an irregular situation with humanitarian support, has grown in scale significantly and has been documented for years. In February 2024, the Human Rights Commissioner of the Council of Europe sent an additional alarm call to European member States, unequivocally denouncing the use of the anti-smuggling legislation to hamper freedom of assembly and association.<sup>32</sup>

### 3.4. Good practices at regional level

52. A few member States have structured their approach to counter migrant smuggling by involving the various departments which may facilitate the investigation of this crime, and the location of perpetrators. This cross-department approach can be found in Cyprus, in Belgium and in Serbia.<sup>33</sup> The EU is also facilitating such a transversal approach through the EMPACT initiative.

53. A complex network of international co-operation schemes in the field of migrant smuggling has also developed over the years, to ease judicial and police co-operation on a crime which is inherently of a transnational nature. Joint investigative teams (JIT) and European Investigation Orders (EIO) are particularly useful to States to trace smuggling networks and identify perpetrators.

54. INTERPOL hosts a Specialized Operational Network (ISON) against Migrant Smuggling. This organisation is facilitating secure information-sharing between 196 States and provides access to databases, especially some used to detect stolen, lost or fraudulent travel documents. The organisation also provides training workshops and operational support during cross-border investigations. A pilot project was launched over the years 2022-2024 to address the criminal use of new technologies in migrant smuggling and human trafficking from Asia into Canada.<sup>34</sup>

<sup>25</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, “Determining who to charge with the crime of migrant smuggling: who is and who is not a migrant smuggler” (CTOC/COP/WG.7/2023/2), 25 July 2023.

<sup>26</sup> A.Se with Belga, « [Migration: les «hébergeurs» de migrants sont acquittés](#) », *Le Soir*, 26 May 2021 (French only).

<sup>27</sup> Parliamentary Assembly of the Council of Europe, “[PACE committee warns against the erosion of the right of asylum](#)”, 30 May 2024.

<sup>28</sup> Frontex, “[Irregular border crossings into EU so far this year highest since 2016](#)”, 11 December 2023.

<sup>29</sup> Andrew Harding, “[Channel migrant deaths are rising - who's to blame?](#)”, *BBC*, 9 March 2024.

<sup>30</sup> European Commission, op.cit.

<sup>31</sup> “[Egyptians remain in detention after Greek court acquittal over shipwreck](#)”, *Reuters*, 23 May 2024.

<sup>32</sup> Commissioner for Human Rights of the Council of Europe, “[Recommendation: Europe must end repression of human rights defenders assisting refugees, asylum seekers and migrants](#)”, 22 February 2024.

<sup>33</sup> Council of Europe, European Committee on Crime Problem, op.cit. at 6.

<sup>34</sup> Interpol, “[Project CCISOM: new technologies. Cyber challenges in smuggling of migrants and human trafficking](#)”, page last accessed on 13 June 2024.



55. Some member States have developed co-operation with countries sharing geographical, linguistic or cultural commonalities. This is the case for instance of the Ibero-American Network for International Legal Cooperation, and of the Conference of the Ministries of Justice of Ibero-American countries of which Spain, Andorra and Portugal are members. The year 2021 saw the entry into force of the Treaty on the Electronic Transmission of Requests for International Judicial Cooperation between Central Authorities, applicable in the context of combatting transnational crime notably on people smuggling as defined in the Palermo Protocol.<sup>35</sup>

56. The Southeast European Law Enforcement Center (SELEC) brings together Albania, Bosnia and Herzegovina, Bulgaria, Greece, Hungary, Moldova, Montenegro, North Macedonia, Romania, Serbia and Türkiye. SELEC especially cooperates with the IOM, with the UNODC and with Europol in the field of migrant smuggling, and a series of cross-border police cooperation have been successfully led through such joint efforts recently.<sup>36</sup>

57. The establishment by the Council of Europe of the European Network of Prosecutors on Migrants Smuggling<sup>37</sup> and of the Focus Group for Prosecutors on Migrant Smuggling by Eurojust are part of these efforts to facilitate exchange of information and also to identify avenues for further harmonisation of standards in the field of mutual legal assistance (MLA).

### 3.5. Good practices at national level

58. As emphasised by the Slovenian authorities, migrants should not be criminalised for being smuggled. Rather, “the migrants are in the position of being witnesses, and they are not the victims/harmed persons, unless specific circumstances occur and the migrants themselves are the subject of physical violence, threat, some form of slavery.”<sup>38</sup> In the Netherlands, a ‘free-in, free-out’ policy enables migrants to report a crime to the police without being checked for their administrative or criminal status. This is meant to encourage the reporting of exploitation cases but may also incentivise migrants willing to report situations of abuse by smugglers, including aggravating circumstances to which they may have been subjected.

59. In 2022, the Belgian parliament appointed an ad-hoc committee to review Belgium’s legislation and policy in the field of the trafficking and the smuggling of human beings. The outcomes of these parliamentary proceedings have resulted in the adoption, in May 2023, of a set of 100 recommendations aiming to better prevent and sanction the crime of migrant smuggling and the crime of trafficking in human beings.<sup>39</sup> Among the six recommendations on migrant smuggling, the Parliament asked to assess whether the notion of direct or indirect material benefit should be clarified to avoid any risk of undue criminalisation of migrants or persons providing support to them without seeking any form of profit. The Parliament also recommended that humanitarian workers raise their awareness on the form of abuse which smuggled migrants may face, and how to report such cases to the competent authorities.

60. Belgium establishes an explicit distinction between people’s smuggling and “assistance to illegal immigration.” Moreover, Belgian law considers that there cannot be any illegal entry if a migrant comes from another Schengen State, because this is a free movement area. Any offence of migrant smuggling should therefore involve the irregular crossing of a non-Schengen border for the purpose of making profit. The Belgium authorities have structured a multidisciplinary approach on migrant smuggling and on trafficking in human beings since 2016.<sup>40</sup> An inter-departmental co-ordination unit for action against trafficking in and smuggling of human beings was set-up, under the authority of the Ministry of Justice.<sup>41</sup>

<sup>35</sup> IberRed, “[Spain ratifies the Treaty of Medellin allowing its entry into force](#)”, 2 June 2021.

<sup>36</sup> Southeast European Law Enforcement Center, “[SELEC support for tackling migrants’ smuggling into Europe across Balkan route - Southeast European Law Enforcement Center](#)”, 9 June 2023.

<sup>37</sup> European Committee on Crime Problems, webpage of the [Council of Europe Network of Prosecutors on Migrant Smuggling](#), last accessed on 13 June 2024.

<sup>38</sup> Council of Europe, European Committee on Crime Problems, “[Country factsheet: smuggling of migrants. Legal and judicial information on migrant smuggling - Slovenia](#)”, last updated on 7 November 2023.

<sup>39</sup> Chambre des Représentants de Belgique, « [Commission spéciale chargée d’évaluer la législation et la politique en matière de traite et de trafic des êtres humains](#) », 12 June 2023 (French only).

<sup>40</sup> Service Public Fédéral Justice, « [Circulaire du 23/12/2016 relative à la mise en œuvre d’une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains](#) », 10 March 2017 (French only).

<sup>41</sup> Myria, [2022 Annual report trafficking and smuggling of human beings](#), 2023.



## 4. Recent EU developments

### 4.1. *The scope of criminalisation at stake*

61. The possibility left for EU member States to criminalise humanitarian assistance, rather than an obligation imposed on them not to do so, has further encouraged the interpretation of the 2002 Directive and of the Framework Decision very broadly, leading to undue criminalisation and forms of intimidations against migrants and their defenders. This was recognised by the European Commission which, in a study published in 2017 to evaluate the existing framework, spoke of “unintended consequences” and euphemistically referred to reports on “fears about perceived risks of criminalisation.”<sup>42</sup>

62. Regarding the distinction to be made between migrant smuggling and the facilitation of irregular migration for humanitarian assistance, the same study asserted that “added value brought by the EU framework pertaining to legal certainty as regards this distinction is limited” without further substantiation. The European Commission was unable to assess the efficiency of the legislation in place. However, it acknowledged the possible need to “offset [...] the risk of unintended consequences, and in particular the risk that no assistance is provided to those in need, in breach of the EU Charter of Fundamental Rights, the non-refoulement principle and other international human rights commitments.”

63. In 2020, following growing criticism on the criminalisation of humanitarian assistance, including from the European Parliament,<sup>43</sup> a non-binding Guidance was issued positing that “humanitarian assistance that is mandated by law cannot and must not be criminalised.”<sup>44</sup> Yet, as noted by UN Special Rapporteur on human rights defenders, “the laws most frequently used to criminalise defenders in these cases stem from the EU’s ‘Facilitators Package.’”<sup>45</sup>

64. In July 2023, a reference for a preliminary ruling was sent to the Court of Justice of the European Union (CJEU) by the Tribunale di Bologna in Italy, asking whether the compatibility of such criminalisation without a legally binding obligation to exclude humanitarian assistance from criminal sanctions was compatible with the 2002 Directive with the Charter on Fundamental Rights of the European Union.<sup>46</sup> The examination of this reference is pending.

### 4.2. *A new “Facilitation Package”: Stated objectives of the European Commission*

65. In November 2023, the European Commission put forward a new proposal to revise the “Facilitators Package”. This proposal aims to revise the 2002 Directive and Framework Decision, and to associate these with a new Regulation on enhancing police cooperation and Europol’s mandate to prevent and combat migrant smuggling and trafficking in Europe.

66. Articles 3, 4 and 5 of the revised Directive define what constitutes migrant smuggling according to EU law. This definition is broader than that in the Palermo Protocol. Article 3.1(a) defines the criminal offenses as the act of intentionally assisting the entry, transit or stay irregularly associated with the request, the receiving, the acceptance or the aim to receive financial or material benefit directly or indirectly.

67. The inclusion of the notion of profit-making is welcome. However, even if no material or financial benefit is involved, any facilitator may be sanctioned if there is a high likelihood of causing serious harm to the person whose entry, transit or stay is facilitated (3.1(b)). Besides, it is uncertain what will be the

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<sup>42</sup> European Commission, “REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)” ([SWD \(2017\) 117 final](#)), 22 March 2017.

<sup>43</sup> European Parliament, “Resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised” ([2018/2769\(RSP\)](#)), 5 July 2019.

<sup>44</sup> European Commission, “Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence” ([2020/C 323/01](#)), 1 October 2020.

<sup>45</sup> United Nations Special Rapporteur on the situation of human rights defenders, “[Response to the proposal by the European Commission for a Directive to update the Facilitators Package](#)”, Position Paper, February 2024.

<sup>46</sup> Official Journal of the European Union, “Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 — Criminal proceedings against OB (Case C-460/23, Kinshasa)” ([2023/C 338/17](#)), 25 September 2023.

elements considered by a court to rule that the person “carried out the conduct in order to obtain such a benefit” and what constitutes “a high likelihood of causing serious harm to a person”.

68. The proposed Directive also introduces new offences. First, the “public instigation of third-country nationals” to enter, transit or stay in the EU unauthorised, for instance through digital tools or social media (Article 3.2): according to the EU migration law expert Professor Marianna Gkliati during an exchange of view with the Assembly’s Sub-Committee on Migrant Smuggling and Trafficking in Human Beings on the new proposal by the European Commission, this provision may be interpreted in a disproportionately broad way, for instance against people informing refugees of the safest itinerary. Second, Article 5 introduced the criminal offence of “incitement, aiding and abetting, and attempt” to commit any of the above-mentioned crimes as being liable for criminal sanctions as well.

69. Article 16 of the proposed revised directive provides for the use of “special investigative tools such as those which are used in countering organised crime or other serious crime cases” to investigate and prosecute the crimes defined in Articles 3 to 5 of the draft revised Directive.

### **4.3. Human rights considerations**

70. This new definition and the promotion of “special investigative tools” have raised concerns with regard to the principles of necessity and proportionality at the office of the European Data Protection Supervisor (EDPS) and of the UN Special Rapporteur on the situation of human rights defenders.<sup>47</sup>

71. As raised by Professor Gkliati, “even with the limited scope of the offence of smuggling, these persons contributing one way or another to the process of border crossing could still be held criminally liable”, including, for example, by interpreting search and rescue operations as posing a high likelihood of causing harm.<sup>48</sup> The EU Fundamental Rights Agency has denounced existing cases of the kind.<sup>49</sup>

72. Indeed, although Article 4 clarifies what should be considered as aggravating circumstances of migrant smuggling, it also includes the fact that “the third-country nationals who were subject to the criminal offence were particularly vulnerable, including unaccompanied minors” (Article 4.e): in theory, any person paying a smuggler may fall under this definition, which again contributes to aligning the notion of irregular border-crossing with the smuggling of migrants as being equal in nature.

73. Moreover, recital 8 of the Regulation aiming to amend the mandate of Europol, provides for the possibility of transferring personal data to third countries even though the third country does not provide adequate or appropriate data protection safeguards, including biometric data as indicated in Article 9 of the proposed draft Regulation.<sup>50</sup> The framework of the draft Regulation as proposed may, according to the EDPS, run counter to the obligations laid down in the existing [Europol Regulation](#) which, especially, imposes that the processing of biometric data shall “be subject to appropriate safeguards laid down in [Europol] Regulation with regard to the rights and freedoms of the data subject”.

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<sup>47</sup> UN Special Rapporteur on the situation of human rights defenders, op.cit. and European Data Protection Supervisor, “[Opinion 4/2024 on the Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings](#)”, 23 January 2024.

<sup>48</sup> Pr. Mariana Gkliati, Associated Professor at the Law School and at the Public Law & Governance School at the University of Tilburg (Netherlands), exchanges of view on “EU policy development prospects in the field of the fight against migrant smuggling: the EU Facilitator package” with the Committee on Migration, Refugees and Displaced Persons in Paris, 20 March 2024.

<sup>49</sup> Fundamental Rights Agency of the European Union, “[Legal proceedings by EU Member States against civil society actors involved in SAR operations in the Mediterranean Sea: Search and rescue operations in the Mediterranean and fundamental rights](#)”, June 2023.

<sup>50</sup> European Commission, “Proposal for a Regulation on enhancing police cooperation in relation to the prevention, detection and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol’s support to preventing and combating such crimes and amending Regulation (EU) 2016/794” ([COM\(2023\) 754 final](#)), 28 November 2023.

## 5. Human rights and the rule of law: the two sides of a coherent approach

### 5.1. *Stop the business*

74. Migrant smuggling is a cross-border crime finding some of its roots in the attractiveness of irregular channels of mobility and stay for foreign nationals. The key to combating migrant smuggling is to make the business of smugglers unprofitable.

75. Alternatives to irregular migration: denying access to the European territory through various mechanisms and policies has not proved effective, and has diversified irregular migration routes, sometimes rendering them riskier. Similarly, the effectiveness of information campaigns to warn against the risks of irregular mobility is not conclusive.<sup>51</sup> It has been suggested that an alternative approach could be to redirect migrants from smugglers to official channels of mobility.<sup>52</sup> It should also be borne in mind that many smuggled migrants need international protection, with no effective alternative to safety other than paying a smuggler.

76. Focus transnational cooperation on threats to international public order: stopping the business of migrants' smugglers requires authorities to focus most efforts on tracing the money sent by migrants in order to identify and arrest the original instigators of such crimes. The low risk of detection is considered as one of the reasons why criminal networks keep making growing profit out of the smuggling of migrants.<sup>53</sup> As mentioned earlier, the profile of smugglers may vary widely and not all of them are acting with a view to exploiting migrants, including financially, to make a profit.

77. Conversely, the threat which criminal organisations represent for State authorities is real, in the sense that they generate illegal profits outside of any financial regulation framework, constituting a threat to the international financial system in itself and also because profits are re-injected into other forms of illegal criminal activities such as trafficking in human beings, the illicit manufacturing and trafficking of firearms and drugs and potentially the financing of terrorism. The aim of State Parties to the UNTOC is to enhance judicial and police cooperation transnationally to bring perpetrators of serious organised and transnational crime to justice.<sup>54</sup>

78. What is more, criminal organisations are likely to abuse migrants, extort extra money along the way or even put human lives at risks to minimise the risks of detection or to lower the running costs of their business. Contrary to low profile migrant smugglers, these organisations are well structured and are extremely difficult to trace and to stop. Transnational cooperation should aim to target such perpetrators and bring their impunity to an end. Reviews conducted by the UNODC have indicated that it is usually low-profile smugglers who are charged, rather than instigators heading the most structured rings.<sup>55</sup>

79. Judicial and police cooperation should focus their efforts on what is commonly referred to as the "follow the money" approach to apprehend the instigators, in addition to promoting the role of regulatory financial authorities, to ensure that money remitters or money value transfer services comply with international standards on combating fraud and anti-money laundering.<sup>56</sup> The Council of Europe is equipped to support member States face these challenges in the field of criminal law, providing instruments aiming to address the contemporary forms which such serious organised crimes may take, for example cybercrime.

### 5.2. *The need for harmonised standards*

80. Police and judicial co-operation can be enabled by a dense fabric of regional and international organisations, including the Council of Europe, which is positive. However, strong discrepancies are noted on the way in which migrant smuggling is criminalised by member States. As highlighted by the CDPC "there is no consistency in the physical and mental elements of the offence of migrant smuggling,

<sup>51</sup> Nicolás Caso and Jørgen Carling, "[The reach and impact of migration information campaigns in 25 communities across Africa and Asia](#)", *Migration Policy Practice* 13 (1): 3–11, 2024.

<sup>52</sup> Hellenic Foundation for European and Foreign Policy et al, op.cit.

<sup>53</sup> The Financial Action Task Force, "[Money Laundering and Terrorist Financing Risks Arising from Migrant Smuggling](#)", March 2022.

<sup>54</sup> UNODC, "[Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto. Part 3: Legislative guide on the Smuggling of Migrants Protocol only](#)", 2005.

<sup>55</sup> UNODC, op.cit. at 11.

<sup>56</sup> The Financial Action Task Force, op.cit.

its aggravations and penalties.”<sup>57</sup> As a result, experts consider that “the lack of a harmonised system works to the advantage of migrant smugglers, who can exploit existing loopholes to avoid criminalisation.”<sup>58</sup>

81. Thus, it is essential that the crime of migrant smuggling is defined clearly across member States through a common definition focusing on the crime of smuggling of people as defined in the Palermo Protocol, explicitly exempting humanitarian assistance and support to migrants in accessing their fundamental rights from any form of criminal liability, when such acts are conducted without the seeking of any financial or material benefit.

82. An overarching definition enabling of migrant smuggling through a multidisciplinary approach would complement the organised-crime oriented definition provided in the Palermo Protocol. Indeed, it should be clarified that not all smugglers belong to organised crime groups: targeted and proportionate responses to such perpetrators would be worth considering, perhaps in cooperation with countries of origin and of transit, including through non-criminal responses. This may help to better apprehend the specificities of some of the root causes of migrant smuggling and to explore ways to stop this phenomenon, including by considering penalties outside of criminal law and a nuanced approach to criminal sanctions.

83. It is also important that unauthorised entry into a country is explicitly distinguished from the crime of migrant smuggling. Driving a vehicle as part of smuggled group may be part of the circumstances enabling border-crossing for refugees and people seeking protection but should never be sanctioned for entering a country irregularly (Refugee Convention). Moreover, unlawful acts committed as a consequence of being trafficked, including immigration-related offences, should not be criminalised, in line with the European Convention on Action against Trafficking in Human Beings and as recently recalled by the UN Special Rapporteur on trafficking in persons.<sup>59</sup> This does not mean that smuggled migrants should be immune from criminal sanctions if found guilty of committing a crime: any arrest and investigation following irregular border crossings that reveals that inhumane or degrading treatments have been perpetrated, sometimes leading to death, should be prosecuted as criminal acts distinguished from that of migrant smuggling.

### **5.3. Complement the approach through non-criminal measures**

84. Some member States have opted for a transversal approach to migrant smuggling. The vulnerability which may be experienced by smuggled migrants indeed requires that the State authorities are vigilant to the risks of exploitation and abuse which may happen on their territory.

85. The protection of migrant workers and the increase in the resources of labour inspectorates are of particular importance. The Assembly has made specific recommendations aimed to further protect migrant workers, including undocumented workers in Resolution [2536 \(2024\)](#) “Precarious and irregular work situations of migrant seasonal and domestic workers” and [Resolution 2504 \(2023\)](#) “Health and social protection of undocumented workers or those in an irregular situation.”

86. The possibility for migrants to report, safely, any form of abuse and to possibly share information on possible organised criminal groups profiting from the business of people smuggling, without fear of being checked for their administrative status, should be considered as good practice. It may indeed not only support investigation efforts but may also incentivise migrants to reports situations of abuse and vulnerability which they or some of their community members may face.

### **5.4. The Council of Europe’s expertise**

87. For a concerted approach on migrant smuggling to succeed in Europe, there must be an equality of understanding and interpretation on the legal definition and its interpretation by the courts. This could have a positive effect on the current way in which the notion of migrant smuggling is rather loosely used, and even weaponised, in political discourse.

88. International mutual legal assistance frameworks designed to promote judicial and police cooperation have demonstrated their ability to maintain States’ sovereignty while ensuring that the transnational nature of the issue is effectively addressed. The risk for a nation State of engaging in co-

<sup>57</sup> European Committee on Crime Problems, “Working document: national laws relating to smuggling of migrants in Council of Europe member States” ([CDPC \(2016\) 3](#)), CDPC 70th Plenary Session, 27 May 2016.

<sup>58</sup> European Committee on Crime Problems, op.cit. at 5.

<sup>59</sup> Special Rapporteur of the United Nations on trafficking in persons, especially women and children, “Trafficking in persons, mixed migration and protection at sea” [A/HRC/56/60](#), 25 April 2024.

operation without any binding and sound definition and monitoring tool is greater if they do not define and shape their co-operation within the basis of a proven model such as the Palermo Protocol. Trying to go it alone can lead to legal confusion and challenge in international courts which can have the unintended consequence of diverting public policies (and resources) away from the international efforts needed to combat serious transnational criminal organisations.

89. The Council of Europe is experienced in working with and assisting member States in domains where legislation and its interpretation vary. A relevant example is the long discussions around the notion of “counterfeiting” of medical products : some member States were reluctant to agree to terms which might have hampered the manufacturing of generic drugs at an affordable cost in some member States.<sup>60</sup> Eventually, it was agreed that the legal instrument should focus on public-health related stakes without reference to intellectual property rights in relation the supplying or supplying of medical products.<sup>61</sup> The resulting agreement provided European States with the first international treaty against counterfeit medical products and similar crimes involving threats to public health, in 2011: the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health ([CETS No. 211](#)). Another relevant example is the adoption of the Convention on Action against Trafficking in Human Beings in 2005 ([CETS No. 197](#)) which has since demonstrated that the addition of a victim-oriented approach to the crime committed, has resulted in more easy and effective cooperation between States to combat but also prevent trafficking in human beings as indicated in the GRETA's reports.<sup>62</sup>

90. The Council of Europe would provide a meaningful space in which to discuss and define the elements of a common definition on migrant smuggling. Various conventions and standards are already in place to accompany member States towards greater alignment and co-operation on judicial matters directly connected with the crime of migrant smuggling or intersecting with this crime.

91. These conventions and standards include; the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ([CETS N° 198](#)); the European Convention on Mutual Assistance in Criminal Matters and its protocols (ETS [N° 30](#), [99](#) and [182](#)); the Criminal and Civil Law Conventions on Corruption (ETS N° 173 and 174). The Convention on Cybercrime ([ETS No. 185](#)) is also of particular interest: it provides a legal framework for international co-operation not only with respect to cybercrime (offences against and by means of computers) but also with respect to any crime involving electronic evidence. With 93 States either party to or observers to this Convention committee, the Budapest Convention is open to ratification to all States and regarded as the most comprehensive and coherent international agreement on cybercrime and electronic evidence to date.

92. Additionally, the various tools available to identify vulnerable persons and protect them may be considered relevant during the interception of smuggled migrants: the Convention on Action against Trafficking in Human Beings (CETS No. 197), the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment, the Convention on Preventing and Combating Violence Against Women and Domestic Violence, and the [Convention on Protection of Children against Sexual Exploitation and Sexual Abuse](#).

93. Finally, the Modernised Convention for the Protection of Individuals with Regard to the Protection of Personal Data (Convention 108+) is of particular relevance to ensure the highest level of safety to ensure fluidity and efficiency of exchanges of personal data, including biometric data. This Convention has set internationally recognised standards, including by Interpol. Importantly, modules are available to States not party to the Convention 108+ to enhance the harmonisation of the normative approach to data protection, thereby laying the ground for safer frameworks of co-operation in this extremely sensitive field: the [Model Contractual Clauses for the Transfer of Personal Data from Controller to Controller](#) and the [Model Contractual Clauses for the Transfer of Personal Data from Controller to Processor](#).

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<sup>60</sup> Ad-hoc Committee on counterfeiting of medical products and similar crimes involving threats to public health, “Key issues related to the draft Convention of the Council of Europe on counterfeiting of medical products and similar crimes involving threats to public health” ([PC-ISP \(2009\) 01](#)), 13 May 2009.

<sup>61</sup> “Draft explanatory report: Convention of the Council of Europe on counterfeiting of medical products and similar crimes involving threats to public health” ([PC-ISP \(2009\) 5](#)), 13 August 2009.

<sup>62</sup> GRETA, “[Practical impact of GRETA's monitoring work in improving the implementation of the Convention on Action against Trafficking in Human Beings](#)”, March 2024.



### 5.5. Cooperation with the EU: the urge for policy coherence

94. The European Union (EU) is a strategic partner which, unlike the Council of Europe, legislates in the field of migration and asylum law. The efforts made by the EU institutions to explore concrete policy pathways to enhance access to its territory regularly, whether it is for international protection purposes, or for labour migration purposes, are welcome and should be encouraged.

95. Cooperation frameworks already in place to promote synergies between the judicial authorities should be encouraged and the forthcoming meeting with the Council of Europe's Network of Prosecutors on migrant smuggling and the Focus group on migrant smuggling of Eurojust is positive.<sup>63</sup>

96. The harmonisation, if not the alignment, of norms along commonly shared human-rights standards is paramount, not only for the sake of coherence in the laws applying in EU member States which are also members of the Council of Europe, but also because of the influence which EU law is having on non-EU member States, especially in the field of migration and border management, and which are, for the most part, bound by the Council of Europe's standards.

97. In the context of the recent proposal by the European Commission, particular attention should be paid to procedural rights guaranteed pursuant to Article 6 of the Convention. The severity of the sanctions envisaged against people found guilty of the crime of migrant smuggling should be accompanied by the appropriate legal and procedural safeguards which the Court provides for. A common definition on the criminal offences to be applied across member States, including EU member States, would ensure that the principles guaranteed by the Convention under Article 6 can fully apply and cases before Court can be deemed admissible.

98. According to the Court's case law, the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on three criteria:<sup>64</sup> the classification in domestic law; the nature of the offence; and the severity of the penalty that the person concerned risks incurring. On the three criteria, the legislations across member States of the Council of Europe vary widely. The current definition of the criminal act of facilitating unauthorised entry, transit and stay entailed in the 2002 Directive may lack sufficient safeguards against undue criminalisation and cannot, therefore, be considered as fit for purpose, at least not before the CJEU has ruled on Kinshasa litigation.

99. Moreover, as is stands, any adoption of the draft EU Regulation without any prior thorough fundamental rights impact assessment confirming its alignment with the applicable international data protection and fundamental rights standards may lead to the adoption of conflicting norms in EU member States bound by the Council of Europe's norms, in particular Convention 108+.

100. Although cross-border co-operation may be valid, the pre-requisites for such co-operation to align with the international standards necessary to avoid any adverse consequences on the human rights of migrants and on States' security (exchange of data) should be given due consideration and perhaps be considered as a separate piece of legislation requiring proper time and examination.

101. The "package approach" may be counter-intuitive and runs the risk of pushing for an overarching policy agenda in a domain where there is policy incoherence with other regional instruments and a resultant risk to human rights safeguards.

## 6. Conclusion

102. The profits generated by migrant smugglers are a challenge to States' responsibilities in three respects: the thriving of a business which is connected to other criminal activities such as counterfeiting, money laundering and trafficking in human beings; border management and border control; and the need to protect the fundamental rights for people whose vulnerability may be heightened because of their informal mobility.

103. The response to migrant smuggling involves establishing the conditions for transnational co-operation between the police and judicial forces of the State authorities affected by this crime, notably through harmonised definitions and practices and procedural standards enabling the sharing of police and judicial information in line with data protection requirements.

<sup>63</sup> European Committee on Crime Problems, "2nd meeting of the Council of Europe Network of Prosecutors on Migrant Smuggling (CDPC-NPMS)" ([DPC-NPMS\(2023\)01](#)), 14 April 2023.

<sup>64</sup> European Court on Human Rights, "[Guide on Article 6 – criminal](#)" (updated on 29 February 2024).

104. Such co-operation requires harmonised standards and, above all, a common definition and understanding of what the criminal act of people smuggling is, and what it entails. The tendency, in national and in regional legislations, to approach the institutional response to migrant smuggling through the single prism of States' legitimate right to control their borders is taking the risk of overshadowing other elements constitutive of the crime of the smuggling of migrants, and of undue criminalisation. In fact, criminal law is not the only angle from which the issue of migrant smuggling should be tackled, and this is where the Council of Europe can provide a meaningful input to support inter-State co-operation and policy co-operation, even beyond its own membership.

105. In this effort, the Council of Europe can provide valuable expertise through its existing instruments and tools and through initiating a reflection on the need for specific norms or guidelines to support member States in fighting against the real perpetrators of a crime and the drivers which make these crimes possible, rather than against the migrants themselves.