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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

Feasibility Study on a Possible Council of Europe Instrument on Smuggling of Migrants (and Criminal Law)

DRAFT

Note:

This draft has been prepared for the June 2024 plenary meeting of the CDPC. It outlines the existing international frameworks relating to smuggling of migrants (part II) and, in particular, their known gaps, conflicts, and challenges (part III).

This first draft seeks to solicit input from Member States and Observers about their experiences with the existing frameworks, and their views concerning the need, feasibility, scope, and content of a possible new Council of Europe instrument against the smuggling of migrants. For these reasons, parts IV and V of this study are presently left blank and the headings are only indicative of future content.

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Abbreviations

art/arts	article/s
CDPC	European Committee on Crime Problems
CoE	Council of Europe
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant for Civil and Political Rights
IOM	International Organization for Migration
IMO	International Maritime Organization
NGOs	non-governmental organisations
OHCHR	Office of the United Nations High Commissioner for Human Rights
para/paras	paragraph/s
s/ss	section/s
SAR	search-and-rescue
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Childrens Fund
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime

I. Introduction and background

I.1 Topic

[1] The present report explores the need for and the feasibility of developing a Council of Europe (CoE) instrument against the smuggling of migrants. To do so, the report outlines the existing global and regional legal frameworks pertaining to smuggling of migrants and facilitation of unlawful border crossings and explores the challenges posed by smuggling of migrants to CoE Member States, especially to policy makers, legislators, and law enforcement. The report highlights the strengths and, in particular, the gaps and weaknesses of the existing international legal instruments. Based on this analysis, the report reflects on the role of the Council of Europe in addressing the smuggling of migrants and, the need, if any, of a new Council of Europe instrument on this topic, and the possible elements of such an instrument.

[2] The report is based on the Terms of Reference for 2024–2027, instructing the Council of Europe’s European Committee on Crime Problems (CDPC) to:

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.

[3] For the purpose of this report the term ‘smuggling of migrants’ is used in the manner as defined in Article 3(a) of the *Protocol against the Smuggling of Migrants by Land, Sea and Air* supplementing the *United Nations Convention against Transnational Organized Crime*:

‘smuggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

[4] The term ‘illegal entry’ is further defined in Article 3(b) of the Protocol to mean ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State’.

I.2 Context and summary of prior CoE/CDPC work

[5] At the plenary of the CDPC in June 2015, a proposal entitled ‘Criminality and Migration’ for a new activity concerning the issue of smuggling of migrants was presented. The CDPC subsequently decided ‘to include in future CDPC activities the question of the criminal law aspects related to the issue of smuggling of migrants and to add to the terms of reference of the CDPC an activity on this matter’. This resulted in the inclusion of a specific task in its Terms of reference for 2016-2017.

[6] In 2016, the CDPC commissioned a study on ‘National Laws Relating to Smuggling of Migrants in Council of Europe Member States’. This was followed by a first Conference on the Smuggling of Migrants held in June 2017. Ahead of the 2017 Conference, the CDPC commissioned two independent experts¹ to review international and national laws pertaining to the smuggling of migrants in CoE Member States, examine experiences and obstacles in investigations and international co-operation, and develop recommendations for future Council of Europe activities in this field. The resulting working document ([CDPC \(2016\) 4 Rev](#)) sets out how a new Council of Europe instrument (such as a recommendation or a possible new convention) could assist in closing loopholes exploited by migrant smugglers and provide greater clarity, certainty, and consistency in the application of existing frameworks.

¹ Andreas Schloenhardt, Professor at The University of Queensland and Professorial Research Fellow at the University of Vienna; Calogero Ferrara, Prosecutor, Tribunal of Palermo.

[7] The Conference's final observations included suggestions for further action by the Council of Europe in this field.

[8] To ensure follow-up to the outcome of the Conference two focused working groups were created: (1) a Working Group on fostering international cooperation and investigative strategies to fight the smuggling of migrants; (2) a Working Group on the prevention of smuggling of migrants. An Action Plan on 'Fostering International Cooperation and Investigative Strategies in Fighting the Smuggling of Migrants' was adopted by the CDPC in August 2020. It foresees five overarching actions while emphasising that these 'should be non-exhaustive, adjustable according to any evolving needs, significant developments and experience gained in the area of migrant smuggling':

- (1) Setting up of a Council of Europe Network of Prosecutors on Migrant Smuggling in order to address investigative, prosecutorial and judicial challenges in migrant smuggling-related cases;
- (2) Organisation of Workshops gathering together relevant authorities and experts to foster co-operation amongst source, transit and destination countries;
- (3) Examine the possibility of listing 24/7 points of contact to facilitate first alert contact between law enforcement authorities dealing with migrant smuggling;
- (4) Creation of a Council of Europe open database containing judicial and legislative information on migrant smuggling and facilitating knowledge sharing;
- (5) Ensuring information knowledge in the field of migrant smuggling.

[9] The goal of the Action Plan should be to help CoE Member States overcoming the investigative, prosecutorial, and judicial challenges in migrant smuggling-related cases, facilitating the information knowledge and exchange amongst relevant stakeholders and boosting co-operation amongst source, transit and destination countries.

[10] Action n°1 (*Addressing investigative, prosecutorial and judicial challenges in migrant smuggling-related cases*) requires the setting-up of a Council of Europe Network of Prosecutors on Migrant Smuggling (CDPC-NPMS) to facilitate the transnational exchange of information and good practices, as well as the gathering of evidence on relevant cases. The Network was launched in December 2021 and met in May 2022 and April 2023. In the context of the same Action, a restricted website accessible to members of NPMS was launched to allow a) access the full list of members contact details; b) share documents, including relevant judicial decisions and template cases, and information; c) access a live discussion forum to address global issues relevant to the members of the Network.

[11] Action n°2 (*Consider evaluating and improving mutual legal assistance mechanisms and other methods of international cooperation*) and Action n°4 (*Facilitating information exchange between law enforcement authorities*) have not yet been launched (December 2023) due to the need of stronger legal basis for their effective implementation.

[12] Action n°3 (*Fostering cooperation amongst source, transit and destination countries*) and Action n°5 (*Ensuring information knowledge in the field of migrant smuggling*) were launched in June 2022 and are currently being implemented.

[13] Action n°3 was partly already implemented with the involvement of third States' representatives and International Institutions in the activities of CoE network and is expected to be strengthened through the organisation of a joint Council of Europe-Eurojust Focus Group on Migrant Smuggling event, including a workshop with third States' representatives, notably prosecutors, on cooperation tools between these countries and European States (date and format to be determined).

[14] Action n°5 consists of the production of country-profiles featuring legal and judicial information on migrant smuggling. The deadline for CDPC members to provide the Secretariat with their completed country-profile was set at the end of October 2023 and the first complete country-profiles are available and publicly accessible on the [CoE website](#).

[15] Based on the outcome of the sessions of the mentioned CoE Network it was repeatedly stressed the importance of a new and more modern international legal instrument to face the increasing challenges on this topics, to harmonise national legislations, to strengthen cooperation between CoE Member States and

with third countries, to deal with obstacles hampering such cooperation, as well as identifying and sharing good practices on most successful and modern cooperation tools in transnational cases, to build up a common basis between judicial and law enforcement authorities to facilitate cooperation and to ensure information knowledge in this domain.

I.3 Purpose of this report

[16] The purpose of the present report is to explore the need for and feasibility of developing a new Council of Europe convention or other type of possible instrument against the smuggling of migrants.

[17] To this end, the report seeks to:

- Outline existing global and European instruments aimed at preventing and suppressing the smuggling of migrants and their adoption by CoE Member States (including observer States who participated in the CDPC's prior work in this topic);
- Identify relevant gaps, weaknesses, conflicts, and challenges of those instruments and summarise relevant critical observations expressed by scholarly experts and practitioners, national authorities, and international organisations;
- Highlight best practice and positive experiences in relation to the adoption, implementation, and operationalisation of the relevant instruments;
- Explore the need for greater harmonisation of national laws and better synthesis of national and international approaches;
- Examine the possibility to balance criminalisation, enforcement, and international cooperation with the protection of the rights of smuggled migrants and prevention measures;
- Identify the role, if any, of the Council of Europe in this field and the prospects and potential of a new CoE convention or other instrument (including recommendations or 'soft law' guidelines);
- Identify the main content and component of a possible new CoE instrument against the smuggling of migrants.

Commented [PE1]: Following discussions after the June 2024 CDPC Plenary, the draft report has been amended to replace 'legal' with 'possible' to better align it with the CDPC's mandate regarding this report, still in its draft version.

I.4 Smuggling of migrants: a snapshot

[18] It is not possible to provide a simple generalisation about the smuggling of migrants. This complex phenomenon is multi-faceted and has a myriad of political, socio-economic, demographic, human rights, and criminal justice dimensions that prevent and prohibit simplistic statements about the causes, scale, patterns, and consequences of smuggling of migrants. Not surprisingly, there is much disagreement about the conditions and circumstances that enable and encourage the smuggling of migrants — and about the best suitable tools to prevent the smuggling of migrants, to deter, detect, and punish smugglers, and to protect smuggled migrants. Indeed, few topics have been as prominent and polarising in political and public debates in recent years, not only all across Europe, but around the world.

[19] IOM, the International Organization for Migration, describes 'the large scale smuggling of migrants across international borders' as

a global threat to migration governance, national security and the well-being of migrants. Many migrants resort to using migrant smugglers when they do not have the option of travelling through legal channels. Consequently, migrant smugglers have become an integral part of the irregular migration journey, and criminal networks profit significantly from this situation.²

[20] UNODC, the United Nations Office on Drugs and Crime, adds:

² IOM, 'Counter Migrant Smuggling' (2024) <<https://www.iom.int/counter-migrant-smuggling>>.

People move to other countries for many reasons, but for undocumented migrants it is nearly always for a better life. This may be for themselves or for their families, and it may involve searching for work or escaping from poverty, natural disasters, violence, armed conflict or persecution.

Profit-seeking criminals exploit the lack of legal opportunities available to migrants and take advantage of their situation by offering services at great cost. While these may include services such as transport, they may also consist of document fraud. This can include the lending of stolen passports with photos that resemble the migrants, the falsification of travel or identity documents or the obtaining of genuine passports or visas on the basis of fraudulent supporting documents. [...]

Smuggled migrants are vulnerable to abuse and exploitation. Their safety and even their lives are often put at risk: they may suffocate in containers, perish in deserts or drown at sea while being smuggled by profit-seeking criminals who treat them as goods.

The profiles of the smugglers vary widely. Full-time professional criminals are involved in smuggling migrants around the world; some of those criminals are specialized in smuggling people, and some are not. There is evidence of both smaller and larger, more organised groups and networks operating as smugglers in all areas, although this varies by region and route. There are also many smugglers who run legitimate businesses and are involved in the smuggling of migrants as opportunistic carriers or hospitality providers who choose to look the other way in order to make some extra money. Corrupt officials and other individuals may also be involved in the process.³

[21] The factors that influence the methods and routes of smuggling of migrants are summarised in a paper presented to the Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime:

The inability to access legal channels for migration is a key factor that fuels all migrant smuggling. Decisions about the methods and routes used for a specific migrant smuggling operation depend on various factors. Geography, distance, the availability of public and private means of transportation, border controls, visa requirements and migration policies in transit and destination countries are key determinants that also influence other factors, such as the need to resort to fraudulent documents and/or corruption. Equally important are a smuggler's ability to access and use information that is useful for their operations, as well as their connections across countries with other smugglers and networks. Migrant access to knowledge and networks also play a significant role, as do historical and cultural ties between countries of origin and destination, established flows of migration, previous migration by relatives and friends, and diaspora communities. Migrants also need to be able to afford a needed smuggling service, which turns their purchasing power into another key factor that determines routes and methods.⁴

[22] The risks and dangers associated with smuggling of migrants are well-documented,⁵ and frequently make headlines. Depending on the means and methods used to smuggle, migrants may be subjected to threats, violence, serious harm, and in many situations their lives are at risk. Many smuggled migrants lose their lives each year during maritime voyages on overcrowded and unseaworthy vessels, long journeys across deserts, or transportation in poorly ventilated truck compartments. Others are subject to rights violations at the hands of States and their efforts to deter or punish irregular migration.⁶ It should also be stressed that, while violence and exploitation are not necessary components

³ UNODC, 'Smuggling of migrants: the harsh search for a better life' (2024) <<https://www.unodc.org/toe/en/crimes/migrant-smuggling.html>>.

⁴ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 3 [5].

⁵ UNODC, *Global Study on Smuggling of Migrants* (United Nations 2018) 38–42.

⁶ See, for example, UN General Assembly, Human Rights Council, *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea, Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales*, UN Doc A/HRC/47/30 (12 May 2021).

of smuggling, they are not uncommon during the smuggling process.⁷ Of particular note is the link between many situations of smuggling and trafficking in persons.⁸

Smuggling of migrants to Europe

[23] A document presented by the European Commission in November 2023 summarises the recent developments and current situation in Europe:

Migrant smuggling to and within the EU is reaching new heights, fuelled by increasing demand due to emerging and deepening crises, most notably economic recessions, environmental emergencies caused by climate change, as well as conflicts and demographic pressure in many third countries. Migrant smuggling drives the increase of irregular arrivals to the EU: in 2022, around 331 000 irregular entries were detected at the EU external borders, the highest level since 2016, representing a 66% increase compared to the previous year. In 2023, until the end of September, approximately 281 000 irregular border crossings were detected at the external borders of the EU, representing an 18% increase compared to the same period in 2022. This coincides with an increase in the smuggling activities, evidenced by a new record with over 15 000 migrant smugglers reported by Member States to Frontex in 2022. Taking into account the increase in irregular arrivals in 2023 and the various worldwide crises in a range of countries of origin and transit, consistently high and potentially increased migratory flows to Europe and related smuggling criminal activities can be expected.

It is estimated that more than 90% of the irregular migrants who reach the EU make use of the services of smugglers, mostly organised in criminal groups. [...] Providing a strong and firm response to smugglers' activities is therefore of primary importance to reducing irregular migration. It is estimated that the activities of ruthless migrant smugglers, especially at sea, resulted in a staggering death toll of over 28 000 people since 2014.⁹

[24] Smuggling of migrants is a complex, fluid, and rapidly changing crime type and can be very profitable for the organised criminal groups and other criminal elements involved in it. The nexus between smuggling of migrants and organised crime poses particular challenges for law enforcement, prosecutors, and the judiciary, especially in relation to the leadership of organised criminal groups, their international context, and the financial and other resources at their disposal. Smuggling of migrants is a serious human rights issue, not least because of the vulnerable position of irregular migrants, many of them refugees, and the threats, violence, extortion, and other criminal means employed by unscrupulous smugglers.

[25] Compared to other types of organised crime such as drug trafficking, trafficking in persons, or firearms trafficking, the understanding of smuggling of migrants is much poorer and reliable data is, for the most part, non-existent. Investigations of smuggling of migrants show that the *modi operandi* of smugglers are constantly changing in response to demand, law enforcement, border controls, and changes in laws and policies. 'Tougher' measures adopted by one country frequently merely displaces smuggling of migrants to other routes or causes smugglers to adopt more clandestine, more dangerous, and more costly methods, which results in higher fees and higher profits for smugglers. Complicating

⁷ Anne T Gallagher, 'Exploitation in Migration: Unacceptable but Inevitable' (2015) 68(2) *Journal of International Affairs* 55. Note that the regularity of violence during smuggling is contested: see, for example, Sheldon X Zhang, Gabriella E Sanchez, and Luigi Achilli, 'Crimes of Solidarity in Mobility: Alternative Views on Migrant Smuggling' (2018) 676 *Annals of the American Academy of Political and Social Science* 6.

⁸ See generally Erick Gjerdingen, 'Suffocation Inside a Cold Storage Truck and other Problems with Trafficking as "Exploitation" and Smuggling as "Choice" Along the Thai-Burmese Border' (2009) 26(3) *Arizona Journal of International & Comparative Law* 699–737; see also, for example, Paolo Campana and Federico Varese, 'Exploitation in Human Trafficking and Smuggling' (2016) 22(1) *European Journal on Criminal Policy and Research* 89; Marika McAdam, 'What's in a Name? Victim Naming and Blaming in Rights-Based Distinctions between Human Trafficking and Migrant Smuggling' (2015) 4(1) *International Human Rights Law Review* 1.

⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023) 1.

matters further, many leaders and organisers of smuggling networks are located in jurisdictions with poor laws and weak law enforcement.

I.5 Content and structure of this report

[26] This report is divided into five parts:

[27] Part I sets out the introduction, provides the background and context to this study, and broadly canvasses the main issues of smuggling of migrants.

[28] Part II provides an overview of the main international instruments relating to the smuggling of migrants, chief among them the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime* (hereafter the '*Smuggling of Migrants Protocol*'). Part II also outlines the European Union's (EU) 2002 Council Directive and Framework Decision criminalising the facilitation of unlawful entry into, transit, and stay in EU Member States (often referred to as the 'Facilitators Package'). A proposal presented in November 2023 by the European Commission to replace the 'Facilitators Package' with a new Council Directive is briefly explained. Part II further introduces the *Global Compact for Safe, Orderly, and Regular Migration* which places smuggling of migrants into the broader context of international migration and human mobility.

[29] Part III turns to the gaps in the existing international instruments, highlights conflicts and discrepancies between them, and explores some of the legal and practical challenges associated with their implementation.

[30] Based on these observations, part IV reflects on the role of the Council of Europe in preventing and suppressing smuggling of migrants and sets out arguments in support of and against the development of a new CoE instrument and canvasses a range of alternative options.

[31] Part V takes a cautious look at the main elements of a possible new CoE convention on smuggling of migrants. The idea here is not to present a draft text of such an instrument, but to reflect thematically, critically, and constructively on some key issues and components. This is done with a view to addressing known gaps and weaknesses and reconciling the sometimes conflicting frameworks, especially for Council of Europe Member States.

I.6 Methods

[32] The research and analysis for this report, conducted between January and November 2024, involved desk-based collection and consideration of primary and secondary sources as well as consultation with the members of the bureau and plenary of the CoE CDPC, representatives of relevant international organisations, and other relevant stakeholders.

[33] Drafts of this report were submitted or presented to, and discussed with the CDPC on the following occasions:

- 1 February 2024: draft concept note submitted to CDPC Secretariat
- 21 March 2024: draft report parts I and II submitted to CDPC Secretariat
- 5 April 2024: draft report parts II and II discussed with CDPC Bureau
- 20 May 2024: draft report parts I to III submitted to CDPC Secretariat
- 17 June 2024: draft report parts I to III presented to CDPC plenary
- October 2024: full draft report presented to CDPC Bureau
- November 2024: final report presented to CDPC Secretariat.

[34] This report does not involve the use of any classified information and does not contain any personal information about smuggled migrants, migrant smugglers, officials, or other individuals.

Persons consulted for the purposes of this report are, where relevant, referred to by their department, office, or agency rather than their names or titles.

II. Existing international frameworks

[35] In international law, the smuggling of migrants, especially its criminalisation and criminal justice cooperation, is addressed by the United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air* which entered into force in 2003. The Protocol supplements the *United Nations Convention against Transnational Organized Crime* (UNTOC), which provides additional criminal justice tools, especially in relation to international cooperation.

[36] The *Global Compact for Safe, Orderly and Regular Migration*, adopted in 2021, reiterates many of the Protocol's principles and provides further guidance on how to address the causes and conditions of irregular migration, protect and enhance the status of irregular migrants, create legal avenues for migration, and tackle many of the economic, demographic, and social circumstances of international migration.

[37] Both the *Smuggling of Migrants Protocol* and the *Global Compact* respect and stress the importance of international human rights and refugee law, chiefly the *Convention and Protocol relating to the Status of Refugees*, in protecting the rights of, and providing assistance to smuggled migrants, especially those who are asylum seekers.

[38] At the (European) regional level, an EU Council Directive and a Framework Decision of 2002 set out a legal framework for Member States to suppress 'facilitation of unauthorised entry, transit and residence'. While in theory these instruments are designed to combat the smuggling of migrants, they refrain from using that term and show many differences in definitions, scope, and content compared to the global instruments. At the time of writing, the 2002 'Facilitators Package' was under review and a new EU Council Directive had been proposed in November 2023.

[39] Throughout this report, reference is also made to other global and Council of Europe instruments which, directly or indirectly, guide States' legal responses to the smuggling of migrants.

II.1 Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime

[40] The principal instrument in international law on the topic of smuggling of migrants is the United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air*, which was developed in the late 1990s, adopted by the UN General Assembly and opened for signature in late 2000, and entered into force on 28 January 2004. As on 4 May 2024, the Protocol has 152 Parties worldwide. All Council of Europe Member States except Andorra are Parties to the *Smuggling of Migrants Protocol*; Ireland and Iceland have signed but not ratified the Protocol.¹⁰

[41] The Protocol supplements the *United Nations Convention against Transnational Organized Crime* and needs to be interpreted together with this Convention. Provisions under the Convention apply, mutatis mutandis, to the Protocol; and the offences established in accordance with the Protocol are regarded as offences established in accordance with the UNTOC.¹¹ To become a party to the Protocol, a State must first become a Party to the UNTOC; it is not possible to accede to the Protocol independently.¹²

[42] The *Smuggling of Migrants Protocol* comprises a preamble followed by 25 articles. These are divided into four parts: I. General provisions (arts 1–6), II. Smuggling of migrants by sea (arts 7–9), III. Prevention cooperation and other measures (arts 10–18), and IV. Final Provisions (arts 19–25). According to Article 2, the Protocol pursues three equally important objectives: to stop the smuggling of migrants, foster international cooperation, and protect the rights of smuggled migrants. Despite this

¹⁰ See Appendix 1 below.

¹¹ *Smuggling of Migrants Protocol*, art 1(1).

¹² UNTOC, art 37.

statement, as with the Convention and its other Protocols, the criminal justice focus is given priority over the other objectives. Indeed, early drafts of the Protocol were limited to criminalisation and international cooperation and made no reference to the protection of smuggled migrants.¹³

[43] The Protocol's central feature is the obligation in Article 6 to comprehensively criminalise the smuggling of migrants and related conduct. Article 6(1) identifies three offences that must be established in domestic law, including:

- (a) a smuggling of migrants offence
- (b) an offence relating to fraudulent travel and identity documents, and
- (c) an offence of enabling of illegal stay.

[44] The definition of smuggling of migrants set out in Article 3(a) and the criminalisation requirement under Article 6(1) are limited to instances in which the offender seeks 'to obtain, directly or indirectly, a financial or other material benefit'. Acts that facilitate the illegal entry or stay of another but that are not done for this purpose are, by definition, not smuggling of migrants. Furthermore, under Article 5, '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.' This provision upholds the cardinal principle that irregular migration is not per se criminal and that smuggled migrants must not be punished for using the services offered by smugglers.¹⁴

[45] Despite the Protocol's strong criminal justice focus, the stated purpose of protecting the rights of smuggled migrants in Article 2 is reflected in several provisions. Article 4 extends the scope of the Protocol to 'the protection of the rights of persons who have been the object of [migrant smuggling]'. Under Article 9(1), States Parties are obliged to 'ensure the safety and humane treatment of the persons on board' suspected smuggling vessels. Article 16 sets out a number of 'protection and assistance measures'. Article 19 contains a 'saving clause' to ensure that 'other rights, obligations and responsibilities of States and individuals under international law' remain unaffected and that the Protocol is applied in a way 'that is not discriminatory to persons on the ground that they are the object of' migrant smuggling. In Article 18, the Protocol sets out a framework for receiving States for the repatriation of smuggled migrants. It concludes with a range of final clauses that are mainly administrative in nature.¹⁵

[46] Because of the special relationship, the provisions under the UNTOC are also relevant for the prevention and suppression of smuggling of migrants, especially if related to organised crime activities, for international cooperation, and for the protection of victims and witnesses. The Convention's 41 articles can be broadly divided into three categories: criminalisation, international and technical cooperation, and implementation. In summary, these provisions

- define and standardise certain terms (arts 2, 3);
- require States to establish four functional crimes 'aimed at the tactical and strategic behaviour'¹⁶ of organised criminal groups as offences in their national laws (arts 5, 6, 7, 23, see also arts 10, 11, 15);
- require the introduction of specific control and investigative measures (arts 7, 9, 20) and the protection of victims and witnesses (arts 24, 25);
- provide for the forfeiture of the proceeds of crime (arts 12–14);
- promote and facilitate international criminal justice cooperation (arts 16–19, 21, 22, 27);

¹³ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 459.

¹⁴ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 347.

¹⁵ *Smuggling of Migrants Protocol*, arts 20-25.

¹⁶ Frank Verbruggen, 'On Containing Organised Crime Using "Container Offences": Some Reflections on Substantive Criminal Law Issues' in Hans-Jörg Albrecht and Cyrille Fijnaut (eds), *The Containment of Transnational Organized Crime: Comments on the UN Convention of December 2000* (edition iuscrim 2002) 113, 114.

- provide for training, research, and information-sharing measures (arts 28–30);
- encourage the adoption of preventive policies and measures (art 31); and
- contain provisions concerning the administration of the Convention (arts 32–41).

[47] Critical provisions under the Protocol and the UNTOC are discussed further in Part III of this study.

II.2 Global Compact for Safe, Orderly and Regular Migration

[48] The *Global Compact for Safe, Orderly and Regular Migration* is the first international agreement addressing international migration in a holistic and comprehensive manner. Prepared under the auspices of the United Nations, it is a non-binding instrument that seeks to inform and guide States in their development of migration laws and policies that are sustainable, fair, transparent, economically sound, and that respect different conditions and cultures in source, transit, and destination countries. It was adopted by the UN General Assembly on 7 April 2021 and sets out ten ‘guiding principles’ and 23 separate objectives. The *Global Compact* is rooted in the UN 2030 Agenda for Sustainable Development and the progress towards fulfilling each of the Compact’s objectives is strictly connected to develop the rule of law as a key component for any State to effectively address smuggling of migrants as well as trafficking in persons.

[49] Objective 9 of the *Global Compact* specifically addresses the smuggling of migrants. On the surface, Objective 9 does little more than restate the core principles and obligations of the *Smuggling of Migrants Protocol*.¹⁷ The seven Actions found in its paragraphs (a) to (f) promote the Protocol and reiterate the points relating to cooperation and information sharing, protection of smuggled migrants, criminalisation of smugglers, and prevention. There are subtle differences in the vocabulary and semantics that, in some instances, go beyond the scope of the Protocol.

[50] Another way to look at the commitments and actions under Objective 9 is to separate them into strategies to counter supply and demand for smuggling of migrants. Seen this way, like the Protocol, Objective 9 clearly prioritises anti-supply measures, especially by criminalising and prosecuting smugglers. Beyond a general statement to ‘prevent the smuggling of migrants along the migration cycle’, there is nothing aimed at reducing the demand by making smuggling of migrants needless or futile, or by changing the cost-benefit balance to make the outcomes of smuggling any less appealing.

[51] Objective 9 goes beyond the *Smuggling of Migrants Protocol* insofar as its Action (c) calls on States to develop step-by-step cooperation protocols along migration routes specifically to identify and assist smuggled migrants and facilitate cross-border law enforcement and intelligence cooperation. These protocols seek to ‘prevent and counter smuggling of migrants’ and are intended to reconcile three potentially conflicting purposes: ending the impunity for smugglers, preventing irregular migration, and ensuring that countermeasures are in full respect for human rights.

[52] Beyond the specific references to smuggling of migrants and the UN Protocol in Objective 9, other parts of the *Global Compact* play an important role in addressing the causes of irregular migration, enhancing the conditions of international migration, protecting the rights of all migrants, improving governance and international cooperation in the field of international migration, and addressing the economic, developmental, social, humanitarian, and demographic aspects, both from the perspective of States and of migrants. In sum, the *Global Compact* presents a framework for comprehensive international cooperation on migrants and human mobility; it goes above and beyond the criminal law aspects of smuggling of migrants.

¹⁷ See also Vincent Chetail, ‘The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law’ (2020) 16 *International Journal of Law in Context* 253, 265.

II.3 European Union instruments

[53] Presently, the only binding regional measures pertaining to smuggling of migrants are those developed by the European Union (EU) in the early 2000s. These measures are part of a framework to develop common policies on asylum and immigration across Member States and to combat immigration-related crime and abuse of asylum systems.

II.3.1 2002 ‘facilitators package’

[54] On 28 November 2002, the Council of the European Union adopted Directive 2002/90/EC ‘defining the facilitation of unauthorised entry, transit and residence’,¹⁸ followed by Framework Decision 2002/946/JHA ‘on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence’.¹⁹ Collectively, these two documents are frequently referred to as the ‘facilitators package’. Council Directive 2002/90/EC provides the definition of facilitation of unauthorised entry, transit and residence, and the cases of exemption. Framework Decision 2002/946/JHA sets out the ‘minimum rules for penalties, liability of legal persons and jurisdiction’ of the offences under the Council Directive.²⁰ The 2002 Council Directive and Framework Decision aim ‘to prevent irregular migration by compelling EU Member States to punish anyone who assists a person to irregularly enter, transit or stay in the territory of a Member State.’²¹

[55] Article 1(1) of the 2002 Council Directive requires Member State to criminalise two offences:

- (a) intentionally assisting a person who is not a national of a Member State 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; and
- (b) assisting intentionally, for financial gain a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

II.3.2 2017 evaluation of ‘Facilitators Package’

[56] Not least because of the differences to the *Smuggling of Migrants Protocol* and concerns about over-criminalisation of irregular migration (discussed in part III of this study), the 2002 EU Council Directive and Framework Decision are facing long-standing criticism. In light of recent developments and rising smuggling activities, there are also questions about the effectiveness of these instruments.

[57] Following the EU action plan against migrant smuggling adopted in May 2015, in 2017, the European Commission carried out an evaluation of the ‘facilitator’s package’ as part of its ‘Regulatory Fitness and Performance Programme (REFIT)’. This undertaking sought to evaluate the effect, the effectiveness, efficiency, relevance, coherence and EU-added value of the existing provisions. On the one hand, this assessment showed that Member States criminalise and sanction the facilitation of unauthorised entry, transit and residence, that the ‘facilitators package’ had created some approximation of national laws, and was sufficiently different to the offences and laws around trafficking in persons. On the other hand, it also revealed ‘a serious lack of reliable and comparable data on migrant smuggling offences and criminal justice responses at national and European level, affecting almost all evaluation

¹⁸ EU Council Directive 2002/ 90/ EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence OJ L238/ 17, 5 December 2002 (hereafter 2002 EU Council Directive).

¹⁹ EU Council Framework Decision 2002/ 946/ JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L238/ 1, 5 December 2002 (hereafter 2002 EU Framework Decision).

²⁰ Preamble, EU Council, Framework Decision 2002/ 946/ JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [3].

²¹ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 21.

criteria.²² As a result, it was ‘not possible to assess how and to what extent increases in detection and prosecution of facilitators, or the enhanced cooperation between Member States, are directly linked to the implementation of the Facilitators Package.’²³ The evaluation made clear that

Most of the individuals and organisations consulted were strongly in favour of a modification of the existing definition of the offence. Despite the fact that the current Article 1(2) of the *Facilitation Directive* leaves the choice to the Member States to exempt from criminal sanctions the facilitation of unauthorised entry and transit when it is conducted on humanitarian grounds, this provision was criticised for its optional character, entailing a lack of clarity and legal certainty. Concerns were raised by the representatives of civil society about the perceived risks of criminalisation of assistance provided by civil society organisations or individuals assisting and/or working with irregular migrants.²⁴

[58] These perceptions and criticisms concerned both humanitarian assistance provided within the territory of a Member State as well as at the borders or on the high seas, despite the different legal frameworks that apply to such conducts. The analysis of the implementation of the Facilitators Package revealed the existence of varied approaches to what constitutes a crime across Member States: whereas in certain Member States the practice of the authorities is to focus on cases of facilitation when committed with a lucrative intent or by organised criminal groups, in others, due to the broad definition of the offence, people providing services to irregular migrants in the context of their professional activities or providing assistance for selfless reasons have also been prosecuted.²⁵

[59] It must be pointed out that the 2002 EU Council Directive and Framework Decision date back to the systems of pillars, pre-Lisbon era. Indeed, the Directive on the facilitation of unauthorised entry, transit and residence was rooted in the first pillar whereas the Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence was related to the third pillar and the common ground is to regulate the facilitation as a criminal offence by EU Member States in a very broad sense. In terms of the facilitation of irregular entry or transit, criminal sanctions will be imposed on any person who intentionally assists a person who is not a national of a Member State 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 foreigners because the main inspiration of the whole package was more the protection of EU territory and less the fight against the criminal groups involved in smuggling activities.

[60] The increasing acknowledgement that smuggling of migrants is mainly associated with serious human rights violations and deaths, in particular when it occurs by sea, and the crucial need to tackle migrant smuggling networks that are often closely linked to other forms of serious and organised crime led to the adoption of the *Renewed EU Action Plan against Migrant Smuggling (2021-2025)* (COM(2021) 591 final (29 September 2021)) aimed at

- (a) strengthening operational cooperation, and information exchange among EU countries and EU law enforcement agencies to investigate and prosecute migrant smuggling networks;
- (b) covering areas such as financial investigations, asset recovery, document fraud and digital smuggling; and
- (c) adopting a comprehensive approach and seek even closer cooperation with partner countries along the migratory routes towards the EU.

[61] The Renewed EU Action Plan includes the following main pillars of action:

²² European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023).

²³ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023).

- reinforced cooperation with partner countries and international organisations, including through Anti-Smuggling Operational Partnerships;
- implementing legal frameworks and sanctioning smugglers active within and outside the EU;
- preventing exploitation and ensuring the protection of migrants;
- reinforcing cooperation and supporting the work of law enforcement and the judiciary to respond to new challenges; and
- improving the knowledge on smugglers' organisation and ways of functioning.

II.3.3 2023 proposal for a new Council Directive

[62] Following the 2017 evaluation, a decision was made to substitute the 2002 Facilitators Package with a new Directive in order

to bring about a modern EU criminal law instrument that clearly defines and effectively sanctions the offence of facilitation of unauthorised entry, transit and stay in the EU, in line with the provisions of Article 83 of the *Treaty on the Functioning of the European Union* and the *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air*.²⁶

[63] According to the official documents, the proposal for a Directive serves the following specific objectives:

- Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling;
- More harmonised penalties that take account of the seriousness of the offence;
- Improving the jurisdictional reach;
- Reinforcing Member States resources to tackle and prevent migrant smuggling; and
- Improving data collection and reporting.²⁷

[64] In addition, as part of the Renewed Action Plan, the Commission has presented a Proposal for a Regulation of the European Parliament and of the Council 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.

[65] Furthermore, the Commission has launched a Call to Action for a Global Alliance to Counter Migrant Smuggling. The work on this Call to Action will be taken forward in a framework set up by the Commission, working closely and acting as a contact point for all global stakeholders. The Commission will convene technical Expert Groups with representatives from EU institutions, agencies, Member States, partner countries, international organisations and other stakeholders. The Commission will ensure that the Global Alliance to Counter Migrant Smuggling will work at bilateral and multilateral level as well as through the work of the UNODC. Regular stocktaking at political level will be ensured, with the first event anticipated to take place in the spring of 2024. The Conference will be the first such opportunity to take stock of the achievements of the Global Alliance.

II.4 Other instruments to consider

[66] In addition to the international and regional instruments which directly address the smuggling of migrants (and facilitation of unlawful entry, transit, or stay), a range of other international treaties and

²⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023).

²⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023) 12.

regional convention address matters that are connected to the criminal justice or human rights dimensions of smuggling of migrants or that concern crimes closely connected to it.

[67] At the global level, this includes, inter alia, criminal law frameworks such as:

- *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entry into force 29 September 2003)
- *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entry into force 25 December 2003)
- *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entry into force 14 December 2005)

[68] Also of importance are the following international human rights and refugee law instruments:

- *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entry into force 22 April 1954)
- *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entry into force 4 October 1967)
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entry into force 26 June 1987)
- *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entry into force 2 September 1990)
- *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976)
- *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entry into force 3 January 1976)

[69] In the context of smuggling of migrants by sea, some relevant provisions can also be found in:

- *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 97 (entry into force 22 June 1985)
- *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 2 (entry into force 25 May 1980)
- *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entry into force 16 November 1994)

[70] At the European level, the Council of Europe has developed a suite of other criminal law conventions that, directly or indirectly, play a role in matters associated with preventing and suppressing the smuggling of migrants and with international cooperation in criminal justice matters. These include

- *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, ETS 197 (entry into force 1 February 2008)
- *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, opened for signature on 8 November 1990, ETS 141 (entry into force 1 September 1993)
- *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*, opened for signature on 16 May 2005, ETS 198 (entry into force 1 May 2008)
- *Council of Europe Convention on the Transfer of Sentenced Persons*, opened for signature 21 March 1983, ETS 112 (entry into force 1 July 1985)
- *Council of Europe Criminal Law Convention on Corruption*, opened for signature on 27 January 1999, ETS 173 (entry into force 1 July 1999)

- *European Convention on Extradition*, opened for signature 13 December 1957, ETS 024 (entry into force 18 April 1960)
- *European Convention on Mutual Assistance in Criminal Matters*, opened for signature 20 April 1959, ETS 30 (entry into force 12 June 1962)

[71] Of further importance is, of course, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 4 November 1950, ETS 5 (entry into force 3 September 1953)) and the jurisprudence of the European Court of Human Rights (ECtHR).

[72] Individual obligations arising from these treaties that are relevant in the smuggling of migrants context are discussed where relevant in the remaining parts of this report.

III. Gaps, conflicts, challenges

[73] The existing frameworks outlined in part II provide a suite of ideas, legal provisions, and some practical measures which States may adopt in their quest to prevent and suppress the smuggling of migrants. These provisions primarily include criminal justice measures (mostly aimed at penalising the smugglers), but also feature some measures to protect and assist smuggled migrants. They comprise global frameworks, developed under the auspices of the United Nations, as well as regional frameworks, though the latter are limited to the European Union. Depending on the source, some matters found in these legal frameworks are binding and mandatory for States Parties, some are optional, and some are guiding principles rather than legal provisions in the strict sense. There are no such legal frameworks in Africa, the Americas, Asia, and the Pacific addressing specifically the smuggling of migrants. Especially in the Asia-Pacific region accession to the UN *Smuggling of Migrants Protocol* remains patchy.²⁸

[74] In sum, these international and regional frameworks developed over the past 25 years offer a comprehensive—though neither a complete nor a concise—range of tools. Neither do they offer a simplistic, single ‘one size fits all’ approach to this complex subject matter. Collectively and individually, these frameworks permit States great flexibility in the manner in which they choose to tackle the smuggling of migrants.

[75] The following sections set out the principal issues arising from the existing frameworks, the challenges States Parties face in adopting and enforcing specific provisions and elements, weaknesses and gaps in these frameworks, and conflicts between different instruments. The issues discussed here are by no means an exhaustive list; rather, they summarise the principal points raised in official reports, in the literature, in case law, and in comments provided by experts, national authorities, and international organisations.

[76] Note: Options and recommendations on how best to address the issues identified here are not included in the present draft. They will be added as the work on and consultations about this study progresses.

III.1 Divergent national systems; the issue with sovereignty

[77] There are great differences between Member States’ national criminal laws on smuggling of migrants. This has been highlighted by a 2016 study commissioned by the CDCP²⁹ and is documented widely in the literature and in official reports. The 2016 study concluded that:

There appears to be minimal, if any, common understanding about what constitutes smuggling of migrants, what types of smuggling and what motives of smugglers ought to be and ought not to be criminalized, and what punishment basic and more heinous methods of smuggling warrant — and what those methods are.³⁰

[78] The differences and discrepancies between national laws relating to smuggling of migrants—not only between Council of Europe Member States—are, to a considerable degree, a reflection that the existing international frameworks lack specificity and that their provisions remain broad and vague, with too many loopholes and too little mandatory content. Flexibility and a degree of vagueness were indeed necessary to reach consensus between States in the first place, especially at the global level. The topic of smuggling of migrants is politically very loaded and drafters had to be mindful not to be overly prescriptive, ensure that States with different legal systems and traditions are able to accommodate and implement the international frameworks, but also recognise that States have very different and often

²⁸ See further, Andreas Schloenhardt & Hamish Macdonald, ‘Barriers to Ratification of the United Nations Protocol against the Smuggling of Migrants’ (2017) 7 *Asian Journal of International Law* 13, 17–18.

²⁹ Council of Europe, CDCP, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 5–6.

³⁰ Council of Europe, CDCP, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 9–10.

divergent policies and attitudes towards irregular migration, smuggling of migrants, asylum, and refugee protection.

[79] For these reasons, the protection of national sovereignty is enshrined as a cardinal principle in Article 4 of the *United Nations Convention against Transnational Organized Crime* (UNTOC) and throughout the Convention and its supplementing Protocols. Article 4, which is entitled ‘protection of sovereignty’ states:

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

[80] The *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* explains:

Article 4(1) is a reflection of the fact that the United Nations itself is based on the principle of the sovereign equality of all its Members. Based on the principles of the *Charter of the United Nations*, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* elaborates the principle of non-intervention in matters that are essentially within the domestic jurisdiction of any State. The Declaration emphasizes that no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State, and by proscribing the use of any measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.

Article 4(2) contains a further expression of national sovereignty by stating that the Convention does not authorise States parties to perform functions within the territory of another State normally reserved to the competent authorities of that State. In practice, this means that in instances in which investigations and enforcement produce a situation in which agents of one State party will perform functions within the territory of another State this has to occur with the approval of that other State so as not to breach the principle of territorial integrity.³¹

[81] In addition, there are many provisions and references found across the *Smuggling of Migrants Protocol* (and the UNTOC) to protect national prerogatives and sovereignty and to permit States flexible adoption of Protocol requirements. This is reflected, inter alia, in conditional clauses such as ‘subject to the basic concepts of its legal system’ (Article 6(2)(a), (b), (3)), or ‘in accordance with its domestic law’ (Articles 11(4), (5), 13), or concessional clauses such as ‘to the extent possible’ (Article 11(1), (2)) and ‘within available means’ (Article 12).

[82] The flexibility thus gained was, as mentioned, necessary to reach agreement on the Protocol’s text and to motivate as many States as possible to sign and accede to the Protocol. On the downside, it reduces the level of harmonisation and synergy that can be achieved by the Protocol. It opens the door for grave variations between national laws which, as later parts of this study show, can be seen in the offences (their elements and scope) used to criminalise the smuggling of migrants, in the manner in which States protect the rights of, and assist smuggled migrants, and in their level of engagement in international cooperation. Given that the full respect of national sovereignty is perhaps the most prominent principle underpinning the international legal framework on smuggling of migrants, it is not surprising that national laws, domestic policies, along with law enforcement and practical measures, prevention initiatives, and the public discourse about smuggling of migrants differ greatly between States, not only outside, but also within Europe.

[83] The drafters of the *Smuggling of Migrants Protocol* and the UNTOC were mindful of the fact that their efforts may merely result in a lowest common standard and thus in Article 34(3) inserted a clause expressly permitting States Parties to exceed that standard by ‘adopting more strict or severe

³¹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (UNODC, 2nd ed 2017) [49].

measures than those provided for' by the Convention and its Protocols.³² Although this is a standard clause in international treaties and ensures a degree of compliance and conformity, it nevertheless gives States additional scope, inter alia, for more far-reaching criminalisation and more severe penalties.

[84] Although the nature of the 2002 EU Council Directive and Framework Decision and of EU law generally is different, there is nevertheless considerable scope for Member States to depart from the key points of these instruments. A 2016 review by the European Parliament found that:

The current EU *acquis* grants disproportionate discretionary powers to Member States in the implementation of the Facilitators' Package. This causes issues of legal uncertainty and inconsistency in the implementation of EU legislation and impacts on their effectiveness.

There are major differences in the transposition of specific provisions of the Facilitators' Package in the selected EU Member States under analysis. These mainly relate to the lack of specific mandatory provisions to ensure the fundamental rights of smuggled migrants and exemption from criminalisation of actors providing assistance to them for humanitarian purposes.³³

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.2 Conflicting international frameworks

[85] The differences of national offences and other laws relating to smuggling of migrants between different jurisdictions (discussed in the following sections) are not only a reflection of the diverse national laws, agendas, and circumstances of different States, they are also a result of discrepancies between the international and regional legal frameworks outlined in part II above.³⁴ A 2016 review by the European Parliament concluded: 'There is a substantial "implementation gap" between the UN Protocol against the Smuggling of Migrants by Land, Sea and Air ... and the EU *acquis* on irregular immigration.'³⁵

[86] The 2002 EU Council Directive and Framework Decision depart from the *Smuggling of Migrants Protocol* in several ways. One main point of difference is the lack of any reference to the purpose of obtaining a financial or other material benefit in the Council Directive. This is explained by the overall purpose of the Directive, which is to combat the facilitation of illegal immigration in all its forms. This is reinforced by a statement in paragraph (2) of the Directive's Preamble, stating that '[m]easures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of

³² Andreas Schloenhardt, 'Article 34: Implementation of the Convention', in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 339.

³³ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 21.

³⁴ See generally, European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 22–29; Alessandro Spena, 'Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 33–40; Jennifer Allsopp and Maria Giovanna Manieri, 'The EU Anti-Smuggling Framework: Direct and Indirect Effects on the Provision of Humanitarian Assistance to Irregular Migrants' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 81, 85.

³⁵ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 21.

the border in the strict sense and for the purpose of sustaining networks which exploit human beings.’ Thus, ‘Directive 2002/90/EC does not limit the targets it is aimed at, potentially punishing those who are assisting irregular migration for honourable reasons as harshly as those who do so for financial gain, such as organised crime.’³⁶ The financial or material benefit is an aggravation under Article 1(3) of the Framework Decision 2002/946/ JHA, which envisages higher penalties if the offence under Article 1(1)(a) of the Council Directive is committed for financial gain and endangers the lives of the smuggled migrants, and if the offence is committed for financial gain and is part of the activities of a criminal organisation.

[87] Whereas the *Smuggling of Migrants Protocol* is clear about its intention not to criminalise persons who engage in the smuggling of migrants for humanitarian purposes with no financial gain, the 2002 Council Directive leaves this matter to the discretion of Member States. Article 1(2) permits them ‘not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned’.

[88] In sum, there is only a limited level of similarity and overlap between the different frameworks and, as will be shown, even for well-intended States Parties, when adopting or amending national laws, it can be challenging if not impossible to synthesise and reconcile the obligations and optional requirements of different frameworks. It is a welcome development that the 2023 proposal for a new EU Directive seeks to reconcile these differences, though as later parts of this study show, some discrepancies to the *Smuggling of Migrants Protocol* remain and it is, at the time of writing, far from clear whether the 2023 proposal will be adopted using the text issued in November 2023.

[89] Adding to these challenges is the fact that the international legal frameworks relating to smuggling of migrants remains quite skeletal. Compared to other transnational crime types (such as, for instance, trafficking in persons, trafficking in illicit drugs, firearms trafficking, and corruption), the anti-smuggling framework is relatively new and continues to evolve and develop, and is rather piecemeal as it leaves many facets of the smuggling of migrants — and the responses thereto — unaddressed. There is no comprehensive and coherent framework that offers standardised solutions and templates to national policy and lawmakers for the myriad of issues associated with the prevention and suppression of smuggling of migrants, the prosecution of migrants smugglers, and the protection of smuggled migrants.

[90] Furthermore, the existing international frameworks are, as has often been noted, rather imbalanced, prioritising criminalisation along with other criminal justice responses, over measures that look at the human element of this crime type: the vulnerability of smuggled migrants, the causes of forced displacement, poverty and unemployment that are fuelling international migration, and the lack of adequate and affordable legal migration pathways.

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.3 Definition/basic offence of smuggling of migrants

[91] Defining smuggling of migrants is not an easy feat, especially for legislators and drafters of international conventions. Whilst seemingly brief and straightforward, the definition set out in Article 3(a) of the *Smuggling of Migrants Protocol* has, rightly or wrongly, faced much criticism for lacking precision, for being ignored by some lawmakers, and for the blurry distinction to trafficking in persons (discussed separately below). A 2016 study for the CDPC has also found that the vast majority

³⁶ Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU* (Routledge 2010) 45; see also Valsamis Mitsilegas, ‘Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens, Strengthening the State’ (2012) 19(1) *Indiana Journal of Global Legal Studies* 3, 10.

of Council of Europe Member States neither use nor define the term ‘smuggling of migrants’ in their national laws.³⁷ As mentioned, the 2002 EU Council Directive does not use the term and instead refers to facilitation of unlawful entry or transit.

III.3.1 Elements of Article 3(a)

[92] Only Article 3(a) of the *Smuggling of Migrants Protocol* provides a definition of ‘smuggling of migrants’. This definition focuses on the conduct and motivation of the smugglers: the procurement of illegal entry for the purpose of obtaining a material benefit. It does not consider the actions of the smuggled migrants and does not capture persons who support migrants for other purposes.³⁸

[93] The conduct element ‘procurement’ (or procuring) is not further defined in the Protocol. It derives from early drafts of the Protocol text and is generally taken as a synonym for facilitating, taking care of, or managing. It has been argued that in the context of the Protocol, ‘procuring’ describes the migrant’s position more as something that is the result of another person’s (the smuggler’s) action rather than as an action itself.³⁹ Just what conduct amount to procuring is open to interpretation, as is the question whether it captures acts as well as omissions. This can make it difficult to differentiate between smugglers (who, pursuant to the Protocol, should be held criminally responsible) and smuggled migrants (who should not be), as well as between principal offenders and participants.

[94] By comparison, the 2002 EU Council Directive, which does not use the term ‘smuggling of migrants’ or any equivalent expression, refers to the conduct element as ‘assisting’ another person to enter or transit across the territory of another Member State unlawfully. This choice of verb marks a subtle shift away from the smugglers who ‘procure’, onto the smuggled migrants as authors of conduct they are seeking (i.e. migration) and for which they are accepting assistance.⁴⁰ The way in which facilitation of transit is criminalised varies greatly between EU Member States.⁴¹

[95] The term ‘illegal entry’ used in the definition of smuggling of migrants is further defined in Article 3(b) of the Protocol to mean ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State’. Unlike the 2002 EU Council Directive, transit is not expressly covered by the smuggling of migrants definition.

[96] The purpose or mental element of the definition refers to ‘obtaining, directly or indirectly, a financial or other material benefit’. This element relates to the perpetrator’s subjective intention; there is no requirement that any benefit is actually obtained. The same element features in the criminalisation requirements of Article 6(1) and is also used in the definition of ‘organised criminal group’ in Article 2(a) of the UNTOC. An *Interpretative Note* explains that:

[T]he words ‘in order to obtain, directly or indirectly, a financial or other material benefit’ should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.⁴²

³⁷ Council of Europe, CDCP, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 5.

³⁸ Marika McAdam, ‘Article 3: Use of Terms’, in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 541.

³⁹ Alessandro Spena, ‘Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 33, 37.

⁴⁰ Alessandro Spena, ‘Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 33, 34.

⁴¹ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 11.

⁴² UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention*

[97] Examples of non-financial benefits include a free plane or train ticket, property, such as a car, and free passage on a smuggling vessel.⁴³

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.3.2 Financial or other material benefit

Smuggling of Migrants Protocol

[98] As already mentioned, the ‘financial or material benefit’ element is a mental element and central feature of both the definition and criminalisation of ‘smuggling of migrants’ in international law. The expression replaced the word ‘profit’ that was found in early drafts of the *Smuggling of Migrants Protocol*.⁴⁴

[99] This element highlights the Protocol’s focus on and nexus to organised criminal groups and other criminal elements who engage in smuggling of migrants for illicit gain. It has been observed that the smuggler’s intention to obtain a financial or other material benefit from the conduct of procuring the illegal entry of another recognises ‘the smuggler’s conduct to have a wrongness of its own: a wrongness that is not a mere reflection of irregular migration, but derives directly from it being a commodification of human beings, an exploitation of the migrant’s vulnerability as a source of enrichment, of money-making.’⁴⁵

[100] In turn, the element excludes persons who facilitate the illegal entry for other reasons. It also emphasises that the focus is on the ‘procurement’ of illegal entry, not on the illegal entry itself.⁴⁶ An *Interpretative Note* added by the drafters of the Protocol reiterates this position:

[T]he reference to ‘a financial or other material benefit’ as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organisations.⁴⁷

[101] With the inclusion of this element,

[t]he *Smuggling of Migrants Protocol* recognises that irregular migration, of which smuggling of migrants is one form, is frequently connected to situations in which persons must flee from persecution, war, torture, discrimination, and severe human rights abuses, or are forced to leave their home countries for other

against Transnational Organized Crime and the Protocols thereto UN Doc A/55/383/Add.1 (3 November 2000) [3].

⁴³ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 46-47; UNODC, *Model Law against Smuggling of Migrants* (United Nations, 2010) 13.

⁴⁴ See further, Marika McAdam, ‘Article 3: Use of Terms’, in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 546.

⁴⁵ Alessandro Spina, ‘Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 33, 37.

⁴⁶ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 340; Marika McAdam, ‘Article 3: Use of Terms’, in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 549.

⁴⁷ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 469.

reasons. For many smuggled migrants, the services offered by smugglers represent the only way to escape threats, harm, and death.⁴⁸

[102] Irregular migration involves a great range of actors and aids beyond the irregular migrants themselves. It is not uncommon for persons to provide advice and assistance to irregular migrants as a courtesy, out of compassion, and free of charge. Such situations do not amount to smuggling of migrants. A person receiving a gift from an irregular migrant as a ‘thank you’ without asking or seeking a benefit is not a migrant smuggler. In fact, those who provide assistance to irregular migrants are frequently family or friends. The *Smuggling of Migrants Protocol* is clear that such acts of kindness, support, and advice, no matter how big or small, do not qualify for the definition and the offence of smuggling of migrants. Objective 9, action (d) of the *Global Compact for Migration* echoes the *Smuggling of Migrants Protocol* by calling on States to limit criminalisation to instances that are ‘committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit for the smuggler.’

[103] Despite the Protocol’s clear position, many States appear to simply ignore the ‘financial or other material benefit’ element and criminalise any assistance provided to irregular migrants. The 2016 study commissioned by the CDPC noted that a majority of Member States do not include this element in their (basic) smuggling of migrants offence,⁴⁹ thus departing quite fundamentally from the principles of the Protocol. A 2017 UNODC study similarly revealed ‘significant discomfort’ with this element and widespread divergence from the Protocol’s definition: of a representative sample involving different legal systems and different experiences with smuggling of migrants, none of the 13 States surveyed had adopted the definition of smuggling of migrants unchanged into their legislation; only two included the ‘financial or other material benefit’ as an element of the smuggling offence.⁵⁰ The Protocol leaves it open for States Parties to criminalise under their national laws smuggling activities that are not done for profit,⁵¹ but the Protocol neither provides the foundation nor the justification for that.⁵² The omission of this element, notes Marika McAdam, ‘falls short of criminalization requirements, jeopardizing the integrity of the definition and detracting from a harmonised understanding of “smuggling of migrants”.’⁵³

[104] Most experts and international organisations oppose the criminalisation of persons who assist others to cross borders irregularly, which is an offence in many jurisdictions. In 2010, the Council of Europe Commissioner for Human Rights has noted an alarming trend that ‘contact with foreigners increasingly becomes associated with criminal law’ which may result, on the one hand, in friends, landlords, doctors and others assisting migrants becoming the target of criminalisation and, on the other, rising levels of xenophobia and discrimination against persons suspected of being foreigners.⁵⁴ In 2024, the Commissioner added:

⁴⁸ Andreas Schloenhardt, ‘Article 6: Criminalization’ in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 574–575; UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 1: Understanding the smuggling of migrants, 29.

⁴⁹ Council of Europe, CDPC, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 6.

⁵⁰ UNODC, *The Concept of “Financial or other material benefit” in the Smuggling of Migrants Protocol* (UNODC 2017) 18.

⁵¹ UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 4 [12].

⁵² Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 366.

⁵³ Marika McAdam, ‘Article 3: Use of Terms’ in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 549; Gallagher and David, *International Law of Migrant Smuggling* (n 20) 363.

⁵⁴ Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper (Council of Europe, 2010) 39; see also EU Agency for Fundamental

In many cases, people simply extend a helping hand to fellow human beings without realising that this may put them in conflict with increasingly broad-ranging rules on the prevention of irregular entry or stay. In this way, even everyday acts of humanity are at risk of becoming the subject of harassment or criminalisation. The latter is also true for those helping family members, or for refugees, asylum seekers and migrants themselves who provide mutual support.⁵⁵

[105] The parameters of what constitutes a ‘financial or other material benefit’ are open to interpretation, and case law and scholarly works have discussed a range of scenarios:

for instance, is the element fulfilled where a person drives another person across a border for a small sum of money, knowing that border crossing is or is likely to be illegal? What if they are [merely] reimbursed for petrol? What about a person who facilitates illegal migration of a family member in hopes of one day receiving remittances?⁵⁶

[106] Clearly, such cases have none of the hallmarks of organised crime and are situated at the lower end of the spectrum of criminality, if they are considered to be warranting criminalisation at all.⁵⁷ The same can be said if, for instance, parents smuggle a child into another country to provide the child with better education opportunities.⁵⁸ Gallagher and David argue that such a purpose goes ‘beyond the ordinary meaning of “material benefit” and, critically, beyond the scope and purpose of the Protocol and the intention of the drafters’.⁵⁹

[107] Where the smuggling of a relative occurs with the expectation that this person at some time in the future sends remittances to the family members who assisted them, it is argued that while the primary purpose is a social one, a further purpose is to indirectly obtain a financial or other material benefit, which brings this case within the scope of Article 6(1)(a).⁶⁰ The reverse situation, where the primary purpose is the financial or other material benefit and where the secondary purpose is a social, political, or other non-financial purpose, is also covered by the criminalisation requirement under Article 6 of the Protocol. This would be the case, for instance, where a terrorist organisation engages in the smuggling of migrants to finance their (non-profitable) terrorist activities.⁶¹

EU 2002 Council Directive

[108] The 2002 EU Council Directive requires Member States to criminalise facilitation of irregular entry or exit without any purpose or other element relating to financial gain. It captures any form of intentional assistance of unlawful entry or transit of another person. This position has

led to widespread concern about the criminalisation of more humanitarian interventions to support migrants in distress, which results in their entering Europe but involves no financial gain, the so-called ‘délits de solidarité’. In practical terms this has affected the willingness of small professional shipmasters, particularly fishing trawlers in the Mediterranean, to come to the rescue of migrants in distress. Calls for

Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (FRA 2014) 1–2, 12, 13.

⁵⁵ Council of Europe, Commissioner for Human Rights, *Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe*, Recommendation (Council of Europe, February 2024) 11.

⁵⁶ Marika McAdam, ‘Article 3: Use of Terms’ in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 549.

⁵⁷ Cf UNODC, *The Concept of “Financial or other material benefit” in the Smuggling of Migrants Protocol* (UNODC 2017) 18.

⁵⁸ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 366.

⁵⁹ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 366.

⁶⁰ Abdelnaser Aljahani, ‘The Legal Features of Smuggling Organisations in Light of the Migrant Smuggling Protocol’ (2015) 79(3) *Journal of Criminal Law* 170, 178–179.

⁶¹ Abdelnaser Aljahani, ‘The Legal Features of Smuggling Organisations in Light of the Migrant Smuggling Protocol’ (2015) 79(3) *Journal of Criminal Law* 170, 179.

the clear decriminalisation of their involvement in sea rescue, and even systematic compensation, are now widespread.⁶²

[109] The EU Agency for Fundamental Rights has also stressed that:

There is no general safeguard in the Framework Decision preventing the punishment of acts performed for humanitarian purposes, rescue at sea or emergency situations. There is a risk that domestic legislation aimed at addressing facilitation of irregular entry and stay may result in punishing rescue at sea, the provision of humanitarian assistance or landlords renting out accommodation.⁶³

[110] There are many reports by international organisations, practitioners, and academic experts criticising this approach.⁶⁴ Jennifer Allsopp and Maria Giovanna Manieri add that ‘criminalisation of assistance feeds a general climate of fear and insecurity about irregular immigration [...] Criminalisation also jeopardises the “citizen’s right to assist” those in need of humanitarian aid as a key function of democracy.’⁶⁵

[111] Article 1(2) of the Directive permits—but does not require—Member States ‘not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.’ The nature and scope of ‘humanitarian assistance’ is not further defined by the Directive. Elsewhere, it has been noted that

[h]umanitarian smuggling activities may involve, for instance, providing food, medication, clothing, and even temporary accommodation so long as these activities serve to save or protect the life of smuggled migrants. Activities such as rescuing smuggled migrants from a life-threatening situation also fall into that category. Other measures designed to save or restore smuggled migrants’ lives, health or physical integrity should also be viewed as humanitarian activities. Humanitarian aid of this kind is akin to situations of emergency or necessity in which a failure to act may result in greater harm and in which the smuggling of migrants and other acts facilitating illegal entry or enabling illegal stay of another person may be justified or justifiable.⁶⁶

[112] The fact that the exemption for humanitarian assistance under Article 1(2) is not mandatory and thus leaves discretion to Member States whether to include the exemption and, if they do include it, how to define its scope and application.⁶⁷ Article 1(2) has been widely criticised for creating uncertainty for those helping or wanting to help irregular migrants in distress or in other situations of danger or vulnerability. It ‘unavoidably makes helping immigrants more risky for potential helpers, thereby indirectly impinging upon the chances migrants have to be helped when they find themselves in need of humanitarian assistance’.⁶⁸ The EU Agency for Fundamental Rights and the United Nations High Commissioner for Refugees (UNHCR) have further noted that the safeguard clause under Article 1(2)

⁶² Michael Collyer, ‘Cross-Border Cottage Industries and Fragmented Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 17–18 with further references.

⁶³ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 9.

⁶⁴ See, among many, Council of Europe, Commissioner for Human Rights, *Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe*, Recommendation (Council of Europe, February 2024) 15.

⁶⁵ Jennifer Allsopp and Maria Giovanna Manieri, ‘The EU Anti-Smuggling Framework: Direct and Indirect Effects on the Provision of Humanitarian Assistance to Irregular Migrants’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 81, 89.

⁶⁶ Andreas Schloenhardt, ‘Article 6: Criminalization’ in in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 575.

⁶⁷ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 27.

⁶⁸ Alessandro Spina, ‘Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 33, 35–36.

is rarely found in national laws of the EU Member States.⁶⁹ A 2024 report by the Council of Europe Commissioner for Human Rights similarly stressed that the humanitarian exception is applied inconsistently across Council of Europe Member States.⁷⁰

[113] The 2017 evaluation of the 2002 EU Council Directive and Framework Decision and their implementation also conceded that the

broad definition on what constitutes a crime of facilitation of unauthorised entry, transit and residence. [...] it has not been effective in creating clarity and legal certainty about the distinction between facilitation of irregular migration and humanitarian assistance, due to the broad definition of the offence and the absence of exemptions.⁷¹

[114] The wording of Article 1 of the Council Directive suggests that assistance provided by family or friends falls in the scope of criminalisation and is not expressly exempted. The proposal to include an optional exemption from criminalisation for family members, which was present in the original draft, was deleted during the negotiations.⁷²

[115] Other research has shown that only a small number of EU Member States has exempted facilitation of unlawful entry and transit for humanitarian purposes from criminalisation and/or sanctioning and found ‘some evidence across various member states [...] of the use of facilitation-related offences against altruistic individuals assisting others, including family members, members of humanitarian organisations and private individuals acting out of compassion.’⁷³

[116] Oddly, while the 2002 EU Council Directive does not require a financial gain element for the offence of facilitating unlawful entry and transit, Article 1(1)(b) of the requires Member States to criminalise irregular residence only when there is financial gain (which is the same position as in the equivalent offence under Article 6(1)(c) of the *Smuggling of Migrants Protocol*). Many EU Member States nevertheless criminalise facilitation of unlawful stay in the absence of a profit motive.⁷⁴ This offence is discussed separately below.

2023 Proposal for a new EU Directive

[117] The 2023 proposal for a new EU Facilitation Directive addresses, at least in part, the long-standing concerns over criminalising the facilitation of illegal entry and stay in the absence of any profit motive. Article 3(1)(a) of the proposal makes it an offence to

intentionally assist a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals [...] where the person who carries out the conduct requests,

⁶⁹ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 10; UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 5 [17].

⁷⁰ Council of Europe, Commissioner for Human Rights, *Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe*, Recommendation (Council of Europe, February 2024) 15.

⁷² European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 27.

⁷³ Jennifer Allsopp and Maria Giovanna Manieri, ‘The EU Anti-Smuggling Framework: Direct and Indirect Effects on the Provision of Humanitarian Assistance to Irregular Migrants’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 81, 86-87; see also European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 27.

⁷⁴ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 10.

receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit.

[118] This proposal includes the ‘financial or material benefit’ where the such a benefit is requested or actually received or accepted by the smuggler. While this offence is closer to the *Smuggling of Migrants Protocol*, it still departs from the Protocol’s criminalisation requirement in fundamental ways. The UNHCR notes that

the criterion of ‘financial or material benefit’ under Article 3.1.a of the Commission’s Proposal is not an element of specific intent of the criminal offence of smuggling. This means that the criminal intent to be proven under the Proposal will be limited to the intention of assisting in the unlawful entry, transit or stay, and not the intent to obtain a financial or material benefit.

Article 3.1.a criminalizes also the request, reception or acceptance of a promise of financial or material benefit. This reference would criminalize the mere fact of having been offered a financial or material benefit without having any intention of accepting or even when refusing it.⁷⁵

[119] Article 3(1)(b) of the proposal sets out an alternative construction, which does not involve a financial or material benefit element. Instead, it criminalizes situations where the person

intentionally assist a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals [...] where there is a high likelihood of causing serious harm to a person.

[120] The scope of this offence, as also observed by the UNHCR, is wider than that contemplated by the *Smuggling of Migrants Protocol*. ‘Because the offence is not limited by a specific intent of profit, it risks criminalizing humanitarian assistance or assistance to family members. The UNHCR has further concerns that the element of the criminal offence of “serious harm” is undefined, leaving too wide a margin for interpretation.’⁷⁶ For this reason, the UNHCR has recommended the deletion of this proposed new offence and instead advocates the implementation of offences in line with Article 6(3)(a) and (b) of the *Smuggling of Migrants Protocol* (discussed further below).⁷⁷

[121] The proposal sets out an additional offence in Article 3(2) criminalising the ‘public instigation’ of unlawful entry, transit, or stay of a third-country national. The UNHCR recommends deleting this proposed offence because it remains unclear

what activities would fall under public instigation, on how this offence would differ from the traditional offence of “incitement to smuggling” included in Article 5, as well as what conditions and to which actors this provision will apply. [...] This provision carries the risk of deterring people and organisations from performing humanitarian activities, including search and rescue (SAR) activities and activities that would assist foreign nationals in seeking international protection by accessing safe territory irregularly, as well as sharing information on fundamental rights with persons seeking international protection. Proposed Article 3(2) may also lead to arbitrary and/or disproportionate restrictions of the freedom of expression and of assembly not only of humanitarian actors, but of any person in the Member State that would express support or campaign for the humane reception of potential asylum-seekers, if their entry, transit or stay is considered as unlawful under EU or national law.⁷⁸

[122] Under Article 5, inciting, aiding, abetting, and attempting the offences under Articles 3 and 4 must also be criminalised.

[123] The official material explains:

⁷⁵ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 7 [22].

⁷⁶ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 7 [23]-[24].

⁷⁷ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 10.

⁷⁸ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 8-9 [30].

This proposal brings clarity on which offences should be criminalized. These include facilitation conducted for financial or material benefit or the promise thereof; facilitation that is highly likely to cause serious harm to a person even though conducted without financial or material benefit; and in cases of public instigation of third-country nationals, for instance through the internet, to enter, transit across or stay irregularly in the European Union. The proposal also clarifies that the purpose of the Directive is not to criminalize third-country nationals for the fact of being smuggled, assistance provided to family members, or humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.⁷⁹

[124] The 2023 proposal does, however, not include a clear exemption for assistance provided on humanitarian grounds or provided by family members and friends. The UNHCR notes that the humanitarian exception

is limited to ‘assistance [...] in compliance with legal obligations.’ This may lead to criminalization of humanitarian assistance that is not explicitly based on a legal obligation, expressed in the Directive or otherwise, binding on the humanitarian actor but that still assists in securing the rights of the asylum-seeker or migrant under international refugee law or international human rights law.

More importantly, the lack of a clear legal obligation to ensure that such criminalization will not occur provides significant grounds for concern as it puts friends, family members and others providing assistance with purely humanitarian motives, including NGOs, at risk of prosecution. This is contrary to the object and purpose, as well as the intention of the drafters, of the Smuggling Protocol. In this sense, compared to the 2002 Directive, the current proposal arguably provides for fewer safeguards against criminalization of humanitarian assistance and solidarity.⁸⁰

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.4 Smuggling of migrants vs trafficking in persons

[125] Although smuggling of migrants and trafficking in persons are different crime types that are defined differently in separate international instruments, regional frameworks, and national laws, there is—as has often been observed and widely discussed⁸¹—nevertheless much confusion and overlap between the two offences and their definitions.

[126] Clearly contributing to the confusion is the rather unfortunate choice of terms. In the English language, there is generally no difference between the words ‘smuggling’ and ‘trafficking’. Even in legal and criminal justice contexts, the two words are commonly used interchangeably. This problem is the same, if not more severe, in most other languages. Further adding to the confusion is the fact that until the 2000s, terms such as ‘migrant trafficking’, ‘alien smuggling’ and the likes were used in some national laws and the literature. The two UN Protocols on smuggling of migrants and trafficking persons have established a common terminology which, however, remains poorly understood outside expert circles.

[127] International and national laws generally separate the two crimes quite rigidly, with significant consequences for perpetrators, practitioners, and for the persons who are the victims/objects of these

⁷⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023) 12.

⁸⁰ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 6 [18]-[19].

⁸¹ See, among many, Angeliki Dimitriadu, ‘The Interrrelationship between Trafficking and Irregular Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 64–69.

crimes: different offences apply to smugglers and traffickers; law enforcement and prosecutors have different mandates, powers, and responsibilities; and, importantly, victims of trafficking in persons are afforded protection and support that are unavailable to smuggled migrants.

[128] The following features are commonly cited to distinguish smuggling of migrants from trafficking in persons:⁸²

- (1) The first is the purpose of each offence: whereas trafficking in persons is designed as an offence against the person, protecting their physical, mental, and sexual integrity and freedom of choice, smuggling of migrants is an offence to protect the sovereignty of States to manage immigration and control their borders.⁸³ Although human rights violations may occur in the course of smuggling of migrants, these are not defining elements of this crime.
- (2) The second distinguishing feature is said to be the relationship between the perpetrator and the victim/object of the crime: whereas smuggling is characterised by a commercial relationship in which migrants pay for the services of smugglers and end that relationship with the final payment of the fees, the relationship between traffickers and their victims is exploitative and may continue over a period to maximize economic or other gains for the traffickers.
- (3) In a similar vein, the perpetrators' objective is, in the case of smuggling, the organised movement of irregular migrants for profit and, in the case of trafficking, the exploitation of the victim.⁸⁴
- (4) A further point of difference relates to movement and border-crossing: whereas for smuggling of migrants the irregular border crossing is a defining element, this is not the case for trafficking in persons, which can (and does) also occur within the territory of one State or, if it does occur across borders, may also involve regular movements.
- (5) The definition of smuggling of migrants focuses on the actions of those who act for financial or material benefit, not on the actions of smuggled migrants themselves or those who may facilitate their movement or otherwise support them for non-profit purposes. This focus on the actions of smugglers, rather than the impact of those actions on migrants, creates a further distinction to trafficking in persons, with exploitation of trafficked 'victims' being at the heart of the latter.⁸⁵
- (6) The final and perhaps most contentious difference is the issue of consent: whilst not expressly mentioned, smuggling of migrants implies that the migrants consent to their irregular movement.⁸⁶ By contrast, consent is not an element of trafficking in persons (which is expressly stressed in Article 3(c)) of the *Trafficking in Persons Protocol* and the means of trafficking required by the definition under Article 3(a) render any consent by the victim void (a requirement that does not apply to trafficking in children). The same applies to the definition of 'trafficking in human beings' and the role of consent under Article 4(a) and (b) of the *Council of Europe Convention on Action against Trafficking in Human Beings*.⁸⁷

[129] Despite separate definitions and these additional explanations, the strict distinction between smuggling of migrants and trafficking in persons is difficult to maintain in practice. Situations in which smugglers lie about the conditions of the transport, coerce smuggled migrants into making additional

⁸² See, similarly, European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 22.

⁸³ Mary A Young, 'The Smuggling and Trafficking of Refugees and Asylum Seekers: The International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crime' (2003) 27 *Suffolk Transnational Law Review* 101, 108.

⁸⁴ UNODC, *A short introduction to migrant smuggling*, Issue Paper (United Nations, 2010) 10.

⁸⁵ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 44; Anne T Gallagher, 'Migrant Smuggling' in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) 187, 191.

⁸⁶ Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2015) 17(2) *International Journal of Refugee Law* 394, 396.

⁸⁷ Open for signature, 16 May 2005, CETS No 197 (entered into force 1 February 2008).

payments, force them to embark onto unseaworthy vessels, or lock them away in rooms or holding facilities can, depending on the circumstances, amount to trafficking in persons. Frequently, situations of smuggling can morph into trafficking:

The vulnerability of smuggled migrants, in particular debt, exposes them to traffickers and exploiters, especially during transit and at the country of destination. Paying back the debt incurred by the 'smuggling service' increases the desperation of migrants and they may end up in situations of forced labour, forced prostitution or labour exploitation.⁸⁸

[130] For example, migrants may agree to be smuggled, unaware that, on arrival, they will be forced to work in poor or restrictive conditions for the smuggler to pay off a debt for the service. This situation should be considered an instance of trafficking because of the deceptive means and the exploitation. Smuggled migrants might also retract their consent during a smuggling venture but may be forced by the smugglers to continue the journey. Although retracting consent alone does not automatically turn smuggling into trafficking; such cases would be seen as trafficking if other elements of trafficking, such as the purpose of exploitation, are satisfied.⁸⁹

[131] Many experts have criticised the existing definitions for creating an artificial dichotomy between the experiences of victims of trafficking and smuggled migrants.⁹⁰ The human rights deficiencies of the *Smuggling of Migrants Protocol* are most evident in its reference to migrants as 'objects', thus enabling States to describe smuggling as a victimless crime.⁹¹ Trafficked persons, on the other hand, are referred to as 'victims' and have access to several assistance and protection measures not afforded to smuggled migrants. The distinction between different categories of irregular migrants, such as smuggled migrants, victims of trafficking, and, where applicable, refugees, has created a hierarchy of protection, with some people receiving more benefits than others. The criteria used to make these distinctions are not always certain; the consequences, however, are very severe. In some cases, this can lead to the exclusion of people who do not neatly fit into any of these categories. This problem is most evident if a smuggled migrant is also seeking asylum; it 'can make a difference between arrest and protection, or between deportation and asylum, or between return to an uncertain fate and assistance for a decent life'.⁹² For example, persons crossing a border with the aid of smugglers may be detained and swiftly removed from the receiving State without any assessment of the circumstances of their arrival, which may involve exploitation and other elements of trafficking. All too frequently, border, law enforcement, and immigration officers focus only on the irregular status of the person and fail to recognise that they may be victims of trafficking or refugees fleeing persecution.

[132] Objective 9 action (e) of the *Global Compact for Migration* also calls on States to

design, review or amend relevant policies and procedures to distinguish between the crimes of smuggling of migrants and trafficking in persons by using the correct definitions and applying distinct responses to these separate crimes, while recognising that smuggled migrants might also become victims of trafficking in persons, therefore requiring appropriate protection and assistance.

⁸⁸ Anniina Jokinen, 'Irregular Migration, Trafficking in Persons and Prevention of Exploitation' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 70, 70.

⁸⁹ Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2015) 17(2) *International Journal of Refugee Law* 394, 401.

⁹⁰ Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2015) 17(2) *International Journal of Refugee Law* 394, 397; John Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24(4) *Michigan Journal of International Law* 1143, 1150; John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 38(3) *International Migration* 31, 33.

⁹¹ Mary A Young, 'The Smuggling and Trafficking of Refugees and Asylum Seekers: The International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crime' (2003) 27 *Suffolk Transnational Law Review* 101, 123.

⁹² Marika McAdam, 'The Antics of Semantics in International Law' (2018) 11 *Anti-Trafficking Review* 125, 125.

[133] Furthermore, because the *Trafficking in Persons Protocol* affords greater protection, States ‘have additional incentives to categorise the individuals as smuggled rather than trafficked’.⁹³ Adding to this problem is the fact that illegal entry and smuggling of migrants are generally much easier to detect and prosecute than trafficking in persons. This means that many more persons are treated as smuggled migrants and ‘illegal immigrants’ rather than potential victims of trafficking or, as the case may be, as asylum seekers or refugees. ‘The trafficking issue is far more complex than envisaged by policy makers’,⁹⁴ notes Susanne Kneebone, and law enforcement, border control, and asylum authorities are often not well trained or equipped to identify instances of trafficking.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.5 Subject of criminalisation

[134] There has been significant debate about the kinds of perpetrators that are meant to be the target of the smuggling of migrants offences or, in other words, the subject of criminalisation. These debates concern (1) the extent to which relevant offences focus on (and are limited to) organised criminal groups, (2) the (non-)criminalisation of smuggled migrants and other migrants in an irregular situation, and (3) the involvement of non-governmental organisations (NGOs) in assisting irregular migrants, especially rescuing them at sea.

III.5.1 Focus on organised criminal groups

[135] The *Smuggling of Migrants Protocol* supplements the UNTOC, a Convention seeking ‘to prevent and combat transnational organised crime’ (Article 1). This special relationship along with remarks found in the preamble of the Protocol highlights the fact that the main focus of the Protocol, especially of its criminalisation provisions, is on organised criminal groups involved in the smuggling of migrants. The *Legislative Guides* also note that it ‘is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organised criminal groups [...]’.⁹⁵

[136] The definition of smuggling of migrants in Article 3(a) of the Protocol and the criminalisation requirements of Article 6 of the Protocol make no express reference to organised crime or to ‘organised criminal groups’ (as defined in Article 2(a) of the UNTOC). Elements such as the ‘financial or other material benefit’ requirement under Articles 3(a) and 6(1) of the Protocol as well as references to ‘organising or directing other persons to commit an offence’ (Article 6(2)(c)) are, however, indications that the Protocol’s intention is to capture groups and individuals seeking to profit, directly or indirectly, from the smuggling of migrants. This interpretation is also supported by the *Travaux Préparatoires*, which note that the offences under Article 6 ‘should be seen as being part of the activities of organised criminal groups’.⁹⁶

[137] While this is neither advocated nor applied by the Protocol (but occasionally raised by official sources and in the literature) limiting the focus on organised criminal groups as perpetrators and subjects

⁹³ Mary A Young, ‘The Smuggling and Trafficking of Refugees and Asylum Seekers: The International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crime’ (2003) 27 *Suffolk Transnational Law Review* 101, 123.

⁹⁴ Susan Kneebone, ‘The Refugee–Trafficking Nexus: Making (Good) the Connections’ (2010) 29(1) *Refugee Survey Quarterly* 137, 138.

⁹⁵ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 340 [28].

⁹⁶ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 489.

of criminalisation fails to recognise that smuggling of migrants takes many forms and involves a great range of actors. Myths about transnational organised crime syndicates organising smuggling ventures around the world and generating benefits in the millions or billions of dollars do not correspond with the reality of most smuggling ventures and of the perpetrators involved. Many smuggling operations are low key ventures, many smugglers are amateurs and opportunists, and most smuggling networks are only loosely connected and do not have the hallmarks of mafia-style, hierarchical organisations. Many smugglers only operate locally and specialise in offering irregular migration in a particular region or across selected borders.⁹⁷

[138] Instead, notes, for instance, Michael Collyer,

many migrants and refugees are assisted by what [has been referred to] as ‘cross-border cottage industries’; individuals or small groups who see an opportunity to profit from the presence of irregular migrants by assisting them to cross an individual border or difficult stretch of terrain. These patterns have been identified much more recently in the Mediterranean.⁹⁸

[139] Gabriela Sanchez similarly notes that evidence shows

that worldwide smuggling is becoming increasingly fragmented. Most smuggling efforts are in hands of local, independent operators who offer migrants affordable or low-cost options that cover specific, short segments of their journeys (e.g., pay-as-you-go services). This leads most migrants to enter into agreements with multiple facilitators during their journeys, which on the one hand may reduce up-front costs, but most importantly eliminates or limits the need for hierarchical, network-like forms of smuggling.⁹⁹

[140] Unless it is done by air, smuggling over long distances is commonly done in stages, involving different smugglers, with long breaks and waiting times, which can take weeks, months, or even years, between border crossings. ‘There are many different ways of smuggling migrants’, notes UNODC,

they range from simple to complex, from safe to dangerous and from cheap to very costly. The level of safety and ease of reaching the destination are dependent on the amount of money paid. Migrants with little financial means may opt for a ‘pay-as-you-go’ package in which they pay bit by bit for different parts of the journey to smugglers who may not be linked with one another. These migrants are more likely to become stranded and be exposed to abuse. The more comprehensive ‘package deals’ may be quicker, safer and have a higher guarantee of success, but they can also be considerably more expensive.¹⁰⁰

[141] The common ‘pay-as-you-go’ pattern is sometimes referred to as ‘fragmented migration’. Such migration, adds Collyer, ‘may be presented as having a linear logic, an intention to reach a particular end point, that was completely absent at its outset. Subsequent stages often develop out of disappointment or danger encountered at earlier stages.’¹⁰¹ In fact,

the destinations available to an individual migrant or refugee are frequently determined by the financial resources they can mobilise. They may therefore reach intermediary destinations with very limited resources and are much more vulnerable to exploitation in the labour market or in the organisation of

⁹⁷ Gabriela Sanchez, *Five Misconceptions about Migrant Smuggling*, Policy Brief 2018/07 (European University Institute, Robert Schumann Centre for Advanced Studies, May 2018) 1–2; Angeliki Dimitriadu, ‘The Interrrelationship between Trafficking and Irregular Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 64, 65.

⁹⁸ Michael Collyer, ‘Cross-Border Cottage Industries and Fragmented Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 19 with further references.

⁹⁹ Gabriela Sanchez, *Five Misconceptions about Migrant Smuggling*, Policy Brief 2018/07 (European University Institute, Robert Schumann Centre for Advanced Studies, May 2018) 2.

¹⁰⁰ UNODC, ‘Smuggling of migrants: the harsh search for a better life’ (2024) <<https://www.unodc.org/toc/en/crimes/migrant-smuggling.html>>; see also UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 9 [45].

¹⁰¹ Michael Collyer, ‘Cross-Border Cottage Industries and Fragmented Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 19 with further references.

onward migration. At each stage they must negotiate separately for onward passage, sometimes spending many months in intermediary locations. It is during these periods that they come to know the border crossing operations better and are more likely to encounter the much smaller scale ‘cottage industry’ operations.¹⁰²

[142] For the same reasons, costs and profits for smugglers vary greatly and estimates about the total proceeds generated by smuggling activities in any one country, region, or globally are difficult to make and often unreliable. Although the ‘financial and material benefit’ is a defining element of smuggling of migrants, it is not advisable to limit criminal offences along with enforcement and prosecution measures to smuggling activities involving organised criminal groups; this should instead, as shown below, be viewed as an aggravating circumstance.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.5.2 Non-criminalisation of smuggled migrants

[143] The subject of the smuggling of migrants offence, as its name suggests, is the smuggler, who procures or otherwise facilitates another person’s (the migrant’s) illegal entry. The *Smuggling of Migrants Protocol* is not criminalising smuggled migrants, which is stated expressly in its Article 5. The *Legislative Guides* stress that ‘it is the smuggling of migrants and not migration itself which is the focus of criminalisation’,¹⁰³ ‘even in cases where it involves entry or residence that is illegal under the laws of the State concerned [...]’.¹⁰⁴ The 2002 EU Council Directive has been widely criticised for failing to include and express and binding non-criminalisation clause, similar to that of Article 5 of the *Smuggling of Migrants Protocol*. The UNHCR notes that this results in

the unjust penalisation of asylum-seekers and refugees on account of irregular entry [...]. This is inconsistent with the Smuggling Protocol (Article 5), to which the European Union is a Party, and which mandates that migrants and people seeking international protection, who are themselves the object of people smuggling activities, cannot be liable to criminal prosecution for smuggling offences under the Protocol on that basis.¹⁰⁵

[144] Article 5 of the Protocol upholds the principle that smuggled migrants should not be criminalised merely for being the object of the offence of smuggling of migrants, an obligation that closely resembles similar non-criminalisation principles in international refugee law. Article 5 reinforces the Protocol’s position that ‘the smuggled migrant is seen as the “object” of the smuggler’s conduct, and not as an agent of the smuggling process. This is why the fact of being smuggled should never be blamed on’ the smuggled migrant.¹⁰⁶

[145] The Protocol thus recognises that smuggled migrants (who are frequently asylum seekers, including refugees) are often unable to comply with relevant domestic legal and regulatory requirements relating to immigration, transportation, and emigration. It is accepted that persons fleeing from persecution, emergencies, and other hardship are usually unable to obtain, keep, and renew relevant

¹⁰² Michael Collyer, ‘Cross-Border Cottage Industries and Fragmented Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 19–20 with further references.

¹⁰³ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations 1st edn 2004) 347 [50].

¹⁰⁴ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 340 [28].

¹⁰⁵ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 4 [11].

¹⁰⁶ Alessandro Spina, ‘Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 33, 38.

travel documents and permits, engage in lengthy bureaucratic emigration and immigration procedures, and that they may at times have little choice but to cross international borders unlawfully, often facilitated by migrant smugglers.¹⁰⁷

[146] Article 5 does not grant blanket immunity to smuggled migrants, it merely aims to preclude States Parties from subjecting smuggled migrants to criminal prosecution simply for their involvement in having been smuggled. Smuggled migrants may nevertheless be prosecuted for non-smuggling related offences. For example, migrants who cause property damage or harm to others in the course of being smuggled can be prosecuted for such offences.¹⁰⁸ They may also be prosecuted if they are involved in smuggling others for profit as well as themselves.¹⁰⁹ The Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime has noted that migrants

could be prosecuted for immigration or document-related offences criminalized under national legislation. Similarly, while a smuggled migrant cannot be prosecuted for smuggling him or herself, he or she would not be immune from prosecution for immigration, transport-related or other offences, criminalized under national legislation or the criminalisation requirement under the Smuggling of Migrants Protocol for smuggling another person.¹¹⁰

[147] There has been some debate as to whether the *Smuggling of Migrants Protocol* supports or permits the criminalisation of the irregular entry of a smuggled migrant. The criminal laws or immigration laws of some States set out offences, punishable by criminal sanctions, to enter their territory irregularly; i.e., without complying with the relevant entry rules and regulations. The *Legislative Guides* note that:

The Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences: article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalization of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organised criminal groups¹¹¹

[148] Article 6(4) leaves the decision whether to criminalise irregular entry to States Parties,¹¹² noting that ‘nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.’ It is important to note though that Article 6(4) ‘is not to be interpreted as rendering article 5 [...] nugatory’ as it relates to the establishment of offences under Article 6, not to the non-criminalisation clause.¹¹³ In other words: ‘States parties may establish offences under their domestic laws as long as such offence are not in breach of article 5’.¹¹⁴

¹⁰⁷ See 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) *International Journal of Refugee Law* 39, 44; Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Nijhoff, 2003) 16–17.

¹⁰⁸ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 389.

¹⁰⁹ UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations 2010) Tool 5.3 Non-criminalization; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 359.

¹¹⁰ UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 4 [12].

¹¹¹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 347 [50].

¹¹² Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 47.

¹¹³ Pablo Rodríguez Oconitrillo, *Non-criminalization of smuggled migrants: Notes on the interpretation of article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air* (UNHCR, 2014) 21.

¹¹⁴ Pablo Rodríguez Oconitrillo, *Non-criminalization of smuggled migrants: Notes on the interpretation of article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air* (UNHCR, 2014) 21.

[149] Criminalisation of irregular entry is outside the scope of the Protocol, because this is ‘not part of the activities of organised criminal groups’¹¹⁵ and because criminalisation conflicts with the Protocol’s purpose to protect the rights of smuggled migrants.¹¹⁶ Article 6 also does not cover situations where smuggled migrants procure, provide, or possess fraudulent travel or identity documents to enable their own smuggling or to remain in the State concerned unlawfully.¹¹⁷ The *Travaux Préparatoires* state that mere possession of a fraudulent document for this purpose falls outside the scope of Article 6 and thus should not lead to a criminal prosecution.¹¹⁸ The EU Fundamental Rights Agency has also warned against criminalising mere illegal entry, noting that

[t]he use of criminal sanctions and imprisonment to fight irregular migration harms not only the persons concerned, but also casts a negative light on how society as a whole perceives them. Migrants lacking permits to stay may be committing an offence and are, therefore, often unfairly seen as criminals, which makes them more vulnerable to exploitation and abuse.¹¹⁹

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.5.3 NGOs and private vessels

[150] Ever since the development of the 2002 EU Council Directive and Framework Decision there have been concerns about implications for civil society organisations and private individuals and businesses who engage with migrants in an irregular situation.¹²⁰ These concerns stem from the absence of any ‘financial gain’ element in the criminalisation requirements of the EU framework.¹²¹

[151] A particularly contentious issue in the political and public debates about smuggling of migrants has been the work of non-governmental organisations (NGOs) that rescue migrants at sea and transport them to shore. Such initiatives were set up partly to compensate for the progressive reduction of search and rescue missions in the Mediterranean by the EU and its Member States.¹²² Through private donations and other fundraising activities, several NGOs have hired or bought ships that rescue of smuggled migrants who are travelling on unseaworthy vessels or whose ships have already sunk. Once

¹¹⁵ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 489.

¹¹⁶ Valsamis Mitsilegas, ‘The normative foundations of human smuggling: Exploring the fault lines between European and international law’ (2019) 10(1) *New Journal of European Criminal Law* 68, 70–71.

¹¹⁷ Pablo Rodríguez Oconitrillo, *Non-criminalization of smuggled migrants: Notes on the interpretation of article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air* (UNHCR, 2014) 15, 18.

¹¹⁸ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 489

¹¹⁹ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 2.

¹²⁰ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 12; Jennifer Allsopp and Maria Giovanna Manieri, ‘The EU Anti-Smuggling Framework: Direct and Indirect Effects on the Provision of Humanitarian Assistance to Irregular Migrants’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 81, 88.

¹²¹ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 26.

¹²² John David Janer Torrens, ‘Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organisations: Migrant Smuggling or Humanitarian Assistance?’ (2020) 8 *Journal of International Law and International Relations* 381, 383–384; Eugenio Cusumao, ‘Straightjacketing migrant rescuers? The code of conduct on maritime NGOs’ (2019) 24(1) *International Politics* 106, 107; Forensic Oceanography, *Blaming the rescuers: Criminalising solidarity, re-enforcing deterrence* (University of London, June 2017) 23.

taken onboard, the NGOs usually provide the migrants with basic medical assistance, food and clothing, and then try to find a destination port where the migrants can safely disembark.¹²³ Presently most reports relate to vessels operating in the Mediterranean, though there are other examples of similar ventures taking place in Southeast Asia, the Caribbean, and other parts of the world.

[152] The problem is not limited to NGOs, but also extends to other private vessels (such as merchant vessels, cruise ships, private yachts and motorboats etc) who encounter smuggled migrants in distress. The UN Special Rapporteur on the Human Rights of Migrants notes that

private vessels could potentially provide invaluable assistance to migrants in distress at sea. Border guards mentioned to the Special Rapporteur that boats in distress are often sighted by private vessels prior to getting into danger. However, the criminalization of migration has contributed to the reluctance of private vessels in assisting migrants in distress. In particular, known difficulties in disembarking migrants, the high costs associated with such intervention, and the lack of cooperation by States with private entities seeking to provide such humanitarian assistance, as well as the potential repercussions for private individuals, has resulted in the reluctance of private vessels to take responsibility for boats in distress, thus compounding the risk of death at sea.¹²⁴

[153] In circumstances where NGO vessels repeatedly rescue large number of smuggled migrants, some destinations have become reluctant to permit their disembarkation. As a result, some vessels had to travel long distances, negotiate with multiple destinations, and wait long periods until they were able to find a port where the migrants could safely disembark.

[154] In several instances, politicians and officials have accused NGOs of effectively assisting migrant smugglers by taking smuggled migrants to their intended destination.¹²⁵ Some States as well as Frontex (the European Border and Coast Guard Agency) have made statements suggesting that NGO rescue vessels act as ‘pull factors’ for irregular migrants and further fuel smuggling activities¹²⁶ — although several studies have found no actual evidence for these effects.¹²⁷

[155] Such statements are often tied to wider opposition to search-and-rescue (SAR) missions by both NGOs as well as State authorities or international organisations, which ‘carry the stigma of increasing the departures and, therefore, the deaths along the immigration routes and these statements were, and still are today, paradigmatic of an attitude scattered among several influential stakeholders in believing that the SARs create an unintended pull factor.’ There is, however, no evidence that establishing SAR

¹²³ For further details see, for example, Domingo Torrejon, ‘Uncertainty, alter and distress: The precarious position of NGO search and rescue operations in the central Mediterranean’ (2017) 5 *Paix et Sécurité Internationale – Journal of International Law and International Relations* [s.p.]; Eugenio Cusumano and Matteo Villa, ‘From “Angels” to “Vice Smugglers”; the Criminalisation of Sea Rescue NGOs in Italy’ (2021) 27 *European Journal on Criminal Policy and Research* 23, 25–28.

¹²⁴ UN Human Rights Council, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, report of the Special Rapporteur on the human rights of migrants, François Crépeau*, UN Doc A/HRC/23/46 (24 April 2013) 12 [46].

¹²⁵ See, for example, Dominik Straub and Nina Weissensteiner, ‘Ermittlungen gegen Helfer im Mittelmeer’, *Der Standard* (online) (28 April 2017); Eugenio Cusumao, ‘Straightjacketing migrant rescuers? The code of conduct on maritime NGOs’ (2019) 24(1) *International Politics* 106, 108.

¹²⁶ See further, Domingo Torrejon, ‘Uncertainty, alter and distress: The precarious position of NGO search and rescue operations in the central Mediterranean’ (2017) 5 *Paix et Sécurité Internationale – Journal of International Law and International Relations* [s.p.]; Forensic Oceanography, *Blaming the rescuers: Criminalising solidarity, re-inforcing deterrence* (University of London, June 2017) 17–20; Eugenio Cusumano and Matteo Villa, ‘From “Angels” to “Vice Smugglers”; the Criminalisation of Sea Rescue NGOs in Italy’ (2021) 27 *European Journal on Criminal Policy and Research* 23, 28–30.

¹²⁷ Eugenio Cusumao, ‘Straightjacketing migrant rescuers? The code of conduct on maritime NGOs’ (2019) 24(1) *International Politics* 106, 106; Council of Europe, Commissioner for Human Rights, *Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe*, Recommendation (Council of Europe, February 2024) 12; Forensic Oceanography, *Blaming the rescuers: Criminalising solidarity, re-inforcing deterrence* (University of London, June 2017) 25–31; Eugenio Cusumano and Matteo Villa, ‘From “Angels” to “Vice Smugglers”; the Criminalisation of Sea Rescue NGOs in Italy’ (2021) 27 *European Journal on Criminal Policy and Research* 23, 34–37.

areas along the Mediterranean migrant smuggling routes affect the level of departures or increase deaths at sea.

[156] In a 2024 report on the assistance provided NGOs and other human rights defenders to migrants in an irregular situation in Europe, the Council of Europe Commissioner for Human Rights noted:

The current trend towards repression of human rights defenders assisting refugees, asylum seekers and migrants coincides with what the Commissioner has identified as progressively more restrictive and non-human rights compliant asylum and migration policies in Europe. These policies have often been characterised by their strong focus on preventing irregular arrivals, restricting access to asylum procedures, and the externalisation of member states' responsibilities to third countries. [...]

Those who assist refugees, asylum seekers and migrants may be seen by states as an obstacle to the implementation of asylum and migration policies focused on deterrence and security, and therefore faced with hostility. The rolling back of human rights which is often part and parcel of states' policies in this area also leads to measures explicitly or implicitly targeting those helping refugees, asylum seekers and migrants to access and realise these rights.¹²⁸

[157] There have also been reports of captains and organisers of NGO vessels being prosecuted for facilitating irregular migration.¹²⁹ The Commissioner's report further noted:

There have been numerous instances of people providing humanitarian assistance or engaging in human rights work being accused of, charged with, and prosecuted for aiding, abetting or facilitating irregular migration in various forms. In many cases, human rights defenders who have been charged with smuggling-related offence have acted in immediate response to the risk of loss of life or serious harm, at sea or on land. Others have been charged with facilitation-related offence for offering food, clothes or shelter, or just for giving someone in an irregular situation a lift in their car. Such proceedings often fail to make an appropriate distinction between those acting with criminal intent and those acting to defend human rights.

[...] [T]here are some indications that the overwhelming majority of cases of human rights defenders charged with smuggling or facilitation are eventually dropped or the defendants acquitted. Additionally, domestic bodies, like the French Constitutional Council and the Italian Constitutional Court, have delivered judgments which call into question broad-ranging approaches to the criminalization of smuggling or facilitation used by member states. Even if criminal proceedings for smuggling or facilitation of irregular migration rarely lead to convictions, their practical effect is often to sap the energy, time, financial resources and will of human rights defenders, and forcing them to devote significant efforts to their case, thus preventing them from fully continuing their human rights work. In this way, criminal proceedings in relation to smuggling or facilitation have become one of the most blatant and visible forms of harassment of human rights defenders helping refugees, asylum seekers and migrants in Europe.¹³⁰

[158] So long as NGOs do not intend to make a financial or other material benefit from these activities—and there are no reports that they do—these rescue missions and the subsequent transportation to a safe destination do not amount to smuggling of migrants. In June 2019, the Council of Europe Commissioner for Human Rights pointed out that it is not reasonable to believe that NGOs operating in the Mediterranean are engaged in the smuggling of migrants.¹³¹ Their activities fall into the category of 'humanitarian reasons' and altruistic ventures which the drafters of the Protocol expressly sought to exclude from the scope of criminalisation.¹³² In 2014 and again in 2018, the UN High

¹²⁸ Council of Europe, Commissioner for Human Rights, *Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe*, Recommendation (Council of Europe, February 2024) 10–11.

¹²⁹ John David Janer Torrens, 'Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organisations: Migrant Smuggling or Humanitarian Assistance?' (2020) 8 *Journal of International Law and International Relations* 381, 387–388; Forensic Oceanography, *Blaming the rescuers: Criminalising solidarity, re-inforcing deterrence* (University of London, June 2017) 20–21.

¹³⁰ Council of Europe, Commissioner for Human Rights, *Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe*, Recommendation (Council of Europe, February 2024) 14–16.

¹³¹ Council of Europe Commissioner for Human Rights, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean* June 2019, 37.

¹³² UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 469, 489; John

Commissioner for Human Rights (OHCHR) issued ‘principles and guidelines’ which, inter alia, call on States to adopt or amend any domestic legislation that could penalise individuals and organisations who rescue migrants at sea.¹³³

[159] The legal position is different under the 2002 EU Council Directive which, by default, criminalises any individual or organisation assisting others to enter into a Member State unlawfully. As already mentioned, the humanitarian exemption clause enables Member States to refrain from imposing sanctions for cases where the aim is to provide humanitarian assistance but this clause is optional. A study published in 2020 shows that only six States exempt organisations and individuals who assist smuggled migrants on humanitarian grounds from punishment.¹³⁴ The EU Agency for Fundamental Rights has also called on Member States to ‘exclude punishment for humanitarian assistance at entry (rescue at sea and assisting refugees to seek safety) as well as the provision of non-profit humanitarian assistance (e.g. food, shelter, medical care, legal advice) to migrants in an irregular situation.’¹³⁵ The Council of Europe Commissioner for Human Rights adds that:

Member states often do not recognise, in law, policy or practice, that many forms of assistance constitute activities to promote the protection of human rights or contribute to the elimination of violations in relation to refugees, asylum seekers and migrants, and thus fall within the scope of human rights defence. This includes search and rescue at sea, which directly impacts on the protection of the right to life. The provision of humanitarian assistance, including the provision of food, water, clothes and shelter, similarly protects the right to life and human dignity and helps to ensure the enjoyment of basic social and economic rights. Helping people to obtain access to legal processes, including asylum procedures, and providing them with expert advice and legal help are also clearly connected to ensuring the right to access to courts. The same goes for challenging non-human rights compliant practices and policies by states, such as through litigation or advocacy. Ensuring transparency and accountability in relation to asylum and migration policies, including monitoring and reporting, are crucial activities to uphold human rights.¹³⁶

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.6 Enabling and assisting to remain unlawfully

[160] Article 6(1)(c) of the *Smuggling of Migrants Protocol* criminalises persons who enable non-citizens and non-permanent residents to remain in the host State unlawfully. Unlike the smuggling of migrants offence under paragraph (a), this offence also covers situations in which the migrants entered the host country regularly. The intent of this offence is

to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors’ permits or visas, but then resorting to illegal means to enable them

David Janer Torrens, ‘Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organisations: Migrant Smuggling or Humanitarian Assistance?’ (2020) 8 *Journal of International Law and International Relations* 381, 396

¹³³ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (OHCHR 2014) 15; OHCHR, *Principles and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations* (OHCHR, 2018).

¹³⁴ John David Janer Torrens, ‘Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organisations: Migrant Smuggling or Humanitarian Assistance?’ (2020) 8 *Journal of International Law and International Relations* 381, 390–391.

¹³⁵ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 16.

¹³⁶ Council of Europe, Commissioner for Human Rights, *Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe*, Recommendation (Council of Europe, February 2024) 9.

to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorisations to enter.¹³⁷

[161] The conduct required to be criminalised consists simply of committing any act that amounts to enabling the illegal stay of another person who lacks the necessary legal status or authorizations.¹³⁸ The object of the offence is any person who is not a national or permanent resident. The illegal means under subparagraph (c) may involve, for instance, the harbouring or concealing of persons to avoid their apprehension by law enforcement, immigration or other authorities, though there is no requirement that the other person needs to be hidden in any way. Anne Gallagher and Fiona David further use the example of

the many diverse operators in the so-called regularization business that provide migrants with fraudulent alternatives to legitimizing and extending their residency through the sale of 'refugee case histories' and national insurance numbers as well as bogus college schemes and marriage arrangements.¹³⁹

[162] The mental element found in the *châpeau* of Article 6(1) requires proof of intention in addition to the purpose to obtain, directly or indirectly, a financial or other material benefit. The *Legislative Guides* note that there must be an 'intention to commit whatever act is alleged as having enabled illegal residence'.¹⁴⁰ There is no additional requirement that an accused knew or was aware that the smuggled migrant was not a national or permanent resident of the host state.¹⁴¹

[163] Article 1(1)(b) of the 2002 EU Council Directive similarly requires Member States to criminalise intentionally assisting one or more persons who are not nationals of a Member State to reside in the territory of a Member State unlawfully. Unlike the facilitation offence under paragraph (a), but like Article 6(1)(c) of the *Smuggling of Migrants Protocol*, this offence further requires that the accused acts 'for financial gain'. Unlike Article 6(1)(c), there is no requirement that the assistance is provided 'intentionally'.

[164] The EU Agency for Fundamental Rights (FRA) critically remarks that:

EU Member States do not, however, necessarily limit punishment to cases in which a person intentionally conceals a migrant to prevent his or her removal. [...] As a result, migrants can rent flats only informally, which exposes them to a greater risk of abuse and exploitation. They may be forced to pay a high rent for substandard accommodation. In return for housing, migrant women in an irregular situation are particularly vulnerable to sexual exploitation and abuse.¹⁴²

[165] Consequently, the FRA stresses that it should be made 'clear that renting accommodation to migrants in an irregular situation without the intention to prevent the migrant's removal should not be considered facilitation of stay, while ensuring that the legal system punishes those persons who rent accommodation under exploitative conditions'.¹⁴³

[166] Article 3(1) of the 2023 proposal for a new EU Facilitation Directive merges the offence of enabling illegal stay the facilitation of illegal entry or transit offence. The proposed provision further requires that the accused requests, receives or accepts a financial or material benefit, seeks to obtain such a benefit, or that there is a high likelihood of causing serious harm.

¹³⁷ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 343 [36].

¹³⁸ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 343 [37].

¹³⁹ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 369.

¹⁴⁰ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 343 [38].

¹⁴¹ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 370.

¹⁴² EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (FRA, 2014) 13 [references omitted].

¹⁴³ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (FRA, 2014) 16.

[167] Various official reports have been highly critical of the requirement, especially under the existing EU Directive, to criminalise persons assisting migrants who reside in the country irregularly. The FRA notes that such offences ‘may discourage persons and organisations from providing assistance to migrants in an irregular situation and bar them from renting housing in the private market. This can force them into accepting precarious and insecure accommodation, sometimes at exploitative conditions.’¹⁴⁴ A 2016 report by the European Parliament pointed out that, unlike the situation of migrants whose illegal entry into a country is facilitated, there are

multiple reasons why migrants could fall into irregularity while residing in the territory of a Member State: refusal of an application for international protection or asylum; loss of a residence permit due to unemployment, exploitation or domestic violence; bureaucratic failures in processing residence or work permit applications, resulting in withdrawal or loss of status; as well as being born in the EU to parents who are undocumented.¹⁴⁵

[168] Furthermore, it needs to be noted that there is no express permission under Article 1(2) of the existing Directive or any other provision to make exemptions for humanitarian assistance to migrants in an irregular situation in the country. Member States may refrain from punishing facilitation of irregular stay if this is not done intentionally and/or for financial gain. The Directive, however, notes the FRA, does not require Member States to refrain:

Thus, the directive does not encourage the punishment of people who provide emergency shelter, food and other necessities to migrants in an irregular situation, as long as this is not done for financial gain. At the same time, it does not explicitly discourage or prohibit them from punishing such people. In contrast to emergency aid, renting accommodation involves a financial transaction. In some Member States, landlords risk punishment, under national law criminalising facilitation of stay, if they rent accommodation to migrants in an irregular situation.¹⁴⁶

[169] National laws in relation to criminalizing persons who enable or assist the unlawful stay of others along with and state practice in enforcing such laws appear to differ greatly between European States. While, on the one hand, some States exempt from punishment at least some forms of humanitarian assistance to irregularly staying migrants or allow the use of defences such necessity,¹⁴⁷ others have considered criminalizing landlords who fail to check the immigration status of their tenants. Such measures, stresses the FRA, ‘shift immigration law enforcement on to the general public, resulting in further reluctance to rent housing to migrants. This, in turn, increases migrants vulnerability to exploitation and the risk that they must accept substandard housing.’¹⁴⁸ The Council of Europe Commissioner for Human Rights expressed similar concerns, noting that such offences fuel

the criminalisation of persons, whether citizens or foreigners who engage with foreigners. The message which is sent is that contact with foreigners can be risky as it may result in criminal charges. This is particularly true for transport companies (which have difficulty avoiding carrying foreigners) and employers (who may be better able to avoid employing foreigners at all). Other people, going about their daily life, also become targets of this criminalisation such as landlords, doctors, friends etc. Contact with foreigners increasingly becomes associated with criminal law. The result may include rising levels of discrimination against persons suspected of being foreigners (often on the basis of race, ethnic origin or religion), xenophobia and/or hate crime.⁷⁴ The Council of Europe member states should reverse these trends and establish a human rights compliant approach to irregular migration.¹⁴⁹

¹⁴⁴ EU Agency for Fundamental Rights (FRA), *Fundamental rights of migrants in an irregular situation in the European Union*, Comparative report (FRA, 2011) 11-12.

¹⁴⁵ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 24.

¹⁴⁶ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 8.

¹⁴⁷ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 11.

¹⁴⁸ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 13.

¹⁴⁹ Council of Europe, Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper (Council of Europe, 2010) 40 [references omitted].

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.7 Types and methods of smuggling

[170] Despite its official title, referring to ‘land, sea and air’, the *Smuggling of Migrants Protocol* only contains special provisions relating to smuggling of migrants by sea (Articles 7, 8, and 9). There are no provisions relating specifically to smuggling by land (using motorvehicles, trains, or on foot) or by air (using aeroplanes). The Protocol contains criminalisation and other requirements relating to the use of ‘fraudulent travel or identity documents’ which apply regardless of the means used. The EU instruments make no reference to any means, types, or methods of smuggling.

III.7.1 Smuggling by sea

[171] Compared to irregular travel by land and air, globally, journeys by sea constitute only a small part of migrant smuggling. Nonetheless, due to the dangerous nature of this form of smuggling and the fact that individual smuggling vessels usually carry large numbers of migrants, it draws disproportionate attention from States and international and non-governmental organisations, and in media reporting.¹⁵⁰ Vessels used for smuggling are often overcrowded, poorly maintained or unseaworthy, and undersupplied with water, food, and lifejackets, use inadequate navigational equipment. All too frequently smuggling vessels become lost, sink, or require rescue, putting the lives of smuggled migrants at risk.¹⁵¹

[172] Much of the impetus for the *Smuggling of Migrants Protocol* originated in concern over smuggling by sea which is reflected in the inclusion of Chapter II and its three Articles. These stem from a proposal originally made by Italy to the International Maritime Organization (IMO) in 1997¹⁵² and were later integrated into the draft submitted by Austria to the United Nations calling for an international instrument against smuggling of migrants.

[173] Article 7 effectively functions as a statement, mandating that State Parties cooperate to the ‘fullest extent possible to prevent and suppress’ smuggling by sea. It also confirms the primacy of the international law of the sea as the central framework for addressing this form of smuggling.¹⁵³ It is within this framework, supplemented by the Protocol and obligations under international human rights and refugee law, that States Parties must adopt responses to smuggling by sea. These responses have broadly focused on two measures.¹⁵⁴ First, States may carry out interdictions of migrant smuggling vessels to prevent the arrival of smuggled migrants into their territory, or otherwise punish smugglers who have disembarked migrants and are seeking to leave. In the smuggling context, the term ‘interdiction’ (or sometimes ‘interception’) refers to the apprehension of a vessel at sea and subsequent actions that may be taken against it, such as searches, detention, disembarkation and/or arrest of persons on board, as well as push-backs.¹⁵⁵ Second, States must engage in search and rescue operations to assist

¹⁵⁰ UNODC, *Smuggling of Migrants by Sea*, Issue Paper (United Nations, 2011) 7.

¹⁵¹ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Smuggling of Migrants by Sea: Note by the Secretariat*, UN Doc CTOC/COP/WG.7/2015/2 (27 August 2015) 3 [20]–[21].

¹⁵² IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea*, IMO Doc LEG 76/11/1 (1 August 1997).

¹⁵³ See also UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 84.

¹⁵⁴ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 404 (hereafter Gallagher and David, *International Law of Migrant Smuggling*).

¹⁵⁵ Felicity Attard, ‘Combating the Smuggling of Persons by Sea under the UNCLOS High Seas Regime’ (2016) 6 *ELSA Malta Law Review* 27, 33; see also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 9.

persons in distress at sea (unlike interdiction, which is permitted, but not required). These obligations are independent of interdiction and apply to all persons, including smugglers and smuggled migrants. Nonetheless, in practice, interdiction and rescue operations are often carried out concurrently and States have often justified the interdiction and push-back of smuggling vessels under the pretence of ensuring safety at sea.¹⁵⁶

[174] The failure of the EU Council Directive to make any reference to search and rescue obligations has been criticised, inter alia by the EU Agency for Fundamental Rights (FRA), which has noted that '[t]he Directive fails to remind EU Member States of their obligation under international law to assist persons in distress at sea, regardless of their immigration status, nor that those who do so should not be punished under the directive.'¹⁵⁷

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.7.2 Smuggling by air

[175] 'The smuggling of migrants by air' explains a background paper prepared for the Working Group on Smuggling of Migrants of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime

refers to a specific transportation mode, usually involving commercial airlines, which is used to smuggle migrants close to or directly into a country of destination. The use of fraudulent documents and corruption play an important role in migrant smuggling by air, since formal procedures associated with air travel require the possession of travel and identity documents at check-in and immigration controls at both embarkation and destination points.¹⁵⁸

Smuggling by air is generally perceived as a safer mode of travel, offering high chances of success and low risk of detection. However, it tends to be more expensive than other smuggling methods. The costs associated with the production and acquisition of fraudulent documents, the costs for airfares and the demand for fast and effective smuggling methods explain the high fees charged by smugglers for smuggling by air. Nonetheless, the smuggling of migrants by air is not always an option, even for those who can afford it, as they must often receive extensive coaching and are instructed on how to present themselves and react to predictable situations. Therefore, they need to meet certain requirements, which, for example, families with children often do not.¹⁵⁹

[176] Civil aviation organisations as well as international human rights organisations have issued a range of guidance notes or regulations mostly aimed at commercial carriers, such as airlines. This material, for the most part, articulates on the one hand the obligation placed on cross-border carriers to check that their passengers are in possession of the required identity and travel documents and, on the other, reminds carriers of their obligations pertaining to irregular migrants (such as undocumented passengers) who are asylum seekers and refugees. Balancing these obligations can be challenging for carriers such as airlines, shipping companies, coach lines, and railway companies. This has also fuelled

¹⁵⁶ Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47(2) *Journal of Maritime Law & Commerce* 219, 240 (hereafter Attard, 'Smuggling Protocol').

¹⁵⁷ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 15.

¹⁵⁸ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 2 [3]; see further, UNODC *Migrant smuggling by air*, Issue Paper (UNODC, 2010) 4–11.

¹⁵⁹ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 3 [6].

concerns over the ‘hand-balling’ of what are effectively official control and law enforcement functions to private entities.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.7.3 Document fraud

[177] Smuggling of migrants is frequently associated with the use of fraudulent travel or identity documents. Research has shown ‘that a substantial percentage of identity-related crime is associated with offences that involve travel and identity documents that are committed with a view to facilitating organised criminal activities such as trafficking in persons and smuggling of migrants.’¹⁶⁰ As already mentioned, this is particularly common—but not limited to—smuggling by air where documents are needed for check-in, at immigration control, and at transfers through international airports.¹⁶¹

[178] The *Smuggling of Migrants Protocol* contains specific offences along with special provisions for smuggling of migrants involving the use of fraudulent travel or identity documents. The existing and proposed EU Directives do not contain such provisions. Article 6(1)(b) of the Protocol requires States Parties to criminalise (i) ‘producing a fraudulent travel or identity document’ and (ii) ‘procuring, providing or possessing such a document’. These activities should be criminalised when they are committed intentionally for the purpose of the smuggling of migrants, i.e. in order to procure illegal entry of a person into a State Party where that person is not a national or a permanent resident. Article 3(c) further defines ‘fraudulent travel or identity document’.¹⁶²

[179] Article 12 of the *Smuggling of Migrants Protocol* focusses on steps that States Parties can take in relation to document creation, issuance, and quality, with the ultimate goal of implementing processes that cannot be abused and producing documents that cannot be easily forged or fraudulently used.¹⁶³ Article 13 requires a State Party, where requested by another Party, to verify within a reasonable time whether a document purporting to have been issued by it is legitimate and valid.¹⁶⁴ The *Trafficking in Persons Protocol* contains two identical provisions in Articles 12 and 13 and two similar provisions can be found in Articles 8 and 9 of the *Council of Europe Convention on Action against Trafficking in Human Beings*.

¹⁶⁰ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Criminalization within the Scope of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UN Doc CTOC/COP/2008/4 (9 September 2008) 4 [12].

¹⁶¹ See further, UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 6–7 [25]–[34].

¹⁶² See further, Andreas Schloenhardt, ‘Article 6: Criminalization’ in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 576–579.

¹⁶³ See further, Matthew R Taylor, ‘Article 12: Security and Control of Documents’ in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 627–630.

¹⁶⁴ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations 1st edn 2004) 372; see further, Matthew R Taylor, ‘Article 13: Legitimacy and Validity of Documents’ in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 631–633.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.7.4 New and emerging patterns

[180] The debate about how fit the *Smuggling of Migrants Protocol* is to address new and emerging forms of smuggling of migrants and associated matters such as the use of the internet and social media to promote smuggling venture or to connect smuggled migrants to smugglers is only in its infancy and has not (yet) resulted in specific recommendations in relation to international law.

[181] It is no surprise that the internet and social media play an important and increasing role in promoting the service of migrants smugglers, facilitating the production and sale of fraudulent travel and identity documents, and in connecting smuggled migrants to smugglers, and connecting smugglers at different stages of the journey with each other. Similarly, financial transactions from smuggled migrants and their families to smugglers and between smugglers increasingly involve electronic means such as online banking and money transfers as well as alternative remittance systems (such as hawala or feiqian).

[182] These trends are not new and not unique to smuggling of migrants. They call for enhanced online investigation capabilities and clear use around the rules of electronic evidence, which are not well developed in many countries. Other international instruments, such as the Council of Europe *Convention on Cybercrime*,¹⁶⁵ include tools to address some of these issues.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.8 Money laundering and corruption

[183] Much of the available literature on smuggling of migrants focuses on the act of transporting irregular migrants across international borders. Similarly, most investigations, prosecutions, media reports, and public debates are centred quite narrowly on the smugglers and smuggling networks who physically guide or transport migrants from one country to another, or on the organisers and organisations that plan and oversee smuggling ventures across multiple countries. Less attention has been devoted to other factors and actors that facilitate irregular migration and the smuggling of migrants. This includes the financing (and finances) of smuggling operations, the associated costs and profits, the laundering of proceeds of smuggling of migrants, and the role of corruption in the context of smuggling of migrants.

III.8.1 Financing and proceeds of smuggling of migrants

[184] Smuggling of migrants is a profit-driven crime in which perpetrators engage for the purpose of obtaining, directly or indirectly, for themselves or for others, a financial or other material benefit. Smugglers seek to make money from persons willing or forced to migrate by facilitating their illegal entry into a country of which the migrants are neither nationals nor permanent residents. From a business perspective, migrant smugglers supply a service to clients who cannot access regular migration

¹⁶⁵ Opened for signature 23 November 2001, ETS No 185 (entry into force 1 July 2004).

channels, or who seek to avoid these channels, and who usually have no alternative but to rely on migrant smugglers.¹⁶⁶

[185] The smuggling of migrants, including the transportation and accommodation of irregular migrants, the production and procuring of fraudulent documents, and the human resources involved in such activities, can create considerable expenses, which need to be recouped from the smuggled migrants or, if this is not possible, from their families or friends. Smugglers are, by definition, motivated by the desire to obtain a financial or material benefit from their operations which means that in some cases smugglers charge excessive or exorbitant fees for their services and potentially generate enormous profits.¹⁶⁷ It has also been found that migrants sometimes receive guarantees from their smuggler if they are prepared to pay premium fees:

Such guarantees might imply that if the smuggled migrant is detected, he or she will be smuggled again without being charged extra costs. More sophisticated forms of guarantees also involve third parties, who are entrusted with the smuggling fee and only release it to the smuggler either entirely or in instalments in relation to agreed milestones. These guarantees are an important tool to attract further business and also allow smugglers to charge considerably higher fees. The use of guarantee schemes in long-distance smuggling operations also seems to indicate a high level of professionalism as well as high profits and good success rates.¹⁶⁸

[186] The UNODC has identified three main ways used to pay migrant smugglers for their services. The first way involves payments that are made by migrants to the smugglers or to others involved 'stage-by-stage' as the migrants proceed through transit countries and to the destination. Unless the smuggled migrant intends to physically carry the large quantities of cash to pay for each stage of the journey, funds are sent to the smuggled migrant when necessary from a third party in the country of origin or elsewhere. Secondly, money may be made available to the smuggled migrant on credit by a smuggler or another third party. This credit is usually payable upon arrival in the destination country. The third method involves full payment made upfront prior to departure.¹⁶⁹

[187] Investigations and prosecution are often focused solely on the transportation and illegal border crossing element of migrant smuggling venture and fail to look at the financial flows associated with smuggling of migrants. Wherever relevant and feasible, financial investigations should be conducted alongside those into the smuggling of migrants offence. Parallel financial investigations can assist in identifying the wider criminal network and additional participants in organised criminal groups, in revealing additional evidence in support of the prosecution of the predicate offence and in locating proceeds of crime enabling confiscation and seizure of assets.

[188] To prevent and disrupt payments made to migrants smugglers, some jurisdictions have introduced offences criminalising the financing or otherwise support of smuggling ventures. These offences frequently focus specifically on transactions made through alternative remittance systems, i.e. informal money or value transfer services that operate outside of regulated Western financial systems. The use of alternative remittance systems is particularly common in places where the official banking sector is not well developed, inaccessible, or simply too costly. For these reasons, it is a common method to transfer funds between migrant communities but also to send money from migrant families to smuggled

¹⁶⁶ Andreas Schloenhardt & Thomas Cottrell, 'Financing the Smuggling of Migrants in Australia' (2014) 38 *Criminal Law Journal* 265, 267; Andreas Schloenhardt, *Organised Crime and Migrant Smuggling: Australia and the Asia-Pacific*, Research and Public Policy Series No 44, Australian Institute of Criminology (2002) 15; Khalid Koser, 'Why Migrant Smuggling Pays' (2008) 46(2) *International Migration* 3, 5; UNODC, *Toolkit to Combat Smuggling of Migrants* (2010) Tool 1: Understanding the smuggling of migrants, 29.

¹⁶⁷ Andreas Schloenhardt and Thomas Cottrell, 'Financing the Smuggling of Migrants in Australia' (2014) 38 *Criminal Law Journal* 265, 267; Cat Barker, *The People Smugglers' Business Model*, Research Paper No 2, Parliamentary Library, Parliament of Australia (2013) 6; UNODC, *A Short Introduction to Migrant Smuggling* (UNODC, 2010) 23.

¹⁶⁸ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 9 [42].

¹⁶⁹ UNODC, *A Short Introduction to Smuggling of Migrants* (UNODC, 2010) 14.

migrants and to smugglers. Offences along with other measures targeting the financing and support of smuggling of migrants run the risk of criminalising transaction that are widespread, legal, and without alternative for many people and may thus affect large parts of the community.¹⁷⁰

[189] The *Smuggling of Migrants Protocol* makes express mention of the ‘financial or other material benefit’ that drives migrant smugglers, but contains no further reference to the finances and financing of smuggling of migrants.¹⁷¹ The UNTOC contains special provisions on the laundering of proceeds of offences under the Convention (Articles 6 and 7), which includes smuggling of migrants. The EU Council Directive and Framework Decision do not contain specific measures concerning the financing and finances of smuggling of migrants.

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.8.2 Corruption

[190] Smuggling of migrants could not occur on the large scale that it so often does without collusion between corrupt officials and smugglers and their associates. Corruption seriously undermines national and international efforts to prevent and suppress the smuggling of migrants.¹⁷² Corruption, including active or passive bribery, abuse of office, embezzlement, trading in influence, et cetera comes in many forms and can be systemic, institutional, or individual. It may occur at various points of a smuggling venture, including recruitment, transportation, illegal entry, or enabling illegal stay. Corruption also facilitates the falsification or use of fraudulent travel and identity documents and may occur after smugglers or smuggled migrants have been apprehended to facilitate their illegitimate release or to extort more money from smuggled migrants or their relatives. In other instances, corruption supports fraudulent adoption, marriage, or employment schemes and various other forms of fraud linked to smuggling of migrants.¹⁷³

[191] There is evidence that corruption is a significant predictor of smuggling of migrants out of a country because, like poverty, personal insecurity, and violence, it may be a push factor for emigration and thus create a market for migrant smugglers.¹⁷⁴ Corruption can, however, take place at any stage of the smuggling process, from origin, through transit, and in destination countries. Because it weakens existing systems and measures to protect borders, control immigration, protect refugees, and enforce the law, it can have an especially debilitating effect on efforts to curtail smuggling of migrants. Bribery and other forms of corruption are used to circumvent controls in place to prevent irregular migration and protect smuggling operations from law enforcement and prosecution.¹⁷⁵

[192] The considerable profits generated by smuggling of migrants make corruption possible on a large scale. Corruption is considered one of the main factors influencing the prices charged to migrants by smugglers, as well as smugglers’ changing *modi operandi*. The strengthening of police controls and border patrols may increase the risk of interception for smugglers who may then need to invest more in

¹⁷⁰ Andreas Schloenhardt and Thomas Cottrell, ‘Financing the Smuggling of Migrants in Australia’ (2014) 38 *Criminal Law Journal* 265, 285-286.

¹⁷¹ See further, Andreas Schloenhardt and Thomas Cottrell, ‘Financing the Smuggling of Migrants in Australia’ (2014) 38 *Criminal Law Journal* 265, 273-274.

¹⁷² UNODC, *Global Study on Migrant Smuggling* (2018) 50-51; IOM, *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base* (2016) 9.

¹⁷³ UNODC, *Corruption and the Smuggling of Migrants*, Issue Paper (United Nations, 2013) 3.

¹⁷⁴ UNODC, *Corruption and the Smuggling of Migrants*, Issue Paper (United Nations, 2013) 9.

¹⁷⁵ UNODC, *Corruption and the Smuggling of Migrants*, Issue Paper (2013) 9-10.

corruption in order to successfully manage their business. It may also bring them to change their routes and to try to recruit new corrupt officials.¹⁷⁶

[193] In addition to focusing attention on government officials, migrant smugglers can also find accomplices in the private sector. Smugglers often seek to corrupt or intermediates in key private sector businesses and organisations, such as commercial carriers, logistics and freight companies, employers, security service providers, education personnel, or ports and airport personnel. They may also find ways to infiltrate these private sector organisations. The utility of these private sector individuals lies in the fact that they may have confidential information required by the smugglers, or be capable of producing false documentation (proof of residency, certificate of employment, residency certificates, certificate of studies, etc.) in support of a visa, or immigration or refugee application. Individuals working for private security service providers at airport or other checkpoints can help smugglers and migrants avoid controls.¹⁷⁷

[194] While the *Smuggling of Migrants Protocol* contains no specific provisions pertaining to corruption, the corruption-related provisions under Articles 8 and 9 of the UNTOC apply to all offences under the Convention and its Protocols. The EU Council Directive and Framework Decision do not address the nexus between smuggling of migrants and corruption.

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.9 Aggravating factors

[195] Smuggling of migrants can take many forms, involves a great range of criminal elements, and can have serious consequences, sometimes resulting in death, physical and mental harm, or financial losses. Among the smuggled migrants may be children, refugees, and other vulnerable persons; it may also be associated with other crime types. One way to capture these different circumstances and ensure that more heinous forms of smuggling are punished more severely is to legislate aggravating offences or circumstances with higher statutory penalties and/or to articulate in legislation or guidelines aggravating factors that must be taken into consideration at the sentencing stage.

[196] There is much debate about the types of aggravating circumstances that ought to be recognised, yet there is limited guidance offered by international anti-smuggling of migrants frameworks and many differences between national approaches. The 2016 study commissioned by the CDCP noted that there is ‘no consistency in the types and range of aggravations recognised in the domestic laws of Council of Europe Member States, and there are some jurisdictions that have not legislated any aggravations beyond the basic smuggling offence.’¹⁷⁸

[197] Article 6(3) of the *Smuggling of Migrants Protocol* creates an obligation to incorporate aggravating circumstances into the offences established by the Protocol. Two sets of circumstances are expressly mentioned in subparagraphs (a) and (b). The aggravation in Article 6(3)(a) relates to circumstances ‘that endanger, or are likely to endanger, the lives or safety of the migrants concerned’.¹⁷⁹

¹⁷⁶ UNODC, *Corruption and the Smuggling of Migrants*, Issue Paper (2013) 13–14; Cat Barker, *The People Smugglers’ Business Model*, Research Paper No 2 (Parliamentary Library, House of Representatives of Australia, 2013) 16.

¹⁷⁷ UNODC, *Corruption and the Smuggling of Migrants*, Issue Paper (2013) 18; UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 8 [35]–[36].

¹⁷⁸ Council of Europe, CDCP, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 7.

¹⁷⁹ See also UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 41 [Art 6(a)].

The *Legislative Guides* note that ‘the most common occurrence to which this requirement is directed is the use of modes of smuggling, such as shipping containers, that are inherently dangerous to the lives of the migrants’ and call on States Parties to ensure ‘that legislation should be broad enough to encompass other circumstances, such as cases where fraudulent documents create danger’.¹⁸⁰ The UNODC’s *Toolkit to Combat Smuggling of Migrants* lists several other examples for situations that may endanger the lives or safety of smuggled migrants such as, ‘conditions in which migrants are smuggled if, for example, the boat, bus or car was particularly cold, wet, dry or crowded, or if the current at sea was particularly strong’ or if the smuggled migrants sent out are left unattended in a boat that is not unseaworthy.¹⁸¹

[198] The aggravation in Article 6(3)(b) relates to the way in which smugglers treat migrants, including the exploitation of smuggled migrants.¹⁸² The term ‘inhuman or degrading treatment’ is not further defined in the Protocol but reflects language used in international human rights instruments.¹⁸³ It is understood to also include torture and other cruel treatment or punishment.¹⁸⁴ Examples of such treatment include the ‘abuse of a child or a position of trust or authority’, ‘use of violence, threats or intimidation against migrants or their families [such as] hitting migrants to control them during travel’, or the use of minors in the commission of offences.¹⁸⁵ The acts of inhuman or degrading treatment may trigger criminal liability for other offences under national law, separately from the smuggling of migrants. The mention of ‘exploitation’ in the context of this aggravation provides a nexus to the *Trafficking in Persons Protocol*, where this term is used as an element in the definition of trafficking in persons under Article 3(a).¹⁸⁶ It must be noted though that exploitation is used as physical element in Article 6(3)(b) of the *Smuggling of Migrants Protocol*, whereas the *Trafficking in Persons Protocol* uses exploitation as a mental element.

[199] The 2002 EU Framework Decision includes aggravating factors punishable by custodial sentences with a maximum sentence of not less than eight years, for case that are committed as part of activities carried out by a criminal organisation, understood as a structured association of more than two persons established over a period of time; where the lives of the victims have been endangered.¹⁸⁷

[200] Article 6(3) of the *Smuggling of Migrants Protocol* does not provide an exhaustive list of aggravating circumstances and Article 34(3) of the UNTOC permits States Parties to create aggravations beyond those set out in the Protocol. The Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational

¹⁸⁰ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 346 [48]; see also UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 5: Legislative Framework, 24–25.

¹⁸¹ UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 5: Legislative Framework, 24–26; see also UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 41.

¹⁸² The UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) at 346 [48] note that this may also include ‘cases where fraudulent documents [...] lead to inhuman or degrading treatment.’

¹⁸³ UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217 (III) (10 December 1948) art 5; ICCPR, art 7.

¹⁸⁴ See further UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 42–44; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 75–380.

¹⁸⁵ UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 5: Legislative Framework, 24–25; see Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 382–383 for further examples.

¹⁸⁶ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 489.

¹⁸⁷ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 28.

Organized Crime also notes that it is good practice ‘for States to consider aggravating circumstances that go beyond those set out in the Smuggling of Migrants Protocol.’¹⁸⁸

[201] Common suggestions for additional aggravating circumstances include smuggling of unaccompanied minors and other vulnerable persons, smuggling by organised criminal groups, and smuggling of migrants causing death. The *Model Law against the Smuggling of Migrants* and the *Toolkit to Combat Smuggling of Migrants* set out further aggravating circumstances that legislators may wish to consider. This includes circumstances in which the offender takes advantage of or abuses a ‘particular vulnerability or dependency of the smuggled migrant for financial or other material gain.’¹⁸⁹ The Model Law provides the following two examples to illustrate the application of this aggravation:

Migrants, abandoned in the desert and with no other option, accept the services of a smuggler who happens to be passing by, but have to pay him or her three times the normally agreed price when departing from the nearest city.

An agent, as part of the smuggling ‘package of services’, arranges for the migrants to rent a rundown house that he owns in a transit city for a very inflated amount of rent, and to buy packages of food that he provides at greatly inflated prices, while the migrants wait for their net connection.¹⁹⁰

[202] The *Model Law* suggests a separate aggravation for instances in which ‘the offence involves serious injury or death of the smuggled migrant or another person, including death as a result of suicide’.¹⁹¹ In such cases, the smugglers may of course also be liable for distinct offences relating to assault or homicide. The *Model Law* further proposes the use of aggravating circumstances such as prior commission of the same or similar offences; commission as part of an organised criminal group; use of drugs, medications or weapons in the commission of the offence; smuggling a large number of migrants; smuggling by public officials, abuse of a position of authority; smuggling involving use of violence or threats against the migrant or their families; and confiscating or destroying travel or identity documents of smuggled migrants.¹⁹²

[203] Article 4 of the 2023 proposal for a new EU Council Directive sets out five ‘aggravated criminal offences’ for situations in which a person facilitates or publicly instigates unlawful entry, transit, or stay and, in addition

- (a) commits the offence within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA;
- (b) deliberately or by gross negligence causes serious harm to, or endangered the life of, the third-country nationals who were subject to the criminal offence;
- (c) commits the offence by use of serious violence;
- (d) the third-country nationals who were subject to the criminal offence were particularly vulnerable, including unaccompanied minors;
- (e) causes the death of third-country nationals who were subject to the criminal offence.¹⁹³

¹⁸⁸ UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 3 [10]; see also UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012*, UN Doc CTOC/COP/WG.7/2012/6 (27 June 2012) 3 [15].

¹⁸⁹ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 46 [Art 6(d)].

¹⁹⁰ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 46.

¹⁹¹ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 45 [Art 6(c)].

¹⁹² UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 47–50.

¹⁹³ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023) 12.

[204] The UNHCR has expressed concerns over some of the proposed aggravations, noting:

Most cases of criminalisation of migration concern people who drive boats who, often, are persons seeking international protection and who may be charged with aiding or abetting the irregular entry of others when they had no intent of obtaining a financial or material benefit, but whose primary interest was reaching safety and securing their own entry to seek asylum. In some cases, they may have acted under duress to prevent others, including often their own family members, from drowning.

It is particularly concerning that, in such cases, the aggravated criminal offences related to the conduct of smuggling, established under the proposed Directive, would often apply, particularly for cases when vulnerable people are on board (Article 4d) or for endangering lives (Article 4b). In cases of death (Article 4e), asylum-seekers and refugees acting under duress to steer the boat could face at least 15 years imprisonment (Article 6.4).¹⁹⁴

[205] Article 9 of the Proposal requires Member States to regard the following as aggravating circumstances which need to be taken into consideration by judicial authorities when sentencing persons who are found guilty of facilitating or publicly instigating unlawful entry, transit, or stay, including any of the aggravated offences under Article 4 and persons aiding, abetting, instigating and attempting such offences:¹⁹⁵

- (a) the criminal offence was committed by a public official when performing his or her duties;
- (b) the criminal offence entailed or resulted in the involvement of third-country nationals who were subject to the criminal offence in illegal employment as referred to in Directive 2009/52/EC of the European Parliament and of the Council;
- (c) the offender has previously been definitively convicted of criminal offences of the same nature under Articles 3, 4 or 5;
- (d) the criminal offence entailed or resulted in the exploitation or instrumentalisation of a third-country national who was subject to the criminal offence;
- (e) dispossessing the third-country nationals who are subject to the criminal offence of their identity or travel documents;
- (f) the criminal offence was carried out while carrying a firearm.

[206] The official material explains:

Since the adoption of the Facilitators Package in 2002, criminal networks involved in migrant smuggling have increasingly resorted to violence towards migrants and law enforcement authorities, endangering lives. The proposal introduces the definition of aggravated criminal offences (e.g., offence committed as part of an organised criminal group, causing serious harm or endangering life or health, causing death) to which there are corresponding higher level of criminal penalties. The minimum level of maximum penalties in the proposed Directive are higher than those provided for by the current Facilitators Package (which envisaged a maximum level of imprisonment of at least 8 years) and have been determined taking into account the overall regime of the penalties introduced by EU criminal law instruments. The main offence of facilitation would be punishable by a maximum level of imprisonment of at least 3 years, while aggravated offences (e.g. organised crime, use of serious violence) for at least 10 years and the most serious offences (causing death) 15 years.¹⁹⁶

[207] One element which frequently features as an aggravating factor in national smuggling offences is the 'financial or other material benefit element'. Indeed, the 2016 study of national smuggling of migrants laws in Council of Europe Member States revealed that a majority of States employ the

¹⁹⁴ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 5 [15]-[16].

¹⁹⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023) 13.

¹⁹⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023).

reference to ‘financial or other material benefit’ as an aggravating factor for smuggling of migrants offences.¹⁹⁷ This, however, runs contrary to the express purpose of the *Smuggling of Migrants Protocol* and the intention of its drafters. The 2016 study further remarked that:

The concern with this approach is that, in the absence of other legal exceptions, many countries criminalise the activities of persons aiding irregular migrants, including refugees and asylum seekers, for humanitarian reasons or persons aiding their family members in the migrant process without obtaining, or seeking to gain, any material advantage.¹⁹⁸

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

Mitigating circumstances

[208] A novelty of the 2023 Proposal is the inclusion of mitigating circumstances in Article 10 if ‘the offender provides the competent authorities with information which they would not otherwise been able to obtain, helping them to: (a) identify or bring to justice other offenders; or (b) find evidence.’ Commenting on this proposal, the UNHCR further suggest to

take into account mitigating circumstances such as those situations where the criminalised conduct occurred under duress or out of necessity, or situations which are not a clear cut and where the role of the offender in aiding the offence is minor, or situations in which the offender is a child below the age of 18 years.¹⁹⁹

III.10 Penalties and sanctioning

[209] Closely associated with the inclusion of aggravating circumstances to recognise more heinous forms of smuggling is the issue of (statutory) penalties, sentencing, and other sanctions for smuggling of migrants. The 2016 study commissioned by the CDCP revealed ‘striking differences in the types and spectrum of penalties (including fines and imprisonment) provided in domestic laws. While in some Member States the maximum penalty for the basic offence of smuggling of migrants is two years imprisonment, it reaches up to eight years in other jurisdictions.’²⁰⁰ The EU Agency for Fundamental Rights similarly notes that ‘[s]ome EU Member States punish facilitation of entry and stay with fines or imprisonment, others with both in combination. The penalty scales vary greatly.’²⁰¹

[210] The *Smuggling of Migrants Protocol*, in line with common practice of other transnational criminal law treaties, does not articulate or advocate specific sanctions, penalty ranges or the like. Such points are omitted in recognition of national sovereignty and differences in national criminal law systems and sentencing practice.

[211] Article 11 of the UNTOC, which must be read in conjunction with the Protocol, provides some, albeit very flexible guidance on the topic of sanctions. Article 11(1) leaves it to States Parties to determine the seriousness of the sanctions, a term which includes civil, administrative, and criminal

¹⁹⁷ Council of Europe, CDCP, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 6; see also EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 9.

¹⁹⁸ Council of Europe, CDCP, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 6.

¹⁹⁹ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 5 [16].

²⁰⁰ Council of Europe, CDCP, *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, CoE Doc CDPC (2016) 3 (27 May 2016) 6.

²⁰¹ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 9.

sanctions.²⁰² The flexible nature of the obligations imposed by paragraph 1 is due to the difficulties in harmonising penalties and sanctions across jurisdictions. Other articles of the UNTOC address specific types of sanctions. For example, Article 10(4) addresses sanctions for legal persons and Article 12 deals with confiscation. Article 11(4) addresses the execution of the sanctions and requires States Parties to ensure the courts ‘bear in mind the serious nature’ of the offences when considering the early release or parole. This paragraph should be interpreted in a broad sense, meaning any law, policy, or decision that may reduce the detention period imposed for an offence. From this perspective, while leaving substantial flexibility to each national system, the provision aims at limiting the possibility of reductions or modifications of the imprisonment sentences.

[212] The grave discrepancies between both statutory penalties and sentencing practice in different jurisdictions can play into the hands of criminal elements who may view jurisdictions with lower penalties and punishment as ‘easy targets’ for their operations. These discrepancies can also hamper international cooperation, especially if penalties do not meet the minimum threshold necessary to engage in mutual legal assistance, extradition, or other forms of cooperation.

[213] This observation is, however, not to be understood as a call for higher penalties, which is a frequent recommendation made by populist politicians and news media. Statutory penalties as well as sentences imposed on offenders must be proportionate and dissuasive. There is ample research on numerous crime types showing that raising statutory penalties is generally not an effective deterrent, especially if this is done in the absence of other measures aimed at preventing crime, reducing victimisation, and deterring would-be offenders.

[214] These principles are recognised in Article 1 of the 2002 EU Framework Decision, which notes that criminal penalties must be effective, proportionate, and dissuasive and may entail extradition. As mentioned, the Framework Decision sets out penalties only in those cases where facilitation is done for financial gain by a criminal organisation or lives of migrants are endangered. In these cases, the punishment should be a maximum sentence of not less than eight, or exceptionally six, years.²⁰³

[215] Article 6(1) of the 2023 proposal for a new EU Facilitation Directive reiterates the principles; the following subsection provide more detailed guidance on minimum penalties:

- (2) offences referred to in Article 3 (intentionally assisting unlawful entry, transit or stay for a financial or material benefit or with a high likelihood of causing harm; publicly instigating unlawful entry, transit or stay) must be punishable by a maximum term of imprisonment of at least three years.
- (3) offences referred to in Article 4(a) to (d) (committed by a criminal organisation, endangering the life of migrants, using serious violence, smuggling vulnerable persons) must be punishable by a maximum term of imprisonment of at least ten years.
- (4) offences referred to in Article 4(e) (causing death of migrants) including attempts to commit the criminal offence referred to in that provision, are punishable by a maximum term of imprisonment of at least fifteen years.²⁰⁴

[216] In addition to these penalties, Article 6(5) of the proposal encourages the use of additional sanctions and measures such as:

²⁰² Thea Coventry, ‘Article 30: Prosecution, Adjudication, and Sanctions’ in Cecily Rose, Michael Kubiciel, and Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press, 2019) 301, 303.

²⁰³ See also European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 24.

²⁰⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023) 12.

- (a) withdrawal of permits or authorisations to pursue activities which have resulted in committing the criminal offence, or prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the criminal offence was committed;
- (b) return after the enforcement of the penalty in a Member State, or to serve the penalty imposed, or part of it, in the third country of return, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;
- (c) prohibition to enter and stay on the territory of the Member States for an appropriate period of maximum 10 years, without prejudice to more favourable provisions that may be applicable by virtue of Union or national law;
- (d) exclusions from access to public funding, including tender procedures, grants and concessions;
- (e) fines;
- (f) freezing and confiscation of the proceeds derived from, and instrumentalities used for, the commission of the offence, in accordance with Directive 2014/42/EU of the European Parliament and of the Council.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.11 Prevention

[217] The smuggling of migrants is mostly perceived as a criminal justice issue and the existing international frameworks are preoccupied with criminalisation and law enforcement. Measures to prevent the smuggling of migrants—that is to stop smuggling before it happens—deter smugglers, and prevent would-be migrants from falling victim to smugglers only feature very marginally in international law and remain poorly developed—if indeed they exist at all—at the national level.

[218] Prevention efforts are a key part of a holistic response to the smuggling of migrants and a purpose of the *Smuggling of Migrants Protocol*.²⁰⁵ While almost every aspect of the Protocol can be viewed as having a preventive function, from criminalisation and cooperation at sea through to the return provisions, Article 15 of the Protocol expressly targets the causes of the phenomenon. The benefits of this aspect of prevention are clear: if done effectively, prevention can stop criminal elements from profiting from illegal activity, avoid potential harms to smuggled migrants, and reduce the costs of investigating and prosecuting offenders.²⁰⁶

III.11.1 Public awareness campaigns

[219] Article 15(1) of the *Smuggling of Migrants Protocol* requires States Parties to take measures to increase awareness of the risks of smuggling and the fact that it is a criminal activity frequently perpetrated by organised criminal groups for profit. The *Legislative Guides* note that Article 15(1) and (2), together, seek to inform migrants and others involved in smuggling of ‘the evils of organised crime in general and the smuggling of migrants in particular’.²⁰⁷ The ‘measures’ to be taken are not further explained and there is no indication how information programs should be designed and delivered. Article 13 of the 2023 proposal for a new EU Directive similarly asks Member States to raise public awareness by employing information campaigns, education programmes, and by working with other States and EU agencies.

²⁰⁵ *Smuggling of Migrants Protocol*, arts 2, 4.

²⁰⁶ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 372 [81].

²⁰⁷ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 372 [82].

[220] Awareness raising is a crucial element to prevent the smuggling of migrants, though research has shown that most awareness campaigns had little to no impact and, in some cases, were counterproductive. Thus far, most awareness campaigns were aimed at highlighting the risks, dangers, and costs of smuggling migrants and the hostile reception they may receive in destination countries. Creating fear appears to have been the main objective of most campaigns which seems to be, at best, a cynical and, at worst, a cruel method to confront the despair and desperation that is driving many migrants fleeing from persecution and poverty and who are generally left with no alternative to resorting to smugglers.

[221] Indeed, overly negative or one-sided information has been proven to be ineffective. Rather, campaigns should present a realistic and 'rational picture of migration'.²⁰⁸ Deterrence of would-be migrants has been a key goal of many public awareness campaigns but they do nothing to reduce demand. A 2016 publication notes:

[C]ommunicating the risks at a distant border point with Europe will have little impact on [the migrants'] decision to leave. If, through desperation and access to limited funds, they eventually reach the shores of the Mediterranean, being informed in advance will have little impact, as the risks of moving on may appear more attractive than the difficulties of returning home. Knowledge of difficulties is only an effective deterrent for those who try to come directly from their country of residence and this may only be a minority of irregular migrants and even refugees.²⁰⁹ [...] The structural organisation of long overland journeys into multiple fragmented sections means that policies of 'hostile environment'-style deterrence near the intended destination will have few knock-on effects on departures.²¹⁰

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.11.2 Informing would-be smuggled migrants

[222] Instead of broad-based scare campaigns, international organisations recommend providing targeted and accurate information to would-be migrants, explaining, on the one hand, the reality and risks associated with smuggling of migrants and irregular migration and, on the other, point them to alternative, actionable avenues so that they can make more informed decisions. As early as 2000, the UN Human Rights organisations stressed the importance of sharing information with migrants themselves, which is critical to protect the safety and rights of smuggled migrants.²¹¹ A background paper prepared for the Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime observes that '[g]ood practice involves assisting origin countries to provide accurate information to persons targeted for recruitment by smugglers'.²¹² Neither the *Smuggling of Migrants Protocol*, nor the 2002 EU Council Directive and Framework Decision and the 2023 proposal for a new EU Directive address this point.

²⁰⁸ UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations 2011) 46; UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 9.6.

²⁰⁹ Michael Collyer, 'Cross-Border Cottage Industries and Fragmented Migration' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 20.

²¹⁰ Michael Collyer, 'Cross-Border Cottage Industries and Fragmented Migration' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 21.

²¹¹ UN General Assembly, 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', UN Doc A/AC.254/27 (8 February 2000) [18].

²¹² UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and Good Practices in the Prevention of the Smuggling of Migrants*, UN Doc CTOC/COP/WG.7/2012/4 (23 March 2012) 6 [27].

[223] Furthermore, involving former migrants in information campaigns has proven successful in some situations, as has communication in the native language and appeal to the domestic culture. In the implementation of their prevention strategies, some countries have also benefitted from the support of local NGOs providing relevant documents and peer-to-peer information. The background paper suggests that information programmes that target potential migrants as well as would-be smugglers be conveyed in culturally sensitive and appropriate language, and be based on evidence.²¹³ The paper further observes that information campaigns that seek to deter migrants are unlikely to be effective if alternatives to smuggling are not provided, explaining that '[w]here people have no choice but to leave their homes, messages should not simply warn of the risks of using smuggling services, but should also provide information about where protection can be sought'.²¹⁴

[224] The relationship between smuggling of migrants and the availability of legal avenues of migration is a controversial and politically sensitive issue. There is room to further discuss solutions such as: institution of flexible arrangements to leave and return to a country; access to a certain number of legal pathways; implementation of policies of visa liberalisation; setting-up of 'hotspots' in source and transit countries; implementation of bilateral agreements with relevant source and transit countries; founding of education programmes; and, facilitation of legal migrants' mobility. However, all such measures depend on the willingness of States' to engage in a wider and objective discussion about the economic benefits of migration; the impact on local labour markets, support systems, and social cohesion; the capacity to integrate immigrants, including local language training; and so forth. It also requires evidence-based policy making on matters relating to all forms of migration and human mobility.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.11.3 Deterring would-be offenders

[225] Smuggling of migrants can be a 'high profit, low risk' activity. By definition, perpetrators engage in the smuggling of migrants 'for the purpose of obtaining, directly or indirectly, a financial or other material benefit'. Measures to deter migrant smugglers thus require a better understanding of the motivation of offenders, the profile of the individuals and groups involved in smuggling migrants, and their relationship to the smuggled migrants.

[226] Profiling and deterring smugglers is a fundamental aspect of prevention strategies. A comprehensive collection of studies, literature, and cases from relevant jurisdictions can give insight into the profile of smugglers and their motivations. Such information can then be used to develop strategies and incentives to deter would-be smugglers, increase the risk of detection, and reduce the profits they can achieve. The 2023 proposal for a new EU Directive somewhat addresses this issue when in Article 13 it calls for campaigns and programmes aimed at 'reducing the commission of the criminal offences'.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

²¹³ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and Good Practices in the Prevention of the Smuggling of Migrants*, UN Doc CTOC/COP/WG.7/2012/4 (23 March 2012) 6 [25]–[26].

²¹⁴ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and Good Practices in the Prevention of the Smuggling of Migrants*, UN Doc CTOC/COP/WG.7/2012/4 (23 March 2012) 6–7 [28].

III.11.4 Addressing root-causes and demand for smuggling of migrants

[227] Article 15(3) of the *Smuggling of Migrants Protocol* requires States Parties to promote or strengthen development programs and cooperative efforts to address the root socio-economic causes of the smuggling of migrants. In doing so, States are asked to pay special attention to economically and socially depressed areas. Though framed in mandatory language, this paragraph remains ‘largely aspirational’ and sets out no specific actions that may be undertaken.²¹⁵ It is also qualified with the phrase ‘as appropriate’. In the past, the call to engage with and assist countries of origin of smuggling migrants has often meant information campaigns by destination countries highlighting their strong border measures and the futility of engaging smugglers. Existing and proposed EU frameworks do not make an reference to (addressing) the causes of smuggling of migrants. Objective 9 action (f) of the *Global Compact for Migration* only mentions the causes of smuggling of migrants indirectly by calling on States to:

take measures to prevent the smuggling of migrants along the migration cycle, in partnership with other States and relevant stakeholders, including by cooperating in the fields of development, public information, justice, as well as training and technical capacity-building at the national and local levels, paying special attention to geographical areas from which irregular migration systematically originates.

[228] UNODC’s *Model Law against the Smuggling of Migrants* explains that a ‘root cause of smuggling is the desire of people to migrate away from conditions such as poverty and oppression in search of better lives’.²¹⁶ Notably, the root causes of migration are also acknowledged in the Protocol’s Preamble, with reference to UN General Assembly Resolution 54/212.²¹⁷ Among other things, this Resolution notes the ‘the widening economic and social gap between and among many countries and the marginalisation of some countries in the global economy’, the human rights of all migrants, and the need for coherent, effective, and cooperative global migration policies.²¹⁸

[229] The need to address the drivers of migration is an important part of combatting irregular migration, including the smuggling of migrants. Structural factors such as States’ political, socio-economic, environmental, and demographic circumstances clearly play a key role in triggering and shaping irregular migration along with factors such as personal and historical ties between places and persons, migration networks, and individual circumstances.

[230] Nonetheless, the causes of migrant smuggling itself are not referable to these drivers: poverty and underdevelopment does not create a market and demand for the services of smugglers. As is now widely accepted, smuggling of migrants and the demand for it are, first and foremost, a result of a lack of regular avenues for migration.²¹⁹ Put simply, smuggling proliferates with the implementation of restrictive migration policies²²⁰ and becomes more lucrative as migration controls evolve.²²¹ The Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime has stressed that:

²¹⁵ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 425.

²¹⁶ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 81.

²¹⁷ UN General Assembly, *International Migration and Development*, UN Doc A/RES/54/212 (1 February 2000).

²¹⁸ UN General Assembly, *International Migration and Development*, UN Doc A/RES/54/212 (1 February 2000) 3–4.

²¹⁹ UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations, 2011) 43.

²²⁰ Sheldon Zhang, Gabriella Sanchez, and Luigi Achilli, ‘Crimes of Solidarity in Mobility: Alternative Views on Migrant Smuggling’ (2018) 676(1) *Annals of the American Academy of Political and Social Science* 6 10, 13; Gabriela Sanchez, *Five Misconceptions about Migrant Smuggling*, Policy Brief 2018/07 (European University Institute, Robert Schumann Centre for Advanced Studies, May 2018) 3.

²²¹ Friedrich Heckmann, ‘Illegal Migration: What Can We Know and What Can We Explain? The Case of Germany’ (2004) 38(3) *International Migration Review* 1103, 1121–1122. See also Anna Triandafyllidou and Thanos Maroukis, *Migrant Smuggling: Irregular Migration from Asia and Africa to Europe* (Palgrave Macmillan, 2012) 203; Jacqueline Babha, *Child Migration and Human Rights in a Global Age* (Princeton University Press, 2014) 211.

Limiting the demand for migrant smuggling can be achieved by broadening the possibilities for regular migration and increasing the accessibility of regular travel documents and procedures. Making regular migration opportunities more accessible in origin countries and refugee camps, including the expansion of migration and asylum bureaux in origin areas, would reduce opportunities for smugglers.²²²

[231] Although Article 15(3) asks States Parties to take measures to address root causes, addressing them ‘through provision of improved avenues for safe and legal migration is rarely part of the practice or rhetoric of migrant smuggling prevention in any major country of destination.’²²³ On this background, the Working Group recently called on States to ‘urgently adopt or enhance measures and policies that contribute to enhancing pathways for regular migration. In addition, those policies would enable States to regain control over migration flows and reduce the share of undocumented migrants.’²²⁴

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.12 International cooperation in criminal matters

[232] International cooperation on tackling the smuggling of migrants is crucial due to the transnational nature of this crime. ‘[N]ational efforts to counter the smuggling of migrants’, notes UNODC, ‘are often undermined by the lack of effective bilateral and multilateral mechanisms for the sharing of information and the coordination of operational activities among law enforcement agencies, border control authorities and other relevant actors.’²²⁵

[233] Unlike trafficking in persons, smuggling of migrants involves the illegal entry of individuals from one State into another where they are not nationals or lawful residents. By definition, smuggling involves more than one State thus necessitating international cooperation to prevent and combat this phenomenon. As smuggling networks have become more sophisticated, utilizing advanced technology and exploiting legal loopholes, the challenge to curb this criminal activity is becoming more daunting and the significance of international cooperation cannot be overstated. Collaborative international efforts are essential to disrupt smuggling networks, prosecute perpetrators, locate and seize proceeds of crime, and to protect smuggled migrants.

[234] The paramount importance of international cooperation is stressed in the foreword, preamble, and throughout the UNTOC and its Protocols, including the *Smuggling of Migrants Protocol*. International cooperation in criminal matters is specifically mentioned in its statement of purpose of the UNTOC (Article 1). The Convention provides in detail for a wide array of international cooperation modalities, ranging from judicial cooperation, such as extradition (Article 16) and mutual legal assistance (Article 18), to law enforcement cooperation (Article 27) or other types of cooperation, such as joint investigations (Article 19) and cooperation to use special investigative techniques (Article 20(2) and (4)). The Convention also enables the transfer of sentenced persons (Article 17) and the transfer of

²²² UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 11 [55]; see also UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Analysis of the impact that the availability of regular channels of migration has on reducing the demand for the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2021/2 (29 July 2021).

²²³ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 502.

²²⁴ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Analysis of the impact that the availability of regular channels of migration has on reducing the demand for the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2021/2 (29 July 2021) 11 [49].

²²⁵ UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations, 2011) 11 [42].

criminal proceedings (Article 21). While the suite of tools enabling and enhancing international cooperation between criminal justice authorities is far-reaching, there is little evidence that these tools are utilised much. A 2021 review of cases has shown that the UNTOC's international cooperation provisions are used quite frequently in practice, only a small number of cases involved instances of smuggling of migrants.²²⁶

[235] The Council of Europe, too, has set up an impressive range of conventions and other instruments to create a legal basis for and facilitate international cooperation in criminal justice matters between States Parties. This includes, inter alia, the frameworks for extradition, mutual legal assistances, and transfer of sentenced persons mentioned above. In addition, some of the crime-specific conventions developed by the Council of Europe contain further provisions on international cooperation (such as measures relating to endangered or missing persons, information exchange, and cooperation with civil society, Articles 33–35 *Council of Europe Convention on Action against Trafficking in Human Beings*) which are presently not available for cooperation in relation to smuggling of migrants, but which may be worth considering for inclusion in a future instrument.

[236] Nor further discussed here are the extensive instruments, legal frameworks, and institutional arrangements created for international criminal justice cooperation among EU Member States. These include, inter alia, innovative mechanisms such as the European Arrest Warrant and joint investigation teams, as well as supranational authorities such as Europol (the European Union Agency for Law Enforcement Cooperation), Eurojust (the European Union Agency for Criminal Justice Cooperation), and the European Public Prosecutor's Office (EPPO), which (can) play an important role in criminal justice cooperation against smuggling of migrants among EU Member States but which can, for the most part, presently not realistically be replicated by other regional or global international organisations.

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.13 Investigations and law enforcement

[237] Effective prevention and suppression of smuggling of migrants along with proper protection of the human rights of smuggled migrants requires professional law enforcement. Police, immigration, border control, customs, and coastguard officials must be adequately equipped and trained to detect instances of smuggling of migrants, disrupt smuggling ventures, arrest smugglers, and provide adequate protection and support to smuggled migrants. This requires adequate training, appropriate and balanced investigative powers, the necessary equipment and technology, proper cooperation and information exchange within and between different agencies, national coordination, and awareness of the rights of suspects as well as the rights of smuggled migrants, especially if they are refugees, asylum-seekers, or other vulnerable groups.

[238] The criminal justice response to smuggling of migrants, nationally and internationally, is thwarted where proper knowledge, expertise, and training are lacking, where technical resources and equipment are inadequate, and where communication and national coordination between authorities and officials remain underdeveloped. This is not limited to police and other law enforcement agencies, but also extends to prosecutors and the judiciary. In many countries, the capabilities to detect instances of smuggling of migrants, effectively stop smuggling ventures, and support criminal investigations and prosecutions of the organised criminal groups involved continue to be inadequate.²²⁷

²²⁶ UNODC, *International Cooperation in Criminal Matters involving the United Nations Convention against Transnational Organized Crime as a Legal Basis*, Digest of Cases (United Nations, 2021) 77, 84.

²²⁷ UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations, 2011) 10 [37]–[39].

[239] Efforts to disrupt migrant smuggling networks and detect and arrest smugglers are hampered where investigations are aimed at irregular migrants rather than the smugglers. ‘The key investigative challenge’, notes the Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, is to target the

networks behind the smuggling of migrants, rather than low-level actors or migrants themselves. Smugglers strategize to pass risks of detection and investigation onto those they smuggle. To avoid playing into the hands of smugglers, good practice is to treat smuggled migrants as witnesses to smuggling of migrants rather than as targets of smuggling of migrants investigations. In this context, practitioners stress that protection and assistance of migrants can be crucial to effective investigations.²²⁸

[240] Investigating the smuggling of migrants is particularly challenging if organised criminal groups are involved that operate clandestinely, use encrypted communication, operate across international borders, that have access to considerable financial and human resources, that engage in bribery, and use threats and violence against smuggled migrants, witnesses, officials, and competitors. In these circumstances, special investigative techniques play an important role to investigate complex networks and smuggling operations, identify organisers and financiers, and collect sufficient evidence to build prosecution that hold up in court.

[241] Special investigative techniques are defined as techniques for gathering information in such a way as not to alert the target persons, applied by law enforcement officials to detect and investigate crimes and suspects.²²⁹ Such techniques, which include controlled delivery, electronic and other forms of surveillance, wire-tapping of communications, and undercover operations, are encouraged by Article 20 of the UNTOC since they particularly useful for the investigation of organised crime. Article 16 of the 2023 proposal for a new EU Council Directive contains a similar provisions to ensure that investigative tools available against organised crime can also be employed in cases of facilitation of irregular migration.²³⁰

[242] Under Article 20, the use of special investigative techniques is, however, conditional: ‘if permitted by the basic principles of its domestic legal system’. Different jurisdictions regulate these conditions differently, and techniques permissible in one jurisdiction may be unacceptable in others. States often have different regimes in relation to the deployment and use of undercover officers on a cross-border basis, use of civilians in undercover operations, protection of informants/undercover officers or telephone interception.²³¹ Furthermore, in the context of smuggling of migrants investigations, special investigative techniques must be applied in such a way that the rights of smuggled migrants are protected, and the health and safety of migrants and involved personnel are not jeopardized.²³²

[243] Law enforcement cooperation across borders is another important tool to investigate the smuggling of migrants, identify and detect perpetrators, and brings them to justice. Informal police-to-

²²⁸ UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 4 [14].

²²⁹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2nd ed 2017) [443].

²³⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down the minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (28 November 2023) 13.

²³¹ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Informal Expert Working Group on Joint Investigations: Conclusions and Recommendations, Draft*, UN Doc CTOC/COP/2008/CRP.5 (2 October 2008) 14; UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2nd ed 2017) [447].

²³² UN Conference of States Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices in the criminalization, investigation and prosecution of the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) 5 [16].

police cooperation facilitates the rapid exchange of information and can also be used to support formal cooperation.²³³ A key challenge in investigating transnational organised crimes, such as smuggling of migrants, ‘is ensuring that investigative approaches are similarly transnational. Without adequate cooperation to investigate smuggling of migrants, smugglers are able to evade justice by simply relocating themselves, their activities and their assets beyond the reach of the investigative team. Good practice’, notes the Working Group on Smuggling of Migrants, ‘is to ensure that there is strong cooperation along smuggling routes so that areas of impunity are removed. The challenge of international cooperation in smuggling of migrants investigations is to overcome barriers of language, culture, bureaucracy and lack of trust between agencies.’²³⁴

[244] An innovative measure to complement investigations and law enforcement cooperation is recommended by Objective 9, Action (c) of the *Global Compact for Migration*, which calls on States to develop step-by-step cooperation protocols along migration routes specifically to identify and assist smuggled migrants and facilitate cross-border law enforcement and intelligence cooperation. These protocols need to be ‘gender-responsive’ and ‘child-sensitive’ and, with regards to smuggled migrants, must be in accordance with international law. These protocols serve to enhance and accelerate inter-agency and cross-border cooperation, but they also seek to ensure that international human rights obligations are adequately respected.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.14 Border and immigration control

[245] Immigration controls at States’ borders is frequently seen as a key component of preventing and deterring the smuggling of migrants. As concerns over irregular migration has grown, together with the desire to detect and punish those who facilitate such movements, many States have resorted to the physical fortification of borders, increasing immigration bureaucracy, sophisticated monitoring mechanisms, and, to varying degrees, the externalization of measures designed to curb irregular migration. While border controls have a role in combatting the smuggling of migrants, it is well-recognised that they may also contribute to and exacerbate the problem. Simply put, migrants who are unable to enter a State through legal avenues, and are also unable to evade border controls, may turn to the services of smugglers. This tension is reflected in, but not resolved by, the *Smuggling of Migrants Protocol*, which, on the one hand, encourages respect for the free movement of people and respect for migrants’ human rights while, on the other hand, requiring States Parties to strengthen border measures.²³⁵

[246] Article 11 of the *Smuggling of Migrants Protocol* (which is identical to Article 11 of the *Trafficking in Persons Protocol*) notionally addresses ‘border measures’, though the range of activities included extends beyond States’ physical borders. Four primary ideas are reflected in Article 11: (1) that States Parties should strengthen border measures to prevent and detect the smuggling of migrants; (2) that specific measures, including criminal law measures, should be taken to deter and respond to

²³³ See further, UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices concerning cooperation and coordination, including the sharing of intelligence and other information, in response to the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/5 (26 March 2012) 3–4 [9]–[11].

²³⁴ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices concerning cooperation and coordination, including the sharing of intelligence and other information, in response to the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/5 (26 March 2012) 6 [22].

²³⁵ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 504-505.

smuggling facilitated through the use of commercial carriers; (3) that States Parties should impose immigration consequences on those who engage or are otherwise implicated in smuggling;²³⁶ and, (4) that cooperation between the border agencies of States Parties is important in responding to the smuggling of migrants.²³⁷ The *Trafficking in Persons Protocol* contains an identical provision in Article 11 and a similar provision can be found in Article 7 of the *Council of Europe Convention on Action against Trafficking in Human Beings*.

[247] It must be stressed that Article 11(1) does not advocate for a generalised strengthening of borders or greater restrictions on immigration. Rather, it supports only those controls ‘necessary to prevent and detect’ smuggling. States Parties should be careful to avoid breaching their other international obligations, in particular those under human rights and refugee law as preserved by Article 19, as well as balancing the fact that border controls contribute to the reliance by irregular migrants on smugglers. All too frequently, the *Smuggling of Migrants Protocol* has been used as a front to implement restrictive control measures at the border. The assumption inherent in many of the measures adopted at national borders, notes Michael Collyer, is not that migrant smugglers can be easily identified and prosecuted, but that interrupting their operations will result in such pain and misery for irregular migrants that news will get back to potential migrants and they will stop coming.²³⁸

[248] The primary benefit of rigorous border controls is the (perceived or actual) enhancement of a country’s security profile. Border controls are commonly viewed as the first line of defence against potential threats by enabling authorities to monitor and control their territory and detect instances of irregular movements of people and goods. Border controls should go hand-in-hand with effective immigration systems which manage migration in a manner that supports national, economic, labour market, and demographic interest and respect international human rights law, especially in relation to family reunification, refugees, asylum-seekers, and other vulnerable groups. Effective border controls can also serve as a catalyst for international cooperation. Countries facing common threats from smuggling and irregular migration are prompted to collaborate, leading to enhanced security partnerships and intelligence sharing, leading to synchronized operations against smuggling networks and fostering bilateral and multilateral alliances.

[249] On the flip-side, one of the most critical concerns regarding tight border controls is the potential risk for human rights violations. Practices such as refusal of protection, indefinite detention, family separation, and aggressive deportation campaigns can cause harm and suffering and violate the rights of smuggled migrants. Moreover, many countries have used measures such as denying entry to smuggled migrants and returning them to transit points as a way to shift the protection and processing of refugees and asylum seekers to other countries. In this context, the UNHCR stresses that compliance with the non-refoulement obligation under Article 33 of the *Refugee Convention*

requires that States’ border control measures for entry must not result in compelling a person to return to or remain in a territory where their life and freedoms would be threatened or where they would be at risk of being subjected to torture or cruel, inhuman and degrading treatment or punishment, or other serious human rights violations. The fact that a person has been smuggled into another country does not absolve that country from this obligation.²³⁹

[250] Border control operations are confronted with a myriad of challenges that hinder and influence their ability to detect and prevent smuggling activities. These challenges can be categorised into physical, technological, and logistical issues, each contributing to the broader difficulties in managing borders, protecting people, and effectively tackling smuggling networks. The geographical issues are particularly relevant for those Council of Europe Member States that face challenges with their external

²³⁶ This obligation relates to the offences established pursuant to Article 6 of the *Smuggling of Migrants Protocol*.

²³⁷ Matthew R Taylor, ‘Article 11: Border Measures’ in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 621–622.

²³⁸ Michael Collyer, ‘Cross-Border Cottage Industries and Fragmented Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 20.

²³⁹ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 2-3.

borders, especially those positioned at the Mediterranean smuggling routes. Since technology plays a critical role in modern border controls, gaps in technological capabilities can create loopholes for smugglers. Logistics and coordination among various national and international agencies presents another significant challenge. Effective border control requires seamless cooperation between immigration services, customs, law enforcement, and international partners. However, discrepancies in protocols, data sharing limitations, and bureaucratic delays often undermine coordination and collaboration efforts.

[251] Despite the sophistication of modern border control technologies, smuggling networks continually adapt and evolve. The dynamic nature of these networks, their use of technology, and the exploitation of legal and procedural loopholes mean that they often remain a step ahead of enforcement efforts. This ongoing adaptation challenges the static nature of many border control systems, requiring continuous updates and strategic shifts that can be both costly and complex to implement. The financial outlay required for maintaining robust border controls is substantial. High-tech surveillance systems, extensive manpower for border patrols, and complex administrative processes entail significant expenditures. For many States, especially those with limited budgets, these costs can strain national finances, sometimes at the expense of other essential public services.

[252] Article 11(1) of the *Smuggling of Migrants Protocol* acknowledges these challenges by qualifying the obligations to strengthen border controls. The words ‘to the extent possible’ limit it to the means and resources available to each State Party. Practical limitations may also arise from the geographical settings of a State’s land and sea borders, which can make effective border control difficult. The obligation is further limited to border controls ‘as may be necessary to prevent and detect smuggling of migrants’. In sum, the *Smuggling of Migrants Protocol* respects the sovereignty of States over their borders but also seeks to uphold established international human rights and refugee law principles.

[253] While the significant role border controls can play in detecting smuggling of migrants, they do little to address the causes of irregular migration and they may result in displacing irregular migration to other routes, to more clandestine and dangerous smuggling methods, and may, in effect, play into the hands of smugglers. The Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime has recently stressed that ‘migrant smuggling networks benefit from restrictive migration policies and border closures. Rather than diminishing migration, those measures increase irregular border crossings, with a high toll of suffering and deaths for those who have no choice but to resort to the services of smugglers.’²⁴⁰

[254] Only through careful planning, continual reassessment, and international cooperation can border controls contribute to the fight against smuggling of migrants without compromising fundamental human rights, especially of vulnerable migrants. The Working Group on Smuggling of Migrants further observed that:

Some countries respond to migrant smuggling by tightening immigration controls and reinforcing border control. Nonetheless, as observed in the *Global Study on Smuggling of Migrants*, measures to increase or decrease border control result in increased or decreased risks of detection for smuggled migrants and, if taken alone, typically lead to rapid route displacement rather than changes in the overall number of smuggled migrants. Stricter border control measures often increase the risks for migrants and provide more opportunities for smugglers to profit. Also, in the specific context of migrant smuggling by air, when supported by genuine documents that are fraudulently used or obtained, border controls on their own do not solve the problem. Therefore, it is important to complement border control efforts with improved

²⁴⁰ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Analysis of the impact that the availability of regular channels of migration has on reducing the demand for the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2021/2 (29 July 2021) 13 [48].

collaborative investigation and prosecution responses. Specialist operational functions with high-level investigative and prosecutorial skills are required.²⁴¹

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.15 Protection of the human rights of smuggled migrants

[255] Among experts and in the literature the greatest deficiencies in the existing international frameworks addressing the smuggling of migrants are seen in the fragmentary protection of the rights of smuggled migrants. The same concern is frequently raised in relation to national laws and practical measures adopted by States to counter smuggling of migrants. Whilst obvious, it is important to stress that '[r]egardless of their immigration status, smuggled migrants and migrants in an irregular situation are bearers of inalienable human rights arising from international, regional and national law. These rights derive from key international treaties.²⁴²

[256] The criticism of inadequate human rights protection in the migrant smuggling context is long-standing, far-reaching, and widely documented, including in a large number of reports by international organisations, special rapporteurs and independent observers, NGOs, and in a wide range of scholarly analyses.²⁴³ In fact, early drafts of the *Smuggling of Migrants Protocol* were limited to criminalisation and international cooperation and failed to give much attention to the situation of smuggled migrants, their human rights, needs, and vulnerabilities, and to the human rights abuses that frequently cause their irregular movements and the abuses they experience during their journey.²⁴⁴

[257] In October 1999 during the fifth session of the Ad Hoc Committee which developed the final text of the Protocol, several delegations suggested adding the words 'as well as to protect the victims of such smuggling, including their human rights' to the stated purposes of the Protocol or, alternatively, in a separate article,²⁴⁵ but the draft text remained unchanged at that time.²⁴⁶ An intervention by several United Nations agencies eventually led to a formal, albeit modest, recognition of the rights of smuggled migrants in the text of the Protocol. At the eighth session of the Committee in February and March 2000, the Office of the United Nations High Commissioner for Human Rights (OHCHR), along with the UNHCR, the United Nations Children's Fund (UNICEF) and the International Organization for Migration (IOM) submitted a note stressing the

clear need to ensure that the individuals falling victim to such practices are protected. The vulnerability of migrants, in particular irregular migrants, as a result of their precarious situation in society often leads to violations of their most basic human rights. [...] It is imperative, therefore, that the Protocol should

²⁴¹ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Smuggling of migrants by air and its facilitation through document fraud*, UN Doc CTOC/COP/WG.7/2019/3 (25 July 2019) 10–11 [50].

²⁴² European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 32.

²⁴³ For a summary of key reports see EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 2.

²⁴⁴ UNODC, *Travaux préparatoires of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 459.

²⁴⁵ UNODC, *Travaux préparatoires of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 459–459.

²⁴⁶ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 379.

preserve and seek to uphold the fundamental human rights to which all persons, including smuggled migrants, are entitled. [...].²⁴⁷

[258] With the support of most delegations, the purpose ‘to promote international cooperation in the interest of the protection of such trafficking and respect for their human rights’ was included in a revised draft.²⁴⁸ Despite this inclusion, the *Smuggling of Migrants Protocol* remains a criminal justice instrument that is ‘problematic from a human rights perspective.’²⁴⁹

[259] The risks faced by smuggled migrants have been broadly acknowledged by the international community. The UN General Assembly has noted that smuggling ‘may endanger the lives of migrants or subject them to harm’ and called on States to ensure their laws and policies fully respect their human rights.²⁵⁰ The Working Group on the Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime has similarly called on States Parties to the Protocol to ‘respect the fundamental human rights of smuggled migrants’.²⁵¹

[260] The Preamble to the Protocol and its aggravated offences recognise that smuggled migrants may suffer violence, exploitation, and other harms as a consequence of, or ancillary to, the smuggling process.²⁵² Article 2, which sets out the Protocol’s purpose, also explicitly calls on States Parties to ‘[protect] the rights of smuggled migrants’.²⁵³ Consistent with this goal, Article 16 outlines protection and assistance measures. It sets out broad standards for States Parties dealing with smuggled migrants, requiring them to preserve and protect the rights of smuggled migrants, protect them from violence, and render them appropriate assistance where their lives or safety are endangered or if they are detained. It also requires States Parties to take into account the special needs of women and children.²⁵⁴

[261] The *Smuggling of Migrants Protocol* is, nonetheless, primarily a criminal justice instrument directed to the prevention and combatting of this phenomenon. While Article 16 affords some attention to the protection needs of smuggled migrants, it does not create any new rights under international law. The Protocol’s contents have been described as ‘vague’ and ‘equivocal’ because, unlike trafficked persons, smuggled migrants are not deemed victims of crime or human rights violations simply as a consequence of being smuggled.²⁵⁵ The Protocol effectively positions smuggling as a crime against States, their immigration controls and sovereignty, rather than a crime against the person.²⁵⁶ In the words of the *Legislative Guides*, smuggled migrants are simply a ‘commodity’, though one that—it appears to

²⁴⁷ UN General Assembly, 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*, UN Doc A/AC.254/27 (8 February 2000) [15].

²⁴⁸ UNODC, *Travaux préparatoires of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 459–461.

²⁴⁹ Tom Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective’ (2015) 17(2) *International Journal of Refugee Law* 394, 395.

²⁵⁰ UN General Assembly, *Protection of Migrants*, UN Doc A/RES/70/147 (25 February 2016) 5 [3], 9 [8].

²⁵¹ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna from 30 May to 1 June 2012*, UN Doc C/TOC/COP/WG.7/2012/6 (27 June 2012) 3 [21].

²⁵² *Smuggling of Migrants Protocol*, art 6(3).

²⁵³ See *Smuggling of Migrants Protocol*, arts 4 and 14(2), both of which refer to the protection of smuggled migrants’ rights.

²⁵⁴ Note also Articles 24 and 25 of the *United Nations Convention against Transnational Organized Crime*, which concern protection to victims and witnesses.

²⁵⁵ Andreas Schloenhardt and Kate L Stacey, ‘Assistance and Protection of Smuggled Migrants: International Law and Australian Practice’ (2013) 35 *Sydney Law Review* 53, 64; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 555.

²⁵⁶ Joseph Lelliott, ‘Smuggled and Trafficked Unaccompanied Minors’ (2017) 29(2) *International Journal of Refugee Law* 238, 245.

somewhat grudgingly concede—‘consists of human beings, raising human rights and other issues not associated with other commodities’.²⁵⁷

[262] In effect, Article 16(1) reinforces the saving clause under Article 19(1) and emphasises that implementation of the Protocol must not come at the expense of smuggled migrants’ entitlements under international law. UNODC notes that ‘[r]egardless of their immigration status, smuggled migrants have the right to expect that their human rights and dignity will be upheld and prioritised at all stages by those who intercept and identify them, those who detain them and those who remove them from the country [...]’.²⁵⁸ While some rights will apply to smuggled migrants universally, such as those contained in the *International Covenant on Civil and Political Rights*,²⁵⁹ the *International Covenant on Economic, Social and Cultural Rights*,²⁶⁰ and the *European Convention on Human Rights*,²⁶¹ others will apply according to other status. Further rights attach to smuggled migrants who are, for example, children, persons with disabilities, victims of trafficking, or refugees or asylum seekers,²⁶¹ and States Parties will require robust procedures to identify individual protection needs.²⁶² Indeed, in the absence of comprehensive protection provisions in the Protocol, the rights accruing to smuggled migrants under the broader international human rights framework are of particular importance. Objective 9, action (c) of the *Global Compact for Migration* also calls on States to ‘ensure that counter-smuggling measures are in full respect for human rights.’

[263] In addition, Article 19(2) of the *Smuggling of Migrants Protocol* states that the measures set forth by the Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the grounds that they have been smuggled, and shall be consistent with internationally recognised non-discrimination principles. This statement acknowledges that measures taken by States to prevent and suppress smuggling can perpetuate discrimination or violate the prohibition against discrimination, which is particularly acute in cases involving persons who are not citizens of the host country, such as refugees and asylum-seekers. International law is clear that smuggled migrants cannot be discriminated against simply because they are non-nationals.²⁶³ The ‘internationally recognized principles of non-discrimination’ referred to in Article 19(2) are not further defined in the *Smuggling of Migrants Protocol* and the phrase does not refer to a specific set of instruments or documents. Article 2 of the *Universal Declaration of Human Rights* provides one of the earliest non-discrimination statements by declaring that all rights and freedoms are afforded ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Subsequent international agreements, such as Article 26 of the ICCPR, further elaborate on this statement by recognizing additional protected classes or persons.²⁶⁴

[264] The ‘guiding rationale’ of the Protocol, observes a report by the European Parliament, compels ‘States Parties to ensure that human rights and refugee law are not compromised in any way by the implementation of anti-smuggling measures and by including clearer references and obligations related

²⁵⁷ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 349 [55].

²⁵⁸ UNODC, *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants, Module 9: Human Rights* (United Nations, 2010) 3.

²⁵⁹ Opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976).

²⁶⁰ Opened for signature 16 December 1966, 993 UNTS 3 (entry into force 3 January 1976).

²⁶¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entry into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entry into force 3 May 2008); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entry into force 22 April 1954); and *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entry into force 4 October 1967).

²⁶² See, for example, UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations, 2011) 10; Anne T Gallagher, ‘Migrant Smuggling’ in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge, 2014) 187, 203.

²⁶³ OHCHR, ‘Human Rights and Human Trafficking: Fact Sheet No 36’ (2014) 6.

²⁶⁴ See David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 369.

to the protection of migrants' fundamental rights.²⁶⁵ The 2002 EU Directive and Framework Decision, by comparison, do not follow this rationale and omit to explain their relationship to relevant international and regional human rights instruments, which stipulate legal obligations for States Parties in relation to protection and assistance, not least in critical situations such as destitution or persons in distress at sea. 'Within the European Union context', notes the UN Special Rapporteur on the Human Rights of Migrants, 'irregular migration remains largely viewed as a security concern that must be stopped. This is fundamentally at odds with a human rights approach, concerning the conceptualization of migrants as individuals and equal holders of human rights.'²⁶⁶ The report by the European Parliament similarly notes:

The focus of EU legislation concerning the smuggling of migrants seems to be mainly on preventing irregular migration. [...] A comparative analysis of the human rights obligations included as part of the EU Facilitators' Package and of human rights and mandatory protection provisions in the UN Smuggling Protocol illustrates the existence of an implementation gap in the current EU acquis on the smuggling of migrants in terms of human rights protection and safeguards.²⁶⁷

Although not specifically recalled in the EU Facilitators' Package, the EU acquis does recognise, through various instruments of EU legislation, mandatory protection provisions enshrined in the UN Smuggling Protocol. These include protection against violence, protection for victims and witnesses of crime, and protection of the right to life and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Through its recent jurisprudence, the CJEU has contributed to clarifying that the personal scope of application of specific safeguards included in EU legislation does extend to the protection of undocumented migrants.²⁶⁸

III.16 Smuggled migrants who are refugees

[265] The smuggling of migrants frequently involves refugees who are fleeing from persecution and who are protected under the *Convention* and *Protocol relating to the Status of Refugees*.²⁶⁹ The UNHCR notes that

[r]esorting to smugglers or using other clandestine means to seek safety is often the only way forcibly displaced people can seek asylum and access international protection to which they are entitled. Therefore, it is vital that people seeking international protection should not become liable to criminal prosecution for the sole fact of having resorted to smugglers to cross irregularly a border or to stay irregularly in the territory of the State.²⁷⁰

[266] Article 19(1) of the *Smuggling of Migrants Protocol* contains an express reference acknowledging the rights and protection afforded to refugees under international law. The saving clause in Article 19 serves as a reminder that States are under an obligation to ensure that any measures taken to prevent and suppress smuggling of migrants do not undermine or otherwise negatively on the rights

²⁶⁵ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 32–33.

²⁶⁶ UN Human Rights Council, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, report of the Special Rapporteur on the human rights of migrants, François Crépeau, UN Doc A/HRC/23/46 (24 April 2013) 9 [31].

²⁶⁷ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 32–33 [references omitted].

²⁶⁸ European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 37 [references omitted].

²⁶⁹ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entry into force 22 April 1954), and *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entry into force 4 October 1967) (hereafter collectively referred to as '*Refugee Convention*').

²⁷⁰ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 3-4.

of refugees. While the saving clause makes explicit mention of the *Refugee Convention*, the *Interpretative Notes* to the *Smuggling of Migrants Protocol* stress that the Protocol does ‘not cover the status of refugees’.²⁷¹ In cases where a smuggled migrant is also a refugee, the *Refugee Convention* applies in addition to the *Smuggling of Migrants Protocol*.²⁷² This also means that a migrant smuggler who is a refugee is afforded protection under the *Refugee Convention* even though he or she may be prosecuted for smuggling.²⁷³

[267] A note submitted by the UN human rights organisations during the drafting of the Protocol led to the inclusion of the express reference to the principle of non-refoulement in Article 19(1), thus acknowledging ‘that increasing numbers of asylum seekers, including those with genuine claims to refugee status, are being transported by means covered in the [*Smuggling of Migrants Protocol*]’.²⁷⁴ The fact that some asylum seekers and refugees employ smugglers does not undermine their right not to be subjected to refoulement, which applies irrespective of whether a person enters a State lawfully or unlawfully and with or without the aid of smugglers. The UNHCR stresses that:

The principle of non-refoulement constitutes an essential binding and non-derogable component of international refugee protection, most prominently expressed in Article 33 of the 1951 [Refugee] Convention. It is a norm of customary international law and is consequently binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol. The principle of non-refoulement has been restated in international and regional human rights instruments. Compliance with this principle requires that States’ border control measures for entry must not result in compelling a person to return to or remain in a territory where their life and freedoms would be threatened or where they would be at risk of being subjected to torture or cruel, inhuman and degrading treatment or punishment, or other serious human rights violations. The fact that a person has been smuggled into another country does not absolve that country from this obligation.²⁷⁵

[268] The note submitted by the UN human rights organisations during the drafting of the Protocol further suggested that, in order to make such a provision effective, a clause should be added requiring States Parties to ensure that smuggled migrants were given full opportunity, including through the provision of adequate information, to make a claim for asylum or to present any other justification for remaining in the country, and that such claims be considered on a case-by-case basis.²⁷⁶ However, this suggestion was not adopted by the drafters.

[269] For refugees and asylum seekers, one of the most important provisions under the *Smuggling of Migrants Protocol* is Article 5 which, as already mentioned above, upholds the principle that irregular migration and asylum seeking are not criminal offences. Through Article 5, the *Smuggling of Migrants Protocol* recognises that smuggled migrants, including ‘refugees, often have to rely on smugglers to

²⁷¹ UNODC, *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) 555.

²⁷² UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Information received from States for the Second Reporting Cycle, Analytical Report of the Secretariat*, UN Doc CTOC/COP/2006/6 (16 August 2006) [38].

²⁷³ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 165.

²⁷⁴ UN General Assembly, 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*, UN Doc A/AC.254/27 (8 February 2000) [18].

²⁷⁵ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 2-3.

²⁷⁶ UN General Assembly, 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*, UN Doc A/AC.254/27 (8 February 2000) [18].

flee persecution, serious human rights violations or conflict. They should not be criminalised for making use of smugglers or for their illegal entry.²⁷⁷

[270] In this context, reference is also made to Article 31 of the *Refugee Convention* which recognises that refugees may have to use irregular means to enter a country of asylum.²⁷⁸ Under Article 31, States must not impose penalties on refugees who enter without authorisation if they come directly from a territory where their life or freedom was threatened. Article 31 was included in the *Refugee Convention* specifically to prevent States from penalising the unauthorized entry or presence of refugees or applying unnecessary restrictions to their movement.²⁷⁹ In a similar fashion, Article 5 of the *Smuggling of Migrants Protocol* (discussed above) operates to protect irregular migrants from criminalisation merely for seeking or gaining entry with the assistance of smugglers.

[271] The 2002 EU Framework Decision contains a safeguard clause that is similar to Article 19(1) of the Protocol, stating that the Framework Decision applies without prejudice to protection afforded to refugees and asylum seekers. This means that it should not be applied to punish facilitation of entry and stay for persons in need of protection if they come directly from a territory where their life or freedom was threatened and present themselves without delay to the authorities.²⁸⁰

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.17 Support of smuggled migrants

[272] Among European States there has been much debate about the material and immaterial support afforded smuggled migrants with many populist claims suggesting that any support offered will act as ‘pull factor’. Indeed, some States—expressly or subtly—have deliberately created hostile environments for smuggled migrants entering their territory, believing that ‘making the lives of irregular migrants as miserable as possible acts as effective deterrence’.²⁸¹ The reception and treatment smuggled migrants experience in some States amounts to what has been termed ‘secondary’ or ‘double-victimisation’.²⁸²

[273] The assistance and support to smuggled migrants envisaged by international framework is extremely minimal. Article 16(3) of the *Smuggling of Migrants Protocol* requires States Parties to afford appropriate assistance to those smuggled migrants whose lives or safety have been endangered. While this paragraph is framed in mandatory language, the Protocol does not shed light on what ‘appropriate assistance’ may entail. The interpretative materials are also of little help. The *Legislative Guides* argues that

²⁷⁷ UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 1: Understanding the smuggling of migrants, 29.

²⁷⁸ See further, Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 163–169.

²⁷⁹ John Morrison, ‘The Dark-Side of Globalisation: The Criminalization of Refugees’ (2001) 43(1) *Race & Class* 71, 73.

²⁸⁰ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 9; European Parliament, Directorate for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 28.

²⁸¹ Michael Collyer, ‘Cross-Border Cottage Industries and Fragmented Migration’ in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, 2016) 17, 20.

²⁸² See further, Alessandro Spina, ‘Smuggled Migrants and Victims?: Reflecting on the UN Protocol against Migrant Smuggling and on its Implementation’ (2021) 3(4) *Brill Research Perspectives in Transnational Crime* 43–57.

Article 16, paragraph 3, does not create a new right, but does establish a new obligation in that it requires States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol.²⁸³

[274] Absent any substantive guidance, it seems that what assistance is ‘appropriate’ will vary across different situations and places and is ultimately a question for each State Party. As observed by Gallagher and David, the scope and content of this ‘new obligation’ is unclear.²⁸⁴ It appears that appropriate assistance will always require, at least, ‘basic’ assistance according. Regardless, it should be reiterated that States remain bound by their obligation to preserve and protect the human rights of smuggled migrants. Measures to this end will almost certainly include, at a minimum, steps to remove any immediate risks to smuggled migrants lives or safety, together with adequate medical attention, food, water, and shelter.²⁸⁵

[275] Article 16(4) of the Protocol requires States Parties to take into account the special needs of women and children when applying the other provisions of Article 16. What their ‘special needs’ are, or how they should be assessed, is not further explained. Some minimal guidance may be gleaned from the similar Article 6(4) of the *Trafficking in Persons Protocol*, which refers to children’s need for ‘appropriate housing, education and care’. In the context of children, UNODC’s *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants* recommends that, at a minimum, minors should (among other things) be removed immediately from danger and seen by a medical professional, given food, and be dealt with by trained officers.²⁸⁶ Even less guidance is given as to the special needs of smuggled women.²⁸⁷

[276] Although there is no reference to the rights of children in the Protocol, their ‘special needs’ should be interpreted in light of States’ obligations under international law, especially those under the *Convention on the Rights of the Child (CRC)*.²⁸⁸ The CRC, which enjoys near-universal acceptance, sets out a range of entitlements directly relevant to the protection and assistance of smuggled children, such as rights concerning health, education, standard of living, detention, protection from exploitation, and refugee status.²⁸⁹ The UN Committee on the Rights of the Child and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, in a Joint General Comment, stress that States must be guided by the ‘overarching principles’ of non-discrimination, the best interests of the child, the right to life, survival and development, and the right to be heard when dealing with all migrant children.²⁹⁰ In particular, and pursuant to Article 3 of the CRC, States must consider the best interests of smuggled children in any decision affecting them including, inter alia, during immigration

²⁸³ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 365 [71].

²⁸⁴ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 566.

²⁸⁵ See also UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 69.

²⁸⁶ UNODC, *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants, Module 9: Human Rights* (United Nations, 2010) 8.

²⁸⁷ As observed by Anne T Gallagher, ‘Migrant Smuggling’ in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge, 2014) 187, 204.

²⁸⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entry into force 2 September 1990).

²⁸⁹ *Convention on the Rights of the Child*, arts 22, 24, 27, 28, 34–37.

²⁹⁰ UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, UN Doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017) 4–5. See also UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017); UN, Committee on the Rights of the Child, *General Comment No 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc CRC/GC/2005/6 (1 September 2005).

or removal procedures. Failures to provide smuggled children with a standard of care and assistance appropriate to their individual needs will place States in breach of their CRC obligations, as will the prioritization of '[n]on rights-based arguments such as those relating to general migration control' over their best interests.²⁹¹ It should be stressed that unaccompanied minors (a category into which many smuggled children fall) must also be afforded 'special protection and assistance provided by the State'.²⁹²

[277] Objective 9, Action (c) of the *Global Compact for Migration* thus also recommends that States 'develop gender-responsive and child-sensitive cooperation protocols along migration routes that outline step-by-step measures to adequately identify and assist smuggled migrants, in accordance with international law'.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.18 Return of smuggled migrants

[278] The approach of many States to preventing and combating smuggling of migrants, and irregular migration generally, is characterised by deterrence and strong migration controls.²⁹³ A big part of such a strategy is the return of smuggled migrants, both to deny them any advantage from being smuggled and send a message to other persons considering attempts at unauthorised entry. In this context, 'return' broadly entails the removal of smuggled migrants from one State to another, which may be their country of origin, a transit country, or, in some cases, another country which accepts them. Returns of smuggled migrants are often referred to as either voluntary or forced. Evidently, given they have actively sought entry into a State (and engaged smugglers to this end) smuggled migrants are usually unlikely to voluntarily accept their removal, at least not truly so.²⁹⁴ The use of punitive or coercive measures by States to push smuggled and other irregular migrants into 'voluntarily' leaving are also not uncommon.

[279] The return provisions in Article 18 of the *Smuggling of Migrants Protocol* are 'very sparse' and, for the most part, concerned with States Parties' obligation to accept return of their nationals and those with the right of permanent residence.²⁹⁵ They reflect the desire of States Parties receiving smuggled migrants to remove them quickly and without impediment. To this end, Article 18 contains provisions requiring States to verify without undue or unreasonable delay smuggled migrants' nationality or residency status and provide them with any documents or authorisations necessary for travel. Article 18 is silent on limitations to return and says little on how the return process should be carried out, except for a somewhat cursory requirement that it is orderly, safe, and dignified.

[280] The narrow focus of Article 18 on facilitating return belies the complexity of the issue. It obscures the fact that, while States have a sovereign right to expel non-citizens, numerous international legal commitments place limits on this right and on States' ability to lawfully remove smuggled migrants from their jurisdiction. Smuggled migrants are often present within so-called 'mixed' migration flows that incorporate persons of various genders and ages with differing backgrounds, vulnerabilities, and,

²⁹¹ UN, Committee on the Rights of the Child, *General Comment No 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc CRC/GC/2005/6 (1 September 2005) [85]; see also UNHCR, 'UNHCR Guidelines on Determining the Best Interests of the Child' (May 2008) 76.

²⁹² *Convention on the Rights of the Child*, art 20.

²⁹³ UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility*, UN Doc A/HRC/35/25 (28 April 2017) 7 [29].

²⁹⁴ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 435.

²⁹⁵ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 696.

not infrequently, experiences of harm and persecution.²⁹⁶ A significant proportion of smuggled migrants are asylum seekers or refugees and may be entitled to protection under international refugee and human rights law.

[281] Neither the 2002 EU Council Directive and Framework Decision nor the 2023 proposal for a new EU Directive contain specific measures relating to the return of smuggled migrants. Such a reference is found in the 2021 EU Action Plan²⁹⁷ and in separate directives relating to the removal and return of irregular migrants, which are not further discussed here.

Recommendation #

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.19 Implementation and review

[282] Up until recently, the implementation of the *Smuggling of Migrants Protocol* was not properly monitored and no agency, including the UNODC, the guardian of the UNTOC and its Protocols, were (and continue to be) in a position to ensure that States Parties adopt and interpret the Protocol provisions accurately, let alone enforce the obligations arising from the Protocol. The UNTOC itself contains very rudimentary provisions to ensure that States Parties implement the Convention and comply with their obligations. Article 32(1) and (3)(d) task the Conference of the Parties with a periodic review of the implementation of UNTOC and its Protocols but, due to a lack of consensus during the negotiations, contains no further details about how these reviews are to be conducted.²⁹⁸ The absence of more specific, express review mechanisms in the Convention is explained by concerns of States that can be traced back to the early stages of the drafting process.²⁹⁹

[283] Twenty years after the Convention was opened for signature, the UNTOC Review Mechanism was finally launched in October 2020. The individual reviews of States Parties conducted as part of this Mechanism are intended to collect best practices, find gaps and difficulties of States in implementing the UNTOC and its Protocols' provisions, and identify technical assistance needs, complementing the general, thematic reviews and discussions that take place in the plenary of the Conference of the Parties.³⁰⁰ The UNODC, acting as the secretariat of the UNTOC and its protocols, administers and supports the review process. The review is divided into five phases, including one preparatory and four subsequent review phases. Each review phase covers a different set of provisions under UNTOC and its Protocols. All States Parties and their implementation of all four instruments, the Convention and the Protocols, will be reviewed over the course of 12 years. Details of the review mechanism are set out

²⁹⁶ UNODC, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response* (UNODC 2021) 93.

²⁹⁷ European Commission, 'A Renewed EU Action Plan against Migrant Smuggling (2021-2025)', COM(2021) 591 final (29 September 2021) 1.

²⁹⁸ Max Bernt and Andreas Schloenhardt, *Vertragliche Umsetzungskontrolle im Transnationalen Strafrecht* (Springer 2021) 113.

²⁹⁹ See further Andreas Schloenhardt, 'Article 32: Conference of the Parties' in Andreas Schloenhardt et al (eds) *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 322–325; Cecily Rose, 'The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols' (2020) 114(1) *American Journal of International Law* 51–.

³⁰⁰ Christian Ponti, 'The Review Mechanism of the United Nations Convention against Transnational Organized Crime and Its Protocols' (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 22, 28.

and discussed in official documents and a range of other publications and are not further reproduced here.³⁰¹

[284] The Review Mechanism has been criticised for lacking public scrutiny because country reviews remain confidential by default unless the country decides to make information public. Confidentiality permeates the entire review process, which is said to compromise the transparency, quality, and legitimacy of the Review Mechanism.³⁰² The pressure on non-compliant or low-performing States to improve their national laws and other measures will be limited if the material submitted to the review and the findings presented by the reviewing States remain sealed and if these States remain unnamed in the constructive dialogues.³⁰³

[285] A further point of criticism of the Review Mechanism is the limited participation of civil society, NGOs, scholarly experts, and other non-government stakeholders in the review process.³⁰⁴ Their involvement has been the subject of extensive debates throughout the development of the Review Mechanism but ultimately, States opposed to civil society involvement succeeded with their argument that the review is an intergovernmental review process. These States did not want to give academia and NGOs a voice in criticising their track record in preventing and suppressing organised crime.³⁰⁵ The involvement of civil society is limited to ‘constructive dialogues’³⁰⁶ that take place after the working groups have concluded their sessions and adopted their final reports.³⁰⁷ The depth and content of these

³⁰¹ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its ninth session, held in Vienna from 15 to 19 October 2018*, UN Doc CTOC/COP/2018/13 (1 November 2018) 6–14, Annex: Procedures and rules for the functioning of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto; Andreas Schloenhardt, ‘Article 32: Conference of the Parties’ in Andreas Schloenhardt et al (eds) *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 325–329.

³⁰² Christian Ponti, ‘The Review Mechanism of the United Nations Convention against Transnational Organized Crime and Its Protocols’ (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 22, 34; Cecily Rose, ‘The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols’ (2020) 114(1) *American Journal of International Law* 51, 62–63; Max Bernt and Andreas Schloenhardt, *Vertragliche Umsetzungskontrolle im Transnationalen Strafrecht* (Springer 2021) 133.

³⁰³ Christian Ponti, ‘The Review Mechanism of the United Nations Convention against Transnational Organized Crime and Its Protocols’ (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 22, 37.

³⁰⁴ See, for example, Max Bernt and Andreas Schloenhardt, *Vertragliche Umsetzungskontrolle im Transnationalen Strafrecht* (Springer 2021) 122–123; Ian Tennant and Prem Mahadevan, ‘The Implementation Review Mechanism of the UN Convention against Transnational Organized Crime (UNTOC)’ (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 39–54; Ponti, ‘UNTOC Review Mechanism’ (n 35) 34; Mark Shaw and Julia Stanyard, ‘What to make of the new UNTOC review mechanism?’, *Global Initiative Against Transnational Organized Crime* (14 October 2018); Tania Bañuelos Mejía, ‘The United Nations Convention against Transnational Organized Crime 20 Years from Its Adoption’ (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 3, 16–17.

³⁰⁵ Cecily Rose, ‘The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols’ (2020) 114(1) *American Journal of International Law* 51, 57.

³⁰⁶ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its ninth session, held in Vienna from 15 to 19 October 2018*, UN Doc CTOC/COP/2018/13 (1 November 2018) 6–14, Annex: Procedures and rules for the functioning of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, IX [53].

³⁰⁷ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its ninth session, held in Vienna from 15 to 19 October 2018*, UN Doc CTOC/COP/2018/13 (1 November 2018) 6–14, Annex: Procedures and rules for the functioning of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, IX [53(a)].

dialogues are further limited by the fact that specific countries (and their shortcomings) are not identified during the constructive dialogues (unless a country under review wishes to raise matters relating solely to its own review).³⁰⁸

[286] Further concerns relate to the costs and funding of the Review Mechanism. The 12-year duration of the review also risks that some States gradually become disengaged and disinterested.³⁰⁹ The experience with similar mechanisms under other treaties, such as *United Nations Convention against Corruption*, has been that thorough reviews are expensive, especially if they involve lengthy country visits by foreign and UN officials that require careful planning and reporting. Because the UNTOC review is paid out of the regular budget plus optional, voluntary contributions by States, the entire review is only desk based.³¹⁰ While this may save time and money, it severely limits the ability of the reviewing States to validate the information provided by the State Party under review and to independently gather information from official sources and non-government entities.³¹¹

[287] On the other hand, the fact that a Review Mechanism has come into existence and operation ‘will undoubtedly strengthen the implementation and of the Convention and its Protocols and will boost the objectives of the Convention’.³¹² The design and operation of the Mechanism is probably the best possible compromise that could be reached. The measures adopted to make the review more efficient, faster, and less costly are based on the experience gained from the UNCAC Review Mechanism. A further innovation to make the review more efficient is the ability to substitute reviewing States that are underperforming.³¹³

Recommendation

[Based on the gaps, conflicts, and challenges identified above, a recommendation on how best to address these matters in a new possible Council of Europe instrument against smuggling of migrants will be inserted here in the next draft of this study.]

III.20 Other issues

[288] In addition to the points raised in the previous sections of part III of the present study, there are a range of other issues that either stem from gaps and discrepancies in the international legal frameworks or that relate to challenges in implementation of these frameworks. Mostly due to time constraints, these points are only flagged and not discussed in sufficient depth in the present draft. Observations and inputs by Member States and observers on these points are greatly welcome and future drafts of this study may include a more in-depth discussion of some of these issues.

³⁰⁸ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its ninth session, held in Vienna from 15 to 19 October 2018*, UN Doc CTOC/COP/2018/13 (1 November 2018) 6–14, Annex: Procedures and rules for the functioning of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, IX [53(b)]; Ian Tennant and Prem Mahadevan, ‘The Implementation Review Mechanism of the UN Convention against Transnational Organized Crime (UNTOC)’ (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 39, 49; Cecily Rose, ‘The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols’ (2020) 114(1) *American Journal of International Law* 51, 61–62.

³⁰⁹ Tania Bañuelos Mejía, ‘The United Nations Convention against Transnational Organized Crime 20 Years from Its Adoption’ (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 3, 16–17.

³¹⁰ Cecily Rose, ‘The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols’ (2020) 114(1) *American Journal of International Law* 51, 59, 62.

³¹¹ See further, Max Bernt and Andreas Schloenhardt, *Vertragliche Umsetzungskontrolle im Transnationalen Strafrecht* (Springer, 2021) 120–121.

³¹² Tania Bañuelos Mejía, ‘The United Nations Convention against Transnational Organized Crime 20 Years from Its Adoption’ (2019) 3(1–2) *Brill Research Perspectives in Transnational Crime* 3, 15.

³¹³ Max Bernt and Andreas Schloenhardt, *Vertragliche Umsetzungskontrolle im Transnationalen Strafrecht* (Springer, 2021) 133.

III.20.1 Commercial carriers

[289] One point which appears to be insufficiently addressed in both the *Smuggling of Migrants Protocol* and the existing and proposed EU frameworks is the role and liability of commercial carriers in the context of smuggling migrants. This frequently relates to airlines (and by extension the issue of smuggling by air discussed earlier), but of course also includes railway companies, bus lines, taxis, as well as ferries, cruise lines, and so on. The topic is not necessarily limited to carriers of passengers but also extends to freight companies that, wittingly or unwittingly, become involved in the smuggling of migrants.

[290] The *Smuggling of Migrants Protocol* requires States Parties to adopt legislative or other measures to prevent commercial carriers from being used by migrant smugglers.³¹⁴ Article 11(2) to (5) contains several requirements to ensure that persons travelling across international borders hold the necessary documents. While the exact nature of measures dealing with commercial carriers is left to the discretion of individual States, Article 11(3) advocates regulations that require commercial carriers to ensure that their passengers are in possession of the travel documents that may be needed to enter the destination country, such as passports and visas. There is, however, no obligation on carriers to assess the validity or authenticity of the documents.³¹⁵ Article 11(4) suggests that carriers are sanctioned if they fail to comply with these requirements,³¹⁶ although there should be no liability on carriers for transporting undocumented refugees.³¹⁷

[291] The requirements in Article 11(1) to (5) reflect similar obligations in international aviation regulations. For example, airlines are required to ensure that their passengers are properly documented and meet the immigration requirements at the destination point. If the receiving state does not admit the passenger, international aviation law makes the carrier liable to cover the costs of the return and, if this is not possible within a reasonable timeframe, any costs related to the passenger's stay. Standards supplementing the *Convention on International Civil Aviation*³¹⁸ provide that undocumented or otherwise inadmissible passengers, including those travelling with fraudulent documents, are to be returned to the custody of the air-carriers which should return the persons at their expense to the point of departure or another place where the returnees are admissible. At the EU level, Article 26 of the *Convention Implementing the Schengen Agreement* and the supplementing Council Directive 2001/51/EC regulate the duty of carriers to return non-admitted third-country nationals at their own cost, providing for sanctions against those who transport undocumented migrants into the EU.³¹⁹

[292] Carriers that are found transporting undocumented passengers can be fined if they neglect to verify the documentation of their passengers. For this reason, carriers check passengers' travel documents and visas at check-in, refraining from carrying those passengers who are not properly

³¹⁴ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 373.

³¹⁵ UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* UN Doc A/55/383/Add.1 (3 November 2000) [103]; UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 373.

³¹⁶ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004) 373, 374. See further, UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 12–13, 57–61.

³¹⁷ UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* UN Doc A/55/383/Add.1 (3 November 2000) [103].

³¹⁸ Opened for signature 7 December 1944, 15 UNTS 295 (entry into force 4 April 1947).

³¹⁹ See further, European Parliament, Directorate for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, report (European Parliament, 2016) 27–28.

documented.³²⁰ Carriers cannot be fined, however, if their passengers possess fraudulent documents—the emphasis of these standards is on the possession of documents, not on their authenticity. An *Interpretative Note* to Article 11(2) of the *Smuggling of Migrants Protocol* adds that this paragraph requires States Parties to impose an obligation on commercial carriers only to ascertain whether or not passengers have the necessary documents in their possession and not to make any judgment or assessment of the validity or authenticity of the documents. Commercial airlines are not burdened with the obligation to apprehend false and altered travel and identity documentation. If, however, fraudulent documents are found, carriers are required to seize them and return them to the authorised agencies of the issuing country.

[293] The measures adopted by airlines and other carriers to check travel and identity documents and deny boarding to passengers suspected of being documented improperly can have far-reaching implications for refugees and asylum seekers. It should be noted that Article 11(2) of the Protocol does not limit the discretion of States Parties not to hold carriers liable for transporting undocumented refugees and that Article 19 preserves the general obligations of States Parties under international refugee and human rights law in this regard.³²¹

III.20.2 Corporate liability

[294] Somewhat connected to the issue of commercial carriers is the issue of liability of and sanctions for legal persons (corporations) for their involvement in acts or omissions in relation to smuggling of migrants. For the offences under the *Smuggling of Migrants Protocol*, Article 10 of the UNTOC requires States Parties to hold legal persons liable. Such liability may civil, administrative, or criminal, does not compromise the liability of natural persons, and has to be consistent with the principles of the respective national legal system. Articles 2 and 3 of the 2002 EU Framework Decision similar mandate liability of legal persons for their involvement in facilitation of illegal entry and transit and provide special sanctions for legal persons. These provisions are reiterated and further developed in Articles 7 and 8 of the 2023 proposal for a new EU Council Directive.

[295] Despite these mechanisms, there appear to be no documented cases in which they have been employed in practice. Furthermore, there is very little literature and analysis about the (potential) role of corporate criminal liability in relation to smuggling of migrants offences.

[296] The UNHCR has recently raised concerns over the sanctions contemplated by Article 8 of the 2023 proposal for a new EU Council Directive noting that these sanctions

could lead to severe fines against, as well as exclusion from access to public funding for, non-governmental organisations providing humanitarian assistance, and acting solely for humanitarian purpose and not for profit. In some instances, these sanctions could act as a deterrent for organisations working with persons seeking international protection and/or providing search and rescue (SAR) for refugees and migrants in distress at sea, possibly delaying attempts at rescue, and thereby increasing the risk of loss of life. Safeguards need to include an exemption for acts taken to prevent a person from coming into a situation of distress at sea or to assist them to recover thereafter, in light of longstanding obligations under the law of the sea for shipmasters to render assistance to persons in distress.³²²

III.20.3 Information exchange

[297] The collection and sharing of accurate information on the routes, means, and methods of smuggling, and on effective policy, legislative, and law enforcement approaches, is key to the prevention and punishment of smuggling of migrants, as well as the protection of the rights and safety of smuggled migrants. In recognition of this, Article 10 of the *Smuggling of Migrants Protocol*

³²⁰ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 14.

³²¹ See further Andreas Schloenhardt, 'Smuggling of migrants and refugees' in Cathryn Costello et al (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 542.

³²² UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 8 [28].

encourages cooperation through information exchange on various matters related to implementation of the Protocol, consistent with domestic legislation and administrative systems. Article 10 complements a number of related obligations in the UNTOC, notably Article 26 (enhanced cooperation with law enforcement authorities), Article 27 (law enforcement cooperation), Article 28 (information collection and exchange), Article 29 (training and technical assistance) and Article 30 (economic development and technical assistance).³²³

[298] There have been ample debates and there are multiple documents identifying the gaps and challenges associated with information exchange in the context of smuggling of migrants. These go hand-in-hand with calls for the creation and use of advanced and secure information sharing platforms and the setting up of secure digital communication channels and databases for real-time exchange of information on, inter alia, smuggling routes, profile of smugglers and their networks, illicit profits, and crimes committed against migrants and deaths of migrants. Reference is made to the extensive documents and resources produced and collated by the Working Group on Smuggling of Migrants established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime.³²⁴

III.20.4 Training

[299] The development of robust laws, policies, and procedures to prevent and smuggling of migrants is of limited utility in the absence of measures to adequately instruct and train official in the operation and enforcement of those laws and procedures. Article 14 of the *Smuggling of Migrants Protocol* complements the detailed obligations contained in Articles 29 and 30 of the UNTOC which concern training, technical assistance, and other related measures. Broadly, Article 14 requires States Parties to train their own officials to better prevent the smuggling of migrants, to cooperate with other States and organisations to this end, and to consider providing technical assistance and resources to other States where appropriate. A prevailing theme throughout the Article is that training efforts must include an explicit focus on the rights of migrants and their humane treatment.³²⁵

³²³ See further, Matthew R Taylor, 'Article 10: Information' in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 615–619.

³²⁴ See, for example, UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Information-sharing on the smuggling of migrants as a form of transnational organized crime, consistent with article 10 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, and article 28 of the United Nations Convention against Transnational Organized Crime*, UN Doc CTOC/COP/WG.7/2019/2 (25 July 2019); UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices concerning cooperation and coordination, including the sharing of intelligence and other information, in response to the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/5 (26 March 2012).

³²⁵ See further, Matthew R Taylor, 'Article 14: Training and Technical Cooperation' in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 635–640; UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, *Challenges and good practices concerning cooperation and coordination, including the sharing of intelligence and other information, in response to the smuggling of migrants*, UN Doc CTOC/COP/WG.7/2012/5 (26 March 2012) 5 [18]–[21].

III.20.5 Further matters

Technical and financial assistance; economic development

Data collection and analysis (research)

Confiscation of assets

Cooperation with private sector

Cooperation with civil society

Prosecution

Smuggled migrants as witnesses

National coordination

Jurisdiction

IV. Need, feasibility, and role of a new Council of Europe instrument on smuggling of migrants

IV.1 A gap to fill? The need for a further legal instrument against the smuggling of migrants

IV.1.X Options

Maintain status quo

Guidelines, recommendations, best-practice

A new Convention

IV.2 Role and mandate of the Council of Europe in relation to smuggling of migrants

IV.2.1 Existing criminal justice instruments

Crime-specific instruments

Criminal justice cooperation instruments

European Committee on Crime Problems (CDPC)

IV.2.2 European Convention on Human Rights

IV.2.3 Migration and Refugees

IV.3 Feasibility and future of a new legal instrument against the smuggling of migrants

IV.3.1 Development process

IV.3.2 Finding sufficient Signatories and States Parties

IV.3.3 Implementation and assistance

IV.3.4 Monitoring and review

V. Main elements of a possible Council of Europe instrument against Smuggling of Migrants

V.1 Common provisions

V.1.1 Statement of purpose

V.1.2 Scope of application

V.1.3 Saving clause; non-discrimination principle;

V.1.4 Relationship with other instruments

V.1.5 Definitions

V.2 Substantive criminal law

V.2.1 Offence(s)

V.2.2 Aggravated offences

V.2.3 Non-criminalisation of humanitarian assistance

V.2.4 Non-criminalisation of smuggled migrants

V.2.5 Aiding or abetting and attempt

V.2.6 Corporate liability

V.2.7 Jurisdiction

V.2.8 Sanctions and measures

V.3 Investigation and cooperation

V.3.1 Investigation powers and techniques

V.3.2 Law enforcement cooperation

V.3.3 Border measures

V.3.4 Security and control of documents

V.3.5 Information exchange

V.3.6 International cooperation

V.4 Protection and support of smuggled migrants

V.4.1 Protection of the rights of smuggled migrants

V.4.2 Assistance to smuggled migrants

V.4.3 Measures relating to endangered or missing persons

V.4.4 Repatriation and return

V.5 Prevention measures

V.5.1 Public awareness and education

V.5.2 Measures to discourage demand; information to smuggled migrants

V.5.3 Cooperation with civil society

V.6 Monitoring

V.6.1 Group of experts on action against smuggling of migrants

V.6.2 Committee of the Parties

V.6.3 Procedure

V.7 Final provisions

Appendices

Appendix 1: CoE Member States ratification of relevant international instruments/EU membership

	UN Smuggling of Migrants Protocol	EU Member State
Albania	21 Aug 2002	No
Andorra		No
Armenia	1 Jul 2003	No
Austria	30 Nov 2007	Yes
Azerbaijan	30 Oct 2003	No
Belgium	11 Aug 2004	Yes
Bosnia and Herzegovina	24 Apr 2002	No
Bulgaria	5 Dec 2001	Yes
Croatia	24 Jan 2003	Yes
Cyprus	6 Aug 2004	Yes
Czechia	24 Sep 2013	Yes
Denmark	8 Dec 2006	Yes
Estonia	12 May 2004	Yes
Finland	7 Sep 2006 (ap)	Yes
France	29 Oct 2002	Yes
Georgia	5 Sep 2006	No
Germany	14 Jun 2006	Yes
Greece	11 Jan 2011	Yes
Hungary	22 Dec 2006	Yes
Iceland	13 Dec 2000 (s)	No
Ireland	13 Dec 2000 (s)	Yes
Italy	2 Aug 2006	Yes
Latvia	23 Apr 2003	Yes
Liechtenstein	20 Feb 2008	No
Lithuania	12 May 2003	Yes
Luxembourg	24 Sep 2012	Yes
Malta	24 Sep 2003	Yes
Monaco	5 Jun 2001	No

	UN Smuggling of Migrants Protocol	EU Member State
Montenegro	23 Oct 2006 (sc)	No
Netherlands	27 Jul 2005 (ac)	Yes
North Macedonia	12 Jan 2005	No
Norway	23 Sep 2003	No
Poland	26 Sep 2003	Yes
Portugal	10 May2004	Yes
Republic of Moldova	28 Feb 2006 (a)	No
Romania	4 Dec 2002	Yes
San Marino	20 Jul 2010	No
Serbia	6 Sep 2001	No
Slovak Republic	21 Sep 2004	Yes
Slovenia	21 May 2004	Yes
Spain	1 Mar 2002	Yes
Sweden	6 Sep 2006	Yes
Switzerland	27 Oct 2006	No
Türkiye	25 Mar 2003	No
Ukraine	21 May 2004	No
United Kingdom	9 Feb 2006	No

(a) accession, (ap) acceptance, (r) ratification, (s) signature, (sc) succession

Appendix 2: Comparison between UN Smuggling of Migrants Protocol and EU frameworks

UN Smuggling of Migrants Protocol		2002 EU Council Directive (CD) and Framework Decision (FD)		2023 proposal new EU Directive COM(2023) 755 final	
Pre		Pre			
Art 1	Relationship w UNTOC				
Art 2	Statement of purpose			Art 1	Subject matter
Art 3	Use of terms			Ar 2	Definitions
3(a)	'smuggling of migrants'				
3(b)	'illegal entry'				
3(c)	'fraudulent travel or identity document'				
3(d)	'vessel'				

UN Smuggling of Migrants Protocol		2002 EU Council Directive (CD) and Framework Decision (FD)		2023 proposal new EU Directive COM(2023) 755 final	
	Art 15 UNTOC	Art 4	Jurisdiction (FD)	Art 12	Jurisdiction
Art 4	Scope of application				
Art 5	Criminal liability of migrants				
Art 6	Criminalisation	Art 1	General infringement (CD)	Art 3	Criminal offence
1(a)	Smuggling of migrants	1(a)	Assisting to enter or transit across	1(a)	Assisting to illegally enter, transit, stay for benefit
		2	Humanitarian assistance		
1(b)(i)	Producing fraudulent document				
1(b)(ii)	Possessing fraudulent document				
1(c)	Enabling illegal residence	1(b)	Assisting to reside	1(a)	Assisting to illegally enter, transit, stay for benefit
				1(b)	Assisting to illegally enter, transit, stay likely to cause serious harm
				2	Publicly instigating to illegal enter, transit, stay
2(a)	attempts	Art 2(c)	Attempts	Art 5	attempt
2(b)	Accomplices	Art 2(b)	Accomplices	Art 5	Aiding and abetting
2(c)	Organizing or directing	Art 2(a)	instigating	Art 5	Incitement
3	Aggravations			Arts 4, 9	Aggravating offences, aggr. circumstances
3(a)	Endangering life or safety			4(b), (e)	Causing serious harm, endangering life, causing death
3(b)	Inhuman or degrading treatment, exploitation			4(c), 9(d)	Serious violence, exploitation
				4(b)	Criminal organisation
				4(d)	Vulnerable migrants
				Art 9(a)	Public official
				9(b)	Illegal employment
				9(c)	Repeat offending
				9(e)	Removing ID or travel documents
				9(f)	Firearm
				Art 10	Mitigating circumstances

UN Smuggling of Migrants Protocol		2002 EU Council Directive (CD) and Framework Decision (FD)		2023 proposal new EU Directive COM(2023) 755 final	
4	Offences under domestic law				
	Art 11 UNTOC	Art 3	Sanctions (CD)	Art 6	Penalties for natural persons
		Art 1	Penalties (FD)		
	Art 10 UNTOC	Art 2	Liability of Legal Persons (FD)	Art 7	Liability of legal persons
		Art 3	Sanctions for legal persons (FD)	Art 8	Sanctions for legal persons
Art 7	Cooperation on the sea				
Art 8	Measures against SoM by sea				
Art 9	Safeguard clause				
Art 10	Information	Art 7	Communication of information btw Member States (FD)		
Art 11	Border measures				
Art 12	Security and control of documents				
Art 13	Legitimacy and validity of documents				
Art 14	Training and technical assistance			Art 15	Training
	Art 20 UNTOC			Art 16	Investigative tools
	Art 28 UNTOC			Art 17	Data collection, statistics
Art 15	Other prevention measures			Art 13	Prevention
Art 16	Protection and assistance measures				
Art 17	Agreements and arrangements				
Art 18	Return of smuggled migrants				
Art 19	Saving clause	Art 6	International law on refugees (FD)		
	Art 16 UNTOC	Art 5	Extradition and prosecution (FD)		
Arts 20-25	Administrative provisions	Arts 4-7	Administrative provisions (CD)		
		Arts 8-11	Administrative provisions (FD)		

