Working Group on the Smuggling of Migrants
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Examination of the “financial or other material benefit”
aspect of the definition of smuggling of migrants

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Background paper prepared by the Secretariat

I. Introduction

1. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the General Assembly in 2000, provided the first internationally agreed definition of the crime of “smuggling of migrants”. The Protocol required States parties to enact and enforce legislation criminalizing the smuggling of migrants, “when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit” (art. 6 (1) (a)).

2. In its resolution 6/3, entitled “Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”, the Conference called upon States parties to continue to review and, as appropriate, strengthen their relevant legislation, including criminal legislation, and establish as criminal offences the acts covered by the Smuggling of Migrants Protocol and the Organized Crime Convention, including by introducing appropriate sanctions commensurate with the nature and gravity of the offence.

3. In its resolution 7/1, entitled “Strengthening the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto”, the Conference decided that the Working Group on the Smuggling of Migrants would be a constant element of the Conference, forwarding its reports and recommendations to the Conference.

4. Furthermore, in its resolution 2014/23, entitled “Strengthening international cooperation in addressing the smuggling of migrants”, the Economic and Social Council encouraged Member States to promote the reliable collection of data and research, at the national and, as appropriate, the regional and international levels, on the smuggling of migrants, including on smuggling networks and the involvement of organized crime in countries of origin, transit and destination, and on the possible

* CTOC/COP/WG.7/2017/1.
links that might exist between the smuggling of migrants and other criminal activities.

5. In the same resolution, the Council urged Member States, where appropriate, to adopt measures to increase public awareness of the fact that the smuggling of migrants was a criminal activity frequently perpetrated by organized criminal groups for profit, posing serious risks to the migrants concerned.

6. Successive resolutions on the smuggling of migrants adopted in recent years by the Conference of the Parties, the Commission on Crime Prevention and Criminal Justice and the General Assembly have called for the criminalization, in national legislation, of the smuggling of migrants, in line with the Smuggling of Migrants Protocol. The agreement of the international community on a common definition of the key terms in the context of the Organized Crime Convention and its Protocols promotes more effective international cooperation against transnational organized crime, including the smuggling of migrants, through the fulfilment of the dual criminality principle that prevails in international cooperation regimes.

7. The present background paper was prepared by the Secretariat to aid in the discussions of the Working Group at its fourth meeting. It suggests specific issues for discussion, provides an overview of main issues and guidance for response by States and provides a list of key tools and recommended resources to assist States in implementing the Protocol.

II. Issues for discussion

8. The Working Group may wish to discuss the following issues, among others, in its deliberations on the financial and material benefit aspect of the definition of smuggling of migrants:

   (a) What is the purpose and scope of the Smuggling of Migrants Protocol in relation to “financial or other material benefit”?

   (b) In States where “financial or other material benefit” is included as an element of migrant smuggling offences, how is it understood and applied?

   (c) In relation to “financial benefit”, is there a threshold for establishing the financial element? For instance, must the financial benefit amount to “profit”? If so, how much profit would be required to establish the element?

   (d) In relation to “material benefit”, does the phrasing “other material benefit” offer insight into the understanding of what the concept of material benefit entails? For instance, would it include sexual services, criminal services (e.g., drug smuggling) or labour provided in lieu of smuggling fees?

   (e) Where States parties do not include the “financial or other material benefit” element in their domestic legislation, why is that so? Does the omission make smuggling situations easier or more difficult for investigators to identify? Are prosecutions and convictions easier or more difficult to achieve? What is the role of the presence or absence of that element in the defence of alleged migrant smugglers?

   (f) What are the evidentiary burdens of establishing the financial or other material element and intent to benefit? Can intent to financially or materially benefit be proven in the absence of actual benefit?

   (g) To what extent is the financial or material benefit element an aggravating or mitigating factor in the sentences imposed on convicted smugglers? Where financial or other material benefit is not required as an element of the offence, can the absence or presence of financial gain influence criminal justice priorities or sentencing?
(h) Does the absence of the element result in the criminalization — or potential criminalization — of persons who are acting for purely humanitarian or familial reasons?

(i) Given that the smuggling of migrants is a transnational crime, does the presence or absence of the “financial or other material benefit” element hamper international cooperation, including mutual legal assistance and extradition, for instance, by not meeting the dual criminality requirement?

(j) Does the absence of the “financial or other material benefit” element serve to broaden what is considered to be “serious” organized crime? If so, what is the impact of this in terms of diversion of investigative and prosecutorial resources away from organized criminal groups to low-level, less organized actors?

(k) Do criminal justice practitioners consider that the presence or absence of the element in the definition helps or hinders their work? Is the spirit of the Protocol, which is aimed at preventing and combating the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration, upheld in the absence of the “financial or other material benefit” element in the definition?

(l) The Smuggling of Migrants Protocol sets minimum standards and States parties are entitled to adopt stricter or more severe measures than those provided for in it. Does the absence of the “financial or other material benefit” element amount to stricter or more severe measures? Does it amount to non-compliance with or deviation from criminalization?

III. Overview of main issues and guidance for response

A. International legal definition of “smuggling of migrants” and the scope of the Smuggling of Migrants Protocol in relation to the “financial or other material benefit” element

9. “Smuggling of migrants” is defined in the Smuggling of Migrants Protocol as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national” (art. 3 (a)). The drafters of the Protocol elected to include the “financial or other material benefit” element not only as an element of the definition of the offence but also as a requirement for its criminalization (art. 6).

10. Smuggling is thereby a crime of specific or special intent. There is no apparent requirement for the benefit to have occurred: the crime of the smuggling of migrants is committed under the Protocol once the relevant physical elements are established along with an intention to obtain a benefit. It is important to note that intention to benefit, rather than actual benefit, is the relevant consideration under the terms of the Protocol. This focus may help reduce the evidentiary burdens currently associated with proving specific profits or payments made in relation to specific migrants.

11. States parties to the Protocol are required to criminalize both the smuggling of migrants and the production and possession of fraudulent travel or identity documents, where such conduct is committed for the purpose of enabling the smuggling of migrants as defined by the Protocol. States parties are further required to criminalize the enabling of illegal stay when it is committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit. The structure of the criminalization provisions thereby introduces the “financial or other material benefit” element not only into smuggling offences but also into related document offences and offences involving facilitation of stay.

12. These provisions should be read in the light of article 5 of the Protocol, which explicitly states that migrants who are smuggled are not liable to criminal
prosecution under the Protocol for being the object of such conduct. Protection from criminalization of smuggled migrants is reinforced by the “financial or other material benefit” element in the definition and criminalization provisions, which serves to shift the offence from illegal entry, stay, etc. to the seeking of profit or other benefit. In relation to document offences, possession or other stipulated acts are not, of themselves, sufficient; there must also be an intention to secure a financial or other material benefit and an intention or purpose of enabling the smuggling of migrants. This requirement provides an additional protection against prosecution of migrants who smuggle themselves.

13. An interpretative note on the definition of smuggling of migrants\(^1\) states that the reference to “a financial or other material benefit” as an element of the definition was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. 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.

14. Close analysis of the drafting history of the Protocol, along with a review of relevant guidance and other material, supports the following conclusions: (a) the Protocol’s focus is on the activities of organized criminal groups acting for profit; and (b) the Protocol does not seek — or cannot be used as the legal basis for — the prosecution of those acting with humanitarian intent or on the basis of close family ties where there is no purpose to obtain a financial or other material benefit.\(^2\)

1. **Focus of the Protocol on the activities of organized criminal groups acting for profit**

15. As its preamble and drafting history make clear, the broader context of the Protocol is the involvement of organized criminal groups in the facilitated, unauthorized movement of migrants for profit, often at great risk to the safety and well-being of the migrants. The concept of financial or other material benefit in the Protocol’s definition of the smuggling of migrants constitutes the mens rea element of the smuggling offence.

16. While the Protocol does not provide a definition of “financial or other material benefit”, the Organized Crime Convention uses the same term in its definition of organized criminal group: “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 […] in order to obtain, directly or indirectly, a financial or other material benefit”. This definition is relevant because the Protocol’s own scope of application, as set out in its article 4, encompasses smuggling offences that are transnational in nature and involve an organized criminal group.

17. Organized criminality is not a specific requirement for criminalization at the national level; article 34 (2) of the Organized Crime Convention confirms that involvement of an organized criminal group is not required and that offences should apply equally, regardless of whether such involvement can be proven or not. However, the focus of the Smuggling of Migrants Protocol is on smuggling acts committed by organized criminal groups; the “financial or other material benefit” element of the definition of “organized criminal group” (Organized Crime Convention, art. 2 (a)) is explicitly restated in the Smuggling of Migrants Protocol in both the definition of the smuggling of migrants (art. 3) and the provision on criminalization (art. 6). Moreover, article 4 stipulates that the Protocol should apply to the prevention, investigation and prosecution of offences that involve an

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organized criminal group, thus reaffirming the focus of the Protocol on organized crime. In addition, it is clarified in the Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto that “procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or material benefit) [...] has been recognized as a serious form of transnational organized crime and is therefore the primary focus of the Protocol”.

18. The key factor that determines the structure of migrant smuggling networks is profit and its maximization. Contacts between criminals of a smuggling network can be compared to business-like relations and it is possible that one criminal may perform his or her function in several criminal networks. Such networks may be involved in other types of organized criminal activities, such as the laundering of money generated from criminal activities or, for example, trafficking in firearms and drugs; sometimes human trafficking routes follow the main migrant smuggling paths by land, sea or air, involving the same organized criminal groups.

2. The Protocol cannot be used as the legal basis for the prosecution of those acting with humanitarian intent or on the basis of close family ties where there is no purpose to obtain a financial or other material benefit

19. According to the Travaux Préparatoires, the intention of the drafters was to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. In the words of the interpretative note attached to the relevant provision, “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” (p. 469, para. 88).

20. That theme is elaborated upon in the Legislative Guides, in which it is affirmed that the reference to “financial or other material benefit” was indeed intended to exclude groups with purely political or social motives. The concern of drafters 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” is further noted in the Legislative Guides (see p. 333, para. 19).

21. The Model Law against the Smuggling of Migrants adds little to this, affirming the “financial or other material benefit” element as “an integral part of the definition of ‘smuggling of migrants’” and noting that “payment or profit arising from smuggling of migrants can include non-financial inducements, such as a free train or airplane ticket, or property, such as a car. Thus, it is important to ensure that the definition of ‘financial or other material benefit’ is as broad and inclusive as possible”.

22. The concept of “benefit” as used in the Protocol is to be considered broadly. In drafting the Protocol, States made a deliberate decision to replace “profit” with the much more expansive term “financial or other material benefit”. As it is used in the Protocol, the concept of financial or other material benefit (with the additional modifier “direct or indirect”) accommodates benefits that extend beyond financial gain to include, for example, work or sexual services, payments made by or through intermediaries and payments or benefits both promised and received.

23. The conclusion that the Smuggling of Migrants Protocol does not seek to and cannot be used as the legal basis for the prosecution of humanitarian actors (most particularly in relation to asylum seekers) is reinforced in its article 19, paragraph 1, which makes clear the continuing application of international law, including

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3 United Nations publication, Sales No. E. 05.V.2, p. 340, para. 28.
4 Note by the Secretariat on organized crime aspects of the smuggling of migrants, including financial investigations and responses targeting the proceeds of crime (CTOC/COP/WG.7/2015/4), para. 14.

24. The Protocol does not prevent States from creating criminal offences outside its scope — for example, facilitation of illegal entry or illegal stay. But the instrument does not provide a legal basis for the prosecution of facilitation of illegal entry or illegal stay where there is no intent to obtain a financial or other material benefit.

25. It is nevertheless important to acknowledge that the Protocol’s approach in that regard is not universally accepted. In particular in relation to facilitation of irregular entry, some States and regions have pursued a differentiated approach that does not exclude from prosecution for the smuggling of migrants those who are acting with humanitarian intent or on the basis of close family ties, even when there is no — or no obvious — financial intent.

B. National approaches in the definition (article 3) and criminalization (article 6) of the smuggling of migrants

26. In criminalizing the smuggling of migrants, many States parties to the Protocol have not included a “financial or other material benefit” element, despite it being a key component of the international definition. This disparity raises questions about the impact that different approaches to the definition may have on efforts to mount effective and coordinated responses to the transnational crime of smuggling of migrants.

27. Much of the relevant literature on “financial or other material benefit” in the context of the smuggling of migrants arises in the context of the response by the European Union. The European Union legal framework around the smuggling of migrants comprises two instruments, namely Council of the European Union directive 2002/90/EC, defining the facilitation of unauthorized entry, transit and residence and framework decision 2002/946/JHA, on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence.

28. In short, the provisions require European Union member States to criminalize facilitation of unauthorized residence when conducted for financial gain. Member States can, however, criminalize the offence irrespective of the “financial gain” motive and are required to criminalize facilitation of unauthorized entry or transit even when there is no financial gain. It is important to note that article 1 of the facilitation directive preserves member States’ discretion to not impose sanctions for the offence of facilitating unauthorized entry or transit in cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

29. A recent survey found that in most European Union member States, the basic migrant smuggling offence requires only proof of facilitation of illegal entry, but not of additional physical or mental elements relating to profit or benefit obtained or intended to be gained by the perpetrator. In most European Union member States, the presence of a financial or material benefit serves as an aggravating factor when imposing the penalty. The approach taken by the European Union, which allows but does not require its member States to exclude activities that are aimed at providing humanitarian assistance, leaves open the possibility that persons involved in facilitating unauthorized entry and transit for humanitarian purposes will be prosecuted. Such criminalization can be extended to persons who render assistance to migrants in distress in a way that results in their unauthorized entry into a European Union member State.

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1. Specific insights into application and practice

30. In some States that have included some aspect of the “financial or other material benefit” element in their legislation, the relevant concept appears to be limited to financial or pecuniary benefit, although there is some indication from practitioners that certain other benefits, such as provision of work services, and potentially other services, could theoretically be included. In other States, there appears to be a clear legislative intent to ensure that the element is capable of being applied broadly. For those States, the case of a migrant who crews a smuggling vessel (or drives a smuggling vehicle) in lieu of or for a reduction in a smuggling fee, for example, was widely considered to constitute a benefit.7

31. In States where the concept refers to “indirect” profit, that is variably understood as being an expectation of enrichment, where the benefit has not yet been obtained or is “imminent”. In relation to those States, the legislative framing of the “financial or other material benefit” concept is considered to exclude any kind of threshold for profit or other benefit; even a small amount of profit or a relatively minor benefit is sufficient to satisfy the element or condition for establishing an aggravated offence and would not represent a barrier to prosecution.

32. Overall, among the group of States that have included some aspect of the “financial or other material benefit” concept in their legislation, the substantive scope of the concept is generally considered capable of sufficiently broad interpretation to take account of the various ways in which smugglers derive benefits from their crimes. However, in application, it appears that the “financial or other material benefit” concept is most often approached only on the basis of financial profit, with financial gain usefully serving to distinguish criminal smuggling from other conduct.

2. Humanitarian exemptions in law and practice

33. As noted, the drafters of the Protocol intended that the definition of smuggling of migrants would not apply to the facilitated movement of migrants across national borders for purely humanitarian purposes. However, explicit humanitarian exemptions are rare.8 In addition, one country’s exemption of facilitated entry or exit not motivated by profit also operates to exclude smuggling undertaken solely for humanitarian purposes, but this broad approach is uncommon and recent research surveys by the United Nations Office on Drugs and Crime (UNODC) confirm a general trend among States to either not include such an exemption or to construe it narrowly.

34. In most countries, the humanitarian exemption operates in practice as an exemption from penalty, rather than from charge. A similar situation exists in some countries where the presence of profit or gain comes into play only to rebut suggestions that assistance of an asylum seeker was humanitarian in motivation. In all countries that provide an explicit humanitarian exemption, the establishment of mixed motives (i.e., humanitarian and financial) is sufficient to make the exemption inapplicable such that those cases will be prosecuted and punished as cases of smuggling.

35. Reservations have been expressed about a situation in which humanitarian actors could be immune from any consequences for their involvement in the systematic and large-scale facilitation of irregular movement, particularly among

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7 Ibid.

8 Of the 13 surveyed countries in a recent UNODC study, only four include humanitarian exemptions explicitly in their legislation, and even then, only in carefully limited circumstances (The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol). Case law on humanitarian exemptions is also available from the Smuggling of Migrants Knowledge Portal (see, for example, R v Abdulle (2014) and R v Abdulle (2015), Canada; resolución 151/2008, Spain; and Jugement du 14 Septembre 2014, France.)
States facing large-scale flows. Concerns include the notion that rigid application of this principle might play into the hands of smugglers.⁹

36. In practice, humanitarian motivations can influence prosecution decisions and sentencing. In the absence of humanitarian exemptions in the law, it appears that, when faced with clear evidence of humanitarian intent, and in the absence of any indication of financial or other material gain (either intended or obtained) on the part of the suspect, States will often decide not to pursue prosecutions. Where such cases are prosecuted, sentences may be mitigated (either reduced or no penalty imposed at all) on the basis that there was no intention of securing a financial or material gain. While any intention to benefit will negate a proposition that conduct was humanitarian, mitigation of sentencing, usually in the form of imposition of a lesser penalty, can occur even in situations where some profit or benefit accrued to the smuggler, provided that it was not the primary motivation.

37. Exercising prosecutorial discretion in deciding not to pursue certain cases is generally considered a way of accommodating very different realities — as is flexibility in sentencing, although such an approach might not be foolproof in ensuring consistent and appropriate outcomes.

38. In most of the States of destination surveyed by UNODC, asylum seekers comprise a substantial portion of those who are smuggled, and many such persons are indeed subsequently recognized as refugees. In practice, in cases involving the non-beneficial facilitated entry or stay of asylum seekers, the humanitarian exemptions as summarized above are applied without any distinction being made on the basis of the intention of the migrant to seek asylum or on what the smuggler knows or believes to be the intent of the migrant.

39. Exemptions for the facilitated entry or stay of family members also appear to be limited. Depending on the circumstances of the case, the general humanitarian exemption discussed above may apply. Practitioners in most States confirmed that the facilitation of illegal entry of family members without intention to profit is unlikely to be a prosecutorial priority and, even if such cases were prosecuted, it is likely that either no sentence or a lesser sentence would be imposed. At the same time, facilitating illegal entry of family members with the intention to profit is considered unlikely to be exempted as a humanitarian act. Therefore, while supportive of such exercises of discretion, explicit exemptions from prosecution for the smuggling of family members are not generally supported, also considering that some criminal organizations are family-based and further, that the concept of “family” could extend that exemption to a large number of beneficiaries.

40. Regardless of whether and how the profit or benefit motive is captured in national legislation, implementation of the legal framework around smuggling should reflect the reality that it is a crime committed for purposes of financial or other material benefit.

C. Evidentiary issues, sanctions and deterrence

41. Policy and practical considerations behind including “financial or other material benefit” as an element of the basic smuggling offences include the idea that the profit or benefit aspect is an essential element of the offence of smuggling of migrants and is central to the way in which the crime is understood and responded to.

42. In contrast, one idea behind excluding the “financial or other material benefit” element entirely or merely addressing it as an aggravating element of an offence is that, while smuggling is almost invariably motivated by profit, States must ensure that they have the flexibility to respond to all situations of facilitated illegal entry and stay. Prosecutorial or judicial discretion can work to ensure that the focus remains squarely, if not exclusively, on those who are motivated by profit.

⁹ Ibid.
43. When considering more practical aspects, there is concern regarding the heavy evidentiary burden that results from the inclusion of “financial or other material benefit” as an element of the basic offences, especially if prosecutors are required to prove actual benefit, as opposed to intention to benefit. Difficulties in securing reliable evidence, in particular from smuggled migrants and in situations where payment for services is brokered or otherwise indirect, are also to be taken into consideration. However, omitting the profit element does not operate to prevent this aspect from being considered, and it is often highly relevant for understanding what has taken place.

44. Practitioners in States where the legal framework does not include “financial or other material benefit” as an element of basic smuggling offences considered that requiring proof of financial or other material benefit would present difficulties at both the investigation and prosecution stages. They pointed to the challenge of financial investigations and of attributing a specific benefit to a specific individual, in particular in large-scale smuggling ventures. Echoing concerns expressed by practitioners in other States, they also repeatedly emphasized the difficulties of securing reliable evidence — either direct or corroborative — from smuggled migrants themselves. Smuggled migrants are often afraid of prosecution, compromising their asylum claims and retaliation. Even when they are willing to cooperate, smuggled migrants can make poor, easily discredited witnesses who may have little knowledge of the higher-level organizers involved in their journey.

45. The presence of some aspect of the “financial or other material benefit” concept appears to be a relevant consideration, irrespective of whether or how the aspect is captured in law. As noted above, the “financial or other material benefit” element serves as an aggravating factor in the imposition of penalties for certain facilitation-of-entry and facilitation-of-stay offences. Generally, where profit or intention to profit is included, the level of profit or benefit is considered to be immaterial to establishing the offence. Irrespective of the legislative approach taken by individual States, it appears that motivation for the smuggling of migrants is critical at the sentencing stage and that the role of a financial motive in the offending will affect an assessment of its objective seriousness.

46. In the same way that smuggling for family reunification or humanitarian purposes is unlikely to be subject to the heaviest penalties, a clear financial motivation — and evidence of high actual or expected profits — will inevitably incur harsher penalties. Consistent with this approach, actions with relatively low financial returns (especially where such returns are expected or secured by poor, low-level local operatives recruited to crew smuggling vessels) can be expected to result in lesser penalties.

47. Those who are motivated to commit the crime of smuggling purely for profit are considered more culpable and deserving of greater sanctions than those whose motivations are altruistic or mixed. The approach also reflects very practical considerations: low actual or expected profits or benefits point to low-level offenders. An unambiguous profit motivation and the expectation or securing of large profits is often associated with organized criminality and higher-level offending, as well as with conduct that exploits or endangers smuggled migrants. In situations where the benefit is not financial but, for example, is in the form of work or services, the resulting aggravation factors may include other forms of aggravation (such as inhuman treatment or exploitation) rather than the notion of profit or benefit.

48. There is a fundamental, essential link between smuggling and profit; in the absence of a clear humanitarian or family reunification motivation, smuggling is invariably motivated by profit. Irrespective of how it is captured in law, courts do not appear to have trouble recognizing and responding to this reality. Factors taken into account in inferring financial or other material benefit include the lack of any familial or other relationship between the smuggler and the smuggled, the fact that previous migrants have paid, that the accused has offended previously or is living
well beyond his legitimate means, or that the conditions of smuggling are so poor that they cannot be humanitarian in motivation.

49. In addition to the evidence provided by witnesses, wiretapping also constitutes an essential investigative tool for proving an intention to financially or materially benefit and for proving financial or other material benefit in the absence of formal records of any transactions. Tracking of bank and other transfers is also widely used in many States, but has proved problematic in others, particularly where transfers are made from or to foreign banks. Case law on the smuggling of migrants also shows that payments are often done through Western Union and MoneyGram, and cooperation with these financial service providers has allowed the gathering of important evidence on the movement of cash. Such cooperation amounts to a remarkable example of best practice translated into effective collaboration between private actors and investigative authorities.10

50. There is a strategic value in focusing on “financial or other material benefit” irrespective of whether it is or is not an element of the offence. For example, where no smuggling fees are paid, or where fees are repaid through labour, the investigation or prosecution may be reoriented towards trafficking in persons, or indeed towards the possibility that the facilitated movement is linked to terrorism. In situations where smuggling is clearly being undertaken for profit, a focus on the financial aspects of the smuggling crime can help contribute to high-value prosecutions, including prosecutions for involvement in organized crime. Such an approach also supports the tracing, freezing and seizure of the assets of organizers, thereby offering an important opportunity to disrupt large and complex smuggling operations.

D. International legal cooperation

51. International cooperation is key to effectively addressing the smuggling of migrants. In addition to the specific framework of collaboration established by article 8 of the Protocol, article 10, on information exchange between States parties, and article 14, on training and technical cooperation, are of particular relevance to fighting the smuggling of migrants by sea.

52. States parties are also expected to make full use of the provisions on international cooperation of the Organized Crime Convention, which apply, mutatis mutandis, to the Protocol.

53. The complex nature of migrant smuggling networks and their modus operandi means that smugglers cannot be identified purely by determining their country of departure: the criminal network itself must be traced back to countries of transit and destination.

54. The key to an effective and comprehensive response to migrant smuggling lies in strengthened multilateral cooperation in investigations along smuggling routes. States concerned should be encouraged to regularly exchange information and expertise as provided for in article 10 of the Protocol, and to facilitate direct communication between law enforcement actors in countries along the same smuggling routes.

55. Regional and transregional initiatives to enhance cooperation in investigations against the smuggling of migrants along common routes should be encouraged and multiplied. Such initiatives may also assist in identifying and establishing channels of cooperation when instability in the countries involved creates doubt as to who the relevant interlocutors are.

56. International cooperation in investigations relating to the tracing, freezing, seizure and confiscation of criminal assets and proceeds of crime is also essential to

adequately punish and deter organized criminal groups engaging in the smuggling of migrants. Proceeds of crime would often be hidden in countries other than those where they were produced and, in some cases, they may even transit through one or more countries in the process. Cooperation at the international level among competent authorities and law enforcement agencies is therefore required to uncover the origin, movement and location of the criminal assets. To that end, articles 13 and 14 of the Convention, which apply to the smuggling of migrants, set forth provisions covering the international aspects of identifying, freezing and confiscating of the proceeds and instrumentalities of crime. Implementation of those provisions would enable States to increase the efficiency of their actions towards depriving smugglers of their criminal proceeds.

57. The Smuggling of Migrants Protocol seeks to promote a consistent approach to defining and criminalizing the smuggling of migrants in order to, inter alia, provide a solid basis for international legal cooperation, including through mutual legal assistance and extradition. General principles of international legal cooperation require that the conduct that is the subject of a request for mutual legal assistance or extradition be considered a criminal offence in both the requesting and the requested State.

58. There is a question about whether differences between national legal frameworks, not least those concerning the definition of migrant smuggling and the inclusion or exclusion of the “financial or other material benefit” element, could infringe on the principle of dual criminality and thereby compromise such cooperation.

E. Other actors: civil society

59. Irrespective of whether or not “financial or other material benefit” is included within domestic law as an element of migrant smuggling offences, the overall framework within which relevant laws are understood and applied needs to include safeguards to ensure that faith-based organizations, civil society and individuals acting without any purpose to obtain a financial or other material benefit are excluded from the application of smuggling offences, while ensuring that such exclusion cannot be used as a loophole to escape justice.

60. Research conducted by the Centre for European Policy Studies has confirmed that some civil society organizations fear sanctions for their work assisting irregular migrants in relation to both entry and stay. The report also notes that, while they would be protected from prosecution under legal regimes related to rescue at sea, fears of prosecution have deterred some shipmasters, particularly those of fishing trawlers in the Mediterranean, from rescuing migrants in distress. It is important to note that this and other studies have found that prosecutions for facilitation of entry, rescue or assistance for humanitarian purpose are rare, but not unheard of.

61. At the policy level, various European Union bodies have advocated against the criminalization and pursuit of those who support migrants for purposes other than profit. In 2014, the Agency for Fundamental Rights recommended that European Union member States should always include financial and other material benefit as a requirement for punishment, or explicitly exclude punishment for facilitation of entry and stay where it is based on humanitarian grounds.\textsuperscript{11} It also recommended that States explicitly exclude from punishment rescue at sea and assisting refugees to seek safety, as well as the provision of humanitarian assistance such as food, shelter, medical care and legal advice (without profit) to migrants in irregular situations.

\textsuperscript{11} European Union Agency for Fundamental Rights, Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them (Vienna, 2014).
62. A recommendation for the two European Union instruments to be revised to make the humanitarian exemption mandatory and to include the “financial or other material benefit” purpose as an element in all facilitation offences has been made by the Director-General for Internal Policies of the European Parliament. It is noteworthy that the European Union Action Plan against migrant smuggling (2015-2020) emphasizes the need to focus on the “business model” of smuggling and strengthen financial investigations to deprive smugglers of their profit, ensuring that appropriate criminal sanctions are in place while avoiding risks of criminalization of those who provide humanitarian assistance to migrants in distress.

IV. Key tools and recommended resources

The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol: Issue Paper

Recognizing the critical importance of a common understanding of the internationally agreed definition of migrant smuggling, UNODC has undertaken a study on the “financial and other material benefit” element of that definition. The study examines legislation and case law among a broadly representative group of States in order to gain a comparative perspective on how this aspect of the definition has been understood and applied. It gives particular attention to the experiences and views of practitioners who are involved in investigating and prosecuting the smuggling of migrants and related crimes.

Additional key tools and recommended resources

For additional key tools and recommended resources, see the background paper prepared by the Secretariat entitled “Use of the United Nations Convention against Transnational Organized Crime to address challenges relating to the smuggling of migrants” (CTOC/COP/WG.7/2017/3).