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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

Report on the need for and feasibility of a possible new Council of Europe instrument on smuggling of migrants

Notes:

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This report has been prepared by independent experts. It does not represent the position of the CDPC Secretariat and the Council of Europe.

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Table of Contents

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)	i
<hr/>	
Abbreviations	v
Executive summary	vi
I. Introduction and background	1
I.1 Topic	1
I.2 Smuggling of migrants: a snapshot	1
I.3 Context and summary of prior CDPC work	4
I.4 Purpose of this report	5
I.5 Content and structure of this report	5
I.6 Methods	6
II. Existing international frameworks	8
II.1 Overview	8
II.2 Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime	9
II.3 Global Compact for Migration and the New York Declaration	11
II.3.1 <i>Global Compact for Safe, Orderly and Regular Migration</i>	11
II.3.2 <i>New York Declaration for Refugees and Migrants</i>	12
II.4 European Union instruments	12
II.4.1 2002 'Facilitators Package'	12
II.4.2 2017 evaluation	13
II.4.3 2023 proposal for a new Directive	15
II.5 Other instruments to consider	16
III Gaps, conflicts, challenges: The need for a new Council of Europe instrument on smuggling of migrants	18
III.1 Divergent national systems; the issue with sovereignty	18
III.2 Conflicting international frameworks	20
III.3 Definition and basic offence of smuggling of migrants	21
III.3.1 <i>Elements of Article 3(a)</i>	22
III.3.2 <i>'Not-for-profit'/humanitarian activities</i>	24
III.4 Smuggling of migrants vs trafficking in persons	31
III.5 Subject of criminalisation	35
III.5.1 <i>Focus on organised criminal groups</i>	35
III.5.2 <i>Non-criminalisation of smuggled migrants</i>	37
III.5.3 <i>NGOs and private vessels</i>	40
III.6 Enabling and assisting to remain unlawfully	45
III.7 Types and methods of smuggling	47
III.7.1 <i>Smuggling by sea</i>	48
III.7.2 <i>Smuggling by air</i>	49
III.7.3 <i>Smuggling by land</i>	50

III.7.4	Document fraud.....	50
III.7.5	New and emerging types and methods	51
III.8	Money laundering and corruption	52
III.8.1	Financing and proceeds of smuggling of migrants	52
III.8.2	Corruption.....	54
III.9	Aggravating factors	55
III.9.1	Endangering the lives or safety of smuggled migrants.....	56
III.9.2	Inhuman or degrading treatment, exploitation of smuggled migrants	56
III.9.3	Other aggravating circumstances	57
III.9.4	Mitigating circumstances	60
III.10	Penalties and sanctioning.....	61
III.11	Prevention.....	62
III.11.1	Public awareness campaigns	63
III.11.2	Informing would-be smuggled migrants.....	63
III.11.3	Deterring would-be offenders	64
III.11.4	Addressing root-causes and demand for smuggling of migrants.....	65
III.11.5	Regular migration opportunities	65
III.12	International cooperation in criminal matters.....	67
III.13	Investigations and law enforcement	68
III.14	Border and immigration control	70
III.15	Protection of the human rights of smuggled migrants	73
III.16	Smuggled migrants who are refugees.....	78
III.17	Support of smuggled migrants.....	80
III.18	Return of smuggled migrants	81
III.19	Data collection and research.....	82
III.20	Implementation and review	83
III.21	Other issues	85
III.21.1	Commercial carriers	86
III.21.2	Corporate liability.....	87
III.21.3	Information exchange.....	88
III.21.4	Further matters	88
IV	Opportunities, obstacles, options: The feasibility of a new Council of Europe instrument on smuggling of migrants.....	90
IV.1	The opportunity	90
IV.2	The purpose	92
IV.3	The precedent	94
IV.4	The obstacles	96
IV.5	The options.....	99
Appendices		103
Appendix 1: Main elements of a possible Council of Europe instrument against Smuggling of Migrants		103
Part I Common provisions		105
Part II Criminalisation		106
Part III Special methods of smuggling and associated offences		107
Part IV Law enforcement and international cooperation		108

<i>Part V Protection and support of smuggled migrants</i>	108
<i>Part VI Prevention measures</i>	110
<i>Part VII Monitoring</i>	110
<i>Part VII Final provisions</i>	110
Appendix 2: CoE Member States ratification of relevant international instruments/EU membership.	111
Appendix 3: Comparison between UN Smuggling of Migrants Protocol and EU frameworks	113

Abbreviations

art/arts	article/s
CCBE	Council of Bars and Law Societies of Europe
CDPC	European Committee on Crime Problems
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant for Civil and Political Rights
ILO	International Labour Organization
IMO	International Maritime Organization
IOM	International Organization for Migration
NGOs	non-governmental organizations
OHCHR	Office of the United Nations High Commissioner for Human Rights
para/paras	paragraph/s
s/ss	section/s
SAR	search-and-rescue
SOLAS	International Convention for the Safety of Life at Sea
UN	United Nations
UNCAC	United Nations Convention against Corruption
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

Executive summary

This report examines the need for and the feasibility of developing a Council of Europe 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 explores the challenges posed by smuggling of migrants to Council of Europe 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 opportunities, obstacles, and options for developing a new Council of Europe instrument, and the possible elements of such an instrument.

The existing legal instruments pertaining to smuggling of migrants consist of two sets of frameworks. Globally, the most important legal instrument is the *Protocol against the Smuggling of Migrants by Land, Sea and Air* which was adopted in 2000 and entered into force in 2004. This Protocol supplements the *United Nations Convention against Transnational Organized Crime*. The *Global Compact for Safe, Orderly and Regular Migration*, which was adopted in 2018, echoes many of the principles and provisions of the Protocol and places them into the wider issues of migration and human mobility.

For Member States of the European Union (EU), criminal laws relating to smuggling of migrants have been shaped by a Council Directive and a Framework Decision of November 2002 on facilitating unauthorised entry, transit, and residence. These instruments differ substantially from the UN Protocol. The Council Directive and Framework Decision have received wide-ranging criticism which has led to a process resulting in the proposal for a new Directive which was presented in November 2023 and revised in May 2024.

Because more than twenty years have passed since both the UN Protocol and the EU Council Directive and Framework Decision have been adopted, it is not surprising that there is a large and growing body of critical analysis of these frameworks and their effect on smugglers, smuggled migrants, and on States affected by smuggling of migrants. This report highlights 21 main issues that are commonly raised in the available commentary. These include:

1. The grave differences between national laws on smuggling of migrants and prioritisation of national sovereignty which hampers a greater level of harmonisation and cooperation between States;
2. Conflicts and discrepancies between different international instruments which States struggle to reconcile in their national laws;
3. Interpretation of and departure from the definition of ‘smuggling of migrants’ as set out in Article 3(a) of the *Smuggling of Migrants Protocol*;
4. Distinguishing between smuggling of migrants and trafficking in persons;
5. Articulating and limiting the subject of criminalisation; separating criminal elements from humanitarian assistance and dealing with the role of NGOs;
6. Concerns about criminalising assistance rendered to persons staying in the host country unlawfully;
7. The lack of special provisions on certain types of smuggling, including emerging methods;
8. A lack of specific provisions relating to money laundering and concerns over criminalising the financing of smuggling of migrants;
9. The lack of more detailed guidance on aggravated forms of smuggling of migrants;

10. Discrepancies between statutory penalties and sanctions imposed on smuggling of migrants;
11. A lack of meaningful guidance on measures to prevent the smuggling of migrants and deter would-be offenders effectively;
12. Inadequate use of international cooperation measures;
13. The use of investigative techniques and training of law enforcement;
14. Concerns about the role played by border and immigration control;
15. Severe deficiencies in the protection of the human rights of migrants;
16. Inadequate recognition and protection of smuggled migrants who are refugees and asylum seekers;
17. The basic support available to smuggled migrants;
18. The conditions of their return to their country of origin;
19. A lack of implementation review and monitoring;
20. Data collection and research;
21. And a range of other issues which are flagged peripherally in this report.

The Council of Europe's debates about the need for and feasibility of a new international instrument against smuggling of migrants present an opportunity to address shortcomings of the existing frameworks, solve some long-standing problems, reconcile different legal requirements, and align the response with Council of Europe standards. The smuggling of migrants is a major and multi-dimensional challenge for all Member States and this study, coupled with the realities that smuggled migrants face, demonstrates the urgency of taking further action.

The topic is a suitable fit for the mandate of the Council of Europe and its mission to promote democracy, human rights, and the rule of law. Given the Council of Europe's broad geographical scope, the potential for greater harmonisation of domestic laws, and the need for more effective international cooperation, developing a new international instrument against smuggling of migrants would be a significant step.

The purpose of developing any new international instrument, regardless of the form this may take, must be to complement and enhance the existing international law on smuggling of migrants. The further objective must be to deliver a framework suitable for Member States whilst recognising that smuggling of migrants is a global issue. Since the existing international frameworks are widely criticised for taking a narrow criminal justice approach, a new instrument could complement these instruments by adding a human rights perspective in line with the principles and provisions of the *European Convention on Human Rights*. The development of the *Council of Europe Convention on Action against Trafficking in Human Beings* provides a precedent for how a Council of Europe instrument can build on an existing UN treaty and set higher standards, especially in relation to victim and human rights protection.

There are multiple obstacles to developing a new Council of Europe instrument against smuggling of migrants and there are doubts that a new instrument would be able to achieve what the existing frameworks have not. In particular, there appears to be a lack of enthusiasm and political will among Member States to develop, adopt, comply with, enforce, and invest in a new multilateral instrument. This is also manifested by the fact that the standards set by the *Smuggling of Migrants Protocol* are not met by many States Parties. Furthermore, there appear to be implementation and reporting fatigue among States and a reluctance to take on new obligations, especially in relation to protecting smuggled migrants. Relatedly, the current political climate and many populist claims about irregular migrants hamper a balanced, fair, and evidence-based discussion about the most

suitable and sustainable measures to prevent and suppress smuggling of migrants. The development of a new instrument may also be untimely so long as it remains unclear what the new EU framework on facilitation of illegal entry, transit, and residence will look like.

While this report notes that the development of a new Council of Europe instrument against smuggling of migrant may be useful to complement and enhance the existing international legal frameworks, it is unable to conclude that such a step is, at the present moment, feasible and timely. It is doubtful that such a step would gain sufficient traction among Member States. Further concerns stem from the fact that a new instrument, cannot, without more, address the underlying causes of smuggling of migrants and the demand that is fuelling this phenomenon. On the other hand, developments in Brussels are rather slow with an uncertain outcome that, in any event, is unlikely to address many of the divergencies and deficiencies that have been identified.

The further course of action will depend on decisions made by the CDPC, the Committee of Ministers, and thus ultimately by Member States. If a decision is made to take this issue further, the Council of Europe has several options available. One possible course of action can be the establishment of a Working Group to develop the content of this report into the text of a potential new CoE instrument. This process could, for instance, aim to develop a recommendation to be adopted by the Committee of Ministers which endorses the purpose and provisions of the *Smuggling of Migrants Protocol*, strengthens the protection afforded to smuggled migrants, and raises the standards which the Protocol lays down.

Should the CDPC decide to proceed in this or another manner, the authors of this report stand ready to advice and support the CDPC, Member States, and the Council of Europe in their quest to fight the smuggling of migrants, protect the rights of smuggled migrants, and enhance international cooperation among and beyond Council of Europe Member States.

I. Introduction and background

I.1 Topic

[1] The present report assesses the need for and the feasibility of developing a possible Council of Europe 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 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 legal 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 ‘prepare a report assessing the need for and feasibility of a possible instrument in’ the field of smuggling of migrants.

[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*¹ supplementing the *United Nations Convention against Transnational Organized Crime*:²

‘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.

I.2 Smuggling of migrants: a snapshot

[4] It is not possible to provide 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 its causes, scale, patterns, and consequences. 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.

[5] 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.³

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

¹ Opened for signature 15 November 2000, 2241 UNTS 507 (entry into force 28 January 2004).

² Opened for signature 15 November 2000, 2225 UNTS 209 (entry into force 29 September 2003).

³ 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.⁴

[7] 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.⁵

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.⁶

[8] The risks and dangers associated with smuggling of migrants are well-documented⁷ and frequently make headlines. Depending on the means and methods used, 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.⁸ While violence and exploitation are not necessary

⁴ UNODC, 'Smuggling of migrants: the harsh search for a better life' (2024) <<https://www.unodc.org/toc/en/crimes/migrant-smuggling.html>>.

⁵ Hereafter 'Working Group on Smuggling of Migrants'.

⁶ 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].

⁷ UNODC, *Global Study on Smuggling of Migrants* (United Nations 2018) 38–42.

⁸ 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).

components of smuggling, they are not uncommon during the smuggling process.⁹ Of particular note is the link between many situations of smuggling and trafficking in persons.¹⁰

Smuggling of migrants to Europe

[9] 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 2014.¹¹

[10] Smuggling of migrants is a complex, fluid, and rapidly changing crime type and can be a profitable 'business' for the organised criminal groups and other criminal elements. 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 such groups, their international connections, 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.

[11] 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 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 displace smuggling activities 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. Smuggling of

⁹ 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.

¹⁰ 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.

¹¹ 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.

migrants is a particularly lucrative criminal activity for organised criminal groups for two additional reasons: one, because payments are usually made in advance of providing the services and, two, because many smugglers show little concern for the fate of their ‘human cargo’. Complicating matters further, many leaders and organisers of smuggling networks are located in jurisdictions with poor laws, weak law enforcement, and lack of effective investigation, prosecution, and judicial cooperation.

I.3 Context and summary of prior CDPC work

[12] Work of the Council of Europe’s ‘European Committee on Crime Problems’ (CDPC) on the topic of smuggling of migrants commenced in June 2015 with the presentation of a proposal entitled ‘Criminality and Migration’. 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’.

[13] 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 experts¹² to review international and national laws pertaining to the smuggling of migrants in Council of Europe Member States, examine experiences and obstacles in investigations and international cooperation, and develop recommendations for future Council of Europe activities in this field.

[14] 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. The goal of the Action Plan is to help 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 cooperation amongst source, transit and destination countries.

[15] Countering the smuggling of migrants was identified as a priority in the decisions of the Council of Europe Heads of State and Government at their 4th Summit held in Reykjavík on 16 and 17 May 2023. The European leaders stated in the *Reykjavík Declaration*:

We recall the increasing challenges of migration and the necessity to fight against trafficking and smuggling of migrants. We commit to intensifying efforts to foster and improve international co-operation in this regard, while continuing to protect the victims and respect the human rights of migrants and refugees, as well as supporting frontline States, within the existing Council of Europe frameworks.

[16] Following the Reykjavík Summit, the CDPC in its terms of reference for the years 2024 to 2027 was instructed 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.

¹² Andreas Schloenhardt, Professor at The University of Queensland and Professorial Research Fellow at the University of Vienna; Calogero Ferrara, Prosecutor, Tribunal of Palermo.

[17] In January 2024, the authors of this report were contracted to provide ‘consultancy services on the development of a report assessing the need for and feasibility of a possible instrument in the field of migrant smuggling (Deliverable 10. of the CDPC (European Committee on Crime Problems) Terms of reference for 2024-2027)’. The present report represents the final deliverable of this engagement. Note that the authors of this report were not contracted to examine ways to improve international cooperation in fighting smuggling of migrants.

I.4 Purpose of this report

[18] The purpose of the present report, as per the authors’ act of engagement, is to ‘assess the need for and feasibility of a possible Council of Europe instrument in the field of migrant smuggling’.

[19] 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 Council of Europe Member States;
- 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 opportunities and obstacles in developing a new legal instrument against smuggling of migrants
- Identify the role and options of the Council of Europe in context;
- Outline the main components and content of a possible new Council of Europe instrument against the smuggling of migrants.

I.5 Content and structure of this report

[20] This report comprises four parts and three appendices:

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

[22] 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 outlines the background and content of the *Smuggling of Migrants Protocol* as well as the 2002 EU 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 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.

[23] In order to establish the need, if any, for a new instrument against smuggling of migrants, Part III of this report 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.

[24] Based on these observations, Part IV examines the feasibility of developing a new Council of Europe instrument on smuggling of migrants. It 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 Council of Europe instrument. This is done by exploring opportunities and obstacles and canvassing a range of alternative options.

[25] Appendix 1 outlines the main elements of a possible new Council of Europe instrument against smuggling of migrants. The idea here is not to present a draft text of such an instrument, but to reflect thematically on some key issues and components.

I.6 Methods

[26] 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 CDPC Bureau and plenary, representatives of Member States and relevant international organisations, Council of Europe officials, and other relevant stakeholders.

[27] 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 III 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
- 14 October 2024: full draft report presented to CDPC Bureau
- 31 October 2024: final report presented to CDPC Secretariat
- 20 November 2024: final report presented to CDPC plenary.¹³

[28] In addition, and in support of this study, the CDPC Secretariat in collaboration with the Office of the Special Representative on Migration and Refugees convened a ‘Second Smuggling of Migrants Conference’, held in Strasbourg on 10 and 11 September 2024. This conference aimed to foster enhanced international cooperation, discuss the effectiveness of the existing legal frameworks and any possible gaps, share best practices, and explore comprehensive measures needed for effectively countering migrant smuggling.

[29] This report does not involve the use of any classified information. Due to time and capacity constraints, the report does not engage with the jurisprudence of the European Court of Human Rights and other regional and national courts on matters pertaining to smuggling of migrants, irregular migration, refugee and asylum seekers, and related matters. The report 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, agency, or State rather than their names or titles.

[30] The authors of this report wish to thank, the following Member States and organisation for their submissions and comments on earlier drafts of this report: Germany, Finland, United Kingdom, UNHCR, UNODC, and the European Commission Directorate-General for Migration and Home Affairs (DG Home). One Member State submitted comments but wished to remain

¹³ This is the current version of the present report.

anonymous. These submissions and comments are kept on file by the CDPC Secretariat and the authors; they are not footnoted in this report.

[31] This report is current as on 30 October 2024. This report was prepared by independent experts. The content of this report is based on the available data, documentation, and literature, the authors' own expertise, and the material, statements, and opinions provided to the experts by a small number of Member States and international and regional governmental organisations. It does not represent the position of the CDPC Secretariat and the Council of Europe.

II. Existing international frameworks

II.1 Overview

[32] 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.

[33] The *New York Declaration for Refugees and Migrants*, adopted in September 2016 by the United Nations (UN) General Assembly,¹⁴ paved the way for the *Global Compact for Migration* and also the *Global Compact for Refugees*.¹⁵ The *Global Compact for Safe, Orderly and Regular Migration* ('*Global Compact for Migration*') 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. The *Global Compact for Refugees*—which is not further discussed in the present report—contains two references to smuggling. One acknowledges the relevance of the international legal framework set out in the UNTOC and its Protocols.¹⁶ The second reference is in the context of UNHCR support to protection sensitive arrangements, and to efforts to prevent and combat trafficking in persons and smuggling of migrants.¹⁷

[34] A small number of other global initiatives provide guidance to states about how to address the complex challenges associated with smuggling of migrants. The 2030 Agenda for Sustainable Development mentions human trafficking but not migrant smuggling.¹⁸ The 2013 Declaration of the High-level Dialogue on International Migration and Development only makes a cursory reference to preventing and combating smuggling of migrants and to ratifying, acceding, and implementing relevant international instruments.¹⁹

[35] 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 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.

[36] 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.

[37] Several regional consultative processes—which are not further discussed in this report—have been established in the late 1990s to provide fora for states to share their experience with migrant smuggling and discuss common policy positions, legal frameworks, and cooperative mechanisms.

¹⁴ UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016).

¹⁵ UN General Assembly, *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2018).

¹⁶ UN General Assembly, *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2018) [5] fn.

¹⁷ UN General Assembly, *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2018) [57].

¹⁸ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc A/RES/70/1 (25 September 2015) [27] goals 5.2, 8.7.

¹⁹ UN General Assembly, *Declaration of the High-level Dialogue on International Migration and Development*, UN Doc A/RES/68/4 (21 January 2014) [17].

- This includes the ‘Budapest Process’, which was established in 1993 and is managed by the International Centre for Migration Policy Development in Europe (ICMPD) in Vienna. It seeks to strengthen migration and border management in the ‘Silk Routes Region’, ranging from South and Central Asia all the way to Western Europe.²⁰
- The ‘Khartoum Process’ is a platform for political cooperation amongst the countries along the migration route between the Horn of Africa and Europe. It aims at establishing a continuous dialogue for enhanced cooperation on migration and mobility. The process also seeks to support Member States in identifying concrete projects to address trafficking in human beings and the smuggling of migrants and other migration-related areas.²¹
- The Euro-African Dialogue on Migration and Development (‘Rabat Process’) offers a framework for consultation, bringing together countries of origin, transit and destination of the migration routes linking Central, West and Northern Africa with Europe.²²
- The ‘Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime’ has more of a border control and law enforcement focus, bringing together States and international organisations from the Asia-Pacific region.²³

II.2 Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime

[38] 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 16 September 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.²⁴

[39] 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.²⁵ 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.²⁶

[40] 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

²⁰ See further, ICMPD Budapest Process, ‘About the Budapest Process’ (2024) <<https://www.budapestprocess.org/>>.

²¹ See further, Khartoum Process, ‘The Khartoum Process’ (2024) <<https://www.khartoumprocess.net/>>.

²² See further, ICMPD, ‘Rabat Process Euro-African Dialogue on Migration and Development’ ([s.d.]) <<https://www.rabat-process.org/en/>>.

²³ See further, Bali Process, ‘The Bali Process’ ([s.d.]) <<https://www.baliprocess.net/>>.

²⁴ See Appendix 2 below.

²⁵ *Smuggling of Migrants Protocol*, art 1(1).

²⁶ UNTOC, art 37.

IV. Final Provisions (arts 19–25).

[41] 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 statement, 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.²⁷

[42] The Protocol's central feature is the obligation in Article 6 to criminalise the smuggling of migrants. 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.

[43] 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.²⁸

[44] 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 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.²⁹

[45] Because of the special relationship, the provisions under the UNTOC are also relevant for the prevention and suppression of smuggling of migrants, especially in relation to organised criminal groups, international cooperation, and 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'³⁰ 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);

²⁷ UNODC, *Travaux préparatoires de la négociation pour l'élaboration de la Convention des Nations Unies contre le crime transnational organisé et les protocoles thereto* (United Nations, 2006) 459.

²⁸ 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.

²⁹ *Smuggling of Migrants Protocol*, arts 20–25.

³⁰ 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.

- promote and facilitate international criminal justice cooperation (arts 16–19, 21, 22, 27);
- 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).

[46] Critical provisions under the Protocol and the UNTOC are discussed further in Parts III and IV of this study.

II.3 Global Compact for Migration and the New York Declaration

II.3.1 Global Compact for Safe, Orderly and Regular Migration

[47] 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 19 December 2018 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 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.

[48] Objective 9 of the *Global Compact* 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*.³¹ The six 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.

[49] 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.

[50] 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.

[51] 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

³¹ 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.

aspects, both from the perspective of States and of migrants. In sum, the *Global Compact* presents a framework for comprehensive international cooperation on migration and human mobility; it goes above and beyond the criminal law aspects of smuggling of migrants.

II.3.2 New York Declaration for Refugees and Migrants

[52] The *New York Declaration* takes a nuanced stand on the topic of smuggling of migrants. Paragraphs 34 to 36 of the Declaration, where most of the references to smuggling can be found, largely echo the spirit of the *Smuggling of Migrants Protocol* by stressing the need to prevent and ‘vigorously combat’ smuggling of migrants. In this context (and also in para 19), reference is made to the Protocol, to several regional initiatives, and to the need for enhanced technical cooperation between countries of origin, transit, and destination to prevent the smuggling of migrants and prosecute smugglers.

[53] In addition, the *New York Declaration* provides an important acknowledgment of the factors that cause refugees and migrants to resort to smugglers:

Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys, which many may not survive. Some feel compelled to employ the services of criminal groups, including smugglers, and others may fall prey to such groups or become victims of trafficking. Even if they reach their destination, they face an uncertain reception and a precarious future.³²

[54] The express statement that some people ‘feel compelled’ to employ the services of smugglers highlights that many smuggled migrants have little or no other choice. The reference to trafficking in persons in this context shows that the two phenomena sit along a continuum and that situations of smuggling of migrants can transcend into trafficking.

II.4 European Union instruments

[55] 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. In addition, the EU is a Party to the *Smuggling of Migrants Protocol*, which it signed on 12 December 2000 and approved on 6 September 2006.

II.4.1 2002 ‘Facilitators Package’

[56] On 28 November 2002, the Council of the European Union adopted Directive 2002/90/EC ‘defining the facilitation of unauthorised entry, transit and residence’,³³ followed by Framework Decision 2002/946/JHA ‘on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence’.³⁴ Collectively, these two documents are frequently referred to as the ‘facilitators package’. Although the EU has signed the *Smuggling of*

³² UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016) [9].

³³ 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.

³⁴ 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.

Migrants Protocol in 2000 (and approved it in 2006), no reference is made to the UN framework in the EU instruments.

[57] 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.³⁵ 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.’³⁶

[58] Article 1(1) of the 2002 Council Directive requires Member States 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.4.2 2017 evaluation

[59] 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 rising smuggling activities, there are also questions about the effectiveness of these instruments.

[60] Following the EU action plan against migrant smuggling adopted in May 2015, in 2017, the European Commission carried out an evaluation of the ‘Facilitators 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 criteria.’³⁷ 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.’³⁸ 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

³⁵ 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].

³⁶ 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.

³⁷ 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).

³⁸ 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).

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.³⁹

[61] These perceptions and criticisms concerned 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 further 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.⁴⁰

[62] It must be pointed out that the 2002 EU Council Directive and Framework Decision date back to the systems of pillars of the pre-Lisbon era. 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.

[63] 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.

[64] The increasing acknowledgement that migrant smuggling 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 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 seeking even closer cooperation with partner countries along the migratory routes towards the EU. The *Renewed EU Action Plan* includes the following main pillars of action:

- 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.4.3 2023 proposal for a new Directive

[65] 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*.⁴¹

[66] According to the official documents, the 2023 proposal for a new directive serves five 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.⁴²

[67] The 2023 proposal was met by substantial criticism from a range of official agencies and experts (which is documented in the relevant contexts throughout the present report). On the basis of input provided, the Council of the European Union released a modified text (redraft) of the proposal on 31 May 2024 (which is equally considered throughout the present report).⁴³ At the time the present report was completed in late September 2024, the Council of the European Union was asking Member States to provide comments and drafting suggestions on several provisions of the proposal text. Further developments since that time are not captured in the present report.

[68] 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. 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 taking place in May 2024.

⁴¹ 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) 3.

⁴² 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) 3–4.

⁴³ Council of the European Union, 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 – Presidency redraft, 10569/24 (31 May 2024).

II.5 Other instruments to consider

[69] In addition to the international and regional instruments which directly address the smuggling of migrants (and facilitation of unlawful entry, transit, and stay), a range of other international treaties and regional convention address matters that are connected to the criminal justice or human rights dimensions of smuggling of migrants or that concern associated crimes.

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

- *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)

[71] Also of importance are, inter alia, 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)
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entry into force 1 July 2003)
- *Migrant Workers (Supplementary Provisions) Convention* (ILO No 143), adopted 24 June 1975, 1120 UNTS 323 (entry into force 9 December 1978)

[72] In the context of smuggling of migrants by sea, some relevant provisions can also be found, inter alia, 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)

[73] At the European level, the Council of Europe has developed a suite of 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, inter alia:

- *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 2002)
- *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)

[74] 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)) with its Protocols and the jurisprudence of the European Court of Human Rights (ECtHR).

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

III Gaps, conflicts, challenges: The need for a new Council of Europe instrument on smuggling of migrants

[76] The existing frameworks outlined in part II comprise global instruments, developed under the auspices of the United Nations, as well as regional frameworks developed by the European Union. Some matters found in these legal frameworks are binding and mandatory for States, some are optional, and some are guiding principles rather than legal provisions in the strict sense.

[77] For reference it is worth noting that there are no specific regional legal frameworks on smuggling of migrants in Africa, the Americas, Asia, and the Pacific. Especially in the Asia-Pacific region accession to the UN *Smuggling of Migrants Protocol* remains patchy.⁴⁴

[78] In sum, the existing frameworks relating to smuggling of migrants provide a suite of tools 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. The 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.

[79] The frameworks have been criticised for protecting the interests of destination countries and show little concern—and offer few solutions—for source and transit countries. ‘Irregular migration is a source of long-standing anxiety for States; most particularly for the relatively wealthier countries of destination’, notes Anne Gallagher.⁴⁵ There is growing criticism of the existing instrument for being too Western-centric and driven by the desire of wealthy industrialised nations to fortify their borders, deter asylum seekers and irregular migrants, and prevent uncontrolled immigration from less developed nations.⁴⁶

[80] 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 exhaustive; 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.

III.1 Divergent national systems; the issue with sovereignty

[81] There are great differences between Council of Europe Member States’ national criminal laws on smuggling of migrants. This has been highlighted by a 2016 study commissioned by the

⁴⁴ See further, Andreas Schloenhardt and 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.

⁴⁵ Anne Gallagher, ‘Migrant Smuggling’ in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge, 2015) 187, 188.

⁴⁶ See further, Andreas Schloenhardt and Hamish Macdonald, ‘Barriers to Ratification of the United Nations Protocol against the Smuggling of Migrants’ (2017) 7 *Asian Journal of International Law* 13, 33.

CDPC⁴⁷ 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 criminalised, and what punishment basic and more heinous methods of smuggling warrant — and what those methods are.⁴⁸

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

[83] 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):

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.

[84] 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.⁴⁹

[85] There are many provisions and references throughout the *Smuggling of Migrants Protocol* (and the UNTOC) to protect national prerogatives and sovereignty and to permit States Parties 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

⁴⁷ 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) 5–6.

⁴⁸ 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) 9–10.

⁴⁹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (UNODC, 2nd ed 2017) [47]–[48].

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).

[86] 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 report 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.

[87] The drafters of the the *Smuggling of Migrants Protocol* and the UNTOC were mindful of the fact that their efforts may result in a low 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 measures than those provided for' by the Convention and its Protocols.⁵⁰ 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.

[88] While 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.⁵¹

III.2 Conflicting international frameworks

[89] The differences found in 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.⁵² The 2002 EU Council Directive and Framework Decision depart from the

⁵⁰ 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.

⁵¹ 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.

⁵² 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 of Migrants Protocol in several ways (which are elaborated in detail in the following sections).

[90] In sum, there is only a limited level of similarity and overlap between the different frameworks. 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.’⁵³ Even for well-intended States Parties, when adopting or amending national laws, it can be challenging to synthesise and reconcile the obligations and optional requirements of different frameworks.

[91] One of the stated purposes of the 2023 proposal for a new EU Directive is to achieve greater consistency between the EU framework and the *Smuggling of Migrants Protocol*. As later parts of this report show, the 2023 proposal goes some way to address the known gaps and disparities between EU law and international law on smuggling of migrants. But the proposal has the potential to create some new issues and differences which are documented throughout the following parts. Appendix 3 of the present report contains a table comparing the content of the UN Protocol with the existing and proposed EU instruments.

[92] 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. The framework is also rather piecemeal as it leaves many facets of 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 migrant smugglers, and the protection of smuggled migrants.

[93] Furthermore, the existing international framework is, 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, affordable, and legal migration pathways.

III.3 Definition and basic offence of smuggling of migrants

[94] Article 3(a) of the *Smuggling of Migrants Protocol* provides a definition of ‘smuggling of migrants’ to ‘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’. Article 6(1)(a) requires States Parties to criminalise the smuggling of migrants as defined in Article 3(a).

[95] Whilst seemingly brief and straightforward, the definition set out in Article 3(a) has faced much criticism for lacking precision, for being ignored by some lawmakers, and for the blurry distinction to trafficking in persons (discussed separately under III.4 below). A 2016 study for the CDPC further found that the majority of Council of Europe Member States neither use nor define

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.

⁵³ 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 term ‘smuggling of migrants’ in their national laws.⁵⁴ As mentioned, the 2002 EU Council Directive does not use the term and instead refers to a different concept.

III.3.1 Elements of Article 3(a)

[96] The definition of ‘smuggling of migrants’ in Article 3(a) of the *Smuggling of Migrants Protocol* focuses chiefly 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, if any, of the smuggled migrants and does not capture persons who support migrants for other purposes.⁵⁵

‘Procurement’

[97] The conduct element ‘procurement’ (or procuring) is not further defined in the Protocol. It derives from early drafts and is generally taken as a synonym for facilitating, taking care of, or managing. ‘Procurement of illegal entry’ is not equivalent to merely crossing a border irregularly. 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.⁵⁶ Just what conduct amounts 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.

[98] 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.⁵⁷

‘Illegal entry’

[99] The term ‘illegal entry’ used in the definition of smuggling of migrants is further defined in Article 3(b) of the *Smuggling of Migrants 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 covered by the smuggling of migrants definition.

‘Financial or other material benefit’

[100] 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 (smuggler’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

⁵⁴ 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) 5.

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ 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.

definition of ‘organised criminal group’ in Article 2(a) of the UNTOC. The expression replaced the word ‘profit’ that was found in early drafts of the *Smuggling of Migrants Protocol*.⁵⁸

[101] An *Interpretative Note* explains that

the 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.⁵⁹

[102] This element highlights the Protocol’s focus on, and its nexus to, organised crime and those 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.’⁶⁰ This emphasises that the focus is on the ‘procurement’ of illegal entry, not on the illegal entry itself.⁶¹ 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] The inclusion of the ‘financial or material benefit’ element is crucial, but experience has shown that it can be difficult to prove in practice, especially in cases where smugglers operate under complex financial arrangements or where the benefits are not money or physical objects. Furthermore, the element can be difficult to prove in complex cases involving organised criminal groups who carry out criminal activities in several jurisdictions.

[104] Despite the *Smuggling of Migrants Protocol*’s clear position, many States Parties criminalise any assistance provided to irregular migrants. The 2016 study commissioned by the CDPC notes that a majority of Council of Europe Member States do not include the ‘financial or other material benefit’ element in their (basic) smuggling of migrants offence,⁶² thus departing 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.⁶³ The Protocol does not expressly bar

⁵⁸ 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.

⁵⁹ 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) [3].

⁶⁰ 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.

⁶¹ 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.

⁶² 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.

⁶³ UNODC, *The Concept of “Financial or other material benefit” in the Smuggling of Migrants Protocol* (UNODC 2017) 18.

States Parties from criminalising under their national laws activities that are not done for profit,⁶⁴ but the Protocol neither provides the foundation nor the justification for that.⁶⁵

[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:

[F]or 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?⁶⁶

[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.⁶⁷ The same can be said if, for instance, parents smuggle a child into another country to provide the child with better education opportunities.⁶⁸ Anne Gallagher and Fiona 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.’⁶⁹

[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 might bring this case within the scope of Article 6(1)(a).⁷⁰ 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.⁷¹

III.3.2 ‘Not-for-profit’/humanitarian activities

Smuggling of Migrants Protocol

[108] The requirement that persons seek to obtain a financial or other material benefit means that persons who procure the illegal entry of another person for other purposes are excluded from the definition of smuggling of migrants under Article 3(a) and are not liable for the offence of smuggling of migrants under Article 6(1)(a) of the *Smuggling of Migrants Protocol*. An *Interpretative Note* added by the drafters of the Protocol explains that

⁶⁴ 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].

⁶⁵ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 366.

⁶⁶ 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.

⁶⁷ Cf UNODC, *The Concept of “Financial or other material benefit” in the Smuggling of Migrants Protocol* (UNODC 2017) 18.

⁶⁸ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 366.

⁶⁹ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 366.

⁷⁰ 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.

⁷¹ 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 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 criminalise the activities of family members or support groups such as religious or non-governmental organisations.⁷²

[109] Irregular migration involves a great range of actors and aids beyond the irregular migrants themselves. Many of these aids and actors are not migrant smugglers because it is lawful and common behaviour to provide advice and assistance to irregular migrants as a courtesy, out of compassion, and free of charge. In some cases, those who provide assistance to irregular migrants are family or friends. Providing humanitarian assistance and information on rights, legal counseling and advice to asylum seekers and refugees also does not amount to smuggling. Receiving a gift from an irregular migrant as a ‘thank you’ without asking or seeking a benefit does not turn the recipient into a migrant smuggler. The *Smuggling of Migrants Protocol* is clear that 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. 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.⁷³

[110] Irregular migration, of which smuggling of migrants is one form, is frequently connected to cross-border movements of refugees fleeing persecution, war, torture, discrimination, and severe human rights abuses, and of persons who are forced to leave their home countries for other reasons. For many people, irregular migration, with or without the aid of others, is the only way to escape threats, harm, and death.⁷⁴ The ‘financial or other benefit’ requirement in the *Smuggling of Migrants Protocol* recognises that many people, including refugees and asylum seekers, require or seek assistance to flee from violence and human rights violations and that merely providing that assistance ought not to be criminalised.

[111] Many experts and international organisations oppose the criminalisation of persons who assist others to cross borders irregularly, which, as mentioned, 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.⁷⁵ In 2024, the Commissioner added:

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

⁷² 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.

⁷³ Andreas Schloenhardt, ‘Article 6: Criminalization’ in in Andreas Schloenhardt et al, *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 575.

⁷⁴ 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.

⁷⁵ 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 Rights (FRA), *Criminalization of migrants in an irregular situation and of persons engaging with them* (FRA 2014) 1–2, 12, 13.

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.⁷⁶

[112] The omission of the ‘financial or other material benefit’ element, notes Marika McAdam, ‘falls short of criminalisation requirements, jeopardising the integrity of the definition and detracting from a harmonised understanding of “smuggling of migrants”’.⁷⁷ Jennifer Allsopp and Maria 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.’⁷⁸

2002 EU Council Directive

[113] 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 is explained by the overall purpose of the Directive, which is to combat the facilitation of illegal immigration in all its forms. It 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 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.’⁷⁹ 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.

[114] Many international organisations, practitioners, and academic expert criticise this approach because it 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 the clear decriminalisation of their involvement in sea rescue, and even systematic compensation, are now widespread.⁸⁰

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

⁷⁶ 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.

⁷⁷ 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; Anne Gallagher and Fiona David, *International Law of Migrant Smuggling* (Cambridge University Press, 2014) 363.

⁷⁸ 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.

⁷⁹ 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.

⁸⁰ 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. See also 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.

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.⁸¹

[116] A position paper issued by the Council of Bars and Law Societies of Europe (CCBE) in May 2024 commenting on the EU frameworks against smuggling of migrants notes that:

The current situation is already quite vague and uncertain for lawyers providing advice at the borders. Given this, and the prevailing hostile political environment, many lawyers feel there is always a risk that they could be connected with smuggling. The CCBE obtained reports that lawyers refrain from providing legal assistance in some circumstances because of the fear that the authorities might use it against them as evidence of being connected with smuggling. The legislation in force has therefore a deterrent effect on the provision of legal assistance to asylum seekers. Few cases can be quoted to illustrate that lawyers were targeted under the ‘anti-facilitators legislation’.⁸²

[117] The wording of Article 1 of the Council Directive suggests that assistance provided by family or friends falls in the scope of criminalisation. The proposal to include an optional exemption from criminalisation for family members, which was present in the original draft, was deleted during the negotiations.⁸³

[118] Article 1(2) of the EU Council 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’.⁸⁴ The nature and scope of ‘humanitarian assistance’ is not further defined by the Directive. The exemption for humanitarian assistance under Article 1(2) is not mandatory; Member States have complete discretion whether to include the exemption and, if they do, how to define its scope and application.⁸⁵

[119] 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’.⁸⁶ The 2017 evaluation of the EU Council Directive and Framework Decision and their implementation concedes 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

⁸¹ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 9.

⁸² Council of Bars and Law Societies of Europe, ‘CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transits and stay in the Union’ (17 May 2024) 2.

⁸³ 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.

⁸⁴ Note that the recent case of *Kinsla C-460/23* an Italian Court submitted a matter to the European Court of Justice to determine whether the absence of a humanitarian exception clause violates European Union law, including fundamental human rights. A decision by the Court was still outstanding at the time this report was finalised.

⁸⁵ 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.

⁸⁶ 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, 35–36.

between facilitation of irregular migration and humanitarian assistance, due to the broad definition of the offence and the absence of exemptions.⁸⁷

[120] 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) is rarely found in national laws of the EU Member States.⁸⁸ In 2020, the EU Commission reported that ‘only eight Member States include in national law an exemption from punishment for facilitating unauthorised entry and/or transit in order to provide some form of humanitarian assistance’.⁸⁹

[121] 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.⁹⁰ Other research confirms 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.’⁹¹

[122] Oddly, while the 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 Directive 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.⁹² This offence is discussed separately in section III.6 below.

2023 Proposal for a new EU Directive COM(2023) 755 final

[123] 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, 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.

[124] This proposal includes the ‘financial or material benefit’ where such a benefit is requested or actually received or accepted by the smuggler. While this offence is closer to the *Smuggling of*

⁸⁷ 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.

⁸⁸ 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].

⁸⁹ European Union, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, OJ C 323/1 (1 October 2020), also containing details of national exemptions.

⁹⁰ 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.

⁹¹ 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.

⁹² EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 10.

Migrants Protocol, it still departs from the Protocol's criminalisation requirement in fundamental ways.⁹³ 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 criminalises also the request, reception or acceptance of a promise of financial or material benefit. This reference would criminalise the mere fact of having been offered a financial or material benefit without having any intention of accepting or even when refusing it.⁹⁴

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

intentionally assists 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.

[126] The scope of this offence, as also observed by 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 criminalising humanitarian assistance or assistance to family members. UNHCR has further concerns that the element of the criminal offence of "serious harm" is undefined, leaving too wide a margin for interpretation.'⁹⁵ For this reason, 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).⁹⁶ The Council of Bars and Law Societies of Europe has also called for the removal of the offence under proposed Article 3(1)(b).⁹⁷

[127] 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. 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.⁹⁸

⁹³ See also the remarks by Fezile Osum, Border Violence Monitoring Network (BVMN) at the 2nd *Smuggling of Migrants Conference*, Strasbourg, 10 September 2024.

⁹⁴ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 7 [22].

⁹⁵ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 7 [23]-[24].

⁹⁶ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 10.

⁹⁷ Council of Bars and Law Societies of Europe, 'CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union' (17 May 2024) 4.

⁹⁸ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 8-9 [30]; see also, PICUM, *How the New EU Facilitation Directive Furthers the Criminalisation of Migrants and Human Rights Defenders* (2024) 12.

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

[129] The official material explains:

This proposal brings clarity on which offences should be criminalised. 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 criminalise 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.⁹⁹

[130] The 2023 proposal does, however, not include a clear exemption for assistance provided on humanitarian grounds or provided by family members and friends. This has been criticised by the Council of Bars and Law Societies of Europe.¹⁰⁰ UNHCR notes that

the humanitarian exception contained in [Recital 7] is limited to ‘assistance [...] in compliance with legal obligations.’ This may lead to criminalisation 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 criminalisation 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 criminalisation of humanitarian assistance and solidarity.¹⁰¹

[131] Resolution 2568 (2024) of the Council of Europe Parliamentary Assembly also

warns against the excessively large scope of the crimes falling under the definition of migrant smuggling entailed in the proposed Directive aiming to replace Directive 2002/90/EC, taking the risk of furthering the lack of consistency across European States on the understanding and on the interpretation on what the crime of migrant smuggling should and should not entail.¹⁰²

[132] On 31 May 2024, the Council of the European Union presented a new draft of Article 3 (‘criminal offences’), which seems to revert the offences back to the position under the 2002 EU Council Directive. Proposed Article 3(1) makes it an offence to intentionally assist a third country national to unlawfully enter into or transit a Member State. It does not require proof of a financial or material benefit element. Under proposed Article 3(1a), in contrast, intentionally assisting the unlawful stay of a third-country national requires proof that the accused ‘requests, receives, or accepts, directly or indirectly, a financial or material benefit, or a promise thereof’.

[133] The new draft further proposes the inclusion of a clause to exclude humanitarian assistance. The draft presented on 31 May 2024 includes two options for a new Article 2a which make it clear that the criminal offences under Article 3(1) (and (1a)?) do ‘not include humanitarian

⁹⁹ 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.

¹⁰⁰ Council of Bars and Law Societies of Europe, ‘CCBE position paper on the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union’ (17 May 2024) 4–5.

¹⁰¹ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 6 [18]–[19].

¹⁰² Council of Europe, Parliamentary Assembly, *A shared European approach to address migrant smuggling*, draft report, Resolution 2568 (2024) [15].

actions to assist third-country nationals, or any other assistance aimed at meeting their basic human needs, in order to preserve their human dignity or physical and mental integrity'. A recital accompanying this text stresses that nothing in the proposed Directive affects the rights, obligations, and responsibilities to provide assistance for the stated reasons and notes that assistance provided to a close family member to meet their human rights needs should not be criminalised.

III.4 Smuggling of migrants vs trafficking in persons

[134] 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 nevertheless much confusion and overlap between the two offences and their definitions. It appears that at the time the two Protocols were written, trafficking in persons was seen as a more heinous offence which is commonly linked to organised crime. Smuggling of migrants, it seems, was viewed as a less dangerous matter. The practical experience and changes in the attitude of many States towards migration, however, demonstrate that these views are not sustainable due to the wide range of modalities and risks involved in either crime type.

[135] 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 like were used in some national laws and the literature. The two UN Protocols on smuggling of migrants and trafficking in persons have established a common terminology which, however, remains poorly understood outside expert circles. Article 4(a) of the *Council of Europe Convention on Action against Trafficking in Human Beings* replicates the definition of 'trafficking in person' under Article 3(a) of the *UN Trafficking in Persons Protocol* (but refers to 'human beings' instead of 'persons').¹⁰³

[136] International and national laws generally separate the smuggling of migrants and trafficking in persons rigidly, with significant consequences for perpetrators, practitioners, and for the persons who are the victims/objects of these 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. The rigid distinction can also hamper investigations if, for fear of detection, detention, and repatriation, smuggled migrants are unwilling to give testimony to law enforcement and judicial authorities, or, vice-versa, if authorities merely focus on the irregular status of smuggled migrants and detain and return them, without asking them to cooperate and whilst failing to afford them the protection they may need as refugees or asylum seekers.

[137] The following features are commonly cited to distinguish smuggling of migrants from trafficking in persons:¹⁰⁴

- (1) The first is the purpose of each offence: whereas trafficking in persons is designed as an offence against persons, protecting their physical, mental, and sexual integrity and freedom of choice, smuggling of migrants is an offence to protect the sovereignty of States to

¹⁰³ Open for signature, 16 May 2005, CETS No 197 (entered into force 1 February 2008).

¹⁰⁴ 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.

manage immigration and control their borders.¹⁰⁵ Although human rights violations may occur in the course of smuggling of migrants, these are not defining elements of this crime. It must be added, that despite this purpose, the *Smuggling of Migrants Protocol* serves as a criminal justice not a migration management tool. It does not aim not to penalise migration or the facilitation of unauthorised entry, residence, or transit in a foreign country where there is no intention to gain a financial or material benefit for the facilitator. Additionally, the Protocol does not intend to obstruct the ability of protected groups to access their rights fairly and effectively.¹⁰⁶

- (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 maximise economic or other gains for the traffickers.
- (3) In a similar vein, the perpetrators' objective is, in the case of smuggling, the (once off) organised movement of irregular migrants for profit and, in the case of trafficking, the (ongoing) exploitation of the victim.¹⁰⁷
- (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 victim' being at the heart of the latter.¹⁰⁸
- (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.¹⁰⁹ 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*.

[138] 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

¹⁰⁵ Mary A Young, 'The Smuggling and Trafficking of Refugees and Asylum Seekers: Is 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.

¹⁰⁶ UN Network on Migration, *Mapping the Landscape of Smuggling of Migrants* (2023) <<https://migrationnetwork.un.org/resources/mapping-landscape-smuggling-migrants-english>>.

¹⁰⁷ UNODC, *A short introduction to migrant smuggling*, Issue Paper (United Nations, 2010) 10.

¹⁰⁸ 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.

¹⁰⁹ 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.

into making additional 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.¹¹⁰

[139] For example, migrants may agree to be smuggled, unaware that, on arrival, they will be forced to work in poor or restrictive conditions to pay off a debt to the smugglers. This situation should be considered an instance of trafficking in persons 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 all the elements of trafficking are satisfied.¹¹¹

[140] Many experts have criticised the existing definitions for creating an artificial dichotomy between the experiences of victims of trafficking and smuggled migrants.¹¹² 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.¹¹³ 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.

[141] The *New York Declaration for Refugees and Migrants* acknowledges that smuggling of migrants and trafficking in persons sit along a continuum and are frequently interconnected.¹¹⁴ This challenges the distinction drawn by the UN Protocols between the two crime types and discussions about the consent of migrants in this context. On this point, Jean-Pierre Gauci and Vladislava Stoyanova note that

there is growing acknowledgement that in the context of smuggling, given the various push factors (persecution, war, violence) coupled with a lack of legal avenues for protection, that consent is not ‘freely given’. Related to this, the NY Declaration manifests a clear change in the way that smuggled migrants are framed. They are not anymore ‘objects’ of smuggling (as the Smuggling Protocol frames them), but rather ‘people in vulnerable situations’ and ‘victims of exploitation and abuse in the context of the smuggling of migrants’.¹¹⁵ This builds on developments in the human rights field, which have recognised the human rights risks faced by smuggled migrants, including to their right to life and dignity but also the risks of exploitation by smugglers en route [...] it

¹¹⁰ 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.

¹¹¹ 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.

¹¹² 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.

¹¹³ Mary A Young, ‘The Smuggling and Trafficking of Refugees and Asylum Seekers: Is 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.

¹¹⁴ UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016) [9].

¹¹⁵ UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016) [23].

reflects an understanding that similarly to trafficked persons, they might be in need of assistance, are compelled into that situation and are at risk of exploitation and abuse.¹¹⁶

[142] The distinction between different categories of persons, 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’.¹¹⁷ 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.

[143] Furthermore, because the *Trafficking in Persons Protocol* affords greater protection, States ‘have additional incentives to categorise the individuals as smuggled rather than trafficked’.¹¹⁸ 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’,¹¹⁹ notes Susanne Kneebone, and law enforcement, border control, and asylum authorities are often not well trained or equipped to identify instances of trafficking.

[144] Adding to the complexities is the fact that not all cases of smuggling of migrants ‘go wrong’ for the migrants; not all involve aggravated circumstances. In its submission on an earlier draft of this report, UNODC explains that its experience has been that

while the upholding of migrants rights is fundamental, where national legislation treats smuggled migrants as victims of crime to the same extent as victims of trafficking, this can also be problematic. Protection measures - sheltering, trauma support etc- have proven to be a hinderance rather than a help to people who have not been victims of any crime but who have simply been interrupted by authorities on their journey which they otherwise want to complete. It also puts a strain on often limited resources to offer victim services by default to everyone. There is no easy middle, but UNODC does agree that it is important to have stronger, more agile and responsive support in instances where aggravations turn smuggled migrants into victims of crime.

[145] On this point, 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 recognizing that smuggled migrants might also become victims of trafficking in persons, therefore requiring appropriate protection and assistance.

¹¹⁶ Jean-Pierre Gauci and Vladislava Stoyanova, ‘The human rights of smuggled migrants and trafficked persons in the UN global compacts on migrants and refugees’ (2018) 4(3) *International Journal of Migration and Border Studies* 222, 227–228.

¹¹⁷ Marika McAdam, ‘The Antics of Semantics in International Law’ (2018) 11 *Anti-Trafficking Review* 125, 125.

¹¹⁸ Mary A Young, ‘The Smuggling and Trafficking of Refugees and Asylum Seekers: Is 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.

¹¹⁹ Susan Kneebone, ‘The Refugee–Trafficking Nexus: Making (Good) the Connections’ (2010) 29(1) *Refugee Survey Quarterly* 137, 138.

III.5 Subject of criminalisation

[146] There has been some controversy about the kinds of perpetrators that are meant to be the target of the smuggling of migrants offences, i.e. 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) assistance provided by non-governmental organisations (NGOs) to irregular migrants, especially by rescuing them at sea.

III.5.1 Focus on organised criminal groups

[147] 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 [...]’.¹²⁰ On this background, and commenting on an earlier draft of the present report, UNHCR ‘recommends that the scope of the offence of smuggling of human beings be precisely defined with a focus on organised crime acting with the intention of acquiring a financial or material benefit.’

[148] The definition of smuggling of migrants in Article 3(a) 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’.¹²¹

[149] There is some debate in the literature and official reports about the question of whether the Protocol focusses only on organised criminal groups (as perpetrators and smugglers). The Protocol is not expressly limited in that way. While it contains some reference and connotations relating to organised crime, it recognises that smuggling of migrants takes many forms and involves a great range of actors.

[150] In this context, it is important to stress that 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 activities and 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 organisations. Some smugglers are part of criminal networks made up of different cells, some with internal structures and hierarchies. Many smugglers only operate locally and specialise in offering irregular migration in a particular region or across selected borders.¹²²

¹²⁰ 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].

¹²¹ 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.

¹²² 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

[151] Many migrants and refugees are assisted by what Michael Collyer refers 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.’¹²³ In its submission to the CDPC, UNHCR, too, ‘acknowledges that smuggling is not committed only by organised criminal groups, generating millions in profits, but also by small and loosely connected criminals profiting from circumstances where refugees and migrants lack access to safe and legal pathways to protection or where they seek opportunities.’ 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.¹²⁴

[152] Unless it is done by air, smuggling over long distances is commonly done in stages, involving different smugglers at different points, often with long breaks and waiting times of weeks, months, or even years between border crossings. ‘There are many different ways of smuggling migrants’, explains 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.¹²⁵

[153] 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.’¹²⁶ 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 onward migration. At each stage they must negotiate separately for onward passage, sometimes spending many months in intermediary locations. It is during these periods

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.

¹²³ 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.

¹²⁴ Gabriela Sanchez, *Five Misconceptions about Migrant Smuggling*, Policy Brief 2018/07 (European University Institute, Robert Schumann Centre for Advanced Studies, May 2018) 2.

¹²⁵ 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].

¹²⁶ 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.

that they come to know the border crossing operations better and are more likely to encounter the much smaller scale ‘cottage industry’ operations.¹²⁷

[154] 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.

[155] On this background, it would be wrong, as some authors suggest, to limit criminal offences, along with enforcement and prosecution measures, to smuggling activities involving organised criminal groups. Their involvement should instead, as will be shown, be included as an aggravating circumstance.

III.5.2 Non-criminalisation of smuggled migrants

[156] The subject of the smuggling of migrants offence, as its name suggests, is the smuggler, who procures 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’,¹²⁸ ‘even in cases where it involves entry or residence that is illegal under the laws of the State concerned [...]’.¹²⁹ 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.¹³⁰

[157] Article 5 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.¹³¹ Equally, under EU law, following on from the right to asylum enshrined in Article 18 of the *EU Charter of Fundamental Rights*, EU Member 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.¹³²

[158] For these reasons, the 2002 EU Council Directive has been widely criticised for failing to include an express and binding non-criminalisation clause. 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.¹³³

[159] The Protocol thus recognises that those who are smuggled (who are frequently asylum seekers, including refugees) are frequently unable to comply with relevant domestic legal and

¹²⁷ 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.

¹²⁸ 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].

¹²⁹ 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].

¹³⁰ 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, 38.
¹³¹ *Refugee Convention*, art 31.

¹³² EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 15.

¹³³ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 4 [11].

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 travel documents, engage in lengthy bureaucratic documentation procedures, and that they may at times have little choice but to cross international borders irregularly, often facilitated by migrant smugglers.¹³⁴

[160] 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 offences unrelated to smuggling. For example, migrants who cause property damage or harm to others in the course of being smuggled can be prosecuted for such offences.¹³⁵ They may also be prosecuted if they are involved in smuggling others for profit as well as themselves or for the use of fraudulent documents.¹³⁶ The Working Group on Smuggling of Migrants has noted that migrants

could be prosecuted for immigration or document-related offences criminalised 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, criminalised under national legislation or the criminalisation requirement under the Smuggling of Migrants Protocol for smuggling another person.¹³⁷

Criminalisation of illegal entry

[161] 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 criminalisation 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 groups¹³⁸

[162] Article 6(4) leaves the decision whether to criminalise irregular entry to States Parties,¹³⁹ 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.¹⁴⁰ In other words:

¹³⁴ 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 Organized Crime in Australia and the Asia Pacific Region* (Nijhoff, 2003) 16–17.

¹³⁵ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 389.

¹³⁶ 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.

¹³⁷ 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].

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) 347 [50].

¹³⁹ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 47.

¹⁴⁰ 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.

‘States parties may establish offences under their domestic laws as long as such offence are not in breach of Article 5’.¹⁴¹

[163] Criminalisation of irregular entry is outside the scope of the Protocol, because this is ‘not part of the activities of organised criminal groups’,¹⁴² because it is not covered by the definition and criminalisation provisions, and because criminalisation of irregular entry conflicts with the Protocol’s purpose to protect the rights of smuggled migrants.¹⁴³ 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.¹⁴⁴

[164] The offences under Article 6(1) of the Protocol also do 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.¹⁴⁵ 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.¹⁴⁶

[165] These points broadly reflect the non-penalisation obligation under the *Refugee Convention*. Under Article 31(1), penalties cannot be imposed on account of their irregular entry or presence, on refugees and asylum seekers who have come directly, have presented themselves without delay to authorities, and have shown good cause for their irregular entry or presence. Penalties imposed on account of irregular entry or presence when not prohibited under Article 31(1) must be in accordance with international and regional refugee and human rights law standards. They must not be discriminatory or undermine the right to seek and enjoy asylum, including by denying access to territory, a fair asylum procedure or the rights to which refugees are entitled under the *Refugee Convention* and other human rights instruments. It is of particular importance that States ensure any penalties do not breach the States’ non-refoulement obligations under Article 33 of the Convention or other international human rights instruments.

[166] Where Article 31(1) does not protect against penalisation and States decide to penalise refugees on account of their irregular entry or stay, States must avoid criminal penalties. The irregular entry or presence of refugees must not be treated as a criminal offence. Imposing criminal sanctions would be unnecessary and disproportionate, exceeding the legitimate interest of States to control irregular immigration. Seeking asylum is a universal human right, the exercise of which must not be criminalised.

[167] Refugees who are suspected or found to have organised, facilitated, or assisted in the irregular entry or stay by smuggling themselves and/or others are protected from penalisation under Article 31(1) where, when meeting the criteria of directness, promptness and good cause, they are the object of smuggling or where they have organised or facilitated smuggling of themselves and/or others to secure their own entry and/or that of family or other persons for humanitarian reasons. In such cases, penalisation, in the form of criminal prosecution for

¹⁴¹ 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.

¹⁴² 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.

¹⁴³ 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.

¹⁴⁴ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 2.

¹⁴⁵ 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.

¹⁴⁶ 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

smuggling of migrants is in violation of Article 5 of the *Smuggling of Migrants Protocol* including when the refugee does not meet the requirements of Article 31(1) of the *Refugee Convention*.

[168] Resolution 2568 (2024) of the Council of Europe Parliamentary Assembly similarly

recalls that the crime of migrant smuggling is not equal in nature to irregular border crossing. Moreover, pursuant to Article 31 of the United Nations Convention relating to the Status of Refugees, States shall not impose penalties, on account of their irregular entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their irregular entry or presence. The need for international protection of each person should be examined in a fair and individualised manner. States should also not impose penalties on individuals who were coerced into committing an illegal act pursuant to Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197).¹⁴⁷

[169] The Committee on Migration, Refugees and Displaced Persons of the Council of Europe Parliamentary Assembly further notes that:

The ‘unauthorised’ crossing of its borders cannot, as such, be sufficient for a State to prosecute migrants. Indeed, the right to leave any country, including one’s own, is recognised as a universal right in the *jus cogens* (Article 13 of the Universal Declaration of Human Rights) and in the International Covenant on Civil and Political Rights (Article 12) which has a binding force for all State Parties.¹⁴⁸

Migrants cannot be criminalised for having crossed a border irregularly before it is established whether they need international protection following an individual and fair assessment of their situation. This is in line with Article 31 of the Convention related to the Status of Refugees, and in line with the consistent case law of the European Convention on Human Rights when interpreting the right to an effective remedy set forth in Article 13 of the European Convention on Human Rights.¹⁴⁹

III.5.3 NGOs and private vessels

[170] Ever since the development of the 2002 EU Council Directive and Framework Decision there have been concerns about implications for civil society organisations, private individuals, and businesses.¹⁵⁰ These concerns stem from the absence of the requirement of a ‘financial gain’ element which may result in the criminalisation of groups and individuals assisting refugees and migrants in an irregular situation.¹⁵¹ This issue does not arise (or not in the same manner) in the context of the *Smuggling of Migrants Protocol*.

[171] A particularly contentious issue in the political and public debates about smuggling of migrants has been the work of NGOs rescuing people in distress at sea and transport them to shore (in compliance with international law). Such initiatives were set up by NGOs to complement or

¹⁴⁷ Council of Europe, Parliamentary Assembly, *A shared European approach to address migrant smuggling*, Resolution 2568 (2024) [7].

¹⁴⁸ Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, *A shared European approach to address migrant smuggling*, draft report, CoE Doc AS/Mig (2024) 12, [39].

¹⁴⁹ Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, *A shared European approach to address migrant smuggling*, draft report, CoE Doc AS/Mig (2024) 12, [40].

¹⁵⁰ 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.

¹⁵¹ 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.

compensate for the progressive reduction of search and rescue missions in the Mediterranean by the EU and its Member States.¹⁵² Although presently these debates relate to vessels operating in the Mediterranean, there are also many other examples of similar ventures taking place in Southeast Asia, the Caribbean, and other parts of the world.

[172] Through private donations and other fundraising activities, several NGOs have hired or bought ships specifically to rescue people in distress. Among those rescued are often smuggled migrants who are travelling on unseaworthy vessels or whose ships have already sunk. Once taken onboard, the NGOs usually provide them with basic medical assistance, food and clothing, and then try to find a destination port where the rescuees can safely disembark.¹⁵³ Questions about the scope of criminalisation of smuggling of migrants on the one hand, and the duty to rescue people in distress on the other, are, of course, not limited to NGOs; they also extend to other private vessels (such as merchant vessels, cruise ships, private yachts, and motorboats) and indeed to any captain who encounters people in distress.

[173] Article 9(1)(a) of the *Smuggling of Migrants Protocol* places a mandatory and absolute obligation on States Parties to ‘ensure the safety and humane treatment’ of all persons on board any vessel against which measures are taken.¹⁵⁴ 2004 Amendments to the *International Convention for the Safety of Life at Sea (SOLAS)*¹⁵⁵ further stipulate that ‘ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship’ and deliver them ‘to a place of safety’.¹⁵⁶ IMO [International Maritime Organization] *Guidelines on the Treatment of Persons Rescued at Sea* state that a ‘place of safety’ ‘is a location where rescue operations are considered to terminate. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met’.¹⁵⁷ The Guidelines further clarify that the assisting ships are not necessarily places of safety; even if survivors are not in immediate danger, assisting ships may not have the means to properly care for persons and ensure their safety.¹⁵⁸ If the rescued persons are refugees, the place of safety cannot expose them to refoulement.¹⁵⁹

[174] 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 criminalisation of migration has contributed to

¹⁵² John David Janer Torrens, ‘Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organizations: 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-inforcing deterrence* (University of London, June 2017) 23.

¹⁵³ 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 Criminalization of Sea Rescue NGOs in Italy’ (2021) 27 *European Journal on Criminal Policy and Research* 23, 25–28.

¹⁵⁴ See further, Joseph Lelliott, ‘Article 9: Safeguard Clauses’ in Andreas Schloenhard et al (eds), *UN Convention against Transnational Organized Crime* (Oxford University Press, 2023) 609–613.

¹⁵⁵ Opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

¹⁵⁶ IMO Maritime Safety Committee, *Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended*, IMO Doc MSC.153(78) (20 May 2004) reg 33-4, 33-5; see also International Convention on Maritime Search and Rescue, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) as amended by IMO Maritime Safety Committee, *Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended*, IMO Doc (20 May 2004) 3 [3] (hereafter MSC.155(78)).

¹⁵⁷ IMO Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea* IMO Doc MSC.167(78) (20 May 2004) [6.12].

¹⁵⁸ IMO Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea* IMO Doc MSC.167(78) (20 May 2004) [6.13].

¹⁵⁹ IMO Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea* IMO Doc MSC.167(78) (20 May 2004) [6.17].

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.¹⁶⁰

[175] 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. Where officials refused disembarkation, rescued migrants had to spend prolonged periods on board of the vessels, often on the high seas and in poor conditions, adding to their distress and suffering.

[176] In several instances, politicians have accused NGOs of effectively assisting migrant smugglers by taking smuggled migrants to their intended destination.¹⁶¹ This led to the prosecution of NGO personnel, ‘volunteers, human rights defenders, crews of boats involved in search and rescue operations at sea, but also ordinary members of the public, family members, journalists, mayors and religious leaders’.¹⁶² Almost all of the cases against NGOs ended in dismissals or acquittals.¹⁶³ Some States as well as Frontex have made statements suggesting that NGO rescue vessels act as ‘pull factors’ for irregular migrants and further fuel smuggling activities¹⁶⁴ — although studies have found no evidence supporting such statements.¹⁶⁵

[177] Such statements are often tied to wider opposition to search-and-rescue (SAR) missions 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 areas along the Mediterranean migrant smuggling routes affect the level of departures or increase deaths at sea.

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

¹⁶⁰ 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].

¹⁶¹ 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.

¹⁶² European Union, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, OJ C 323/1 (1 October 2020).

¹⁶³ See also the remarks made by the Council of Europe Commissioner for Human Rights, Michael O’Flaherty, speech at the opening of the 2nd *International Conference on Smuggling of Migrants*, Strasbourg, 10 September 2024, CoE Doc CommHR(2024)38.

¹⁶⁴ 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 Criminalization of Sea Rescue NGOs in Italy’ (2021) 27 *European Journal on Criminal Policy and Research* 23, 28–30; Carlo Amenta, Paolo di Betta, Calogero Ferrara, *The Migrant Crisis in the Mediterranean Sea: Empirical Evidence on Policy Interventions* (2021).

¹⁶⁵ 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 Criminalization of Sea Rescue NGOs in Italy’ (2021) 27 *European Journal on Criminal Policy and Research* 23, 34–37.

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.¹⁶⁶

[179] There have also been reports of captains and organisers of NGO vessels being prosecuted for facilitating irregular migration.¹⁶⁷ 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 criminalisation 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.¹⁶⁸

[180] The duty to rescue under international law as well as the lack of any motive by NGOs to make a financial or other material benefit means that these rescue missions and the subsequent transportation of rescued persons to a safe harbour 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.¹⁶⁹ Their activities fall into the category of 'humanitarian reasons' and altruistic ventures which the drafters of the *Smuggling of Migrants Protocol* expressly sought to exclude from the scope of criminalisation.¹⁷⁰ In 2014 and again in 2018, the UN High Commissioner for Human

¹⁶⁶ 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.

¹⁶⁷ John David Janer Torrens, 'Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organizations: 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.

¹⁶⁸ 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.

¹⁶⁹ 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.

¹⁷⁰ UNODC, *Travaux préparatoires de la négociation pour l'élaboration de la Convention des Nations Unies contre le crime transnational organisé et les protocoles thereto* (United Nations, 2006) 469, 489; John David Janer Torrens, 'Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organizations: Migrant

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.¹⁷¹ In 2020, the EU Commission issued a *Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities*.¹⁷²

[181] The legal position is different under the 2002 EU 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 and only a small number of Member States have implemented it.¹⁷³ A guidance note issued by EU Commission in October 2020 explains that,

in the Commission’s view, Article 1 of the Facilitation Directive must be interpreted as follows:

- i) humanitarian assistance that is mandated by law cannot and must not be criminalised;
- ii) in particular, the criminalisation of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law;
- iii) where applicable, assessment of whether an act falls within the concept of ‘humanitarian assistance’ in Article 1(2) of the Directive – a concept that cannot be construed in a manner that would allow an act mandated by law to be criminalised – should be carried out on a case-by-case basis, taking into account all the relevant circumstances.¹⁷⁴

[182] 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.’¹⁷⁵ 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.

Smuggling or Humanitarian Assistance?’ (2020) 8 *Journal of International Law and International Relations* 381, 396.

¹⁷¹ 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).

¹⁷² *Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities*, OJ L 317/23.

¹⁷³ European Union, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, OJ C 323/1 (1 October 2020); John David Janer Torrens, ‘Migrant Search and Rescue Operations in the Mediterranean by Humanitarian Organizations: Migrant Smuggling or Humanitarian Assistance?’ (2020) 8 *Journal of International Law and International Relations* 381, 390–391.

¹⁷⁴ European Union, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, OJ C 323/1 (1 October 2020).

¹⁷⁵ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 16.

Ensuring transparency and accountability in relation to asylum and migration policies, including monitoring and reporting, are crucial activities to uphold human rights.¹⁷⁶

[183] On this background and with regard to the development of a possible new Council of Europe instrument against smuggling of migrants, UNHCR stresses in its submission to the CDPC that

[p]roviding humanitarian assistance and information on rights, legal counselling and advice to asylum seekers and refugees also does not amount to smuggling. The criminalisation of humanitarian actors, human rights defenders and individuals, such as family members, providing humanitarian aid or otherwise fulfilling a humanitarian duty to rescue or to provide legal or other help to refugees and migrants who are smuggled should be clearly prohibited in such an instrument, in recognition of the fact that they act to protect the right to life and to defend human rights and have no criminal intent of benefiting from facilitating the irregular entry. Measures should be recommended to avoid obstructing humanitarian action in line with international law obligations.

[184] Echoing these concerns, the Council of Europe Parliamentary Assembly notes

with concern the lack of consistency in the legislation of member States aiming to combat the smuggling of migrants, which can lead to negative human rights consequences. It recalls that laws or actions on migrant smuggling should never be used to intimidate or criminalise migrants and migrants' rights defenders. Such practices do not increase the efficiency of policy action to prevent and tackle the crime of migrant smuggling and put the safeguarding of rights enshrined in the European Convention on Human Rights at risk, in particular Article 11 and Article 3, for instance when they result in the obstruction of humanitarian assistance.¹⁷⁷

III.6 Enabling and assisting to remain unlawfully

[185] 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 subparagraph (a), this offence also covers situations in which the migrants entered the host country regularly. The purpose 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 to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorisations to enter.¹⁷⁸

[186] 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 authorisations.¹⁷⁹ The conduct 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. Gallagher and 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

¹⁷⁶ 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.

¹⁷⁷ Council of Europe, Parliamentary Assembly, *A shared European approach to address migrant smuggling*, Resolution 2568 (2024) [9].

¹⁷⁸ 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].

¹⁷⁹ 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].

through the sale of “refugee case histories” and national insurance numbers as well as bogus college schemes and marriage arrangements.’¹⁸⁰

[187] The mental elements of the offence require proof of intention plus 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’.¹⁸¹ There is no additional requirement that an accused knew or was aware that the other person was not a national or permanent resident of the host state.¹⁸²

[188] Article 1(1)(b) of the 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 Article 1(1)(a) of the Directive—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’.

[189] 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.¹⁸³

[190] In Article 3(1) of the 2023 proposal for a new EU Facilitation Directive, the offence of enabling illegal stay has been merged with 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.

[191] 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.’¹⁸⁴ 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.¹⁸⁵

[192] Furthermore, 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

¹⁸⁰ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 369.

¹⁸¹ 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].

¹⁸² Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 370.

¹⁸³ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (FRA, 2014) 13 [references omitted].

¹⁸⁴ EU Agency for Fundamental Rights (FRA), *Fundamental rights of migrants in an irregular situation in the European Union*, Comparative report (FRA, 2011) 11-12.

¹⁸⁵ 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.

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, notes the FRA, however, 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.¹⁸⁶

[193] National laws in relation to criminalising persons who enable or assist the unlawful stay of others along with State practice of 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 as necessity,¹⁸⁷ others have considered criminalising 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.’¹⁸⁸ 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. The Council of Europe member states should reverse these trends and establish a human rights compliant approach to irregular migration.¹⁸⁹

III.7 Types and methods of smuggling

[194] 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 or by air. 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.

¹⁸⁶ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 8.

¹⁸⁷ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 11.

¹⁸⁸ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 13.

¹⁸⁹ Council of Europe, Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper (Council of Europe, 2010) 40 [references omitted].

III.7.1 Smuggling by sea

[195] Compared to irregular travel by land, 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, international organisation, NGO, and the media.¹⁹⁰ Vessels used for smuggling are often overcrowded, poorly maintained or unseaworthy, and undersupplied with water, food, and lifejackets, and have inadequate navigational equipment. All too frequently, smuggling vessels become lost, sink, or require rescue, putting the lives of smuggled migrants at risk.¹⁹¹

[196] Much of the impetus for the *Smuggling of Migrants Protocol* originated in concerns over smuggling by sea which resulted 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 1997¹⁹² and were later integrated into the draft submitted by Austria to the United Nations calling for an international instruments against smuggling of migrants.

[197] Article 7 effectively functions as a statement, mandating that States 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.¹⁹³ 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 that are consistent with obligations under all these regimes.¹⁹⁴ These responses have broadly focused on two measures: interdictions and search and rescue (often referred by the acronym SAR).¹⁹⁵

[198] 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.¹⁹⁶ Unlike interdiction (which is permitted, but not required, in certain situations by the law of the sea), States are mandated by international law to carry out search and rescue. These obligations are independent of interdiction and apply to all persons, including smugglers and smuggled migrants.¹⁹⁷

[199] 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

¹⁹⁰ UNODC, *Smuggling of Migrants by Sea*, Issue Paper (United Nations, 2011) 7.

¹⁹¹ 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].

¹⁹² IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea*, IMO Doc LEG 76/11/1 (1 August 1997).

¹⁹³ See also European Union, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, OJ C 323/1 (1 October 2020); UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 84.

¹⁹⁴ See further, UNHCR, ‘Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum’ (1 December 2022) <<https://www.refworld.org/policy/legalguidance/unhcr/2022/en/124184>>.

¹⁹⁵ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 404 (hereafter Gallagher and David, *International Law of Migrant Smuggling*).

¹⁹⁶ Felicity Attard, ‘Combatting 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.

¹⁹⁷ See further, Joseph Lelliott, ‘Part II: Smuggling of Migrants by Sea’ in Andreas Schloenhardt et al (eds), *UN Convention against Transnational Organized Crime: A Commentary* (Oxford University Press, 2023) 587–588.

of ensuring safety at sea.¹⁹⁸ In a submission made on an earlier draft of this report, UNHCR stresses that pushing back boats carrying people who may seek or be in need of international protection out to sea involves significant risks of violating obligations under international refugee and human rights law, whether the boat concerned is transporting rescued persons, is operated by those people themselves, or is operated by facilitators. States conducting push-backs at sea may be in breach of their non-refoulement and other obligations if they fail to inquire into the possible protection needs of those affected or deny them an effective opportunity to have their claims to international protection fairly assessed.¹⁹⁹

[200] 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.’²⁰⁰

III.7.2 Smuggling by air

[201] ‘The smuggling of migrants by air’, explains a background paper prepared for the Working Group on Smuggling of Migrants,

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.²⁰¹

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.²⁰²

[202] Civil aviation organisations as well as international human rights organisations have issued a range of guidance notes and 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,

¹⁹⁸ 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.

¹⁹⁹ See further, UNHCR, ‘Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum’ (1 December 2022) <<https://www.refworld.org/policy/legalguidance/unhcr/2022/en/124184>>.

²⁰⁰ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 15.

²⁰¹ 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.

²⁰² 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].

and railway companies; it has also fuelled concerns over the ‘hand-balling’ of what are effectively official control and law enforcement functions to private entities.

[203] An issue paper on *Migrant smuggling by air* published by UNODC in 2010 sets out recommendations to strengthen the response to smuggling of migrants by air and include involving smuggled migrants in the criminal justice process; effective use of human resources; strengthening airport security; strengthening cooperation with airport authorities and airline personnel; strengthening multi-sector, multi-agency cooperation; strengthen and broaden information gathering and sharing; and strengthening operational cooperation.²⁰³ There are no specific recommendations on how to address smuggling of migrants by air through legal provisions or legal instruments.

III.7.3 Smuggling by land

[204] Smuggling of migrants by land involves great range of methods to transport or guide irregular migrants from one State into another using motorvehicles, trains, or on foot. It may involve routes and methods that circumvent control points by crossing borders in remote areas, through mountains or rivers. It may involve the concealment of irregular migrants in vehicles, compartments, or trains crossing the border, or the use of fraudulent documents.

[205] Debates about measures to prevent, detect, and suppress smuggling of migrant by land have focussed mostly on law enforcement and border control measures, measures against document fraud, and on concerns about cruel and dangerous measures to transport migrants clandestinely across borders. These issues are discussed individually in other parts of this report. There have been no recommendations to add new legal provisions specifically aimed at smuggling of migrants by land.

III.7.4 Document fraud

[206] Smuggling of migrants is frequently associated with the use of fraudulent travel or identity documents. 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.²⁰⁴ 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.’²⁰⁵

[207] 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.

[208] Article 6(1)(b) of the Protocol requires States Parties to criminalise (i) ‘producing a fraudulent travel or identity document’ and (ii) for ‘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

²⁰³ UNODC, *Migrant smuggling by air*, issue paper (2010) 19–21.

²⁰⁴ 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].

²⁰⁵ 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].

‘fraudulent travel or identity document’.²⁰⁶ It appears that few States have introduced specific offences linking document fraud to smuggling of migrants; it seems to be more common that general offences under national criminal laws pertaining to document and identity fraud are used in such cases.

[209] 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.²⁰⁷ 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.²⁰⁸ 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*.

III.7.5 New and emerging types and methods

[210] The debate about how fit the *Smuggling of Migrants Protocol* is to address new and emerging forms, means, and methods of smuggling of migrants is only in its infancy and has not (yet) resulted in specific recommendations in relation to new provisions or instruments. Overall, the Protocol takes a broad approach to avoid any loopholes and gaps in the definition, and to allow the inclusion of ‘yet-to-be-conceived’ forms of smuggling.

[211] 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 involves electronic means such as online banking, cryptocurrencies, and money transfers as well as alternative remittance systems (such as hawala or feiqian).²⁰⁹

[212] 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*²¹⁰ and the recently completed *United Nations Convention against Cybercrime*²¹¹ include tools to address some of these issues.

²⁰⁶ 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.

²⁰⁷ 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.

²⁰⁸ 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.

²⁰⁹ See further, UNODC, *Migrant Smuggling in Asia: Comparative Research on Financial Flows within Asia and Europe* (UNODC Regional Office for Southeast Asia and the Pacific, August 2013) 9–20.

²¹⁰ Opened for signature 23 November 2001, ETS No 185 (entry into force 1 July 2004).

²¹¹ UN General Assembly, Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information Technologies for Criminal Purposes, *Draft United Nations Convention against cybercrime*, UN Doc A/AC.291/L.15 (7 August 2024).

III.8 Money laundering and corruption

[213] 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 smugglers and smuggling networks who physically guide or transport migrants from one country to another, or on the organisers and organisations who 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 costs and profits of these operations, the laundering of proceeds of smuggling of migrants, and the role of corruption in the smuggling of migrants context.

III.8.1 Financing and proceeds of smuggling of migrants

[214] 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 nor have other permits to enter. From a business perspective, migrant smugglers supply a service to clients who cannot access regular migration channels, or who seek to avoid these channels, and who usually have no alternative but to rely on migrant smugglers.²¹²

Prices, proceeds, and profits

[215] 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 accumulate considerable profits.²¹³

[216] Some research has found that smugglers offer guarantees to reach destination if the migrants 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

²¹² 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.

²¹³ 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.

schemes in long-distance smuggling operations also seems to indicate a high level of professionalism as well as high profits and good success rates.²¹⁴

[217] 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 (which is risky and not common), 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.²¹⁵

[218] In most countries, investigations and prosecutions of smuggling of migrants are often focused solely on the transportation and illegal border crossing element. Efforts to detect, trace, and disrupt the financial flows associated with smuggling of migrants and to deprive smugglers of the proceeds of their crimes are still in their infancy.²¹⁶ 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 thus enabling confiscation and seizure of assets.

Financing and finances

[219] To prevent and disrupt payments made to migrant smugglers, some jurisdictions have introduced offences criminalising the financing of smuggling of migrants. Such offences essentially criminalise the transfer (or attempt to transfer) of funds and/or the supporting (or offering to support) to persons or groups known or suspected to engage in the smuggling of migrants.

[220] Such offences frequently focus specifically on transactions made through alternative remittance systems, i.e. informal money or value transfer services that operate outside 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, such systems are commonly used to transfer funds between migrant communities but also to send money from migrant families to would-be smuggled migrants and to smugglers. Offences along with other measures targeting the financing and support of smuggling of migrants can thus run the risk of criminalising transactions that are widespread, legal, and without alternative for many people and may thus affect large parts of the community.²¹⁷

[221] 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

²¹⁴ 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].

²¹⁵ UNODC, *A Short Introduction to Smuggling of Migrants* (UNODC, 2010) 14; UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Organized crime aspects of the smuggling of migrants, including financial investigations and responses targeting the proceeds of crime*, UN Doc CTOC/COP/WG.7/2015/4 (28 August 2015) 6 [20].

²¹⁶ See generally, FATF, *Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants*, FATF Report (July 2011).

²¹⁷ Andreas Schloenhardt and Thomas Cottrell, ‘Financing the Smuggling of Migrants in Australia’ (2014) 38 *Criminal Law Journal* 265, 285-286; UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Organized crime aspects of the smuggling of migrants, including financial investigations and responses targeting the proceeds of crime*, UN Doc CTOC/COP/WG.7/2015/4 (28 August 2015) 6 [21].

and financing of smuggling of migrants.²¹⁸ 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.

[222] The Working Group on Smuggling of Migrants has called on States Parties to carry out financial investigations

on a routine basis, by multidisciplinary teams of trained and specialized professionals, in close coordination with the financial intelligence units. [...]

Financial investigation related to the smuggling of migrants involves the collection, collation and analysis of all information and records available to assist in the prosecution and to deprive the smugglers of the proceeds of crime. As smuggling of migrants per definition is a transnational crime, the financial investigations also require international cooperation, including for purposes of tracing the proceeds of crime in the countries in which the proceeds are usually reinvested and laundered.

Many of the techniques used to conduct financial investigations in the migrant smuggling context are similar to techniques used for investigating other criminal offences. Such techniques include, for example, physical surveillance, searches, comparing assets with income or information from different service providers, including mobile phone services, Internet, travel agencies and commercial carriers.

Investigators should consider how financial records can prove, in an admissible manner, that the smuggler, directly or indirectly, received a financial or other material benefit. Information obtained through financial data may include identification of income and its sources, identification of suspects and their location, travel bookings, and identification of routes.²¹⁹

III.8.2 Corruption

[223] 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.²²⁰ 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 take place 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.²²¹

²¹⁸ See further, Andreas Schloenhardt and Thomas Cottrell, 'Financing the Smuggling of Migrants in Australia' (2014) 38 *Criminal Law Journal* 265, 273–274.

²¹⁹ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Organized crime aspects of the smuggling of migrants, including financial investigations and responses targeting the proceeds of crime*, UN Doc CTOC/COP/WG.7/2015/4 (28 August 2015) 8 [29]–[31].

²²⁰ 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.

²²¹ UNODC, *Corruption and the Smuggling of Migrants*, Issue Paper (United Nations, 2013) 3; UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Smuggling of Migrants, *Organized crime aspects of the smuggling of migrants, including financial investigations and responses targeting the proceeds of crime*, UN Doc CTOC/COP/WG.7/2015/4 (28 August 2015) 7 [24].

[224] 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. 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.²²²

[225] 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 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.²²³

[226] 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 providers, or ports and airport personnel. They may also find ways to infiltrate these private sector entities. The utility of these private sector entities 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.²²⁴

[227] 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. In addition, the *United Nations Convention against Corruption* (UNCAC) and the Council of Europe *Criminal Law Convention on Corruption* set out extensive measures to prevent and criminalise corruption in all its forms and to enhance international cooperation. The 2002 EU Council Directive and Framework Decision do not contain specific provisions addressing the nexus between smuggling of migrants and corruption.

III.9 Aggravating factors

[228] Smuggling of migrants can take many forms, involve a great range of criminal elements, and 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

²²² UNODC, *Corruption and the Smuggling of Migrants*, Issue Paper (United Nations, 2013) 9–10.

²²³ 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.

²²⁴ 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].

in legislation or guidelines aggravating factors that must be taken into consideration at the sentencing stage.

[229] There is much debate about the types of aggravating circumstances that ought to be recognised and there are many differences between national laws. The 2016 study commissioned by the CDPC 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.’²²⁵

[230] 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).

III.9.1 Endangering the lives or safety of smuggled migrants

[231] 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’.²²⁶ 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’.²²⁷ 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.²²⁸

III.9.2 Inhuman or degrading treatment, exploitation of smuggled migrants

[232] The aggravation in Article 6(3)(b) relates to the way in which smugglers treat migrants, including the exploitation of smuggled migrants.²²⁹ The term ‘inhuman or degrading treatment’ is not further defined in the Protocol but reflects language used in international human rights instruments.²³⁰ It is understood to also include torture and other cruel treatment or punishment.²³¹ 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

²²⁵ 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) 7.

²²⁶ See also UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 41 [Art 6(a)].

²²⁷ 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.

²²⁸ 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.

²²⁹ 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.’

²³⁰ UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217 (III) (10 December 1948) art 5; ICCPR, art 7.

²³¹ 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.

control them during travel', or the use of minors in the commission of offences.²³² The latter could amount to trafficking in children for the purpose of committing crime. The acts of inhuman or degrading treatment may trigger criminal liability for other offences under national law, separately from the smuggling of migrants.

[233] 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).²³³ 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. An *Interpretative Note* acknowledges that the aggravation under Article 6(3)(b) overlaps with the concept and offences of the *Trafficking in Persons Protocol*, stating that '[t]he words "inhuman or degrading treatment" in subparagraph (b) were intended, without prejudice to the scope and application of the trafficking in persons protocol, to include certain forms of exploitation.'²³⁴ As a result, situations in which smuggled migrants are exploited by their smugglers may also fall under the trafficking in persons offences in those States that have signed the *Trafficking in Persons Protocol*.²³⁵ If this is the case, smuggled migrants are simultaneously victims of trafficking in persons and must be afforded the assistance and protection provided to victim under the *Trafficking in Persons Protocol*. Gallagher and David further argue that exploitation in the context of Article 6(3)(b) of the *Smuggling of Migrants Protocol* 'has a broader coverage than just the form of exploitation covered by the' *Trafficking in Persons Protocol*:

This might include, for example, situations where migrants are subjected to actions intended to arouse feelings of fear, anguish, and inferiority in the course of the smuggling process or after arriving at their destination. It is also possible to conceive of situations where the treatment of a smuggled migrant is 'exploitative'—in the sense that it is abusive and for the gain of another—but not of the same nature as 'exploitation' referenced in the trafficking definition.²³⁶

[234] The *Legislative Guides* further note that in cases of migrant smuggling in which there is no consent or if there is consent that has been vitiated or nullified as provided for in Article 3, subparagraphs (b) or (c) of the *Trafficking in Persons Protocol*, the presence of exploitation in what would otherwise be a smuggling case will generally make the trafficking offence applicable if the State Party concerned has ratified and implemented that Protocol.²³⁷

III.9.3 Other aggravating circumstances

[235] The 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

²³² 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.

²³³ 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.

²³⁴ 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.

²³⁵ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 43–44.

²³⁶ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 381.

²³⁷ 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 [49]; see also UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 5: Legislative Framework, 25; UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 43–44.

more than two persons established over a period of time; where the lives of the victims have been endangered.²³⁸

[236] 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 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.’²³⁹

[237] 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.’²⁴⁰ 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.²⁴¹

[238] 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’.²⁴² 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.²⁴³

[239] 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;

²³⁸ 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.

²³⁹ 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].

²⁴⁰ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 46 [Art 6(d)].

²⁴¹ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 46.

²⁴² UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 45 [Art 6(c)].

²⁴³ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 47–50.

- (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.²⁴⁴

[240] 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).²⁴⁵

[241] Article 9 of the Proposal (which was amended in part by the new draft presented on 31 May 2024) 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:²⁴⁶

- (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 convicted of criminal offences of the same nature as those referred to in Articles 3 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 committed with the use of a weapon or the threat of using a weapon
- (g) the criminal offence was committed involving cruel, inhuman, or degrading treatment of a third-country national who was subject to the criminal offence.

²⁴⁴ 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.

²⁴⁵ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM(2023) 755' (14 March 2024) 5 [15]-[16].

²⁴⁶ 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.

[242] 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.²⁴⁷

[243] 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 reference to ‘financial or other material benefit’ as an aggravating factor for smuggling of migrants offences.²⁴⁸ 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.²⁴⁹

III.9.4 Mitigating circumstances

[244] One novelty of the EU’s 2023 Proposal is the inclusion of mitigating circumstances in Article 10 (which was substantially amended by the new draft presented on 31 May 2024) if ‘the offender provides the competent authorities with information which they would not otherwise been able to obtain, helping them to identify or bring to justice other offenders; or find evidence.’

[245] Commenting on this proposal, UNHCR further suggests 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.²⁵⁰

²⁴⁷ 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).

²⁴⁸ 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; see also EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 9.

²⁴⁹ 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.

²⁵⁰ UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 5 [16].

III.10 Penalties and sanctioning

[246] Closely associated with the inclusion of aggravating circumstances is the issue of (statutory) penalties, sentencing, and other sanctions for smuggling of migrants. The 2016 study commissioned by the CDPC 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.²⁵¹

[247] 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.’²⁵²

[248] 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.

[249] Article 11 of the UNTOC 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 sanctions.²⁵³ The flexible nature of the obligations imposed by paragraph 1 is due to the difficulties in harmonising penalties and sanctions across jurisdictions and requirements set by other international instruments and domestic laws and policies.

[250] 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 prison sentences.

[251] 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.

[252] This observation must, however, not 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 and increasing sentences are generally not an effective and immediate deterrent, especially if this is done in the

²⁵¹ 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.

²⁵² EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 9.

²⁵³ 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.

absence of other measures aimed at preventing crime, reducing victimisation, and deterring would-be offenders.²⁵⁴

[253] These principles are expressly recognised in Article 1 of the 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.²⁵⁵

[254] Article 6(1) of the 2023 proposal for a new EU Facilitation Directive reiterates the principles; the following subsections provide more detailed guidance on minimum penalties. These subsections were substantially changed by the new draft proposal presented on 31 May 2024. Following these revisions, it is now proposed that the offences referred to in Article 3(1) and (1a) must be punishable by a maximum term of imprisonment of at least one year (Article 6(2)). If these offences involve a financial or material benefit, the maximum penalty should be raised to imprisonment of at least three years (proposed Article 6(2a)). Offences referred to in Article 3(1) and (1a) that are committed within the framework of a criminal organisation, cause serious harm or endanger the life of smuggled migrants, by using serious violence, or involve particularly vulnerable migrants (such as unaccompanied minors) must be punishable by a maximum term of imprisonment of at least eight years (proposed Article 6(3)). Offences resulting in death must be punishable by a maximum term of imprisonment of at least ten years (proposed Article 6(5)). In addition to these penalties, proposed Article 6(5) of the proposal encourages the use of additional sanctions and measures.

III.11 Prevention

[255] Prevention is a key part of a holistic response to the smuggling of migrants and a stated purpose of the *Smuggling of Migrants Protocol*.²⁵⁶ 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.²⁵⁷ 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.

[256] Nevertheless, 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 at the national level—if indeed they exist at all.

²⁵⁴ See, among many, Jay Gormley, Melissa Hamilton, and Ian Belton, *The Effectiveness of Sentencing Options on Reoffending*, Report (UK Sentencing Council, 2022); Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Victoria, Sentencing Advisor Council, April 2011); US Department of Justice, National Institute of Justice, 'Five things about deterrence' (May 2016) <<https://www.ojp.gov/pdffiles1/nij/247350.pdf>>; Derek Pyne, 'Deterrence: Increased enforcement versus harsher penalties' (2012) 117(3) *Economic Letters* 561–562.

²⁵⁵ 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.

²⁵⁶ *Smuggling of Migrants Protocol*, arts 2, 4.

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) 372 [81].

III.11.1 Public awareness campaigns

[257] 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’.²⁵⁸ 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.

[258] Awareness raising is a crucial element to prevent the smuggling of migrants. Thus far, deterrence of would-be migrants has been the main goal of most public awareness campaigns, highlighting the risks, dangers, and costs of smuggling of migrants and the hostile reception irregular migrants receive in transit and destination countries. Creating fear appears to have been the main objective of such campaigns. They do nothing to address the demand for smuggling of migrants. Some campaigns, frankly, have been cynical and cruel attempts to confront the despair and desperation that is driving many refugees and migrants fleeing from persecution and poverty and who are generally left with no alternative to resorting to smugglers.

[259] For these reasons, most awareness campaigns had little to no impact and, in some cases, were counterproductive. Research shows that overly negative or one-sided information has been proven to be ineffective. 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. [...] 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.²⁵⁹

[260] Rather, it is recommended that campaigns should present a realistic and ‘rational picture of migration’.²⁶⁰

III.11.2 Informing would-be smuggled migrants

[261] 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.²⁶¹ A background paper prepared for

²⁵⁸ 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].

²⁵⁹ 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, 21.

²⁶⁰ 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.

²⁶¹ 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

the Working Group on Smuggling of Migrants observes that ‘[g]ood practice involves assisting origin countries to provide accurate information to persons targeted for recruitment by smugglers.’²⁶² 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.

[262] The effectiveness of information campaigns as a prevention measure depends on the ability to reach the target audience. This can be challenging where migrants come from remote or marginalised communities where access to information is limited. The success of information campaigns depends on their credibility and the trust that potential migrants place in the information provided. In some cases, migrant smugglers exploit the lack of trust in official channels, spreading misinformation to attract clients for their business.

[263] Generally, information campaigns that engage affected communities of migrants and refugees and peer-to-peer exchange have been more effective. 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 mentioned before 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.²⁶³ The paper further observes that information campaigns that seek to deter persons from embarking on irregular journeys 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’.²⁶⁴

III.11.3 Deterring would-be offenders

[264] 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.

[265] 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’.

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].

²⁶² 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].

²⁶³ 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].

²⁶⁴ 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

[266] Promoting and strengthening development programs and cooperative efforts to address the root socio-economic causes of smuggling of migrants plays an important part in stopping the smuggling of migrants and requires a whole-of-government approach. This is recognised in Article 15(3) of the *Smuggling of Migrants Protocol* which further asks States Parties 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.²⁶⁵ It is also qualified with the phrase ‘as appropriate’.

[267] Existing and proposed EU frameworks do not make any 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.

[268] 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’.²⁶⁶ Notably, the root causes of migration are also acknowledged in the Protocol’s Preamble, with reference to UN General Assembly Resolution 54/212 in international migration and development.²⁶⁷ Among other things, this Resolution notes the ‘the widening economic and social gap between and among many countries and the marginalization of some countries in the global economy’, the human rights of all migrants, and the need for coherent, effective, and cooperative global migration policies.²⁶⁸

[269] 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. Nonetheless, the causes of migrant smuggling are not referable to these drivers: poverty and underdevelopment does not create a market and demand for the services of smugglers.

III.11.5 Regular migration opportunities

[270] It is now widely accepted that smuggling of migrants and the demand for it are, first and foremost, a result of a lack of regular avenues for migration.²⁶⁹ The Council of Europe Commissioner for Human Rights recently noted:

[W]e concentrate so much on the fever – the smuggling – that we forget to treat the infection – the absence of mobility opportunities. Some governments present the fight on smuggling as a way to tackle irregular migration. But we must acknowledge that smugglers are not creating irregular

²⁶⁵ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 425.

²⁶⁶ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 81.

²⁶⁷ UN General Assembly, *International Migration and Development*, UN Doc A/RES/54/212 (1 February 2000).

²⁶⁸ UN General Assembly, *International Migration and Development*, UN Doc A/RES/54/212 (1 February 2000) 3–4.

²⁶⁹ UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations, 2011) 43.

migration, but rather offering illicit services that continue to be in high demand because people on the move lack alternatives. [...]

To tackle smuggling, it is necessary then, and as I have said, to work towards removing the reasons for its demand, through the provision of safe and legal routes. Member states can, among other initiatives, expand opportunities for: resettlement, humanitarian visas, sponsorship schemes, and family reunification. In this regard I acknowledge, of course, that safe and legal routes are by no means a magic bullet: situations will continue to exist in which people resort to irregular means. But at least reducing the need to resort to smugglers can save lives.²⁷⁰

[271] Put simply, smuggling proliferates with the implementation of restrictive migration policies²⁷¹ and becomes more lucrative as migration controls evolve.²⁷² States are responsible for the smuggling of migrants in that the barriers that they erect create and subsidise the underground market for smuggling of migrants. The Working Group on Smuggling of Migrants has stressed that:

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.²⁷³

[272] 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.’²⁷⁴ 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.’²⁷⁵

[273] The relationship between smuggling of migrants and the availability of legal avenues of migrations is a controversial and politically sensitive issue. What European States need to realise is that smuggling of migrants will not disappear so long as people need to seek opportunities abroad and so long as some employers in destination countries will want to lower labour costs

²⁷⁰ Council of Europe Commissioner for Human Rights, Michael O’Flaherty, speech at the opening of the 2nd *International Conference on Smuggling of Migrants*, Strasbourg, 10 September 2024, CoE Doc CommHR(2024)38 [emphases removed].

²⁷¹ 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.

²⁷² 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.

²⁷³ 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).

²⁷⁴ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 502.

²⁷⁵ 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].

through the exploitation of migrants in an irregular situation. It thus results in a dilemma if States neither want to facilitate labour mobility nor punish exploitative employers.

[274] On this background, there is ample need 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. 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. These points are central to any meaningful strategy against smuggling of migrants — but they go beyond the limitations set for the present report.

III.12 International cooperation in criminal matters

[275] International cooperation in criminal matters is essential to disrupt smuggling networks, prosecute perpetrators, locate and seize proceeds of crime, and to protect smuggled migrants. The importance of international cooperation is stressed in the foreword, preamble, and throughout the UNTOC and the *Smuggling of Migrants Protocol*. ‘[N]ational efforts to counter the smuggling of migrants’, adds 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.’²⁷⁶

[276] 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 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 employed much. A 2021 review of cases has shown that while the UNTOC’s international cooperation provisions are used in practice, only a small number of cases involve instances of smuggling of migrants.²⁷⁷

[277] 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 in section II.5 above. While this is beyond the terms of reference of the present report, the CDPC may wish to explore how these existing instruments are used in the context of smuggling of migrants cases and what obstacles States may encounter when they employ these instruments to seek international cooperation.

[278] 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

²⁷⁶ UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations, 2011) 11 [42].

²⁷⁷ 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.

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.

[279] Not further discussed here are the extensive instruments, legal frameworks, and institutional arrangements created for international criminal justice cooperation between EU Member States. These include, inter alia, innovative mechanisms such as the European Arrest Warrant and joint investigation teams, as well as the creation of 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, for the most part, presently cannot be realistically replicated by other regional or global international organisations.

III.13 Investigations and law enforcement

[280] 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.

[281] 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 organised criminal groups continue to be inadequate.²⁷⁸

[282] The development of robust laws, policies, and procedures to prevent and smuggling of migrants is of limited utility in the absence 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.²⁷⁹

²⁷⁸ UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (United Nations, 2011) 10 [37]–[39].

²⁷⁹ 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*

[283] Efforts to disrupt migrant smuggling networks and detect and arrest smugglers are hampered where investigations are aimed at irregular migrants or migrant rather than at the smugglers. ‘The key investigative challenge’, notes the Working Group on Smuggling of Migrants, 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.²⁸⁰

[284] Investigating the smuggling of migrants is particularly challenging if organised criminal groups are involved that operate clandestinely, use encrypted communication, operate across international borders, have access to considerable financial and human resources, 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. The importance of parallel financial investigations is discussed above in section III.8.1 of this report.

[285] Special investigative techniques are defined as techniques for gathering information in such a way as not to alert the target persons.²⁸¹ 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 can be particularly useful for the investigation of organised crime. Article 16 of the 2023 proposal for a new EU Council Directive contains similar provisions to ensure that investigative tools available to combat organised crime can also be employed in cases of facilitation of irregular migration.²⁸² The text of proposed Article 16 and the accompanying recital were amended in the new draft presented on 31 May 2024.

[286] Under Article 20 of the UNTOC, 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, the use of civilians in undercover operations, and the protection of informants/undercover officers or telephone interception.²⁸³ Furthermore, in the context of smuggling of migrants investigations, special investigative

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].

²⁸⁰ 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].

²⁸¹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2nd ed 2017) [443].

²⁸² 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.

²⁸³ 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].

techniques must be applied in such a way that the rights of smuggled migrants are protected, and the health and safety of migrants and of personnel are not jeopardised.²⁸⁴

[287] Law enforcement cooperation across borders is another important tool to investigate the smuggling of migrants, identify and detect perpetrators, and bring them to justice. Informal police-to-police cooperation facilitates the rapid exchange of information and can also be used to support formal cooperation.²⁸⁵ 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.’²⁸⁶

[288] 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.

III.14 Border and immigration control

[289] Immigration and border controls are frequently seen as a key component of detecting and deterring the smuggling of migrants. As concerns over irregular migration have grown, together with the desire to detect and punish migrant smugglers, many States have resorted to the physical fortification of borders, increasing immigration bureaucracy and monitoring, and, to varying degrees, the externalisation of measures designed to curb irregular migration.

[290] While border controls have a role in combatting the smuggling of migrants, it is well-recognised that they may also contribute and exacerbate to 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*. On the one hand, the Protocol encourages respect for the free movement of people, respect for their human rights and the principle of non-refoulement,

²⁸⁴ 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].

²⁸⁵ 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].

²⁸⁶ 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].

and the non-criminalisation of smuggled migrants, but, on the other hand, requires States Parties to strengthen border measures.²⁸⁷

[291] Article 11 of the *Smuggling of Migrants Protocol* notionally addresses ‘border measures’,²⁸⁸ 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 smuggling facilitated through the use of commercial carriers; (3) that States Parties should impose immigration consequences on smugglers or and others implicated in smuggling;²⁸⁹ and, (4) that cooperation between the border agencies of States Parties is important in responding to the smuggling of migrants.²⁹⁰

[292] 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 exercise caution 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.

[293] The Council of Europe Commissioner for Human Rights recently noted:

As long as situations of persecution, conflict and human rights violations exist, people will flee. And as long as people have no other viable option to reach a country where they can seek and receive adequate protection, they will resort to smugglers. In this situation, a strategy predominantly based on border control, law enforcement and criminal justice can only promise limited results. Indeed, even if the imposition of ever-more-restrictive border control measures is often presented as a way to ‘break the business model of smugglers’, in reality this approach may result exactly in the opposite, as it may contribute to conditions for smuggling to flourish.

In this regard, we observe how smugglers often adapt their tactics to new legal landscapes, and what is more, stricter border controls can also lead to more dangerous routes or methods. For example, many smugglers have stopped piloting boats to avoid arrest, leaving untrained passengers to steer them. We must therefore be cautious with our assumptions: increasing pressure on smugglers through stronger border controls, investigations, and prosecutions will not necessarily lead to greater security or to greater protection of those suffering at our borders.²⁹¹

[294] 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.²⁹²

[295] 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

²⁸⁷ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 504-505.

²⁸⁸ 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*.

²⁸⁹ This obligation relates to the offences established pursuant to Article 6 of the *Smuggling of Migrants Protocol*.

²⁹⁰ 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.

²⁹¹ Council of Europe Commissioner for Human Rights, Michael O’Flaherty, speech at the opening of the 2nd *International Conference on Smuggling of Migrants*, Strasbourg, 10 September 2024, CoE Doc CommHR(2024)38.

²⁹² 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.

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 synchronised operations against smuggling networks and fostering bilateral and multilateral alliances.

[296] 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 refoulement, refusal of protection, indefinite detention, family separation, and aggressive deportation campaigns can cause harm and suffering and violate the rights of smuggled migrants.²⁹³ Moreover, many countries have used measures such as denying entry to smuggled asylum seeker and refugees 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, 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.²⁹⁴

[297] In a submission received on an earlier draft of this report, UNHCR further stresses the importance of protection-sensitive entry systems. These are systems that take into account the protection needs of individuals seeking access to State territory and the duty of States to respect their obligations under international human rights and refugee law, including the principle of non-refoulement. Protection-sensitive entry systems ensure that legitimate measures to control entry are not applied arbitrarily and that they allow asylum seekers and other groups with specific protection needs to be identified and granted access to a territory where their needs can be properly assessed and addressed.²⁹⁵

[298] 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 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 present 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.

[299] 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

²⁹³ See also the examples and accounts presented by Felize Osum, Border Violence Monitoring Network (BVMN) at the *2nd Smuggling of Migrants Conference*, Strasbourg, 10 September 2024.

²⁹⁴ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 2-3.

²⁹⁵ See further, UNHCR, 'The 10-Point Plan in Action. Chapter 3: Protection-sensitive entry systems' (2007) <<https://www.unhcr.org/sites/default/files/legacy-pdf/5846ced57.pdf>>.

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.

[300] 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.

[301] 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 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.’²⁹⁶

[302] 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 collaborative investigation and prosecution responses. Specialist operational functions with high-level investigative and prosecutorial skills are required.²⁹⁷

III.15 Protection of the human rights of smuggled migrants

[303] Among experts and in the literature on the subject, one of the greatest deficiencies in the existing international frameworks are seen in the fragmentary protection of the rights of smuggled

²⁹⁶ 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].

²⁹⁷ 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].

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.'²⁹⁸ 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.²⁹⁹

[304] The inclusion of provisions relating to the protection and rights of smuggled migrants in the *Smuggling of Migrants Protocol* was somewhat of an afterthought. Early drafts of the 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, to the human rights abuses that cause their irregular movements, and the abuses smuggled migrants experience during their journey.³⁰⁰ 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,³⁰¹ but the draft text remained unchanged at that time.³⁰²

[305] 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 Ad Hoc 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 preserve and seek to uphold the fundamental human rights to which all persons, including smuggled migrants, are entitled. [...].³⁰³

[306] 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.³⁰⁴ 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

²⁹⁸ 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.

²⁹⁹ 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.

³⁰⁰ UNODC, *Travaux préparatoires of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 459.

³⁰¹ UNODC, *Travaux préparatoires of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 459 459.

³⁰² David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 379.

³⁰³ 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].

³⁰⁴ UNODC, *Travaux préparatoires of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations 2006) 459 461.

compromised in any way by the implementation of anti-smuggling measures and by including clearer references and obligations related to the protection of migrants' fundamental rights'.³⁰⁵

[307] 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.³⁰⁶ 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'.³⁰⁷

[308] 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.³⁰⁸ Article 2, which sets out the Protocol's purpose, also explicitly calls on States Parties to '[protect] the rights of smuggled migrants'.³⁰⁹ 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.³¹⁰

[309] Despite this, the *Smuggling of Migrants Protocol* remains a criminal justice instrument and 'problematic from a human rights perspective'.³¹¹ 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.³¹² The Protocol effectively positions smuggling as a crime against States, their immigration controls and sovereignty, rather than a crime against the person.³¹³ In the words of the *Legislative Guides*, smuggled migrants are simply a 'commodity', though one that—the Guides appear to somewhat grudgingly concede—'consists of human beings, raising human rights and other issues not associated with other commodities'.³¹⁴

[310] 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

³⁰⁵ 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.

³⁰⁶ UN General Assembly, *Protection of Migrants*, UN Doc A/RES/70/147 (25 February 2016) 5 [3], 9 [8].

³⁰⁷ 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 [21].

³⁰⁸ *Smuggling of Migrants Protocol*, art 6(3).

³⁰⁹ See *Smuggling of Migrants Protocol*, arts 4 and 14(2), both of which refer to the protection of smuggled migrants' rights.

³¹⁰ Note also Articles 24 and 25 of the *United Nations Convention against Transnational Organized Crime*, which concern protection to victims and witnesses.

³¹¹ Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective' (2015) 17(2) *International Journal of Refugee Law* 394, 395.

³¹² 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.

³¹³ Joseph Lelliott, 'Smuggled and Trafficked Unaccompanied Minors' (2017) 29(2) *International Journal of Refugee Law* 238, 245.

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) 349 [55].

who remove them from the country [...].³¹⁵ While some rights will apply to smuggled migrants universally, such as those contained in the *International Covenant on Civil and Political Rights*,³¹⁶ the *International Covenant on Economic, Social and Cultural Rights*,³¹⁷ and the *European Convention on Human Rights*, 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,³¹⁸ and States Parties will require robust procedures to identify individual protection needs.³¹⁹ 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.’

[311] 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.³²⁰ The ‘internationally recognised 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 recognising additional protected classes or persons.³²¹

[312] The 2002 EU Directive and Framework Decision, by comparison, 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 conceptualisation of migrants as individuals and equal holders of human rights.’³²² The report by the European Parliament similarly notes:

³¹⁵ UNODC, *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants, Module 9: Human Rights* (United Nations 2010) 3.

³¹⁶ Opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976).

³¹⁷ Opened for signature 16 December 1966, 993 UNTS 3 (entry into force 3 January 1976).

³¹⁸ *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).

³¹⁹ 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.

³²⁰ OHCHR, ‘Human Rights and Human Trafficking: Fact Sheet No 36’ (2014) 6.

³²¹ See David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 369.

³²² 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].

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.³²³

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.³²⁴

Smuggled migrants as witnesses

[313] Smuggled migrants will often be witnesses and thus an important resource for investigations and prosecutions.³²⁵ It is good practice, notes the Working Group on Smuggling of Migrants, 'to treat smuggled migrants as witnesses to smuggling of migrants rather than as targets of smuggling of migrants investigations.'³²⁶ As witnesses, their rights and safety need to be protected throughout the criminal justice process.³²⁷

[314] Not least because of their irregular status, smuggled migrants often fear intimidation, retaliation, and removal if they cooperate with law enforcement agencies or testify in court. These fears are particularly acute when there is a close relationship between the witness and the offender, or when the offender is part of an organised criminal group. Hence, it is vital that effective measures are taken to protect the safety and privacy of witnesses and their families.³²⁸ Many jurisdictions offer criminal justice visas or other protection tools for witnesses willing to cooperate with law enforcement which can be used to enable smuggled migrants to remain in the country lawfully.

[315] The *Convention against Transnational Organized Crime* includes a number of provisions requiring States Parties to take measures to protect witnesses and to cooperate with other enforcement authorities to offer protection to witnesses.³²⁹ In implementing these requirements, the *Toolkit to Combat Smuggling of Migrants* suggests that there are three key principles to bear in mind: physical protection, psychological protection, and protection from unfair treatment.³³⁰

³²³ 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].

³²⁴ 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].

³²⁵ See further, 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).

³²⁶ 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].

³²⁷ UNODC, *Toolkit to Combat Smuggling of Migrants* (2008) Tool 7, 55.

³²⁸ UNODC, *Criminal Justice Assessment Toolkit* (2006) Victims and Witnesses, 14–15, International Cooperation, 14–15.

³²⁹ *Convention against Transnational Organized Crime*, arts 24–26.

³³⁰ UNODC, *Toolkit to Combat Smuggling of Migrants* (2008) Tool 7, 56.

III.16 Smuggled migrants who are refugees

[316] Smuggling of migrants frequently involves refugees who are protected under the *Convention and Protocol relating to the Status of Refugees*.³³¹ The UNHCR notes that

resorting 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.³³²

[317] 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 impact on the rights 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’.³³³ In cases where a smuggled migrant is also a refugee, the *Refugee Convention* applies in addition to—and, in case of conflict, supersedes—the *Smuggling of Migrants Protocol*.³³⁴ 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.³³⁵

[318] 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*]’.³³⁶ 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 Council of Europe Commissioner for Human Rights recently stressed ‘that the reliance on services provided by migrant smugglers [must not] be used to delegitimise people’s claim to protection.’³³⁷

[319] The UNHCR stresses that:

The principle of non-refoulement constitutes an essential binding and non-derogable component of international refugee protection,⁵ most prominently expressed in Article 33 of the 1951

³³¹ *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*’).

³³² UNHCR, ‘Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755’ (14 March 2024) 3-4.

³³³ UNODC, *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) 555.

³³⁴ 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].

³³⁵ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 165.

³³⁶ 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].

³³⁷ Council of Europe Commissioner for Human Rights, Michael O’Flaherty, speech at the opening of the 2nd International Conference on Smuggling of Migrants, Strasbourg, 10 September 2024, CoE Doc CommHR(2024)38.

[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.³³⁸

[320] 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.³³⁹ However, this suggestion was not adopted by the drafters.

[321] For refugees and asylum seekers, one of the most important provisions under the *Smuggling of Migrants Protocol* is Article 5 which, as already mentioned upholds the principle that asylum seeking is not a criminal offence. Through Article 5, the *Smuggling of Migrants Protocol* recognises that smuggled migrants, including 'refugees, often have to rely on smugglers to flee persecution, serious human rights violations or conflict. They should not be criminalised for making use of smugglers or for their illegal entry.'³⁴⁰

[322] In this context, reference is also made to Article 31(1) of the *Refugee Convention* which recognises that refugees may have to use irregular means to enter a country of asylum.³⁴¹ Under Article 31, States must not impose penalties on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in the State's territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Article 31 specifically prevents States from penalising the unauthorised entry or presence of refugees or applying unnecessary restrictions to their movement.³⁴² In a similar fashion, Article 5 of the *Smuggling of Migrants Protocol* operates to protect irregular migrants from criminalisation merely for seeking or gaining entry with the assistance of smugglers.

[323] The EU Framework Decision of 2002 contains a safeguard clause that is similar to Article 19(1) of the Protocol, stating that the Framework Decisions 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.³⁴³

³³⁸ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 2-3.

³³⁹ 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].

³⁴⁰ UNODC, *Toolkit to Combat Smuggling of Migrants* (United Nations, 2010) Tool 1: Understanding the smuggling of migrants, 29.

³⁴¹ See further, Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 163-169.

³⁴² John Morrison, 'The Dark-Side of Globalisation: The Criminalisation of Refugees' (2001) 43(1) *Race & Class* 71, 73.

³⁴³ 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.

III.17 Support of smuggled migrants

[324] Among European States there has been much debate about the material and immaterial support afforded to smuggled migrants with many populist claims suggesting that any support offered will act as ‘pull factor’. Some States—overtly 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’.³⁴⁴ Indeed, the reception and treatment smuggled migrants experience in some States amounts to what has been termed ‘secondary’ or ‘double-victimisation’.³⁴⁵

[325] 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

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.³⁴⁶

[326] 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 obligation is unclear.³⁴⁷ It appears that appropriate assistance will always require, at a minimum, ‘basic’ assistance. Regardless, it should be reiterated that States remain bound by their obligation to preserve and protect the human rights of smuggled migrants without discrimination. 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.³⁴⁸

[327] 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.³⁴⁹ Even less guidance is given as to the special needs of smuggled women.³⁵⁰

[328] 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

³⁴⁴ 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.

³⁴⁵ See further, Alessandro Spena, ‘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.

³⁴⁶ 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].

³⁴⁷ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 566.

³⁴⁸ See also UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2010) 69.

³⁴⁹ UNODC, *Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants, Module 9: Human Rights* (United Nations, 2010) 8.

³⁵⁰ 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.

under the *Convention on the Rights of the Child* (CRC).³⁵¹ The CRC, which enjoys near-universal acceptance, set 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.³⁵² 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.³⁵³ 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 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 prioritisation of ‘[n]on rights-based arguments such as those relating to general migration control’ over their best interests.³⁵⁴ 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’.³⁵⁵

[329] On this background, Objective 9 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 need to be ‘gender-responsive’ and ‘child-sensitive’ and, with regards to smuggled migrants, especially if within vulnerable categories, must be in accordance with international law.

III.18 Return of smuggled migrants

[330] The return of smuggled migrants broadly entails the removal of persons with no lawful authority to enter or remain from one State to another, which may be their country of origin, a transit country, or, in some cases, another country which accepts them. The approach of many States to preventing and combating smuggling of migrants, and irregular migration generally, is characterised by deterrence and strong migration controls.³⁵⁶ A big part of such a strategy is the return of smuggled migrants, both to deny them the benefit of being smuggled and to send a message to other persons considering attempts at unauthorised entry.

³⁵¹ Opened for signature 20 November 1989, 1577 UNTS 3 (entry into force 2 September 1990).

³⁵² *Convention on the Rights of the Child*, arts 22, 24, 27, 28, 34–37.

³⁵³ 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).

³⁵⁴ 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.

³⁵⁵ *Convention on the Rights of the Child*, art 20.

³⁵⁶ 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].

[331] 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.³⁵⁷ The use of punitive or coercive measures by States to push smuggled and other irregular migrants into ‘voluntarily’ leaving are also not uncommon. Some States use monetary and other incentives to encourage irregular migrants to agree to their removal.

[332] 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.³⁵⁸ 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. In this regard, Article 18 echoes calls by many European States on source and transit countries to accept the return of persons who are found not to be refugees and to enter into readmission agreements to that end. 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.

[333] 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 mixed movements, i.e. cross-border movements of persons of various genders and ages with differing backgrounds, vulnerabilities, and experiences of harm and persecution.³⁵⁹ Many smuggled migrants are asylum seekers or refugees and may be entitled to protection under international refugee and human rights law.

[334] 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 Plan³⁶⁰ and in separate directives relating to the removal and return of irregular migrants, which are not further discussed here.

III.19 Data collection and research

[335] Efforts to effectively prevent and suppress migrant smuggling are severely hampered by the lack of comprehensive data collection. In spite of the widespread tendency to attempt to estimate or guess the scale of smuggling activities and the number of smuggled migrants, there are few reliable statistics.

[336] The absence of any comprehensive data and research on the scale and spread of migrant smuggling has a direct impact on the ability of those charged with enforcing relevant laws. If the scale and nature of the problem is not known, it is unlikely that the appropriate measures and resources can be allocated to prevent and suppress it. Without accurate information about smuggling of migrants, prevention strategies cannot be identified, and suppression activities are

³⁵⁷ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2017) 435.

³⁵⁸ Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 696.

³⁵⁹ UNODC, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response* (UNODC 2021) 93.

³⁶⁰ European Commission, ‘A Renewed EU Action Plan against Migrant Smuggling (2021-2025)’, COM(2021) 591 final (29 September 2021) 1.

rendered useless because insufficient information will not lead to effective prosecution of offenders.³⁶¹

[337] Data collection, research, and analysis are important for evaluating the impact and efficiency of policy, legislation, and enforcement programs, and for providing feedback to policy makers and legislators. Without defensible and realistic baseline data, claims concerning the operation and impact of anti-migrant smuggling strategies cannot be verified, and thus the credibility and commitment of government programs are left subject to question.

[338] Remarkably few jurisdictions have systematic statistics on smuggling of migrants. In many countries, statistics about migrant smuggling are not collected at all, and even if they are collected, they are often fed into broad categories and become inseparable and indistinguishable. Few countries count the number of investigations, prosecutions, and convictions under individual offences relating to migrant smuggling. Fewer countries still separate the number of offences by type of offender, geographic location, severity of the crime et cetera. Even if statistics exist, they are rarely published or otherwise openly available, which further hampers efforts to analyse and understand the levels and patterns of migrant smuggling and design adequate strategies to fight it.

[339] On the other hand, if collected and reported consistently, such information makes it possible to review investigation and prosecution processes and identify potential weaknesses in the criminal justice system that cause cases to collapse. The collection of data should also be followed by data analysis in order to identify and understand trends and patterns of smuggling of migrants.

[340] Crime statistics generally only count those criminal offences that come to the attention of the police or other law enforcement agencies. However, for a variety of reasons, smuggled migrants and witnesses of migrant smuggling may not report offences to the authorities. The reporting rate may be affected by a number of factors, including access to law enforcement agencies, confidence (or lack thereof) in the police, et cetera. The difference between how much crime actually occurs and how much crime is reported to or discovered by the authorities is usually referred to as the ‘dark figure of crime’. Crime statistics are therefore a very imperfect way to document and measure the smuggling of migrants.³⁶²

III.20 Implementation and review

[341] Up until recently, the implementation of the *Smuggling of Migrants Protocol* was not properly monitored and no agency, including UNODC, 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.

[342] 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.³⁶³ The absence of a more specific, express review

³⁶¹ See further, UNODC, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (2012) 8–9.

³⁶² See further, EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 6.

³⁶³ Max Bernt and Andreas Schloenhardt, *Vertragliche Umsetzungskontrolle im Transnationalen Strafrecht* (Springer 2021) 113.

mechanism in the Convention is explained by concerns of States that can be traced back to the early stages of the drafting process.³⁶⁴

[343] 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.³⁶⁵ UNODC, acting as the secretariat of 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 and discussed in official documents and a range of other publications and are not further reproduced here.³⁶⁶

[344] The Review Mechanism has been criticised for lacking transparency, public scrutiny, and for failing to involve NGOs and, importantly, those personally affected by smuggling of migrants. Country reviews remain confidential by default unless the country decides to make information public, though even if the information is public, the country under review may not be disclosed. Confidentiality permeates the entire review process, which is said to compromise the quality and legitimacy of the Review Mechanism.³⁶⁷ It has been argued that 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.³⁶⁸

[345] 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.³⁶⁹ 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

³⁶⁴ 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–.

³⁶⁵ 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.

³⁶⁶ 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.

³⁶⁷ 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.

³⁶⁸ 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.

³⁶⁹ 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.

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.³⁷⁰ The involvement of civil society is limited to ‘constructive dialogues’³⁷¹ that take place after the working groups have concluded their sessions and adopted their final reports.³⁷² The depth and content of these 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).³⁷³

[346] Further concerns relate to delays, the slow speed, costs, and funding of the Review Mechanism. The 12-year duration of the review also risks that some States gradually become disengaged and disinterested;³⁷⁴ the first years of operation of the Mechanism already show that many States are slow to respond within set deadlines, if indeed they respond at all.

[347] The experience with similar mechanisms under other treaties, such as the *United Nations Convention against Corruption*, the *Council of Europe Criminal Law Convention on Corruption*, and the *Council of Europe Convention on Action against Trafficking in Human Beings* has been that thorough reviews are expensive, especially if they involve lengthy country visits by officials and experts 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.³⁷⁵ 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.³⁷⁶

III.21 Other issues

[348] In addition to the points raised in the previous sections, there are a range of other issues that either stem from gaps and discrepancies in the international legal frameworks or that relate

³⁷⁰ 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.

³⁷¹ 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].

³⁷² 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)].

³⁷³ 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.

³⁷⁴ 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.

³⁷⁵ 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.

³⁷⁶ See further, Max Bernt and Andreas Schloenhardt, *Vertragliche Umsetzungskontrolle im Transnationalen Strafrecht* (Springer, 2021) 120–121.

to challenges in implementing these frameworks. Due to time and capacity constraints, these points are only flagged superficially here and not discussed in sufficient depth.

III.21.1 Commercial carriers

[349] The *Smuggling of Migrants Protocol* requires States Parties to adopt legislative or other measures to prevent commercial carriers from being used by migrant smugglers.³⁷⁷ 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.

[350] Article 11(2)–(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 no obligation on carriers to assess the validity or authenticity of the documents.³⁷⁸ Article 11(4) suggests that carriers are sanctioned if they fail to comply with these requirements,³⁷⁹ although there should be no liability on carriers for transporting undocumented refugees.³⁸⁰

[351] 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*³⁸¹ 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.³⁸²

[352] Carriers who 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

³⁷⁷ 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.

³⁷⁸ 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.

³⁷⁹ 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.

³⁸⁰ 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].

³⁸¹ Opened for signature 7 December 1944, 15 UNTS 295 (entry into force 4 April 1947).

³⁸² 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.

documents and visas at check-in and refrain from carrying those passengers who are not properly documented.³⁸³

[353] 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.

[354] 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.³⁸⁴

III.21.2 Corporate liability

[355] 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.

[356] Articles 2 and 3 of the 2002 EU Framework Decision similarly 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. 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.³⁸⁵

[357] The revised draft of the new EU Directive presented on 31 May 2024 makes significant changes to the text of proposed Article 8.

[358] Based on the available open-source material, there appear to be no documented cases in which a legal person was held accountable under laws relating to corporate liability. There is also

³⁸³ EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014) 14.

³⁸⁴ 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.

³⁸⁵ UNHCR, 'Comments on the Commission Proposal for a Facilitation Directive (Anti-smuggling Directive) - COM (2023) 755' (14 March 2024) 8 [28]; see also, PICUM, *How the New EU Facilitation Directive Furthers the Criminalisation of Migrants and Human Rights Defenders* (2024).

next to no literature and analysis about the potential and actual impact and operation of these provisions.

III.21.3 Information exchange

[359] 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* 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).³⁸⁶

[360] There have been many 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 on this topic produced and collated by the Working Group on Smuggling of Migrants.³⁸⁷

III.21.4 Further matters

[361] Other issues that are part and parcel of any effective response to smuggling of migrants, but which are not further discussed here include:

- Jurisdiction
- Prosecution³⁸⁸
- Rights of the accused and access to justice
- Confiscation of assets

³⁸⁶ 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.

³⁸⁷ 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).

³⁸⁸ See further, 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).

- National coordination³⁸⁹
- Cooperation with private sector
- Cooperation with civil society
- Technical and financial assistance; economic development
- Victim identification
- State-sponsored smuggling of migrants

³⁸⁹ 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).

IV Opportunities, obstacles, options: The feasibility of a new Council of Europe instrument on smuggling of migrants

[362] Part III of the present report shows that the existing international frameworks at global and regional levels are full of deficiencies, contradictions, and, in some cases, errors. Their texts, interpretation, implementation, and enforcement raise many concerns in relation to legality, feasibility, sustainability, fairness, economics, and, importantly, human rights. Yet, it also has to be stressed that these instruments are significant and indispensable and that they have been crafted carefully.

[363] The *Smuggling of Migrants Protocol* is a major achievement in the development of international law. The Protocol has been widely praised for creating a global legal framework for a common and dangerous phenomenon that affects most countries of the world.³⁹⁰ Its criminalisation provisions place an emphasis on smugglers, especially organised criminal groups, who take advantage of vulnerable persons. The Protocol seeks to protect the rights of smuggled migrants and shield them from criminal liability for being the object of smuggling. The Protocol facilitates international cooperation and, in conjunction with the *United Nations Convention against Transnational Organized Crime*, provides a suite of measures to bring migrant smugglers to justice. The significance of the Protocol is also reflected in the large number of States Parties.

[364] The biggest weakness of the existing instruments has been their primary focus on criminal justice; yet, criminalisation should be the last resort (the ‘ultima ratio’) in the quest to stop smuggling of migrants. In trying to address the consequences rather than the causes of smuggling of migrants this approach, put simply, ‘puts the cart before the horse’. The *Smuggling of Migrants Protocol* as well as the existing and proposed EU frameworks have rightly been criticised for creating a self-fulfilling prophecy when it comes to criminalisation whilst failing to address the conditions and circumstances that drive smuggling of migrants and provide adequate protection of smuggled migrants, many of whom are refugees and asylum seekers.

[365] In order to approach the question whether a new international instrument against the smuggling of migrants is feasible, the following sections explore (1) the opportunities the current efforts by the Council of Europe present, (2) what the purpose of a new instrument would be, (3) the precedent set by the *Council of Europe Convention on Action against Trafficking in Human Beings*, and (3) the main obstacles in relation to finding common ground on the development and content of a new instrument, and (5) the options for moving forward,.

IV.1 The opportunity

[366] Mindful of the ‘increasing challenges of migration and the necessity to fight against trafficking and smuggling of migrants’, the Heads of State and Government of the Council of Europe made a commitment at the Reykjavík Summit in May 2023 ‘to intensifying efforts to foster and improve international co-operation in this regard, while continuing to protect the victims and respect the human rights of migrants and refugees, as well as supporting frontline States, within the existing Council of Europe frameworks.’³⁹¹

³⁹⁰ See, among many, 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, 224–225.

³⁹¹ Council of Europe, *Reykjavík Declaration: United around our values* (2023) 7.

[367] The debate about a possible new international instrument against smuggling of migrants presents a unique opportunity to address shortcomings of the existing frameworks, solve some long-standing problems, reconcile different legal requirements, and align the response to smuggling of migrants with Council of Europe standards.

[368] The smuggling of migrants is a major and multi-dimensional challenge for all Member States and, put simply, an issue too big to be ignored by the Council of Europe. Regardless of whether or not there is sufficient political momentum for a new instrument, this study of the existing international legal frameworks, coupled with the realities that smuggled migrants face, clearly demonstrates the urgency of taking further action.

[369] The topic is a suitable fit for the mandate of the Council of Europe and its mission to promote democracy, human rights, and the rule of law across Europe and beyond. A new instrument would complement, support, and strengthen a range of existing Council of Europe instruments and initiatives to fight various crime types (such as corruption, cybercrime, trafficking in human beings, money laundering), enhance international cooperation in criminal matters, protect human and social rights, and support civil society. ‘The Council of Europe’, notes the EU Agency for Fundamental Rights,

oversees a comprehensive regional human rights framework with approximately 200 legally binding treaties or conventions. The core human rights instruments of the Council of Europe are the *European Convention on Human Rights* and the revised *European Social Charter*. Read in light of the resulting case law, both instruments are relevant for the protection of migrants in an irregular situation.³⁹²

[370] A new Council of Europe instrument would be tailored to the legal and political landscape of Council of Europe Member States, including but going beyond the borders of the 27 EU Members. It would also be open to adoption and accession by non-Member States of the Council of Europe. It thus has the potential to bring together a great range of transit and destination countries and, perhaps in the future even some source countries.

[371] The development of a new instrument would build on and utilise the established institutional strengths of the Council of Europe, the CDPC, and the work done by the Commissioner for Human Rights and the Special Representative on Migration and Refugees. It presents an opportunity to also develop a ‘Group of Expert’-style monitoring mechanism similar to those already used in relation to trafficking in human beings, corruption, and money laundering. This is a widely recognised and much admired feature of Council of Europe conventions.

[372] In a submission to the CDPC commenting on an earlier draft of this report, UNHCR notes that:

In light of its constitutive aim to pursue the ‘maintenance and further realisation of human rights and fundamental freedoms’, the Council of Europe is particularly well-placed to develop the first human rights instrument on smuggling of human beings. This provides the opportunity to set common standards for States’ obligations for the protection of the rights of smuggled persons while countering smuggling of human beings and stronger rights-based prevention measures to ensure compliance with international and European human rights law obligations towards all human beings without discrimination, and to uphold international and European obligations towards asylum seekers, refugees and stateless persons. Most importantly, a major added value of such an instrument in the international effort to counter smuggling of human beings would be the establishment of an independent human rights monitoring mechanism as per practice in other [Council of Europe] Conventions, for example, on trafficking, corruption and violence against women.

[373] In sum, given the Council of Europe’s broad geographical scope, the potential for greater harmonisation of domestic (substantive and procedural) laws, and the need for more effective

³⁹² EU Agency for Fundamental Rights (FRA), *Fundamental rights of migrants in an irregular situation in the European Union*, Comparative report (FRA, 2011) 23.

international cooperation, also involving third countries, developing a new international instrument against smuggling of migrants would be a significant step.

[374] A draft report prepared by the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe presented in early 2024 adds:

The Council of Europe is experienced in working with and assisting member States in domains where legislation and its interpretation vary. The Council of Europe would provide a meaningful space in which to discuss and define the elements of a common definition on migrant smuggling. Various conventions and standards are already in place to accompany member States towards greater alignment and co-operation on judicial matters directly connected with the crime of migrant smuggling or intersecting with this crime. In this effort, the Council of Europe can provide a useful expertise through the existing instruments and tools and in reflecting on the need for specific norms or guidelines to support member States in fighting against perpetrators of a crime and its drivers, not against migrants themselves.³⁹³

IV.2 The purpose

[375] The purpose of developing any new international instrument on smuggling of migrants, regardless of the form this may take, must be to complement and enhance the existing international law on smuggling of migrants. A new instrument must close known gaps, solve contradictions, and address emerging challenges. In a negative sense, it must avoid creating further confusion and conflict and must not subvert or weaken the existing instruments. The goal of any new instrument must be to add genuine value to the existing international legal frameworks. Resolution 2568 (2024) of the Parliamentary Assembly of the Council of Europe notes that:

The Assembly considers that any effort by the Council of Europe, including through the adoption of a regional instrument on the matter of migrant smuggling, should not aim to create new crimes but should instead complement the Palermo Protocol and facilitate its unambiguous and consistent interpretation in the light of the challenges faced today.³⁹⁴

[376] Marija Pejčinović Burić, Secretary General of the Council of Europe, similarly expressed the view that a new legal instrument should build on existing instruments, ‘especially the United Nations’ important Palermo Protocol.’³⁹⁵

[377] If a new instrument is developed by the Council of Europe, the further objective must be to deliver a framework suitable and specifically designed for Member States whilst recognising that smuggling of migrants is a global issue. Here, the specific mandate of the Council of Europe is of utmost importance, that is to ‘uphold fundamental rights, democracy, and the rule of law in Europe’. A new instrument must be more than the lowest common denominator; it must pitch to a higher standard, set by the *European Convention on Human Rights* that binds Member States. This position is echoed in a submission received from Finland on an earlier draft of this report:

In the view of Finland, a possible new Council of Europe instrument could, irrespective of its legal status and its scope, above all emphasise the aspect of human dignity more stringently than other instruments. The concept of human dignity includes, inter alia, not being exploited for financial benefit or treated in any way that may amount to torture, inhumane or other ill-treatment. This aspect would resonate with core values of the Council of Europe. If such an instrument existed —

³⁹³ Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, *A shared European approach to address migrant smuggling*, draft report, CoE Doc AS/Mig (2024) 12.

³⁹⁴ Council of Europe, Parliamentary Assembly, *A shared European approach to address migrant smuggling*, Resolution 2568 (2024) [6].

³⁹⁵ Council of Europe, Secretary General, ‘International Conference on a Global Alliance to counter migrant smuggling’, speeches and op-eds (28 November 2023) <<https://www.coe.int/en/web/secretary-general/speeches-and-op-eds>>.

irrespective of its legal status — it could also be referred to in the case-law of the ECtHR, thus sending a signal also to e.g. the EU.

While human dignity and humanitarian aspects may be perceived by some as ‘vague’, they could contribute and add value to discussions and the understanding of the ‘big picture’ of the question of smuggling of migrants. Such a big picture is often lost in discussions which concentrate on e.g. penalties and sentencing practice.

On the other hand, a possible Council of Europe instrument should not focus on penalties and sentencing practice. This opinion is based on the differences between the jurisdictions of the member States of the Council of Europe as well as potential conflicts with other instruments, such as the 2023 draft EU Council Directive.³⁹⁶

[378] There is an underlying question whether the criminal law is the right tool and the primary measure to address an issue that is deeply rooted in political, socio-demographic, economic, and environmental complexities. Since the existing international frameworks are widely criticised for taking a narrow criminal justice approach to address the smuggling of migrants, a new instrument could complement these efforts by adding a human rights perspective in line with the principles and provisions of the European Convention on Human Rights. In a submission to the CDPC commenting on an earlier draft of the present report, UNHCR notes that:

Clarifying and specifying the scope and constituent elements of the criminal offence of smuggling of human beings and of aggravated forms of smuggling is another area where a human rights instrument could contribute to ensuring legal certainty and harmonisation among the currently varied and divergent legislative approaches adopted by European countries, which undermine the effectiveness of criminal justice responses and risk causing unjust punishment of refugees and migrants as well as of those who help them for humanitarian reasons and not with the intent of acquiring a material or financial benefit.

With regard to protection, a human rights instrument addressing the smuggling of human beings has the potential to develop further standards and clarify protection obligations towards individuals who are smuggled and in need of humanitarian assistance and to ensure access to justice and remedies for those individuals who are victims of violence, abuses, and rights violations while being smuggled, and not only ‘the object of a criminal conduct’, as set out in the Smuggling [of Migrants] Protocol. This would require an approach that comprehensively and systematically builds upon all relevant international and European law obligations, including human rights law, refugee law, law of the sea, and criminal law with its specific obligations towards victims of crime.

With regard to prevention, such an instrument could design preventative measures to address the factors and root causes of smuggling. While acknowledging the complexity of global challenges related to human mobility, such measures should go beyond crime prevention and encourage states to take a broader set of prevention measures, including the establishment of safe pathways of admission to access protection, complementary pathways for family reunification, education and labour mobility as well as legal pathways for migration; these are critical measures that would significantly reduce the demand for smuggling services. The Council of Europe has already been a forerunner in standard settings in this area with its forward-looking Convention on Action against Trafficking in Human Beings.

[379] Placing the smuggling of migrants in the wider context of international migration echoes the objectives of the *Global Compact for Migration*. Similarly, Resolution 2658 (2024) of the Parliamentary Assembly of the Council of Europe

considers that one of the keys to combating migrant smuggling is to make the business of smugglers unprofitable and to increase effective access to safe and legal pathways for labour migration, family reunion, and people seeking international protection. A State-led approach should aim to regulate and protect human mobility on the one hand, while enhancing the means

³⁹⁶ Emphases removed.

dedicated to investigating and sanctioning organised cross-border criminal groups involved in the smuggling of migrants, on the other.³⁹⁷

[380] UNODC similarly comments that the present study

rightly identifies that the Protocol's less detailed provisions are in the areas of prevention of smuggling of migrants and protection of smuggled migrants. Should a new instrument be developed at [the] regional level with these areas as a focus, this could potentially add value to the body of international law on the subject, as opposed to criminal justice elements which already have a clear international legal framework defining them, two decades of related implementation action and growing recognition of related global best practice.

IV.3 The precedent

[381] The idea to develop a new Council of Europe instrument that builds on and complements an existing United Nations treaty is not new. Indeed, the present discussions about the need for and feasibility of a new Council of Europe instrument against the smuggling of migrants parallels similar debates which resulted in the adoption of the *Council of European Convention on Action against Trafficking in Human Beings*.³⁹⁸ The development of that Convention followed in the footsteps of the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children*, which was adopted in the year 2000.³⁹⁹ Just like the *Smuggling of Migrants Protocol*, the *Trafficking in Persons Protocol* supplements the *United Nations Convention against Transnational Organized Crime*.

[382] In 2005, just two years after the *Trafficking in Persons Protocol* entered into force, the Council of Europe adopted its own anti-trafficking convention, using much of the same language as the Protocol, indeed copying most of its provisions verbatim.⁴⁰⁰ The purpose of this additional Convention, as noted in the preamble, was to build on and enhance the existing global framework created by the United Nations, specifically 'with a view to improving the protection which the Protocol and the UNTOC afford and developing the standards established by them'. The *Explanatory Report* to the Convention adds:

The Council of Europe Convention, while taking the [Trafficking in Persons] Protocol as a starting point and taking into account other international legal instruments, whether universal or regional, relevant to combating trafficking in human beings, seeks to strengthen the protection afforded by those instruments and to raise the standards which they lay down.⁴⁰¹

The important place that this Convention attributes to the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime is reflected in the adoption of the definition on 'trafficking in human beings' agreed upon in this Protocol. As a complement to and development of this United Nations Protocol, which emphasises the crime prevention aspect of trafficking, the Council of Europe Convention clearly defines trafficking as being first and foremost an issue of violation of human rights and emphasises the victims' protection aspect of trafficking. The aim is to improve the protection afforded by it and to develop the standards contained therein.⁴⁰²

³⁹⁷ Council of Europe, Parliamentary Assembly, *A shared European approach to address migrant smuggling*, draft report, Resolution 2568 (2024) [2].

³⁹⁸ Opened for signature 16 May 2005, ETS 197 (entry into force 1 February 2008).

³⁹⁹ Opened for signature 15 November 2000, 2237 UNTS 319 (entry into force 25 December 2003) ('*Trafficking in Persons Protocol*').

⁴⁰⁰ See, for example, Articles 4, 7, 8, 9, 16, and 18 of the *Council of Europe Trafficking in Human Beings Convention*, Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Persons* (2005) 2 [6].

⁴⁰² Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Persons* (2005) 10 [49]; see further, Olivier Delas and Kristine Plouffe-Malette, 'La Convention du Conseil de

[383] The idea here was not to re-invent, sideline, or undermine the UN Protocol, but to enhance it and set higher standards for Council of Europe Member States:

Even though there are already other international instruments in this field, the Convention benefits from the more limited and uniform context of the Council of Europe, contains more precise provisions and may go beyond minimum standards agreed upon in other international instruments. The evolution of international law proves that regional instruments are very often necessary to complement global efforts. European instruments in the field of the protection of children's rights, money laundering or trafficking in drugs have proved to have a very positive impact on the implementation of global initiatives. The drafting of a Council of Europe Convention does not aim at competing with other instruments adopted at a global or regional level but at improving the protection afforded by them and developing the standards contained therein, in particular in relation to the protection of the human rights of the victims of trafficking.⁴⁰³

[384] And indeed, the Council of Europe has an important role in preventing and suppressing trafficking in persons because of its focus on the human rights of individuals.⁴⁰⁴

Given that one of the primary concerns of the Council of Europe is the safeguarding and protection of human rights and human dignity, and that trafficking in human beings directly undermines the values on which the Council of Europe is based, it is logical that finding solutions to this problem is a top priority for the Organisation.⁴⁰⁵

The main added value of the present Convention in relation to other international instruments is its human rights perspective and its focus on victim protection. Therefore, paragraph 5 of the Preamble states that the respect for the rights and protection of victims and the fight against trafficking in human beings must be the paramount objectives.⁴⁰⁶

[385] Among the main features which set the Council of Europe Convention apart from the *Trafficking in Persons Protocol* and that are praised widely are: the non-punishment provision in Article 26; the human rights-based approach advocated in the context of prevention (Article 5) and protection and assistance afforded to victims (Articles 11 to 13, 28); and the provisions to discourage demand (Article 6) and identify victims (Article 10).⁴⁰⁷ To address concerns about the limited scope of the *Trafficking in Persons Protocol*, the Council of Europe Convention expressly applies to trafficking within the territory of one country and across borders, and whether or not it involves organised criminal groups (Article 2).⁴⁰⁸ The *Explanatory Report* adds:

The added value provided by the Council of Europe Convention lies firstly in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims. Secondly, the Convention's scope takes in all forms of trafficking (national, transnational, linked or not to organised crime, and for purposes of exploitation) in particular with a view to victim protection measures and international cooperation. Thirdly, the Convention sets up monitoring machinery to ensure that

l'Europe sur la lutte contre la traite des êtres humains face au droit de l'Union européenne' (2013) 46(1) *Criminologie* 157, 160.

⁴⁰³ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Persons* (2005) 6–7 [30] (references omitted); Olivier Delas and Kristine Plouffe-Malette, 'La Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains face au droit de l'Union européenne' (2013) 46(1) *Criminologie* 157, 162–163.

⁴⁰⁴ See further, Julia Planitzer and Helmut Sax, 'Introduction' in Julia Planitzer and Helmut Sax (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar, 2020) 1, 4–7.

⁴⁰⁵ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Persons* (2005) 3 [10]

⁴⁰⁶ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Persons* (2005) 9 [46].

⁴⁰⁷ See further Olivier Delas and Kristine Plouffe-Malette, 'La Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains face au droit de l'Union européenne' (2013) 46(1) *Criminologie* 157, 163–165.

⁴⁰⁸ For a comparison of the UN, Council of Europe, and European Union frameworks against trafficking in persons, see Ana Isabel Pérez Cepeda and Demelsa Benito Sánchez, *Trafficking in Human Beings: A Comparative Study of the International Legal Document* (Europa Law Publishing, 2014) 14–42.

Parties implement its provisions effectively. Lastly, the Convention mainstreams gender equality in its provisions.⁴⁰⁹

[386] The Council of Europe's *Trafficking in Human Beings Convention* is widely seen as the 'gold standard' of trafficking in persons laws; it builds on and surpasses the *Trafficking in Persons Protocol*; it is a 'Trafficking in Persons Protocol +plus'. The same must be the goal if a new instruments against the smuggling of migrants is to be developed. This view is reflected in submissions received by Finland and UNHCR (quoted above), suggesting that a new Council of Europe instrument can serve to highlight the human dignity and enhance the human rights of smuggled migrants above and beyond the protection presently afforded by the *Smuggling of Migrants Protocol*.

IV.4 The obstacles

[387] There are multiple obstacles to developing a new Council of Europe instrument against smuggling migrants. There are valid concerns that a new instrument cannot achieve what the existing frameworks have not. There are reasons to believe, as was noted in one submission received by the authors, that 'developing a new instrument creates a risk of multiple definitions of smuggling of migrants and related offences, causing even more normative confusion in implementation, creating barriers to international cooperation and possibly further limiting rights of migrants and humanitarian actors in practice.'

[388] In a submission on an earlier version of this report UNODC notes that:

Migration is increasingly a political issue globally, and a new regional criminal justice instrument in Europe, even if well intentioned, would still be drafted mostly from the perspective of a region of mainly destination countries, where source countries have no real voice — on an issue that is, by definition, both complex and international. Even if more closely aligned to the global framework in some respects, in negotiation of the regional instrument, a policy decision may still be made that does not fully comply with the Protocol, leading to a third approach to migrant smuggling and adding to the confusion in practice. A clear global perspective is particularly important since countering smuggling of migrants requires international cooperation among source, transit and destination countries.

Any additional international instrument in 2024/2025 that seeks to redefine migrant smuggling crimes and offences poses a possible unintended risk of further limiting/encroaching upon the rights of irregular migrants, whose protection may neither be the main focus of or considered in any migrant smuggling-related offence.

[389] Many obstacles broadly stem from a lack of political will of Member States to develop, adopt, comply with, enforce, and invest in a new multilateral instrument. Put simply, there is little enthusiasm among Council of Europe Member States—and indeed around the world—for the suggestion to develop a new instrument. This is also reflected in the very limited input Member States provided during the process that led to the completion of this report, the small number of written submissions received by the CDPC, and the low level of engagement by Member States in the CDPC plenary held in June 2024 and the Second Smuggling of Migrants Conference which was convened by the CDPC Secretariat in September 2024 specifically for the purpose of supporting the present study. Overall, Member States have not expressed any desire to go beyond the minimum standards set by the existing instruments

[390] On this background and without more, it will be challenging to garner support for a new instrument. In particular, it would be very difficult to reach consensus on the purpose and content

⁴⁰⁹ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Persons* (2005) 7 [36].

of a new Convention. This is despite the fact that smuggling of migrants is a long-standing and vexed political issue, despite the record-high levels of smuggling of migrants witnessed by Council of Europe Member States over the last decade, despite the immense human suffering that comes with smuggling of migrants, despite the enormous illicit profits and corruption associated with this crime, and, last but not least, despite the well known gaps and deficiencies of the existing international legal frameworks.

[391] The lack of engagement and enthusiasm by Member States experienced during the preparation of the present report stands in sharp contrast to senior Council of Europe representatives and committees who have voiced their support for the development of a new legally binding Council of Europe instrument on smuggling of migrants and, rightly so, emphasised the Council of Europe's mandate and expertise in this field.

[392] It has to be noted that the many weaknesses, gaps, and discrepancies in the international frameworks to prevent and suppress smuggling of migrants highlighted in part III of this report are not the result of mistakes, misunderstanding, and misinterpretations. Many of them are planned and intended and sometimes demonstrate a deliberate departure from the obligations created by the *Smuggling of Migrants Protocol*. One submission on an earlier draft of this report adds that

[i]t is not because of a lack of understanding of the requirements of international law that the definition is as it is in EU instruments. It is a policy choice to reduce the evidentiary burden that comes with including the element of financial and other material benefit; and the desire to go further than the requirements of the Protocol and capture broader forms of conduct. It speaks volumes that only six EU States, under the current legal framework, exempt organizations and individuals who assist smuggled migrants on humanitarian grounds from punishment.

[393] A submission received by the European Commissions Directorate-General for Migration and Home Affairs (DG Home) similarly notes that:

An identified gap is that there is no common understanding about what constitutes migrant smuggling and what motives of smugglers should be criminalised, including because States would like to have flexibility on such matters. It remains unclear how a new instrument (in this case from the Council of Europe) would close the gap of providing a common understanding, as it would necessarily have to either a) be in line with the UN or EU approach; b) or be different from both of them. None of these solutions seem to address the gap of not having a coherent approach. For the same reasons, it appears unlikely that a new instrument would solve the gap of having conflicting international frameworks. Such common understanding is something that can probably be worked on in practice, by bringing practitioners at judicial and law enforcement level closer together and exchange, through networks and platforms that in part already exist.

[394] The submission further stresses that:

The elements highlighted in the report (especially financial or material benefit, humanitarian clause, non-criminalisation of smuggled migrants, SAR including carried out by private vessels) are being addressed in the negotiations of the new EU Directive. These issues are extremely political and legally complex, and thus lead to difficulties in finding a common approach even in EU criminal law, which deals with minimum rules (and affords Member States flexibility in criminalising beyond the strict definition). It is unclear how a Council of Europe instrument would not face the same difficulties, and a push towards a minimum common denominator, as it is negotiated by 27 EU Member States and [an] additional 20 [correction: 19 States]. [...]

The same doubt would be valid in case of divergent approaches between EU legislation and Council of Europe instrument on penalties, corporate liability, data collection, prevention, jurisdiction and confiscation.

[395] The lack of political will is manifested by the fact that the rather meagre standards set by the *Smuggling of Migrants Protocol* are still not met by many States Parties. This is often not a result of ill will or a lack of resources — though the laws relating to smuggling of migrants found in some (unnamed) jurisdictions beg the question just how much effort went into their drafting

and in making sure that they reflect the spirit of the *Smuggling of Migrants Protocol* and coherently fit into existing domestic laws.

[396] There are some States that fail to see any benefits from adhering to the standards set by the international law relating to smuggling of migrants. Others view smuggling of migrants as a negligible or transient issue, unworthy of attention and investment, although research has shown that there is no clear correlation between the scale of a country's smuggling of migrants 'problem' on the one hand, and the scale (and quality) of its responses on the other.⁴¹⁰ On this background, there is little optimism to think that a new instrument aiming at a higher standard can achieve what the existing frameworks have not.

[397] Furthermore, there appears to be general implementation and reporting fatigue among States and a reluctance to take on new (binding) obligations, especially in relation to protecting smuggled migrants. Earlier research suggests that

[s]ome countries, States Parties and non-Parties [of the *Smuggling of Migrants Protocol*] alike, may perceive some Protocol obligations as undermining their sovereign right to determine who enters and remains within their borders. This issue is particularly relevant where States fear that any protection of smuggled migrants may encourage further immigration, including illegal immigration.⁴¹¹

[398] Relatedly, politics and populism frequently get in the way of a balanced, fair, and evidence-based discussion about the most suitable and sustainable legal and practical tools to prevent and suppress smuggling of migrants. 'Debates on this issue are often so politically charged that they hinder reliable policy development', notes the Council of Europe Commissioner for Human Rights.⁴¹² Regrettably, in order to score cheap political points, this topic, including the precarious situation of smuggled migrants, is all too frequently misrepresented, distorted, at times exaggerated, treated with contempt, or ridiculed. It is, at best, challenging to develop the content and text of a new international instrument in the current political climate.

[399] There is also the issue of timing. Some of the current reservations towards a new Council of Europe instrument stem from ongoing changes to national laws relating to smuggling of migrants and parallel developments in the European Union. There is a shared view among some Member States that it may not be timely and appropriate to advance discussions about a new instrument so long as the new EU Council Directive (and associated regulations) is not finalised. For example, in a submission received from Germany commenting on an earlier draft of this report it was stressed that the focus of many Council of Europe Member States on the development of a new EU framework on smuggling of migrants casts doubts over the need for a Council of Europe criminal law convention on smuggling of migrants at this time and risks duplication. In its submission, the United Kingdom similarly noted that 'thought needs to be given to the interaction (timing and content) between any potential CoE instrument and the work the EU is already doing to update its legislation on facilitation of illegal migration, to deliver maximum benefit.'

[400] On the other hand, and as a presentation to the Second Smuggling of Migrants Conference convened by the Council of Europe in September 2024 has shown, the developments in Brussels are rather slow and the outcome, if any, appears to be uncertain and unpredictable at this time. What is clear from the consultations at the EU level is that Member States show no ambition to go beyond the requirements of the *Smuggling of Migrants Protocol*. Indeed it appears that a new

⁴¹⁰ See generally, Andreas Schloenhardt and Hamish Macdonald, 'Barriers to Ratification of the United Nations Protocol Against the Smuggling of Migrants' (2015) 7 *Asian Journal of International Law* 13, 21–30.

⁴¹¹ Andreas Schloenhardt and Hamish Macdonald, 'Barriers to Ratification of the United Nations Protocol Against the Smuggling of Migrants' (2015) 7 *Asian Journal of International Law* 13, 35 with further references.

⁴¹² Council of Europe Commissioner for Human Rights, Michael O'Flaherty, speech at the opening of the 2nd *International Conference on Smuggling of Migrants*, Strasbourg, 10 September 2024, CoE Doc CommHR(2024)38.

EU Directive will fall short of the standards set by the Protocol and will not address the many of the divergencies and deficiencies identified above. These circumstances led one Council of Europe Member State in its submission to an earlier draft of this proposal to ask critically: ‘En fait, il y aurait alors des règles minimales au niveau de l'UE et des règles “maximale” au niveau du Conseil de l'Europe pour traiter le même phénomène, cela semble assez bizarre/irréaliste. Est-ce que c'est praticable/opportun?’

[401] In sum, it is the opinion of the authors of this report that these obstacles raise doubts that a new instrument, especially a binding instrument, will presently gain sufficient traction among Council of Europe Member States and that a new instrument can achieve more than existing international frameworks against the smuggling of migrants already have. Some might argue that, at best, a new instrument can merely duplicate the principles and provisions already articulated in UN and EU instruments and that, at worst, it may subvert, cross, and erode them.

[402] Further concerns stem from the fact that a new instrument against smuggling of migrants, cannot, without more, address the underlying causes of smuggling of migrants, irregular migration, and forced displacement and with that the demand that is fuelling this phenomenon. This shortcoming is also and especially owed to the circumstance that the the Council of Europe is made up mostly of destination countries plus some transit countries of smuggling of migrants, such that a new instrument will not, at least in the short and medium term, have any source countries and any of the major non-European transit points on board.

[403] It needs to be reiterated, that these are the observations made by the independent experts engaged to prepare the present report. These observations are based on the available evidence, documentation, and literature, the authors' professional expertise, and the material, statements, and opinions provided to them by a small number of Member States and international and regional governmental organisations. These observations may not reflect the views of the Council of Europe and the CDPC.

IV.5 The options

[404] The key challenge for the CDPC is to ensure that the findings and reflections of the present report lead to concrete action rather than being shelved or diluted due to the influence of various political and diplomatic considerations, which may not always align with the urgency of the issue. The CDPC has a duty to ensure that the momentum that led to the present report is maintained and that it leads to meaningful outcomes. This requires ongoing advocacy and engagement with key stakeholders as well as political will and consensus among Member States, which can be difficult to secure, but which is urgently needed.

[405] It would be highly desirable to coordinate and bundle the work undertaken by the CDPC with that undertaken by other parts of the Council of Europe on the topic of smuggling of migrants, especially the Parliamentary Assembly, the Commissioner for Human Rights, and the Special Representative on Migration and Refugees. As mentioned, the process that was undertaken to further develop the UN *Trafficking in Persons Protocol* into a Council of Europe *Convention on Action against Trafficking in Human Beings* can serve as a template for the path the CDPC may choose to take from this point.

[406] The debate about a new instrument against the smuggling of migrants does not necessarily and immediately imply the development of a legally binding international document. Indeed, the Council of Europe can adopt a variety of instruments, ranging from conventions to agreements, recommendations, resolutions, guidelines, and more.⁴¹³ These instruments differ in scope, legal

⁴¹³ The text of this section is partly based on information received from the Council of Europe. The authors thank the CDPC Secretariat for their input.

force, and adoption process through its organs (Committee of Ministers, Parliamentary Assembly, etc.), preceded usually by preparatory work by intergovernmental committees such as the CDPC.

[407] Conventions are, obviously, legally binding and provide the strongest legal basis for international cooperation. Council of Europe conventions are open to Member States and non-Members alike. Their background, purpose, composition, and content are documented in an explanatory report. The primary challenges in adopting new conventions are related to the time-consuming negotiation process and the need for consensus among Member States. Developing a convention requires extensive consultations, drafting, and revisions, which can take several years to be completed. Furthermore, not all Member States may be politically willing to ratify or effectively implement the convention, leading to gaps in its application and effectiveness.

[408] A Committee of Ministers' recommendation is an instrument under Article 15.b of the *Statute of the Council of Europe* by which the Committee may communicate its conclusions to Member States' governments regarding the measures it believes will further the aims of the Organisation. Their non-binding nature means that Member States are not legally obliged to implement and comply with the terms of the recommendation. Recommendations have no review mechanisms and depend on the political will of Member States. For these reasons, their implementation will be influenced by domestic considerations, may do little to change the status quo, close gaps and resolve inconsistencies, and they will require ongoing advocacy from the Council of Europe. Recommendations may, however, develop new standards which may subsequently serve as the basis for a legally binding instrument, such as a convention.

[409] The process for adopting these instruments typically starts with identifying a need or gap in the current framework (as the present report does), followed by a committee, and then a Committee of Ministers decision. Subsequently, the drafting of the text and the negotiations can start at committee of experts' level with final adoption by the Committee of Ministers (in case of conventions, the Parliamentary Assembly of the Council of Europe provides an opinion).

[410] At the 'International Conference on a Global Alliance to counter migrant smuggling' held in Brussels on 28 November 2023, Marija Pejčinović Burić, Secretary General of the Council of Europe, expressed her view that a new legal instrument should be, ideally, 'a legally-binding, open convention, involving European and non-European states.'⁴¹⁴ The present report and its authors are, however, not in a position to make a succinct suggestion which, if any, type of new instrument against the smuggling of migrants should be developed and adopted. Instead, the current draft of this report merely canvasses—and puts up for discussion—the following considerations.

[411] There are several possible paths following the submission of the final draft of this report. One option is for the CDPC to simply acknowledge the report without further action. However, given the magnitude of smuggling of migrants and the challenges associated with countering this phenomenon, coupled with statements made by senior groups and individuals of the Council of Europe, maintaining the status quo does not appear to be a feasible and palatable option.

[412] Alternatively, the CDPC may opt to commission additional consultancy to further research and refine the observations and recommendations made in the present report. However, since the Committee is already looking back at nearly ten years of work on the topic of smuggling of migrants, including several independent reports on the national and international responses to this issue, it is not clear what additional insights and benefits could be gained from this course of action.

[413] The findings of this report could also be developed further into guidelines to address the smuggling of migrants and assist Member States in implementing and reconciling the existing

⁴¹⁴ Council of Europe, Secretary General, 'International Conference on a Global Alliance to counter migrant smuggling', speeches and op-eds (28 November 2023) <<https://www.coe.int/en/web/secretary-general/speeches-and-op-eds>>.

international frameworks. In the opinion of the authors of this report, this may not be a particularly beneficial course of action since it would duplicate the work of the international organisations responsible for these frameworks: the EU for its Council Directive and Framework Decision and UNODC, which is the ‘guardian’ of the *Smuggling of Migrants Protocol* and the *United Nations Convention against Transnational Organized Crime*.

[414] In fact, UNODC has issued a plethora of materials assisting States Parties with the adoption, implementation, enforcement, and interpretation of these instruments. It has published *Legislative Guides*⁴¹⁵ and *Model Laws*⁴¹⁶ and is presently in the process of updating them. These documents are specifically developed for use in different legal systems and legal traditions and assist States in reconciling the obligations under the Protocol and the UNTOC with obligations arising from other international and regional treaties. Furthermore, in February 2024 UNODC has begun the process of developing new UNODC normative guidance on smuggling of migrants, which aims to be more responsive to region-specific dynamics, and help develop domestic legislation that implements current counter-smuggling obligations and facilitates better international cooperation. As part of this process UNODC is undertaking a gap analysis for the review of its *Model Law against the Smuggling of Migrants* and *Legislative Guide for the Implementation of the Smuggling of Migrants Protocol*, as well as for the potential development of regional adaptations of these tools.

[415] It may, in the opinion of the authors of the present report, be timely for the CDPC to discuss and decide what future mandate and responsibility it is willing to accept in relation to smuggling of migrants, what ‘ownership’ of this topic it is prepared to take, and how it can best collaborate on this issue with other parts of the Council of Europe (especially Parliamentary Assembly, the Commissioner of Human Rights, and the Special Representative on Migration and Refugees) and key external stakeholders (chiefly UNODC, IOM, and UNHCR).

[416] One possible course of action can be the establishment of a Working Group, open to all Member States and with representatives of the Council of Europe Commissioner of Human Rights, the Special Representative on Migration and Refugees, UNODC, IOM, UNHCR, and selected independent experts to develop the content of this report into the text of a potential new Council of Europe instrument.

[417] This process could, for instance, aim to develop a recommendation to be adopted by the Committee of Ministers which endorses the purpose and provisions of the *Smuggling of Migrants Protocol*, strengthens the protection afforded to smuggled migrants, and raises the standards which the Protocol lays down.⁴¹⁷ A recommendation could add a human rights lense to the Protocol and support Council of Europe Member States in fulfilling their obligations under the Protocol as well as under other Council of Europe instruments, especially the *European Convention on Human Rights*. A recommendation could also be employed to advocate greater use of other Council of Europe treaties and mechanisms, especially those set up to foster international cooperation in criminal justice matters.

[418] Furthermore, a recommendation could endorse the work of UNODC in relation to smuggling of migrants (recognising that the Council of Europe has observer status in the relevant United Nations fora, such as the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and its working groups and the Commission on Crime

⁴¹⁵ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (UNODC, 2nd edn 2017); UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 1st edn 2004).

⁴¹⁶ UNODC, *Model Law against Smuggling of Migrants* (United Nations, 2010); UNODC, *Model Legislative Provisions against Transnational Organized Crime* (United Nations, 2nd edn 2021).

⁴¹⁷ The process outlined here is broadly based on the history action of the Council of Europe on trafficking in human beings as outlined in Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Persons* (2005) 3–4 [10]–[21].

Prevention and Criminal Justice (CCPCJ)). Indeed, it would be highly desirable for the CDPC to reciprocate this arrangement by including UNODC as a permanent observer in meetings of the CDPC plenary.

[419] In a submission made on an earlier draft of this report, UNODC further notes:

There is a need for proactive outreach and coordination with key global players in the implementation of the CDPC's 2020 Action Plan on 'Fostering International Cooperation and Investigative Strategies in Fighting the Smuggling of Migrants'.

Further to the analysis captured in the study, there is great potential for implementation of responding activities in partnership and in a complementary manner with existing UNODC work to counter-migrant smuggling. It would be worthwhile exploring cooperation and joint action to ensure the effective application of available global resources to address the issue of migrant smuggling, ensure greater harmonization and complementarity of efforts and avoid duplication. For example:

UNODC's SHERLOC database which has case law and legislation on migrant smuggling and organized crime in general, should be a key resource for and supported by the Council of Europe Network of Prosecutors on Migrant Smuggling (CDPC-NPMS), since it aims to share documents, including relevant judicial decisions and template cases, and information. UNODC could, in parallel, facilitate exchange with other regional prosecutor networks it has supported to establish and share specialized issues papers and legal resources it develops to aid interpretation of challenging concepts in the international law relating to migrant smuggling.

UNODC also has extensive technical assistance initiatives at global scale to foster cooperation among source, transit and destination countries in countering migrant smuggling, being both informal cooperation at practitioner level, and formal cooperation – e.g. supporting the direct use of the UN Convention Against Transnational Organized Crime for international cooperation, or supporting the conclusion of specific bilateral and multilateral cooperation agreements among countries along a common route.

[420] In addition, and although this is beyond the terms of reference of the present report, the CDPC may wish to explore how the existing instruments pertaining to international cooperation in criminal matters are used in the context of smuggling of migrants cases and what obstacles States may encounter when they employ these instruments.

[421] Should the CDPC decide to continue its work on this topic, the authors of this report stand ready to advice and support the CDPC, Member States, and the Council of Europe in their quest to fight the smuggling of migrants, protect the rights of smuggled migrants, and enhance international cooperation among and beyond Council of Europe Member States.

Appendices

Appendix 1: Main elements of a possible Council of Europe instrument against Smuggling of Migrants

[422] A new instrument needs to address and balance three seemingly conflicting objectives: the protection of smuggled migrants, the prosecution of smugglers, and the prevention of smuggling of migrants. Furthermore, any new instrument, whilst protecting the sovereignty of States, should seek to ensure the greatest possible level of consistency and uniformity in the implementation of its obligations. It needs to be both precise and prescriptive, giving States clear instructions about their obligations but also limiting their ability and scope to depart from the core principles and specific requirements of that instrument. This requires the use of precise language, the articulation of clear and lower than minimum standards that need to be met by States Parties, and abstaining, as far as possible, from opt-out clauses, optional provisions, and discretionary content. Where relevant, the instrument's text should be supplemented by interpretative notes and further explanatory material capturing the intention of the drafters and highlighting the mandatory content.

[423] The text of the *Smuggling of Migrants Protocol* should be used as a starting and every effort should be made to adopt the same composition and language as the Protocol, verbatim wherever possible. Because the Protocol is not an independent treaty, the text of a new instrument also needs to draw on the provisions of the *United Nations Convention against Transnational Organized Crime*.

[424] For those Council of Europe Member States that are also Member States of the European Union, any new Council of Europe instrument must ensure that these States meet their obligations under both the Protocol and applicable EU law. The explanatory material can be used to guide Member States in this process.

[425] Building broadly on the design and structure of the *Smuggling of Migrants Protocol*, a new instrument should include the following parts, which are outlined further in the following sections of this report:

- I. Common provisions
- II. Criminalisation
- III. Special methods of smuggling and associated offences
- IV. Law enforcement and international cooperation
- V. Protection and support of smuggled migrants
- VI. Prevention measures
- VII. Monitoring
- VIII. Final provisions

[426] The idea here is not to present the draft text of such an instrument, but to reflect thematically on some key issues and components. The elements and issues listed above capture remarks made by the Secretary General at the 'International Conference on a Global Alliance to counter migrant smuggling' in November 2023, where she outlined what, in her view, a new legal instrument in this field should address:

First, the need for precise, detailed and coherent criminalisation rules that will ensure even more effective international cooperation, on extradition and mutual legal assistance to start with. Second,

the future text should apply irrespective of whether the smuggling occurs at the national or transnational level. And, third, it should include provisions for the protection of smuggled migrants' human rights, including children and pregnant women. The link between migrant smuggling, corruption and money laundering must also be better understood and addressed, including the online aspects of these crimes, the handling of e-evidence and the conduct of such investigations, and creating necessary bridges to our Convention against Cybercrime. Finally, any new Council of Europe legal instrument should be open to non-Council of Europe member states, and to the European Union too.⁴¹⁸

[427] Furthermore, Resolution 2568 (2024) of the Parliamentary Assembly of the Council of Europe expressed the view that a new Council of Europe instrument should complement the international standards set in the *Smuggling of Migrants Protocol* and should in particular

1. comply with the definition of the crime of migrant smuggling and the scope of criminalisation as defined in Articles 3 and 6 of the Palermo Protocol, including aggravating circumstances;
2. acknowledge the heterogeneous profile of people involved in the perpetration or the facilitation of the crime of migrant smuggling and the necessity to prosecute perpetrators according to a proportionate, gradual and nuanced approach to criminal sanctions;
3. recall that the “procurement” of illegal entry is not tantamount to crossing a border irregularly and that the crime of migrant smuggling necessarily involves that the smuggler is making a material or non-material profit;
4. expressly state that migrants are not the perpetrators of the crime of smuggling and that reducing or waiving the smuggling fee in return for facilitating the unauthorised crossing of a border should not be considered as a criminal act committed by the smuggled migrant if this was done under coercion or threat, or if they are found to be in need of a form of protection (refugee, person in need of humanitarian protection, person at risk of being a victim of trafficking, victim of trafficking);
5. clarify that people in need of protection should never be criminalised or administratively sanctioned for crossing a border unauthorised pursuant to Article 31 of the United Nations Convention relating to the Status of Refugees and Article 26 of the European Convention on Action against Trafficking in Human Beings;
6. explicitly exempt humanitarian assistance and any support to migrants in accessing their fundamental rights from any form of criminal liability, when such acts are conducted without seeking any financial benefit;
7. clarify that member States are legally bound by the obligation to protect and safeguard the right to leave any country, including one's own, as enshrined in Article 2 of Protocol No. 4 to the European Convention on Human Rights (ETS No. 46), and in Article 12 of the International Covenant on Civil and Political Rights.⁴¹⁹

[428] For further details about the design and content of a new instrument against smuggling of migrants, drafters are well advised to consult the *Model Law against the Smuggling of Migrants*, first published by the United Nations in 2011.⁴²⁰ A second edition is currently under development.

⁴¹⁸ Council of Europe, Secretary General, ‘International Conference on a Global Alliance to counter migrant smuggling’, speeches and op-eds (28 November 2023) < <https://www.coe.int/en/web/secretary-general/speeches-and-op-eds> >.

⁴¹⁹ Council of Europe, Parliamentary Assembly, *A shared European approach to address migrant smuggling*, draft report, Resolution 2568 (2024) [10].

⁴²⁰ UNODC, *Model Law against the Smuggling of Migrants* (United Nations, 2011).

Part I Common provisions

[429] ‘Common provisions’ at the start of the instrument include a statement of the purpose of the instrument,⁴²¹ the scope of application,⁴²² a saving clause with reference to international refugees and human rights laws and the non-discrimination principle,⁴²³ and a provision explaining the role of and relationship to other Council of Europe instruments. Part I also includes provisions defining key terms for the purposes of the instrument.⁴²⁴

[430] Any new Council of Europe instrument against the smuggling of migrants should adopt the definition of ‘smuggling of migrants’ (and all of its elements) set out in Article 3(a) of the *Smuggling of Migrants Protocol*. Here, it would be desirable to add explanations of the terms ‘procurement’ and ‘financial or other material benefit’ and provide clear guidance that the focus is exclusively on migrant smugglers, and not on the persons smuggled.

[431] Relevant definitions need to be supplemented by clear and authoritative guidance, in particular about the elements, differences, and commonalities of smuggling of migrants vis-à-vis trafficking in persons. While the two phenomena are separate crimes requiring distinct responses, relevant laws and policies should expressly note that smuggling of migrants can transcend into trafficking in persons and that smuggled migrants may be victims of crime requiring appropriate protection and assistance.

[432] Any new instrument against the smuggling of migrants must be clear that activities which are not undertaken in order to obtain an undue financial or other material element do not constitute smuggling of migrants and ought not to be criminalised. In addition, a mandatory, unambiguous ‘solidarity clause’ exempting humanitarian assistance and ‘not-for-profit’ assistance, especially when provided by family and friends, should be introduced. It is acknowledged that this recommendation may lack support by some States, but experience has shown that leaving such a clause out or making it non-mandatory creates uncertainty and inconsistency and is not working in practice. The Directorate for Internal Policies of the European Parliament explains:

The humanitarian exemption should not be made a defence, but a bar to prosecutions, to ensure that no investigation is opened and no prosecution is pursued against private individuals and civil society organisations assisting migrants for humanitarian reasons. This will be an additional safeguard to prevent unwarranted criminalisation.⁴²⁵

[433] On this background, the Directorate further recommends that ‘the financial gain element should be qualified to encompass only “unjust enrichment” or “unjust profit”, in order to exclude bona fide shopkeepers, landlords and businesses’.⁴²⁶

[434] In the same context, the differentiation between smuggling and humanitarian acts must be unequivocal to safeguard individuals and organisations offering lifesaving aid, ensuring they are not unjustly prosecuted under anti-smuggling laws. Any new instrument should be complementary to—and not conflict with—the principles and obligations of the law of the sea, especially the obligation to carry out search and rescue operations, including an express clause acknowledging this relationship and restating these principles and obligations.

⁴²¹ Cf *Smuggling of Migrant Protocol*, art 2.

⁴²² Cf *Smuggling of Migrant Protocol*, art 4.

⁴²³ Cf *Smuggling of Migrant Protocol*, art 19.

⁴²⁴ Cf *Smuggling of Migrant Protocol*, art 3.

⁴²⁵ 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) 64.

⁴²⁶ 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) 64.

[435] The ‘common provisions’ of a new instrument should, similar to Article 19 of the *Smuggling of Migrants Protocol*, further include a ‘saving clause’

designed to safeguard rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, international human rights law, refugee law and law of the sea. This also includes ensuring that the measures foreseen will be implemented in such a manner that they will not be discriminatory and will uphold the rights of individuals and, in particular, the right to seek and enjoy asylum and the principle of non-refoulement.

Part II Criminalisation

[436] Part II sets out the elements of the basic offence of smuggling of migrants, aggravating (and possibly mitigating) circumstances, extensions to criminal liability such as attempt and secondary liability (aiding and abetting, organising and directing),⁴²⁷ the liability of legal persons,⁴²⁸ jurisdiction,⁴²⁹ provisions and sanctions and punishment, and, importantly, clear non-criminalisation and non-punishment provisions.

[437] The basic criminalisation of smuggling of migrants should follow the approach and elements found in Article 6(1)(a) of the *Smuggling of Migrants Protocol* and thus capture all the elements of the definition under Article 3(a) of the Protocol, including the requirement that the accused seeks ‘to obtain, directly a financial or other material benefit’.

[438] It is good practice to include aggravated offences or circumstances for more heinous and particularly reprehensible forms of smuggling of migrants. Aggravations can serve as a deterrent and reinforce the principle of proportional punishment. This includes in particular the aggravations set out in Article 6(3) of the *Smuggling of Migrants Protocol* regarding endangering the lives and safety of smuggled migrants and the inhuman or degrading treatment of smuggled migrants. The involvement of organised criminal groups, as defined in Article 2(a) of the *United Nations Convention against Transnational Organized Crime*, should also be included as an aggravating circumstance to the basic offence of smuggling of migrants.⁴³⁰ Furthermore, it may be desirable to recognise the involvement of corrupt officials and the smuggling of particularly vulnerable persons, such as unaccompanied minors and pregnant women, as aggravating circumstances.

[439] It is not recommended to include an offence based on Article 6(1)(b) of the *Smuggling of Migrants Protocol* on providing, procuring et cetera fraudulent travel or identity documents for the purpose of smuggling of migrants. This provision seems somewhat superfluous as relevant cases should be sufficiently criminalised in general criminal offences under national laws.

[440] It is debatable whether a separate offence criminalising persons who enable the illegal stay of migrants is warranted and desirable. If such conduct is criminalised, such an offence should include, at a minimum, all the elements of Article 6(1)(c) of the *Smuggling of Migrants Protocol*, including the intention to obtain, directly or indirectly, a financial or other material benefit. To ensure that the offence neither targets irregular migrants merely renting accommodation, nor landlords letting accommodation, the offence should be limited to persons acting with an intention to prevent the detection or removal of the irregular migrant or to situations that are exploitative.⁴³¹

⁴²⁷ Cf *Smuggling of Migrant Protocol*, art 6(2).

⁴²⁸ Cf *United Nations Convention against Transnational Organized Crime*, art 10.

⁴²⁹ Cf *United Nations Convention against Transnational Organized Crime*, art 15.

⁴³⁰ See also Section III.9 below.

⁴³¹ EU Agency for Fundamental Rights (FRA), *Fundamental rights of migrants in an irregular situation in the European Union*, Comparative report (FRA, 2011) 11-12; EU Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (FRA, 2014) 16.

[441] As already mentioned above, any new Council of Europe instrument against the smuggling of migrants must be clear that activities which are not undertaken in order to obtain an undue financial or other material element do not constitute smuggling of migrants and ought not to be criminalised. In its submission commenting on an earlier draft of this report, one Member State noted: ‘L’instrument du CE pourrait donc clarifier cela. [...] cela peut être un point positif si effectivement un tel instrument permettait de mieux distinguer l’aide apportée à titre humanitaire et le trafic d’êtres humains avec profit sensu stricto.’

[442] To this end, a mandatory, unambiguous ‘solidarity clause’ exempting humanitarian assistance and ‘not-for-profit’ assistance, especially when provided by family and friends, should be introduced. In its submission, reflecting on the possibility of a new Council of Europe instrument against smuggling of migrants, UNHCR calls on the CDPC to

[e]nsure that new rules to address the smuggling of human beings do not inadvertently exacerbate xenophobia and discrimination, nor are misused, resulting in the criminalisation of those who provide humanitarian aid or help to asylum seekers, refugees or migrants, acting out of compassion or based on a humanitarian imperative to save lives and provide humanitarian aid or support asylum seekers, refugees and migrants in accessing their rights.

[443] One challenge in articulating and implementing such a clause is ensuring that this exemption is not abused by criminal elements acting for financial gain or other illicit purposes. Clear guidelines and criteria need to be established to distinguish between genuine humanitarian acts and activities that could be construed as smuggling or covering up similar criminal activities.

[444] International and national instruments against smuggling of migrants should contain a clear and mandatory provision to ensure that smuggled migrants are not criminalised for being the object of smuggling of migrants.⁴³² This provision should be supplemented by clear guidance on the scope of this provision and an express note stating that smuggling of migrants-related laws and provisions do not criminalise the illegal entry of migrants.

[445] Statutory penalties for smuggling of migrants offences as well sentences imposed on convicted migrant smugglers (including natural and legal persons) must be effective, proportionate, and dissuasive. In addition to imprisonment and fines, it is desirable to offer alternative, non-custodial sanctions (such as community service, temporary prohibitions on certain professions, employment, licenses etc). Sanctions must be accompanied by legislative and other measures to confiscate or otherwise deprive convicted migrants smugglers of the proceeds and instrumentalities of their crime.⁴³³

Part III Special methods of smuggling and associated offences

[446] Part III sets out provisions to address specific issues associated with different types of smuggling of migrants (for example by sea,⁴³⁴ air, and land), as well as provisions for associated and ‘facilitator’ offences such as money laundering and corruption.⁴³⁵

[447] In this context, it must be reiterated that international instruments, national laws, and practical measures to stop the smuggling of migrants must be complementary to (and not conflict with) the principles and obligations of the law of the sea, especially the obligation to carry out search and rescue. It is desirable to include an express clause acknowledging this relationship and restating these principles and obligations.

⁴³² Cf *Smuggling of Migrants Protocol*, art 5.

⁴³³ Cf *United Nations Convention against Transnational Organized Crime*, arts 12–14.

⁴³⁴ Cf *Smuggling of Migrants Protocol*, arts 7–9.

⁴³⁵ Cf *United Nations Convention against Transnational Organized Crime*, arts 6–9.

[448] A new instrument needs to include a clear requirement making smuggling of migrants a predicate offence for provisions, including offences, relating to laundering the proceeds of crime.

[449] Measures to prevent and combat the smuggling of migrants need to be accompanied by laws and practical measures focussing on corrupt practices, corrupt officials, and corruption in the private sector. Articles 8 and 9 of the *United Nations Convention against Transnational Organized Crime* along with the measures set out in the *United Nations Convention against Corruption* and the *Council of Europe Criminal Law Convention on Corruption* contain a range of tools that can be used to prevent, detect, and suppress corruption in the smuggling of migrants context.

Part IV Law enforcement and international cooperation

[450] Part IV sets out provisions (requirements and restrictions) relating to investigative techniques, law enforcement, border measures, information exchange, and international cooperation. These measures should, however, not be excessively technical and operational as States have different national laws and capacities to implement and enforce such measures.

[451] Beyond criminalisation, relevant provisions should prioritise the detection and disruption of organised criminal groups involved in the smuggling of migrants over the suppression of low-level, ad hoc and single smuggling of migrants events. In instances in which organised criminal groups are or are suspected to be involved in the smuggling of migrants, additional investigative, prosecutorial, and judicial measures used to prevent, detect, and suppress organised crime, such as those set out in the *United Nations Convention against Transnational Organized Crime*,⁴³⁶ should be available under the conditions and safeguards set out in national and international laws and in the jurisprudence of the European Court of Human Rights.

[452] Measures to detect and suppress the smuggling of migrants should be supplemented, where relevant and possible, by parallel financial investigations. This needs to go hand-in-hand with sound legal frameworks permitting the freezing and seizure of funds and other assets suspected to be proceeds of smuggling of migrants. Furthermore, any new instrument should include appropriate references to other relevant frameworks, such as the *Council of Europe Convention against Cybercrime*⁴³⁷ and its Protocols, to address the emerging modalities of smuggling, particularly in the digital realm.

Part V Protection and support of smuggled migrants

[453] A new instrument should contain clear and detailed provisions and the protection of the rights of smuggled migrants and the support afforded to them.⁴³⁸ The inclusion of comprehensive protection measures in the legal framework underscores the Council of Europe's commitment to safeguarding the dignity and rights of all individuals, regardless of their migration status. This should also include specific provisions concerning children, women, and vulnerable migrants, smuggled migrants who are refugees and asylum seekers, measures relating to endangered or missing persons, and protection from violence. Special protection and support should also be afforded to smuggled migrants who become witnesses in legal proceedings.⁴³⁹

[454] The protection provisions require clear references to and reconciliation with human rights and refugee law, in particular the *Convention and Protocol relating to the Status of Refugees* and

⁴³⁶ Cf *United Nations Convention against Transnational Organized Crime*, arts 19, 20.

⁴³⁷ Opened for signature 23 November 2001, ETS No 185 (entry into force 1 July 2004).

⁴³⁸ Cf *Smuggling of Migrants Protocol*, art 16.

⁴³⁹ Cf *United Nations Convention against Transnational Organized Crime*, art 24.

the *European Convention on Human Rights*.⁴⁴⁰ In this context, UNHCR, in its submission to the CDPC, recommended the introduction of a clause recognising the vulnerability of asylum seekers, refugees and migrants, especially children, resorting to smuggling with a view to upholding the fundamental human rights to which all persons, including smuggled individuals, are entitled. Furthermore, in relation to smuggled migrants who are refugees and asylum seekers, a clause should be added requiring States to ensure that smuggled migrants are 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.

[455] The principle of non-refoulement, enshrined in Article 33 of the *Refugee Convention* and reiterated in the *European Convention on Human Rights*, must form a cornerstone of the new instrument. Smuggled migrants must not be returned to a country where they face serious risks of persecution, torture, or other forms of inhuman treatment. In addition, people in need of protection should never be criminalised or administratively sanctioned for crossing a border unauthorised, in line with Article 31 of the *Refugee Convention*. UNHCR, in its submission to the CDPC, stresses that

[a]ny Council of Europe instrument should ensure that none of its provisions may affect States' obligations under the 1951 [Refugee] Convention and the principle of non-refoulement. 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.⁴⁴¹

[456] A new instrument should mandate that smuggled migrants, especially those who have suffered abuse, have access to support services. This should include the provision of legal assistance, medical care, psychological support, and safe accommodation. These protections are not only aligned with the *European Convention on Human Rights* but also reflect the principles outlined in the *International Covenant on Civil and Political Rights*.

[457] In instances where smuggled migrants are compelled or choose to return to their countries of origin or habitual residence or a safe third country, a new instrument should provide guidelines for their voluntary and safe return, coupled with reintegration assistance that may include support for employment, education, and community reintegration. Comprehensive return and sustainable reintegration measures are essential to reduce the likelihood of re-migration under dangerous circumstances. One of the key challenges in facilitating the voluntary and safe return of migrants is ensuring that the conditions in the receiving State are conducive to their reintegration. In many cases, the factors that led to the initial migration, such as poverty, conflict, or lack of opportunities, may still be present, making reintegration difficult. Additionally, coordinating reintegration programs across different countries, each with its own legal and social frameworks, can be difficult requiring extensive resources and support. Furthermore, social stigma or discrimination against returnees in their home communities can hinder their reintegration efforts.

⁴⁴⁰ Cf *Smuggling of Migrants Protocol*, art 19.

⁴⁴¹ References omitted.

Part VI Prevention measures

[458] Prevention measures should offer detailed guidance on public awareness raising and education, measures to discourage demand and accurately inform smuggled migrants, cooperation with civil society, as well as provisions acknowledging the causes of displacement and the need for development and regular pathways for migration.⁴⁴²

[459] Awareness raising must be based on realistic depictions of smuggling of migrants and must not be used solely to create fear and deter would-be migrants. Information should be provided 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, pointing them to alternative, actionable avenues, especially legal pathways of migration and available protection for refugees.

[460] To prevent and suppress the smuggling of migrants, it is essential to identify and understand the motives that drive persons to become engaged in smuggling of migrants. This needs to go hand-in-hand with legal and practical measures aimed at depriving migrant smugglers of the financial or other material benefit they may obtain through their criminal activities.

[461] To stop smuggling of migrants at the source and in transit points it is necessary to review and enhance pathways for safe and regular migration. Such measures need to go hand-in-hand with measures addressing the causes of forced displacement and improving human rights and civil liberties, security, and the socio-economic situation of the populations in source and transit countries.

Part VII Monitoring

[462] It is essential that any new instrument offers guidance and support to States implementing the provisions of the instrument. This should also include technical assistance. A committee of the parties should be set up to offer a consultative forum for States, to discuss implementation and compliance, and to review, as necessary, the terms of the instrument.

[463] To ensure that States follow the terms of the instrument, it will be desirable to include a transparent monitoring mechanism. Here, the Group of Expert-style system of the Council of Europe conventions on trafficking in human beings and corruption can serve as a model.

Part VII Final provisions

[464] This part includes standard clauses relating to the administration, amendment et cetera of the instrument.

⁴⁴² Cf *Smuggling of Migrants Protocol*, art 15.

Appendix 2: 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
Montenegro	23 Oct 2006 (sc)	No

	UN Smuggling of Migrants Protocol	EU Member State
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 3: 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 (provisions that are crossed out or marked by * were removed or added in the new draft presented on 31 May 2024)	
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’				
	Art 15 UNTOC	Art 4	Jurisdiction (FD)	Art 12	Jurisdiction
Art 4	Scope of application				
Art 5	Criminal liability of migrants				
Art 6	Criminalization	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	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	1a	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

UN Smuggling of Migrants Protocol		2002 EU Council Directive (CD) and Framework Decision (FD)		2023 proposal new EU Directive COM(2023) 755 final (provisions that are crossed out or marked by * were removed or added in the new draft presented on 31 May 2024)	
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 organization
				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
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 8a*	Freezing and confiscation
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)		

UN Smuggling of Migrants Protocol		2002 EU Council Directive (CD) and Framework Decision (FD)		2023 proposal new EU Directive COM(2023) 755 final (provisions that are crossed out or marked by * were removed or added in the new draft presented on 31 May 2024)	
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)		