STATE RESPONSES TO CROSS-BORDER ACTIVISM ON THE WESTERN BALKAN ROUTE TO EUROPE 2015-2016:

ARGUMENTS TOWARDS DECRIMINALIZATION OF HUMANITARIAN SMUGGLING

by Zuzana Pavelková

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PROFESSOR: Boldizsár Nagy

Central European University

1051 Budapest, Nador utca 9.

Hungary

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Executive Summary

The present thesis looks at state responses to cross-border activism at the Western Balkan route to Europe between 2015 and 2016, and beyond. Starting from a normative position, it argues that humanitarian smuggling, understood as non-profit facilitation of irregular entry, should be decriminalized. The requirement of decriminalizing individuals engaging in assistance to irregular border crossing – referred to as "flight helpers" – is justified by adopting a human rights-based approach to smuggling. The thesis argues that in the absence of safe and legal pathways to Europe, human rights of refugees, including the right to ask for international protection, are safeguarded by flight helpers. Considering the lack of political will to alter the legal provisions enabling criminalization of flight helpers across the EU, the thesis looks for arguments in favour of a narrow reading of the existing regulatory frameworks, allowing for a *de facto* decriminalization of flight helpers in the short-term. In order to advance its normative starting point, the thesis looks for supportive arguments in international, European and EU law and analyses available domestic case-law. The research demonstrates that the international anti-smuggling law, international refugee law, international law of the sea as well as some non-binding instruments of international human rights soft law can provide arguments in favour of decriminalization of humanitarian smuggling. In particular, the international anti-smuggling framework as represented by the UN Smuggling Protocol foresees implicit exceptions for instances of humanitarian smuggling, with the threshold between permissible and punishable action being the element of financial or material benefit. While the primary goal of the Protocol is to tackle organized crime, the safeguards for flight helpers remain limited, as the element of gain is not further defined in the Protocol and neither is the required state conduct in its absence. The strongest safeguard against criminalization presents the duty of search and rescue under the international law of the sea, to which the obligations under the Smuggling Protocol are subjected to. The principled gaps in international law are further expanded within the ambits

of EU law, which omits the element of gain from its definition of smuggling, while establishing merely optional explicit humanitarian exceptions. In this regard, the thesis demonstrates that the EU Facilitators Package not only enables for the criminalization of a wide array of genuinely humanitarian acts but also risks to undermine the international duty of search and rescue at sea and risks extorting a long-term chilling effect on the provision of humanitarian aid. Moreover, the thesis argues that with the gain element missing and the humanitarian exceptions being merely optional, the EU anti-smuggling framework comes in tension with the core requirements of criminal justice and the rule of law. Looking into the implementation of the Facilitators Package in domestic jurisdictions of EU member states, the thesis elucidates that the law is neither clear nor foreseeable for its subjects, and at times not even for the public authorities. In the concluding part, the thesis suggests four argumentative strategies for defending flight helpers in courts. First and foremost, the thesis argues that flight helpers and their allies should appeal to a narrow reading of the smuggling offence in respect of the acts as such. Acts of individualized, spontaneous or ad-hoc nature should automatically fall outside of the scope of its application, as the existing international and EU anti-smuggling framework aim primarily at tackling organized crime. Second, flight helpers should appeal to a narrow reading of the smuggling offenses in respect of the overall circumstances of the act. In this regard, the flight helpers can argue that the provision of the Smuggling Protocol have been transposed into EU law in a wrongful manner. Third, in cases where the element of gain is missing from the domestic provisions on smuggling, the lacking clarity and foreseeability of the law may infringe upon the fair trial rights of the facilitator both in an abstract and, depending on the circumstances of the case in a concrete manner. Lastly, in extreme situations involving emergencies or a risk of immediate harm to the persons being facilitated, the flight helpers can appeal to the fundamental rights of the smuggled, including the absolute, non-derogable right to life, which may create a situation of necessity comparable to that of distress at sea.

Abbreviations

AIDA	Asylum Information Database
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CM	Committee of Ministers
CoE	Council of Europe
CoE MSs	Council of Europe member states
COM, the Commission	European Commission
ECHR, the Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court for Human Rights
EDAL	European Database of Asylum Law
EEAS	European External Action Service
ELENA	European Legal Network on Asylum
EP	European Parliament
EU	European Union
EU Charter of Fundamental Rights, the Charter	Charter of Fundamental Rights of the European Union
EU Facilitation Directive	Directive of the Council defining the facilitation of unauthorised entry, transit and residence
FRA	European Union Agency for Fundamental Rights
FYEG	Federation of Young European Greens
GRETA	Council of Europe Group of Experts on Action against Trafficking in Human Beings

IRPA	Immigration and Refugee Protection Act
IOM	International Organization for Migration
IOs	international organisations
JHA	Justice and Home Affairs Council
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MPC	Migration Policy Centre
MPI	Migration Policy Institute
MSs	Member States (of the European Union or of the Council of Europe)
(i) NGOs	(international) non-governmental organisations
OAU	Organisation of African Unity
OECD	Organization for Economic Cooperation and Development
OGH	Oberster Gerichtshof [Supreme Court of Austria]
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
PACE	Council of Europe Parliamentary Assembly
PICUM	Platform for International Cooperation on Undocumented Migrants
Refugee Convention	Convention Relating to the Status of Refugees
SAR Convention	International Convention on Maritime Search and Rescue
Smuggling Protocol	United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air
SOLAS Convention	International Convention for the Safety of Life at Sea
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
Trafficking Protocol	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children
UN GA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UN TOC	United Nations Convention against Transnational Organized Crime

Introduction: Who Wants to be a Criminal?

When granting the Order of the White Lion to Nicholas Winton in autumn 2014, the Czech President Zeman stated he was filled with "respect and humbleness."[1] On the eve of World War II, Nicholas Winton, at that time not more than 29 years old, organized train transports for more than 600 Jewish children from the soon to be occupied Czechoslovakia.[2] Bringing them to foster families in Great Britain, he saved them from an almost certain death in one of the concentration camps in Europe. It was not until 1988 that his act became publicly known thanks to an emotional encounter with "his" children live on BBC.[3] In today's Czech Republic, Winton continues to be celebrated as the "modest hero."[4] The not so known part of the story: at the time they were about to enter Britain, the Jewish children were still lacking proper documentation. And Winton helped them obtain a forged entry permit:

> Officials at the Home Office worked very slowly with the entry visas. We went to them urgently asking for permits, only to be told languidly, 'Why rush, old boy? Nothing will happen in Europe.' This was a few months before the war broke out. So we forged the Home Office entry permits.[5]

In today's terms, were the Jewish children irregular migrants? And Winton a smuggler, a criminal? Or a hero, at last?[6]

[1] "Zeman Udělil Wintonovi Řád Bílého Lva, Posmrtně Vyznamenal Churchilla [Zeman Grants Winton the White Lion's Order; Commemorates Churchill in Memoriam]," *iDNES.cz*, October 28, 2014, http://zpravy.idnes.cz/sir-nicolas-winton-prevzal-rad-bileho-lva-f1w-/domaci.aspx?c=A141028_145424_domaci_cen.

[2] "Nicholas Winton and the Rescue of Children from Czechoslovakia, 1938–1939," *United States Holocaust Memorial Museum*, accessed February 21, 2017, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007780.

[3] aggy007, *Sir Nicholas Winton - BBC Programme "That's Life" aired in 1988*, accessed February 21, 2017, https://www.youtube.com/watch?v=6_nFuJAF5F0.

[4] See e.g. "Nicolas Winton - Skromný Hrdina (Modest HERO)," accessed February 21, 2017, https://www.facebook.com/Nicolas.Winton/.

[5] "The Power of Good - The Nicholas Winton Story," accessed February 21, 2017, http://www.powerofgood.net/story.php.

[6] Winton's story is obviously one of many. As will be shown in Chapter I, assistance in irregular border crossing for people fleeing wars or persecutions has long history in Europe.

Switching back to 21st century Europe, one could witness that ever since the beginning of spring 2015, volunteers, human rights defenders and humanitarian workers have been vital in providing assistance to refugees entering Europe via the Western Balkan route. The civil society, often composed of independent volunteers organizing themselves in loose networks, has been for months filling the protection gap the states have proven unable or perhaps unwilling to cover.[7] While the activists managed to partly substitute the states in their obligation to protect and provide for human rights of the incomings, state responses towards their engagement remained ambiguous, oscillating between cooperation, attempts at accommodation into existing, official structures, and, as shown below, at times also criminalization.

Although border activism, let alone refugee and migrants rights activism, is not an entirely new phenomenon, the nature of the events on the Western Balkan route and the magnitude and variety of civil society responses to it have placed states before new dilemmas. In several countries throughout Europe, individuals have been accused of smuggling and put on trial for what appear to be genuine acts of humanitarian assistance.[8] Relying on existing theories of

[7] See e.g. Johannes Gunesch, Annastiina Kallius, Johannes Mahr, Amy Rodgers, *Hungary's Long Summer of Migration - Irresponsible Governance Fails People Seeking International Protection* (Migrant Solidarity Group of Hungary (MigSzol), 2016), http://www.migszol.com/files/theme/Report/migszol_report_eng.pdf; Imogen Wall, "The Volunteer Effect," *IRIN News*, November 10, 2015, http://www.irinnews.org/analysis/2015/11/10.

[8] "Aide Aux Étrangers : Le Français Pierre-Alain Mannoni Relaxé À Nice," *France 24*, January 6, 2017, http://www.france24.com/fr/20170106-aide-etrangers-francais-pierre-alain-mannoni-relaxe-nice; Agence France-Presse, "French Farmer on Trial for Helping Migrants across Italian Border," *The Guardian*, January 4, 2017, sec. World news, https://www.theguardian.com/world/2017/jan/04/french-farmer-cedric-herrou-trial-helping-migrants-italian-border?CMP=Share_iOSApp_Other; "Rob Lawrie Admits Bid to Sneak Afghan Child from Calais," *BBC News*, January 14, 2016, sec. Leeds & West Yorkshire, http://www.bbc.com/news/uk-england-leeds-35312424; Lisbeth Zornig Andersen, "When Denmark Criminalised Kindness," *Granta Magazine*, December 7, 2016, https://granta.com/denmark-criminalised-kindness/; Hiba Zayadin, "Salam Aldeen: Refugee Crisis Volunteer or 'Humanitarian Smuggler'?," *Muftah*, January 18, 2017, http://muftah.org/salam-aldeen-refugee-crisis-volunteer-humanitarian-smuggler/.

social movements,[9] crimmigration,[10] migrant activism[11] or mobile commons,[12] social sciences appear well-equipped to analyse cross-border activism and look into how states construct and, potentially, expand or shrink the operating space for refugees, as well as the newly emerging non-state actors. In contrast to that, legal scholars seem to have long focused primarily on issues relating to the criminalization of refugees, leaving persons engaging with them largely out of their scope of attention.[13] Hathaway[14] and Crépeau[15] were the first to argue that the international anti-smuggling framework might be at tension with the core principles of international refugee protection and other human rights goals. Fischer-Lescarno[16] and recently

[9] E.g. Luther P. Gerlach and Virginia H. Hine, *People, Power, Change: Movements of Social Transformation* (Bobbs-Merrill Company, 1970). Donatella della Porta and Mario Diani, *Social Movements: An Introduction*, 2 edition (Malden, MA: Wiley-Blackwell, 2006). Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 3 edition (Cambridge; New York: Cambridge University Press, 2011).

[10] E.g. Juliet P. Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2006), https://papers.ssrn.com/abstract=935547. Joanna Parkin, *The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research*, CEPS Papers in Liberty and Security in Europe, No. 61 (Brussels: Centre for European Policy Studies (CEPS), 2013), https://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf.

[11] Imogen Tyler and Katarzyna Marciniak, "Immigrant Protest: An Introduction," *Citizenship Studies* 17, no. 2 (April 2013): 143–56, doi:10.1080/13621025.2013.780728; Imogen Tyler and Katarzyna Marciniak, *Protesting Citizenship:migrant Activisms*, ed. Imogen Tyler and Katarzyna Marciniak (Routledge, 2014), http://eprints.lancs.ac.uk/67261/; Nick Gill et al., "The Tactics of Asylum and Irregular Migrant Support Groups: Disrupting Bodily, Technological, and Neoliberal Strategies of Control," *Annals of the Association of American Geographers* 104, no. 2 (March 4, 2014): 373–81, doi:10.1080/00045608.2013.857544.

[12] Dimitris Papadopoulos and Vassilis S. Tsianos, "After Citizenship: Autonomy of Migration, Organisational Ontology and Mobile Commons," *Citizenship Studies* 17, no. 2 (April 1, 2013): 178–96, doi:10.1080/13621025.2013.780736.

[13] Compare Jennifer Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community," in *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies (CEPS), 2016), 49–50.

[14] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).

[15] Francois Crépeau, "The Fight against Migrant Smuggling: Migration Containment over Refugee Protection," in *The Refugee Convention at Fifty: A View from Forced Migration Studies* (Lanham: Lexington Books, 2003), 173–85.

[16] Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur, "Border Controls at Sea: Requirements under International Human Rights and Refugee Law," *International Journal of Refugee Law* 21, no. 2 (July 1, 2009): 256–96, doi:10.1093/ijrl/eep008.

also Basaran,[17] Carrera and den Hertog[18] or Tazzioli[19] have assessed states obligations in context of the law of the sea, yet typically did so without bringing these in connection with the international anti-smuggling regime. Following some initial, early critiques by Webber,[20] Landry,[21] Landry and Peers,[22] Provera,[23] Carrera and Guild,[24] and in particular Carrera et al.[25] have recently provided a substantive legal and policy analysis of the relationship between the international and EU anti-smuggling framework, and advocated for amendment of the latter. Allsopp,[26] Allsopp and Mannieri,[27] as well as Carrera et al.[28] further strived to document the

[17] Tugba Basaran, "Saving Lives at Sea: Security, Law and Adverse Effects," *European Journal of Migration and Law* 15 (2014): 365–87; Tugba Basaran, "The Saved and the Drowned: Governing Indifference in the Name of Security," *Security Dialogue*, 2015, 1–16, doi:10.1177/0967010614557512. See also Tugba Basaran, "The Curious State of the Good Samaritan: Humanitarianism under Conditions of Security," in *Governing Borders and Security: The Politics of Connectivity and Dispersal*, PRIO New Security Studies (London and New York: Routledge, 2015).

[18] Sergio Carrera and Leonhard den Hertog, *Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean*, CEPS Paper in Liberty and Security in Europe, No. 79 (Brussels: Centre for European Policy Studies (CEPS), 2015), http://www.ceps.eu/system/files/LSE_79.pdf.

[19] Martina Tazzioli, "Border Displacements. Challenging the Politics of Rescue between Mare Nostrum and Triton," *Migration Studies* 4, no. 1 (March 2016): 1–19, doi:10.1093/migration/mnv042.

[20] Frances Webber, *Border Wars and Asylum Crimes* (London: Statewatch, 2006). See also Frances Webber, *Crimes of Arrival: Immigrants and Asylum-Seekers in the New Europe* (Statewatch, 1996), https://pdfs.semanticscholar.org/dd96/d0201d8825d97bc4c23e5d1f57ce798e6394.pdf.

[21] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119" (Refugee Studies Centre, Oxford Department of International Development, University of Oxford, October 2016).

[22] Steve Peers and Rachel Landry, "Human & Humanitarian Smugglers: Europe's Scapegoat in the 'refugee Crisis,'" accessed November 4, 2016, http://eulawanalysis.blogspot.com/2016/10/human-humanitarian-smugglers-europes.html.

[23] Mark Provera, *The Criminalisation of Irregular Migration in the European Union*, No. 80 (Centre for European Policy Studies (CEPS), 2015), http://www.ceps.eu/system/files/Criminalisation%20of%20Irregular%20Migration.pdf.

[24] Sergio Carrera and Elspeth Guild, *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies (CEPS), 2016).

[25] Sergio Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, ed. European Parliament, Directorate-General for Internal Policies, Policy Department C - Citizens' Rights and Constitutional Affairs (LIBE) (European Union Publications Office, 2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf.

[26] Jennifer Allsopp, "Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France, Working Paper Series No. 82" (Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2012), http://rsc.socsci.ox.ac.uk/files/publications/working-paper-series/wp82-contesting-fraternite-2012.pdf; Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community."

[27] 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 *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies (CEPS), 2016), 81–91.

[28] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*.

impact of the EU anti-smuggling framework on humanitarian actors. Spena[29] and Landry[30] offer an abstract argument on the moral defensibility of humanitarian smuggling.

Recognizing that the criminalization of assistance *en route* became ever more prevalent in the context of the "refugee crisis" and may have a long-term chilling effect on the civilian provision of assistance,[31] the thesis aims at building up on the existing, growing scholarship. In particular, the thesis is interested in human rights compliance of state responses to assistance in irregular border crossing offered to individuals entering Europe in unprecedented numbers on the so-called Western Balkan route in 2015-16. While the starting point of the thesis are events at the Western Balkan route within the specified time frame, the scholarly interest in the topic is further stirred by recent developments in the Central Mediterranean. Here, the legality and legitimacy of humanitarian rescue vessels keeps not only being rhetorically torpedoed by some EU officials as well as the Italian prosecution.[32] It also risks to further escalate with a humanitarian rescue vessel recently being seized by the Italian authorities.[33]

In an attempt at constructing a work which is relevant, practical and timely, the thesis strives to answer the following research question: **How can human rights advocates make use of**

[29] Alessandro Spena, "Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?," in *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies (CEPS), 2016), 33–41.

[30] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119."

[31] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 56–60. Already back in 2009, the UNCHR raised concerns that the prosecutions in the Cap Anamur case have scared fishermen from providing rescue at sea. See "Italy Acquits Migrant Rescue Crew," *BBC News*, October 7, 2009, http://news.bbc.co.uk/2/hi/8295727.stm. Interestingly, Allsopp argues that criminalization of humanitarian assistance creates challenges also in respect of regular civilians not engaging in humanitarianism. See Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community," 50–54.

[32] Kai Dambach, "Italy Prosecutor Claims NGOs Working with Human Smugglers," *Deutsche Welle*, April 24, 2017, http://www.dw.com/en/italy-prosecutor-claims-ngos-working-with-human-smugglers/a-38554753. Patrick Wintour, "NGO Rescues off Libya Encourage Traffickers, Says EU Borders Chief," *The Guardian*, February 27, 2017, sec. World news, https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief?CMP=share_btn_tw.

[33] Jan-Christoph Kitzler, "Verfahren Gegen die 'Iuventa': Rettungsboot in Not [Process against Iuventa: Rescue Ship in Need of Rescue]," *Tagesschau.de*, August 3, 2017, https://www.tagesschau.de/ausland/iuventa-105.html.

the existing international, European and EU legal framework to argue in favour of decriminalization of humanitarian smuggling?

Consequently, instead of attempting at a – perhaps false – objectivity leading to a predictable conclusion that the current framework needs to be amended, the present work sets as its starting point the underlying normative position of the author. The thesis thus does not aim to look for – or to pretend to look for – what the law is. Rather, it searches for arguments in favor of a specific way of interpreting the existing legal framework as it stands today. What is thus particular about the approach of the thesis and may distinguish it from other scholarly works in the area is the fact that it uses the law as a tool for advancing its normative starting point.[34]

Last but not least, it deserves to be noted that my primary interest in the topic derives from my personal experiences and encounters with refugees and those assisting them for the past couple of years. In the course of the current "refugee crisis", I have had the chance to visit the transit zones and camps in Belgrade and later Idomeni shortly after the border between Greece and Macedonia got closed in March 2016. I regard these experiences as particularly formatting, further influencing me in my personal and political convictions as well as in my academic interest. As I plan to continue being active in this field in the future, I want to better understand what sanction I may be exposing myself to as a result of my actions and in how far are these reconcilable with the international, European and EU law.

[34] I would like to thank my supervisor, Professor Boldizsár Nágy, for suggesting and encouraging me to opt for this approach.

Chapter I: Understanding Cross-Border Refugee Assistance In Europe: Underlying Notions, Analytical Framework

1.1.Methodology

In addition to the key research question of the thesis outlined above, the present work is guided by my scholarly interest in the following set of sub-questions and considerations:

- What is the legal status of flight helpers and how do states react to them?
- Is the state response towards flight helpers consistent and coherent over time or rather ad hoc and arbitrary? Are there differences among EU MSs?
- Do states distinguish between trafficking, smuggling and smuggling for humanitarian purposes? Should they make a distinction?
- Does international law favour a different approach to human smuggling than the EU law?
- Does international human rights law require mandatory humanitarian exceptions in domestic criminal law provisions on human smuggling?
- What is the legal status of a humanitarian corridor?

With regard to the formal requirements of the thesis, the present work will not be able to provide exhaustive answers to all of the above mentioned questions. Nonetheless, as they do stir my research interest in the topic, they deserved to be mentioned as they guide my choices of methodology and the overall analytical framework.

The thesis attempts at answering its main research question by looking into the validity of the following hypotheses:

- **H1:** The international anti-trafficking and anti-smuggling regime stands in tension with international refugee law. While it is imperative to protect victims of trafficking, the overbroad criminalization provisions of the UN Smuggling Protocol neglect the fact

that smugglers, as service providers, are often times indispensable to refugees' ability to seek international protection.

- **H2:** The principled tensions between fight against organized crime and access to international protection emerging in international law become further tangible within the ambits of EU law. Grounded in the policy logic of deterrence, instead of one of protection, the EU Facilitators Package enables for criminalization of humanitarian assistance to refugees in crossing borders.

- **H3:** As a result of the vagueness of the law at international and European level, domestic legislators and courts are left to navigate within the gaps and to regulate and decide through and despite them. As a result, the state responses to flight helpers become ad-hoc and arbitrary, instead of being consistent and foreseeable.

- **H4:** The inconsistencies are problematic from a criminal justice, as well as a rule of law perspective as they do not enable individuals to regulate their conduct. The legal gaps can be possibly closed by reading down the existing smuggling provisions in the context of states' other international and European law obligations.

With regard to my current academic background, I approach the matters at stake primarily from the perspective of law. To this end, majority of my research focuses on a thorough engagement with the primary sources of law, including international treaties, EU legislation, judgements of domestic and regional courts, as well as several soft law instruments such as resolutions or explanatory memoranda. Where more support in favour or against an argument is needed, I rely on existing legal scholarship, official positions of international and EU bodies, NGO reports, as well as empirical and social science research on human smuggling.

The particular methodological challenge in the context of the present work arises from the fact that the matters at stake in the present thesis fall in between the two distinct, albeit overlapping

areas of law: criminal law and human rights law.[35] Both follow different goals and employ slightly different, albeit overlapping methodological toolboxes, especially as regards interpretation of the law.[36] In the context of the present thesis, I approach the matters at stake from the perspective and with the methodology of human rights law. This means that I am primarily interested in how the law serves the purpose of protecting the individuals against unnecessary state interference or against the violations of their rights by others. The goal of punishment and prevention of certain acts and that of rehabilitation of the perpetrator are considered merely secondary objectives in the context of the present work.

The thesis consists of four substantive Chapters, an Introduction and a Conclusion. Chapter I presents the methodological framework and its delimitations, as well as the underlying notions and terms the way they are being understood and employed by the author for the purposes of the present work. In order to provide the reader with contextual background knowledge, Chapter I offers also a brief historical perspective on civilian refugee assistance in Europe and an overview of contemporary research on human smuggling. It finishes with presenting key policy arguments in favour of decriminalizing humanitarian smuggling, which constitute the normative starting point of the thesis.

Chapter II identifies and analyses state obligations vis a vis human smuggling in the context of international law and contrasts them with requirements of international refugee law. It starts the analysis by looking into the 1951 Convention Relating to the Status of Refugees ("Refugee Convention")[37] and the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol")[38] as the two single most important international refugee law treaties up to date. In a second step,

[35] On a similar note, in social sciences, researchers have in recent years approached the overlap between criminal and immigration law measures with the theory of "crimmigration." See Stumpf, "The Crimmigration Crisis."
[36] Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (New York: Cambridge University Press, 2017), 32–33, 319–30.
[37] United Nations General Assembly (UN GA), "Convention Relating to the Status of Refugees ("1951 Refugee Convention") (18 July 1951), UNTS Vol. 189, P. 137.," n.d.
[38] United Nations General Assembly (UN GA), "Protocol Relating to the Status of Refugees ('1967 Protocol') (31 January 1967), UNTS Vol. 606, P. 267.," n.d.

it looks into the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air ("Smuggling Protocol")[39] and considers it also in light of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children ("Trafficking Protocol")[40] as well as the United Nations Convention against Transnational Organized Crime ("UN TOC")[41], to which both of the Protocols are supplement to. Furthermore, Chapter II assesses state responsibilities under the anti-smuggling regime in context of the law of the sea duty to rescue and other fundamental rights safeguards.

Chapter III analyses the anti-smuggling framework at the level of the EU. Within the ambits of EU, the contours of the anti-smuggling regime are primarily outlined by the so-called Facilitators Package – the Directive of the Council defining the facilitation of unauthorized entry, transit and residence from 2002 ("Facilitation Directive")[42] and the Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ("Council Framework Decision")[43], relating to the Directive's implementation. Additionally, Chapter III looks into acts falling under the broader Schengen acquis, particularly the regulation of conduct of border authorities and international carriers. Moreover, Chapter III takes into consideration fundamental rights safeguards resulting from the Charter of Fundamental Rights of the European Union ("EU Charter of Fundamental

[39] "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507.," n.d.

[40] "United Nations General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children Supplementing the United Nations Convention against Transnational Organized ('Trafficking Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2237, P. 319.," n.d.

[41] "United Nations General Assembly, Convention against Transnational Organized Crime ('UN TOC') (15 November 2000), A/RES/55/25, UNTS Vol. 2225, P. 209.," n.d.

[42] Council of the European Union, "Directive 2002/90/EC of the Council Defining the Facilitation of Unauthorised Entry, Transit and Residence ('EU Facilitation Directive') (28 November 2002) OJ L 328/17," accessed March 7, 2017, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090&from=EN.

[43] Council of the European Union, "Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ('Council Framework Decision') (28 November 2002), 2002/946/JHA, OJ L 328/1," n.d.

Rights") and other EU legislation, as well as various Council of Europe instruments, including recent soft law.[44]

Following the analysis of state obligations under international, European and EU law, the Chapter IV looks into their implementation – or in the case of the latter transposition – into domestic laws and practices. Due to the relative novelty of the issue and absence of sufficient case-law from a single country in the period at stake in the present work, [45] the Chapter employs a case-based instead of a country-based analysis. It looks into several existing judgements from across various EU member states, where relevant also beyond the core 2015-16 period. The Chapter looks into some of the heavily medialized cases, including those of Cédric Herrou,[46] Lisbeth Zornig Andersen,[47] Fredrik Önnevall,[48] Rob Lawrie[49] or Pierre-Alain Mannoni[50]. All of these represent instances of individuals being put on trial for what appears to be genuinely humanitarian and often also very much ad-hoc, spontaneous acts of assistance. To complement the overview of state responses, Chapter IV looks into two recent preliminary rulings of the Court of Justice of the European Union ("CJEU").[51] Lastly, Chapter IV finalizes the analyses by looking into the judgement of the Supreme Court of Canada in R. v Appulonappa as an international comparator with high relevance to the research topic.[52]

[44] "European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 ('EU Charter of Fundamental Rights', 'the Charter') (26 October 2012) OJ C 326/391," n.d.
[45] More on the challenges with regard to the research on exististing case-law in Chapter IV.
[46] "Cédric Herrou, Le Procès D'un Geste D'humanité," *Libération.fr*, January 4, 2017, http://www.liberation.fr/france/2017/01/04/cedric-herrou-le-proces-d-un-geste-d-humanite_1539167.
[47] David Crouch, "Danish Children's Rights Activist Fined for People Trafficking," *The Guardian*, March 11, 2016, sec. World news, https://www.theguardian.com/world/2016/mar/11/danish-childrens-rights-activist-lisbeth-zornig-people-trafficking.
[48] Agence France-Presse, "Swedish Journalist Faces Trial for Helping a Syrian Boy Enter Sweden," *The Guardian*, November 17, 2016, sec. World news, https://www.theguardian.com/world/2016/nov/17/swedish-journalist-faces-trial-for-helping-a-syrian-boy-enter-sweden.
[49] "Former Soldier Who Smuggled Afghan Girl out of Calais Refugee Camp Spared Jail," *The Independent*, January 14, 2016, http://www.independent.co.uk/news/uk/home-news/rob-lawrie-former-soldier-who-smuggled-afghan-girl-out-of-calais-refugee-camp-spared-jail-a6813121.html.
[50] See "Aide Aux Étrangers."
[51] Specifically, Chapter IV looks int to the A.S. v Slovenia and the Jafari judgement. Court of Justice of the European Union (CJEU), Case C-490/16, A.S. v Slovenia, Judgement of the Court (Grand Chamber), 26 July 2017, accessed August 5, 2017; Court of Justice of the European Union (CJEU), Case C-646/16, Jafari, Judgement of the Court (Grand Chamber), 26 July 2017, accessed August 5, 2017.
[52] *R. v Appulonappa*, Supreme Court of Canada, 2015 SCC 59, 3 SCR 754.

Finally, the Conclusion part of the thesis summarizes and clusters the arguments developed in Chapters II-IV into a coherent argumentation strategy towards decriminalizing humanitarian smuggling.

1.2. Delimitations

The starting point of the present work are events at the Western Balkan route between 2015 and 2016. The so-called Western Balkan route is typically understood as encompassing the pathway over land through a range of EU and non-EU countries including Greece, Macedonia, Serbia, Croatia, Slovenia and Hungary, following the transit over the Mediterranean between Turkey and Greece.[53] As explained above, with regard to the recent events in the Mediterranean, as well as the prevailing lack of case-law from one single jurisdiction, the thesis does, however, also look into examples from other countries than those strictly at the Western Balkan route. While majority of the cases focuses on transfer over mainland, the thesis includes some limited case-law relating to situations at sea, as long as it proves to provide a relevant perspective in the context of the research question outlined above.

Besides, the thesis looks into acts of support *en route*, that is while the refugees are still travelling towards their preferred country of destination. Such assistance can take a variety of forms and shapes. For the purposes of conceptual clarity, the thesis focuses on activities in which non-state actors physically assist refugees in crossing the border and leaves out any other sort of material, immaterial or other support before and after the border-crossing. Last but not least, as will be explained further below, the thesis focuses primarily on actions undertaken in good faith, with the aim of assisting refugees and typically run on a non-profit basis. Actions aiming at deliberately exploiting refugees are left out of the focus of the thesis, as they clearly fail to meet the "humanitarian" criteria.

[53] European Border and Coast Guard Agency (Frontex), "Frontex | Western Balkan Route," accessed February 12, 2017, http://frontex.europa.eu/trends-and-routes/western-balkan-route/.

Timewise, the starting point of the thesis are events taking place between spring 2015 and autumn 2016, during which the term "refugee crisis" resonated strongly in the media and the public discourse. In the context of the present work, the thesis identifies as the edge point of the "refugee crisis" two major boat tragedies in the Mediterranean in April 2015.[54] With regard to their amplitude in terms of the total number of victims, and occurrence tightly one after the other, the tragedies gained substantial attention in the media and public discourse.[55] Yet more importantly, what followed was an increasing shift of the refugees from the Central Mediterranean towards the Eastern Mediterranean and Western Balkan route.[56] The opposite edge point for my observations is the closure of the borders between Greece and Macedonia and the subsequent so-called EU-Turkey deal in March 2016.[57] Despite an initial uproar of the civil society against both of these measures, the "refugee crisis" slowly but surely started to disappear from the public discourse. Looking back at 2016, several NGOs, rights advocates and refugees claimed that this was "the year the world stopped carrying about refugees."[58] Admittedly, such view of the "refugee crisis" is somewhat reductionist.[59] Nevertheless, for the

[54] United Nations High Commissioner for Refugees, "UNHCR - New Mediterranean Boat Tragedy May Be Biggest Ever, Urgent Action Is Needed Now," *UNHCR*, accessed February 16, 2017, http://www.unhcr.org/news/press/2015/4/5533c2406/unhcr-new-mediterranean-boat-tragedy-biggest-urgent-action-needed.html.

[55] Patrick Kingsley and Kirchgaessner, "700 Migrants Feared Dead in Mediterranean Shipwreck," *The Guardian*, April 19, 2015, sec. World news, http://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet. Ibid.; Alia Chughtai, "The Ongoing Tragedy of Migrants and the Mediterranean," *Al Jazeera English*, April 20, 2015, http://www.aljazeera.com/indepth/interactive/2015/04/ongoing-tragedy-migrants-mediterranean-150419121823695.html; Jim Yardley, "Hundreds of Migrants Are Feared Dead as Ship Capsizes Off Libyan Coast," *The New York Times*, accessed August 7, 2017, https://www.nytimes.com/2015/04/20/world/europe/italy-migrants-capsized-boat-off-libya.html; "Mediterranean Migrants: Hundreds Feared Dead after Boat Capsizes," *BBC News*, April 19, 2015, sec. Europe, http://www.bbc.com/news/world-europe-32371348.

[56] European Border and Coast Guard Agency (Frontex), "Frontex | Western Balkan Route."

[57] On the effectiveness of closing the border see Bodo Weber, "The EU-Turkey Refugee Deal and the Not Quite Closed Balkan Route" (Friedrich Ebert Stiftung (FES), June 22, 2017), http://library.fes.de/pdf-files/bueros/sarajevo/13436.pdf.

[58] "2016: The Year the World Stopped Caring about Refugees," accessed February 18, 2017, http://www.aljazeera.com/indepth/features/2016/12/2016-year-world-stopped-caring-refugees-161227090243522.html.

[59] Albeit in less significant numbers, refugees from the African continent were arriving to the coasts of Greece and Italy since the end of the 1990s, without much of attention of the European public. And even when focusing solely on the current "refugee crisis," its beginnings can be traced back to several years earlier - the aftermath of the Arab Spring and the years 2012 or 2013. See Peter Tinti and Reitano Tuesday, *Migrant, Refugee, Smuggler, Saviour*, 1st edition (London, United Kingdom: Hurst & Company, 2016), 243.

purposes of the present work, the limitation is justified by the fact that 2015-2016 was also the period during and around which a majority of the flight helping activities at stake in the present thesis took place. It is, however, without any doubt that for many refugees involuntarily stranded in Greece, Turkey or elsewhere, the crisis continues.

1.3.Terminology

The choice of proper terminology appears to be a particularly thorny issue in the context of asylum and migration. For the purposes of conceptual clarity, the following part explains the main terms and concepts of the present thesis the way I understand and apply them in the context of this work. The terminological framework designed below is thus by its nature contextual. It does not attempt at developing a decisive argument or a comprehensive, final definition of each and every one of the terms introduced. Neither does it suggest that the terminology applied in the context of the present work can be easily transferred to other research projects, let alone other disciplines. Consequently, what the Sub-Chapter below provides are working definitions. They will be refined and if need be adjusted at further stages of the thesis.[60]

1.3.1. Refugees, Migrants and "Mixed Flows"

In the course of the "refugee crisis," a range of terms emerged to describe the newcomers. While constantly being contested in public discourse, the labels "refugee," "migrant" and "asylum seeker" kept being used interchangeably.[61] Generally speaking, the arrivals to Europe

[60] I design the terminological framework below against the background of three sets of considerations. First, filling notions with content and placing them in relationship to each other is unavoidable in the context of academic work, as it delineates the research and further specifies its limits. Second, however, I understand the process of developing a terminological framework in itself an exercise of symbolic power. As such, it runs an inherent risk of being arbitrary, overly simplistic or in contradiction to the everyday realities faced by individuals. Third, there is a lack of common language for describing the processes of irregular migration facilitation both, interdisciplinary and within the distinct academic disciplines. Consequently, in the subsequent part I am striving to find appropriate balance between the inherent need for some level of simplification and abstraction on one hand, as well as the aspiration to pay due regard to the complexity of the realities experienced by the different actors on the other.

[61] Compare United Nations High Commissioner for Refugees (UNHCR), "UNHCR Viewpoint: 'Refugee' or 'Migrant' – Which Is Right?," *UNHCR*, July 16, 2016, http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html; Barry Malone, "Why Al Jazeera Will Not Say Mediterranean 'Migrants,'" *Al Jazeera English*, August 20, 2015,

via the Western Balkan corridor in the period between 2015 and 2016 can be perhaps best described as "mixed flows." According to the International Organization for Migration ("IOM") these can include "refugees, asylum-seekers, economic migrants and other migrants."[62] As the primary starting point of the present thesis is international law, I refer to the incomings as to refugees, as I understand them as rights holders under the 1951 Refugee Convention. Recognizing the principled critique of the refugee-migrant dichotomy, I do so without prejudice towards the difficulties encountered by groups of migrants other than refugees.[63] Further explanation on the applicability of the 1951 Refugee Convention in the

http://www.aljazeera.com/blogs/editors-blog/2015/08/al-jazeera-mediterranean-migrants-150820082226309.html; Somini Sengupta, "Migrant or Refugee? There Is a Difference, With Legal Implications," *The New York Times*, August 27, 2015, https://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html; Adam Taylor, "Is It Time to Ditch the Word 'migrant'?," *Washington Post*, August 24, 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/08/24/is-it-time-to-ditch-the-word-migrant/; David Marsh, "We Deride Them as 'migrants'. Why Not Call Them People?," *The Guardian*, August 28, 2015, sec. Opinion, https://www.theguardian.com/commentisfree/2015/aug/28/migrants-people-refugees-humanity; Camila Ruz, "The Battle over the Words Used to Describe Migrants," *BBC News*, August 28, 2015, sec. Magazine, http://www.bbc.com/news/magazine-34061097; Migrants' Rights Network (MRN), "Al Jazeera Will Not Say Mediterranean 'Migrants', but We Should," 2015, http://www.migrantsrights.org.uk/migration-pulse/2015/al-jazeera-will-not-say-mediterranean-migrants-we-should; Jørgen Carling, "Refugees Are Also Migrants: All Migrants Matter," *Border Criminologies*, September 16, 2015, https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also.

[62] International Organization for Migration (IOM), International Migration Law: Glossary on Migration. International Organization for Migration, Geneva, 2004, p. 42 <http://www.iomvienna.at/sites/default/files/IML_1_EN.pdf> accessed 9 December 2016.

[63] While the present thesis is approaching the matters at stake from the perspective of international law, it is worth mentioning some voices in the social sciences contesting the genesis of "migrants" and "refugees" as binary, mutually exclusive categories. The argument goes that both of these terms evocate different imaginations as to the characteristics and motives of the incomings, which then result in "'migrants' […] being thrown to wolves." Presenting the complex phenomenon of migration as a question of two boxes is without doubts overly simplistic. For it could be well argued that *all* migrants are vulnerable.[63] What is more, in the context of irregular migration, it can be argued that the particular risk and the innate vulnerability herein emanate primarily *from the act of migrating* as such and are merely exacerbated by the person's "refugeeness". It could be also argued that at the moment of travel, refugeeness is only complementary, if not completely subordinated to the individual's other characteristics, such as his or her real or perceived class, gender, "race," color, religion, nationality, ethnic origin, sexual orientation or other. And that vice versa, financial or social capital, perceived Whiteness or "Western" appearance may render *certain* groups of refugees less vulnerable than *certain* groups of migrants. The debates on particular vulnerabilities of migrants and potential legal gaps arising from the binarity of the migrant-refugee categories are without doubts much needed in order to develop better and, perhaps, more comprehensive or intersectional protection frameworks. I argue that as long as the particularly vulnerability remains recognized, both "migrants" and "refugees" can be employed as overarching labels. The concrete choice of one term should then primarily depend on the discipline in which one's work is grounded and the readership it is directed to. As this thesis looks at the issue of irregular migration from the point of view of international law as it stands today, it can only hardly neglect the existence of two distinct categories, combined with different sets of rights and different levels of protection. See Carling, "Refugees Are Also Migrants: All Migrants Matter."

context of arrivals on the Western Balkan route in 2015-2016 are provided in Chapter II of the thesis.

1.3.2. Human(itarian) Smuggling, Trafficking and Cross-Border Activism

In addition to the confusion how to describe the newcomers, the public struggled to find a unified vocabulary to define the activities of those providing for their entry, with some media reports referring to the events on the Western Balkan route even as trafficking.[64] For the purposes of conceptual clarity, it seems useful to draw a dividing line between smuggling, facilitation of entry, humanitarian smuggling, trafficking, as well as what I call cross-border activism.

I relate my analytical framework primarily to the standards laid down in international law and in particular the UN Smuggling and UN Trafficking Protocol. As will be explained in further detail in Chapter II, these have coined a clear distinction between trafficking in human beings on one hand and people smuggling on the other. In the meantime, it is sufficient for the reader to know that if I do employ the term trafficking in the context of the present work, I typically relate to situations where individuals are being transported against their will to a place where they are being put into slavery-like conditions, including sexual exploitation or forced labour. In my understanding of the term, the threat or the use of force or coercion as well as the exploitation after the transit are central to trafficking and distinguish it from smuggling. In contrast to that, I understand smuggling as the act of facilitation of irregular transgression of an international border. In this sense, the term "human smuggling" equals to that of "facilitation of irregular entry", which is the terminology employed in the EU law context. It is my understanding that while those being smuggled may be exploited on the road, the purpose of

[64] Jørgen Carling, "Why 'trafficking' Is in the News for the Wrong Reasons," July 30, 2015, https://jorgencarling.org/2015/07/30/why-trafficking-is-in-the-news-for-the-wrong-reasons/.

the smuggler is to receive a financial or material benefit from the transfer itself, as opposed to aiming at profiting from the person transported after arrival.

Finally, in the context of the present thesis, I not only apply the term smuggling but also refer to certain acts as "humanitarian smuggling". In the area of criminal law, this term appear to have been used for the first time by Webber in 1996 and again in 2006, however, without further clarification of the concept.[65] In her work from 2016, Landry defines humanitarian smuggling as "acts facilitating irregular entry […] that are not only morally permissible, but should also fall outside of scope of punishable offences under smuggling prohibitions."[66] The expression "should fall outside" is inherently normative. To start with, I thus apply the term humanitarian smuggling to situations where the circumstances of the case suggest the intent of the smuggler was to provide assistance. In this sense, the adjective "humanitarian" indicates a rebuttable presumption that the acts under scrutiny are committed for humanitarian purposes, in good faith and are as such morally justifiable.[67] As will be demonstrated in Chapter II, international law coins the distinction between humanitarian and human smuggling in the basis of the element of gain. In this sense, I regard actions which do not involve a financial or material benefit as *prima facie* humanitarian.

Lastly, I understand humanitarian smuggling as part of the border concept of cross-border activism. With the term cross-border activism I strive to give recognition to the fact that an act of assisting a refugee in crossing a international border in contravention to the state-imposed controls and in a generalized climate of anti-refugee sentiments is in its essence a highly political one.[68]

[65] Webber, *Crimes of Arrival*, 1; Webber, *Border Wars and Asylum Crimes*, 8.
[66] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 4.
[67] Landry, Rachel, pp. 4–6.
[68] See Shoufu and others: "In this tragedy we are all inadvertently political actors. By already being willing to help, you have taken a political stand." Shoufu and Are you Syrious?, "What to Do When Volunteers Become Lackeys of Authorities?," *Medium*, March 22, 2017, https://medium.com/@AreYouSyrious/debate-what-to-do-when-volunteers-become-lackeys-of-authorities-765b45e561f8#.3wc3eimg7.

1.3.3. Flight Helpers, Smugglers and Humanitarian Non-State Actors

Lastly, a multitude of labels has been assigned to those providing assistance to refugees entering Europe on the Western Balkan route. From volunteers to "flight helpers,"[69] to "traitors,"[70] the figure of those providing assistance remained equally contested in the public discourse. In the context of the present thesis, I employ the term flight helpers, which I understand as a sub-group within the category of "humanitarian non-state actors".[71] The term humanitarian non-state actors suggests that the thesis looks into activities of private individuals, independently from whether they act in individual capacity, as part of loose collectives or as members of well-established organizations. In this context, as the adjective "non-state" suggest, the notion excludes measures taken by governmental officials, organs of state or *de facto* or *de jure* state agents. The adjective "humanitarian" suggests a rebuttable presumption of intent, in line with the definition of "humanitarian smuggling" applied in this thesis. Consequently, I employ the term flight helpers to individuals engaging in acts of humanitarian smuggling as defined above.

Admittedly, some research indicates cases where the refugees themselves at some point of their journey engage in or contribute to their irregular transfer or the transfer of others across a border.[72] However, for the purposes of simplification in the context of the present thesis, I look merely at situations where individuals facilitating the entry are not refugees themselves. All other actors implicated in the facilitation of irregular entry for other than humanitarian grounds as defined above are understood to fall under the category of smugglers.

[69] Mariana Gkliati, "Proud to Aid and Abet Refugees: The Criminalization of 'Flight Helpers' in Greece," *Oxford Law Faculty*, May 23, 2016, https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and.

[70] Jan Culik, "Far-Right Reaches for New Extremes in the Czech Republic," *The Conversation*, accessed January 2, 2017, http://theconversation.com/far-right-reaches-for-new-extremes-in-the-czech-republic-44496.

[71] Compare 'Humanitarian Non-State Actors and the Delocalised EU Border of the Central Mediterranean', *Oxford Law Faculty*, 2016 <https://www.law.ox.ac.uk/events/humanitarian-non-state-actors-and-delocalised-eu-border-central-mediterranean> [accessed 21 October 2016].

[72] Gabriella Sanchez, "Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research," *Journal on Migration and Human Security (JMHS)* 5, no. 1 (2017): 9–27; Achilli, Luigi, "The Smuggler: Hero or Felon?," June 2015, http://cadmus.eui.eu/handle/1814/36296.

1.4. History of Civilian Refugee Assistance in Europe

Besides Winton's example already mentioned above, numerous other cases throughout Europe's history illustrate that assistance to the "vulnerable outsider" has been often viewed as morally blameless, if not an almost heroic act and a historical necessity.[73]

An equally famous example would include that of Raoul Wallenberg. During his stay in Budapest in 1949, Wallenberg is his position as a Swedish diplomate issued fake "protective passports" to the remaining Jewish population, which claimed their holders were awaiting repatriation to Sweden.[74] Wallenberg and his colleagues from the War Refugee Board later housed those with the protective certificates in designed "safe houses" in the centre of Budapest.[75] It is estimated that Wallenberg helped to save thousands of lives.[76]

Webber notes the case of Aimee Stauffer-Stitelmann, whose conviction to 15 days imprisonment for smuggling Jewish refugee children to Switzerland from 1945 was retrospectively declared null and void by a Swiss Parliamentary commission in 2004.[77]

Landry notes the fascinating story of Danish fishermen during WW II.[78] During the occupation of Denmark in 1943, 95 % of the country's Jewish population managed to escape deportations to concentration camps, mainly by taking boat trips to Sweden.[79] Interestingly enough, due to the high risk involved for the fishermen, some of the trips were not without charge. Considering the possible persecution by the Nazi regime, as well as the length of the journey and difficulty

[73] Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community," n. 15.
[74] "Raoul Wallenberg and the Rescue of Jews in Budapest," *United States Holocaust Memorial Museum*, accessed August 7, 2017, https://www.ushmm.org/wlc/en/article.php?ModuleId=10005211.
[75] Ibid.
[76] Ibid.
[77] Webber, *Border Wars and Asylum Crimes*, 8.
[78] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 15–16.
[79] Ibid., 15.

of navigation, some of the fishermen at that time charged the equivalent of what would be 9.000 USD per person today.[80]

Furthermore, a number of people relied on the assistance of smugglers in order to leave the former Eastern Bloc during the Cold War period. One of the oral history accounts collected by the Czech NGO Post Bellum in the scope of the Memory of Nations project recalls the story of the German smuggler Bruno. According to the witness testimony, Bruno was bringing people over the border from Czechoslovakia to West Berlin in the 1960's for not more than a kilogram of fresh coffee.[81] The Czech family assisting him, whose member were later arrested by the regime and sent to forced labour at uranium mines, did not ask for any financial compensation.[82]

In the course of the Indochinese refugee crisis between 1975 and 1995, a number of French intellectuals called for solidarity with the so-called "boat people" – refugees feeling Vietnam by sea in the aftermath of the Vietnam War.[83] Some of them even helped to organize the rescue ships going to the South China Sea and managed to convince the French government to admit the ones saved.[84]

Together with the emergence of the European border regime since late 1990's and early 2000's, a Europe-wide migrant and refugee solidarity movement started to shape up through networks and groups such as Welcome to Europe, Afrique Europe Interact, Borderline Europe or Watch The Med.[85] Its contours and acting potential are shaped by the advancements and

[80] Ibid., 15–16.
[81] Post Bellum, "Stanislav Husa (1927) - Příběh Pamětníka - Paměť Národa [Stanislav Husa (1927) - Witness Testimony - Memory of Nations Project]," *Www.pametnaroda.cz*, accessed August 4, 2017, http://www.pametnaroda.cz/story/husa-stanislav-1927-3836.
[82] Ibid.
[83] Colin Gordon, "The Drowned and the Saved: Foucault's Texts on Migration and Solidarity," *openDemocracy*, November 10, 2015, https://www.opendemocracy.net/can-europe-make-it/colin-gordon/drowned-and-saved-foucaults-texts-on-migration-and-solidarity.
[84] Ibid.
[85] "Welcome to Europe! | w2eu.info," accessed August 7, 2017, http://w2eu.info/; "Afrique-Europe-Interact," accessed August 7, 2017, https://afrique-europe-interact.net/; "Borderline Europe - Menschenrechte Ohne

mainstreaming of technology into everyday lives. These enable for better interconnectedness and coordination of those willing to help, but also for other kinds of support. For example, the AlarmPhone network was successful in utilizing new technologies for localizing boats in distress at sea, alerting the coast guards and calling other nearby boats to their assistance.[86]

Likewise, in the course of the recent "refugee crisis", a number of individuals went to assist refugees on the Western Balkan route, the in the Mediterranean or elsewhere. The provision of humanitarian assistance by independent volunteers, albeit ad-hoc and semi-professional, became indispensable in mitigating the emergency.[87] For example, according to Bouckaert from the Human Rights Watch, at the Greek island of Lesbos, the task of carrying stranded boats to shore and assisting the injured was carried out "almost entirely" by volunteers instead of public authorities.[88] And yet volunteers were not only providing immediate humanitarian assistance. As the accounts of Czech volunteers assisting refugees on the Western Balkan route as part of the so-called "Czech Team" show, many assisted refugees in semi-regular border crossing, coordinated, or at the least tolerated, by the authorities in the scope of the "humanitarian corridor."[89] As the examples in Chapter V will show, many individuals facilitated the entry of refugees on a spontaneous, ad-hoc basis out of compassion for the individuals they have encountered.

Grenzen E.v.," accessed August 7, 2017, http://www.borderline-europe.de/; "Watch the Med," accessed August 7, 2017, http://www.watchthemed.net/.

[86] AlarmPhone, "About | AlarmPhone," *Www.alarmphone.org*, accessed August 4, 2017, https://alarmphone.org/en/about/.

[87] Wall, "The Volunteer Effect."

[88] Peter Bouckaert, "Lesbos' Refugee Disaster," *Foreign Affairs*, November 11, 2015, https://www.foreignaffairs.com/articles/europe/2015-11-11/lesbos-refugee-disaster.

[89] Tomáš Jungwirth, "A Night in the Life of a Volunteer on the Serbian-Croatian Border," *V4Revue*, November 27, 2015, http://visegradrevue.eu/a-night-in-the-life-of-a-volunteer-on-the-serbian-croatian-border/. For an assessment of the legal character of the corridor see Chapter IV.

All in all, the above shows that despite changing societal perceptions and legal regulations, there is a historic continuity of civilian refugee assistance in Europe. The assistance in irregular border crossing is its indispensable part.

1.5. Human Smuggling in Data and Research

Before going into discussions on legal arguments in favour of decriminalizing humanitarian smuggling, it appears useful to briefly summarize the current state of research on human smuggling as such.

The research on human smuggling is characterized by a significant knowledge gap in at least two respects. First, there is a lack of reliable, comprehensive statistical data on smuggling. Second, there is a significant lack of qualitative analysis of the phenomenon, resulting in the issue being continuously "under-researched and poorly understood".[90]

According to a frequently cited Interpol-Europol report from 2016, 90 % of people entering Europe irregularly in 2016 relied on smuggling services at some point of their journey.[91] These were according to the report provided "mostly by members of a criminal network."[92] According to the report, smugglers organize themselves in "loosely connected networks" and are able to "adapt their services to increased controls."[93] The report identifies 250 "smuggling hotspots", defined among others as "hubs offering transport infrastructure such as international train

[90] Council of Europe (CoE), Committee on Crime Problems (CDPC), "Working Document: Preventing and Suppressing the Smuggling of Migrants in Council of Europe Member States - A Way Forward, 70th Plenary Session, Strasbourg, 27-30 June 2016," n.d., 6, similarly also p. 7.

[91] The report states specifically that: "90% of the migrants coming to the EU are facilitated". However, what is actually meant is that 90 % of migrants *coming irregularly*, as majority of migrants enter Europe regularly. This is illustrated e.g. in the number of Schengen visas issued yearly, which by far exceeds the total number of irregular arrivals. For example, in 2015, 14,3 million Schengen visas were issued. See "European Commission (COM), Migration and Home Affairs, Complete Statistics on Short-Stay Visas Issued by the Schengen States: Visa Statistics for Consulates 2015," accessed August 5, 2017, https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy#stats. Moreover, it is worth noting that the often cited estimate is based on merely some 1500 "debriefings" conducted by Frontex and EU MSs in 2015. See Interpol and Europol, "Migrant Smuggling Networks - Joint Europol-INTERPOL Report: Executive Summary," May 2016, 4, 6.

[92] Interpol and Europol, "Migrant Smuggling Networks - Joint Europol-INTERPOL Report: Executive Summary," 4.

[93] Ibid., 4, 7.

stations, airport and services stations for long distance coaches."[94] The report further differentiates three types of smugglers: leaders, organizers and low-level facilitators and describes smuggling as a "highly profitable business" with links to other branches of crime.[95] According to Interpol and Europol, smuggling services are sought "mainly by undocumented migrants or those who do not fit entry requirements."[96] Besides, the numbers of smuggled are expected to rise, "in response to control measures taken by countries along the migratory routes."[97]

In terms of concrete numbers, a recent study of the European Commission on the functionality of EU anti-smuggling legislation, which will be discussed in greater detail in Chapter III ("REFIT study"), argues that "[a]lthough actual numbers of smuggled migrants are not known, irregular migration is a limited yet reasonable proxy indicator for migrant smuggling trends."[98] In this regard, it is estimated that about one million individuals entered the EU irregularly in 2015, providing a proxy for the number of facilitated arrivals in this period.[99]

In contrast to the official reports, Sanchez provides a useful critique of the current state of research on migrant smuggling from the perspective of social sciences, as well as an overview of emerging critical approaches to irregular migration facilitation.[100] Sanchez argues that "[g]lobally, empirical research on migrant smuggling and its organization is scant."[101]

[94] Ibid., 7.
[95] An estimated yearly turnover amounts according to the report to some 5 to 6 billion USD. Ibid., 4, 6–8.
[96] Ibid., 9.
[97] Ibid., 4.
[98] European Commission (COM), "Commission Staff Working Document: Refit Evaluation of the EU Legal Framework against Facilitation of Unauthorised Entry, Transit and Residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA) ('REFIT Evaluation'), SWD (2017) 117 Final," March 22, 2017, 3.
[99] Ibid.
[100] Sanchez, "Critical Perspectives on Clandestine Migration Facilitation." Admittedly Sanchez bases her overview on a comparison of research outcomes from all around the world. Some of the conclusions provided must thus not necessarily hold for the recent movements along the Western Balkan route. Meanwhile, in the absence of comparable research on this particular geographical area, the overview provided by Sanchez can serve as useful guiding tool as to the possible patterns of smuggling on this route.
[101] Ibid., 12.

According to Sanchez, however, the problem is not only the lack of data as such but also the fact that most data comes from law enforcement agencies.[102] Consequently, smuggling is then depicted primarily in the context of criminal activities.[103] Following Sanchez, the problem is with smugglers being presented mainly as "callous, greedy, and violent"[104], "almost monolithically depicted as men from the Global South organized in webs of organized criminals whose transnational reach allows them to prey on migrants and asylum seekers' vulnerabilities."[105] Narratives of irregular migration are then dominated by "dichotomist scripts of smugglers as predators and migrants and asylum seekers as victims."[106] According to Sanchez, these neglect the perspectives of those "who rely on smugglers for their mobility."[107] Consulting the critical scholarship on human smuggling, Sanchez argues that "the relationships that emerge between smugglers and those who rely on their services are much more complex, and quite often, significantly less heinous than what media and law enforcement suggest."[108] And most importantly, despite the real and alleged risks, there is a "systematic demand" for smuggling services.[109]

How can the competing narratives be reconciled? There is no doubt that certain actors offering smuggling services form part of bigger networks engaged in organized criminal activities and that some smugglers will try to use the refugees' situation to their own profit.[110] Moreover, elements of coercive behaviour, use of force or threat of use of force by the smugglers were reported by refugees.[111] And some traffickers may present themselves as smugglers to the

[102] Ibid. According to Sanchez, law enforcement agencies "rely on the most dramatic of failed clandestine journeys to further justify enforcement practice."
[103] Ibid.
[104] Ibid., 9.
[105] Ibid.
[106] Ibid., 10.
[107] Ibid.
[108] Ibid., 9.
[109] Ibid., 12.
[110] This was also admitted and recognized by the critical scholarship. See Ibid., 20.
[111] Ibid.

refugees, in order to lure them in their networks, meaning that these categories may overlap in practice. Nevertheless, in the context of the present research it is important to note that some smugglers – as well as some of their clients – understand smuggling also as nothing more than a provision of a service, for which there is a clear demand. In the words of a Syrian refugee: "Smugglers are neither good nor evil. You pay for a service and you get what you pay for."[112]

1.6. Why Decriminalize Humanitarian Smuggling

The competing narratives and lack of clarity on what is smuggling and how it operates poses a significant challenge when searching for appropriate policy responses to the phenomenon. While smugglers continue being depicted mainly as abhorrent, callous and greedy criminals in the official records and public discourse,[113] the fight against smuggling is characterized by inherent policy dilemmas vis-a-vis the protection needs of refugees.[114] This is especially true in the contexts of externally closed-off border regimes operating with a territorial notion of asylum such as the European one.[115] While under current provisions of EU law, it is impossible to apply for asylum extra-territorially, outside of EU territory, refugees in need of international protection have to find their ways to reach the EU first. This may prove a particularly challenging task in the *de facto* absence of safe and legal pathways to Europe. In the context of the EU, the services provided by smugglers thus become key, if not indispensable, to refugees' ability to ask for asylum.

In the context of the present thesis, I argue that a rights-based approach towards smuggling must follow the primary goal of safeguarding the rights of the most vulnerable – in this case

[112]See e.g."'Smugglers are neither good nor evil. You pay for a service and you get what you pay for,' stated Mohammed, a young man in his early mid-twenties from Syria, now an interpreter and social worker in Italy," in Luigi Achilli and Gabriella Sanchez, "What Does It Mean to Disrupt the Business Models of People Smugglers?," 2017, 3, http://cadmus.eui.eu/bitstream/handle/1814/46165/PB_2017_09_MPC.pdf?sequence=1.

[113] EU Action Plan against Migrant Smuggling (2015-2020) speaks of "ruthless criminal networks". European Commission (COM), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Action Plan against Migrant Smuggling (2015-2020), COM(2015) 285 Final," May 27, 2015, 1, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf.

[114] See e.g. Carrera and Guild, *Irregular Migration, Trafficking and Smuggling of Human Beings*.

[115] Provera, *The Criminalisation of Irregular Migration in the European Union*, 10.

the refugees *en route*. The service provider perspective on smuggling is crucial. It is the building block argument in favour of decriminalization of *some* forms of smuggling. If some smugglers are better to be described as service providers than criminals, not all instances of smuggling are reprehensible or should be punished. Admittedly, as has been demonstrated above, there is no doubt that certain actors offering smuggling services form part of bigger networks engaged in criminal activities. And there is no doubt that some smugglers make enormous profits from their business[116] and that they will and do try to exploit migrants, including refugees on their way to Europe.[117] In this sense, vigilance is required when trying to strike the right balance between acts to be criminalized and acts to be exempted from criminalization. And yet an overbroad, one-dimensional fight against smugglers runs the risk of deterring humanitarian assistance,[118] as humanitarian actors operate in an environment which is becoming increasingly "ambiguous, punitive and militarized."[119]

Consequently, both, an overbroad criminalization as well as an overbroad decriminalization may negatively affect the rights of the smuggled.[120] A good-faith, rights-based policy approach to smuggling would be then one allowing for protection of refugees against exploitation by

[116] Patrick Kingsley, "Trading in Souls: Inside the World of the People Smugglers," *The Guardian*, January 7, 2015, sec. World news, https://www.theguardian.com/world/2015/jan/07/-sp-trading-souls-inside-world-people-smugglers.

[117] E.g. the current situation in Libya appears particularly dire at the moment. "The Migrant Slave Trade Is Booming in Libya. Why Is the World Ignoring It?," *The Guardian*, February 20, 2017, sec. Opinion, https://www.theguardian.com/commentisfree/2017/feb/20/migrant-slave-trade-libya-europe?CMP=share_btn_tw.

[118] See e.g. Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 56–60. Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community."Ibid. Allsopp and Manieri, "The EU Anti-Smuggling Framework: Direct and Indirect Effects on the Provision of Humanitarian Assistance to Irregular Migrants." Provera, *The Criminalisation of Irregular Migration in the European Union*.

[119] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*. Compare also with Watson, who argues that the criminalization of smuggling is a form of migration management. In line with the critical scholarship mentioned above, Watson suggests that smuggling narratives rely on three mutually exclusive categories: smugglers v humanitarians, legal vs "illegal" entry and agents vs victims. These narratives not only reduce the ambiguity of irregular migration but also enable states to redefine humanitarian practices, deny their own culpability and legitimize harm. See Scott Watson, "The Criminalization of Human and Humanitarian Smuggling," *Migration, Mobility, & Displacement* 1, no. 1 (May 25, 2015), https://journals.uvic.ca/index.php/mmd/article/view/13273.

[120] Compare Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 12.

criminals, while at the same time ensuring that humanitarian actors remain unhindered in their activities aiming at safeguarding refugees' fundamental rights.

Considering the above, the starting point of the present thesis is that individuals engaged in acts of *prima facie* humanitarian smuggling – as defined in the previous parts of the Chapter – should be decriminalized, unless the presumption of humanitarian motives is rebutted. From a rights-based perspective, the action of the flight helper is understood as morally defensible; it aims at safeguarding the rights of the refugee, while generating only limited risk of harm for the rights of others or other societal goods. Against the background of these considerations, the thesis searches for arguments enabling to narrow down the personal scope of the existing criminalization provisions and exempt flight helpers from their application.

1.7. Self-Positioning of the Author

Inspired by critical feminist scholarship on possible biases to objectivity in knowledge production, I believe the positionality of both the researcher and the researched subject are of great importance.[121] For considerations of academic honesty, I thus consider it important to mention that I have been involved in a range of activities relating to refugees and migrant's rights in the past five years, including campaigning, social and legal assistance as well as non-violent direct actions. Between 2015 and 2016, I was part of the Federation of Young European Greens (FYEG) Working Group on Migration. In early 2016, I had the chance to work together with and alongside refugees as a volunteer during my two short-term stays in Belgrade and Idomeni. As of May 2017, I consider myself lucky and grateful to be on the board of FYEG

[121] The argument goes that the knowledge of the researcher is always situated and shaped by the circumstances and conditions in which it is being produced. To mediate the bias, the researcher should acknowledge their partiality and critically reflect on its own position on the research context. Compare e.g. Linda McDowell, "Doing Gender: Feminism, Feminists and Research Methods in Human Geography," *Transactions of the Institute of British Geographers* 17, no. 4 (1992): 399–416, doi:10.2307/622707; Gillian Rose, "Situating Knowledges: Positionality, Reflexivities and Other Tactics," *Progress in Human Geography* 21, no. 3 (1997): 305–320.

Executive Committee. These experiences, together with my political convictions, have certainly impacted the way I approach the question at stake in the present thesis.

1.8. Chapter I Summary

The present chapter has presented the overall methodology of the thesis and the underlying notions as they are being understood and employed by the author in the context of the present work. It has also provided the reader with an insight in the history of civilian refugee assistance in Europe, as well as an overview of the current smuggling research. Most importantly, Chapter I has presented the key normative argument in favour of decriminalizing flight helpers, which is the starting point of the present work. In this sense, Chapter I constitutes the basic building block of the present work and will be further build upon in the following parts of the thesis.

Chapter II: Creating the Gap: Humanitarian Smuggling in International Law

The international legal framework relating to the issues at stake in the present thesis is shaped by at least three distinct branches of international law: international refugee law, international criminal law and the law of the sea.[122] In search for a congruent answer, Chapter II discusses questions pertinent to the criminalization of flight helpers from the – at times contradictory – perspectives of these three disciplines.

2.1. The 1951 Refugee Convention and its 1967 Protocol

The single most important international legal document in the area of refugee law is without any doubts the 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention")[123] and its 1967 Protocol Relating to the Status of Refugees ("1967 Protocol")[124].

Considering that the term "refugee" and "migrant" remained contested in the public discourse throughout the "refugee crisis",[125] it appears useful to allow for a brief discussion on the applicability of the 1951 Refugee Convention to the situations on the Western Balkan route between 2015 and 2016, before going into considerations on its substantive provisions.

2.1.1. Applicability of the 1951 Refugee Convention to the Western Balkan Route 2015-2016

The situation on the Western Balkan route between 2015 and 2016 can be perhaps most accurately described as one involving "mixed flows", including "refugees, asylum-seekers,

[122] Similarly Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (New York, NY: Cambridge University Press, 2014), 23.
[123] United Nations General Assembly (UN GA), "Convention Relating to the Status of Refugees ("1951 Refugee Convention") (18 July 1951), UNTS Vol. 189, P. 137."
[124] United Nations General Assembly (UN GA), "Protocol Relating to the Status of Refugees ('1967 Protocol') (31 January 1967), UNTS Vol. 606, P. 267."
[125] Compare United Nations High Commissioner for Refugees (UNHCR), "UNHCR Viewpoint"; Malone, "Why Al Jazeera Will Not Say Mediterranean 'Migrants'"; Sengupta, "Migrant or Refugee?"; Taylor, "Is It Time to Ditch the Word 'migrant'?"; Marsh, "We Deride Them as 'migrants'. Why Not Call Them People?"; Ruz, "The Battle over the Words Used to Describe Migrants"; Migrants' Rights Network (MRN), "Al Jazeera Will Not Say Mediterranean 'Migrants', but We Should"; Carling, "Refugees Are Also Migrants: All Migrants Matter."

economic migrants and other migrants".[126] Under international and EU law as it stands today, two groups among incomers in this period would be entitled to international protection. The first would be refugees within the meaning of the 1951 Refugee Convention.

The 1951 Refugee Convention as amended by the 1967 Protocol defines the term refugee in art. 1 lit. A II as follows:

> [T]he term refugee shall apply to any person who […][127] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country[…].[128]

Admittedly, the black letter wording of the 1951 definition generally omits war refugees, individuals fleeing situations of generalized violence, large-scale human rights abuses or any other displacement resulting from other than the Refugee Convention grounds.[129] As

[126] International Organization for Migration (IOM), International Migration Law: Glossary on Migration. International Organization for Migration, Geneva, 2004, p. 42 <http://www.iomvienna.at/sites/default/files/IML_1_EN.pdf> accessed 9 December 2016.

[127] Originally, the definition in art. 1 lit. A II Refugee Convention included a temporary limitation: "[a]s a result of events occurring before 1 January 1951." This was left out with the 1967 Protocol Relating to the Status of Refugees (1967 Protocol). See art. 1 II 1967 Protocol: "For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words 'a result of such events', in article 1 A (2) were omitted." The 1967 Protocol furthermore more strikes out any geographical limitations on the applicability of the provisions of the Refugee Convention. See art. 1 III 1967 Protocol: "The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol." See United Nations General Assembly (UN GA), "Protocol Relating to the Status of Refugees ('1967 Protocol') (31 January 1967), UNTS Vol. 606, P. 267."

[128] Art. 1 lit. A II 1951 Refugee Convention. United Nations General Assembly (UN GA), "Convention Relating to the Status of Refugees ("1951 Refugee Convention") (18 July 1951), UNTS Vol. 189, P. 137." For the purposes of the present thesis, I omit the situation of stateless, defined in art. 1 lit. A II as a person "who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[129] Nevertheless, individuals fleeing war might fall within the ambits of the Convention, e.g. in cases where the parties of a conflict fight for one of the Convention grounds. See Volker Türk, Alice Edwards, and Cornelis Wouters, *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press, 2017).

Kugelmann notes in the Max Planck Encyclopedia of Public International Law, the responsibility of the United Nations High Commissioner for Refugees ("UNHCR") was, however, later extended *ratione personae* "to displaced persons in refugee-like situations".[130] Individuals in comparable situations also gained protection with the subsequently adopted regional protection mechanisms.[131]

Within the ambits of EU law war refugees would fall under the so-called subsidiary protection, established with the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("Qualification Directive I").[132]

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[130] Dieter Kugelmann, "Refugees," *Max Planck Encyclopedia of Public International Law (MPEPIL)*, March 2010, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e866.

[131] See e.g. Art. 1 II Convention Governing Certain Aspects of Refugee Problems in Africa ("OAU Refugee Convention"): "The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." Compare also with par. 3 Cartagena Declaration on Refugees:"[I]n view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee […]. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." See Organization of African Unity (OAU), "Convention Governing Certain Aspects of Refugee Problems in Africa ('OAU Refugee Convention'), 10 September 1969, UNTS Vol. 1001, P. 45," n.d.; "Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Held at Cartagena de Indias, Colombia, 19-22 November 1984 ('Cartagena Declaration')," n.d., http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html.

[132] "Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (30 September 2004) ('Qualification Directive I'), OJ L 304/12," n.d., accessed August 4, 2017.The Qualification Directive I was replaced in 2011 with the Qualification Directive II. "Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) ('Qualification Directive II') (20 December 2011), OJ L 337/9," n.d. Besides, individuals entering Europe on the Western Balkan route between 2015-2016 could fall under definition of "displaced persons" within the meaning of art. 2 lit. c Temporary Protection Directive. The Temporary Protection Directive applies to displaced persons in situations of "mass influx". It defines displaces persons as "third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i)

Art. 2 lit. e Qualification Directive I defines a person eligible for subsidiary protection as:

> [A] third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm […] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country[133]

The level of protection to be awarded to individuals under EU subsidiary protection is "complementary and additional" to that awarded to refugees within the meaning of the Refugee Convention.[134] Nevertheless, considering that, "[p]ersons in a refugee-like situation do […] fall under the scope of international refugee law,"[135] the protection awarded to persons under

persons who have fled areas of armed conflict or endemic violence;(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights." However, the Temporary Protection Directive has never been invoked and made applicable in the context of the "refugee crisis" as required by art. 5 I of the Directive, which states that: "[t]he existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council." See "Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof ('EU Temporary Protection Directive') (7 August 2001) OJ L 212/12.," n.d.

[133] Art. 2 lit. e Qualification Directive I. "Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (30 September 2004) ('Qualification Directive I'), OJ L 304/12."The same definition can be found in Art. 2 lit. f Qualification Directive II, which states that: "'person eligible for subsidiary protection' means a third- country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country." "Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) ('Qualification Directive II') (20 December 2011), OJ L 337/9."

[134] Recital 33 clause 2 Qualification Directive: "Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention." "Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) ('Qualification Directive II') (20 December 2011), OJ L 337/9."

[135] Kugelmann, "Refugees."

subsidiary protection is analogous at minimum as far as customary law standards are concerned.[136] These include, among others, the duty of *non-refoulement* which is together with the prohibition to penalize entry at the core of the discussion in the following Sub-Chapter.[137]

Admittedly, a particular difficulty is posed in situations of so-called mixed flows in contexts of larger-scale arrivals, where neither states nor humanitarian non-state actors are practically in a position to swiftly verify the extent to which every individual's circumstances fulfil the criteria provided by the Convention or EU law, in order to determine their scope of obligations vis-a-vis the incomers and eventually regulate their behaviour. Nevertheless, from a pre-emptive, rights-based perspective, a strong argument can be made in favour of referring to the individuals entering Europe within the particular time frame and geographical area at stake in the present thesis as "refugees" within the meaning of the 1951 Refugee Convention and making the Convention provisions applicable to them.

The administrative act of awarding a person international protection is merely declaratory as opposed to being constitutive of the individual's "refugeeness". This results from the usage of "shall apply" in the definition of art. 1 lit. A II of the Refugee Convention and has been reaffirmed by the UNHCR, who states that:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. […] Recognition of his refugee status

[136] See also art. 20 I Qualification Directive II: "This Chapter shall be without prejudice to the rights laid down in the Geneva Convention. Art. 21 I Qualification Directive II: "Member States shall respect the principle of non-refoulement in accordance with their international obligations." "Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) ('Qualification Directive II') (20 December 2011), OJ L 337/9."

[137] Guy S. Goodwin-Gill, "The International Law of Refugee Protection," in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasmiyeh et al. (Oxford University Press, 2014), 5, http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021; Guy S. Goodwin-Gill and Jane McAdam, "Part 2 Asylum, 5 Non-Refoulement in the 1951 Refugee Convention," *Oxford Scholarly Authorities on International Law (OSAIL)*, March 22, 2007, http://opil.ouplaw.com/view/10.1093/law/9780199207633.001.0001/law-9780199207633-chapter-5.

> does not therefore make him a refugee, but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.[138]

Thus, a person is a refugee from the moment when his/her/their individual circumstances coincide with the criteria provided by the Convention. While the Convention "does not grant all rights immediately and absolutely to all refugees", all refugees are entitled to the protection of at least a number of "core rights" under the Convention from the very moment they become refugees.[139] Considering these standards, it can be concluded that in absence of certainty as to whether or not individuals are refugees, they should be regarded and treated as such in order to prevent potential violations of rights pertinent to them. Consequently, in the scope of the present thesis, the individuals entering Europe on the Western Balkan route between 2015 and 2016 are be regarded as *prima facie* refugees within the meaning of the 1951 Refugee Convention.

2.1.2. Non-Penalization of Refugees' Irregular Entry; Non-Refoulement

While the primary goal of the Convention and its Protocol is the establishment of protection guarantees for refugees, both instruments remain silent on the issue of smuggling. Nevertheless, some general implications for humanitarian smuggling can be drawn from the Convention's provision on refugees' irregular entry in art. 31 Refugee Convention and *non-refoulement* in art. 33 of the Convention.

Art. 31 I Refugee Convention restricts the ability of states to penalize the irregular entry or presence of refugees in their territory:

[138] United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV. 3* (Geneva, 1979), para. 28, http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.
[139] Hathaway, *The Rights of Refugees under International Law*, 11–12.

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[140]

The obligation not to penalize can be understood as an expression of the fact that irregular entry should not give rise to illegality.[141] In this regard, the question arises in how far could the non-penalization provisions of art. 31 analogically stretch to persons assisting refugees. While the wording of art. 31 clearly leaves out any other subjects than refugees themselves, the *travaux préparatoires* and deliberations on the object and purpose of the Convention may provide additional points of consideration for both sides of the argument in the context of humanitarian smuggling.

The minutes from the debates surrounding the drafting of the 1951 Refugee Convention reveal a stark interconnectedness between issues relating to penalization of entry and its direct prevention. [142] The prohibition of preventing entry later became a separate article, namely the aforementioned art. 33 of the Convention establishing the principle of *non-refoulement.* It requires that a refugee shall not be expelled or returned "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[143]

[140] Art. 31 I 1951 Refugee Convention.
[141] See James C. Hathaway, The Rights of Refugees under International Law, 2005, pp. 405–412.
[142] United Nations High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, 201–20, accessed February 16, 2017, http://www.refworld.org/docid/53e1dd114.html.
[143] "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Art. 33 I 1951 Refugee Convention. United Nations General

The *travaux préparatoires* give indices of a lengthy debate, with several proposals being discussed by the drafters. [144] The idea of exempting refugees from penalization following irregular entry was not self-explanatory. For example, the French delegation understood non-penalization of the initial entry as a "direct corollary to the right of asylum," yet opposed the idea of non-penalizing secondary movements.[145] In the end, it appears that is was the personal story of the then UN High Commissioner for Refugees, Gerrit Jan van Heuven Goedhart, which convinced the drafters that at times even multiple irregular entry might be unavoidable for refugees to escape threats or hostile conditions in their countries of origin, as well as in the first countries of arrival.[146]

Yet, despite the fact that already at a moment when then Convention was being negotiated there was clear evidence that refugees are often dependent on external assistance in crossing international borders, refugees remained the one and only regulatory subject of art. 31 Refugee Convention. It was only the Swiss delegation which brought into the debate its domestic legal provisions on non-penalization of individuals assisting refugees, stating that: "Swiss Federal laws did not regard any person assisting [a refugee] as liable to being punished, provided his motive was above board."[147] The US delegation considered the exemptions of humanitarian workers from the ambits of art. 31 "a possible oversight in the drafting," yet did not express itself in support of modifying the provisions.[148] Similarly, the French delegation considered assistance in border crossing "an obvious humanitarian duty" yet expressed fears that refugee support organizations would transform into "organizations for the illegal crossing of

Assembly (UN GA), "Convention Relating to the Status of Refugees ("1951 Refugee Convention") (18 July 1951), UNTS Vol. 189, P. 137."

[144] United Nations High Commissioner for Refugees (UNHCR), *Refugee Convention Commentary*, 201–20.

[145] Ibid., 215.

[146] Ibid.

[147] Ibid., 213.

[148] Cited after Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 13.

frontiers."[149] Upon the request of representatives of France, United States and Venezuela the idea of non-penalization of assistance in irregularly entry was recorded in the meeting minutes and later included the Drafting Committee report.[150] Nevertheless, it remained excluded from the regulatory framework of art. 31.

Thus, the *travaux préparatoires* offer two possible conclusions with regard to acts of humanitarian assistance. On one hand, it can be argued that since humanitarian smuggling was not included in the Convention despite the phenomenon being known to the drafters, there was not enough will to unequivocally bring humanitarian smuggling within the domain of exceptions. On the other hand, one could argue that while the drafters were unsure of how the phenomenon should be regulated, they did still consider it important and relevant enough to ask explicitly for it to be included in the minutes, perhaps in order to provide some basis for future deliberations. Hathaway offers a third explanation, stating simply that "[t]he drafters assumed […] that governments would not exercise their authority to penalize those assisting refugees to enter an asylum country" except where there would be sufficient evidence the individuals did so "in an exploitative way, or otherwise in bad faith."[151] Landry goes one step further, arguing that the discussions among the drafters give a clear indication "that there was an assumption that governments should not, and would not, criminalize."[152]

It seems hard to follow on which basis do Hathaway and Landry draw their conclusion as the *travaux préparatoires* do not seem to provide much of a background on the discussions and reasoning for not including humanitarian assistance in the final draft.[153] What can thus be

[149] Ibid.
[150] United Nations High Commissioner for Refugees (UNHCR), *Refugee Convention Commentary*, 213–14.
[151] Hathaway, *The Rights of Refugees under International Law*, 405.
[152] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 13.
[153] See United Nations High Commissioner for Refugees (UNHCR), Refugee Convention Commentary, 201–20. It is possible, however, that Hathaway and Landry draw their conclusion on the basis of material not included in the compilation consulted in the context of the present work.

concluded from the *travaux préparatoires* is that they do not provide a sufficient argument for neither criminalizing nor decriminalizing humanitarian assistance to refugees in irregular border crossing. Nevertheless, what the *travaux préparatoires* do provide is at least a starting point for deliberations as regards the meaning, object and purpose of the relevant provisions of the 1951 Refugee Convention.

According to Hathaway, the prohibition of punishing refugees for unauthorized entry is the "most important innovation of the 1951 Refugee Convention" and is tightly connected to the duty of *non-refoulement*. Namely, Hathaway argues, in the Convention logic, the state's duty of *non-refoulement* creates a corresponding "entitlement […] to enter" for any refugee.[154]

Considering that the non-penalization of refugees' entry results from an understanding of the necessity to cross borders irregularly and considering further that in the absence of safe and legal ways to Europe, it is in most cases equally indispensable for refugees to rely on external assistance in their journey, an argument can be made in favour of non-penalization of such assistance. What is more, according to Hathaway, the reasons for excluding refugees from punishment of irregular entry were way less lofty and way more opportunistic. The state representative were well aware that in the opposite case, refugees would turn to irregularity – a situation they were better off avoiding.[155] It is for this reason, among others, that art. 31 requires the refugees to register with the domestic authorities "without delay".[156] Analogically opportunistic arguments can be made for including flight helpers in the scope of non-penalization. As the situation in the Western Balkan 2015-16 has demonstrated, in cases of larger-scale arrivals over short periods of time, states might become dependent on the assistance of volunteers in managing the situation.[157] Creating a legal environment in which

[154] Hathaway, The Rights of Refugees under International Law, 386.
[155] Ibid., 388.
[156] Art. 31 1 1951 Refugee Convention. United Nations General Assembly (UN GA), "Convention Relating to the Status of Refugees ("1951 Refugee Convention") (18 July 1951), UNTS Vol. 189, P. 137."
[157] See e.g. Bouckaert, "Lesbos' Refugee Disaster"; Wall, "The Volunteer Effect."

the flight helpers can operate without the fear of being criminalized thus becomes instrumental for the state in order to preserve its image as a crisis-managing sovereign. In this regard, decriminalization opens the door for assuming regulatory power and oversight vis-a-vis actors who would otherwise continue their activities irregularly.[158] It might thus be well in the interest of states to decriminalize flight helpers for the same reasons why they decriminalize refugees.

At least two important limitations to this argument result from how is art. 31 being reflected and applied in the practice of states. The first limitation to the argument in favour of expanding the applicability of art. 31 to flight helpers results from the expression "coming directly from a territory where their life or freedom was threatened."[159] In this context, secondary movements prove to be a thorny issue, as the nature and scope of rights pertinent to refugees in cases of subsequent movements from the first country fled into keeps being challenged in states' practice.

Admittedly, refugees only rarely reach EU territory coming *stricto sensu* directly from the country they have fled. Typically, refugees would transit multiple countries before reaching EU shores and perhaps even reside temporarily in some of them. This has prompted some politicians to argue that refugees do not have any right to enter EU territory and that they should stay in the countries of first arrival or transit. [160]

[158] Note that some, if not majority, of the humanitarian non-state actors may, however, oppose the fact that the states strive to assume regulatory powers over their activities. See e.g. The Observatory for the Protection of Human Rights Defenders (OBS), "Greece: Ongoing Crackdown on Civil Society Providing Humanitarian Assistance to Migrants and Asylum Seekers / GRE 001 / 0416 / OBS 036 Judicial Harassment / Threats - Restrictions to Freedom of Association," April 27, 2016, http://www.omct.org/human-rights-defenders/urgent-interventions/greece/2016/04/d23733/; Statewatch, "NGOs and Volunteers Helping Refugees in Greece to Be Placed under State Control," February 21, 2016, http://www.statewatch.org/news/2016/feb/eu-med-crisis-volunteers-state.htm.

[159] Art. 31 I 1951 Refugee Convention. United Nations General Assembly (UN GA), "Convention Relating to the Status of Refugees ("1951 Refugee Convention") (18 July 1951), UNTS Vol. 189, P. 137."

[160] Keiligh Baker and Simon Tomlinson, "Hungary PM: 'They're NOT Refugees, They're Migrants after German Life'," *Daily Mail*, September 7, 2015, http://www.dailymail.co.uk/news/article-3224896/Austria-brings-border-checks-stop-migrants-entering-Europe.html.

At first glance, the black letter wording of the Convention may suggest that secondary movements do not fall within the ambits of art. 31. Hathaway and Foster argue that arrivals shall be considered direct "as long as the refugee provides a plausible explanation for not having sought protection in such [safe] states."[161] Goodwin Gill states that "refugees are not required to have come directly from their *country of origin.*"[162] Nevertheless, "other countries or territories passed through should also have constituted actual or potential threats to life or freedom."[163] Hathaway argues along the same line, stating that art. 31 remains applicable in cases of secondary movements when there is risk of persecution in the first country of refuge.[164]

In the context of intra-EU movements, it might, however, prove difficult for refugees to argue "actual or potential threats to life or freedoms" in the countries transited, as in fact the whole purpose of creating the Common European Asylum System ("CEAS") was to bring the minimum standards existing in laws and practices across EU MSs to a comparable level.[165] The assumption of comparable protection standards across EU forms the basis for responsibility sharing under Dublin Regulation in its current form (Dublin III Regulation).[166] The Dublin Regulation thus can be understood as an expression of the fact that from the

161 James C. Hathaway and Michelle Foster, The Law of Refugee Status, 2nd ed (Cambridge: Cambridge University Press, 2014), 29.
162 Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed (Oxford: Clarendon Press, 1996), 152.
163 Ibid.
164 Hathaway, The Rights of Refugees under International Law, 394.
165 See e.g. the European Commission's webpage, which states that: "Asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar." European Commission (COM), "Migration and Home Affairs - Common European Asylum System," Text, (December 6, 2016), https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.
166 The Dublin Regulation went so-far through two recast procedures and evolved from Dublin I to todays' Dublin III Regulation. A new proposal for amendments was submitted by the Commission in 2016. "Regulation (EU) No 604/2013 of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person of ('Dublin III Regulation') (26 June 2013) OJ L 180/31.," n.d. "European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast) ('Dublin IV Regulation Proposal¨') (4 Mai 2016), <http://ec.europa.eu/dgs/home-Affairs/what-We-Do/policies/european-Agenda-Migration/proposal-Implementation-package/docs/20160504/dublin_reform_proposal_en.pdf> Accessed 30 September 2016.," n.d.

perspective of states, secondary movements are undesirable, as the protection standards are considered unified.[167] In this sense, the fact that the protection standards are considered to a large extent unified within the EU presents a considerable obstacle towards expanding the applicability of art. 31 Refugee Convention to intra-EU movements, as refugees may face difficulties for providing "plausible explanation" for not seeking protection in the first countries fled into. An exception could be transits through countries such as Greece, Hungary, or perhaps Italy, where the actual or potential threat to life or freedoms could be argued on the basis of existing judgements of the European Court of Human Rights ("ECHR"),[168] UNHCR statements[169] or human rights reports.[170] In sum, the fact that the applicability of art. 31 remains contested vis-à-vis intra-EU movements presents the first obstacle towards relying on the Refugee Convention when searching for arguments for decriminalization of humanitarian smuggling.

The second obstacle towards expanding the prohibition to penalize entry to flight helpers is posed by the relative, or perhaps relativized, nature of the guarantees provided under art. 31. While the Refugee Convention does not expressly name any exceptions or limitations to art. 31, Hathaway argues that the state practice suggests the prohibition to penalize is not understood in absolute terms. In practice, a number of countries throughout the world apply limitations on refugees' freedom of movement. Detention for identity verification,

[167] Consider e.g. the Commission's aims with regard to a new recast Dublin IV Proposal. The Commission states expressly that the aim fo the proposal is to prevent secondary movements. European Commission (COM), "Migration and Home Affairs - Country Responsible for Asylum Application (Dublin)," Text, (December 6, 2016), https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en.

[168] M.S.S. v. Belgium and Greece, App. No. 30696/09 (2011) ECHR (n.d.), accessed August 7, 2017. See also Tarakhel v. Switzerland, App. No. 29217/12 (2014) ECHR (n.d.).

[169] Cécile Pouilly, "UNHCR Urges Suspension of Transfers of Asylum-Seekers to Hungary under Dublin," *UNHCR*, April 10, 2017, http://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html.

[170]European Union Agency for Fundamental Rights (FRA), *Fundamental Rights at Europe's Southern Sea Borders* (Luxembourg: European Union Publications Office, 2013). It should be also noted that the whole Dublin system has been subjected to criticism from academia and at times described as "responsibility shifting". Minos Mouzourakis, "We Need to Talk about Dublin: Responsibility under the Dublin System as a Blockage to Asylum–burden Sharing in the European Union," *Refugee Studies Centre (RSC)*, Working Paper Series, 105 (2014), https://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf.

Residenzfplicht – the prohibition to leave a specific area – or financial incentives to stay in concrete reception centers are according to Hathaway all expressions of the states' will to sanction irregular entry. [171] The fact that the guarantees under art. 31 are not absolute even for the original right holders – the refugees – creates another difficulty when trying to stretch its applicability to other groups not expressly mentioned by the Convention.

However, Hathaway also notes that "[t]o the extent such practices [of de facto penalization] expose persons who are in fact refugees […] to the risk of return to persecution, they violate the duty of *non-refoulement*."[172] In this regard, it is worth mentioning the newest academic attempt at clarifying states' obligations vis-a-vis refugees' right to enter. The Michigan Guidelines on Refugee Freedom of Movement developed during the Eighth Colloquium on Challenges in International Refugee Law in early 2017,[173] state that "[a] good faith understanding of the duty of *non-refoulement* requires states to provide reasonable access and opportunity for a protection claim to be made."[174] What is more, "[a]s more refugees arrive at a state's border, or as those arriving face more imminent risks, access to protection is reasonable only if it is responsive to such additional or more acute needs."[175]

Considering the long-term, detrimental effects the criminalization of humanitarian assistance can have on the society as a whole, an interesting argument could be made in this regard.[176]

[171] Hathaway, *The Rights of Refugees under International Law*, 370–78. In this regard, Provera argues that also EU law gives preference to refugees arriving regularly. This preference is manifested in "a distinction in treatment between border and other applicants" which results in "the possibility of Member States to severely derogate from guarantees rights to which border applicants might otherwise be entitled." See

[172] Ibid., 387. Interestingly, in Hathaway's view, the non-penalization of entry is tightly connected to the duty of non-refoulement. Namely, Hathaway argues, in the Convention logic, the state's duty of non-refoulement creates a corresponding "entitlement […] to enter" for any refugee. See Ibid., 386.

[173] "Michigan Guidelines on Refugee Freedom of Movement, Eighth Colloquium on Challenges in International Refugee Law, March 31 and April 2, 2017, University of Michigan - Program in Refugee and Asylum Law, Michigan, USA.," n.d.

[174] Ibid. par. 10.

[175] Ibid. par. 11.

[176] See e.g. Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 56–60. Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community."

Criminalizing those who provide assistance to refugees appears at least questionable vis-a-vis the obligation to provide for "reasonable access and opportunity," in particular in a context where the states appear unable to attend to the "additional or more acute needs". Nevertheless, to what extent do the effects of criminalizing flight helpers expose in their consequences refugees to a risk of return to persecution appears, questionable. The criminalization of humanitarian assistance makes without any doubts refugees' journey harder. Nevertheless, the link between a potential chilling effect resulting from the criminalization of humanitarian assistance and the risk of return to persecution if humanitarian assistance is no longer provided seems too weak to argue that criminalization of flight helpers automatically amounts to *refoulement*.

All in all, due regard should be given to the fact that the exact contours of the entitlements under art. 31 remain disputed in even in relation to the original rights-holders – refugees. However, at least two remarks can be submitted which somewhat relativize the limitation concerns. First and foremost, allowing state practice, which might be in fact in breach of a right, to become an argument on the content of that right appears as a slippery slope. In particular in the context of human rights, it appears important that the paramount source of reflection on the content of rights is the wording of the relevant treaties, with actual state practice providing merely secondary arguments in support of one view or the other.[177] Second, on the conceptual level, the question of who are the rights-holders under art. 31 is qualitatively distinct from what is the scope of their rights under the same article. At the very least, the potential limitations on the extent rights under art. 31 should not definitively pre-determine our thinking on who the rights holders are. Admittedly, concluding that art. 31 *must* be interpreted in a way so as to include flight helpers goes clearly against the original text of the Convention.

[177] For an opposing view on the importance of state consent for the norm creation in international law, see e.g. Gallagher and David, *The International Law of Migrant Smuggling*, 24. See also Hathaway, *The Rights of Refugees under International Law*, 68–74.

As a principle, however, it appears at least contradictory to exempt refugees from punishment of irregular entry while criminalizing those assisting them.[178]

2.2. UN Smuggling Protocol

On the international level, the anti-smuggling regime is notably shaped by the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air ("Smuggling Protocol")[179] which is together with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children ("Trafficking Protocol"),[180] both supplement to the United Nations Convention against Transnational Organized Crime ("UN TOC").[181] Since the adoption of all three instruments in 2000, the TOC has been ratified by 187 parties,[182] the Smuggling Protocol by 144 parties[183] and the Trafficking Protocol by 170 parties.[184] The Convention and both of the Protocols have been ratified by the EU and separately by all its member states with the exception of Ireland which has so far not ratified the Smuggling Protocol.[185]

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[178] Compare Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 13.

[179] "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."

[180] "United Nations General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children Supplementing the United Nations Convention against Transnational Organized ('Trafficking Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2237, P. 319."

[181] "United Nations General Assembly, Convention against Transnational Organized Crime ('UN TOC') (15 November 2000), A/RES/55/25, UNTS Vol. 2225, P. 209."

[182] United Nations (UN), "United Nations Treaty Collection, Chapter XVIII: Penal Matters, 12. United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, Status as at June 28, 2017.," accessed June 28, 2017, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&clang=_en.

[183] United Nations (UN), "United Nations Treaty Collection, Chapter XVIII: Penal Matters, 12. B Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, Status as at June 28, 2017.," accessed June 28, 2017, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-b&chapter=18&clang=_en.

[184] United Nations (UN), "United Nations Treaty Collection, Chapter XVIII: Penal Matters, 12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, Status as at June 28, 2017.," accessed June 28, 2017, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&clang=_en.

[185] United Nations (UN), "United Nations Treaty Collection, Chapter XVIII: Penal Matters, 12. United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, Status as at June 28, 2017.";

The existence of two separate Protocols on what appears to be an interlinked issue mirrors the understanding of the drafters that smuggling as a criminal offence was qualitatively distinct from trafficking. For the purposes of conceptual clarity, it appears thus useful to start the analyses of the international anti-smuggling framework by looking into the definitional differences between smuggling and trafficking as established by the two Protocols.

2.2.1. Trafficking versus Smuggling

Art. 3 lit a Smuggling Protocol identifies smuggling as:

> [T]he 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.[186]

Art. 3 lit. b Smuggling Protocol defines "illegal entry" as "crossing borders without complying with the necessary requirements for legal entry into the receiving State."

In contrast to that, art. 3 lit. a Trafficking Protocol understands trafficking as:

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[187]

United Nations (UN), "United Nations Treaty Collection, Chapter XVIII: Penal Matters, 12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, Status as at June 28, 2017."; United Nations (UN), "United Nations Treaty Collection, Chapter XVIII: Penal Matters, 12. B Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, Status as at June 28, 2017."

[186] Art. 3 lit. a Smuggling Protocol. "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."

[187] Art. 3 lit. a Trafficking Protocol. "United Nations General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children Supplementing the United Nations Convention against Transnational Organized ('Trafficking Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2237, P. 319."

According to art. 3 lit. a Trafficking Protocol, exploitation means:

> [A]t a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[188]

The two definitions illustrate that from the perspective of international law, smuggling is a qualitatively different offence than trafficking.[189] Accordingly, the two offenses thus differ in at least four respects: (1) scope and definition of the action, (2) aim of the action, (3) means and (4) transnationality. [190]

The term trafficking would thus typically relate to situations where individuals are being transferred against their knowledge or will to a place where they are being put into slavery-like conditions, sexual exploitation or forced labour. Trafficking, in the optic of the Trafficking Protocol, may encompass a variety of different activities, including "recruitment, transportation, transfer, harbouring or receipt." The threat or use of force or coercion or other deceitful means as well as the exploitation after the transit are central to trafficking and distinguish it from smuggling, as the offenders assume control over the victim.[191] And indeed, the whole purpose of the business is to generate profit from those being transferred after arrival. In contrast to smuggling, trafficking may occur within the borders of one country; actual border crossing is not required for a situation to amount to trafficking.

[188] Art. 3 lit. a Trafficking Protocol. Ibid.

[189] Note that question relating to the definitional differences between the two offences should be separated from the question of practicability of dividing two interconnected legal matters into two separate legal instruments. The latter will be addressed further below in this Chapter.

[190] Compare with the European Parliament study ("LIBE-study"), which argues that in practice, the two offences differ in the following regards: (1) consent, (2) transnationality, (3) exploitation and (4) profit. The study will be referred to in greater detail in Chapter III of this work. Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 22–23.

[191] United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (New York: United Nations Publication, 2004), 339–40, http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.

In contrast to that, smuggling relates merely to the facilitation of irregular transit of people across borders. In contrast to trafficking, exploitation is not a definitional element of smuggling and, as will be discussed later, constitutes merely an aggravating circumstance.[192] Moreover, the aim of the smuggler is to obtain a financial or material benefit from the transfer itself. Smuggling thus typically involves more autonomy and at times even complicity of those being smuggled.[193] The transaction between the smuggler and the smuggled ends with arrival in the final destination.

While a number of scholars have elaborated on the technical differences between smuggling and trafficking,[194] there appears to be also an overarching consensus that both of the offences may and do overlap in practice.[195] According to a study commissioned by the European Parliament which will be discussed in greater detail in Chapter III ("LIBE-study"), "[the] smuggled migrants may become victims of trafficking; the same or similar routes can be used for trafficking and smuggling; and the conditions in which migrants are smuggled can be extremely poor, making it questionable whether smuggled migrants consented to them."[196]

While acknowledging the overlap in practice, the present work follows the distinction established in international law and the two Protocols and argues that the situations at stake in

[192] Ibid., 341.

[193] United Nations Office on Drugs and Crime (UNODC), "Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime ('Legislative Guide for the Smuggling Protocol')," in *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (New York: United Nations Publication, 2004), 341, http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.

[194] Anne T. Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010); Gallagher and David, *The International Law of Migrant Smuggling*; James C. Hathaway, "The Human Rights Quagmire of Human Trafficking," *Virginia Journal of International Law* 49 (2008): 1; Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119"; Stoyanova, *Human Trafficking and Slavery Reconsidered*. See also Sara Bellezza, Tiziana Calandrino, and Borderline-Europe - Menschenrechte ohne Grenzen e.V, *Criminalization of Flight and Escape Aid* (Hamburg: Tredition GmbH, 2017).

[195] United Nations Office on Drugs and Crime (UNODC), "Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime ('Legislative Guide for the Smuggling Protocol')," 339–40.

[196] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 22.

the present thesis fall undoubtedly within the ambits of the Smuggling Protocol – they do not involve any element of coercion during transfer or exploitation after arrival. Nevertheless, the practical overlap does pose a major difficulty when searching for an argument in favour of decriminalization of smuggling. An overboard decriminalization of smuggling may be at tension with the goal of protecting the rights of smuggled or trafficked. While keeping this dilemma in mind, the following Sub-Chapters look into the details of the two Protocols in search for arguments for decriminalizing flight helpers.

2.2.2. Financial or Other Material Benefit

The element of gain requires a special attention in the context of humanitarian smuggling, as flight helpers only rarely if ever obtain material or financial compensation, let alone benefit for assisting refugees in border-crossing.[197] Financial or material benefit is not only a definitional element of smuggling, as anchored in art. 3 lit a Smuggling Protocol. An element of gain is also mentioned in the context of states' obligation to criminalize smuggling. According to art. 6 I lit. a Smuggling Protocol:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and *in order to obtain, directly or indirectly, a financial or other material benefit*:
>
> (a) The smuggling of migrants[198]

[197] The difference between financial gain and financial compensation and the special case of paid NGOs employees is elaborated further below.

[198] Art. 6 I lit. a Smuggling Protocol. Emphasis added. In addition to smuggling as such, art. 6 I lit. b Smuggling Protocol establishes the following offences:

> (b) When committed for the purpose of enabling the smuggling of migrants:
>
> (i) Producing a fraudulent travel or identity document;
>
> (ii) Procuring, providing or possessing such a document;
>
> (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

Moreover, according to art. 6 II:

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

How can we interpret art. 6 Smuggling Protocol? Is there a strong, clear and unequivocal obligation not to criminalize humanitarian smugglers? The opinions differ. While the absence of gain could prove to be a crucial argument against the criminalization of flight helpers, the Smuggling Protocol does not provide specific guidance on required state conduct in situations where the element of gain is missing. What is more, art. 6 IV makes clear that the extent of criminalization can go beyond the offences established under art. 6 I-II, stating 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."[199]

In order to better assess the functionality of the gain element in the Protocol's definition of smuggling, we shall thus first look into the *travaux préparatoires*[200] preceding the negotiation of the TOC and the two Protocols, as well as the Legislative Guides,[201] later developed by the United Nations Office for Drugs and Crime ("UNODC"). Subsequently, we shall turn for additional perspectives to the academia.

The *travaux préparatoires* are unambiguous about the purpose of the gain element, stating that:

> The reference to 'a financial or other material benefit' […] was included in order to emphasize that the intention was to include the activities of organized criminal

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

For the purposes of conceptual clarity the present work focuses merely at offences under art. 6 I lit. a. Offences under art. 6 I lit b and art. 6 II Smuggling Protocol are left out of focus of the present thesis.See Art. 6 Smuggling Protocol. "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."

[199] Art. 6 IV Smuggling Protocol. Ibid.

[200] United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (New York: United Nations, 2006).

[201] United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*.

> groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.[202]

Likewise, the Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime ("Legislative Guide for the Smuggling Protocol") states in reference to the *travaux préparatoires* that:

> In developing the text, there was concern that the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum seekers.[203]

What is more, the Legislative Guide for the Smuggling Protocol is explicit in that:

> [T]he intention of the drafters was to require legislatures to create criminal offences that would apply to those who smuggle others for gain, but not those […] who procure the illegal entry of others for reasons other than gain, such as […] charitable organizations assisting in the movement of refugees or asylum seekers.[204]

[202] Interpretative notes on art. 3 of the Smuggling Protocol approved by the Ad Hoc Committee and contained in its report on the work of its first to eleventh sessions, A/55/383/Add.1, paras. 88-90. Cited after United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. Emphasis added.
[203] United Nations Office on Drugs and Crime (UNODC), "Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime ('Legislative Guide for the Smuggling Protocol')," 333.
[204] Ibid., 341.

All in all it can be concluded that while the Smuggling Protocol does not explicitly state it aims at excluding humanitarian assistance from the scope of its application, the inclusion of the element of financial or other material benefit in art. 6 I lit. a does provide some safeguards against the criminalization of humanitarian smuggling. As the element of gain remains further unspecified and so does the required state conduct in its absence, the safeguards remain fairly limited. An originalist reading of art. 6 I lit. a, however, makes a strong case against the criminalization of flight helpers.[205]

2.2.3. Organized Criminal Group

Art. 4 Smuggling Protocol creates further limits on the applicability of art. 6 in the context of individualized acts of assistance in border crossing. Art. 4 states that in relation to offences under art. 6, the Protocol applies, "where the offences are transnational in nature and involve an organized criminal group."[206]

Art. 2 lit. a TOC[207] identifies organized criminal group as:

> [A] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences

[205] Compare e.g. Landry, who argues that the provisions of the Smuggling Protocol imply that acts not meeting the gain threshold should not be criminalized. Such view is also advanced by Basaran, who argues that "[the] Protocols provide an, albeit implicit, protection of humanitarian acts." See Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 7–9. Basaran, "Saving Lives at Sea: Security, Law and Adverse Effects," 382.

[206] "This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences." Art. 4 Smuggling Protocol. "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."

[207] As a supplement to the TOC, the Smuggling Protocol has to be read in conjunction with the TOC. This is also expressly stated in art. 1 of the Smuggling Protocol: „This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention. 2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein. 3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention." See Art. 1 Smuggling Protocol. Ibid.

established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.[208]

Interestingly enough, the element of gain is thus not only included in the definition of smuggling (art. 3 lit. a Smuggling Protocol) and in the definition of state obligations vis-a-vis smuggling (art. 6 I lit. a Smuggling Protocol) but through the element of organized group also in the delimitations of applicability of art. 6 (art. 4 Smuggling Protocol in conjunction with art. 2 lit. a TOC). This further underscores the importance the element of gain plays in the logic of the TOC and the Smuggling Protocol.[209]

Consequently, reading art. 6 Smuggling Protocol in conjunction with art. 4 of the Protocol raises additional questions as to the extent to which art. 6 remains applicable to the matters at stake in the present thesis, as the cases elaborated on further in Chapter IV involve mainly individuals acting in an ad-hoc, spontaneous manner while not aiming for any financial or material benefit.

The Legislative Guide for the Smuggling Protocol seems not to add much clarity in this regard. On one hand, the Legislative Guide states clearly and repeatedly that "it was not the intention of the drafters to deal with cases where there was no element of transnationality or organized crime."[210] On the other hand, the Guide says also that in order to comply with the requirements of the Protocol, domestic legislators are in an obligation to "ensure that no gaps are created and

[208] Art. 2 lit. a TOC. "United Nations General Assembly, Convention against Transnational Organized Crime ('UN TOC') (15 November 2000), A/RES/55/25, UNTS Vol. 2225, P. 209."
[209] With regard to the requirement of transnationality, it should be noted that according to art. 3 II TOC "an offense is transnational in nature, if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State." Majority of the cases discussed in Chapter IV would satisfy the requirements either under lit. a, b or d. See art. 3 II TOC. Ibid.
[210] United Nations Office on Drugs and Crime (UNODC), "Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime ('Legislative Guide for the Smuggling Protocol')," 332.

that no conduct covered by the Protocol is left uncriminalized."[211] What is more, "legislatures *must not* incorporate transnationality or organized crime into domestic offence provisions […]. [D]omestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved."[212]

It can be concluded that the Smuggling Protocol was originally clearly intended to target organized crime. Yet again, as with the element of financial or other material benefit, the Protocol and the subsequent implementation guidelines do not provide unequivocal safeguards against the criminalization of flight helpers. In fact, as it is the states' obligation to "ensure that no gaps are created and that no conduct covered by the Protocol is left uncriminalized,"[213] domestic legislators may feel tempted to draft rather broad domestic law provisions. For the purposes of the research question at stake in the present thesis, it can be, however, advanced that broad domestic smuggling provisions leading to the Protocol being employed against flight helpers go clearly against the intent of the drafters as revealed in *travaux préparatoires*.

The ambiguities within the Protocol and between and Protocol and the implementation guidelines can be perhaps understood as a result of the Protocol standing in between two branches of international law: international criminal law and international human rights law. Having consulted the criminalization elements of the Smuggling Protocol, it appears useful to now look into the human rights safeguards the Protocol offers for the smuggled and their potential implications for the flight helpers.

2.2.4. Rights of the Smuggled

According to art. 2 Smuggling Protocol, the Protocol's purpose is to prevent and fight against smuggling and to promote international cooperation to this end, "while protecting the rights of

[211] Ibid., 342.
[212] Ibid., 333–34. Emphasis added.
[213] Ibid., 342.

the smuggled."[214] The black letter wording suggests that while combatting smuggling is a primary goal of the Protocol, protection remains merely a secondary aim.[215] In other words, in contrast to the 1951 Refugee Convention and its 1967 Protocol, the UN TOC and its two Protocols are not human rights documents.[216]

Nevertheless, the Smuggling Protocol does entails several provisions aiming at safeguarding the rights of the smuggled, included among others in art. 2, 4, 5, 14 I, 14 II lit. e, 16 and 19 of the Protocol. The perhaps two most important safeguards relevant in the context of the present thesis are art. 5 and art. 19 Smuggling Protocol, which bring the Protocol in relation to international human rights and most notably international refugee law standards.[217]

Art. 19 Smuggling Protocol reads as follows:

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

[214] "The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants." Art. 2 Smuggling Protocol. "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."

[215] Similarly Crépeau, who later became the UN Special Rapporteur on the human rights of migrants, notes that "[t]he protection and the assistance of the victims was not the first objective [of the drafters]." Comparing the provision of the Smuggling Protocol with that of the Trafficking Protocol, Crépeau argues there is an "absence of a real and effective protection objective" Crépeau, "The Fight against Migrant Smuggling: Migration Containment over Refugee Protection," 175–77.

[216] Compare Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119."

[217] Interestingly enough, according to Crépeau, the protection guarantees under art. 5 and 19 were only included in the text of the Smuggling Protocol following the interventions of the Office of the High Commissioner for Human Rights (OHCHR), United Nations High Commissioner for Refugees (UNHCR), International Organization for Migration (IOM) and the United Nations Children's' Fund (UNICEF). This further stresses the argument made above – namely, that drafters did not conceive of the Smuggling Protocol primarily as of a human rights instrument. See Crépeau, "The Fight against Migrant Smuggling: Migration Containment over Refugee Protection," 176.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.[218]

Furthermore, art. 5 Smuggling Protocol requires that: "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."[219]

Art. 5 together with art. 19 thus transpose and enlarge the guarantees under art. 31 Refugee Convention discussed above into the context of smuggling. They exclude the criminal liability and discriminatory treatment of migrants, including refugees, on the ground that they are being smuggled. In this context, similar considerations as in the context of art. 31 Refugee Convention could be advanced. Namely, if refugees shall not be criminalized for irregular entry, so should not those assisting them. The limitations to this argument as elucidated above in Sub-Chapter III-1 apply.

2.2.5. Quagmire or Firm Ground?

The UN TOC and both of its Protocols have become subjects of scholarly interest ever since their adoption in early 2000. In order to complement the arguments outlined above, it appears useful to have a brief look into the main lines of scholarly dispute vis-à-vis the required regulation of trafficking and smuggling.

[218] Art. 19 Smuggling Protocol. "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."
[219] Art. 5 Smuggling Protocol. Ibid.

The results of research conducted in the scope of the present thesis suggests that there are approximately three periods, or "waves" in which smuggling and trafficking, as interlinked issues, were vividly discussed among the academia. The first wave of interest emerged, naturally, during and immediately after the UN TOC and its Protocols were negotiated. Gallagher, who was present in the negotiations in her capacity as a representative of the High Commissioner for Human Rights ("OHCHR"), provided a first overview of the "tricks and treaties" in the context of trafficking and smuggling.[220] Despite concerns as to the optional nature of majority of the protection measures, Gallagher argued that the two Protocols are "a small step forward", "[d]espite their imperfections".[221] She called on the international community to ensure that in the Protocols' implementation "human rights are not marginalized any further."[222] The lack of strong human rights protection mechanisms in respect of smuggling were also alleged by, for example, Obokata.[223]

In contrast to that, Crépeau, who later became the UN Special Rapporteur on the human rights of migrants, presented a much stronger critique. Crépau argued that with the Smuggling Protocol, the "refugee receiving countries are trying to strengthen their strategy of migration containment."[224] According to Crépeau, the Protocol shrinks the fight against smuggling to merely repressive means, which demonstrates a "simplistic understanding" of the phenomenon and "completely disregards the protection needs of the refugees."[225]

The debate revived again around 2008, with Hathaway publishing a principled critique of both of the instruments.[226] According to Hathaway, "it is striking that […] there has really been no

[220] Anne Gallagher, "Trafficking, Smuggling and Human Rights: Tricks and Treaties," *Forced Migration Review* 12, no. 25 (2002): 8–36.
[221] Ibid., 28.
[222] Ibid.
[223] Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective* (Leiden, The Netherlands ; Boston: BRILL, 2006).
[224] Crépeau, "The Fight against Migrant Smuggling: Migration Containment over Refugee Protection," 175.
[225] Ibid., 173.
[226] Hathaway, "The Human Rights Quagmire of Human Trafficking."

fundamental, overarching criticism of the effort to stamp out human trafficking as a worthy objective and, more specifically, as an appropriate focus of international law."[227] Hathaway's main argument is that "the fight against human trafficking is […] fundamentally in tension with core human rights goals."[228] The Trafficking Protocol creates a slippery slope in that is enables the criminalization of smuggling, while offering only limited protection to the victims of trafficking.[229] The criminalization of smuggling then promulgates refugee suffering, as it increases the risk of them being trafficked.[230] What is more, the Protocols enable for indiscriminate border deterrence measures and thus render the guarantees under art. 31 Refugee Convention illusionary.[231] What results is a "human rights quagmire" and a "risk of overall net human rights regression."[232]

Again, Gallagher contradicted, stating that the Protocols build a "firm ground", as there is no such thing as "negative human rights externalities"[233] Later, Gallagher elaborated on this argument an extensive overview of the states' obligations in the context of trafficking,[234] and recently, in collaboration with David, also in the context of smuggling.[235] Gallagher's argument in favour of a strong criminalizing framework is motivated by the primary concern for the protection of refugees against exploitation by criminal gangs. Todres argues similarly, stating that criminalization of trafficking is necessary. However, according to Todres the focus on criminalization is not sufficient to combat the phenomenon and may have marginalized other perspectives, including those of human rights, public health and development.[236]

[227] Ibid., 4.
[228] Ibid.
[229] Ibid., 5.
[230] Ibid.
[231] Hathaway, "The Human Rights Quagmire of Human Trafficking."
[232] Ibid., 59.
[233] Anne T. Gallagher, "Human Rights and Human Trafficking: Quagmire or Firm Ground - A Response to James Hathaway," *Virginia Journal of International Law* 49 (2009 2008): 831, 847.
[234] Gallagher, *The International Law of Human Trafficking*.
[235] Gallagher and David, *The International Law of Migrant Smuggling*.

A third wave of scholarly interest in smuggling and trafficking seems to emerge recently, possibly stirred by the "refugee crisis." The new works including those of Landry[237] and Stoyanova[238] build on the previous critique and appear to take seriously their predecessors' suggestion at "widening the lens".[239] Interestingly enough, both Landry and Stoyanova come to comparable conclusions concerning the safeguards offered by the two Protocols to those being smuggled, respectively trafficked.[240] Landry argues that smuggling does not need to exist as a separate offense, as the protection of the smuggled against exploitation or life endangerment can be achieved with already existing criminal laws. Stoyanova on the other hand, comes to the conclusion that trafficking can be better addressed as a specific human rights violation through the concrete human rights instruments, notably the European Convention for Human Rights and Fundamental Freedoms ("ECHR"), than the Trafficking Protocol as such.[241] What is more, Landry provides a useful critique of the financial or material gain threshold. Landry claims that the gain element provides only a suboptimal guarantee for flight helpers.[242] The gain element creates a mutually exclusive for-profit contra humanitarian binary, which, however, does not hold true in reality.[243] The transposition into domestic law would thus permit for example the criminalization of individuals falling into the "grey zone", such as paid employees of humanitarian agencies or taxi drives charging for their services.[244] According to Landry, then, the crucial human rights-criminal law tensions of the anti-smuggling regime

[237] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119."
[238] Stoyanova, *Human Trafficking and Slavery Reconsidered*.
[239] Todres, "Widening Our Lens." See also Obokata, who pointed to a possible knowledge gap already in 2006, stating that research on how trafficking could be addressed through the lens of human rights is missing. Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, 172.
[240] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119"; Stoyanova, *Human Trafficking and Slavery Reconsidered*.
[241] Stoyanova, *Human Trafficking and Slavery Reconsidered*.
[242] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 7–9.
[243] Ibid.
[244] Ibid.

begin already with the Smuggling Protocol and are merely expanded with its transposition in EU law.[245]

2.3. Law of the Sea

While situations at sea are not specifically at focus of the present work, the law of the sea may add valuable perspectives when deliberating on the required state conduct vis-a-vis flight helpers. Interestingly enough, while the Smuggling Protocol does not encompass any specific provisions relating to smuggling by air or land, Section II of the Protocol refers specifically to smuggling by sea. Art. 7 Smuggling Protocol sets clearly that obligations under international law of the sea continue to apply when states attempt to prevent and suppress smuggling by sea.[246]

The international law of the sea regime is created by several treaties, most notably the International Convention for the Safety of Life at Sea from 1974 ("SOLAS")[247], the International Convention on Maritime Search and Rescue Operations from 1978 ("SAR")[248], the United Nations Convention on the Laws of Sea of 1982 ("UNCLOS").[249] All of these provide in one form or another for the duty to render assistance to boats in danger of getting lost and to rescue boats in distress.

According to Chapter V Regulation 33 I SOLAS:

[245] Ibid., 9–11.
[246] "States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea." Art. 7 Smuggling Protocol. "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."
[247] United Nations General Assembly, "International Convention for the Safety of Life at Sea ('SOLAS') (1 November 1974), UNTS Vol. 1184, P. 278," accessed October 20, 2016, https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf.
[248] United Nations General Assembly, "International Convention on Maritime Search and Rescue ('SAR') (27 April 1979), UNTS Vol. 1405, P. 119," accessed October 20, 2016, https://treaties.un.org/doc/publication/unts/volume%201405/volume-1405-i-23489-english.pdf.
[249] United Nations General Assembly, "United Nations Convention on the Law of the Sea ('UNCLOS') (10 December 1982), UNTS Vol. 1833, P. 3," n.d.

> The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, […] is bound to proceed with all speed to their assistance […].[250]

Likewise, art. 98 I lit. a, b UNCLOS requires that:

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
> (a) to render assistance to any person found at sea in danger of being lost;
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.[251]

What is more, according to Chapter V Regulation 33 I clause 2 SOLAS, "[i]f the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress […]."[252]

[250] Chapter V Regulation 33 I clause 1 SOLAS: "The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so." United Nations General Assembly, International Convention for the Safety of Life at Sea ("SOLAS") (1 November 1974), UNTS Vol. 1184, p. 278.
Compare also art. 10 I International Convention on Salvage: 1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea." See "International Convention on Salvage (28 April 1989) ('Salvage Convention'), Treaty Series No. 93 (1996)," n.d.
[251] Art. 98 I UNCLOS: "1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call." United Nations General Assembly, "United Nations Convention on the Law of the Sea ('UNCLOS') (10 December 1982), UNTS Vol. 1833, P. 3."
[252] Chapter V Regulation 33 I clause 2 SOLAS: "If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly." United Nations General Assembly, International Convention for the Safety of Life at Sea ("SOLAS") (1 November 1974), UNTS Vol. 1184, p. 278.

"Distress" encompasses more than situations when people' lives are at risk. Chapter 1.3.11 SAR defines distress as "a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance."[253] The urgency of the duty to provide rescue is further stressed by the fact that ship masters are required to proceed "with all speed"[254], "with all possible speed"[255] even, to assist those in distress. The requirement to assist *any person* is further strengthened in Chapter 2.1.10 SAR, which states that parties shall guarantee that assistance is provided "regardless of the nationality or status of such a person or the circumstances in which that person is found."[256]

The three international treaties are further complemented by the Guidelines on the Treatment of Persons Rescued at Sea[257] developed by the Maritime Safety Committee ("MSC") of the International Maritime Organization ("IMO"), which brought also important amendments to the SOLAS and SAR. In addition to the duty of rescue, SAR and SOLAS, as amended in 2004, now require for the survivors to be brought to a "place of safety".[258] The Guidelines on the Treatment of Persons Rescued at Sea define a place of safety as:

[253] Chapter 1.3.11 SAR. United Nations General Assembly, International Convention on Maritime Search and Rescue ("SAR") (27 April 1979), UNTS Vol. 1405, p. 119.
[254] Chapter V Regulation 33 I SOLAS. United Nations General Assembly, International Convention for the Safety of Life at Sea ("SOLAS") (1 November 1974), UNTS Vol. 1184, p. 278.
[255] Art. 98 I UNCLOS. United Nations General Assembly, "United Nations Convention on the Law of the Sea ('UNCLOS') (10 December 1982), UNTS Vol. 1833, P. 3."
[256] Chapter section 2.1.10 SAR: "Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found." See United Nations General Assembly, International Convention on Maritime Search and Rescue ("SAR") (27 April 1979), UNTS Vol. 1405, p. 119.
[257] International Maritime Organization (IMO), "Resolution of the Maritime Safety Committee MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea," May 20, 2004, http://www.refworld.org/docid/432acb464.html.
[258] Chapter 3.1. 9 SAR, Chapter V Regulation 33 I clause 1 SOLAS. United Nations General Assembly, "International Convention on Maritime Search and Rescue ('SAR') (27 April 1979), UNTS Vol. 1405, P. 119, as Amended by the Resolution of the Maritime Safety Committee MSC.153(78)," accessed October 20, 2016, https://treaties.un.org/doc/publication/unts/volume%201405/volume-1405-i-23489-english.pdf; United Nations General Assembly, "International Convention for the Safety of Life at Sea ('SOLAS') (1 November 1974), UNTS Vol. 1184, P. 278, as Amended by the Resolution of the Maritime Safety Committee MSC.153(78)," accessed October 20, 2016, https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf.

> [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. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.[259]

In addition to the obligation to bring survivors to a place of safety, the amendments to the SOLAS and SAR have established a corresponding duty on behalf of the contracting states by considerably restricting their degree of discretion as to the disembarkation in their ports.[260]

All in all, the law of the sea renders clear that there is an international duty to require masters of ships to provide assistance regardless of the legal situation of the individual, to bring the survivors to a place of safety or, under special circumstances, to notify the reasons why they failed to do so. What is more, these obligations are clearly understood in the context travel and, as the Guidelines regarding the place of safety demonstrate, should enable for further travel.

In the context of the research question at stake in the present work, an interesting argument could be made by looking into situations at land requiring by their degree of urgency or risk of harm a qualitatively comparable measures of assistance, including for example transport to a place of safety, as do situations of distress at sea. In this regard, the laws of the sea make a strong argument against criminalization of facilitation of entry on land at the very least in cases where there is a reasonable certainty that the person assisted in entry faces grave and imminent

[259] Par. 6.12 Guidelines on the Treatment of Persons Rescued at Sea. See art. Par. 6.17 of the Guidelines: "The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea." International Maritime Organization (IMO), "Resolution of the Maritime Safety Committee MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea."

[260] Chapter 3.1.9 SAR, Chapter V Regulation 33 I (1) SOLAS. United Nations General Assembly, International Convention on Maritime Search and Rescue ("SAR") (27 April 1979), UNTS Vol. 1405, p. 119, as amended by the Resolution of the Maritime Safety Committee MSC.153(78); United Nations General Assembly, International Convention for the Safety of Life at Sea ("SOLAS") (1 November 1974), UNTS Vol. 1184, p. 278, as amended by the Resolution of the Maritime Safety Committee MSC.153(78).

danger to their life, requiring immediate transport to the place of safety, where such place happens to be across the border.[261]

2.4. Other Fundamental Rights Safeguards

The web of states' international obligations vis-a-vis refugees and flight helpers is obviously not exhausted with the enumeration above. While the scope of the present work does not allow for an in-depth analysis of all international human rights mechanisms, it appears useful to take a look at the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms ("UN Declaration on Human Rights Defenders"),[262] which relates specifically to rights of human rights activists and humanitarian workers. According to art. 12 of the Declaration:

> I. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.
>
> II. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.[263]

As has been discussed above, refugees *en route* constitute a vulnerable group and may face severe human rights violations in the countries they are transiting, including some EU MSs. In

[261] As will be demonstrated in Chapter IV, such situations are not merely speculative. E.g. they could arise in case of a serious medical emergency requiring transport to the nearest hospital, where the nearest hospital able to provide the necessary treatment happens to be one across the border. See in this regard the considerations on the Mannoni case in Chapter IV.

[262] United Nations General Assembly, "Resolution A/RES/53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms ('UN Declaration on Human Rights Defenders') (8 March 1999)," A/RES/53/144 § (1999), http://protectioninternational.org/wp-content/uploads/2012/04/annex.i_manual_english-3rded.pdf.

[263] Art. 12 I-II UN Declaration on Human Rights Defenders. Ibid.

this sense, the assistance in irregular entry could fall under "activities against violation of human rights and fundamental freedoms" as referred to in art. 12 I of the Declaration. Nevertheless, the "peaceful" requirement could pose an additional hurdle towards its application in the context of humanitarian smuggling and in fact risks bringing the discussion into an argumentative impasse. In practice, states could be expected to argue that acts criminalized under domestic law cannot be regarded as "peaceful" and that in turn, the Declaration, in addition to being merely soft law, cannot be considered as creating a substantive basis towards their decriminalization. Nevertheless, while the UN Declaration on Human Rights does not provide a bullet-proof safeguard against criminalization of flight helpers, an interesting takeaway for the research question at stake is that human rights defenders are rights holders with a specific contingent of rights under international human rights soft law.

2.5. Conclusions Chapter II

Chapter II has demonstrated that international refugee law, international criminal law on migrant smuggling, the law of the sea and to some extent also international human rights soft law can provide arguments in favour of decriminalization of humanitarian smuggling. The 1951 Refugee Convention clearly pardons refugees who enter irregularly and according to some authors, the *travaux préparatoires* suggest that the drafters assumed states would not attempt at criminalizing humanitarian assistance. Chapter II has elucidated, however, that the general non-penalization guarantees applying to refugees by virtue of art. 31 Refugee Convention can be expanded to flight helpers rather by means of opportunistic, than strictly legal arguments. This is especially true in the context of the EU, where the applicability of art. 31 in the context of intra-EU movements remains contested. Chapter II has also demonstrated that the international anti-smuggling framework aims primarily at tackling organized criminal groups and does foresee exceptions for instances of humanitarian smuggling. In the logic of the UN Smuggling Protocol, the threshold between permissible and punishable action is the

element of financial or material benefit. Nevertheless, while the element of gain appears in several provisions of the Smuggling Protocol, it remains further unspecified, rendering it according to some scholars an insufficient guarantee to non-criminalization of flight helpers. Reading the relevant provisions in context of the *travaux préparatoires* shows, however, very clearly that it was never the intention of the drafters to criminalize humanitarian smuggling. Hence, at the very least, there is no international duty to criminalize flight helpers. Even stronger protection against criminalization is provided by the duty of rescue in international law of the sea, which could be under certain circumstances expanded to situations of mainland. Last but not least, the international human rights soft law points to potential future developments, with human rights defenders being considered a specific group of rights holders, with a specific set of rights being pertinent to them.

Chapter III: Widening the Gap: Humanitarian Smuggling in European Law

The fight against human smuggling has evolved into a central feature of EU's asylum and migration policy from its early beginning. A reference to the need to fight smugglers occured already in the conclusions of the 1999 Tampere European Council meeting which for the first time ever established the goal of building a common EU asylum and migration policy.[264] Today, art. 80 I of the Treaty on the Functioning of the European Union ("TFEU")[265] requires the common asylum policy to be developed in accordance with the 1951 Refugee Convention and its 1967 Protocols as well as "other relevant treaties."[266] Meanwhile, preventing irregular, or as the text says "illegal", migration is following art. 79 I TFEU officially one of the aims of EU's immigration policy.[267] In parallel to creating a common asylum policy, the Treaty of Amsterdam and even more so the Treaty of Lisbon provided a basis for approximation of legislation in the area of criminal justice, which proved to be of further relevance for the fight against smuggling.[268]

[264] See point 3 of the Tampere Conclusions: "This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union." See also point 24 of the Tampere Conclusions:" of the Tampere Council Presidency Conclusions: "The European Council calls for closer co-operation and mutual technical assistance between the Member States' border control services, such as exchange programmes and technology transfer, especially on maritime borders, and for the rapid inclusion of the applicant States in this co-operation. In this context, the Council welcomes the memorandum of understanding between Italy and Greece to enhance co-operation between the two countries in the Adriatic and Ionian seas in combating organised crime, smuggling and trafficking of persons." European Council (EUCO), "Tampere European Council, 15 - 16 October 1999, Conclusions of the Presidency ('Tampere Counclusions')," accessed July 23, 2017, http://www.europarl.europa.eu/summits/tam_en.htm.

[265] "European Union, Consolidated Version of the Treaty on the Functioning of the European Union ('TFEU') (26 October 2012) OJ C 326/47.," n.d.

[266] Art. 80 I TFEU. Ibid.

[267] According to art. 79 TFEU ,"[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings." Ibid.

[268] See art. 82 TFEU: "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83 […]." Ibid.

Despite the fact that in the absence of legal ways to Europe, refugees depend on illicit means of travel, the commitment to fight smuggling and irregular migration keeps echoing with increasing frequency. It figures high in a number of policy documents, including the European Agenda on Migration,[269] the European Agenda on Security,[270] the European Council Malta Declaration from 2017[271] and, as the name has it, the EU Action Plan against Migrant Smuggling.[272] In the most recent Commission study on the functionality of the Facilitators' Package ("REFIT study"), the fight against irregular migration is seen as "an essential part of a well-managed migration system."[273] As the present Chapter will demonstrate, what emerges from the policy developments going hand in hand with competence transfer in migration and criminal law matters is not only a border regime characterized by internal contradictions, but also one relying heavily on criminal law measures for enforcing its immigration policy. [274]

[269] The European Agenda on Migration identifies four pillars of response to the „refugee crisis": (1) reduction of incentives for irregular migration, (2) border management including life saving measures, (3) a strong Common European Asylum Policy („CEAS") and (4) new approaches to legal migration. The fight against smugglers and traffickers is part of the first pillar. See European Commission (COM), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration ('European Agenda on Migration') (13 May 2015), COM(2015) 240 Final," 6–17, accessed September 30, 2016, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf.

[270] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - the European Agenda on Security ('European Agenda on Security') (28 April 2015), COM(2015) 185 Final," April 28, 2015, 4, 6, 12, 16–18, http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf.

[271] See e.g. Par. 3 Malta Declaration: "[…]we are determined to take additional action to significantly reduce migratory flows along the Central Mediterranean route and break the business model of smugglers […]." European Council (EUCO), "Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route," February 3, 2017, http://www.consilium.europa.eu/press-releases-pdf/2017/2/47244654402_en.pdf.

[272] The action plan sets four priorities: (1) enhanced police and judicial response (2) improved information gathering and sharing, (3) enhanced prevention of smuggling and assistance to vulnerable migrants, and (4) stronger cooperation with third countries. See European Commission (COM), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Action Plan against Migrant Smuggling (2015-2020), COM(2015) 285 Final," 2–8.

[273] European Commission (COM), "Commission Staff Working Document: Refit Evaluation of the EU Legal Framework against Facilitation of Unauthorised Entry, Transit and Residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA) ('REFIT Evaluation'), SWD (2017) 117 Final," 5.

[274] In parallel to these developments, the 1997 Treaty of Amsterdam and even more so the 2009 Treaty of Lisbon develop EU's foundational documents as to provide a legal basis for approximating MSs' criminal legislation.

Chapter III analyses the implications of the European border regime for individuals assisting refugees in reaching EU MSs.

3.1. The Facilitator's Package

Within the ambits of EU law, assistance in irregular border crossing is regulated mainly in the so-called Facilitators' Package from 2002. This includes on one hand the Directive of the Council Defining the Facilitation of Unauthorised Entry, Transit and Residence ("the Facilitation Directive")[275] and, on the other hand, the Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ("the Council Framework Decision"),[276] which further elaborates the Directive's implementation.[277]

The Facilitation Directive obliges the member states to enact legislation criminalizing various instances of facilitating irregular entry. According to art. 1 I of the Facilitation Directive:

> Each EU Member State *shall* adopt appropriate sanctions on:
>
> (a) 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 aliens.[278]

Nevertheless, following art. 1 II Facilitation Directive:

[275] Directive 2002/90/EC of the Council defining the facilitation of unauthorised entry, transit and residence ("the Facilitation Directive") (28 November 2002) OJ L 328/17.
[276] Council of the European Union, Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ("the Framework Decision") (28 November 2002), 2002/946/JHA, OJ L 328/1.
[277] The link between the two pieces of legislation is established through the respective recitals. In this regard, the Directive - by establishing a definition of the offence - should "render more effective the implementation of the [F]ramework Decision." See Recital 3 and 4 Facilitation Directive and Recital 3 Council Framework Decision.Council of the European Union, "Facilitation Directive"; Council of the European Union, "Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ('Council Framework Decision') (28 November 2002), 2002/946/JHA, OJ L 328/1."
[278] Art. 1 I lit. a Council of the European Union, "Facilitation Directive" Emphasis added.

> [A]ny Member State *may* decide not to impose sanctions with regard to the behavior defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned.[279]

According to art. 2 it is not only the act of smuggling which shall be criminalized, but equally its instigation, participation in and attempt at conducting acts under art. 1 I lit. a Facilitation Directive.[280]

As mentioned, the Facilitation Directive is complemented by the Council Framework Decision from 2002, which strives to set minimum rules for penalties, liability of legal persons and jurisdiction.[281] Art. 1 I Council Framework Decision provides further guidance as to the "appropriate sanctions" referred to in art. 1 I Facilitation Directive. It states that acts defined in Art. 1 I Facilitation Directive shall be sanctioned with "effective, proportionate and dissuasive *criminal* penalties."[282] Following art. 1 II of the Framework Decision, the criminal penalties can be accompanied by other measures, such as confiscation of the smuggling assets, ban on occupational activity in the context of which the act was committed or deportation.[283]

Art. 1 III Council Framework Decision requires further that:

> Each Member State shall take the measures necessary to ensure that, *when committed for financial gain*, the infringements defined in Article 1(1)(a) […] of

[279] Art. 1 II ibid. Emphasis added.
[280] 'Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who: (a) is the instigator of, (b) is an accomplice in, or (c) attempts to commit an infringement as referred to in Article 1 (1) (a) or (b).' Art. 2 Facilitation Directive. Council of the European Union.
[281] Preamble, par. 3, Council of the European Union, "Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ('Council Framework Decision') (28 November 2002), 2002/946/JHA, OJ L 328/1."
[282] Art. 1 I Council Framework Decision. Ibid. Emphasis added.
[283] Art. 1 II Council Framework Decision: "Where appropriate, the criminal penalties covered in paragraph 1 may be accompanied by the following measures: — confiscation of the means of transport used to commit the offence, — a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed, — deportation." Ibid.

Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:

- the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA[284]
- the offence was committed while endangering the lives of the persons who are the subject of the offence.[285]

In 2016, the European Parliament's ("EP") Committee on Civil Liberties, Justice and Home Affairs ("LIBE") commissioned a major study in the functionality of the Facilitators' Package.[286] In the "Fit for Purpose?" study (hereafter as "LIBE study"), Carrera together with a number of academics contributing to the research argue that the Facilitators Package is characterized by an implementation gap vis-a- vis the Smuggling Protocol in three respects: (1) the definition of smuggling, in particular the absence of the element of financial gain, (2) the possibility for humanitarian exceptions and (3) the protection afforded to the smuggled.[287] The following parts of this Sub-Chapter look into the main deficiencies of the Facilitators' Package identified in the scope of the LIBE-study and the REFIT-study and complements them with additional opinions of the academia.[288]

[284] The original text of the 2002 Council Framework Decision refers to the definition of criminal organization provided in the Council Decision Joint Action 98/733/JHA. This was later replaced with the 2008 Council Framework Decision on the Fight against Organized Crime ("2008 Council Framework Decision"). Details see further below in this Chapter. Council of the European Union, "Joint Action 98/733/JHA Adopted by the Council on the Basis of Article K.3 of the TEU, on Making It a Criminal Offence to Participate in a Criminal Organisation in the Member States of the European Union (21 December 1998), OJ L 351/1.," n.d.

[285] According to art. 1 II, penalties may be also supplemented with additional measures, such as assets confiscation, employment ban or deportation of the smuggler. Art. 1 II Council Framework Decision, Council of the European Union, "Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ('Council Framework Decision') (28 November 2002), 2002/946/JHA, OJ L 328/1" Emphasis added.

[286] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants.*

[287] Ibid., 10.

[288] It is important to note that a range of the experts who participated in bringing together the LIBE report come from academic or civil society circles and have published on the very same topic under their own name or on behalf of other entities. Consequently, there is only a limited amount of new academic research to complement

3.1.1. Missing Element of Gain

In contrast to the UN Smuggling Protocol, the element of financial or material benefit is completely missing from the Facilitation Directive's definition of smuggling. As will be discussed below, the element of *financial* benefit figures merely in the Council Framework Decision, where it constitutes an aggravating circumstance leading to harsher penalties. As has been demonstrated in Chapter II, the definitional element of gain is crucial for creating an argument in favour of distinguishing condemnable, for-profit smuggling from humanitarian, pro-bono activities and for excluding the latter from criminalization. Albeit perhaps not sufficient, the element of gain is thus the key safeguard against the criminalization of flight helpers.[289] What is more, by not taking reference to any international legal instrument, the Directive omits to clarify the scope and applicability of its provisions vis-a-vis the Smuggling Protocol, the 1951 Refugee Convention and any other international, EU and European legal instruments.[290] This is problematic for at least two reasons. On the conceptual level, it remains unclear, whether the Directive attempts at implementing the Smuggling Protocol in EU law – in which case it fails to do so – or to replace it with an own definition of smuggling. In practice then, the MSs face an ambiguous web of obligations, allowing them to cherry-pick whether or not to include the gain element as they please. As will be demonstrated in Chapter IV, this leads to significant disparities in the domestic legislations on smuggling across the EU.

3.1.2. Optional Humanitarian Exceptions

In addition to the element of gain missing from the EU law definition of smuggling, the humanitarian safeguards provided in art. 1 II Facilitation Directive are merely optional, left to

the studies with. Moreover, the views expressed in the LIBE report do not represent the positions of the European Parliament but should rather assist the Members of the European Parliament in their work. In the scope of the REFIT evaluation

[289] Note also Landry's remarks on why the financial gain element is not a sufficient safeguard for distinguishing smuggling from humanitarian smuggling discussed in Chapter II.

[290] Peers and Rachel Landry, "Human & Humanitarian Smugglers."

the discretion of the MSs, who "may decide" not to criminalize. What is more, the Directive does not provide any guidance on which behaviours or actions actually do constitute "humanitarian assistance".[291] Yet again, while the MSs remain free to decide on the "extent, scope and personal application" of the humanitarian clause, legal uncertainty as regards the implementation at the domestic level increases.

The voluntary nature and regulatory vagueness of the humanitarian exception can be understood as a result of a compromise between different stakeholders who influenced the drafting process. According to the LIBE-study, the humanitarian clause was included in the Directive's wording only following "protracted negotiations"[292] in the Council, with a number of countries maintaining parliamentary scrutiny or general scrutiny reservations on one or both parts of the Facilitators' Package. The Austrian delegation called for the humanitarian provision to be deleted altogether.[293] The Commission, on the other hand, disagreed with the non-compulsory nature of the humanitarian clause.[294]

Interestingly enough, the Council Framework decision sets the minimum level penalties merely in relation to acts carried out for financial gain and either committed by criminal organizations or while endangering lives of those being smuggled. Nevertheless, while the text of the Council Framework Decision makes clear that the presence of the first one plus any of the other two elements amounts to aggravating circumstances, it does not provide any guidance as to the

[291] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 14.
[292] Ibid., 26.
[293] Netherlands, Sweden and the UK maintaining parliamentary scrutiny reservations on both of the texts. Denmark maintained parliamentary scrutiny reservation on the Council Framework Decision. Finland maintained general scrutiny reservations on both of the texts. Council of the European Union, "Report from the Mixed Committee at the Level of the Article 36 Committee on 3 and 4 May 2001 to the Mixed Committee at the Level of Ambassadors: Draft Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry and Residence and Draft Council Directive Defining the Facilitation of Unauthorised Entry, Movement and Residence, Doc. No. 8632/01," May 11, 2001, 2–3, http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%208632%202001%20INIT.
[294] Ibid., 3.

minimum or maximum level penalties applicable in cases where any of the elements are absent. In contrast to the Directive, the Council Framework Decision makes express reference to international human rights and refugee law, stating that obligations under the Decision "shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular […] art. 31 and art. 33 of the 1951 [Refugee Convention]."[295] Yet again, instead of mandatorily excluding certain acts from criminalization the decision remains silent about the concrete consequences in case of MSs' overlapping duties.[296] While the aggravating circumstances of art. 1 II Council Framework Decision do support the view that the MSs' efforts should primarily focus on tackling organized crime, the Decision does not provide sufficient grounds for a strong argument in favor of automatic acquittals or non-prosecution in cases of humanitarian smuggling, where the conditions in art. 1 II Council Framework Decision are not met.

As a result, the humanitarian exceptions granted under the Facilitators' Package remain non-compulsory and open to wide, according to the LIBE-study even "disproportionate", discretion of the MSs.[297] In line with her critique of the Smuggling Protocol mentioned above, Landry provides a similar critique of the Facilitation Directive. According to Landry, however, the Directive not only leaves an implementation gap, it is a "tacit expansion"[298] of the Smuggling

[295] "This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967." Art. 6 Council Framework Decision. Council of the European Union, "Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence ('Council Framework Decision') (28 November 2002), 2002/946/JHA, OJ L 328/1."

[296] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 27.

[297] Ibid., 21, 31. Compare with Provera, according to whom "there appears to be a greater margin of appreciation given to the Member States." See Provera, *The Criminalisation of Irregular Migration in the European Union*, 9. Compare with Provera, who merely states that "this provision [in art. 1 II Facilitation Directive] is discretionary towards the Member States rather than mandatory." See Ibid., 11.

[298] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 11.

Protocol. It allows the MSs to criminalize a "limitless spectrum of activity" and thus fails to enable individuals to regulate their behaviour.[299]

3.1.3. Rights of the Smuggled

Admittedly, the primary focus of the present thesis are the rights of the flight helpers, with the rights of the smuggled being only implicitly at stake. Nevertheless, in order to gain a comprehensive understanding of the Facilitators' Package as a whole, it appears useful to briefly address also the third implementation gap identified by the LIBE-study.[300]

While the Smuggling Protocol provides for at least some level of protection of the smuggled, the rights of the smuggled remain completely unaddressed by the Facilitation Directive. This is particularly questionable since, as mentioned above, the Directive does not take reference to any international legal instrument and hereby fails to clarify how the MSs' duties under the Facilitations Directive relate to their other obligations under international law.

Moreover, while the Council Framework Decision does position itself in the context of international law and provides for some safeguards, these are fairly limited. For example, in contrast to the UN Smuggling Protocol, only situations of life endangerment constitute aggravating circumstances under the Council Framework Decision; inhumane or degrading treatment or exploitation which do not meet this threshold are left untackled.[301] As a result, the

[299] Ibid., 10.
[300] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 10.
[301] Compare, e.g. with art. 16 I of the Smuggling Protocol, which requires that "[i]n implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected d to torture or other cruel, inhuman or degrading treatment or punishment." See more details in Chapter II. "United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime ('Smuggling Protocol') (15 November 2000) A/RES/55/25, UNTS Vol. 2241, P. 507."

Facilitator's Package as a whole affords less protection to the smuggled individuals than does the Smuggling Protocol.[302]

As will be demonstrated later, some additional albeit limited safeguards pertinent to situations of smuggling were awarded to the smuggled individuals via subsequently adopted EU legislation as well as the EU Charter of Fundamental Rights.[303] In relation to the criminalization of flight helpers, it is important to note that following the LIBE-study, the absence of human rights safeguards in the EU Facilitators' Package as such has led to a "high degree of inconsistency and has fuelled legal uncertainty in this policy area."[304]

It can be concluded that the Facilitator's Package contains only very limited safeguards against the criminalization of flight helpers. This will remain the case until a recast version of the Package is adopted, re-introducing, at the very least, the gain element in the EU law definition of smuggling and making the humanitarian exceptions – accurately defined – compulsory across EU. According to the EU Action Plan against Migrant Smuggling 2015-2020,[305] the Commission was about to submit proposals for improving the EU legal framework on smuggling in 2016.[306] In the Action Plan, the Commission promised that "[i]t will seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress."[307] Despite ongoing,

[302] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 28.
[303] "European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 ('EU Charter of Fundamental Rights', 'the Charter') (26 October 2012) OJ C 326/391."
[304] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 39.
[305] European Commission (COM), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Action Plan against Migrant Smuggling (2015-2020), COM(2015) 285 Final."
[306] Ibid., 3.
[307] Ibid.

long-term criticism of the Facilitators Package by practitioners and scholars,[308] NGOs[309] and official agencies and bodies such as the UNHCR[310], the Council of Europe Commissioner for Human Rights[311] or the FRA[312], the process seems to be again put on halt at the moment. While the promises may have seem credible in 2015, a recast proposal does not figure in the Commission's Annual Work Programme neither for 2016 nor for 2017.[313]

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[308] Webber, *Border Wars and Asylum Crimes*; Liz Fekete, "Europe: Crimes of Solidarity," *Race & Class* 50, no. 4 (April 1, 2009): 83–97, doi:10.1177/0306396809103000; Jonathan P. Aus, "Crime and Punishment in the EU: The Case of Human Smuggling, ARENA Report No 6/07" (ARENA Centre for European Studies, University of Oslo, May 2007), http://www.sv.uio.no/arena/english/research/publications/arena-reports/2006-2010/2007/Report_06_07.pdf; Basaran, "Saving Lives at Sea: Security, Law and Adverse Effects"; Basaran, "The Saved and the Drowned"; Allsopp, "Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France, Working Paper Series No. 82"; Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community"; Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119"; Peers and Rachel Landry, "Human & Humanitarian Smugglers."

[309] European Council for Refugees and Exiles (ECRE), "An Overview of Proposals Addressing Migrant Smuggling and Trafficking in Persons - Background Paper," July 2001, http://www.ecre.org/wp-content/uploads/2016/07/ECRE_An-Overview-of-Proposals-Addressing-Migrant-Smuggling-and-Trafficking-in-Persons_July-2001.pdf; Platform for International Cooperation on Undocumented Migrants (PICUM), "Report: Workshop on Criminalisation of Assistance to Undocumented Migrants 2001" (Platform for International Cooperation on Undocumented Migrants (PICUM), 2001), http://picum.org/picum.org/uploads/file_/Workshop%20on%20Criminalisation%20of%20Assistance%20to%20Undocumented%20Migrants%202001.pdf; Platform for International Cooperation on Undocumented Migrants (PICUM), "Press Release, PICUM Comments on the Adoption of the Framework Decision on Strengthening the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence (JHA-Council Meeting on 28 and 29 November 2002)," December 2002, http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2002/dicembre/oss-picum-decis-favoregg.html; European Economic and Social Committee (EESC), "European Migration Forum, Safe Routes, Safe Futures: How to Manage the Mixed Flows of Migrants across the Mediterranean? 26/27 January 2015, Synthesis Report, Conclusions and Policy Recommendations," 2015, http://www.eesc.europa.eu/resources/docs/1st-european-migration-forum_workshop-conclusions.pdf; FIFDH Genève, *Migration, a Time of Disobedience? | Forum #fifdh17*, accessed March 22, 2017, https://www.youtube.com/watch?v=RnSLwuvtisg; Bellezza, Calandrino, and Borderline-Europe - Menschenrechte ohne Grenzen e.V, *Criminalization of Flight and Escape Aid*.

[310] United Nations High Commissioner for Refugees (UNHCR), "UNHCR Comments on the French Presidency Proposals for a Council Directive and Council Framework Decision on Preventing the Facilitation of Unauthorised Entry and Residence," September 22, 2000, http://www.refworld.org/pdfid/3ae6b33db.pdf.

311 Council of Europe Commissioner for Human Rights, "CommDH/IssuePaper(2010)1, Criminalisation of Migration in Europe: Human Rights Implications" (Council of Europe, 2010), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da917.

312 European Union Agency for Fundamental Rights (FRA), Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them (Luxembourg: European Union Publications Office, 2014), http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf; European Union Agency for Fundamental Rights (FRA), "Annex: EU Member States' Legislation on Irregular Entry and Stay, as Well as Facilitation of Irregular Entry and Stay," in Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them (Luxembourg: European Union Publications Office, 2014), http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf.

313 "2017 Commission Work Programme – Key Documents," Text, European Commission - European Commission, (November 17, 2016), https://ec.europa.eu/info/publications/work-programme-commission-key-documents-2017_en; "2016 Commission Work Programme – Key Documents," Text, European Commission -

3.2. Schengen Acquis

The term Schengen acquis encompasses a set of rules regulating the abolishment of internal border controls among the EU MSs participating in the Schengen Area and the enforcement of border controls at the herewith created single external borders of this area. Its core is constituted primarily by the original 1985 Schengen Agreement, the Convention implementing the 1985 Schengen Agreement ("Schengen Convention", "CISA"),[314] as well as documents adopted by the Schengen executive committee. As of 1999, the Schengen Agreement and the Schengen Convention became part of European Union law with the 1997 Treaty of Amsterdam. In a broader sense, the term Schengen acquis can be understood as encompassing a range of subsequent secondary legislation relating to the matters of internal or external EU borders. The subsequent parts of this Sub-Chapter look into two areas related to the acquis which are relevant for the matters at stake in the present thesis: the regulation of the conduct of border authorities and questions relating to the liability of international passenger carriers.

3.2.1. Regulation of the Conduct of Border Authorities

The recently reviving debate on the legality and legitimacy of actions of NGOs operating in the Mediterranean and the required conduct of border authorities in their respect illustrates that the operating space of flight helpers assisting refugees in crossing borders can be notably shaped by the conduct of the border authorities. In July 2017, reports emerged on a code of conduct in the making, aiming at NGOs operating in the Mediterranean. [315] The NGO Code of Conduct is officially a requirement placed on Italy in the scope of Commission's most recent

European Commission, (October 25, 2016), https://ec.europa.eu/info/publications/work-programme-commission-key-documents-2016_en.

314 "Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders ('CISA') (19 June 1990) OJ L 239," n.d.

315 See the draft version leaked by Statewatch: "Code of Conduct for NGOs Involved in Migrants' Rescue Operations at Sea, Document Leaked by Statewatch on 11 July 2017," accessed July 14, 2017, http://statewatch.org/news/2017/jul/italy-eu-sar-code-of-conduct.pdf.

Action Plan on Measures to Support Italy, Reduce Pressure along the Central Mediteranian Route and Increase Solidarity (sic)[316] ("Action Plan to Support Italy").[317]

Admittedly, the situation in the Mediterranean has become somewhat chaotic in recent years. A number of non-state actors starting to engage in search and rescue especially after the abolishment of two official search and rescue operations – Italian Mare Nostrum[318] and EU's Triton Joint Operation[319] – and their replacement with the EU NAVFOR MED Operation Sophia,[320] which is primarily tasked with fight against smuggling and border protection.[321] While the Italian prosecution and Frontex – the European Border and Coast Guard Agency – accusing NGOs of either cooperating with smugglers[322] or encouraging traffickers,[323] the NGOs themselves allege push-backs and endangerment of rescue ships by Libyan authorities.[324] At the same time, the rescue operations keep drifting ever closer to the Libyan shores.[325] A Code of Conduct might thus prove helpful in regularizing and better distinguishing humanitarian actors from other non-state actors operating in the Mediterranean with less praiseworthy goals, such as far-right groups aiming at actively engaging in disrupting the

[316] The original version published on 4 July 2017 does indeed say "Mediteranian". See European Commission (COM), "Action Plan on Measures to Support Italy, Reduce Pressure along the Central Mediteranian Route and Increase Solidarity (Sic), SEC(2017) 339 ('Action Plan to Support Italy')," July 4, 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170704_action_plan_on_the_central_mediterranean_route_en.pdf.
[317] Ibid., 3.
[318] Ministero della Difesa [Ministry of Defense], "Mare Nostrum Operation - Marina Militare," accessed August 5, 2017, http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx.
[319] European Border and Coast Guard Agency (Frontex), "Frontex | Hot Topics - Joint Operation Triton (Italy)," October 10, 2016, http://frontex.europa.eu/pressroom/hot-topics/joint-operation-triton-italy--ekKaes.
[320] European External Action Service (EEAS), "About EUNAVFOR MED Operation SOPHIA - EEAS - European External Action Service - European Commission," accessed August 7, 2017, https://eeas.europa.eu/headquarters/headquarters-homepage_en/36/About EUNAVFOR MED Operation SOPHIA.
[321] European External Action Service (EEAS), "EUNAVFOR MED Op SOPHIA - Six Monthly Report, 1 January - 31 October 2016, 14978/16 - EU Restricted," accessed March 7, 2017, http://statewatch.org/news/2016/dec/eu-council-eunavformed-jan-oct-2016-report-restricted.pdf.
[322] Dambach, "Italy Prosecutor Claims NGOs Working with Human Smugglers."
[323] Wintour, "NGO Rescues off Libya Encourage Traffickers, Says EU Borders Chief."
[324] Ahmed Elumani, "Libyan Coastguard Turns Back Nearly 500 Migrants after Altercation with NGO Ship," *Reuters*, May 10, 2017, http://www.reuters.com/article/us-europe-migrants-libya-idUSKBN1862Q2.
[325] Stuart A. Thompson and Anjali Singhvi, "Efforts to Rescue Migrants Caused Deadly, Unexpected Consequences," *New York Times*, June 14, 2017, https://www.nytimes.com/interactive/2017/06/14/world/europe/migrant-rescue-efforts-deadly.html?smid=tw-share.

rescue operations.[326] Nevertheless, the need for a new code seems rather questionable, especially as a Voluntary Code of Conduct created by the NGOs operating in the Mediterranean themselves is already existing and a number of the humanitarian agencies have subscribed to it.[327] The document is thus perhaps rightly feared to create new obligations which might curtail the rescue efforts.[328] Not only have NGOs not been included in the drafting process, contrary to the Action Plan to Support Italy.[329] According to a leaked draft prepared by the Italian government, the NGOs would be, among others, completely banned from entering Libyan waters or using phone communication or light signals to indicate their location and would be required to allow judicial and police authorities to enter their boats.[330] NGOs refusing to subscribe to the Code would risk losing access to Italy's ports.[331] As has been mentioned in the Introduction to this thesis, these developments seem to have further escalated in August 2017, with the rescue ship Iuventa owned by the German NGO Jugend rettet [Youth rescues] being seized by the Italian authorities.[332]

These examples illustrate that for the purpose of the present thesis, it might be equally relevant to look into the regulations of the conduct of border authorities. The common operations at EU's external borders are coordinated and implemented by the above-mentioned European

[326] Mark Townsend, "Far Right Raises £50,000 to Target Boats on Refugee Rescue Missions in Med," *The Guardian*, June 4, 2017, sec. World news, https://www.theguardian.com/world/2017/jun/03/far-right-raises-50000-target-refugee-rescue-boats-med?CMP=fb_gu.
[327] Human Rights at Sea, "Voluntary Code of Conduct for Search and Rescue Operations Undertaken by Civil Society Non-Government Organisations in the Mediterranean Sea," February 2017, https://www.humanrightsatsea.org/wp-content/uploads/2017/03/20170302-NGO-Code-of-Conduct-FINAL-SECURED.pdf.
[328] David M. Herszenhorn, Jacopo Barigazzi, and Harry Cooper, "For Europe and Migrants, It Looks like 2015 All over Again," *POLITICO*, July 4, 2017, http://www.politico.eu/article/for-europe-and-migrants-it-looks-like-2015-all-over-again/.
[329] European Commission (COM), "Action Plan on Measures to Support Italy, Reduce Pressure along the Central Mediteranian Route and Increase Solidarity (Sic), SEC(2017) 339 ('Action Plan to Support Italy')," 2.
[330] "Code of Conduct for NGOs Involved in Migrants' Rescue Operations at Sea, Document Leaked by Statewatch on 11 July 2017."
[331] "Failure to sign this Code of Conduct or failure to comply with its obligations may result in the refusal by the Italian State to authorize the access to national ports, subject to compliance with existing international conventions." See Ibid.
[332] Kitzler, "Verfahren Gegen die 'Iuventa': Rettungsboot in Not [Process against Iuventa: Rescue Ship in Need of Rescue]."

Border and Coast Guard Agency ("Frontex").[333] Frontex's operating space is delimitated notably by the Regulation (EU) 656/2014 establishing rules for the surveillance of the external sea borders ("Frontex Sea Borders Surveillance Regulation"), as well as the Regulation (EU) 2016/1624 on the European Border and Coast Guard ("European Border and Coast Guard Regulation").[334]With the latter, Frontex, established originally in 2007 as the so-called European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union,[335] was re-established under the same legal entity and abbreviation as the European Border and Coast Guard Agency.[336] Besides, Frontex operations are subject to the rules for the exercise of border controls at internal and external border of EU MSs as set in the Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders ("Schengen Borders Code").[337]

[333] The European Border and Coast Guard Agency replaced in 2016 the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, operating under the same legal personality and same abbreviation – Frontex (from French "frontières extérieures", meaning "external borders"). See art. 6 I-II European Border and Coast Guard Regulation: "The European Border and Coast Guard Agency shall be the new name for the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union established by Regulation (EC) No 2007/2004. Its activities shall be based on this Regulation. 2.To ensure a coherent European integrated border management, the Agency shall facilitate and render more effective the application of existing and future Union measures relating to the management of the external borders, in particular the Schengen Borders Code established by Regulation (EU) 2016/399." "Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and Amending Regulation (EU) 2016/399 of the European Parliament and of the Council and Repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC ('European Border and Coast Guard Regulation') (16 September 2016) OJ L 251/1," n.d.See also European Border and Coast Guard Agency (Frontex), "Frontex | Legal Basis," accessed July 10, 2017, http://frontex.europa.eu/about-frontex/legal-basis/.

[334] "European Border and Coast Guard Regulation."

[335] "Council Regulation (EC) No 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (25 November 2004) OJ L 349/1 ('Frontex Regulation')," n.d. This was later amended with the "Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 Amending Council Regulation (EC) No 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ('Regulation Amending the Frontex Regulation') (22 November 2011), OJ L 304/1," n.d.

[336] See Recital 10 and art. 6 I European Border and Coast Guard Regulation. "European Border and Coast Guard Regulation."

[337] "Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Borders ("Schengen Borders Code") (Codification) (23 March 2016) OJ L 77/1.," n.d., accessed June 19, 2017.

For years, Frontex has been criticized for partaking in questionable push-back operations, complicity in border violence and an unclear legal structure, making it hard to hold it legally accountable.[338] Despite further norm-making in recent years, it remains questionable in how far the new Regulations and Code truly provide for safeguards. A reference to international human rights law and international refugee law, including the duty of *non-refoulement*, is made merely in the recitals of the European Border and Coast Guard Regulation.[339] The references, however, do not translate into any specific obligations in the Regulation's core.

The situation seems to look better with the Frontex Sea Borders Surveillance Regulation, which according to Carrera and den Hertog presents "a major step for establishing common EU rules on maritime surveillance of human mobility."[340] Art. 9 I Frontex Sea Borders Surveillance Regulation reaffirms that the MSs duty to provide assistance to "any vessel or person in distress at sea […] regardless of the nationality or status of such a person or the circumstances in which that person is found" applies also to situations where MSs participate in Frontex-coordinated operations.[341] Yet again, besides reaffirming the international duty to rescue, the Regulation does not include any direct obligation vis-à-vis individuals who engage in rescue efforts or humanitarian vessels. Besides EU law, Frontex has developed specific Codes of Conduct for

[338] The extent of evidence of Frontex's human rights track record collected by Migreurope and published by the MEPs Lochbihler, Lunacek and Keller in 2011, prompted the MEPs to ask whether the Agency as such was compatible with human rights. Barbara Lochbihler, Ska Keller, and Ulrike Lunacek, "Ist Die Agentur Frontex Vereinbar Mit Den Menschenrechten [Is Frontex Compatible with Human Rights?]" (Greens/EFA in the European Parliament, March 2011), http://www.gruene-europa.de/fileadmin/dam/Deutsche_Delegation/Broschueren/11_03_frontex-studie_maerz2011_DE.pdf.
[339] Recital 47 "European Border and Coast Guard Regulation."
[340] Carrera and Hertog, *Whose Mare?*, 1.
[341] Art. 9 I Frontex Regulation: "Member States shall observe their obligation to render assistance to any vessel or person in distress at sea and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found." "Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ('Frontex Sea Borders Surveillance Regulation') (27 June 2014) OJ L 189/93," n.d. Besides, the Frontex Regulation established more detailed provisions on how to recognize and respond to situations of distress at sea. See art. 9 II Frontex Regulation.

individuals participating in their activities.[342] These however, include again obligations of rather generalized nature. All in all, the Frontex Regulation, the Border and Coast Guard Regulation as well as the Codes of Conduct provide in practice only very limited to basically no safeguards for flight helpers, except for situations of distress at sea. Meanwhile, one should perhaps not expect all too much from regulations on the conduct of border authorities. At the very best, better regulation can protect flight helpers against repressive behaviour of border authorities. It can, however, only hardly tackle the principled gaps left by the Facilitators Package.

3.2.2. Carriers' Liability and Carriers' Sanctions

According to the Facilitation Directive's Preamble, the Directive constitutes a further elaboration on the provisions of the Schengen acquis.[343] Prior to the adoption of the Facilitation Directive, matters relating to assistance in irregular border crossing were dealt with in art. 26 and 27 CISA. Art. 27 CISA requires the following:

> The Contracting Parties undertake to impose appropriate penalties on any person who, *for financial gain*, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.[344]

[342] European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), "Code of Conduct for All Persons Participating in Frontex Activities," accessed July 10, 2017, http://www.statewatch.org/news/2011/nov/eu-frontex-code-of-conduct-press-version.pdf; European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), "Code of Conduct for Joint Return Operations Coordinated by Frontex," accessed July 10, 2017, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf.

[343] Council of the European Union, "Facilitation Directive" par. 6, 8.

[344] Art. 27 I CISA. "Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders ('CISA') (19 June 1990) OJ L 239" Emphasis added.

Interestingly, the Facilitation Directive's predecessor from 1990 thus did include the element of financial benefit, long before the adoption of the Smuggling Protocol.

At the same time, art. 26 CISA obliges the contracting states to implement in their domestic law various measures relating to liability and sanctions of internationally operating passenger carriers. Considering that carriers provide a paid service, they would fall outside of the definition of humanitarian smuggling as defined in the context of the present thesis. The carrier liability regime originally established under art. 26 CISA appears thus at first glance of lesser importance than art. 27 CISA. However, as will be shown below, the carrier liability regime can provide some additional inputs for the arguments at stake in the present thesis.

While the obligations under art. 26 CISA are, in contrast to the Facilitation Directive, "subject to the obligations" under the 1951 Refugee Convention and its Protocol,[345] it requires that in cases where individuals were refused entry into the territory of a member state, it is the carriers who "shall be obliged immediately to assume responsibility for them"[346]. This includes that upon the request of the authorities, the carriers can be required to return the individual.[347] Moreover, the contracting states are required to held the carriers responsible to "take all the necessary measures" to guarantee that the individuals they are transporting dispose with the required travel documents (art. 26 I lit. b CISA) and to impose penalties on those which fail to do so (art. 26 II CISA). This obligation to penalize, however, relates only to cases where individuals are "carried by air or sea" (art. 26 I lit. b) and to "international carriers transporting groups overland by coach" (art. 26 III).[348] The "subject to obligations" under the Refugee

[345] Art. 26 I CISA. Ibid.
[346] Art. 26 I lit. a CISA. Ibid.
[347] Art. 26 lit. a CISA. Ibid.
[348] "The Contracting Parties undertake, subject to the obligations resulting from their accession to the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, to incorporate the following rules into their national law: (a) If aliens are refused entry into the territory of one of the Contracting Parties, the carrier which brought them to the external border by air, sea or land shall be obliged immediately to assume responsibility for them again. At the request of the border surveillance authorities the carrier shall be obliged to return the aliens to the third State from which they were transported or to the third State which issued the travel document on which they travelled or to any other third State to which

Convention clause meant in practice that carriers were exempt from sanctions in cases where the authorities rules the individual's claim for protection valid.[349]

While the art. 27 CISA was ultimately repealed with Art. 5 Facilitation Directive,[350] art. 26 CISA remained and was merely supplemented with more specific provisions under the Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 ("Carrier Sanctions Directive").[351]

On one hand, art. 4 I Carrier Sanctions Directive requires the MSs to "take the necessary measures to ensure that the penalties applicable to carriers under the provisions of Article 26 II and III of the Schengen Convention are dissuasive, effective and proportionate[…]."[352] On the other hand, art. 4 II states that art. 4 I applies "without prejudice to Member States' obligations in cases where a third country national seeks international protection."[353] In practice, most EU MSs did not introduce any specific exemptions in their domestic regulation on carrier liability.[354] Some, however, did move from non-sanctioning carriers in cases where

they are certain to be admitted. (b) The carrier shall be obliged to take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting Parties. 2. The Contracting Parties undertake, subject to the obligations resulting from their accession to the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, and in accordance with their constitutional law, to impose penalties on carriers which transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories. 3. Paragraphs 1(b) and 2 shall also apply to international carriers transporting groups overland by coach, with the exception of border traffic." Art. 26 CISA. Ibid.

[349] Kay Hailbronner and Cordelia Carlitz, "Directive 2001/51 Carriers Liability - Synthesis Report" (Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe, 2007), http://odysseus-network.eu/wp-content/uploads/2015/03/2001-51-Carriers-Liability-Synthesis.pdf.

[350] Art. 5 Facilitation Directive reads as follows: "Article 27(1) of the 1990 Schengen Convention shall be repealed as from 5 December 2004. Where a Member State implements this Directive pursuant to Article 4(1) in advance of that date, the said provision shall cease to apply to that Member State from the date of implementation." Council of the European Union, "Facilitation Directive."

[351] "Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985 ('Carrier Sanctions Directive') (28 June 2001), OJ L 187/45.," n.d.

[352] Art. 4 I Carrier Sanctions Directive. Ibid.

[353] Art. 4 II Carrier Sanctions Directive. Ibid.

[354] Hailbronner and Carlitz, "Directive 2001/51 Carriers Liability - Synthesis Report," 13–15.

the individual's claim was found valid towards non-sanctioning in cases where a person simply lodged an application.[355]

Admittedly, the *modus operandi* of international carriers is qualitatively different from that of individual flight helpers. However, the insight that in some EU MSs, the start of an asylum procedure may exempt the carrier from penalization provides additional input for the arguments at stake the present work. It could be argued that, analogically, flight helpers engaging in acts of humanitarian smuggling should be pardoned in cases where following the arrival, the individual assisted does launch an application.[356]

3.3. Fundamental Rights Safeguards

As has been demonstrated above, MSs are granted a significant level of discretion when implementing the Facilitators' Package into domestic law. However, as the following Sub-Chapter shows, this discretion is "not completely unfettered".[357] There are two ways in which fundamental rights safeguards limit state's ability to criminalize assistance in irregular entry. On one hand, the MSs' margin for discretion is circumscribed by the fundamental rights pertinent to flight helpers themselves. These include primarily concerns of fair trial guarantees and proportionality of sanctions. On the other hand, considering that "those in solidarity play an important role for irregular migrants [and refugees] to have and exercise their rights,"[358] some limits on the MSs' discretion can be derived from the fundamental rights guarantees pertinent to the refugees assisted with entry.

[355] Ibid., 34–35.
[356] Indeed, a launched asylum application has been considered a ground for granting humanitarian exceptions from penalization of irregular entry in the Spanish domestic legislation. Art. 54 III Organic Aliens Law stated that: "[…] it shall not be considered an infraction to transport into Spanish territory a foreign national who, having presented without delay a request for asylum, has had this admitted for processing […]." Cited after European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 26. See more in detail in Chapter IV.
[357] Provera, *The Criminalisation of Irregular Migration in the European Union*, 9.
[358] Ibid.

Admittedly, the extent of rights pertaining to individuals entering the EU irregularly has been subject of controversy. Analogically to Hathaway's argument on the implicit penalization of irregular entry discussed in Chapter II, Provera demonstrates that in practice the EU law gives preference to refugees arriving regularly.[359] This is manifested in "a distinction in treatment between border and other applicants" resulting in "the possibility of Member States to severely derogate from guarantees rights to which border applicants might otherwise be entitled."[360] Meanwhile, NGOs have argued that all human rights treaties apply by virtue of their non-discrimination provision equally to all individuals, regardless of their residence status.[361] Some guarantees relevant in the context of the present work were also recognized by the Court of Justice of the European Union ("CJEU") in its 2011 preliminary ruling in *Achughbabian v Préfet Du Val-de-Marnel*.[362] Here, the CJEU stated that any sanctioning of irregular entry has to be in line with fundamental rights safeguards, in particular those contained in the European Convention on Human Rights and Fundamental Freedoms ("ECHR", "the Convention").[363] While the *Achughbabian* case related to irregular entry and its consequences in the context of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals ("Return Directive"),[364] the decision does provide sufficient grounds for looking into fundamental rights safeguards vis-a-vis the sanctioning of flight helpers.

[359] Ibid., 10.
[360] Ibid.
[361] Luca Bicocchi and Michele LeVoy, "Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework" (Platform for International Cooperation on Undocumented Migrants (PICUM), 2007).
[362] Court of Justice of the European Union, "Achughbabian v Préfet Du Val-de-Marnel, C-329/11, Preliminary Ruling, CJEU 2012," accessed October 16, 2016, http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398691619938&uri=CELEX:62011CA0329.
[363] Ibid., paras. 48–49.
[364] "Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals ('Return Directive') (24 December 2008), OJ L 348," n.d.

The following Sub-Chapter analyses to what extent do the situations at stake in the present thesis raise concerns within the ambits of the rights protected by the Charter of Fundamental Rights of the European Union ("EU Charter of Fundamental Rights", "the Charter"),[365] as well as several other human rights instruments of the EU and the Council of Europe ("CoE").

3.3.1. EU Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union ("EU Charter of Fundamental Rights", "the Charter")[366] is the single most important human rights document of the EU, binding EU institutions, bodies and agencies, as well as the MSs when implementing EU law.[367] By virtue of art. 6 I of the Treaty on the European Union ("TEU"), the Charter constitutes primary law and is thus above secondary legislation, including all Directives and Regulations.[368] This means on one hand that all Directives and Regulations must be in line with the Charter. On the other hand, the Court of the Justice of the European Union is in a position to test secondary legislation against human rights standards set by the Charter.

According to a study of the European Union Agency for Fundamental Rights ("FRA"), a number of fundamental rights included in the Charter catalogue are impacted when migration and facilitation of entry are being criminalized.[369] These include, among others: the right to

[365] "European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 ('EU Charter of Fundamental Rights', 'the Charter') (26 October 2012) OJ C 326/391."
[366] Ibid.
[367] Art. 51 I sentence 1 EU Charter of Fundamental Rights: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law." Ibid.
[368] "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." Note also that: "The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions." Art. 6 I EU Charter of Fundamental Rights. Ibid.
[369] European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 1.

liberty and security of a person (art. 6 Charter),[370] human dignity (art. 1 Charter),[371] right to life (art. 2 I Charter),[372] the right to an effective remedy and to a fair trial (art. 47 Charter)[373].[374]

While the rights mentioned-above are pertinent to refugees and flight helpers equally, in the situation at focus in the present thesis most of them appear to be of greater concern vis-a-vis the situations experienced by the refugees. As has been mentioned in Chapter II, it could be, however, argued that in situations where the rights of refugees are safeguarded by the action of a non-state actor,[375] there should be a corresponding state duty not to criminalize such action.[376] In this regard, the right of the flight helpers not to be criminalized would be implied from the rights of the refugee they aim to safeguard. However, as the extent of rights pertinent to refugees entering irregularly remains disputed, the argument would be built on a rather shaky ground. In line with the argumentation presented in context of the law of the sea in Chapter II, a stronger argument in favour of a right not to be criminalized could be made at best, in situations where the action of the flight helper ensures the enjoyment of one of the absolute, non-derogable rights, such as the right to life (art. 2 I Charter) or the prohibition of torture, inhuman or degrading treatment or punishment (art. 4 Charter).[377]

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[370] Art. 6 EU Charter of Fundamental Rights: "Everyone has the right to liberty and security of person.". "European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 ('EU Charter of Fundamental Rights', 'the Charter') (26 October 2012) OJ C 326/391."

[371] Art. 1 EU Charter of Fundamental Rights: "Human dignity is inviolable. It must be respected and protected." Ibid.

[372] Art. 2 I EU Charter of Fundamental Rights: "Everyone has the right to life." Ibid.

[373] Art. 47 EU Charter of Fundamental Rights: „Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." Ibid.

[374] European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 1.

[375] See e.g. Provera, who notes that "those in solidarity play an important role for irregular migrants to have and exercise their rights." Provera, *The Criminalisation of Irregular Migration in the European Union*, 9.

[376] See Hohfeld's theory of jurral correlatives, mentioned also in Chapter II. Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *The Yale Law Journal* 26, no. 8 (1917): 710–70, doi:10.2307/786270.

[377] Art. 4 EU Charter of Fundamental Rights: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." "European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 ('EU Charter of Fundamental Rights', 'the Charter') (26 October 2012) OJ C 326/391."

In contrast to that, a stronger argument can be made if we address the human rights compliance of the Facilitators Package from the perspective of fair trial rights pertinent to the flight helpers under Title VI of the Charter. Art. 49 I contains the *nullum crimen sine lege* principle, stating that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed."[378] Furthermore art. 49 III requires that "[t]he severity of penalties must not be disproportionate to the criminal offence."[379]

Two concerns could be raised as to the general compliance of the Facilitators' Package with art. 49 Charter. First, it could be argued that the overall vagueness of the Facilitation Directive together with the non-compulsory nature of humanitarian exceptions deteriorates the foreseeability of the law to an extent that individuals become unable to regulate their behavior, thus raising serious concerns vis-a-vis the *nullum crimen* principle. Second, the lack of mandatory humanitarian exceptions or, at the least, maximum level penalties permissible in non-profit driven smuggling could raise concerns vis-a-vis the proportionality of the penalties required by the Council Framework Decision. Interestingly, it appears that the questions of fair trial rights and the overall general compliance of the Facilitators Package with the Charter remained largely unchallenged in the domestic criminal proceedings, in front of the CJEU as well as in the academia.[380] The question of compliance of the Facilitators Package as well as of its implementation in domestic law with the fair trial standards under the EU Charter of Fundamentals Rights could thus offer additional arguments, as well as possible litigation strategy, which might be interesting to explore further. In order to render the fair trial rights

[378] Art. 49 I sentence 1 EU Charter of Fundamental Rights. Ibid.
[379] Art. 49 III EU Charter of Fundamental Rights. Ibid.
[380] Fair trial rights concerns were advanced in the case of R v Appulonappa and to some extent also in the Andersens' case. Both are discussed in further detail in Chapter IV. Supreme Court of Canada, R. v. Appulonappa (November 27, 2015); Andersen, "When Denmark Criminalised Kindness."In the context of the research in the scope of the present work, a similar line of argumentation was not found in the available academic literature

concerns more tangible, Chapter IV looks into the implementation of the Facilitators Package in the domestic legal systems and judicial practices and discusses these against the background of concrete cases.[381]

3.3.2. EU Law on Trafficking and Victims of Crimes

Some additional fundamental rights safeguards for the smuggled can be derived from EU law relating to trafficking and victims of crime, as some provision under EU anti-trafficking legislation do under certain conditions apply to those being smuggled. In the context of the present work, it is interesting to have a brief look into the Council Directive 2004/81/EC on the residence permits issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities ("Victims Residence Directive"),[382] as its provisions may unexpectedly impact on flight helpers. While primarily directed towards victims of trafficking, the applicability of the Victims Residence Directive can be under certain conditions also

[381] Fair trial rights are not the only rights expressly pertinent to flight helpers in the situations discussed in the present thesis. For example, in cases where family members are involved in the process of facilitation could be easily brought within the ambits of the right to family life (art. 7 Charter). According to Dzananović, humanitarian smuggling falls even under the freedom to manifest one's beliefs. This would fall possibly somewhere at the intersection of freedom of thought, conscience and religion (art. 10 I Charter) and freedom of expression (art. 11 I Charter). Nevertheless, as has been mentioned in Chapter I, situations where family members are involved in the process of facilitation of irregular entry present a distinct legal matter and will not be addressed in the context of the present work. See: Art. 7 EU Charter of Fundamental Rights: "Everyone has the right to respect for his or her private and family life, home and communications." Art. 10 I EU Charter of Fundamental Rights: "Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance." Art. 11 I EU Charter of Fundamental Rights: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." "European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 ('EU Charter of Fundamental Rights', 'the Charter') (26 October 2012) OJ C 326/391"; "European Courts and Citizens Struggle to Do 'What's Right' Amidst Reactionary Migration Law and Policy - The Center for Migration Studies of New York (CMS)," *The Center for Migration Studies of New York (CMS)*, accessed February 28, 2017, http://cmsny.org/publications/dzananovic-eu-courts-and-citizens/.

[382] Council of the European Union, "Council Directive 2004/81/EC on the Residence Permit Issued to Third-Country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities ('Victims Residence Directive') (29 April 2004), OJ L 261/19.," n.d.

extended also to victims of smuggling."[383] Cooperation with the authorities is key in order to be considered for the residence permit. In this sense, the individuals must "show a clear intention to cooperate" with the authorities and to cease any contact with the assumed "perpetrators".[384] While the nature and extent of the cooperation required remains unspecified in the Directive's provisions, the recitals suggests that the authorities to be cooperated with may include "police, prosecution and judicial authorities".[385] It can be thus assumed that at the very least, the persons aiming at regularizing their status through the Victims Residence Directive would be required to reveal to the authorities the identity of the flight helper. In practice then, the Directive risks producing paradoxical results by incentivizes the smuggled to identify their helpers as criminals.[386]To conclude, while additional rights awarded to the individuals being smuggled under the EU anti-trafficking and victims of crime regime are likely to significantly improve the situation of individuals who in the process of being smuggled do become victims of crimes, they do not provide any additional argument in favour of decriminalizing humanitarian smuggling and on the contrary, may produce perverse results.

[383] According to art. 3 II, the Directive's provisions "*may* apply […] to the third country nationals who have been the subject of an action to facilitate illegal immigration. See Art. 3 II Directive 2004/81/EC. Emphasis added. Ibid.

[384] Art. 8 I-II Victims Residence Directive: "After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider: (a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and (b) whether he/she has shown a clear intention to cooperate and (c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c). 2. For the issue of the residence permit and without prejudice to the reasons relating to public policy and to the protection of national security, the fulfilment of the conditions referred to in paragraph 1 shall be required." Ibid.

[385] Recital 11 Victims Residence Directive: The third country nationals concerned should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. This should help put them in a position to reach a well-informed decision as to whether or not to cooperate with the competent authorities, which may be the police, prosecution and judicial authorities (in view of the risks this may entail), so that they cooperate freely and hence more effectively. Ibid.

[386] Note that this does not presume that the refugees being assisted in entry would in practice opt for such cooperation with the authorities.

3.3.3. Possible Future Developments within the Council of Europe

While the focus of the present thesis remains at EU law, in order to gain a comprehensive picture about the state's obligations, it is paramount to consider other regional mechanism adopted within the Council of Europe ("CoE").

While the right to asylum is not part of the European Convention on Human Rights' catalogue of rights, the Convention's protection regime largely overlaps with that later established by the Charter.[387] The only exception are the Charter-specific provisions on proportionality of criminal sanctions (art. 49 III Charter), which would fall under general fair trial right of the Convention (art. 6 Convention). Consequently, the considerations on rights possibly at stake under the ECHR would mirror the discussion illustrated in the Sub-Chapter relating to the EU Charter of Fundamental Rights and need not be repeated.

With regard to other protection mechanisms available within the CoE legal space, while the CoE disposes with an own Convention on Action against Trafficking in Human Beings ("CoE Anti-Trafficking Convention"),[388] there is at the moment no specific Convention, Parliamentary Assembly ("PACE") Resolution or even a Committee of Ministers ("CM") Recommendation relating to smuggling. Nevertheless, some hints as to potential future developments are provided in the Guiding Principles developed by the European Committee

[387] The relationship between the Charter and the Convention is regulated in art. 52 III of the Charter. Accordingly, in cases where Charter rights correspond to the Convention rights, "the meaning and scope of those rights shall be the same as those laid down by the […] Convention" (art. 52 III sentence 1 EU Charter of Fundamental Rights). This, however, does not preclude the EU from providing more extensive protection (art. 52 III sentence 2 EU Charter of Fundamental Rights). The protection regime established by the Charter should thus be identical to the one established by the Convention, as interpreted by the judges at the European Court of Human Rights ("ECtHR"). See Art. 52 III EU Charter of Fundamental Rights. "European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02 ('EU Charter of Fundamental Rights', 'the Charter') (26 October 2012) OJ C 326/391."

[388] "Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings ('CoE Anti-Trafficking Convention') (16 May 2005), Council of Europe Treaty Series No. 197.," n.d.

on Crime Problems ("CDPC") during its session on Preventing and Suppressing the Smuggling of Migrants in CoE MSs in 2016 ("the Guiding Principles").[389]

Considering the "serious discrepancies" in regulation of smuggling among CoE MSs,[390] the CDPC suggests the adoption of either a new Convention or a new CM Recommendation.[391] To this end, the CDPC proposes to pick the Smuggling Protocol as "starting point"[392] with EU law offering "further guidance".[393] The new legal instrument should improve the current legal situation, among others, in the following respects: (1) more precise definition of smuggling, (2) inclusion of a gain element in the definition, (3) better distinction between smuggling and trafficking, (4) inclusion of additional aggravating circumstances, (5) better guidance on adequate penalties, and (6) special provision relating to smuggling by air and land.[394]

The first two points are of particular relevance in the context of the present thesis. The CDPC expressly recognizes the value of civilian contribution in the context of the "refugee crisis"[395] and argues that while not being consistently implemented across CoE MSs, the gain element is "central to the definition of smuggling."[396] In this regard, the CDPC Guiding Principles can be considered a positive development. Would the drafters of the new instrument – be it a Convention or merely a Recommendation – follow-up on the work of the Committee and

[389] Council of Europe (CoE), Committee on Crime Problems (CDPC), "Working Document: Preventing and Suppressing the Smuggling of Migrants in Council of Europe Member States - A Way Forward, 70th Plenary Session, Strasbourg, 27-30 June 2016."
[390] See more in detail in Chapter IV.
[391] Council of Europe (CoE), Committee on Crime Problems (CDPC), "Working Document: Preventing and Suppressing the Smuggling of Migrants in Council of Europe Member States - A Way Forward, 70th Plenary Session, Strasbourg, 27-30 June 2016," 7–8. A CM Recommendation would be by experience more easily negotiable than a Convention.391 However, a CM Recommendation would fall rather under the category of soft-law and would lack the legal force of a Convention. It could point towards concrete measures to be taken by CoE MSs, including an obligation to exempt flight helpers from criminalization, but would lack legal mechanisms for enforcing these.
[392] Ibid., 7.
[393] Ibid., 8.
[394] Ibid., 8–9.
[395] See more in detail in Chapter IV.
[396] Council of Europe (CoE), Committee on Crime Problems (CDPC), "Working Document: Preventing and Suppressing the Smuggling of Migrants in Council of Europe Member States - A Way Forward, 70th Plenary Session, Strasbourg, 27-30 June 2016," 9.

include the gain element in the CoE definition of smuggling, we may witness some interesting legal or quasi-legal "naming and shaming" battles. This could be especially the case if a Convention would establish an expert oversight body similar to the Group of Experts on Action against Trafficking in Human Beings ("GRETA") established with the CoE Anti-Trafficking Convention.[397] While human rights lawyers and practitioners typically strive for harmonious interpretation of conflicting norms, the question of what happens in case of conflict between EU and CoE laws would be in the case open to discussion.

At the same time, considering that EU MSs build up a slight majority in the CoE, the drafting process could easily backfire, as the EU MSs would be also likely to influence it to their favour. What would be the result of renewed law-making in CoE remains thus questionable. While a CoE Convention could lead to a closure of some of the implementation gaps and hereby significantly improve the situation of flight helpers, it could also reinforce the current loopholes or introduce completely new ones into what is already a fragile structure. Be as it will, while the CoE mechanisms as they stand today provide only limited safeguards for flight helpers, the CDPC Guidelines do serve as an additional argument in favour of their decriminalization in cases where the element of gain is missing.

3.5. Conclusions Chapter III

Chapter III has demonstrated that, in contrast to the international law, the European law provides only highly limited safeguards against the criminalisation of flight helpers. Most importantly, the EU Facilitation Directive fails to properly identify smuggling. While the EU law does allow for optional humanitarian exceptions, no element of financial or material benefit is required for render an act punishable under criminal law. The inconsistency vis a vis

397 Art. 36 the CoE Anti-Trafficking Convention "Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings ('CoE Anti-Trafficking Convention') (16 May 2005), Council of Europe Treaty Series No. 197."

international law results in legal ambiguities, which will be further elaborated in Chapter IV. Besides, in relation the carriers liability regime some limited arguments can be raised against the criminalization of flight helpers is situations where the individuals facilitated lodge an asylum claim. Moreover, Chapter III has shown that EU law may in fact produce unexpected, perverse results for the flight helpers by incentivizing cooperation of those being smuggled with the prosecutorial bodies. Chapter III has also elaborated on the recent developments in the Mediterranean. Yet besides reaffirming the international duty to rescue, the EU law does provide only limited safeguards for humanitarian actors operating in the Mediterranean. Flight helpers thus might rightly fear further toughening in the upcoming months and years.

Nevertheless, a possible argumentation strategy for defending flight helpers in courts could result precisely from the ambiguities created by the EU Facilitators Package. In this regard, Chapter III argues that the level of legal uncertainty created by the EU law definition of smuggling hinges upon the foreseeability of the law and may in fact infringe upon the fair trial rights of the flight helpers. Considering the strong fair trial rights protection established with the EU Charter of Fundamental Rights and European Convention on Human Rights, a fair trial rights litigation might be an interesting strategy worth exploring in the future.

Apart from the EU legal framework on smuggling, developments within the Council of Europe seem promising, although it remains yet to be clarified to what extent a CoE convention against smuggling would have prevalence over EU law.

Chapter IV: Operating within the Gap: Humanitarian Smuggling in Domestic Legal Systems

Having analysed the abstract legal framework pertinent to human smuggling in general and humanitarian smuggling in particular in the previous two Chapters, Chapter IV turns to the implications of the relevant laws for the practice of the MSs, the domestic lawmakers and courts, as well as the flight helpers.

In the context of the EU, the tension between the states' conflicting obligations became tangible with a series of heavily medialized cases of masters of ships[398] or fishermen[399] being criminalized in the context of rendering assistance to ships of refugees in distress, which were heard in front of the Italian courts from early 2000s.

And yet, comprehensively analysing applicable domestic legislation proves challenging, considering that the domestic legislation in a number of EU MSs is likely to have underwent significant developments in the context of the "refugee crisis". Meanwhile, a central, regularly updated collection of national law of EU MSs relating to smuggling, available in English, is still lacking.[400]

Likewise, comprehensively mapping the landscape of all judicial responses in the period at scrutiny in the present thesis appears a difficult exercise. While the overall number of

398 Tribunale di Agrigento, I Sezione Penale, I Collegio, Cap Anamur, 954/2009 ("Cap Anamur case") (2009).
399 Court of Appeal of Palermo, Judgement No. 2932/2011 ("Tunesian fishermen case") (n.d.).
400Council of Europe (CoE), Committee on Crime Problems (CDPC), "Working Document: Preventing and Suppressing the Smuggling of Migrants in Council of Europe Member States - A Way Forward, 70th Plenary Session, Strasbourg, 27-30 June 2016," 6. In countries where the legislation on migration or legislation on trafficking overlaps with the legislation on smuggling, some of the relevant provisions and codes can be accessed via the Legislationline database administered by the Organisation for Security and Cooperation in Europe ("OSCE"), which has a specific section on both, trafficking and migration. Likewise, in cases where the legislation on facilitation of irregular entry makes part of the legislation on asylum and migration, the Asylum Information Database ("AIDA") run by the European Council on Refugees and Exiles ("ECRE") can a solid starting point for further research. However, a registry of laws relating to smuggling keeps missing. See Organisation for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights (ODIHR), "Legislationline," accessed July 17, 2017, http://legislationline.org/; European Council on Refugees and Exiles (ECRE), "Asylum Information Database ('AIDA')," accessed July 17, 2017, http://www.asylumineurope.org/.

individuals charged with smuggling was on the rise during the period at focus, the statistics do not distinguish between for-profit and *prima facie* humanitarian, non-profit smuggling. In general terms, 12 023 suspected facilitators were detected in the EU in 2015 compared to 10 234 in 2014.[401] In 2016 the figures remained at the levels of 2015, with 9 269 facilitators detected in the first nine months.[402] According to some media reports, in Denmark alone, some 279 people were charged with smuggling and similar offences between September 2015 and February 2016.[403] In Sweden, 116 individuals were charged with smuggling in 2016, compared to 50 in 2015 and 15 in 2014.[404] Besides these initial and ad-hoc figures, aggregated, comparable datasets as to the investigations, prosecutions and convictions across the EU do not exist at this moment.[405]

Apart from obvious quantitative short comings, the research into judicial responses to humanitarian smuggling faces important qualitative challenges. At the time of the writing of the present work, a range of cases are potentially still pending at appellate and high courts,[406] which may or may not overturn the initial judgements. In a number of instances, judgements of lower level courts are either not available online at all or difficult to find, as the official

[401] European Commission (COM), "Commission Staff Working Document: Refit Evaluation of the EU Legal Framework against Facilitation of Unauthorised Entry, Transit and Residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA) ('REFIT Evaluation'), SWD (2017) 117 Final," 4.
[402] Ibid.
[403] Crouch, "Danish Children's Rights Activist Fined for People Trafficking."
[404] Agence France-Presse, "Journalist Facing Trial Is 'Confident' He Was Right to Help Refugee Boy," January 25, 2017, https://www.thelocal.se/20170125/journalist-confident-he-was-right-to-help-refugee-boy-flee-to-sweden-fredrik-onnevall-sweden-syria.
[405] Some partial comparisons are provided in the Commission REFIT evaluation and its Annex. See European Commission (COM), "Commission Staff Working Document: Refit Evaluation of the EU Legal Framework against Facilitation of Unauthorised Entry, Transit and Residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA) ('REFIT Evaluation'), SWD (2017) 117 Final."
[406] According to an Organisation for Economic Cooperation and Development ("OECD") study from 2013, the median length of trial court proceedings across OECD countries amounts to approximately 200 days in each instance, making it approximately 600 days for all instances together. In some countries, however, average trial proceedings may take up to 600 days in fisst instance courts and up to approximately 1200 days in higher and highest instance courts, stretching the overall length of the proceedings to some 2800 days in total. See Giuliana Palumbo et al., *Judicial Performance and Its Determinants: A Cross-Country Perspective - A Going for Growth Report*, OECD Economic Policy Papers 5 (OECD Publishing, 2013), http://www.oecd.org/eco/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf.

databases do not operate in another language than the original.[407] Needless to mention, the judgements themselves are often not available in another language version than the official one. Again, there is no comprehensive, up-to-date English-language case-law database existing at present.[408] Knowledge about the legislation in place and the emerging case law can be thus gathered in a rather piecemeal approach, in part from original sources and to a large extent from research conducted by EU institutions and agencies and NGOs. In some cases, media

[407] See for example the Austrian RDB database: "RDB Rechtsdatenbank," accessed July 20, 2017, https://rdb.manz.at/home. The Lithuanian eTeismai database: "eTeismai," accessed July 20, 2017, http://eteismai.lt/. The Hungarian Bíróság database: "Bíróság," accessed July 21, 2017, http://birosag.hu/.The Italian ASGI database "Associazione per Gli Studi Giuridici sull'Immigrazione - ASGI," accessed July 21, 2017, http://old.asgi.it/index.html. The Finish FINLEX database has some selected case-law available in English: "FINLEX," accessed July 20, 2017, http://www.finlex.fi/en/.

[408] Four databases were identified and consulted in the scope of the research for the present work. First database referred to was the European Database of Asylum Law ("EDAL") run by the European Council on Refugees and Exiles ("ECRE"). EDAL focuses mainly on ECtHR and CJEU judgements and was thus of limited relevance in the scope of the present research. Second database consulted was the United Nations Office on Drugs and Crime ("UNODC") Case-Law Database, available via the United Nations Smuggling of Migrants Knowledge Portal. The third database looked into was the Migrant Smuggling Case Database administered by the Migrant Smuggling Working Group, University of Queensland, Australia. While both of these databases are relatively rich on data on smuggling in general, they were again of limited bearing in the context of the present work. First, they include so far only a limited number of cases from the period at focus in the present work. Second and more importantly, both of the databases provide very little to almost no information on cases involving instances of *prima facie* humanitarian smuggling – smuggling involving no financial or material benefit for the smuggler. The fourth database consulted was the UNHCR Refworld Case Law Database. Refworld was probably most relevant in the context of the present work, as it provided English translations of some of the cases which were referred to in other works but where the transnation was missing. In addition to the database research, the European Legal Network on Asylum ("ELENA") Weekly Legal Update was consulted regularly in the course of the writing of the present work. Albeit short in content, the Updates were perhaps most useful when trying to follow up on recent developments on the domestic level and could provide a valuable source of information for future research. Note in this regard also the Commission's REFIT evaluation, which contemplates "limitations in terms of available statistical evidence as regards the scale of migrant smuggling and the type of policy and criminal justice response put in place to prevent and counter it." See European Council on Refugees and Exiles (ECRE), "European Database of Asylum Law ('EDAL')," accessed July 17, 2017, http://www.asylumlawdatabase.eu/en; United Nations, "United Nations Smuggling of Migrants Knowledge Portal," accessed April 20, 2017, https://www.unodc.org/cld/v3/som/cldb/index.html?lng=en; The University of Queensland, Australia, "Migrant Smuggling Working Group: Migrant Smuggling Case Database," accessed April 20, 2017, https://ssl.law.uq.edu.au/som-database/home.php; United Nations High Commissioner for Refugees (UNHCR), "Refworld | Case Law - Smuggling of Persons," accessed August 5, 2017, http://www.refworld.org/type,CASELAW,,,50ffbce4150,,0.html#SRTop21; European Council on Refugees and Exiles (ECRE), "ELENA Weekly Legal Updates," *ECRE.org*, accessed July 17, 2017, https://www.ecre.org/our-work/elena/weekly-legal-updates/; European Commission (COM), "Commission Staff Working Document: Refit Evaluation of the EU Legal Framework against Facilitation of Unauthorised Entry, Transit and Residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA) ('REFIT Evaluation'), SWD (2017) 117 Final," 2.

reports can provide additional input.[409] Chapter IV thus does not aim at presenting a definitive overview of the jurisprudence available in support of decriminalizing smuggling. Rather, it aims at introducing a snapshot of the publicly most vividly discussed cases and outline the lines of arguments employed by the judges in order to decide one way or the other. As will be demonstrated in Chapter V, even such cherry-picking approach can be helpful when reflecting on possible strategies for defending flight helpers in courts.

4.1. Implementation of Smuggling Provisions in Domestic Legal Systems

Albeit already partly outdated, the most comprehensive, overview of the MSs legislation in the area of facilitation of entry is provided by the 2014 report of the EU Agency for Fundamental Rights ("FRA"). According to the report, all EU MSs penalized the facilitation of irregular entry in one way or the other at that time, with only seven of them MSs granting explicit humanitarian exceptions in some form.[410] The exceptions ranged from assistance to family members (Austria), assistance to asylum seekers presenting themselves without delay to the authorities (Spain),[411] assistance to individuals in need of international protection (Greece), acting *pro-bono* on behalf of a non-governmental organization (UK, Ireland), rescue at sea (Greece), unforeseen circumstances, including medical aid and rescue (Lithuania), safety concerns the relating to the countries of origin or residence of the smuggled (Finland) or

[409] The reliance on media report bears obvious methodological difficulties. Media may even unwillingly report inaccurately about the facts of a case, the exact argumentation line of the parties or the reasoning provided by the judges. What is more, a conflation between smuggling and trafficking cannot be avoided, especially in cases where foreign media report on domestic case-law. For example, even high quality media such as Guardian or Spiegel reported on some cases in the context of trafficking, while the circumstances of the case suggest the actual charge was much more likely smuggling. See e.g. Crouch, "Danish Children's Rights Activist Fined for People Trafficking"; Daryl Lindsey, "The World from Berlin: 'Italy's Refugee Policies Should Be Put on Trial'," *Spiegel Online*, October 8, 2009, sec. International, http://www.spiegel.de/international/germany/the-world-from-berlin-italy-s-refugee-policies-should-be-put-on-trial-a-653989.html.To this end, the present work strives to rely on media reports only in cases where these seem to provide an additional argument or perspective. Reliance on media reports is clearly marked in the text of the present Chapter. However, the problem with conflation between smuggling and trafficking is not limited to media reports alone. As long as primary sources are missing, a certain level of inaccuracy cannot be avoided even with official EU or NGO reports.

[410] European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 10.

[411] Compare with the discussion on carriers' liability and carriers' sanction in Chapter III.

humanitarian motives in general (Belgium, Finland).[412] Only three MSs – Spain, Germany and Ireland – required a profit element for the punishment of facilitation of entry.[413] The element of gain, however, remained further unspecified, leaving room for further interpretation.

In addition to the FRA report, the above-consulted 2016 LIBE-study provides a useful update on some EU MSs implementation efforts. Looking into the domestic legislation of France, Italy, Germany, Spain, Netherlands, UK, and to some extent Greece and Hungary,[414] it states that all eight MSs punish the facilitation of irregular entry, with only Germany including the element of financial gain or profit in the offence definition.[415] Moreover, only Greece and Spain introduce the optional humanitarian clause envisaged in art. 1 II Facilitation Directive in practice.[416] In the UK, for the facilitator to be exempted from punishment, they must not be acting individually but have to act "on behalf of an organization that a) aims at assisting asylum-seekers, and b) does not charge for its services."[417] The territorial jurisdiction of domestic courts varies as well, with countries allowing their domestic courts to prosecute facilitation of entry into another member state (Italy, Spain, UK), in the Schengen area (Germany) or the territory to any other state-party to the Smuggling Protocol (Netherlands).[418] What is more, according to the LIBE-study, the type of punishment "var[ies] greatly among the MSs."[419] The custodial sentences range between maximum one year in Spain to 10 years in

[412] European Union Agency for Fundamental Rights (FRA), "Annex: EU Member States' Legislation on Irregular Entry and Stay, as Well as Facilitation of Irregular Entry and Stay."
[413] European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 10.
[414] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants.*
[415] Ibid., 30.
[416]Ibid.
[417] "United Kingdom, UK Immigration Act, 1971," n.d. For a detailed overview of the developments in the UK since late 1990'see also two older publications by Webber, a UK barrister specializing in immigration law, which provides perhaps one of the earliest critiques of the criminalization of humanitarian smuggling. See Webber, *Crimes of Arrival*; Webber, *Border Wars and Asylum Crimes*.
[418] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 31.
[419] Ibid.

Greece and 14 years in the UK,[420] illustrating clearly that the perception of proportionate punishment for the acts in questions varies greatly among the MSs concerned.

In addition to the two studies, the 2016 CDPC working document provides a more detailed legal analysis and a good overall summary of the "serious discrepancies" in relation to the "criminal offences, enforcement, and protections mechanisms" across the CoE legal space as a whole.[421] According to the CDPC "there is […] no […] consistency in the way in which physical (*actus reus*) and mental elements (*mens rea*) of the offence are expressed, and aggravations and penalties vary greatly between States."[422] Moreover, stating that "[t]he events of 2015 have also shown that many civilians aiding refugees had no certainty whether or not their activities were criminalized or not"[423] the CDPC report confirms one of the initial assumptions of the present thesis.[424] In sum, according to the CDPC:

> 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.[425]

Having looked into the discrepancies in the implementation of the Facilitators' Package at the level of domestic legislation, the following Sub-Chapter looks into its implications in the practice of the domestic courts.

[420] Ibid.
[421] Council of Europe (CoE), Committee on Crime Problems (CDPC), "Working Document: Preventing and Suppressing the Smuggling of Migrants in Council of Europe Member States - A Way Forward, 70th Plenary Session, Strasbourg, 27-30 June 2016," 7.
[422] Ibid., 3.
[423] Ibid., 9.
[424] Compare with the hypotheses developed in Chapter I.
[425] Council of Europe (CoE), Committee on Crime Problems (CDPC), "Working Document: Preventing and Suppressing the Smuggling of Migrants in Council of Europe Member States - A Way Forward, 70th Plenary Session, Strasbourg, 27-30 June 2016," 3.

4.2. Judicial Responses

In its 2014 report, the FRA argued that in situations where the domestic legislation does not guarantee sufficient humanitarian exceptions for facilitation of entry, it is the task of the administration and the domestic courts to do so.[426] In the face of ambiguous international, EU and domestic legal frameworks, the domestic courts of EU MSs are granted with broad discretion to interpret the law and hereby set the applicable standard. As Chapters II and III have demonstrated, three elements in the definition of the smuggling offence and its penalties appear particularly susceptible to further interpretation: (1) the element of gain, (2) humanitarian motivations and (3) fundamental rights safeguards resulting from the rights of the smuggled and the fair trial rights considerations of the flight helpers. The following Sub-Chapter analyses the available judicial response as regards their contribution towards clarifying these and some additional elements.

4.2.1. Element of Gain and Humanitarian Motivations

If constructed as a definitional element of the smuggling offence, the element of financial or material benefit could function as a strong safeguard against the criminalization of flight helpers. This is particularly due to the fact that in the area of criminal law, the presumption of innocence would shift the burden of proof towards the state. Consequently, in cases where the gain is absent or cannot be proven, the element of financial or material benefit can function as a bar against prosecution. Meanwhile, both, the Smuggling Protocol and the Facilitation Directive are silent as to the exact definition of gain. In practice, it thus remains unclear in what instances do different sorts of financial or material transfer between the smuggler and those being smuggled meet the threshold.

[426] European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 10.

In a case relating to the facilitation *of stay* from 2001, the Austrian Verwaltungsgerichtshof [Higher Administrative Court] stated that for an activity to be considered for profit, there has to be a "not […] insignificant pecuniary advantage."[427] In the concrete case, the amount of 400 EUR was consider to surpass the "not insignificant" threshold. The Oberster Gerichtshof (OGH) [Austrian Supreme Court] followed a similar line of argumentation in its two decisions relating to the facilitation of entry and transit from September 2015. In the Kurt. K. and Christian T. case it ruled that licensed Austrian taxi drivers cannot be convicted for bringing up to 31 refugees to the border with Germany, as long as it cannot be proven that they were charging a fare surmounting an "adequate fee" for the journey.[428] Moreover, the reasoning that high turnovers for smugglers are "notorious", advanced by one of the lower instance courts, is not a sufficient prove of "unlawful enrichment"[429].[430] In the particular case, the assumed, albeit not proven fee of 100 EUR per person was not considered to surpass the threshold of an adequate remuneration.[431]

In contrast to that, the OGH dismissed the appeal in the "Cristian-Constantin P. case", relating to an individual who in cooperation with others brought up to ten refugees in his private car over the border from Hungary to Austria and in some cases further to Germany for a prices between 500 to 1000 EUR per journey.[432] The OGH refers to the detailed calculation made by

[427] Verwaltungsgerichtshof [Higher Administrative Court of Austria], 2001/18/0128 (n.d.). Cited after European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 11.

[428] Specifically, the Supreme Courts speaks about "adäquater Fuhrlohn". Oberster Gerichtshof (OGH) [Supreme Court of Austria], 11OS125/15i, 28 September 2015 ("Kurt K. and Christian T. case") (n.d.). See also United Nations Office on Drugs and Crime (UNODC), "Smuggling of Migrants Knowledge Portal, Case Summary - 11Os125/15i (28 September 2015), UNODC No.: AUTx063," accessed August 5, 2017, https://www.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/aut/2015/11os12515i_28_september_2015.html?lng=en&tmpl=som.

[429] „Unrechtmäßige Bereicherung." Oberster Gerichtshof (OGH) [Supreme Court of Austria], 11OS125/15i, 28 September 2015 ("Kurt K. and Christian T. case") at 4.

[430] Ibid., 4–5.

[431] Ibid., 5–6.

[432] Oberster Gerichtshof [Supreme Court of Austria], 14 Os 134/15k, 22 December 2015 ("Cristian Constantin P. and Others case") (n.d.).

one of the lower instance courts, according to which the facilitator's net profit amounted to 50-65 EUR per hour, and concludes that such meets the "unlawful enrichment" threshold.[433]

The three rulings, contrasted with each other, allow for interesting considerations. All three Austrian rulings suggest that not every kind of transfer between the facilitator and the refugee will automatically meet the threshold of financial or material benefit. The ruling in the Kurt K. and Christian T. case suggests that even an appropriate compensation for the service offered does not necessarily render the act of smuggling criminal. The decision in the Cristian-Constantin P. case shows that some domestic courts are ready to engage in detailed calculations of the costs and gains of the transfer on an individual, case by case basis. Yet again, just a few kilometres away, the other side of the border, the situation can be very different. In a 2017 ruling concerning Hungarian taxi drivers bringing 19 refugee minors on seven different occasion over the border to Austria in 2012, the Court found the accused guilty of smuggling.[434] That despite the fact that the 110 EUR per person the taxi drivers asked on average for the transfer from the South to the West of Hungary and over the border to Austria could be considered by all means a reasonable if not a cheap price.[435] The approach adopted by the Austrian courts is certainly desirable, as detailed considerations on the gain element in light of the circumstances of each case increases the likelihood of genuine flight helpers escaping criminalization.

In domestic legal systems where the element of gain is not a definitional element of the smuggling offence and hence its absence in concrete case will not lead to an automatic acquittal, the courts can still consider exempting flight helpers from criminalization on humanitarian grounds. The humanitarian exception is, however, a rather ad-hoc safeguard and

433 Ibid., 5.
434 "Börtönbe Vonul a Volt SZDSZ-Es Honatya Fia," Magyar Idők, accessed July 20, 2017, http://magyaridok.hu/belfold/bortonbe-vonul-volt-szdsz-es-honatya-fia-1875895/.
435 Ibid.

functions merely as a defence argument in the course of the proceedings in a specific case, instead of as a bar against prosecution. What is more, the burden of proof shifts from the state towards the accused. While it is now up to the flight helper who has to prove he or she has been acting for humanitarian motives, it remains unclear how these should manifest themselves. Typically, the Courts seem not have questioned the humanitarian nature of the activities, whenever the humanitarian motives were invoked by the flight helper. However, the extent such motives have had on the final outcome varied.

In a case involving the French academic, Pierre-Alain Mannoni, transporting three Eritrean women, including one minor, from the border with Italy to a hospital in Marseille ("Mannoni case"), the domestic courts interpreted, among others, the lack of profit as a sign of humanitarian motives.[436] According to the court, Mannoni was with his action aiming at preserving the women's dignity. [437]

Meanwhile, the District Court of Malmö decided quite differently in a case involving the documentary film maker Önnevall who in the scope of a documentary film making accompanied and supported together with his colleagues a 15 year old Syrian refugee as he crossed with a fake passport a number of countries on his way from Greece to Sweden in 2014 ("Önnevall case").[438] According to the media reports, the Court argued that while it is obvious that Önnevall and his colleagues were motivated by humanitarian reasons and concerns for the boy, the "jurisprudence leaves little scope to acquit someone for that reason."[439]

In addition to the above, the level of knowledge about transporting a person who has entered irregularly has played a role for some courts in cases relating to the facilitation of transit.

436 Cour d'Appel d'Aix-en-Provence, Tribunal de Grande Instance de Nice [Appellate Court of Aix-en-Provence, Tribunal of Nice], Jugement du 06/01/2017, No. minute: 85/17 ("Herrou and Mannoni case"). (n.d.).
437 Ibid.
438 Agence France-Presse, "Journalist Convicted of Smuggling for Helping Syrian Boy Migrate to Sweden," *The Guardian*, February 9, 2017, sec. World news, https://www.theguardian.com/world/2017/feb/09/swedish-journalist-convicted-of-smuggling-for-helping-syrian-boy-migrate.
439 Ibid.

According to a Finish Supreme Court decision from 2012, the fact that the facilitators knew that the person they are assisting in transit entered irregularly did not play a major role in the context of the case.[440] Moreover, the question of facilitation of transit as opposed to facilitation of entry was assessed differently by the courts. In the same decision, the Finish Supreme Court ruled facilitating transit with the aim of helping someone leave was not sufficient to constitute a crime.[441] In contrast to that, in 2011, the Supreme Court of Lithuania found a man transporting individuals from the border with Belarus to Kaunas and accommodating them in his friend's apartment guilty of facilitating transit.[442] The Court concluded – contrary to the claims of the facilitator – the facilitator knew he was transporting persons who had entered Lithuania irregularly.[443]

The perhaps most relevant decision of a domestic court with regard to the question of humanitarian exceptions for facilitation of entry comes outside of the EU. In its decision from 2015 in *R. v Appulonappa* the Supreme Court of Canada Looked into the provisions of s. 117 of the Immigration and Refugee Protection Act (IRPA). S. 117 stipulated at that time that: "No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act."[444] According to s. 121 I applicable at the relevant time, committing

440 Korkein Oikeus, Högsta Domstolen [Supreme Court of Finland], KKO:2012:24 (February 27, 2012). Summarized and translated in European Union Agency for Fundamental Rights (FRA), Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them, 11.
441 Korkein Oikeus, Högsta Domstolen [Supreme Court of Finland], KKO:2012:24. Summarized and translated in European Union Agency for Fundamental Rights (FRA), Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them, 11.
442 Aukščiausiasis Teismas [Supreme Court of Lithuania], Case 2K-451/2011 (October 18, 2011). Summarized and translated in European Union Agency for Fundamental Rights (FRA), Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them, 11.
443 Aukščiausiasis Teismas [Supreme Court of Lithuania], Case 2K-451/2011. Summarized and translated in European Union Agency for Fundamental Rights (FRA), Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them, 11.
444 S. 117 I "Immigration and Refugee Protection Act ('IRPA') [Canada], SC 2001, C. 27, 1 November 2001," n.d.

the offence for financial gain was to be considered and "aggravating circumstance".[445] The Supreme Court ruled the provisions unconstitutional "insofar as [they] permit[…] prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members."[446] The Supreme Court argued that the primary purpose of s. 117 was to tackle activities "in the context of organized crime".[447] Moreover, "[i]t would depart from the balance struck in the Smuggling Protocol to allow prosecution for […] humanitarian aid."[448] As a result, the Supreme Court concluded the law in question was overbroad and had to be "read down […] as not applicable to persons who give humanitarian […] assistance."[449] The R v Appulonappa case is of paramount importance in the context of the present work. It creates a strong argument towards reading down broad anti-smuggling provisions and hereby exempting flight helpers from criminalization. It would be advisable that lawyers and human rights advocates refer to the Canadian Supreme Court judgement when striving to defend fligh helpers in courts.

The above notwithstanding, it is also likely that in a number of cases with presumably humanitarian motives the charges were never raised or even dropped before they could reach a courtroom. While according to some media reports hundreds of Swedish nationals were stopped by the police for assisting refugees in crossing the Oresund bridge in late 2015,[450] only some 50 were put on trial the same year and some 116 in 2016.[451]

445 S. 121 IRPA: „The court, in determining the penalty to be imposed under section 120, shall take into account whether (a) bodily harm or death occurred, or the life or safety of any person was endangered, as a result of the commission of the offence; (b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization; (c) the commission of the offence was for profit, whether or not any profit was realized; and (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence. Ibid.
446 Supreme Court of Canada, R. v. Appulonappa paragraph 5.
447 Ibid., paras. 37, 38.
448 Ibid., para. 44.
449 "Immigration and Refugee Protection Act ('IRPA') [Canada], SC 2001, C. 27, 1 November 2001," para. 85.
450 David Crouch, "'Do I Regret It? Not for a Second': Swedish Journalist Goes on Trial for Helping Refugees," The Guardian, January 25, 2017, sec. World news, https://www.theguardian.com/world/2017/jan/25/swedish-journalist-on-trial-people-smugglng-refugees-fredrik-onnevall.
451 Agence France-Presse, "Journalist Facing Trial Is 'Confident' He Was Right to Help Refugee Boy."

4.2.3. Extent of the Action and Involvement of Official Authorities

Moreover, considering the overall intent of anti-smuggling legislations to primary tackle organized crime, one would assume that there would be a tendency towards pardoning individualized, ad-hoc instances of kindness. However, the extent of planning and level of systematized practice seem to have been interpreted differently in relation to the humanitarian nature of the act. The Austrian Constitutional Court ruled that the provision of humanitarian aid does not reach the threshold of the offence, as long as it is provided "without the intention to prevent official measures over a longer time."[452] In contrast to that, in the heavily medialized case involving the French farmer Herrou ("Herrou case"), even a largely institutionalized nature of the practice and its long-term duration does not seem to have put in question its humanitarian motives. According to some sources, Herrou assisted approximately 200 migrants by giving them lifts and providing them with temporary shelter at his home and in later in abandoned facility of the French national railways over the period of several months in 2016.[453] He was awarded a suspended fine of up to 3,200 USD for the period of the next 5 years.[454]

Considering the current debate surrounding NGOs operating in the Mediterranean, it appears rather counter-productive to the aim of the present work to argue that more systematized or institutionalized practices deserve more severe penalties. Nevertheless, contrasting the Herrou case with cases involving individualized ad-hoc assistance illustrates that in the way the

452 Verfassungsgerichtshof [Constitutional Court of Austria], G 11/06, 22 June 2006 (n.d.).par. Cited after European Union Agency for Fundamental Rights (FRA), "Annex: EU Member States' Legislation on Irregular Entry and Stay, as Well as Facilitation of Irregular Entry and Stay," 1.

453 See e.g. Adam Nossiter, "Farmer on Trial Defends Smuggling Migrants: 'I Am a Frenchman.,'" The New York Times, January 5, 2017, https://www.nytimes.com/2017/01/05/world/europe/cedric-herrou-migrant-smuggler-trial-france.html; France-Presse, "French Farmer on Trial for Helping Migrants across Italian Border"; "Cédric Herrou, Le Procès D'un Geste D'humanité"; "European Courts and Citizens Struggle to Do 'What's Right' Amidst Reactionary Migration Law and Policy - The Center for Migration Studies of New York (CMS)."

454 Note that with regard to the number of people Herrou has allegedly assisted with entry, the fine equals some 16 USD per person. Cour d'Appel d'Aix-en-Provence, Tribunal de Grande Instance de Nice [Appellate Court of Aix-en-Provence, Tribunal of Nice], Jugement du 06/01/2017, No. minute: 85/17 ("Herrou and Mannoni case").

Facilitators Package is being implemented in individual MSs, there is no consistency between the extent of the action and the awarded penalties.

Besides, an interesting situation emerges in situations where the facilitation of irregular entry happens with the knowledge and to some extent at least implicit consent of the authorities. This was the case of the "humanitarian corridor", which rather than being established officially emerged organically between Hungary and Austria and Croatia and Slovenia in late 2015.[455]

In this regard, two requests for preliminary ruling under art. 267 TFEU[456] submitted to the CJEU by a Slovenian Vrhovno sodišče [Supreme Court] and the Austrian Verwaltungsgericht [Administrative Court] in 2016 can be of relevance in the context of the present work.[457] In the case of *A.S. v Slovenia*, the Slovenian Supreme Court was seeking further clarification on the concept of irregular border crossing, which triggers under 13 I of the Dublin III Regulation[458]

[455] Moving Europe, "The ‚Humanitarian Corridor'," accessed August 7, 2017, http://moving-europe.org/the-humanitarian-corridor/.

[456] Art. 267 TFEU: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay." "European Union, Consolidated Version of the Treaty on the Functioning of the European Union ('TFEU') (26 October 2012) OJ C 326/47."

[457] Court of Justice of the European Union (CJEU), Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Slovenia) lodged on 14 September 2016 — A.S. v Republic of Slovenia, Case C-490/16 (14 November 2016) ("A.S. v Slovenia"), OJ C 419/34, accessed October 25, 2016. Court of Justice of the European Union (CJEU), Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 15 December 2016 — Khadija Jafari, Zainab Jafari, Case C-646/16 (20 February 2017) ("Jafari case"), OJ C 53/23 (n.d.).

[458] Art. 13 I Dublin III Regulation: "Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place." "Regulation (EU) No 604/2013 of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person of ('Dublin III Regulation') (26 June 2013) OJ L 180/31."

the responsibility of the MSs entered into.[459] The Court inquired whether the respective provisions under the Dublin IIII Regulation should "be interpreted as meaning that there is no irregular crossing of the border where the public authorities of a Member State organise the crossing of the border with the aim of transit to another Member State of the EU."[460] In addition to that, the Austrian Administrative Court inquired in the *Jafari case* whether the tolerance of mass border crossing by a MS can be considered as amounting to the issuance of visa within the meaning of art. 12 Dublin III Regulation.[461]

With regard to the question of visa, the CJEU noted that visa is to be understood as "an act formally adopted by a national authority," in contrast to the "mere tolerance" of entry.[462] Likewise, in respect of the notion of irregular border crossing, the CJEU noted that the concept is not defined in any EU legislation.[463] Looking into the context and overall goals of the Dublin III Regulation, the Court rule that crossing a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question, must be generally considered "irregular", even if tolerated by the authorities for the purpose of transfer in contexts of large-scale arrivals.[464] Thus, even if refugees are allowed entry in emergency situation in order to allow them to transit to another territory their situation is not regularized merely by the fact that the authorities tolerated such entry. Furthermore, as the entry remains irregular, it triggers under art. 13 I Dublin III Regulation the responsibility of the first MSs allowing such entry –

[459] Court of Justice of the European Union (CJEU), Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Slovenia) lodged on 14 September 2016 — A.S. v Republic of Slovenia, Case C-490/16 (14 November 2016) ("A.S. v Slovenia"), OJ C 419/34.

[460] Question 3: „In view of the answer to the second question, is the concept of irregular crossing under Article 13(1) of Regulation No 604/2013 in the circumstances of the present case to be interpreted as meaning that there is no irregular crossing of the border where the public authorities of a Member State organize the crossing of the border with the aim of transit to another Member State of the EU?"

[461] Court of Justice of the European Union (CJEU), Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 15 December 2016 — Khadija Jafari, Zainab Jafari, Case C-646/16 (20 February 2017) ("Jafari case"), OJ C 53/23.

[462] Court of Justice of the European Union (CJEU), Case C-646/16, Jafari, Judgement of the Court (Grand Chamber), 26 July 2017 paragraph 48.

[463] Court of Justice of the European Union (CJEU), Case C-490/16, A.S. v Slovenia, Judgement of the Court (Grand Chamber), 26 July 2017.

[464]

in the A.S. case Croatia – to assess the asylum claim. The ruling seems a rather bad news for the flight helpers. It means that even in situations where the states implicitly consent to the entry of foreign nationals in their territory, that entry remains "in breach of the laws of the State concerned" within the meaning of the Facilitators Package and as such punishable within the meaning of art. 1 I Facilitation Directive.

4.2.4. Rights of the Smuggled, State of Necessity

In 2001, when the Facilitation Directive was still being negotiated in the Council, the English Court of Appeal was deciding about the case of Rudolph Alps, concerning Alps bringing his relative at risk of persecution in Turkey on a false passport to the United Kingdom. In line with the possible line of argument suggested in Chapter II, Alps relied in his defense on the art. 31 Refugee Convention, arguing that the exemption from penalties should be expanded to him as flight helper, as well.[465] His line of argument was, however, dismissed by the Court.[466]

In the context of the EU, the tension between the states' obligations to criminalize procurement of irregular entry under the Smuggling Protocol and their duty to require the masters of ships under their flag to render assistance to any ship in distress became tangible with a series of heavily medialized cases landing in front of Italian courts in early o mid 2000'.

The first of the cases which received significant attention in the media was the case relating to the humanitarian vessel called Cap Anamur ("Cap Anamur case"). Owned by the German non-profit Deutsche Notärzte [German emergency doctors], Cap Anamur registered as a "rescue and support vessel" with the Italian authorities.[467] On June 20, 2004, while on its way to Western Africa, it spotted an inflatable boat with 37 individuals in considerable distress. The

[465] "R v Rudolph Alps [2001] EWCA Crim 218.," n.d. Cited after Webber, *Border Wars and Asylum Crimes*, 9.
[466] Webber, *Border Wars and Asylum Crimes*, 9.
[467] Pierluigi Umbriano, "Is It Crime to Help People to Survive? Cap Anamur and Other Cases. Speech at Migrants-Outlaws Everywhere/The Alien as an Enemy? Homeless, Excluded.," 2013, 4, http://www.eldh.eu/fileadmin/user_upload/ejdm/publications/2013/Pierluigi_Umbriano_-_Speech.pdf?PHPSESSID=051a86793dbac1a0c80a6885a9a9cf03.

captain ordered to rescue them, while the NGO's president asked Italian authorities for a permission to embark in Sicily.[468] Following a series of misunderstandings, the Italian authorities permitted the ship to dock. Nevertheless, the captain and the NGO president were both arrested and their ship was seized.[469] In the course of the proceedings before Italian courts, the Italian prosecution argued that the charged individuals have formed the NGO with the intent of violating Italian laws for the purpose of gaining publicity for their actions and have misled the Italian authorities by claimed a medical emergency on board.[470] In its holding from 2009, the Sicilian Court of Agrigento, Sicily decided to acquit the accused with reference to the state of emergency on board.[471] The judgement was celebrated as a human rights victory in majority of German media.[472]

In the context of the "refugee crisis", the rights of the smuggled were an issue of concern to the judges in at least two cases. Interestingly enough, in the Mannoni case, the Court did not relate to the women's right to life, although their health concerns were clearly an issue in the present case, but approached the matters from the angle of human dignity.[473] In this case, aiming at preserving the women's dignity was considered a mitigating circumstance for Mannoni.[474]

Yet the rights of the smuggled can have more complex implications, as shown in a case of a former soldier, Rob Lawrie, who attempted to transport a four year old Afghan girl from the Calais to Great Britain, where she could join her family ("Lawrie case").[475] The crime, in this

[468] Ibid.
[469] Ibid., 4–5.
[470] Ibid., 5.
[471] Tribunale di Agrigento, I Sezione Penale, I Collegio, Cap Anamur, 954/2009 ("Cap Anamur case").
[472] Lindsey, "The World from Berlin."
[473] Cour d'Appel d'Aix-en-Provence, Tribunal de Grande Instance de Nice [Appellate Court of Aix-en-Provence, Tribunal of Nice], Jugement du 06/01/2017, No. minute: 85/17 ("Herrou and Mannoni case").
[474] Ibid.
[475] "Rob Lawrie Admits Bid to Sneak Afghan Child from Calais"; Grant Woodward, "Rob Lawrie: Why I Tried to Smuggle Child Refugee into Yorkshire," *The Yorkshire Post*, March 14, 2016, http://www.yorkshirepost.co.uk/news/analysis/rob-lawrie-why-i-tried-to-smuggle-child-refugee-into-yorkshire-1-7791200; "Former Soldier Who Smuggled Afghan Girl out of Calais Refugee Camp Spared Jail."

case, however, was not the transport as such, but the fact that Lawrie hid the girl in the space above the driver's seat of his van.[476] According to the court, he put the girl's life in danger by hiding her in an unsafe way. The ruling shows two things. First, although the girl's right to family life does not seem to be at stake for the court, it has possibly played a role for the acquittal of the smuggling offense. At the same time, it shows that fundamental right safeguards of the right to life can prove as an effective barrier for protecting refugees against harm. The Lawrie case supports the argument voiced by Landry that smuggling as a separate offense is not indispensable to protect refugees.[477]

4.2.5. Fair Trial Rights of the Flight Helpers

The way smuggling provision are being crafted in certain domestic legal provision may give rise to principled, *in abstracto* fair trial rights concerns, as already suggested in Chapter III. Also the appellants in *A v. Appulonappa* relied in their argumentation on fundamental rights safeguards and notably the right to liberty, as enshrined in art. 7 of the Canadian Charter of Rights and Freedoms.[478] They argued that by being applicable to flight helpers, the relevant provisions of s. 117 IRPA are "overbroad [and] contrary to the principles of fundamental justice."[479] Likewise, they contended that the law is "grossly disproportionate to the conduct it targets," among others because of being "unconstitutionally vague".[480] Having already found the relevant provisions overbroad, the Supreme Court, however, did not consider it necessary

[476] "Former Soldier Who Smuggled Afghan Girl out of Calais Refugee Camp Spared Jail"; "Rob Lawrie Admits Bid to Sneak Afghan Child from Calais."
[477] Landry, Rachel, "Humanitarian Smuggling of Refugees: Criminal Offence or Moral Obligation? Working Paper Series No. 119," 19–23.
[478] Art. 7 Canadian Charter of Rights and Freedoms: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." "The Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Being Schedule B to the Canada Act 1982 (UK), 1982, c 11," n.d.
[479] Supreme Court of Canada, R. v. Appulonappa paragraph 25.
[480] Ibid.

to look into the additional arguments.[481] The proportionality and legal clarity concerns thus remained unanswered.

Last but not least, although fair trial rights concerns seem not to have been voiced be the flight helpers' defense, the factual background of some of the case at focus in the present work points to possible additional lines of argument, as well as to some worrying trends. In a case from 2015 involving the Danish children's rights activists, Lisbeth Zornig Andersen, and her partner ("Andersens case"), Andersen claimed to have called the police to verify whether giving a lift to a group of six refugees, including two children from southern Denmark to Copenhagen was a legal.[482] According to Andersen, the police responded they did not know.[483] Moreover, Andersen recalls asking a policeman standing nearby whether he was about to stop her, as the refugees started to embark her car.[484] The policeman later claimed he does not remember the conversation.[485] According to Andersen, however, the answer was "no".[486]According to what Andersen describes in her blog, the police changed its position on the legality of the acts several times in the following days.[487] It issued a statement stating that giving rides was illegal, only to change it to a few days late towards a milder expression claiming that those giving a ride were "leaning towards breaching the law."[488]

A situation where state authorities seem unsure about the correct interpretation of the law reinforces the above mentioned abstract concerns as to the foreseeability of the law for the individual. In particular in a situation where individuals attempt to verify the legality of their action, yet public authorities fail to provide them with sufficient information in order to enable

[481] Ibid., 78.
[482] Andersen, "When Denmark Criminalised Kindness."
[483] Ibid.
[484] Ibid.
[485] Ibid.
[486] Ibid.
[487] Ibid.
[488] Ibid.

them to regulate their actions, raises serious questions as to the compliance of the prosecution with the *nullum crimen sine lege* principle. While according to the available information, Andersens' defense relied in its argument on international law and the Smuggling Protocol, it remains unclear to what extent did the defense raise fair trial rights concerns, as well.[489]

In this regard, one can only hope that in the future, fair trial rights of flight helpers will gain more priority in domestic court proceedings. Ideally, this would incentivize the respective domestic court to refer the matters at stake for preliminary ruling to the CJEU, hereby enabling the CJEU to assess the Charter compliance of the Facilitators' Package.

4.3. Conclusions Chapter IV

By looking into the MSs law-making efforts and judicial responses to humanitarian smuggling in recent years, the present Chapter illustrates that the vagueness in law at international and EU level translates into increased legal uncertainty in the domestic jurisdictions. The examples show that the implementation of both, the UN Smuggling Protocol and EU Facilitators' Package is inconsistent, producing largely different results among EU MSs. The present situation bears at least three significant risks from a practical, legal and policy point of view.

First, while the authorities typically claim not to target NGOs, non-profits may be unsure about possible consequences of their actions.[490] Considering the recent statements of the Italian prosecutor as well as the proposal for Code of Conduct for NGOs operating in the Mediterranean,[491] more restrictive measures vis a vis NGOs can be expected. The legal uncertainty is troubling in that it could result in an overall chilling effect for the provision of

[489] Ibid.
[490] European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: European Union Publications Office, 2011), 12, http://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union.
[491] "Code of Conduct for NGOs Involved in Migrants' Rescue Operations at Sea, Document Leaked by Statewatch on 11 July 2017."

humanitarian aid to refugees, distort social cohesion in the receiving societies and according to the LIBE study even turn into an existential threat for some humanitarian organizations.[492]

Second, the EU Facilitators Package clearly fails in its ambition at approximating the domestic laws and practice across EU. The above shows that ad-hoc, one time spontaneous acts of solidarity may be penalized with heavy fines or even imprisonment in one MS, while highly systematized, long-term and continuous practices receive a suspended fine in the other. Such degree of discrepancies raises serious questions not only as to the proportionality of the sanctions but also as to the applicability of the principle of mutual recognition across EU.[493]

Third and most importantly, in addition to the negative consequences on the practical and policy level, the present situation is undesirable from a more principled criminal justice point of view. As it is typically the case with vagueness in law, it shifts the power to the judges. Criminal law thus risks being used instrumentally, with the decisions being influenced by the political realities and discourses in the given MSs.[494] The level of vagueness of the current smuggling provisions and the discrepancies in the decisions of domestic courts raise significant concerns as to the foreseeability of the Facilitators Package, which is of paramount important

[492] Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, 56–60. Already back in 2009, the UNCHR raised concerns that the prosecutions in the *Cap Anamur* case have scared fishermen from providing rescue at sea. See "Italy Acquits Migrant Rescue Crew." Interestingly, Allsopp argues that criminalization of humanitarian assistance creates challenges also in respect of regular civilians not engaging in humanitarianism. See Allsopp, "The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community," 50–54.

[493] The principle of mutual recognition requires that MSs recognized each other's' judgements and judicial decisions. See Art. 82 I TFEU: "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.[…]" "European Union, Consolidated Version of the Treaty on the Functioning of the European Union ('TFEU') (26 October 2012) OJ C 326/47."

[494] It is perhaps telling that in France, where there was a long-term societal debate about the legitimacy of aid to irregular migrants and where citizens were ready to resort to acts of solidarity as a form of civil disobedience, the punishments are the mildest. Consider also this statement by Ian Manners, Professor at the Department of Political Science, University of Copenhagen: "There is a very different feeling among at least urbanised Danes, who see these prosecutions as unnecessarily punitive. […] In a different climate the cases would have been dropped." See Crouch, "Danish Children's Rights Activist Fined for People Trafficking."

in particular in the area of criminal law. If individuals are to be held accountable for a specific behaviour, the laws have to be sufficiently clear in order to enable them to regulate their actions. The above shows that this is clearly not the case with how are international and EU smuggling provisions being implemented at the moment. The present implementation of the international and EU smuggling regime in the domestic jurisdictions thus leaves considerable question marks as to their compatibility with the requirements of criminal justice and the rule of law in general.

Conclusion: Closing the Gap: Defending Flight Helpers in Courts; Long-Term Solutions

As the above has shown, a number of the working hypothesis developed in Chapter I of this thesis could be confirmed in the context of the present work.

Chapter II has demonstrated that the international anti-smuggling regime can indeed get in tension with the protection goals of international refugee law. Admittedly, the international anti-smuggling framework foresees exceptions for instances of humanitarian smuggling, with the threshold between permissible and punishable action being the element of gain. Yet while the primary goal of the Smuggling Protocol was clearly to tackle organized crime and not to target humanitarians, the anti-smuggling regime neglects the fact that smugglers, as service providers, are often indispensable to refugees' ability to seek international protection. Apart from the clear exceptions in situations of rescue at sea, a paradox emerges: while refugees cannot be criminalized for irregular entry, those assisting them – in contrast to the original expectations of the drafters – still can.

Chapter III has shown that the principled gaps in international law are further expanded within the ambits of EU law. In omitting the element of financial or other material benefit from its definition of smuggling, the EU Facilitators Package not only allows for criminalization of a wide array of genuinely humanitarian acts, including the assistance to refugees in crossing borders. As the recent developments suggests, insufficient safeguards in this area together with additional requirements posed on NGOs also risk to undermine the international duty of search and rescue at sea.

Chapter IV has elucidated that the abstract, theoretical problems touched upon in Chapter II and III become very tangible and concrete for individuals engaging in acts of humanitarian assistance. As a result of the vagueness of the law at international and European level, not only

the domestic legislators and courts but also individuals are left to navigate within the gaps. They have to legislate, rule, as well as regulate their own behaviour through the jungles of ambiguities. Comparison across the EU shows that instead of being consistent and foreseeable, state responses to flight helpers are ad-hoc, in some cases perhaps even arbitrary and largely left to the discretion of the MSs. In this regard, the EU law clearly fails in its perhaps most important goal – that of harmonizing domestic legal system in the areas conferred to it by the MS. This is in practice particularly troubling if we consider the *modus operandi* of many of the cross-border activists in the context of the "refugee crisis" 2015-2016. With the political landscape changing at that time dynamically from one day to the other, the flight helpers would often flexibly move between different countries, depending on where they considered their assistance was needed the most.[495]It can be assumed that in majority of the cases they had little to no knowledge about the relevant penal provisions applicable to their very own situation.[496]

From a human rights lens, the ambiguities are particularly problematic from a criminal justice, as well as a rule of law perspective. As Chapter IV demonstrates, the law is not sufficiently clear – at times even for the authorities – in order to enable individuals to regulate their conduct.

Two possible solutions offer itself towards closing the gaps in international and EU anti-smuggling regimes if we aim at decriminalizing the flight helpers. The first, rather obvious strategy consists of aiming at an amendment to the existing legal frameworks and in particular the Facilitation Directive. As demonstrated above, while different voices outside as well as within the EU, including the Parliament and the Commission, raise concerns as to the functionality of the Facilitators Package, the amendment process seems to be stagnating at this moment. Without significant advocacy on behalf of the civil society or an intervention of the

[495] I base these assumption on my own experience with volunteering in Belgrade, Serbia and Idomeni, Greece, between January and March 2016.
[496] Ibid.

CJEU in a specific case, it is unlikely to be catalysed in the near future. What is more, simply opening the Directive to amendments does not automatically yield improvement. Any kind of opening of current legislation always bears the risk of backfiring, be it in the form of lowering down the already existing standards or creating further constraints on the NGOs to prove their humanitarian intentions. Hence, as the existing legal framework is unlikely to be altered in the short term, the first strategy of human rights advocates defending flight helpers should appeal to a good ´-faith reading of the existing anti-smuggling laws in light of states' obligations under international refugee law and international, EU and European human rights law.[497]

Chapters II-IV have showcased a range of arguments for defending the flight helpers within the existing legal framework, in particular by offering a narrow reading of the existing provisions in a fundamental rights compliant manner, leading to a *de facto* decriminalization of humanitarian smuggling. Chapters II-IV suggest that there are four different possible lines of arguments for exempting flight helpers from criminalization in a specific case.

First and foremost, flight helpers and their allies should appeal to a narrow reading of the smuggling offense in respect of the acts as such. While neither the international, nor the EU law specifies what exactly constitutes the "facilitation" or "assistance" in irregular entry, the primary purpose of the international anti-smuggling regime is to tackle organized crime. The 1951 Refugee Convention clearly pardons refugees who enter irregularly and according to some authors, the *travaux préparatoires* suggest that the drafters assumed states would not attempt at criminalizing humanitarian assistance. Consequently, acts of individualized, spontaneous or ad-hoc nature should automatically fall outside of the scope of its application, as long as they are conducted for no or not a significant financial or material benefit. Second,

[497] A similar approach is envisioned by the FRA. In its 2014 report, argues in favor of rewording the Facilitation Directive, yet in the meantime, it recommends to consider "practical guidance to support EU Member States to implement the directive in a fundamental rights complaint manner." European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 16.

flight helpers should appeal to a narrow reading of the smuggling offenses in respect of the overall circumstances of the act, in particular with regard to the humanitarian intentions of their actions. In this regard, the flight helpers can refer to the UN Smuggling Protocol, which provides for explicit exemptions in cases where the facilitator does not obtain any financial or material benefit, and argue that its provision have been transposed into EU law in a wrongful manner. Moreover, in cases where the facilitator has obtained some minor benefit for his action, it is possible refer to the series of judgements of the Supreme Court of Austria. These show clearly that not every kind of financial or material transfer between the facilitator and the "client" will meet the gain element threshold.

Third, in cases where the element of gain is missing in the domestic provisions on smuggling, it can be argued that the by transposing the Facilitation Directive without the element of gain, clearly included in the Smuggling Protocol, the domestic legislator has created an environment of legal uncertainty. The lacking clarity and foreseeability of the law is particular troubling from a criminal justice and rule of law perspective. The domestic smuggling provisions thus may infringe upon the fair trial rights of the facilitator both, *in abstracto*, and depending on the circumstances of the case, also *in concreto* by means of application.

Lastly, in extreme situations involving emergencies or a risk of immediate harm to those being facilitated, the facilitators can argue that fundamental rights of the refugee, including the absolute, non-derogable right to life, have created a situation of necessity comparable to that of distress at sea.

In sum, the international refugee law, international law on migrant smuggling as well as European human rights law can provide arguments in favour of defending flight helpers in courts and decriminalizing humanitarian smuggling in the long term which could be used in strategic human rights litigation in the future.

Afterword: Nobody Wants to be a Criminal

As the EU regulatory framework seems unlikely to change in the short term, it seems all the important to gather and develop strategies for defending flight helpers in courts. The present thesis aimed at contributing to this aim. And yet, while creating legal clarity seems indispensable in order to avoid penalization of humanitarian assistance, reading down existing anti-smuggling provisions or creating new and narrower ones can only hardly offer the ultimate solution to the smuggling phenomenon at large. In majority of the cases discussed above, neither the flight helpers nor the benevolent taxi drivers really aimed at engaging in criminal activities. Nevertheless, as long as safe and legal pathways to Europe remain scant, smuggling – be it a criminal enterprise, an ad-hoc moonlighting or a spontaneous act of kindness – will continue.

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