



**UNODC**

United Nations Office on Drugs and Crime

**Issue Paper**

**The Concept of  
“Financial or Other Material Benefit”  
in the Smuggling of Migrants Protocol**



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol**

Issue Paper



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## Preface

As the guardian of the United Nations Transnational Organized Crime Convention and the Protocols thereto, UNODC is mandated to support States Parties in efforts to fulfill their obligations under these instruments. It is in this context that we present this Issue Paper on the “financial or other material benefit” element of the international legal definition of smuggling of migrants as set out in the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime* (Smuggling of Migrants Protocol).

This study follows earlier work undertaken by UNODC to elaborate guidance on concepts contained in the definition of human trafficking. The series of Issue Papers that were produced on the basis of that work have been welcomed by States Parties to the *Protocol on Trafficking in Persons Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime* and have been used in developing new laws and interpreting existing ones. It is hoped that this first Issue Paper on the definition of migrant smuggling – and others that may follow it – will have a similarly positive impact.

“Financial or other material benefit” is the purpose of migrant smuggling. It is the reason behind the growing involvement of organized criminal groups in conduct that often puts the lives of vulnerable migrants in great jeopardy. The financial or other material benefits associated with migrant smuggling are fueling a trade that turns human suffering and resilience against unfair odds, into enormous and unscrupulously procured profits. For these reasons, this critical element of the international legal definition was prioritized for study.

Migrant smuggling is not always understood in accordance with the definition set out in the Smuggling of Migrants Protocol, and in many cases it is not distinguished from the phenomenon of facilitated illegal entry with no benefit motive, an act that falls beyond the scope of the Protocol. The framework provided by the Organized Crime Convention and the Smuggling of Migrants Protocol aims at supporting States collectively address the involvement of organized crime in the facilitation of irregular migration, which manifests itself through the financial or other material benefit element. Smuggling of migrants has become a very profitable business generating significant proceeds that can be disrupted by “following the money”, as for other forms of organized crime. Dismantling organized smuggling networks and bringing top-level organizers to justice requires political will, prioritization of resources, concerted efforts as well as a common understanding and very solid judicial cooperation along smuggling routes. Migration-focused measures risk not fully addressing the challenges presented by migrant smuggling as a form of serious organized crime, to the potential benefit of criminals and to the detriment of migrants.

UNODC will continue working closely with States Parties to the Smuggling of Migrants Protocol to strategically sharpen criminal justice efforts against the serious and profit-driven crime of migrant smuggling, while protecting the rights of smuggled migrants. To that end, it is hoped that this Issue Paper will be seen as the start of ongoing and determined collaboration to better understand the importance of the role that “financial or other material benefit” plays in driving organized smuggling, and how the efforts of States and the international community can be harnessed towards combating it.

## Acknowledgments

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This work would not be possible without the commitment of experts around the world who shared their expertise and insights. UNODC expresses its appreciation to those who attended the expert group meeting in Vienna on 15-16 November 2016 and who provided important input: Syuhaida Abdul Wahab Zen, Sarah Algner-Abendroth, Simona Ardovino, Rami Badawy, Andrea Bonomo, Taha Chebbi, Andhika Crisnayudhanto, Yvon Dandurand, Lisa Jacobson, Mohamad Abazafree Mohd. Abbas, Humberto Morales Nava, Nikolaos Poimenidis, Mark Seebaran, Adriano Silvestri, Kadri Soova, Rahmat Sori, Dishna Warnakula, Lisa West and Susanne Wilke.

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## Executive Summary

### Background

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”* (article 3). The drafters of the Smuggling of Migrants Protocol elected to include the “financial or other material benefit” (FoMB) not only as an element of the definition of the offence but also as a requirement for its criminalization (article 6). However, in criminalizing migrant smuggling, many States Parties to the Protocol have not included a financial or 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.

Recognizing the critical importance of a common understanding of the internationally agreed definition, UNODC has undertaken the present study into the “financial and other material benefit” element of the definition of migrant smuggling. 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 migrant smuggling and related crimes.

### Purpose and expected outcomes

The principal purpose of the study is to contribute to more effective and consistent interpretation and implementation of the international legal obligations that States have assumed through their ratification of or accession to the Smuggling of Migrants Protocol and its parent instrument, the United Nations Convention against Transnational Organized Crime (the Organized Crime Convention). A foundational assumption of the study is that fostering common approaches with regard to criminal justice priorities will contribute to improvements in the national response as well as to more effective cooperation between States in investigation, prosecution and adjudication of migrant smuggling and related offences.

The main output of the study is the present Issue Paper, that is expected to serve as a resource for criminal justice practitioners and others involved in the implementation of the Smuggling of Migrants Protocol, in particular through the investigation, prosecution and adjudication of smuggling cases. The Issue Paper may also inform inter-governmental processes (in particular the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and its Working Group on the Smuggling of Migrants); support policy work at the international and national level; and provide information to guide the provision of

technical assistance to States Parties, especially in relation to legislative support and adjudication of cases.

Furthermore, the Issue Paper is expected to contribute to the future review of the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* and of other reference materials, such as the *UNODC Model Law against the Smuggling of Migrants*. It is also expected that the present Issue Paper on the financial or material benefit element within the international legal definition of smuggling in migrants may be followed by further studies that consider other aspects of the definition and legal framework, thereby helping to build the conceptual clarity necessary for common approaches and cooperation between States.

### Methodology of the study

The methodology for preparation of the Issue Paper comprised the following steps: (i) **initial desk research**: this included a review of the drafting history of the Protocol and a broad survey of national legislation and case law with a focus on the definition of migrant smuggling in general and the “financial or other material benefit element” of that definition in particular; (ii) **country surveys**: a survey instrument was developed with the aim of capturing additional and in-depth information on laws, cases and practices related to the subject of the study as well as practitioner understanding of and views on the issues raised. It was used to guide in-depth roundtable discussions with a total of 124 practitioners and experts from a sample of thirteen States representing different regions and legal traditions (Australia, Canada, Germany, Greece, Indonesia, Italy, Malaysia, Mexico, Morocco, Sri Lanka, Tunisia, the United Kingdom and the United States of America). The States that were invited to participate in the process were identified with a view to maintaining geographical balance and including experience from civil, common and mixed law systems as well as a range of migrant smuggling experiences; (iii) **preparation of Survey Report and draft Issue Paper**: the results of the country surveys, together with a detailed analysis of those results, were compiled into a Survey Report that formed a major input into the Issue Paper; (iv) **convening of an expert group meeting (EGM)** in Vienna on 15-16 November 2016 for the purpose of verifying the findings of the survey and enriching the substance of the draft Issue Paper. The EGM involved expert practitioners identified during the survey process. Other technical experts were also involved. The EGM focused particular attention on addressing the key issues and questions raised by the draft Issue Paper and developed a set of conclusions set out in Part 5 below. This final version of the Issue Paper reflects the inputs of the EGM as well as additional written comments on the draft text provided by participating experts and practitioners.

### The international legal definition of smuggling of migrants

Under the agreed definition set out in the Smuggling of Migrants Protocol, smuggling of migrants will occur if the implicated individual or legal person intended that the action (procuring illegal entry of a person who is not a national or permanent resident) be done in order to obtain a financial or other material benefit. Migrant

smuggling is thereby a crime of specific or special intent. There is no apparent requirement for the benefit to have occurred: the crime of migrant smuggling is made out under the Protocol once the relevant physical elements are established along with an intention to obtain a benefit.

An Interpretative Note attached to the definition states that:

*The travaux préparatoires should indicate that the reference to “a financial or other material benefit” as an element of the definition [of migrant smuggling] 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.*<sup>1</sup>

Close analysis of the drafting history of the Protocol, along with a review of relevant guidance and other material, supports the following conclusions:

- The Protocol’s focus is on the activities of organized criminal groups acting for profit.<sup>2</sup>
- 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.
- The concept of “benefit” as used in the Protocol is to be considered broadly.

## Review of national law and practice

Key findings from the review of national law and practice included the following:

**In relation to legislative approaches:** All States surveyed have criminalized migrant smuggling and / or conduct associated with migrant smuggling. However most do not define migrant smuggling. Rather, conduct is criminalized within an offence or

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<sup>1</sup> Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A /55/383/Add.1, 3 November 2000, para. 88 (hereafter Interpretative Notes). Emphasis added.

<sup>2</sup> Art. 4 of the Smuggling of Migrants Protocol and the fact that the Protocol supplements the Organized Crime Convention support this point. Although the legislative guide clarifies that “domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved” (UNODC, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto UN Sales No. E.05.V.2 (2004), p. 334, para 20 – hereafter Legislative Guide), it also acknowledges 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” (Legislative Guide, part three, chap. II, para. 28, p. 340).

across a range of offences. Facilitated entry offences are generally separated from facilitated stay offences. Although the majority of surveyed States have included some conception of FoMB in their national smuggling law or in other areas of criminal law, none has replicated the phrase “financial or other material benefit” and none offers a definition for the equivalent concept in national law.

***In relation to the scope of FoMB:*** Among the group of States that have included some aspect of FoMB 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 FoMB is most often approached only on the basis of financial profit, with financial gain usefully serving to distinguish criminal smuggling from other conduct. However, the lack of substantive case law (and in some cases also legislative guidance) means that the scope of the FoMB has not yet been adequately tested.

***In relation to facilitated entry motivated by humanitarian / family concerns:*** The survey confirms a general trend among States to either not include a humanitarian exemption or to construe it narrowly. However, absent 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 where prosecutorial discretion is exercised 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 or securing of a financial or material gain. A similar approach is / would be taken to facilitation of entry of close family members, although there was little support expressed for explicit exemptions.

***Relevance of FoMB to penalties and to sentencing:*** The presence of some aspect of financial or other material benefit appears to be a relevant consideration in all survey countries, irrespective of whether or how this aspect is captured in law. Generally, where profit or intention to profit is included as an aggravating circumstance, the level of profit or benefit is considered to be immaterial to establishing the aggravated offence. Irrespective of the legislative approach taken, it appears that motivation for migrant smuggling 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.

***Evidentiary and strategic considerations:*** Practitioners in States where the legal framework does not include FoMB as an element of smuggling offences considered that requiring FoMB to be proven could present difficulties at both the investigation and prosecution stages. Many emphasized that, absent a clear humanitarian or family reunification motivation, smuggling is *invariably* motivated by profit. Irrespective of how it is captured in law, courts appear to acknowledge this reality when adjudicating cases. Also among the survey sample as a whole, it was notable that evidence sought generally relates to tangible benefit, rather than *intention* to

benefit. Practitioners further noted the strategic importance of focusing on FoMB, not least because this can support higher-value prosecutions.

***Challenges to international legal cooperation:*** There is a question about whether differences between national legal frameworks, not least around the definition of migrant smuggling and the inclusion or exclusion of the FoMB element, could violate the principle of dual criminality and thereby compromise international legal cooperation. However, the survey confirmed that, at least within this group of States, this concern is more theoretical than practical. Practitioners repeatedly emphasized the importance of international legal cooperation in high-value prosecutions.

***Policy and practical considerations behind including FoMB:*** Practitioners from the two States that have included FoMB as an element of the base migrant smuggling offences were unanimous in their view that the profit / benefit aspect is an essential element of the offence of migrant smuggling – that it is central to how the crime is understood and responded to. Both pointed to the national approach as being in full accordance with the approach taken by the Smuggling of Migrants Protocol.

***Policy and practical considerations behind excluding FoMB:*** Practitioners from States that have either excluded FoMB entirely or merely addressed it as an element of an aggravated offence were of the view that States must ensure 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 on those who are motivated by profit. They pointed to the obstacles inherent in investigating and prosecuting a crime as complex as migrant smuggling as addressed in their domestic laws, and the heavy evidentiary burden that would result from the inclusion of FoMB as an element in the base smuggling offences. Some practitioners expressed the view that by excluding FoMB, their State had in fact exceeded the minimum standards set by the Protocol.

***International guidance for practitioners:*** Most practitioners were of the view that properly crafted guidance which respects differing national approaches while promoting broad commonality between countries on how migrant smuggling is understood and responded to, could be extremely useful to those involved in investigating, prosecuting and adjudicating such crimes. However, there was little agreement on the form or substantive content of guidance for practitioners.

## Conclusions

Part 5 of the Issue Paper provides a set of conclusions, developed by participants at the expert group meeting, that are intended to provide broad guidance to States and to practitioners on understanding and applying the international legal definition of smuggling of migrants with particular reference to the element of “financial or other material benefit”.



## PART 1. INTRODUCTION

This Part provides a general introduction to the Issue Paper: briefly explaining the policy environment within which the international legal framework around the smuggling of migrants was developed; providing context and background to the study as well as setting out its purpose and expected outcomes; and outlining methodology and structure.

### 1.1. Background

Prior to the inclusion of an agreed legal definition of “smuggling of migrants” in the Smuggling of Migrants Protocol, the term was often used as an umbrella concept referring to a range of conduct related to the facilitation of unauthorized entry into a country and sometimes also unlawful stay. While aspects of illegally facilitated migration have been established criminal offences in many countries for decades, the issue of migrant smuggling was not the subject of official discussions within international and regional organizations prior to the early 1990s. At that time several high profile incidents highlighted the growing phenomenon of organized movement of migrants from Asia to North America,<sup>3</sup> feeding unease amongst affected States, who quickly began pushing for greater international legal cooperation on the issue.<sup>4</sup> These efforts very quickly found a receptive audience among the major destination countries of western and central Europe, North America, and elsewhere that had experienced a significant increase in the number of “unauthorized arrivals”, apparently facilitated by criminal groups that were organized and sophisticated enough to exploit legislative, policy and law enforcement weaknesses.<sup>5</sup>

Deficiencies in international law were seen as particularly acute and detrimental: as summarized by advocates of a new treaty on the subject there was no agreed definition of smuggling of migrants, no domestic obligation to criminalize it, and no obligation to extradite or prosecute its perpetrators,<sup>6</sup> resulting in a “legal lacuna

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<sup>3</sup> The most prominent of these was the *Golden Venture* incident, in which a Chinese vessel, carrying 286 migrants, was deliberately run aground off the coast of New York. The migrants, who had each paid up to USD 30,000 for a place on the vessel, were advised to jump into the sea and swim to shore. Ten died of drowning or hypothermia, and most of the survivors were deported. The incident prompted significant legislative and policy changes in the United States on the issue of migrant smuggling. See A. J. Sein, “The Prosecution of Chinese Organized Crime Groups: The Sister Ping Case and its Lessons” (2008) 11(2) *Trends in Organized Crime* 157, at para. 163.

<sup>4</sup> See D. Vlassis, “The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process,” in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, *Annual Report for 2000 and Resource Materials*, Series No. 59 475 (2002).

<sup>5</sup> See “Measures to Combat Alien Smuggling: Report of the Secretary-General,” UN Doc. A/49/350, 30 Aug. 1994.

<sup>6</sup> “Letter dated 16 September, 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General,” UN Doc. A/52/357, 17 Sept. 1997, at paras. 2–3 (transmitting a draft of the proposed convention).

under international law [that] is increasingly perceived as an obstacle to the efforts of the international community to cope in an efficient manner with the phenomenon of smuggling of illegal migrants for criminal purposes”.<sup>7</sup> The major destination countries were quick to understand that the default position – a purely national approach to sanctioning those who facilitated such migration, supplemented by *ad hoc* and largely ineffective bilateral cooperation – played directly into the hands of smugglers.<sup>8</sup>

Attention initially focused on the International Maritime Organization as a vehicle for promoting and supporting cooperation among States in suppressing “unsafe practices associated with alien smuggling by ships”.<sup>9</sup> States also sought to simultaneously engage the United Nations, and in December 1993 the UN General Assembly adopted a resolution on “prevention of the smuggling of aliens.”<sup>10</sup> The resolution provided the multilateral hook essential for justifying the elevation of migrant smuggling as an issue of common concern, by affirming that these practices have “transnational consequences”, such that there is a “need for States to cooperate urgently at the bilateral and multilateral levels, as appropriate, to thwart these activities”. It called on States to take a set of actions to prevent “the practice of smuggling aliens”.

Parallel developments in Europe strengthened these early international efforts<sup>11</sup> and interest in developing an international regulatory framework around migrant smuggling quickly gained momentum. In 1997 the Government of Austria formally proposed the development of a new legal instrument to deal with the smuggling of migrants: focusing specifically on the creation of a new criminal offence as well as measures related to investigation, prosecution and extradition.<sup>12</sup> In its proposal, the Austrian Government noted that this practice posed “a growing threat to the international community as a whole” and, given that it constituted a “very special form of transnational crime”, required a special convention.<sup>13</sup> After initially

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<sup>7</sup> Ibid.

<sup>8</sup> See generally D. Vlassis, “The Global Situation of Transnational Organized Crime. See also the observation of the United States Government in the 1994 UN report on alien smuggling (“Measures to Combat Alien Smuggling: Report of the Secretary-General,” UN Doc. A/49/350, 30 Aug. 1994), at para. 79, that “[c]ontrol of alien-smuggling is made more difficult in the United States by the fact that in a number of Central American countries, alien smuggling is not illegal and smugglers are often able to operate openly.”

<sup>9</sup> International Maritime Organization, Assembly, *Enhancement of Safety of Life at Sea by the Prevention and Suppression of Unsafe Practices Associated with Alien Smuggling by Ships*, IMO Resolution A.773 (18), 4 November 1993.

<sup>10</sup> UN General Assembly, “Prevention of the smuggling of aliens,” GA Res. 48/102, UN GAOR, 48<sup>th</sup> sess., Agenda Item 10, UN Doc. A/RES/48/102, 8 Mar. 1994, adopted 20 December 1993.

<sup>11</sup> See for example Council of Europe, “Texts adopted at the European Conference on Uncontrolled Migration (Budapest, 15–16 February 1993),” Fifth Conference of European Ministers responsible for migration affairs (Athens, 18–19 November 1993), Doc. MMG–5 (93) 5, 19 October 1993, at 3.

<sup>12</sup> “Letter dated 16 September, 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General,” UN Doc. A/52/357, 17 Sept. 1997.

<sup>13</sup> “Letter dated 16 September, 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General,” UN Doc. A/52/357, 17 Sept. 1997, at introductory para and para. 4. See also R. A. Pedrozo, “International Initiatives to Combat Trafficking of Migrants by

approaching the International Maritime Organization with its own proposal, Italy decided to join forces with Austria in pushing for the development of a legal instrument against migrant smuggling within the context of the Crime Commission's work against transnational organized crime.<sup>14</sup> This goal was secured in late 1998 when the Ad Hoc Committee established to develop a convention on transnational organized crime was mandated to also discuss the elaboration of an international instrument on "illegal trafficking in and transportation of migrants, including by sea".<sup>15</sup> The new specialist legal framework to emerge from that process comprises the *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime*<sup>16</sup> (Smuggling of Migrants Protocol) and its parent instrument the *United Nations Convention against Transnational Organized Crime*<sup>17</sup> (Organized Crime Convention). In addition to defining smuggling, the Smuggling of Migrants Protocol and the Organized Crime Convention detail a wide range of obligations on States: from criminalizing migrant smuggling and related offences to protecting the rights of smuggled migrants and cooperating in the exchange of information, evidence and intelligence.

## 1.2. Context of this study

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*" (article 3). The drafters of the Smuggling of Migrants Protocol elected to include the "financial or other material benefit" not only as an element of the definition of the offence but also as a requirement for its criminalization (article 6). However, in criminalizing migrant smuggling, many States Parties to the Protocol have not included a financial or 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.

Recognizing the critical importance of a common understanding of the internationally agreed definition, UNODC has undertaken the present study into the "financial or other material benefit" element of the definition of migrant smuggling. 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

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Sea," in J. N. Moore and M. H. Nordquist eds., *Current Maritime Issues and the International Maritime Organization* 53 (Martinus Nijhoff, 1999), at 62–63.

<sup>14</sup> D. Vlassis, "The Global Situation of Transnational Organized Crime," at 493.

<sup>15</sup> UN General Assembly, "Transnational organized crime," GA Res. 53/111, UN GAOR, 53<sup>rd</sup> session, Agenda Item 101, UN Doc. A/RES/53/111, 20 Jan. 1999, at para. 10.

<sup>16</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507, 15 November 2000, entered into force 28 January 2004 (Smuggling of Migrants Protocol).

<sup>17</sup> United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003 (Organized Crime Convention).

definition has been understood and applied. It gives particular attention to the experiences and views of practitioners who are involved in investigating, prosecuting and adjudicating migrant smuggling and related offences.

### **1.3. Purpose and expected outcomes**

The principal purpose of the study is to contribute to more effective and consistent interpretation and implementation of the international legal obligations that States have assumed through their ratification of or accession to the Smuggling of Migrants Protocol and its parent instrument, the Organized Crime Convention. A foundational assumption of the study is that fostering common approaches with regard to criminal justice priorities will contribute to improvements in the national response as well as to more effective cooperation between States in investigation and prosecution of migrant smuggling.

The main output of the study is the present Issue Paper that is expected to serve as a resource for criminal justice practitioners and others involved in the implementation of the Smuggling of Migrants Protocol, in particular through the investigation, prosecution and adjudication of migrant smuggling cases. The Issue Paper may also inform inter-governmental processes (in particular the Conference of the Parties to the United Nations Convention on Transnational Organized Crime and its Working Group on the Smuggling of Migrants); support policy work at the international and national level; and provide information to guide the provision of technical assistance to States parties, especially in relation to legislative support and adjudication of cases. Furthermore, the Issue Paper is expected to contribute to the future review of the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (the Legislative Guide) and of other reference materials, such as the *UNODC Model Law against the Smuggling of Migrants*.

This study follows on from work undertaken by UNODC to examine key concepts within the international legal definition of trafficking in persons. That work resulted in three Issue Papers on abuse of a position of vulnerability (2012), the role of consent (2014) and the concept of exploitation (2015). It is expected that the present Issue Paper on the financial or material benefit element within the international legal definition of smuggling in migrants will be followed by further studies that consider other aspects of the definition and legal framework, thereby helping to build the conceptual clarity necessary for common approaches and cooperation between States.

### **1.4. Methodology**

The methodology for preparation of this Issue Paper followed the successful approach adopted for the three studies on various concepts of the international legal definition of trafficking in persons referred to above, with some minor modifications introduced on the basis of that previous experience. That methodology comprised the following steps:

**Initial desk research:** The study commenced with a review of the drafting history of the Protocol and a broad survey of national legislation and case law with a focus on the definition of migrant smuggling in general and the “financial or other material benefit element” of that definition in particular. Regional legal sources, scholarly writings and technical guidance materials were also used in the desk review. The results helped shape the structure and substance of the country surveys and fed into Parts 1 and 2 of the present draft.

**Country surveys:** Preparation of a survey instrument aimed at capturing additional and in-depth information on laws, cases and practices related to the subject of the study as well as practitioner understanding of and views on the issues raised. The survey instrument (see Annex 2) was then used to guide in-depth roundtable discussions with a total of 124 practitioners and experts from 13 States representing different regions and legal traditions (Australia, Canada, Germany, Greece, Indonesia, Italy, Malaysia, Mexico, Morocco, Sri Lanka, Tunisia, the United Kingdom and the United States of America). The States that were invited to participate in the process were identified with a view to maintaining geographical balance and including experience from civil, common and mixed law systems as well as a range of migrant smuggling experiences.

**Preparation of Survey Report and draft Issue Paper:** The results of the country surveys, together with a detailed analysis of those results, were compiled into a Survey Report that formed a major input into the draft of the Issue Paper presented to the expert group meeting detailed below.

**Expert Group Meeting:** UNODC convened an expert group meeting (EGM) in Vienna on 15-16 November 2016 with the purpose of verifying the findings of the survey and enriching the substance of the draft Issue Paper. The EGM involved expert practitioners identified during the survey process from all but two of the countries surveyed. Additional participants were from the European Commission; the European Fundamental Rights Agency; the International Centre for Criminal Law Reform and Criminal Justice Policy; and the Platform for International Cooperation on Undocumented Migrants (PICUM).

**Finalization of the Issue Paper:** The draft Issue Paper was revised in light of the findings of the EGM and other feedback received from participating experts and practitioners.

## 1.5. Structure

An **Executive Summary** sets out the major findings of the Study. The Issue Paper itself is divided into five parts with the present, initial **Part 1** setting out necessary background information.

**Part 2** provides an overview and analysis of the relevant international legal and policy framework. It commences with analysis of the drafting history of the Protocol, seeking to ascertain the intention of States with regard to the definition of migrant smuggling and, in particular, the inclusion of “financial or other material benefit”

(FoMB) in that definition. A brief survey of other sources of insight and authority is then made before drawing some initial conclusions on the applicable international legal and policy framework.

**Part 3** summarizes and analyzes the results of the survey of national law and practice as it relates to FoMB with a view to establishing the foundation for a broader consideration of issues and trends in the following part. The thirteen surveyed States are divided into two broad groups: (i) States that have included FoMB as an element of the base smuggling offences;<sup>18</sup> and (ii) States that have excluded FoMB as an element of the base smuggling offences. It is important to note that this latter group includes States that have incorporated some variation of FoMB into their legal framework outside the base offences – for example, as a factor aggravating penalties.

**Part 4** draws together a series of findings from legislation, case law and the views of practitioners relating to legislative approaches, scope of FoMB and other key issues.

**Part 5** provides some initial guidance, in the form of a set of conclusions, developed by participants in the Expert Group Meeting.

The Issue Paper includes three **annexes**. The first of these sets out a list of key questions and points of possible agreement that were used as the basis for discussions at the Expert Working Group meeting. Annex 2 contains the survey instrument that guided the country studies. Annex 3 provides a list of individuals consulted for the Issue Paper.

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<sup>18</sup> As discussed later on, for the purposes of this paper the term “base smuggling offences” or “base offences” refers to stand-alone offences related to facilitation of irregular entry (and in some cases also irregular stay). It covers offences that are different from: (i) related offences such as production or use of fraudulent documentation; and (ii) aggravated offences (whereby one or more factors such as profit or involvement of multiple migrants or risk of death or serious injury operate to increase the severity of the punishment attached to the base offence).

## PART 2. THE CONCEPT OF “FINANCIAL OR MATERIAL BENEFIT” WITHIN THE DEFINITION OF MIGRANT SMUGGLING

This Part of the Issue Paper considers the “financial or other material benefit” (FoMB) concept from the perspective of international law and policy: what does the drafting history of the Smuggling of Migrants Protocol – and most particularly of the definition of migrant smuggling – tell us about the intention of States with regard to conduct they wished to include and exclude? To what extent do materials including the *travaux préparatoires*<sup>19</sup> shed light on the scope and substantive content of the FoMB concept as it is used in the Protocol? What information on the implementation of the concept is provided by secondary sources of guidance and insights from regional law, policy and practice?

### 2.1. Drafting history of the Smuggling of Migrants Protocol and its definition

A brief overview of the evolution of the definition of migrant smuggling provides important insight into how States’ understanding of the phenomenon developed and coalesced. Much like earlier United Nations reports and resolutions, the first negotiating text submitted by Austria and Italy in early 1999 makes reference to multiple concepts, including “illegal trafficking” and “transport of migrants, especially by sea”. It includes the following definition of “illegal trafficking and smuggling of migrants”:

Any person who intentionally procures, *for his or her profit*, repeatedly and in an organized manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident commits the offence of “illegal trafficking and transport of migrants” within the meaning of this Protocol.<sup>20</sup>

Concurrent discussions by the drafting committee around the development of a protocol on trafficking in persons helped to affirm a distinction between the concepts of human trafficking and migrant smuggling.<sup>21</sup> This distinction was already reflected in the second draft of the Smuggling of Migrants Protocol, which omits any reference to “illegal trafficking” in favor of the new concept of “smuggling of migrants”. At that point it was proposed that the term be defined as: “the

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<sup>19</sup> Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto.

<sup>20</sup> “Draft elements for an international legal instrument against illegal trafficking and transport of migrants (Proposal submitted by Austria and Italy),” UN Doc. A/AC.254/4/Add.1, Dec. 15, 1998, at Art. A. Emphasis added.

<sup>21</sup> See, for example, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, “Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime,” UN Doc. A/AC.254/4/Add.1/Rev.1, May 13, 1999, at note 1 (“The term “smuggling” is used throughout the text in the light of action taken by the Commission on Crime Prevention and Criminal Justice at its eighth session regarding the draft Protocol Addressing Trafficking in Women and Children.”).

*intentional procurement for profit* of the illegal entry of a person into and/or illegal residence of a person in a State of which the person is not a national or a permanent resident”.<sup>22</sup>

The basic elements of the definition of migrant smuggling that were found in the early drafts of the Smuggling of Migrants Protocol – conduct undertaken intentionally, involving procurement for profit of another person’s illegal entry or residence, when that person is not a national of the State concerned – remained consistent from the first until the final draft. However, there are noteworthy differences to be found between the earliest draft and the final version. Most particularly, early drafts of the definition referred to “profit” as an element of the definition of migrant smuggling. This was subsequently changed to “financial or other material benefit,” reflecting the agreed language of the Organized Crime Convention.

In its final version, the Protocol defines “smuggling of migrants” as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.<sup>23</sup> The terms “procurement”<sup>24</sup> and “financial or other material benefit” are not defined. Illegal entry is defined in Article 3(b) of the Protocol to include “...crossing borders without complying with the necessary requirements for legal entry into the receiving State”.

Under this definition, migrant smuggling will occur if the offender engaged in the act (procuring illegal entry of a person who is not a national or permanent resident), and did so intentionally and for the purpose of obtaining a financial or other material benefit. Migrant smuggling is thereby a crime of specific or special intent. There is no requirement for the benefit to have occurred: the crime of migrant smuggling is made out under the Protocol once the relevant physical elements are made out along with the correspondent mental elements (being that the conduct was intentional, and done in order to obtain a benefit).

States Parties to the Protocol are required to criminalize migrant smuggling. They are also required to criminalize production and possession of fraudulent travel or identity documents, where this conduct is committed for the purpose of enabling the smuggling of migrants as defined by the Protocol. States Parties are further required to criminalize enabling illegal stay when this 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 FoMB element not just into smuggling offences but also into related document offences and facilitation of stay offences.

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<sup>22</sup> Ibid. at 4. Emphasis added

<sup>23</sup> Smuggling of Migrants Protocol, Art. 3(a).

<sup>24</sup> Note that the UNODC Model Law suggests that “procure” be construed as “to obtain something or to cause a result by effort”. UNODC, *Model Law against the Smuggling of Migrants* (2010), p.31.

These provisions should be read in light of Article of 5 the Protocol, which explicitly states that migrants who are objects of smuggling offences 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 FoMB element in the definition and criminalization provisions, which operates to shift the offending 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 migrant smuggling. This requirement provides an additional protection against prosecution of migrants who smuggle themselves.<sup>25</sup>

## 2.2. “Financial or other material benefit” in the Smuggling of Migrants Protocol

As noted above, the term “financial or other material benefit” is not defined in the Protocol. Understanding its scope and meaning therefore requires close analysis of the drafting history of the Protocol and its parent instrument, the Organized Crime Convention, along with review of additional supplementary material that may provide insight including the *Legislative Guides for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, published in 2004.

While the Protocol does not provide a definition of FoMB, 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”.<sup>26</sup>

This definition is relevant because the Protocol’s own scope of application, as set out in Article 4, encompasses smuggling offences that are transnational in nature and involve an organized criminal group. The Convention is also relevant because the drafters did consider its meaning and scope of application, appending the following Interpretative Note:

The *travaux préparatoires* should indicate that the words “in order to obtain, directly or indirectly, a financial or other material benefit” should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.<sup>27</sup>

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<sup>25</sup> Legislative Guides, p.344.

<sup>26</sup> Organized Crime Convention, art. 2 (a).

<sup>27</sup> Interpretative notes, A /55/383/Add.1, 3 November 2000, para. 3.

That a similarly broad reading should be given to the term “financial or other material benefit” as it is used in the Protocol is affirmed by an additional Interpretative Note, this one attached to the provision setting out the definition of migrant smuggling.

The *travaux préparatoires* should indicate that the reference to “a financial or other material benefit” as an element of the definition [of migrant smuggling] 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.*<sup>28</sup>

The Legislative Guide elaborates on this theme, affirming that the reference to “financial or other material benefit” was indeed intended to exclude groups with purely political or social motives.<sup>29</sup> The Legislative Guide further notes 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”.<sup>30</sup> The *UNODC Model Law against Smuggling of Migrants*, released in 2010, adds little to this, affirming FoMB as “an integral part of the definition of “smuggling of migrants”; referencing the two Interpretative Notes cited above 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”.<sup>31</sup>

A careful review of the *travaux préparatoires* provides little additional insight, beyond confirming the intention of the drafters of the Smuggling of Migrants Protocol to: (i) craft an instrument that would address organized criminal involvement in facilitation of irregular migration; (ii) ensure that application of this instrument does not extend to the actions of persons providing support to migrants – including through facilitation of unauthorized entry and unauthorized stay – on the basis of humanitarian motives or close family ties; and (iii) in accordance with Article 19(1) to preserve the applicability of existing international rules including those related to human rights and to asylum.

### 2.3. “Financial or other material benefit”: regional insights

Much of the relevant literature on “financial or other material benefit” in the context

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<sup>28</sup> Interpretative notes, A /55/383/Add.1, 3 November 2000, para. 88. Emphasis added.

<sup>29</sup> Legislative Guide, p. 13, para. 26

<sup>30</sup> Legislative Guide, p. 333, para. 19.

<sup>31</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010), p.13.

of migrant smuggling arises in the context of the European Union's response. The EU legal framework around migrant smuggling comprises two instruments: Council Directive 2002/90/EC "defining the facilitation of unauthorized entry, transit and residence" (Facilitation Directive);<sup>32</sup> and Framework Decision 2002/946/JHA "on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence" (Facilitation Decision).<sup>33</sup>

Under Article 1 of Facilitation Directive 2002/90, EU Member States are required to adopt appropriate sanctions on:

*Any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;*

*Any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.*

In short, the provision requires Member States to criminalise facilitation of unauthorised residence when conducted for financial gain. Member States can however criminalise the offence irrespective of the "financial gain" motive. Also, according to the directive, Member States 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 State discretion to *not* impose sanctions for the offence of facilitating unauthorized entry or transit in cases where "[t]he aim of the behaviour is to provide humanitarian assistance to the person concerned".

A recent survey found that in most EU Member States, the base 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 EU States, the presence of a financial or material benefit serves to aggravate the penalty imposed.<sup>34</sup> It is notable that these findings generally reflect those of the country surveys, summarized in Part 3 and analyzed in Part 4 of the present Paper. The EU approach, which allows but does not require Member States to exclude activities that aim to provide humanitarian assistance (Article 1(2)) 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

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<sup>32</sup> EU Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence OJ L238/17, 5 December 2002

<sup>33</sup> EU Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L238/1, 5 December 2002

<sup>34</sup> Working Document: National Laws Relating to Smuggling of Migrants in Council of Europe Member States, 70<sup>th</sup> Plenary Session, Strasbourg, 27 - 30 June 2016 (European Committee on Crime Problems, 2016), p.6.

distress in a way that results in their unauthorized entry into a EU Member State. The table below provides information on the situation in EU Member States as of March 2014:

	Legislation (at least partially) excludes humanitarian assistance from punishment	Legislation requires profit to punish the facilitation	Legislation does not require profit to punish the facilitation
<b>Irregular entry</b>	IE, <u>UK</u> , BE, ES, AT, <u>GR</u> , LT, FI (n=8)	IE, PT, <u>DE</u> , LU (n=4)	<u>UK</u> , ES, FR, BE, NL, <u>DE</u> , DK, SE, FI, EE, LV, LT, PL, CZ, SK, HU, SI, <u>IT</u> , HR, BG, RO, <u>GR</u> , CY (n=22)
<b>Irregular stay</b>	<u>UK</u> , FR, BE, <u>DE</u> , AT, <u>IT</u> <sup>35</sup> , FI, MT (n=8)	IE, PT, ES, LU, NL, HU, SK, CZ, PL, SE, BG, CY, DE, AT, <u>IT</u> (n=15)	<u>UK</u> , FR, BE, DK, FI, EE, LV, LT, RO, <u>GR</u> , SI, HR, FI (n=13)

Adapted from: “Criminalisation of migrants in an irregular situation and of persons engaging with them”, EU Agency for Fundamental Rights, March 2014. (Underline denotes a State surveyed for this Issue Paper).

Research conducted by the Centre for European Policy Studies (CEPS) 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 of fishing trawlers in the Mediterranean, from rescuing migrants in distress.<sup>36</sup> 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,<sup>37</sup> but not unheard of.<sup>38</sup>

At a policy level, various EU bodies have advocated against the criminalization and pursuit of those who are supporting migrants for purposes other than profit. In 2014 the Fundamental Rights Agency recommended that Member States should always

<sup>35</sup>Practitioners explained that while the relevant legislative provision exempting humanitarian assistance from punishment refers to actions “within Italy”, it has been interpreted to also apply to those who, in providing humanitarian assistance, facilitate entry into the country.

<sup>36</sup> Michael Collyer, “Cross-border cottage industries and fragmented migration” in Sergio Carrera and Elspeth Guild, *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (CEPS, 2016), pp.17-18, 45-47.

<sup>37</sup> Jennifer Allsop and Maria Giovanna Manieri, “The EU Anti-Smuggling Framework: Direct and indirect effects on the provision of humanitarian assistance to irregular migrants” in Sergio Carrera and Elspeth Guild, *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (CEPS, 2016), pp.88-89. See also *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament (January 2016).

<sup>38</sup> Gkliati, M. (2016) Proud to Aid and Abet Refugees: The Criminalization of “Flight Helpers” in Greece. Available at: <https://www.law.ox.ac.uk/research-subjectgroups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>.

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.<sup>39</sup> It further recommended that States explicitly exclude from punishment rescue at sea and assisting refugees to seek safety, as well as provision of humanitarian assistance such as food, shelter, medical care and legal advice (without profit) to migrants in irregular situations.<sup>40</sup> A recommendation for the two EU instruments to be revised to make the humanitarian exemption mandatory and to include the FoMB purpose as an element in all facilitation offences has been made by the Director-General for Internal Policies of the European Parliament.<sup>41</sup> It is notable that the EU 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, “ensur[ing] that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress”.<sup>42</sup>

#### 2.4. General conclusions on “financial and other material benefit” in international law and policy

The above analysis supports the following key conclusions with respect to “financial or other material benefit” as it is used in the Smuggling of Migrants Protocol.

***The Protocol’s focus is on the activities of organized criminal groups acting for profit:***

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 their safety and wellbeing. Organized criminality is not a specific requirement for national-level criminalization, indeed Article 34(2) of the Organized Crime Convention confirms that involvement of an organized crime group must not be required and that offences should apply equally regardless of whether such involvement can be proven or not.<sup>43</sup> However, the focus of the Smuggling of Migrants Protocol is on smuggling acts committed by organized crime; the “financial or other material benefit” element of the definition of “organized criminal group” (Article 2(a) Organized Crime Convention) is explicitly restated in the Smuggling of Migrants Protocol in both the Article 3 definition of

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<sup>39</sup> Criminalization of migrants in an irregular situation and of persons engaging with them (EU Agency for Fundamental Rights, 2014), p.16.

<sup>40</sup> *Ibid*, pp. 15-16.

<sup>41</sup> “Introduce the financial gain element to all forms of facilitation (with particular consideration given to the specific circumstances of each individual case) and include standards on aggravating circumstances in light of the UN Smuggling Protocol. In addition, the financial gain element should be qualified to encompass only “unjust enrichment” or “unjust profit”, in order to exclude bona fide shopkeepers, landlords and businesses”, Fit for purpose? *Supra* p.66. See also pp.10-11, p.23, p.62.

<sup>42</sup> EU Action Plan against migrant smuggling (2015 - 2020), Brussels, 27.5.2015 COM(2015) 285 final, p.3.

<sup>43</sup> Article 34(2) UNTOC. Also see *Legislative Guide*, p.356, and Interpretative Notes, A/55/383/Add.1, para. 59.

migrant smuggling and the Article 6 provision on criminalization. Moreover, Article 4 stipulates that the Protocol should apply to the prevention, investigation and prosecution of offences that involve an organized criminal group, thus reaffirming the focus of the Protocol on organized crime. Also, the legislative guide clarifies 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”.<sup>44</sup>

***The Protocol does not seek – and 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:***

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”. The conclusion that the Smuggling of Migrants Protocol does not seek and cannot be used as the legal basis for the prosecution of humanitarian actors (most particularly in relation to asylum seekers) is reinforced by Article 19(1) which makes clear the continuing application of international law, including international humanitarian law and international human rights law, “in particular [...] the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein”.

It is nevertheless important to acknowledge that, as the above review of one regional approach and the country surveys show, the Protocol’s approach in this regard is not universally accepted. Particularly in relation to facilitation of irregular entry, some States and regions have pursued a differentiated approach that does *not* operate to exclude from prosecution for migrant smuggling, 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.

***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 FoMB (with the additional expander “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.

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<sup>44</sup> Legislative Guide, p. 340, para. 28.

It is also important to note that *intention* to benefit, rather than actual benefit is the relevant consideration under the terms of the Protocol. As discussed later in the Paper, this focus may help reduce the evidentiary burdens currently associated with proving specific profits or payments made in relation to specific migrants.



## PART 3. NATIONAL LAW AND PRACTICE: OVERVIEW

The survey process involved a review of legislation and, to the extent that it was available, case law from 13 States as well as insights and views from practitioners/experts. Participating States were Australia, Canada, Germany, Greece, Indonesia, Italy, Malaysia, Mexico, Morocco, Sri Lanka, Tunisia, the United Kingdom and the United States of America. While this group represents different legal systems and a wide spectrum of migrant smuggling experiences, it is important to note that the survey was limited in both scope and depth. To that extent it should not be understood as reflecting general State practice around the Protocol.

In addition to establishing the relevant national legal framework, the survey sought to address key questions to practitioners including the following:

- In states where “financial or other material benefit” is included as an element of migrant smuggling offences, how is it understood and applied?
- In relation to “financial benefit”, is there a threshold for establishing the financial element? For instance, must the financial benefit amount to “profit” and if so, how much profit would be required to establish the element?
- In relation to “material benefit” does the phrasing of “other material benefit” offer insight into the understanding of what material benefit entails? For instance, would it include sexual services, criminal services (e.g. drug smuggling) or labour provided in lieu of smuggling fees?
- Where States Parties do not include the “financial or other material benefit” element in their domestic legislation, why is this the case? 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 the element in the defence of alleged migrant smugglers?
- 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?
- To what extent does the financial or material benefit element aggravate or mitigate sentences imposed on convicted smugglers? Where financial or 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?
- Does the absence of the element result in the criminalization – or potential criminalization – of persons who are acting for purely humanitarian or familial reasons?
- In light of the fact that 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?

- 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 serious organized criminals to target low-level, less organized actors?
- 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 aims to “prevent and combat the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration,”<sup>45</sup> upheld in the absence of the “financial or material benefit” element in the definition?
- The Smuggling of Migrants Protocol sets minimum standards and States are entitled to adopt stricter or more severe measures than those provided for.<sup>46</sup> 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?

### 3.1. States that explicitly include “financial or other material benefit” as an element of base smuggling offences

Only two of the 13 surveyed States, Indonesia and Mexico, have adopted a definition of smuggling of migrants in full conformity with that set out in the Protocol including through incorporation of FoMB as an element of the base offence of migrant smuggling and related offences. The term “base smuggling offences” or “base offences” refers to stand-alone offences related to facilitation of irregular entry (and in some cases also irregular stay). It is used to distinguish these offences from: (i) related offences such as production or use of fraudulent documentation; and (ii) aggravated offences (whereby one or more factors such as profit or involvement of multiple migrants or risk of death or serious injury operate to increase the severity of the punishment attached to the base offence).

#### 3.1.1. Indonesia

**Summary:** Indonesia is primarily (but not exclusively) a transit country for migrants from the Middle East who are *en route* to Australia. Migrant smuggling was not criminalized in Indonesian law until 2011. Prior to that, smuggling-related offences were prosecuted under immigration and shipping laws. The definition of migrant smuggling generally matches that of the Protocol except the “financial or other material benefit” element is replaced with “intention of making a profit, either directly or indirectly”. Indonesian courts have not considered the scope of the profit element of the offence, as this has not been an issue to date. However, practitioners

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<sup>45</sup> *Legislative Guide*, p. 349, para. 54.

<sup>46</sup> Organized Crime Convention, Article 34(3).

agreed that the Bahasa Indonesia term “keuntungan” (translated as profit but considered to be slightly wider than financial benefit), along with the reference to “direct or indirect”, would provide sufficient basis for prosecution when the benefit sought or obtained from smuggling was not strictly financial. Practitioners were unanimous in their view that the profit / benefit aspect is an essential element of the offence of smuggling in migrants. Absent such an element, cases would not be prosecuted as smuggling but would likely be dealt with as offences under immigration laws.

**Legal framework:** Prior to 2011 there was no specific law against migrant smuggling or a definition of smuggling of migrants and migrant smuggling related offences were usually prosecuted as general immigration offences or offences against shipping laws. In 2009 the Organized Crime Convention and the Smuggling of Migrants Protocol were legislatively incorporated into national law.<sup>47</sup> In 2011, Indonesia passed Law 6/2011 on Migration, partly to give effect to its obligations under the Organized Crime Convention and the Smuggling of Migrants Protocol. The new law introduced the criminal offences of people smuggling (Article 120). It also established an offence of assisting irregular migrants (Article 124). This provision is the same as Article 54 of the old Law 9/1992, although the penalties have significantly increased.

**Definition of migrant smuggling:** “People smuggling” is effectively defined in Article 120 of Law 6/2011 on Migration, which specifies that a person is liable for people smuggling if that person:

*“...acts with the intention of making a profit, either directly or indirectly, for themselves or for others, by taking a person or group of people, either organized or unorganized, or instructs others to take a person or group of people, either organized or unorganized, who have no legal right to enter or exit Indonesian territory, or outside Indonesian territory and/or into another country, and the person mentioned does not have a right to enter the territory legally, either by using legal documents and false documents, or without a Travel Document, either through immigration or not”.*

The elements of the offence (as set out in the above definition with annotations gleaned from judicial decisions) are: (i) a person; (ii) who does an act that aims to make a profit, either directly or indirectly, for themselves or for others (courts have emphasized that this element includes cases where the benefit is either for the accused or for someone else, although in most cases the accused directly received financial payment for their actions); (iii) who takes a person or group of people, whether organized or unorganized, or instructs others to take a person or group of people, either organized or unorganized (*Courts have confirmed that this element requires that the accused knows that the person or persons they assist is foreign and*

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<sup>47</sup> Law 5/2009 on the ratification of the United Nations Convention Against Transnational Organized Crime and Law 15/2009 on the ratification of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UNCATOC Protocol.

that the accused plays a role in helping the person or persons move around); and (iv) who has or have no legal right to enter or exit Indonesian territory or outside Indonesian territory and/or into another country, and the person or persons mentioned do not have a right to enter the territory legally, either by using legal documents and false documents, or without a travel document, either through immigration or not (whether the person or persons have entered or exited through the official channels, and have correct documentation).<sup>48</sup>

Practitioners were unable to shed light on the reasons behind Indonesia adopting a definition of migrant smuggling that is different to that set out in the Protocol. It was noted however, that differences between the two definitions could be at least partly explained by the attempt, by Indonesia, to incorporate key criminalization obligations (specifically, Articles 6(1) and 6(2)) into the definition. It was generally felt that there had been no deliberate attempt to narrow this element of the offence in any way.

**Meaning of the element: “intention to make a profit either directly or indirectly”:**

Practitioners were unanimous in their view that the profit / material benefit element of the definition of migrant smuggling is critical to how the crime is understood and responded to in Indonesia – that it goes to the heart of what the crime actually is. In relation to certain offered scenarios, they responded as follows:

- In situations where there is no apparent profit / benefit and no intention of securing a profit or benefit (e.g. **family reunification purposes, purely humanitarian** facilitation of illegal entry), then the case would not be prosecuted as smuggling but rather under general immigration offences;
- In situations where there is no financial profit or intention to secure financial profit but there is evidence of **another kind of substantial benefit** (e.g. the services of a smuggled migrant in exchange for free passage) then it can be expected that the element of the offence “Intention of making a profit, either directly or indirectly” would be argued and could be established.

**Practitioner insight into meaning / application of the definition:** In practice, practitioners experience very little difficulty in establishing the profit element of the offence: statements of witnesses and suspects as well as paper records are used to that end.

**Key issue for practitioners – level of profit and other factors affecting sentencing:**

Practitioners noted that that level of profit intended or secured is *not* relevant to decisions about whether or not to prosecute a case as migrant smuggling. They pointed to multiple prosecutions, generally involving transporters and other minor players, where the amount received and / or promised was very small. It was agreed however, that the level of profit (along with other factors such as causing death or

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<sup>48</sup> The definition of smuggling of migrants in Indonesian law leaves room for an offence of smuggling to be made out when the subject of the smuggling is a national of Indonesia and / or has right of residence in Indonesia. The law has, in fact, been used to prosecute persons involved in returning Indonesian workers abroad through irregular channels for profit.

great harm, being involved in an organized criminal group, etc.) may impact sentencing. Courts have even gone below the mandated minimum sentence (of five years) in cases where the offender was poor and had not benefited substantially (or not expected to reap substantial benefit) from his engagement in the smuggling operation. Equally, where large profits are in play, it is likely that the offender is a higher-level player and, for that reason, the conduct can be expected to attract a harsher penalty.

**Practitioner insights into international legal cooperation:** Practitioners were asked whether differences in another country’s definition of migrant smuggling (specifically, Australia’s definition that omits the “financial or other material benefit element” entirely) impacted requests for mutual legal assistance and extradition. It was generally agreed among the group that these differences had not, thus far, been an obstacle to the considerable international legal cooperation with Australia on this issue. It was noted that most requests typically relate to high-level organizers and therefore the profit element is generally not at issue. In addition, at least in relation to extradition, Indonesia and Thailand operate within a comprehensive bilateral agreement that specifically includes “people smuggling” within the list of included offences. This seems to preclude detailed examination of the elements of the offence.

**Practitioner views on potential guidance to States Parties:** Practitioners noted that their law and the way in which it is understood and applied is very much a product of history and context – including Indonesia’s place as principally a country of transit and its leading role in the region in relation to the crime of migrant smuggling through its co-chairing of the Bali Process on People Smuggling and Trafficking. In terms of potential guidance to other States, practitioners pointed to their incorporation of the understanding / definition of migrant smuggling into the main criminalization provision – this was seen as a potentially useful model. It was also noted that some kind of definition or elucidation of “profit” (and “benefit”) would be useful to those charged with interpreting and applying the law – and that the Protocol itself should provide useful guidance in this regard. Practitioners were unanimous in their view that the profit element should be central to how migrant smuggling is understood. They noted that Indonesian law is sufficiently comprehensive to ensure that conduct falling outside the definition (e.g. because the profit element cannot be established) can nevertheless be captured under other criminal and administrative provisions.

### 3.1.2. Mexico

**Summary:** Mexico is a country of origin and transit, overwhelmingly for individuals being smuggled into the United States. Smuggled migrants are sometimes severely exploited, including through extortion, and smuggling often takes place under circumstances posing risk of death or serious injury. The national legal framework criminalizes migrant smuggling, requiring the establishment of an intention to directly or indirectly derive an economic benefit in cash or in kind. Practitioners reported that a loophole in the law preventing the provisional detention of persons

suspected of having committed serious migrant smuggling offences is compromising effective implementation of the law. Practitioners noted that smuggling offences are generally onerous to investigate and prosecute. They reported difficulties in establishing the profit element of the offence, particularly within the strict time frame required to establish the elements of the offence for the purpose of detaining the suspected migrant smuggler. It is unclear whether differences between how Mexico and other States understand the migrant smuggling offence would obstruct international legal cooperation between them.

**Legal framework / elements of smuggling offences:** Prior to 2013 migrant smuggling was criminalized in federal law as a form of organized crime. The relevant law did not explicitly include the FoMB element. However, in its application Courts appeared to accept that the profit element was an essential aspect of the relevant offence. Interpretative guidance confirms that the federal law provision was intended to exclude humanitarian acts of individuals or groups whose aim was to assist undocumented foreigners without obtaining any profit themselves, rather being the basis of prosecution and punishment of those who engaged in illicit activities with the aim of obtaining a current or imminent lucrative profit. In 2013 this provision was replaced by Article 159 of the federal *Ley de Migracion*, which criminalizes a range of migrant smuggling “acts” (facilitating the movement of one or more persons out of or into Mexico without proper documentation, providing transportation or accommodation services aimed at evading review of a migrant’s legal status), such acts undertaken “in order to directly or indirectly obtain a profit”. This element of the offence is made explicit in Article 159, which directs that:

*For purposes of updating the offense under this article, you must be satisfied as the intent of the perpetrator to obtain an economic benefit in cash or in kind, true, current or imminent. No penalty will be imposed on persons of recognized moral solvency, that for strictly humanitarian reasons and without any benefit, assist the person who has been admitted to the country illegally, even when they receive donations or resources for the continuation of their humanitarian work.*

Article 160 establishes, as aggravated offences, situations where children are involved, where life or safety are endangered or where public officials are perpetrators.

**Practitioner insight into the profit element:** Practitioners noted that the concept of benefit “in kind” is included only in the guidance clause at the end of the provision, and that the three paragraphs detailing the offence refer only to “economic benefit”. In practice, all cases involve economic benefit, which means that Courts have not considered this aspect of the element. Practitioners posited that other benefits – such as sexual services or situations in which migrants are used as drug mules – would likely fall within the provision should they arise. In considering whether labour in lieu of payment could be captured in this understanding, practitioners were less certain and tended to classify such situations as trafficking in persons, or more specifically as smuggling resulting in trafficking. The term “true, current or

imminent” was considered by practitioners to capture situations where a payment had been promised and not yet made, but where it is clear that the smuggler will be receiving a profit. “Imminent” was explained as being an anticipated payment on the basis of, for instance, a migrant’s delivery to a destination. When asked about whether there was any implied threshold to the profit element of the offence, practitioners agreed that mere payment for petrol would not be considered to constitute an economic benefit and would likely not be prosecuted as a crime of migrant smuggling. However, such claims are in fact commonly made by smugglers but dismissed where it is shown that they are acting for significant profit.

**Practitioner insight into humanitarian exemptions:** As noted above, Article 159 makes clear that the offence is not made out in the absence of an intent to obtain a financial or in-kind benefit; that the establishment of a humanitarian motive should result in no penalty being imposed; and that establishing such a motive should be possible even when the individual involved was in receipt of funds relating to that humanitarian work. Practitioners explained that the humanitarian provision is essentially a “penalty condition” that operates to ensure that a person is not sanctioned even though they have carried out the offence. In other words, while the offence is considered to have taken place, no penalty will be imposed if it was perpetrated for non-profit, humanitarian reasons. Unfortunately, no specific examples of cases were raised to illustrate how this provision plays out in practice.

**Issue for practitioner: establishing the profit motive:** The subjective element of the offence, intent to obtain “economic benefit in cash or in kind, true, actual, or imminent” can, in theory at least, be inferred from the circumstances of the case including the conduct of the accused. For example, where a suspected smuggler is providing food and accommodation to persons in close geographic proximity to a border and there is no indication of a humanitarian motivation, then a profit motive can be inferred. Similarly, the intention of providing care, or paying transportation and accommodation, can be inferred as a prior investment with the purpose of obtaining something in return, namely a financial benefit or in kind payment, where the criminal enterprise ends with the transfer of a migrant to another country. Practitioners confirm that legislation does not require that a *specific amount* of profit be proven, merely that the intention to obtain benefit is established. In practice however, courts have been reluctant to infer intent, rather requiring evidence of actual profit being made. This increases the evidentiary burden on investigators and prosecutors.

**Issue for practitioners: proving “direct or indirect” benefit prior to payment:** The broadening of the element through reference to direct or indirect benefit was considered by practitioners as a way of ensuring the inclusion of situations in which smugglers do not collect money as soon as the crime is committed (e.g. at the point that an illegal border crossing is facilitated), but sometime after the fact (e.g. after the migrant has reached his or her destination). However, practitioners noted difficulties in proving the benefit element prior to payment being made. This situation is complicated by changes in the relevant criminal procedure law, which now grants prosecutors only 48 hours to establish their case in order to secure

provisional detention of the alleged perpetrator; a time period that is often insufficient to gain the necessary evidence from financial institutions or other third parties.

A further complication relates to the evidentiary difficulties associated with attributing profit to the migrant smuggling act. Practitioners noted that organized criminals in Mexico commonly operate multiple and simultaneous criminal enterprises: often engaging in smuggling while also trafficking drugs, persons and weapons. In addition, migrant smuggling itself commonly also includes other crimes such as abduction, extortion and murder. This poly-criminality creates significant problems for criminal justice agencies seeking to establish the financial or material benefit element in a case where profits from smuggling must be untangled from profits derived from other criminal enterprises. One practitioner expressed the view that this element of the offence creates an unacceptable burden that only benefits criminals. Another agreed that the need to prove – or “accredit” the profit – is an onerous task and that the focus should instead be on *how* the profit is sought (e.g. through transport, harboring etc.) so that a specific amount of money would not need to be accredited.

**Practitioner insights into international legal cooperation:** Practitioners were asked whether differences in another country’s approach to migrant smuggling (e.g. the United States) impacts on requests for mutual legal assistance and extradition. This was not considered to be problematic although the nature and level of international legal cooperation between Mexico and other countries was not made clear. Practitioners did note that bilateral agreements on extradition and mutual legal assistance were usually very generic and sufficiently flexible to accommodate such differences.

**Practitioner views on potential guidance to States Parties:** Practitioners agreed that guidance on the crime of migrant smuggling, including the profit element of the offence would be extremely useful. They noted the need to emphasize links between migrant smuggling and organized criminal groups – who, in Mexico, exercise a strong monopoly over all migrant smuggling operations. High-level smugglers are rarely apprehended and the financial aspects of the crime (including money laundering from organized migrant smuggling operations) do not receive adequate attention. Practitioners noted that where the relevant offence requires the establishment of a profit motive, legislation should make clear exactly what is captured within this element so that the substantive meaning is not left to judicial interpretation.

### **3.2. States that do not explicitly include “financial or other material benefit” as an element of base smuggling offences**

Eleven of the 13 surveyed countries (Australia, Canada, Germany, Greece, Italy, Malaysia, Morocco, Tunisia, Sri Lanka, the United Kingdom and the United States) have omitted the FoMB element from their base offences.

### 3.2.1. Australia

**Summary:** Smuggling of migrants is criminalized in the Criminal Code, and the Migration Act. The definition of “people smuggling” has been aligned in both laws. It does not include “financial or other material element”. The Australian Government can prosecute (and has prosecuted) individuals for people smuggling absent evidence of financial or other material benefit being pursued or secured by that person. The typical example will relate to a family member facilitating the irregular entry of groups of smuggled migrants who include other family members. Practitioners noted the considerable additional evidentiary burdens that would be imposed should they be required to establish such an element and are of the view that there are sufficient safeguards in place to ensure that the key focus of the law remains on persons who are engaged in smuggling for profit. Considerations of financial gain do however appear to be in issue at various points in the investigation and prosecution phases. Most clearly, financial motivation has repeatedly been shown to be relevant to sentencing decisions.

**Legal framework elements of smuggling offences:** Smuggling of migrants is criminalized in two pieces of legislation: the Criminal Code, and the Migration Act 1958. The latter is, almost without exception, used as the basis of prosecution for migrant smuggling offences. “People smuggling” is defined in s.233A of the Migration Act. There are effectively five elements of the offence: (i) the accused facilitated a person’s entry into Australia; (ii) the accused intended to facilitate that person’s entry into Australia; (iii) the person was a non-citizen; (iv) the person had no lawful right to come into Australia; and (v) the accused was reckless about the person’s lack of a lawful right to come into Australia. The Act, at s.233B also establishes an aggravated offence of people smuggling involving danger of death or serious harm and, at s.233C, when the underlying offence involves smuggling of a group of at least five persons. The Act, at s.233D, further establishes a separate offence of “providing material support or resources” which aids the receiver or another “to engage in conduct constituting the offence of people smuggling” (“even if the offence of people smuggling is not committed”).<sup>49</sup>

**Insights into policy considerations and benefits related to omitting the FoMB element:** Australian Government policy is clear on the point that all facilitated irregular movement into Australia should be prosecuted as people smuggling, including cases where it is argued the smuggling was motivated purely by humanitarian / altruistic concerns. This policy seeks to encourage all persons to use established migration pathways (including those that facilitate family reunification)

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<sup>49</sup> According to the Explanatory Memorandum, this provision is intended to capture the conduct of persons who are relatively removed from the smuggling operation (e.g. those who, from within Australia, support the facilitated irregular entry of other persons including family members). The provision does not apply when the conduct constituting people smuggling relates to the person providing the material support or resources or to a group that includes this person. The effect of this provision is to protect smuggled migrants from being criminalized for supporting their own smuggling or that of the persons within their same venture.

and to deter conduct that endangers life. Practitioners appeared to be unanimous in their view that inclusion of such an element into the national legal definition of “people smuggling” would make it extremely difficult to investigate and prosecute the crime as it manifests in Australia. In that regard it was emphasized that, even absent this additional element, these cases are challenging to prosecute successfully. It was noted that financial gain is typically part of the narrative / circumstances of most offending.

**Practitioner insights into a “spectrum” of motivations for migrant smuggling:** In explaining the Australian approach, practitioners referred to a “spectrum” of seriousness and complicity: at one end are the purely humanitarian / family-based smuggling operations where profit or other material gain is completely absent. At the other end are the ruthless profiteers: organizers and facilitators who set out to maximize profits at the expense of human safety. Australian policy is directed towards criminalizing all forms of smuggling. In practice however, the vast majority of prosecutions have occurred well away from the altruistic end of the spectrum and involved some financial or other material element. The “spectrum” approach also helps to capture the reality that many cases of people smuggling into Australia indicate a range of motivations: altruism and profit.

**Practitioner insights into whether presence or absence of FoMB is ever relevant:** Practitioners reaffirmed their understanding of government policy: all facilitated irregular movement into Australia should be prosecuted as people smuggling – including situations where it is evident / argued the smuggling was motivated purely by humanitarian / altruistic concerns. Multiple cases confirm that smuggling at the altruistic end of the spectrum will indeed be prosecuted. Practitioners noted that the profit element is useful in helping to build a stronger case. But the absence of such an element (or proof of such an element) will not mean there is *no* case. It was mentioned that investigatory and prosecutorial focus is increasingly on investigating and prosecuting organizers, facilitators and others up the chain – whose motivation is very clearly financial. However, it is unclear whether considerations of the profit element figure at all in investigation decisions and priorities. Representatives of the Commonwealth Director of Public Prosecutions (CDPP) confirmed that, in practice, referred cases almost invariably contain a profit element. However, such considerations would play no role in its own decision-making except insofar as prosecutorial policy may direct that a particular case not proceed for reasons of public interest. Duress and / or “sudden or extraordinary emergency” are defenses against a charge of people smuggling. Australian courts have highlighted evidence of material gain when rejecting such defenses.

**Practitioner insights into evidentiary aspects of FoMB:** In expressing their support for the current approach, practitioners were of the view that the evidentiary burdens associated with proving such an element through direct evidence would be considerable. The financial aspects of smuggling operations are located almost exclusively in a hidden economy for which there are never any official records. Corroborative evidence is difficult – and sometimes impossible – to secure, with few countries of origin or transit being in a position to cooperate in evidence collection.

Absent direct evidence, prosecutors would be required to “get into the mind” of accused persons, always a difficult task. According to practitioners, smuggled migrants themselves are often highly compromised as evidentiary sources. They rarely provide a full, verifiable and consistent account of the arrangements that led to their smuggling, and their credibility is anyway subject to attack. Further, migrants are often grateful to their smuggler and may not be as frank in their cooperation with national authorities if they understood that information about financial arrangements could be used against their “saviour”. Finally, practitioners expressed the view that there are sufficient safeguards in the legislation to protect against unfair, unjust or inappropriate prosecutions. These include the protection against first-person prosecution and the defense of “sudden or extraordinary emergency”. When certain hypotheticals were presented to practitioners, they affirmed, for example, that the captain of a vessel rescuing smuggled migrants at sea would not be subject to prosecution for bringing rescued migrants to safety in Australia.

**Relevance of absence / presence of FoMB to sentencing:** A case review indicated that *motivation* for migrant smuggling 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. Smuggling that, in the language of practitioners, occurs at the altruistic end of the “spectrum” has been viewed by the courts as being of relatively lower gravity and is unlikely to be subject to the heaviest penalties – or indeed to be subject to an aggravated smuggling charge. In the same way, an assessment that “financial gain” or “financial reward” was the primary motivation of the offending (and indeed that the operation itself was highly profitable) is regularly noted in the sentencing remarks as justifying heavier penalties. It is relevant to highlight that an unambiguous / primary profit motive will often be associated with a relatively higher role in the hierarchy of the operation and conduct that endangers life and / or evidences a disregard for the safety of smuggled migrants. These factors, taken together, may contribute to harsher sentencing.

**Practitioner insights into international legal cooperation:** Practitioners were asked whether differences in Australia’s definition of people smuggling (specifically, its omission of the “financial or other material benefit element”) impacted on requests for mutual legal assistance and extradition. It was generally agreed among the group that these differences had not, thus far, been an obstacle to international legal cooperation. However, in relation to extradition, requests have sometimes been delayed or refused due to other differences in the legal framework / elements of the offence with the requested country.<sup>50</sup> Thus far, however, this has not related to the element of financial or other material benefit, likely because the subjects of all requests made by Australia for extradition were high-level organizers, in relation to whom the financial motivation of their crime was not in doubt. It was noted that any

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<sup>50</sup> Extradition requests have been (initially) refused on the grounds that the relevant law did not cover offences related to smuggling of migrants and the elements of the offence in the requested country were different to those of Australia / had not been made out.

requests for evidence from Australia to another country invariably relate to financial aspects of the crime (such as requests for bank records).

**Practitioner views on potential guidance to States Parties:** Practitioners noted that the crime of migrant smuggling will naturally be understood and responded to in very different ways depending on the nature of the problem as experienced by individual countries. As a country of destination, Australia has a political imperative to prosecute a range of conduct. The robust legal framework developed in Australia responds to that imperative. For countries of origin and transit, considerations may be very different. For example, it would be difficult, if not impossible, to completely isolate profit from altruism in relation to smuggling out of countries experiencing serious conflict. In such cases, authorities may understandably focus their legislation and its application on organizers and facilitators who are at the extreme end of the spectrum.

### 3.2.2. Canada

**Summary:** Canada is a country of destination for smuggled migrants, many of them being asylum seekers originating at present from Africa, the Middle East and South Asia. Smuggling of migrants is criminalized in the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c.27). The relevant provision does not explicitly require FoMB as an element of the offence and, accordingly, prosecutions can proceed without evidence of FoMB. In practice however, “profit” or “benefit” is an important consideration at both the investigation and prosecution stage. Also, Canadian courts are required, on indictment, to impose a mandatory minimum penalty of imprisonment where the offence was committed for profit or for the benefit of a criminal organization (or terrorist group), which can be viewed as an aggravation of the sentence. In addition, despite the lack of any humanitarian exemption in the legislation, the Supreme Court of Canada has also held that, to ensure compliance with Canada’s Charter of Rights and Freedoms, the offence does not apply to those who provide humanitarian aid to asylum seekers or who provide each other mutual aid (including aid to family members) and that the intention of the law is to target organized criminal involvement in facilitated movement.

**Legal framework / elements of smuggling offences:** As a common law system, both statutes and judicial decisions are important to understanding the law pertaining to migrant smuggling in Canada. The *Immigration and Refugee Protection Act*, S.C. 2007 (IRPA), section 117, sets out the criminal offence which is used to target migrant smuggling. Smuggling of migrants is not defined in the Act. However, the relevant criminal offence in section 117 is established when: (i) a person; (ii) organizes, induces, aids or abets the coming into Canada of one or more persons; (iii) knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of the Act. Canadian courts are required to impose a mandatory minimum penalty of imprisonment where the offence was committed for profit or for the benefit of a criminal organization (or terrorist group), which can be viewed as a way to aggravate the sentence. The Supreme Court of Canada has further noted that this offence does not apply to “persons providing humanitarian aid to asylum

seekers or to asylum-seekers who provide each other mutual aid (including aid to family members”.

**No financial or other material benefit and prosecutorial discretion:** Canada’s legal system allows the prosecutor to not proceed with a particular case where there is no reasonable prospect of conviction or the prosecution itself is considered to not be in the public interest. Canada’s legislation further makes clear that before a prosecution under section 117 can be initiated, the consent of the Attorney General is required. Practitioners noted that this discretion has been exercised in several cases where there was no apparent financial motive to the facilitation of movement into Canada. It is unclear however, whether the absence of a financial motive was the reason behind these decisions. The decision on whether to prosecute a case under section 117 was explained as being made on a case-by-case basis, having regard to all relevant facts. Lack of financial motive is not sufficient to automatically or routinely trigger this discretion in favour of not proceeding with a prosecution, though practitioners emphasized that lack of financial motive will be a factor taken into consideration in making such determinations.

**Case law on whether legislation captures humanitarian and other facilitated movement not motivated by profit:** No specific humanitarian exemptions are provided for in the migrant smuggling offence contained in the *Immigration and Refugee Protection Act*. Instead of legislatively exempting such categories of people from potential criminal liability, the Act seeks to screen them out at the prosecution stage by requiring the Attorney General to consent to prosecute, essentially conferring discretion under section 117 as a safeguard to protect humanitarian actors and family members from prosecution. But the Supreme Court has found that this discretion is insufficient to negate the fact that section 117 “criminalizes conduct beyond Parliament’s object and that people whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment” (*R v Appulonappa*). In this decision, the Court “read in” an exemption meaning that humanitarians, those who assist close family members and migrants providing assistance to one another are not targeted by the offence.<sup>51</sup> The Court held:

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<sup>51</sup> In the related case, *BO10 v Canada*, the Supreme Court of Canada was asked to interpret para. 37(1)(b) of Canada’s *Immigration and Refugee Protection Act*, a provision that makes someone inadmissible to Canada on the ground of “organized criminality” for “engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.” The Court concluded that a person will only be inadmissible to Canada under this ground if they “further the illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime.” This conclusion was based upon rules of statutory interpretation applied in Canada. The Court held, for example, that “organized criminality” relates to crimes committed for profit or some other material benefit and that such an interpretation accords with Canada’s definition of criminal organization. The Court further held that this conclusion was supported by the fact that the Act was enacted shortly after the adoption of the Smuggling of Migrants Protocol and given that the Protocol’s definition of migrant smuggling includes a benefit element, Canada’s domestic laws should be interpreted in a way that is consistent with the Protocol.

The *Smuggling Protocol* includes as a minimum definition for this offence, procuring illegal entry of a person into a state of which the person is not a national or a permanent resident, “in order to obtain, directly or indirectly, a financial or other material benefit”: art. 3(a). As I explain in *B010*, the *Smuggling Protocol* was not directed at family members or humanitarians: paras. 60 and 68. Furthermore, while the *Smuggling Protocol* permits subscribing states to enact national laws criminalizing migration-related offences, it includes a “saving clause” that provides that nothing in the *Smuggling 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”: art. 19(1). It would depart from the balance struck in the *Smuggling Protocol* to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid. This suggests that the Crown’s broad interpretation of s. 117’s purpose is inconsistent with the *Smuggling Protocol*’s object of protecting the rights of smuggled migrants.<sup>52</sup>

Practitioners noted that given that the decision of the Court is relatively new, its practical implications are still being determined. For example: How will the presence or absence of a financial or other benefit motive factor into prosecutions? How should mixed motivations (e.g. smuggling with clear humanitarian objectives that also brings financial reward or smuggling of family members for profit) be dealt with? If financial or other material benefit is a factor, will a particular level of benefit need to be established? How will the concepts articulated in the common law exemption be interpreted in future cases?

**The meaning of material benefit:** The notion of material benefit is not explicitly included in Canada’s offence, nor defined in Canadian criminal statutes. Practitioners noted that there may be some uncertainty as to how material benefit will be interpreted in a criminal law context. They pointed to case law involving Canada’s organized crime provisions that states that the notion of “material benefit” is to be given a broad interpretation in Canadian criminal law. In one case, in particular, it has been noted:

Whether something will be found to constitute a material benefit will depend on the facts of a particular case. This is the kind of interpretive exercise that appropriately falls to the judiciary (*R v Lindsay*).<sup>53</sup>

Practitioners pointed out that in the context of admissibility provisions under the *Immigration and Refugee Protection Act*, there are some decisions examining what constitutes a “benefit”. In one case, the Court found that a reduced fare for the smuggling journey in exchange for working as a crew member constitutes a

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<sup>52</sup> *R v Appulonappa (et al)* 2015 SCC 59, [2015] 3. SCR. 754, p.775, [44].

<sup>53</sup> *R. v. Lindsay*, [2004] OJ No 845 (ON.S.C.J.).

benefit.<sup>54</sup> It remains unclear whether this type of reasoning would also apply in a criminal context given that FoMB is not an element of Canada's base smuggling offence.

**Relevance of absence / presence of FoMB to sentencing:** According to practitioners, the two cases reviewed above have affirmed the existence of FoMB as an aggravating factor that is relevant at sentencing. Here, of relevance is that there are reasonable grounds to believe that FoMB was intended; the benefit need not actually be achieved. No other insights were offered on this aspect.

**Practitioner insights into FoMB:** Notwithstanding the fact that FoMB is not an element of the offence, practitioners consider it to be relevant to understanding what has taken place. They noted that prosecutors want to prove FoMB as important evidence for painting an overall picture, and that expert witnesses are used to explain how financial control works in a smuggling operation. Practitioners further noted that FoMB plays a role in setting criminal justice priorities; cases involving the generation of considerable profits will be prioritized given their relatively higher capacity for harm – both to the community and to the migrants involved. Notwithstanding that evidence is brought of FoMB, practitioners also considered it helpful to not have to prove benefit. Proving such an element may be very difficult. Migrants are generally complicit with smugglers and do not wish to divulge their dealings with them, including the fact and amount of payment. Typically, there is no hard record of financial transactions.

**Practitioner insights into international legal cooperation:** Practitioners were asked whether differences in Canada's definition of smuggling (specifically, its omission of the "financial or other material element") impacted requests for mutual legal assistance and extradition. Practitioners asserted that nothing in the Canadian approach – including the difference between its definition of smuggling and that set out in the Protocol – would prevent international cooperation in smuggling cases.

**Practitioner views on potential guidance to States Parties:** Practitioners supported the development of international guidance that could help States navigate this aspect of the crime of migrant smuggling. In that regard they expressed the view that while FoMB need not be a specific element of the offence, it is key to understanding smuggling. The need to secure greater clarity on the relevance of FoMB in different contexts was also noted.

### 3.2.3. Germany

**Summary:** Germany is a major destination country for smuggled migrants including asylum seekers from many parts of the world, primarily, at present, from Africa and the Middle East. Germany's large recent migrant population makes it a particular target for smuggling aimed at family reunification. Migrant smuggling in Germany is

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<sup>54</sup> *Francis Manoharan Anthonimutho Appulonappar v Minister of Citizenship and Immigration* 2016 FC 914, para. 34.

criminalized under the *Residence Act*. Under the relevant provision, FoMB element is an alternative component to the offence of facilitating movement of a person into Germany. If advantage or benefit (broadly construed) cannot be proven, the fact that the offence is repeated or involves several migrants can be used as an alternative element. Financial benefit is an essential element of crimes related to facilitating the unlawful stay of a migrant who is unlawfully within Germany. There is no clear humanitarian / family reunification exemption in the law although the inclusion of the profit element protects persons from prosecution in cases relating to facilitated stay. Facilitated movement can and (sometimes) will still be prosecuted in the absence of any evidence of benefit, but the motivation may be taken into consideration at the sentencing stage. The flexibility in the legislative approach means that the elements of the offence of migrant smuggling are generally not difficult to establish, although other obstacles including difficulties in securing international legal cooperation can obstruct an effective criminal justice response.

**Legal framework / elements of smuggling offences:** The relevant legal framework is established through Sections 95-97 of the *Federal Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act)*. Section 95 concerns the actions of the migrant, imposing punishments of up to one year imprisonment or fine, on anyone who enters, remains or does not leave when a deportation order is issued. The section also sets out document and misrepresentation offences. Section 95 offences concerning the actions of the migrant are predicate offences to Section 96 involving the actions of the smuggler. Section 96, in essence, sets out the elements of the offence of “smuggling of foreigners” into Germany as: (i) a person; (ii) inciting another person to commit any relevant section 95 offence; (iii) where the first person receives an advantage / benefit or promise of advantage / benefit in return or (iii) acts in a such a manner repeatedly or for the benefit of several foreigners. The section further establishes, as an offence: (i) a person; (iii) inciting another person to commit any relevant Section 95 offence relating to unlawful stay; and (iii) receiving a pecuniary advantage or the promise of a pecuniary advantage in return. In relation to the first offence, the FoMB element (or “advantage”) is an alternative component to the smuggling offence; if “advantage” cannot be proven, the fact that the offence is repeated or involves several migrants can be used as an alternative. In essence, this means that persons facilitating irregular entry without receiving any “advantage” can indeed be prosecuted if they engage in this conduct repeatedly – or if they meet the very low bar of facilitating the irregular entry of more than one migrant. In relation to the second offence, which concerns inciting a migrant to stay in Germany, the receiving or the promise of a “pecuniary advantage” is an essential element of the offence. Practitioners noted that the relevant migrant must first be prosecuted in order to charge the smuggler, though need not be punished. Where the migrant is an asylum seeker and is accordingly not punished under Article 95, the smuggler can still be prosecuted under Article 96.

**Humanitarian incitement not motivated by profit:** The legal framework contains no exemption for incitement to entry offences motivated purely by humanitarian considerations. However, according to a 2009 administrative provision, persons who

act contrary to Section 96 of the Residence Act within the scope of their “specific professional and honorary duties” will not be punished. It was explained that the effect of this provision would not extend to protecting a private individual from non-profit smuggling. The distinction in the law between facilitation of entry and facilitation of stay was seen by practitioners to offer an additional protection for those who are motivated by humanitarian concerns, at least in relation to supporting irregular migrants who are already in Germany. In that regard it was noted that the intention behind this distinction was to remove the possibility of churches and humanitarian organizations involved in providing assistance to migrants from being liable to prosecution. Practitioners supported this differentiated approach, on the basis that people in the country should be assisted, but that it would not be useful to create a situation in which organizations could operate to bring people into Germany without consequence.

**Smuggling for family reunification:** The smuggling of family members, even without any advantage, would be captured under Section 96 where the situation involves more than one person, even if these are members of the same family. Practitioners noted that prosecutors are required to prosecute such cases, even if they have no interest in doing so (for instance, in the case of a person who smuggles his two children). Proceedings can be closed or sentences reduced to a fine rather than imprisonment. It was also explained that non-commercial smuggling does not necessarily only involve family members but can also involve groups of friends / acquaintances.

**Relevance of the smuggled person being an asylum seeker:** As noted above, Section 95 offences committed by the smuggled migrant are predicate offences for Section 96 smuggling offences. In the case of smuggled asylum seekers, the asylum seekers are often not charged. However, a smuggler can still be charged with smuggling an asylum seeker. In other words, while asylum seekers in Germany are not charged in relation to their irregular entry or stay and are generally not punished for other related offences (such as document fraud), those who assist them may be criminally liable. There is some jurisprudence to the effect that barriers to prosecution of persons smuggling asylum seekers may exist in relation to asylum seekers who arrive in Germany directly from the country of persecution, though in practice such persons almost invariably travel via other countries, sometimes only claiming asylum months after arriving in Germany.

**The meaning of advantage / benefit and pecuniary advantage / benefit:** It was explained that the concept of advantage / benefit (*vorteil*) is a broad one that can capture financial, material or non-material benefit. General guidance on the concept confirms that it would extend to include non-commercial sexual services and non-commercial labour. Benefit can be illegal or legal, and can be direct or indirect; it does not have to come from the migrant directly but can be conveyed or promised by a third party. Use of a migrant’s labour to repay smuggling debts is also considered to be a benefit accrued to the smuggler. In relation to pecuniary benefit (*vermoegensvorteil*) this concept is understood as essentially pertaining to financial profit, regardless of how much profit is made (even a small amount of profit will not

be a barrier to prosecution), and whether it is derived directly or indirectly. The benefit must amount to profit – it cannot be satisfied by a mere transaction such as payments to cover costs of organizing papers and transportation. In one judgment it was explained that a pecuniary benefit is every kind of positive development of the suspect’s property. The benefit does not have to be illegal, but has to be linked to encouraging the Article 95 act of the migrant. The smuggling of migrants itself must therefore be the reason for the pecuniary benefit.

**Sentencing: The role of FoMB in aggravation and mitigation:** Practitioners noted that judicial discretion with respect to sentencing is broad and there is some inconsistency in approaches that tend towards leniency. Nevertheless, there are indications that while low-profit smuggling will be prosecuted, sentencing will be mitigated where smuggling involves relatively low financial returns. Often, humanitarian and financial motives may be present. In at least one case, the Federal Court has ruled that financial and humanitarian motives should be reflected in sentencing.<sup>55</sup>

**Practitioner insights into establishing the benefit or profit element:** Practitioners were of the view that where it is an element of the offence required or relied upon, the “benefit” element of the crime of migrant smuggling is framed in sufficiently broad terms as to be relatively easy to establish. For example, if there is no connection between the migrant and the smuggler (for instance, they are not related) then the Judge will usually take for granted that the smuggler is acting for payment. Practitioners noted that the situation would be very different if prosecutors were required to prove promise or receipt of a particular amount of profit or indeed the details of a specific transaction. The common use of informal, brokered financial transaction systems was noted in this regard. As it is, a wide range of investigatory techniques including special financial investigation techniques can be used to establish benefit or profit. It was further noted that while migrants are often reluctant to testify against smugglers, some are willing to cooperate if they feel cheated. And even in cases where evidence of benefit or profit is not required (i.e. where the alternative element of smuggling multiple persons is present), financial investigations will often be employed to develop a clearer picture of the networks, organizations and structures involved. Such investigations may uncover evidence of debt repayment through coercion, which could redirect prosecutors to a potential case of trafficking in persons.

**Practitioner insights into international legal cooperation:** Practitioners noted that international legal cooperation in smuggling cases is anyway often very difficult for a range of factors. Cooperation can indeed be refused if there are substantial differences between how the offence is established within the requested and requesting States. A request from one eastern European State for extradition of one of its nationals for involvement in facilitating irregular migration had to be refused because of such differences. Another request, this time between Germany and an

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<sup>55</sup> Bundesgerichtshof, Decision 26th February 2015, Az: 4 StR 233/14

Asian State, also did not proceed on similar grounds as well as because of that State's inability to grant assurances regarding punishment. An example of unsuccessful MLA was offered, in relation to a smuggling network running from a non-EU State through Germany to another EU State. German attempts to engage the authorities of the other EU-State failed because the individuals concerned were family members, meaning that the other EU-State did not further investigate the situation as assisting migrants to enter or pass through its territory without compensation was a minor offence.

**Practitioner views on potential guidance to States Parties:** Practitioners agreed that some guidance could usefully be provided to all States aimed at supporting the effective prosecution of migrant smuggling in a consistent way. It was noted that Germany's legal system, which provides strong and detailed interpretive guidance to criminal justice practitioners, is a useful example. They noted that any international guidance could usefully highlight the importance of excluding those acting purely for humanitarian reasons – while ensuring that criminal smugglers could not use such provisions as a loophole to escape justice. As it stands, practitioners would not want the approach to be any narrower, and commended the broad concept of financial, material *and non-material* to others, so that any type of benefit can be captured, while not being required.

#### 3.2.4. Greece

**Summary:** Greece is a major transit and destination point for smuggled migrants including asylum seekers from many parts of the world, primarily, at present, from Africa and the Middle East. The relevant legal framework is established through Articles 29 and 30 of Law No. 4251/2014 *Immigration and Social Integration Code*. Financial or other material benefit (“intent to gain”) is not a constitutive element of the migrant smuggling offences (facilitation of illegal entry / facilitation of illegal stay) in Greek legislation, but is an aggravating circumstance for facilitation of both illegal entry and illegal stay. “Gain” is construed narrowly as financial gain. The legal framework contains an exemption from punishment (but not from prosecution) in relation to those who rescue migrants at sea or who facilitate illegal entry or transit or transport of persons in need of international protection. There is no such exemption in place protecting persons involved in the smuggling of family members without intent or receipt of gain from punishment. Practitioners are generally of the view that “intent to gain” is not difficult to establish; that the humanitarian exemption from punishment is appropriate, if sometimes difficult to apply; and that the flexibility in the legal framework is an important part of ensuring that penalties are proportionate to the severity of the conduct.

**Legal framework / elements of smuggling offences:** Greece's legal framework around smuggling of migrants is established through Articles 29 and 30 of Law No. 4251/2014 *Immigration and Social Integration Code*. It is relevant to note that the current legal framework represents a significant change from what existed previously, where smuggling offences were misdemeanours. They are now felonies subject to severe penalties. The base offence of smuggling contains the following

elements: (i) a person; (ii) facilitates the entry into Greece; (iii) of third-country citizens. The base offence is aggravated, resulting in more severe penalties, in a range of circumstances including where that person acted *with intent to gain*. The law sets out a separate offence of facilitating the stay, in Greece, of an irregular citizen of a third country, or hindering police investigations in relation to the offence. The base offence is aggravated, resulting in more severe penalties where that person acted with *intent to gain*. A further offence related to carriers including masters and drivers of vessels involved in transporting or receiving irregular migrants into Greece or who facilitate this transport. The base offence is aggravated, resulting in more severe penalties, in a range of circumstances including where the transporter acts *with intent to gain*.

**Humanitarian exemption from punishment in the law:** Article 30 of the *Immigration and Social Integration Code* stipulates that no penalty shall be imposed on those who rescue migrants at sea or who facilitate illegal entry or transit or transport of persons in need of international protection under international law. Practitioners pointed to some lack of clarity regarding an added provision related to notification to authorities, and pointed out that a person carrying out a rescue could not be expected to know whether the individual being rescued is in need of international protection. It was noted that this provision has not prevented in some cases the prosecution of persons involved in providing humanitarian assistance to irregular migrants and that in recent years the scrutiny of the actions of civil society organizations working with migrants has increased. Practitioners explained that the situation of humanitarian actors who facilitate the entry of migrants – especially when those persons are asylum seekers in need of international protection – is considered to be a significant grey area from a policy perspective. While the law clearly captures such acts, it is not yet determined in policy whether it should be applied to prosecute them. Another problem with the humanitarian / rescue exemption from punishment is the possibility of its misuse; facilitators could take on the role of rescuers.

**No exemption for smuggling of family members:** The legal framework provides no exemption from punishment for persons involved in the smuggling of family members without intent or receipt of gain. However, it was noted that criminal justice agencies may choose to not proceed to prosecution where this is considered to be against the interests of the State and that courts can mitigate the punishment. Practitioners noted that in such cases the individual involved would be unlikely to receive more than a short custodial sentence.

**The meaning and effect of “intent to gain”:** As noted above, the legal framework in Greece introduced “intent to obtain a gain” as an aggravating circumstance. While the term is not defined and could theoretically be broadly construed, in practice it is limited to financial gain. Practitioners were clear on the point that other forms of gain potentially seen in smuggling cases (such as payment of smuggling debt through provision of labor or sexual services) would not be considered “gain” in this context. As an aggravating circumstance, intent to gain is, of course, directly relevant to sentencing. Practitioners noted that in establishing this element of the aggravated

offence, the focus is on intention to gain – not on any gain that may have been realized. There is no threshold established or presumed; even a small profit made through smuggling would be considered sufficient to establish the aggravated offence. It was noted that related aggravating factors (such as commission of smuggling offences “by profession”) carry an implication of financial gain.

**Practitioner insight: flexibility in applying “intent to gain” provision is necessary to balance harsh sentencing:** Practitioners noted some practical and ethical dilemmas associated with the severe penalties attached to broadly framed migrant smuggling offences that now allow no room for misdemeanor charges, even for minor acts. The purpose of severe sentences is deterrence, although some doubt was expressed about the deterrent effect of severe sanctions. The example of a taxi driver transporting several irregular migrants within Greece being captured by the aggravated provisions of the base offence, and thereby subject to lengthy sentences of imprisonment (up to fifty years), was provided as an example of the law’s reach and potential impact. One practitioner noted that a minor smuggler associated with negligent death is liable to a much harsher sanction than a person charged with murder. Criminal justice agencies have responded to this incongruity in a variety of ways, including by avoiding pursuing aggravated offences even where intent to gain is evident. The alternative avenue for achieving this same result would be to aggravate the sentence (e.g. on the basis of profit motive) and then mitigate it on the basis of other considerations (e.g. age and lack of former convictions). In practice though, the aggravation is simply not applied in situations where applying it would lead to a disproportionate penalty. A case involving two foreign sailors hired to support a smuggling venture (*Court of Cassation (Judgment 1003/2014)*) illustrates the capacity of courts to exercise their discretion in achieving a fair result *despite* the law. In this case the sailors were convicted only of the base offence notwithstanding the presence of evidence of intent to obtain gain.

**Practitioner insight: evidence of “intent to gain”:** There is no need to prove intent to gain as an element of the base offence, and many convictions are achieved without proving profit. However, where used as an aggravating element, proving “intent to gain” was not considered to be particularly difficult. Testimony that migrants were to pay an amount of money, for instance, was considered adequate, as was the finding of an amount of money in the suspect’s possession. Financial intent can also be inferred from repeated acts of smuggling or repeated links of a person with conduct related to smuggling. Bank deposits and transactions at financial institutions, as well as wiretapping and cross-checking telephone messages and numbers were noted as being of use in connecting people who work in a network. Evidence of intent to gain can also support establishing intent in relation to other elements of the offence (facilitating entry / stay).

**Practitioner insight: relevance of intent to gain in relation to criminal justice priorities:** Prosecutors and police have little discretion in relation to cases where the elements of the offence are present. However, practitioners noted that certain features of a particular case – such as involvement of organized crime – will cause it to be prioritized at the investigation stage. Evidence of substantial profit (intended

or secured) including evidence of transfers of large amounts of money may also be relevant in elevating certain cases, although this is likely linked to other prioritizing features such as involvement of large numbers of migrants, deaths of migrants, repeat offences and transfers of large amounts of money.

**Practitioner insights into international legal cooperation:** Practitioners noted difficulties associated with international legal cooperation in general, especially in relation to non-EU countries. However, at least thus far, these difficulties have not related to differences in laws on the point of financial or other material benefit.

**Practitioner views on potential guidance to States Parties:** Practitioners agreed on the potential value of international guidance on prosecution and adjudication of smuggling offences. They noted that irrespective of what a particular national law specifies about FoMB, it is essential to “follow the money”: this is a crime that is invariably motivated by profit. Proof of financial gain may be too high a burden to place on criminal justice agencies involved in prosecuting this difficult crime type, not least because of the resulting heavy reliance on cooperation of smuggled migrants. Requiring proof of gain (rather than, for example, intention to gain) may also just result in a change in the modus operandi of smugglers intent on circumventing this element of the offence. At least in relation to the Greek situation, one practitioner noted that many difficulties encountered thus far could be avoided by creating a basic misdemeanour offence, with intent to gain becoming an element of a felony offence attracting much higher penalties. However, other practitioners disagreed, noting the seriousness of the crime type.

### 3.2.5. Italy

**Summary:** Italy is a major transit and destination country for smuggled migrants from many parts of the world, primarily, at present, many thousands of asylum seekers from Africa and the Middle East. The modus operandi of smuggling into Italy is changing with smugglers’ increased reliance on state and non-state rescue services to take migrants to Italian shores. The relevant legal framework is established through the law governing immigration and status of foreigners. Profit is not an element of the base offence, but can serve to aggravate the offence. Profit (framed as “unfair advantage”) is an element of the offence of facilitating stay. Profit may also be a factor in ascertaining the involvement of organized crime, enabling authorities to lay additional charges under the Criminal Code. Italian law provides that humanitarian facilitation of stay is not a crime. This exemption is also applied, in practice, to facilitation of entry. The concepts of profit / unfair advantage are construed broadly, and considered to be well understood and not difficult to establish. While FoMB is only an aggravating factor, investigation of profits and their ultimate confiscation are considered to be essential in addressing high-level organized criminal involvement in migrant smuggling.

**Legal framework / elements of smuggling offences:** Italy’s legal framework around smuggling of migrants is established through Article 12 of the Immigration Law, *Legislative Decree 92/2008*. The base offence of facilitating illegal entry comprises

the following elements: (i) a person; (ii) promotes, manages, organizes or finances the illegal entry of foreign persons into Italy or transports such persons into Italy; (iii) or commits other acts meant to ensure illegal entry into Italy, or illegal entry into another State. The same article provides for an aggravated offence where: (i) a person; (ii) *in order to profit, even indirectly*; (iii) performs acts aimed at obtaining the illegal entry of an individual in Italy or to procure their illegal entry into another State. The offence of facilitating illegal stay is dealt with under the same article. The first offence extends to: (i) a person; (ii) in order to take *unfair advantage* of the illegal status of another person or in the context of migrant smuggling; (iii) favours the stay of that person in Italy. The second offence extends to: (i) a person; ii) *on payment and in order to take unfair advantage*; (iii) offers accommodation or rents property to that person without a lawful stay permit. The concept of unfair advantage as used in this context was clarified by the Supreme Court to mean that in order to be criminally liable, the persons offering accommodation or renting property must consciously impose particularly onerous and exorbitant conditions on migrants.<sup>56</sup>

Where links to organized crime can be established, the smuggling acts can be additionally charged under Article 416 of the Criminal Code. The relevant Criminal Code provision penalizes three or more persons associating in order to commit multiple criminal offences. In relation to migrant smuggling offences, the base offences (organizing, participating in, directing such association, etc.) are aggravated when Article 12(3) of the Immigration Act applies (i.e. when there is an intention to profit from the smuggling act).

**Humanitarian exemption provided by law and implemented in practice:** Italy's legal framework contains an explicit provision that confirms that relief efforts and humanitarian assistance in Italy to foreigners in need, irrespective of their residence status, is not a crime. Practitioners explained that while the provision refers to actions "within Italy", it has been interpreted to also apply to those who, in providing humanitarian assistance, facilitate entry into the country of an irregular migrant in need. No cases of criminalization of humanitarians who provide assistance to persons to enter Italy or to continue their journey on to other European destinations were provided. Indeed, in Italy, the practice of providing support and assistance to migrants in order to ensure their safe entry into the territory is well established, involving State agencies as well as non-state humanitarian actors. It is also well accepted that rescues undertaken by any vessel would not incur criminal liability; rather, their failure to rescue migrants in distress, when this was feasible and without danger to the vessel concerned, would be prosecuted.

**No exemption for smuggling of family members:** The legal framework provides no exemption from prosecution or punishment for persons involved in the smuggling of family members. However, practitioners did note that the act of "financing" illegal

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<sup>56</sup> Italy, Criminal Court of Cassation (*Cassazione Penale, Sez. I*) (2013), No. 26457, 18 June 2013 (24 April 2013).

entry (part of the Article 12 base offence) is not considered to extend to situations in which a person pays a smuggler to smuggle his family. They further noted that cases in which persons are facilitating entry of family members into Italy without seeking or obtaining profit would be very unlikely to face prosecution.

**The meaning and effect of “intent to profit, directly or indirectly”:** Profit is not defined in the law. However, it is considered to be well and uniformly understood and sufficiently broad to encompass material as well as economic benefit. Practitioners expressed the view, for example, that the provision of work or services in lieu of a transportation fee would be considered a “profit” accruing to the smuggler. It was repeatedly noted that payment is the hallmark of trafficking: a lack of payment or evidence of payment may in fact be an important indication that the situation should be investigated as one of trafficking in persons. The concept of “*indirect profit*” as used in Article 12 has been the subject of a Supreme Court judgment, which helpfully explains that:

“...indirect profit should be understood as an expectation of enrichment – not necessarily of a financial or economic nature – that is identifiable and may be equated to a significant advantage, not obligatorily linked to the illegal entry of the foreigner”.<sup>57</sup>

The common situation of indirect profit is one in which a migrant steers a smuggling vessel in lieu of paying a smuggling fee, or receives a discount for his family. The Courts have found that the profit element is satisfied in such cases.<sup>58</sup>

**The meaning of “unfair advantage”:** As noted above, intent to take “unfair advantage” is an element of offences related to facilitation of illegal stay. In 2013 the Supreme Court confirmed that the relevant offence is not satisfied merely by making accommodation available to a person known to be an irregular migrant: there must also be specific intent to procure an “unjust profit” by taking advantage of the migrant’s irregular situation, resulting in “unfair and excessively onerous conditions on the tenant (migrant)”.<sup>59</sup> In 2015, the Supreme Court also noted that the crime of Article 12(5) concerning provision of accommodation to an irregular migrant, applies to anyone who “...acts with the purpose of achieving an undue profit. Such a purpose can be drawn from contract terms much more beneficial to the owner, even if such terms are not excessively detrimental to the migrant”.<sup>60</sup>

**Sentencing: the role of profit in aggravation and mitigation:** As noted above, intent to profit, directly or indirectly, is an aggravating circumstance under the law related to facilitation of entry. Practitioners explained that where the profits in question are

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<sup>57</sup> Italian Supreme Court, Criminal division, Section 1, Judgment no. 15939, 19 March 2013.

<sup>58</sup> Court of Catania, Proc. n. 675/2016 R.I.M.C., 11 April 2016.

<sup>59</sup> Supreme Court, *Sentenza 597/2013*, 24 April 2013. See also Supreme Court, *Sentenza 46070/2003*, 23 October 2003; Supreme Court, *Sentenza 5093/2012*, 17 January 2012. The same reasoning had already been established in 2003, in a case where it had not been ascertained, however, from the conditions of the contract that the landlord had intended to impose unduly onerous responsibilities on the tenant. See Supreme Court, *Sentenza 46066/2003*, 16 October 2003.

<sup>60</sup> Supreme Court, Judgment no. 17117, 20 January 2015. *The meaning and effect of “intent to gain”*. Court of Catania, Proc. n. 93/2016 R. I.M.C., 21 January 2016.

not substantial, this can be expected to affect sentencing and, depending on the circumstances of the case, may also result in the imposition of more lenient precautionary measures. Indirect profits (e.g. those accruing to migrants who work on the vessel in lieu of smuggling fees) may be treated more leniently. It was noted that there is no real or perceived threshold: the aggravation is established once the fact of profit is established. A finding that the migrant/s paid for the voyage the accused was involved in is generally considered an adequate basis on which to aggravate the sentence. Despite apparent clarity in the law, there was some disagreement between practitioners about whether the intention to profit alone is adequate or whether the profit has to actually accrue in order for profit to aggravate a sentence.

**Practitioner insights into the challenge of proving profit as an element of the offence:** Practitioners were unanimous that inclusion of the profit element in the base offence would reduce their capacity to prosecute. Particularly in the Italian context of mass arrivals of migrants, having FoMB as a constituent element of the crime would mean that profit may have to be proven for each of the hundreds of individuals on board, which would be impossible in light of the lack of informal and international legal cooperation with countries of origin and transit where the payment may have taken place. Practitioners were strongly supportive of the current approach that considers profit seriously through aggravation and through its evidentiary value in pointing to criminal associations, but not requiring it as a constituent element to prove. It was noted that smuggled migrants are important witnesses in relation to proving both “profit” and also criminal association (necessary for application of Article 416 of the Penal Code to a smuggling situation). Partly in order to facilitate the cooperation of smuggled migrants, authorities refrain from charging them with the misdemeanour of illegal entry (which is considered not to be fulfilled where they are brought into Italian territory by a rescue vessel), rather seeking their assistance in dismantling criminal networks.

**Practitioner insights into the importance of investigating profit in the context of organized criminal involvement:** Practitioners were uniformly supportive of the legal framework’s links with organized crime provisions of the Criminal Code: this enables investigation into the most lucrative and destructive forms of smuggling in migrants and prosecution of those at the top of the smuggling chain. In that particular context practitioners emphasized the importance of establishing the profit element – not just in terms of securing more severe penalties under both the Criminal Code and Legislative Decree 92/2008, but also in securing the information necessary to identify and disrupt high-profit organized smuggling networks. There is growing emphasis on collaborative financial investigation leading to seizing and freezing of smugglers’ assets. This is particularly important given the changing modus operandi of smuggling into Italy which is seeing migrants take a greater role in their smuggling and the smuggling of fellow migrants (e.g. by steering vessels that are expected to be rescued at some stage of the journey) and organizers keeping well away from any direct operations. Once criminal association is established, Italian authorities have a range of financial investigation tools at their disposal (and a

wealth of experience from anti-mafia work), and are able to confiscate money and assets even absent a direct link with the crime itself.

**Practitioner insights into international legal cooperation:** Practitioners stated that the absence of the FoMB element in the base offence had not proven problematic in practice but could theoretically pose a challenge if cooperation was requested by or from a country that has included this as an element of the offence. It was noted that extradition requests have been refused where smuggling is a misdemeanour in the requested state, rather than a felony. However, practitioners pointed to a wider inability to engage with countries outside Europe in the international legal cooperation that is essential to combat organized smuggling. Beyond some minor successes, cooperation with key countries of origin and transit has proved to be extremely challenging. It was also mentioned that requests for financial information in letters rogatory had not been responded to.

**Practitioner views on potential guidance to States Parties:** Practitioners agreed on the potential value of international guidance on prosecution and adjudication of smuggling offences. They noted the importance of ensuring that the emphasis is firmly on criminal smugglers seeking profit and that the legal framework should not capture civil society, faith-based and humanitarian groups involved in supporting irregular migrants, even if this extends to their entry into the country. They also supported non-criminalization of migrants themselves, as this only increases the difficulties associated with investigation and prosecution of smuggling crimes. In considering international guidance, practitioners repeatedly drew attention to the critical importance of financial investigations; not just because, in the Italian context, this can result in more severe penalties, but also because profits can point to the involvement of organized criminal groups and confiscation of such profits and related assets offers the best chance of disrupting their operations. They noted the need to build political will and capacity around international legal cooperation in relation to financial investigations.

### 3.2.6. Malaysia

**Summary:** Malaysia, which is not party to the Smuggling of Migrants Protocol, is a transit and destination country for smuggled migrants from many parts of the world, including Bangladesh, India, Indonesia, Myanmar, Nepal and the Philippines. Smuggling of migrants is criminalized through the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. The act provides for a range of offences and also defines migrant smuggling. Prior to the incorporation of anti-smuggling provisions into this law, immigration law was used to address facilitation of irregular entry and exit. Financial or other material benefit is not a constitutive element of the definition or the migrant smuggling offences, but smuggling for “profit” is included as a separate offence. “Profit” is not defined but practitioners generally consider it to narrowly pertain to financial profit; so far the separate offence of “profiting from the offence of smuggling of migrants” has not been applied in practice. There is no exemption in place to protect persons involved in smuggling of family members or acting for solely humanitarian reasons.

**Legal framework / definition of the smuggling offence:** Malaysia's legal framework around smuggling of migrants is established through Section 26A of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* that criminalizes the "smuggling of migrants", defined by Section 2 as:

- (a) arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
- (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a).

The *mens rea* of the offences is not intention to benefit, but rather knowing or having reason to believe that the entry or exit is unlawful.

**Distinct offence of smuggling for profit in addition to aggravation of base offence:**

The base offence established by Section 26A is aggravated where the person intends that the migrant will be exploited after entry (by the person themselves or another); where the smuggled migrant is subject to cruel, inhuman or degrading treatment; or where death or serious harm results. Additionally, Section 26D provides for a separate offence of "profiting from the offence of smuggling of migrants", resulting in penalties that are heavier than those provided for the base offence and which include forfeiture of profits from the offence. Thus far, no cases have been brought under Section 26D.

**Practitioner insights into the value of excluding FoMB as an element of smuggling offences:**

Practitioners expressed the view that including FoMB as an element of the crime would pose insurmountable challenges for prosecutors. It was noted that in most cases, evidence of payment taking place is extremely difficult to obtain, given that payments are generally made in countries of origin, or upon arrival in the destination countries. Practitioners stressed that smuggling is invariably perpetrated with a view to profit, but the fact that Section 26D (separate offence of smuggling for profit) has not yet been applied shows how difficult that profit is to establish. The lower-level criminals, including transporters and guards, are generally arrested, while the higher-level operators, to whom the profit accrues, are very difficult to reach; if FoMB were an element that would need to be proven, prosecutions of the lower-level actors may also not succeed for want of evidence. Furthermore, the absence of profit should not be taken to imply that migrant smuggling has not taken place, but rather could be indicative that some other crime type is occurring, for instance, being the facilitating of illegal entry or exit of terrorists. The absence of FoMB then, enlarges the range of prosecutorial options that can be pursued.

**No humanitarian or familial exemptions in the law:** Malaysian law contains no exemption for smuggling offences perpetrated by family members of the smuggled migrants, nor for smuggling of asylum seekers without profit, nor are there any mitigating grounds in these circumstances. Practitioners confirmed that, in practice, no distinction is made between smuggling of asylum seekers for humanitarian

reasons and smuggling of migrants for profit reasons; the base offence is applicable in either scenario and the aggravations that are specified in Section 26B do not relate to the intentions of the smuggler. Practitioners explained that there is no intention to provide for family reunification mechanisms in Malaysia, meaning that situations where a person facilitates the irregular entry or exit of his own immediate family members are considered to be straightforward cases of smuggling under the base offence. In theory, courts have some limited discretion to mitigate sentences, but only within the confines of the relevant provision; non-profit familial / humanitarian considerations do not offer avenues for mitigation. Practitioners emphasized that in reality, smuggling is always perpetrated for financial profit with no cases of smuggling perpetrated for humanitarian reasons encountered in practice.

**Current law and practice: investigation of profit:** Malaysia approaches migrant smuggling as a security issue, meaning that special measures can apply. Such measures include the detention of suspected smugglers for 28 days for further investigation, as well as the application of special procedural laws including those allowing use of wiretapping that can yield evidence of profit. Further, smuggling of migrants is specified as a predicate offence under the *Anti-Money Laundering Act*. In practice, this means that parallel financial investigations of migrant smuggling offences may take place, not with the view to establishing profit for the purposes of Section 26D of the smuggling offence, but with a view to establishing a link between the smuggling offence and organized crime. Information was not provided on whether, and if so how often, special measures and techniques have been used in the investigation and prosecution of smuggling cases.

**Practitioner insight: linkages with organized crime:** Practitioners repeatedly stressed their experience-based insight that profit is invariably the motivation of smuggling offences; the discovery of mass graves and the treatment of smuggled migrants that went on in those locations was again referred to as highlighting the profit-driven, and complex, organized nature of the crime. However, in those cases, aggravated offences were applied, rather than the offence of smuggling for profit. Legislation on organized crime is considered to be relevant in migrant smuggling investigations; the Malaysian *Penal Code* defines “criminal conspiracy” as involving two or more persons who agree to do or cause illegal acts, or legal acts by illegal means (Section 120A), as opposed to three as specified in the Organized Crime Convention definition of organized criminal group. No financial or material benefit or profit motive is required to establish criminal conspiracy.

**Practitioner insight: linkages with trafficking in persons:** The incorporation of migrant smuggling offences into a joint Act alongside trafficking in persons is considered to have a stronger deterrent effect than mere application of immigration laws. Furthermore, practitioners explained the decision to incorporate smuggling offences into the trafficking Act, on the basis that there are significant linkages between the two offences. In this respect, they referred to the discovery in 2015 of migrant camps and mass graves along the Thai-Malaysian border as signifying that smuggled migrants can indeed fall victim to trafficking-related crimes. A less extreme

illustration offered was that of the smuggling debts incurred by smuggled migrants, that are repaid through jobs promised in Malaysia, that may become exploitative. Practitioners were not amenable to the suggestion that the labour of such migrants could be considered as a form of “benefit” for the purposes of Section 26D of the *Anti-Trafficking and Anti-Smuggling Act*; rather, they speculated that no evidence of “profit” would be secured in such cases, which potentially may reveal signs of trafficking. On this point, practitioners also noted the practical challenge of balancing the need to not criminalize victims of trafficking with the penalties that are applied to migrants under the *Immigration Act*.

**Practitioner insights: the meaning of “profit”:** As noted above, the separate offence of smuggling for profit has not yet been applied, meaning that practitioners could only speculate on what is entailed by the concept of “profit”. In general, it was agreed that the term should not be defined. There were different opinions as to whether it would be interpreted to capture material benefits (such as sexual gratification) in addition to financial benefits, with most understanding profit as financial profit. Minority views here pointed to the fact that sexual favors are indeed captured within legal conception of corruption and, accordingly, could be envisaged as payments in smuggling cases. Practitioners agreed that waiving of smuggling fees in exchange for crewing a smuggling vessel or driving a vehicle would *not* constitute a benefit for that migrant, who would anyway be readily prosecuted as a smuggler. When asked whether actual advantage above the cost of the smuggling venture would need to be established to prove “profit”, practitioners were of the view that there is no threshold required; any evidence of payment in cash or through transfer would be sufficient, regardless of the amount. There was less certainty in response to questions about whether intention to profit rather than actual profit would be sufficient, though in practice, verbal statements of migrants that they had paid were not considered to be sufficiently compelling to bring charges under the relevant article in the absence of supporting documents to substantiate payments. The weight of opinion came down in favor of tangible profits needing to be evidenced, though ultimately these were considered to be questions of judicial interpretation.

**Practitioner insights into legal cooperation:** Practitioners noted that bilateral cooperation agreements are relatively easy to conclude and operate under, and that multilateral cooperative agreements are significantly more complicated. In that regard it was noted that the ASEAN Mutual Legal Assistance Convention is only rarely being used as a basis for cooperation. In general, cooperation on migrant smuggling is a challenge in the region given that most countries address the phenomena under immigration laws, rather than as a form of transnational crime, with criminal migrant smuggling legislation either not existing, or only being introduced relatively recently, as in the case of Malaysia. The need for international cooperation on financial investigations in smuggling cases was highlighted.

**Practitioner views on potential guidance to States Parties:** Practitioners unanimously supported the view that national laws should capture the concept of FoMB, but *not* require that it be proven as an element of the smuggling offence. The Malaysian approach of having parallel lines of investigation, of migrant smuggling on

one hand, and money laundering crimes on the other, was commended as an appropriate way of capturing the full range of criminal conduct, while also ensuring that there are no loopholes in liability. It was considered to be crucial to “follow the money” in order to identify the organized criminal networks involved in smuggling, but not to tie them together in pursuit of conviction. There was an evident appetite for guidance on financial investigations of migrant smuggling with practitioners emphasizing that there needs to be stronger will and capacity to identify and understand financial flows. Specifically, it was suggested that guidance on the link between FoMB and organized crime would be valuable (not only in the context of migrant smuggling, but also in relation to terrorism). Practitioners further noted the need for guidance on how FoMB operates in different smuggling contexts. In that regard it was noted that the Smuggling of Migrants Protocol is particularly concerned with smuggling of migrants by sea, which is a focus that has not been carried over into Malaysian anti-smuggling provisions. Smuggling by air was explained to be a greater challenge in the Malaysian context, and a greater concern from a profit point of view, with the associated fraudulent document and visa abuses involving complex transnational crimes and significant profits.

### 3.2.7. Morocco

**Summary:** Morocco is a major transit country for smuggled migrants from various parts of the world, primarily, at present, many thousands of African asylum seekers seeking to enter Europe across the Mediterranean. It is also a point of origin and is increasingly emerging as a country of destination for smuggled migrants. Morocco currently does not include the FoMB element in its base smuggling offence and the relevant legislative provision explicitly states that facilitating illegal entry and exit is criminalized, irrespective of payment. However, the legal framework is soon to be amended and the draft law currently before Parliament offers a definition of smuggling that is more closely aligned with the Smuggling of Migrants Protocol, and includes reference to financial or other material benefit. Practitioners noted that, at present, profit is relevant in practice when determining whether the aggravated offence of facilitating irregular migration through organized criminality has been established. They were of the view that, under the new law, FoMB should be construed broadly to capture the many varied situations through which facilitators benefit from their conduct.

**Legal framework / elements of smuggling offences:** Morocco’s legal framework around smuggling of migrants is established through *Law 02-03 on entry and exit of foreigners in Morocco, irregular emigration and immigration*. Article 50 of that law criminalizes exit through use of fraudulent means as well as entry or exit outside of established border control points. Facilitating or supporting clandestine entry or exit either for free or for a fee is separately criminalized by Article 52. The relatively low penalty is aggravated in cases of habitual smuggling, or organized smuggling (involving two or more people), or leading such a smuggling operation, or causing injury or death to smuggled migrants. Involvement of public officials or persons with a public function in facilitating fraudulent exit or facilitating entry / exit outside of established border control points is separately criminalized. The material element of

the base smuggling offence are: (i) a person; (ii) who facilitates or organizes the entry into or exit from Morocco of another person in particular by transporting them; (iii) in a clandestine and fraudulent manner (for example by using falsified documents or a false name) or outside established border control points; (iv) either free of charge or for a fee.

Morocco, which is not yet party to the Smuggling of Migrants Protocol, has recently announced the development of a new migration strategy, including through reform of legislation on asylum, trafficking in persons and migration. The draft Penal Code currently before Parliament offers a definition of smuggling that is more closely aligned with the Smuggling of Migrants Protocol, and includes reference to financial or material benefit.

**No humanitarian or other exemptions in law:** The current law is explicit that profit – whether intended or accrued – is not an element of the relevant offences. It follows that persons who provide any humanitarian assistance to migrants to enter, stay or leave Morocco irregularly may be prosecuted and penalized. Practitioners explained that in practice, financial or material gain is a feature of smuggling and present in all cases. However, in some cases, other relevant international law may come into play, for instance, so as to not criminalize a bona fide rescuer of migrants in distress at sea. It was noted that there is no barrier to prosecuting a person who is facilitating the movement or stay of asylum seekers: in this case as well, the reasons behind the act are immaterial. It was further noted that despite the prominence in the legislation of offences committed by migrants themselves, in practice the principle of prosecutorial discretion is often applied by prosecutors such that most irregular migrants are not prosecuted: the focus of the law in terms of its implementation is firmly on facilitators.

**The proposed law: practitioner understanding of what “financial or other material benefit”:** Practitioners generally viewed the proposed element of FoMB (a version of which is already an element of some corruption offences) as being of broad application and capable of including, under the umbrella of material gain, the promise or provision of labour or sexual services in exchange for services aimed at supporting irregular migration. It was noted that the term would likely also include promises or provision of professional advancement or awards.

**Current law and practice: relevance of profit to establishing organized criminality and to sentencing:** Practitioners noted that while not strictly relevant to existing offences, profit may aggravate an offence, especially where it points to conduct undertaken through organized criminality, which is itself an aggravated offence. Organized crime is defined broadly under Article 293 of the *Penal Code*, to include the involvement of two or more people, as opposed to three as specified in the Organized Crime Convention definition of organized criminal group. As investigations, including financial investigations, will be triggered when organized crime involvement is suspected, profit can be relevant in setting criminal justice priorities around this crime type.

**Practitioner insights into evidentiary challenges:** Practitioners noted the considerable difficulties involved in investigating smuggling: it is often difficult to identify offenders and the likelihood that other crimes have also been committed complicates the investigatory tasks. Practitioners also noted difficulties in dealing with mixed migration flows that include refugees, and the need to differentiate their treatment from that of migrants. It was noted that financial investigations can be important in some cases and that a special police team has been established to undertake such investigations in trafficking and smuggling cases.

**Practitioner insights into international legal cooperation:** Practitioners affirmed that international legal cooperation with neighboring countries is difficult but that good cooperation had been established with at least one European country. They were further able to point to a positive case of international legal cooperation involving Morocco and two other States. Practitioners noted no perceived obstacle to cooperation between Morocco and a country that has a different approach to the definition, though this assumption has not been tested.

**Practitioner views on potential guidance to States Parties:** Practitioners agreed that international guidance on the definition of migrant smuggling would be useful, especially for Morocco as it seeks to introduce and effectively implement the proposed new law. In regard to the FoMB element, they were of the view that this concept should not be defined: rather guidance should point to it being capable of broad and flexible application. They further observed that the Protocol is attached to the Organized Crime Convention and that this points to an appropriate focus on organized criminal involvement in smuggling. Accordingly, if organized crime involvement can be proven, there should be no requirement to establish a financial or other material benefit. In other cases, where organized crime is not involved or cannot be proven, then FoMB may be an important element in differentiating crime types and setting priorities.

### 3.2.8. Sri Lanka

**Summary:** Sri Lanka is a country of origin for irregular migrants travelling towards Australia, Canada, Europe, elsewhere in Asia and the Middle East. Most irregular migration from Sri Lanka is believed to be facilitated by smugglers, who have become increasingly organized and sophisticated along complex land, sea and air routes.<sup>61</sup> Many smuggled migrants have fallen victim to human trafficking. While the majority of smuggling occurs by air, most prosecutions concern smuggling by sea, owing to political considerations that have prioritized attention on this form. Section 45A of the *Immigrants and Emigrants (Amendment) Act* criminalizes bringing a person into Sri Lanka in contravention of the Act, and 45C addresses “organizing” of irregular migration from Sri Lanka. No financial or material benefit is required for the latter offence, rather, “soliciting pecuniary benefits”, regardless of whether any benefit is realized, can constitute “organizing” alongside several other options. Sri Lanka has not yet ratified the Smuggling of Migrants Protocol.

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<sup>61</sup> *Migrant Smuggling in Asia* (UNODC, 2015), pp.40, 53.

**Legal framework:** While the *Penal Code* now includes a counter-trafficking provision (section 360(c)), migrant smuggling has not yet been criminalized in that instrument. Instead, amendments in 2006 to Sri Lanka's *Immigrants and Emigrants (Amendment) Act, No. 20 of 1948* resulted in the inclusion of s.45A on bringing people into Sri Lanka in contravention of the Act, and s.45C on "facilitating persons to leave Sri Lanka". Practitioners explained that the legislation was enacted in response to the high number of migrants irregularly travelling to Italy prior to the introduction of the law and the associated challenges of establishing who the organizers were.

**Elements of the smuggling offence:** Section s.45C of the *Immigrants and Emigrants (Amendment) Act, No. 20 of 1948* criminalizes organizing or attempting to organize a person to leave Sri Lanka in contravention of the Act. Organization is widely defined in s.45C(3) which stipulates a non-exhaustive list of conduct including: (a) recruitment on promise of employment outside Sri Lanka; (b) false promises of employment; (c) soliciting pecuniary benefits from persons whether or not any such benefit was realized; (d) transportation of persons by sea, land or any other manner without obtaining valid travel documents; and (e) receiving and harboring in Sri Lanka or elsewhere. While soliciting pecuniary benefits is one of the options that can constitute "organizing" for the purpose of establishing an offence under s.45C, in practice the examples most often cited were those falling under subsection (d) involving transportation of persons without obtaining valid travel documents. Practitioners were supportive of the wide and open-ended list of options offered by s.45C and considered the provision to be beneficially broader than Article 3 of the Smuggling of Migrants Protocol.

**Practitioner insights into the relevance of financial or material benefit:** Practitioners were of the view that profit is the incentive for the majority of smuggling offences, with the exception of unlawful exit undertaken by or for family groups or groups of friends. The case of a family of 4 or 5 members who boarded a boat and travelled without the assistance of a facilitator was cited as example of case where not financial benefit was present. In that case, the father was prosecuted for "organizing" under s.45C, notwithstanding that there was no profit motive. Where financial motive is present, evidence for it is produced to make out the offence, even though it is not a required element. Practitioners pointed to increased efforts to "follow the money" through financial investigations of bank accounts and use of mobile phone evidence, as a means of substantiating the involvement of organized criminal networks and their modus operandi, and ascertaining whether there may be any links between smuggling profits and terrorism financing.

**Practitioner insight into FoMB as a consideration in sentencing:** While there is no legislative provision that aggravates sentences on the basis of FoMB, practitioners explained that profit is included in the evidence that is brought to the Court for consideration in sentencing. A useful origin-country perspective was offered in this context: given that payments are typically made only on arrival in destination countries, often the aggravating factor will not pertain to the gain made by the smuggler in receiving the smuggling fee, but rather the loss that is incurred by the

migrant and his or her family in raising that fee. Here the sale of family jewelry or ancestral homes in order to raise the smuggling fee was pointed to as the potentially aggravating factor rather than the actual profit received by the smuggler.

**Practitioner insights into the role of organized crime:** The provision that addresses migrant smuggling is concerned with “organizing” of migrant smuggling, although this was not understood by practitioners to relate explicitly to “organizing” in the context of “organized crime”. The linkages between migrant smuggling and organized crime were explained as addressed by the *Terrorism Financing Act* of 2016 (and joint work with the Australian government on assessing whether proceeds of smuggling fund terrorism), and amendments made to the *Money Laundering Act* in 2011 to include both migrant smuggling and human trafficking as predicate offences.

**Practitioner insights into evidentiary challenges:** Practitioners were of the view that inclusion of FoMB as an element in smuggling of migrant offences would pose significant challenges to prosecutions. While the view was expressed that profit is almost always the incentive for smuggling crimes, practitioners pointed to evidentiary difficulties associated with the fact that smuggling fees are generally not paid until the migrant has arrived in the destination country. Often, smugglers promise several attempts until the venture is successful before receiving payment, meaning that actual evidence is outside of Sri Lankan jurisdiction and that migrants have no incentive to make statements to authorities as to whether payments were made.

**No humanitarian or other exemptions in law:** The broad range of options provided under s.45C for what can constitute “organizing” readily captures all incidents of facilitating irregular migration, irrespective of whether the motivation is humanitarian rather than financial. With the exception of a situation where migrants in distress are rescued at sea, which would not be considered under the provision for want of intention, practitioners considered all cases of facilitated irregular migration for humanitarian reasons to fall within s.45C as a strict liability offence. Whether the role played by migrants in smuggling ventures (e.g. by steering smuggling vessels, cooking food for migrants during the journey or offering medical assistance to persons on board) would constitute assisting the smuggling venture was an issue of significant contention, with practitioners disagreeing as to whether such acts could or should be charged as smuggling, or whether such circumstances should simply serve to mitigate sentences.

**Criminalization of smuggled migrants:** Practitioners emphasized that criminals are the target of anti-smuggling efforts, not migrants themselves. While provisions included in the *Immigrants and Emigrants (Amendment) Act* address irregular migration offences, practitioners emphasized that, in practice, the maximum penalty imposed for such offences is a fine, and that such persons are never incarcerated but are treated as witnesses. During his 2014 visit to Sri Lanka, the United Nations Special Rapporteur on the human rights of migrants was assured that intercepted smuggled migrants are not penalized, but considered as “victims” of migrant smugglers, and that criminal action is only taken against smugglers. However, the

Special Rapporteur received conflicting information that such persons would be imprisoned.<sup>62</sup>

**Practitioner insights into international legal cooperation:** Practitioners emphasized that international cooperation with respect to evidence exchange is a priority for Sri Lanka and that such cooperation is indeed taking place. The Sri Lankan government entered into a Memorandum of Understanding (MoU) with the government of Australia in November of 2009 concerning legal cooperation. This MoU includes a commitment to harmonize Sri Lankan and Australian migrant smuggling legislation “in compliance with relevant international benchmarks”. The MoU does not explicitly state what these benchmarks are. Additionally, Australia and Sri Lanka launched a Joint Working Group on People Smuggling and Other Transnational Crime in 2012, the third meeting of which took place in Colombo in June 2016. The presence or absence of the FoMB element was not considered to be a barrier to extradition. However, no smuggling-related extradition requests have been made by or to Sri Lanka.

**Practitioner views on potential guidance to States Parties:** Practitioners were in favour of the Sri Lankan legislative approach that offers a broad range of options to capture prohibited conduct and noted that the law as framed does not pose prosecutorial challenges. Distinctions between smuggling by organized criminals, and smuggling by family members or petty criminals may not be made in law but practitioners considered that prosecutorial discretion in relation to which charges to lay and judicial discretion in relation to sentencing can mitigate risks of treating family member and organized criminals alike. In their view, the profit aspect of migrant smuggling is a given, that need not be captured in legislation as an element of the crime. If it were required to be proved, prosecutions might be compromised where witness statements could not be obtained from smuggled migrants. Practitioners also took the opportunity to explain why combating smuggling is a key priority of Sri Lanka as an origin country. In their view, migrant smuggling constitutes a threat to national security with its potential linkages with terrorism. More broadly, irregular migration from Sri Lanka is considered to impact negatively on the regular migration regime.

### 3.2.9. Tunisia

**Summary:** Tunisia is a destination for sub-Saharan Africans and a transit country for migrants from the Maghreb, Syria and Sub-Saharan Africa and others *en route* to Europe. The relevant law does not include financial or other material benefit as an element of the base offences nor of any aggravated offences. Practitioners confirmed that smuggling for humanitarian or family reunification reasons would indeed be captured under the law. In practice however, all migrant smuggling that is encountered, investigated and prosecuted is profit-driven. Practitioners expressed support for the approach taken under the law as providing the necessary reach and

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<sup>62</sup> Report of the Special Rapporteur on the human rights of migrants François Crépeau, Mission to Sri Lanka, A/HRC/29/36/Add.1, 2 April 2015, para. 70.

flexibility to address the current high levels of impunity around smuggling.

**Legal framework / elements of smuggling offences:** Tunisia’s legal framework for addressing smuggling of migrants is established through Law 75-40 of 1975, amended in 2004. The law criminalizes a range of acts aimed at facilitating clandestine entry into or exit from Tunisia. In relation to advising, conceiving, facilitating, assisting, mediating or organizing, the offence is established “even without payments, on a volunteer basis”. The offence of transporting with intent to procure clandestine entry or exit is established without any reference to payment, as is the offence of providing accommodation to or hiding irregular migrants. Aggravated offences are attached to each of these base offences. The legal framework accordingly does not recognize FoMB as an element of any migrant smuggling related offences.

**No humanitarian or other exemptions in law:** The law is clear that payment is not an element of the relevant offences. It follows that persons who provide any humanitarian assistance to migrants to enter, stay in or leave Tunisia irregularly may be prosecuted and penalized. This interpretation is strengthened by the fact that in the base offence, facilitation “even on a voluntary basis” is a criminal act. In practice, practitioners confirmed that no distinction is made between smuggling of migrants or asylum seekers for profit and smuggling that might be motivated by other concerns. They explained that this approach is considered necessary to end impunity for all persons involved in smuggling of migrants. In that regard it was noted that individuals initially involved in smuggling family members often become active in the for-profit smuggling of others. The overriding point, however, is that in the experience of practitioners, facilitation of clandestine entry and exit invariably involves profit.

**Criminalization of smuggled migrants:** Practitioners explained that there is a significant difference in how the legal framework is being applied at present, as compared to approaches taken before the political changes of 2011. The previous tendency was to use the legal provisions around facilitation of clandestine entry and exit to criminalize smuggled migrants, sometimes in very large numbers. Today, migrants will still be charged for illegal border crossing, but are now much less likely to be prosecuted for smuggling-related offences. However, this does not extend to protecting smuggled migrants who are more directly involved in the smuggling operation. For example, a migrant who drives a smuggling vehicle or captains a smuggling vessel would be prosecuted for smuggling where it can be established that he has knowledge of the fact that the other persons on board are illegally crossing borders. A recent decision of Tunisia’s highest Court (referred to by one of the judicial practitioners interviewed for this study) has affirmed this approach: explicitly excluding those parties merely wishing to travel from prosecution for smuggling offences.

**Practitioner insight into FoMB as a consideration in sentencing and in establishing criminal justice priorities:** Practitioners were firm on the point that, as the legal framework – including aggravated offences – does not require profit as an element of any offence, the presence or absence of profit is irrelevant to sentencing. They did

note, however, that a number of aggravated offences carrying heavier penalties (such as involvement of organized crime, and involvement of public officials) implied a profit element. It was noted that judges are granted a level of discretion to take account of the specificities of a case to individualize the penalty. However, practitioners could not speculate on what a given judge would do in the presence of high profit or in the absence of any profit motivation at all. The discussion affirmed that beyond potential links to more serious forms of smuggling such as involvement of organized crime, FoMB is not relevant to establishing criminal justice priorities in relation to either investigation or prosecution.

**Practitioner insights into omission of the FoMB element:** Practitioners expressed the view that the broader approach taken in Tunisia offers a greater chance to end impunity around smuggling, thereby exceeding the minimum requirements of the Smuggling of Migrants Protocol definition.<sup>63</sup> They reiterated however, that while the profit element is not required to establish the offence, smuggling is broadly understood and pursued as a crime motivated by profit. The close links between smuggling and organized crime also point to its essentially profit-driven character. It was noted that in addition to smuggling for family reunification and smuggling for humanitarian purposes, cases in which smuggling may occur in the absence of direct financial profit can be those where individuals may be smuggled to perpetrate acts of terrorism. While no such cases were provided, it was noted that they would always be charged under terrorism legislation if knowledge of the intended purpose of the smuggling could be established. It was also noted that a requirement to establish FoMB would increase investigative and prosecutorial burden.

**Practitioner insights into evidentiary challenges:** Practitioners affirmed that migrant smuggling investigations and prosecutions are often difficult. Typically, lower level offenders are apprehended; organizers are skilled at avoiding detection. Special investigation techniques will sometimes be used but to limited effect in securing prosecutions against high-level smugglers. It was noted that smuggled migrants themselves are often not useful as witnesses; sometimes their silence is bought by smugglers. While profit is not an element of the offence, investigation of financial flows can help in the targeting of high-level offenders. However financial investigations are complex and resource-intensive.

**Practitioner insights into international legal cooperation:** Practitioners noted that while Tunisia has entered into several bilateral and multilateral agreements on mutual legal assistance and extradition, in practice there are significant challenges in operationalizing such cooperation. It is unclear whether MLA or extradition requests

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<sup>63</sup> However, this has been challenged by the UN Special Rapporteur on the human rights of migrants, who, in 2013, expressed the view that, by omitting this element, the law “go[es] far beyond the intention of the Smuggling of Migrants Protocol.” Report of the Special Rapporteur on the human rights of migrants François Crépeau, A/HRC/23/46/Add.1, 3 May 2013, p.8 [35].

have been made or received in relation to migrant smuggling and, if so, with what outcome.

**Practitioner views on potential guidance to States Parties:** Practitioners affirmed that guidance on interpretation and application of the international legal definition of migrant smuggling would be useful. They emphasized however: (i) the need to consider criminal justice approaches to migrant smuggling within the broader social, economic, developmental and political causes of irregular migration; (ii) the need for migrant receiving countries to prioritize protection obligations over national security concerns.

### 3.2.10. United Kingdom

**Summary:** The United Kingdom is a country of destination for smuggled migrants from Africa, the Middle East and Asia. The relevant law provides for two distinct “facilitation” offences, only one of which (relating exclusively to the smuggling of asylum seekers) includes the FoMB element. The exemption for humanitarian facilitation of entry is carefully circumscribed and does not extend to not-for-profit facilitation of entry for other motives such as family reunification. In practice, criminal justice authorities invariably use the offence that does not require the establishment of “gain”. Practitioners are of the view that smugglers act only for profit but that requiring this to be proven would complicate the fight against smugglers to the benefit of perpetrators. They further noted that gain is the central motivation behind almost all smuggling. Even where gain need not be established as an element of the offence, financial investigations are an important part of the criminal justice response: helping to shed light on networks and routes and supporting the targeting of higher-level offenders.

**Legal framework / elements of smuggling offences:** The legal framework around smuggling of migrants in the United Kingdom is established through Section 25 of the *Immigration Act 1971*, as amended in 2002. The relevant provision makes it an offence for someone to be knowingly concerned in making or carrying out arrangements for securing or facilitating the entry into the UK or harbouring in the UK of an irregular entrant or (if for gain) an asylum-seeker. The law makes it an offence to knowingly facilitate someone to breach the laws of *any* Member State, not just the United Kingdom. Assisting entry to the United Kingdom by a European citizen in breach of a deportation or exclusion order is also made the subject of an offence.

**Limited humanitarian or family reunification exemption provided by law:** The relevant article provides a clear exemption from prosecution in relation to facilitation of unlawful entry for persons who acts on behalf of an organization that aims to assist asylum seekers and does not charge for the services offered or provided. In effect, this operates as a humanitarian exemption but one that is narrowly construed: it would not exempt acts of an individual or groups of individuals not operating in connection with an organization, and it does not apply to facilitation of stay. With regard to the not-for-profit facilitated entry of family members, such cases could be captured readily by the base offence that does not

require FoMB. However, practitioners expressed the view that in such cases, the Crown Prosecution Service may decide it is not in the public interest to prosecute.

**No implicit or in-practice exemption for not-for-profit facilitation of entry or stay:**

Practitioners were emphatic that smuggling into the United Kingdom is almost invariably motivated by profit and that cases without such a motivation would likely not proceed to prosecution. However case law does suggest that prosecutions have indeed been undertaken against persons assisting unlawful immigration without intention to secure a profit or other benefit.<sup>64</sup> In practice then, both “commercial facilitation” (for financial gain) and “non-commercial facilitation” (not for financial gain) are pursued, with the distinction borne out only in sentencing. However, practitioners reiterated that facilitation of entry takes place for reasons of profit. Cases where it is obvious that no payment was made (and where there are no obvious family or humanitarian motivations at work) will be investigated for the possibility of other crime types such as trafficking in persons being present.

**The meaning and effect of “gain”:** As noted above, the securing or facilitation of the entry of an asylum seeker, when done “for gain” is criminalized. The meaning of “gain” was considered to be unproblematic. In most cases the term will relate to financial gain. Other forms of benefit (e.g. payment of smuggling debts through provision of sexual services or labour) would also be considered “gain”. There is no threshold as to how much gain is required, but it is broadly construed and can be non-specifically inferred from circumstances. For example, in one case, the gain was inferred from disparity between real expenditure and apparent income.<sup>65</sup> It was also explained that gain can be established even where it has not yet materialized – however there are clear evidentiary hurdles involved.

**Sentencing: The role of gain in aggravation and mitigation:** Practitioners explained that while the legal framework does not specify aggravated offences, heavier penalties will be applied when there is evidence of substantial financial gain. Other factors affecting sentencing include repeat offending; a high degree of planning / sophistication; the number of immigrants involved and the level of involvement of the offender. It was noted that even with such factors being present, the maximum penalty (14 years) is rarely handed down; there are no relevant sentencing guidelines meaning that there can be some variance in the sentencing. Several cases were provided that explore “gain” as a consideration in sentencing. In one leading case, the Court of first instance was not able to determine whether the accused was motivated by profit or whether he was acting out of “fellow feeling for someone of similar background and experience to himself”. The Court nevertheless considered that the distinction did not matter given that deterrence was required either way. On appeal, the sentence was reduced on the basis that there was no evidence of

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<sup>64</sup> See for instance, cases reported in *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament (January 2016), p.81.

<sup>65</sup> *Kapoor & Ors* [2012] EWCA Crim 435.

financial gain.<sup>66</sup> Other cases that point to financial gain as a mitigating<sup>67</sup> and aggravating factor<sup>68</sup> in sentencing were also provided.

**Practitioner insights into the value of excluding FoMB as an element of smuggling offences:** The view was expressed that including FoMB as an element of the crime would be a disadvantage to criminal justice practitioners and an advantage to smugglers. While profit could likely be readily inferred in the majority of cases, the additional evidentiary burden would be felt in what is already a difficult process. It was noted that smuggled migrants would be the main source of evidence regarding FoMB. These persons are often not willing or credible witnesses. It was again reiterated that facilitation of entry invariably takes place for reasons of profit. Cases where it is obvious that no payment was made (and where there are no obvious family or humanitarian motivations) will be investigated for the possibility of other crime types such as trafficking in persons being present.

**Practitioner insights into the value of investigating the financial aspects of migrant smuggling:** It was noted that the lack of a need to prove financial gain does not obviate the importance of financial investigations. Unraveling the financial aspects of smuggling can shed light on networks, power structures and modus operandi and can assist practitioners to paint an overall intelligence picture. In addition, the *Proceeds of Crime Act* can be used to investigate and confiscate criminal proceeds associated with migrant smuggling once a conviction for the base offence has been secured. Practitioners further noted that, in the case of organized immigration crimes, financial crimes and asset recovery routes are often pursued either instead of, or in parallel with prosecution for smuggling offences.

**Practitioner insights into international legal cooperation:** Practitioners noted that differences in how the smuggling crime is defined under national law (with particular reference to presence / absence of the financial element) does not pose a particular barrier to international legal cooperation provided that offences can be characterized as “like offences”. No information was provided on cases of smuggling involving the UK in requesting or being requested mutual legal assistance or extradition.

**Practitioner views on potential guidance to States Parties:** Practitioners agreed that general guidance on the definition of smuggling would be useful. In this context however they emphasized the need to understand differences in national approaches. In the UK situation, it is felt strongly that the inclusion of a FoMB element into the definition would complicate investigations and prosecutions and that the risks associated with omitting this element are adequately addressed through the clear humanitarian exemption as well as the safety net of judicial discretion at the sentencing stage. Were such an element to be required, practitioners are of the view that evidence should be established by more than just

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<sup>66</sup> *R v Le and Stark* [1999] 1 Cr. App. R.(S.) 422.

<sup>67</sup> For example, *R v Panesar* [1988] Cr.App.R.(S.) 457.

<sup>68</sup> For example, *R v Akrouf* [2003] EWCA Crim 291.

the statement of the migrant. Regardless of whether it is required or not, financial gain is considered to be a key indicator of larger scale smuggling operations making financial investigation an important tool for securing information on smuggling operations and structures.

### 3.2.11. United States

**Summary:** The United States is a destination country for smuggled migrants from Central and South America as well as, in fewer numbers, from Africa, the Middle East and Asia. The legal framework excludes FoMB from the base smuggling offences but is an element of an aggravated offence, in relation to which commercial advantage or private financial gain must be established beyond reasonable doubt. There is no humanitarian exemption in law. Although the aggravated offence appears as a sub-provision of the base offence, practitioners pointed to it as a distinct offence directly in accord with the criminalization requirements of the Smuggling of Migrants Protocol. Practitioners expressed support for the approach taken under national law, noting that it provides them the flexibility required to support investigation and prosecution of smuggling offences. Practitioners further expressed the view that omission of the FoMB element from the base smuggling offences exceeds the minimum requirements of the Smuggling of Migrants Protocol.

**Legal framework / elements of smuggling offences:** The legal framework around smuggling of migrants in the United States is established through 8 U.S. Code § 1324. The relevant provision establishes a range of offences including alien smuggling; domestic transporting; conspiracy / aiding or abetting; and bringing aliens to the United States. The base smuggling offence is established in relation to any person who – knowing that a person is an alien – brings or attempts to bring that person into the country through any place other than a designated place of entry, regardless of whether or not the alien is authorized to enter or reside in the US and regardless of any future official action which may be taken with respect to such alien. Prosecution for this offence requires that the defendant had knowledge that the person brought into the United States was an alien. An additional offence is established in respect of any person who encourages or induces an alien to come to, enter or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry or residence is or will be in violation of law. The offences established by this provision attract a harsher sanction, where the relevant acts are done for “*commercial advantage or private financial gain*”.

**No humanitarian or family reunification exemption provided by law but discretion exercised in practice:** With only one very narrow exception provided by law prosecutions for smuggling that is without profit and motivated by humanitarian concerns or related to family reunification are possible. In relation to family reunification it was noted that such cases were unlikely to be pursued and, if prosecutions do proceed, penalties involving conduct not motivated by profit are lenient. In that regard it was noted that sentencing guidelines indicate that familial smuggling can indeed result in a reduced sentence. In relation to smuggling for humanitarian purposes, several practitioners commented that they had no

experience of such cases being prosecuted. Absent a profit motive, the lenient penalties applicable would make it less likely for a prosecutor to bring such a case given limited resources. Additionally, such a case would likely present circumstances of little jury appeal so there would be even less incentive to prosecute. Although the drafters considered conduct motivated by profit to be more serious as indicated by the enhanced penalty, they clearly thought it important to consider conduct even if it was not motivated by profit.

It was noted that existing rules, for example those related to search and rescue at sea, operate to prevent the prosecution of persons coming to the rescue of others in distress. This can provide an additional basis for ensuring protection from prosecution for those compelled by a situation of necessity to render assistance that includes bringing rescued persons into the country. Investigators will however test claims of rescue to ensure that they are not a cover for smuggling. For example, legitimate rescues at sea are expected to involve contact between the rescue vessel and search and rescue authorities.

**Practitioner understanding of “commercial advantage or private financial gain”:** As noted above, offences related to migrant smuggling (domestic transportation, harbouring, encouraging / inducing, or aiding / abetting) are aggravated when done for commercial advantage or private financial gain. It was noted that establishing this aggravated offence requires establishing commercial advantage or private financial gain beyond reasonable doubt. Both concepts are well understood. Commercial advantage was illustrated by the situation of an employer being involved in the smuggling of low-wage workers. Respondents noted that US courts had interpreted financial gain to include compensation for fuel costs; even where amounts received to transport migrants are very small, a high number of people can result in a large amount of money. In response to several proposed scenarios, practitioners affirmed that the provision of sexual or labour services or indeed drug production / trafficking in lieu of a smuggling fee would fall within the concept of commercial advantage or other financial gain. Courts have held that migrants providing smuggling related services in response to a waiver of the smuggling fee are indeed acting for material benefit and become part of the conspiracy to smuggle others and are considered to be “encouraging or inducing” others to enter the United States illegally. It is reportedly common for smugglers to claim to be smuggled persons acting to reduce their smuggling fee, particularly in the maritime context. According to the US law, such persons are still driving the boat and therefore still committing the offence.

**Practitioner insights into omission of the FoMB element in the base offence:** Practitioners strongly expressed the view that omission of the FoMB element in the base offence does not represent a dilution of the standard set out in the Protocol. Rather, their view was that this omission results in a framework that exceeds the Protocol’s minimum standards. It was noted that the relevant provision in US legislation pre-dated the US becoming party to the Protocol and was assessed, at that time, to be in compliance with the obligations the US would be undertaking upon ratification. As a practical matter it was repeatedly emphasized that almost all

migrant smuggling is motivated by profit. Even though FoMB is not an element of the offence, evidence of financial motive may well be brought at trial to convince the jury that the accused is indeed a criminal smuggler. Such evidence is very helpful as juries may be reluctant to convict in the absence of some indication of a profit element. Critically, where evidence of profit is unavailable (for instance, where migrants are unaccompanied minors who are unlikely to have paid for their own smuggling, or where migrants do not want to come forward as witnesses to testify about payments made owing to fear of prosecution or of reprisals) the legal framework provides the necessary flexibility to ensure that smugglers can still be prosecuted. Therefore, the law as it stands is considered to be advantageous to broader criminal justice goals. The difficulties of securing evidence related to FoMB were noted as being an important obstacle to an effective criminal justice response.

**Practitioner insights into international legal cooperation:** Practitioners considered that the question of whether the absence of FoMB could be a barrier to international cooperation was a not an issue. On mutual legal assistance they noted that there are relatively few cases. On extradition, they noted that the FoMB element – whether it is absent or present – would be immaterial and not pose a barrier to extradition, as the elements of the offence in the jurisdictions do not have to match precisely. It was noted that international legal cooperation is generally reserved for high level offending where the FoMB element is likely to be prominent.

**Practitioner views on potential guidance to States Parties:** Practitioners were generally supportive of international guidance that would respect differing national approaches while promoting broad commonality between countries on how migrant smuggling is understood and responded to. In this context they reiterated the view that omission of the FoMB element of the offence represents a strengthening and not a weakening of the Protocol's standards. Practitioners commended the US approach as offering a balanced example: providing the necessary flexibility through a range of offences that do not require FoMB to be established except in the context of an aggravated offence. The approach was considered to be supportive of investigations and prosecutions in relation to this difficult crime type.



## PART 4. NATIONAL LAW AND PRACTICE: KEY FINDINGS

This Part seeks to draw out the major findings of the country surveys, identifying, where possible, trends, commonalities and differences in relation to legislative approaches, application and practitioner understanding.

### 4.1. Legislative approaches

All States surveyed have criminalized migrant smuggling and / or conduct associated with migrant smuggling. However, only Malaysia provides a legal definition of smuggling of migrants. In lieu of defining migrant smuggling, conduct is criminalized within an offence or across a range of offences. Facilitated entry offences are generally separated from facilitated stay offences. It is notable that none of the States within the surveyed group have incorporated the Protocol's definition of migrant smuggling, unchanged, into national law.

As shown in Table 1 below, only two States (Indonesia and Mexico) out of the 13 surveyed have included FoMB as an element of the base offences related to both facilitation of entry and facilitation of stay. Two other States (Germany and Italy) have included FoMB as an element of offences related to facilitation of stay only. Five States (Greece, Indonesia, Italy, Mexico, United Kingdom) have included within their legislation some form of exemption for facilitated entry / stay that is motivated by humanitarian considerations. While the exemption would be applicable to persons facilitating the entry of asylum seekers for purely humanitarian purposes, no State surveyed has included, within its law, any reference to the intention or status of the smuggled migrant.<sup>69</sup> In six of the eleven States that have not included FoMB as an element of the base offence, the legal framework provides for aggravated sentences in cases involving financial / material gain. No State within the larger survey group provides for exemptions on the basis of other motivations such as family reunification or in cases where the smuggling involves asylum seekers.

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<sup>69</sup> Of note, the UK legislation contains an exemption from prosecution in relation to facilitation of unlawful entry for persons who acts on behalf of an organization that aims to assist asylum seekers and does not charge for the services offered or provided.

	Smuggling of Migrants Protocol	Australia	Canada	Germany	Greece	Indonesia	Italy	Malaysia	Mexico	Morocco	Sri Lanka	Tunisia	United Kingdom	United States
Legislation requires financial / material element to punish facilitation of entry	✓	X	X	X	X	✓	X	X	✓	X	X	X	X	X
Legislation requires financial / material element to punish facilitation of stay	✓	X	X	✓	X	✓	✓	X	✓	X	X	X	X	X
Legislation (at least partially) excludes humanitarian assistance from punishment	✓	X	X	X	✓	✓	✓	X	✓	X	X	X	✓	X
Legislation provides for aggravated sentence where there is FoMB	✓	X	✓	✓	✓	X	✓	✓	X	X	X	X	X	✓

**Table 1:** Overview of legislative approaches to smuggling of migrants

Of the ten surveyed States that have included some conception of FoMB in their national smuggling law or in other areas of criminal law (see Table 2 below), none have replicated the phrase “financial or other material benefit” and none offer a definition for the equivalent concept in national law. Practitioners evidenced little enthusiasm for defining the concept, preferring to rely on judicial interpretations that can adapt to circumstances of individual cases. Where the notion is captured elsewhere in legislation, its interpretation applies to the smuggling context. For instance, the notion of “gain” in UK anti-migrant smuggling legislation is the same as in its Fraud Act, and “advantage” or “benefit” in Germany exists in Article 331 of the Criminal Code, which deals with public sector corruption.

<b>Countries that have included “financial or other material benefit” element in the base smuggling offence</b>	
<b>Indonesia</b>	Intention of <i>making a profit, either directly or indirectly</i>
<b>Mexico</b>	Intent to <i>obtain an economic benefit in cash or in kind, true, current or imminent.</i>
<b>Countries that have included “financial or other material benefit” as an element of an aggravated offence or in other areas of criminal law.</b>	
<b>Canada</b>	<i>Profiting</i> (in relation to organizing, inducing, aiding or abetting irregular entry into Canada)

<b>Germany</b>	<i>Receive an advantage or the promise of an advantage</i> (in relation to facilitation of illegal stay)
<b>Greece</b>	Acting with intent to gain (in relation to aggravation of facilitation of entry and facilitation of stay offences)
<b>Italy</b>	<i>Taking unfair advantage</i> (in relation to establishing facilitation of stay offences)
<b>Malaysia</b>	<i>Profiting</i> (in relation to facilitation of entry and exit)
<b>Sri Lanka</b>	<i>Soliciting pecuniary benefits from persons whether or not any such benefit was realized</i> (as one alternative form of “organizing” a person to irregularly leave Sri Lanka)
<b>United Kingdom</b>	Facilitating entry <i>for gain</i> (in relation to asylum seekers)
<b>United States</b>	Acting <i>for commercial advantage or private financial gain</i> (in relation to aggravation of specific facilitation of entry offences)

**Table 2:** Legislative framing of the element of financial or other material benefit

It is important to note that few countries were able to provide cases that help elucidate the parameters of the FoMB element; jurisprudence is thin and uneven. Accordingly, much of the discussion with practitioners around the legislative framing of the FoMB element – and indeed its meaning and scope of application as discussed at 4.2, below – was speculative, prompted by the various scenarios presented to interviewees.

#### 4.2. Specific insights into application and practice

**Scope of FoMB:** In five States (Greece, Indonesia, Malaysia, Mexico and Sri Lanka) of the ten that have included some aspect of FoMB in their legislation, the relevant concept appears to be limited to financial or pecuniary benefit although there is some indication from practitioners in all five countries that certain other benefits such as provision of work services, and potentially other services, could theoretically be captured. In the other five States of this group (Canada, Germany, Italy, UK and USA) there appears to be a clear legislative intent to ensure that the element is capable of broad application. For this group as a whole, the case of a migrant who crews a smuggling vessel (or drives a smuggling vehicle) in lieu of or for reduction of a smuggling fee was widely considered to constitute a benefit, with Malaysian practitioners diverging from this opinion, preferring to understand “benefit” in more straightforward financial terms, and practitioners in Sri Lanka instead approaching this scenario as a question of whether or not the person was involved in “organizing” the smuggling. In States where the concept refers to “indirect” profit, this is variously understood as being an expectation of enrichment, where the benefit has not yet been obtained (Italy, Morocco) or is “imminent” (Mexico). In relation to all States within this group, the legislative framing of FoMB 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 / condition for establishing an aggravated offence and would not represent a barrier to prosecution. In Sri Lanka, where soliciting pecuniary benefits can constitute a form of organizing, legislation explicitly states that this is satisfied “whether or not any such benefit was realized”.

Overall, among the group of States that have included some aspect of FoMB 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 FoMB is most often approached only on the basis of financial profit, with financial gain usefully serving to distinguish criminal smuggling from other conduct. As noted above, however, the lack of substantive case law (and in some cases also, legislative guidance) means that the scope of the FoMB has not yet been adequately tested.

***Humanitarian exemptions in law and practice:*** As discussed in Part 2 above, the drafters of the Protocol intended that the definition would not apply to the facilitated movement of migrants across national borders for purely humanitarian purposes. The country surveys confirmed however, that explicit humanitarian exemptions are rare. Of the 13 surveyed countries, only four (Greece, Italy, Mexico and the United Kingdom) include humanitarian exemptions explicitly in their legislation, and even then only in carefully limited circumstances. In addition, Indonesia's exemption of facilitated entry / exit not motivated by profit also operates to exclude smuggling undertaken solely for humanitarian purposes. But this broad approach is uncommon and the survey confirms a general trend among States to either not include such an exemption or to construe it narrowly. Even in a country such as Mexico, which provides a broad exemption from prosecution, the provision operates in practice as an exemption from *penalty*, rather than from charge. A similar situation exists in the United Kingdom 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 Greece, while there are some limited exemptions with respect to acts involving persons in need of international protection, the prosecution of humanitarian actors does not appear to be capable of being ruled out. 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.

Practitioners from most States surveyed expressed reservations 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. Practitioners understood the motives behind the Protocol's approach but, particularly among States facing large-scale flows, there was a strong sense that rigid application of this principle might play into the hands of smugglers.

***Humanitarian motivations can influence prosecution decisions and sentencing:*** Absent 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 or securing of a financial or material gain. While any intention to benefit will negate a defense 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 this was not the primary motivation. Practitioners interviewed for the survey were generally supportive of such approaches, with one group noting this fitted into the concept of a “spectrum” of seriousness and complicity: at one end are the purely humanitarian operations where profit or other material gain is completely absent. At the other end are the organizers and facilitators who set out to maximize profits at the expense of human safety. In other countries, the idea of a “spectrum” does not resonate: it is the profit imperative that differentiates the two activities as being of a wholly different nature. Exercising prosecutorial discretion in deciding not to pursue certain cases is generally considered a way of accommodating these very different realities, as is flexibility in sentencing, although this was noted as not being foolproof in ensuring consistent and appropriate outcomes.

***Relevance of smuggled migrants’ intention to seek asylum:*** In most of the surveyed States of destination, asylum seekers comprise a substantial portion of those who are smuggled. And many such persons are indeed subsequently recognized as refugees. However, no surveyed State has made specific, inclusive legislative provision relating to the prosecution or exemption from prosecution for persons involved in the smuggling of asylum seekers. In Germany for example, legislative exemptions from prosecution for asylum seekers entering the country irregularly have been formulated in such a way as to ensure that persons facilitating their entry can still be prosecuted. In the United Kingdom the exemption from prosecution for facilitation of unlawful entry of asylum seekers is restricted to persons acting “on behalf of an organization”. In Greece, the law provides for some limited exemptions with respect to acts involving persons in need of international protection, but there are grey areas regarding the situations covered by the relevant provisions in reality. 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 indeed, what the smuggler knows or believes to be the intent of the migrant.

***Exemptions for smuggling of family members:*** None of the surveyed States has legislated an exemption for the facilitated entry or stay of family members. Such conduct, provided it is undertaken without intention of profit, would be excluded from prosecution in at least two States of the survey group (Indonesia and Mexico). Depending on the circumstances of the case, the general humanitarian exemption provided for in three additional States (Greece, Italy and the United Kingdom) and 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 of illegal entry of family members with the intention to profit was considered unlikely to be exempted as a humanitarian act. Therefore, while supportive of such exercises of discretion, practitioners were not supportive of explicit exemptions from prosecution for smuggling of family members, noting for example, that some criminal organizations are family-based and further, that the concept of “family” could extend that exemption to a large number of beneficiaries. Practitioners in at least two States noted that government policy was firm on

prosecuting all facilitated illegal entry and that this must, by necessity, be seen as extending to individuals seeking to bring family members in without authorization.

***Relevance of FoMB to penalties and to sentencing:*** The presence of some aspect of financial or other material benefit appears to be a relevant consideration in all survey countries, irrespective of whether or how this aspect is captured in law. As noted above, FoMB serves to aggravate penalties for certain facilitation of entry and facilitation of stay offences in seven of the study countries (Canada, Germany, Greece, Italy, Malaysia, United Kingdom and the United States). Generally, where profit or intention to profit is included as an aggravation, the level of profit or benefit is considered to be immaterial to establishing the aggravated offence. Irrespective of the legislative approach taken by individual States, it appears that motivation for migrant smuggling 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. 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 indeed evidence of high actual or expected profits – will inevitably incur harsher penalties. Consistent with this approach, relatively low financial returns (especially where these are expected or secured by poor, low-level local operatives recruited to crew smuggling vessels) can be expected to result in lesser penalties. Practitioners in the majority of States consider this situation to be both just and logical. Those who are motivated to commit the crime of smuggling purely by 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 high 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 may attach to other forms of aggravation (such as inhuman treatment or exploitation) rather than attaching to the notion of profit or benefit. The surveys did not consider whether anything is lost or gained by not addressing material benefit alongside financial benefit.

***Challenges in establishing FoMB:*** Practitioners in States where the legal framework does not include FoMB as an element of base smuggling offences considered that requiring FoMB to be proven 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, particularly 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, of compromising their asylum claims, and of 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.

The experiences of practitioners from the two surveyed States that include FoMB as an element of the base smuggling offences are mixed. Practitioners in Mexico noted that the short time frame permitted to them to establish the elements of the offence in order to justify detention of suspects means that difficulties invariably arise, particularly where the economic benefit is indirectly attributable to the suspected smuggler because of the use of intermediaries; where it has not yet been received; and in situations where profits from smuggling must be untangled from profits derived from other criminal enterprises. One practitioner expressed the view that this element of the offence creates an unacceptable burden that only benefits criminals. However, practitioners in Indonesia report very little difficulty in establishing the profit element of the smuggling offence; statements of witnesses and suspects as well as paper records are used to that end.

Among the survey group as a whole, many practitioners emphasized the fundamental, essential link of smuggling with profit; absent 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* FoMB 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 they cannot be humanitarian in motivation.

Also among the survey group as a whole, it was notable that evidence sought generally relates to tangible benefit, rather than *intention* to benefit. In addition to the evidence provided by witnesses, wiretapping was repeatedly mentioned as an essential investigative tool to prove an intention to financially or materially benefit, and to prove FoMB in the absence of formal records of any transactions. Tracking of bank and other transfers was also widely used in many States, but proved problematic in others, particularly where transfers are made from or to foreign banks.

***Strategic importance of focusing on FoMB:*** Practitioners from several surveyed States noted the strategic value of focusing on FoMB irrespective of whether this 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 (as mentioned in two countries) 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 organized criminal involvement. Such an approach also supports the tracing, freezing and seizing the assets of organizers, thereby offering an important opportunity to disrupt large and complex smuggling operations.

***Challenges to international legal cooperation:*** The Smuggling of Migrants Protocol seeks to promote a consistent approach to defining and criminalizing migrant

smuggling 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. There is a question about whether differences between national legal frameworks, not least around the definition of migrant smuggling and the inclusion or exclusion of the FoMB element, could infringe the principle of dual criminality and thereby compromise that cooperation. However, the survey confirmed that, at least within this group of States, this concern is more theoretical than practical. While at least two States noted instances of assistance being denied because of concerns about a lack of dual criminality, no examples relating specifically to the presence or absence of the FoMB element were offered. However, it was pointed out that requests for extradition in migrant smuggling cases inevitably relate to high-level organizers in relation to whom the financial motivation of their crime is not in question. Similarly, requests for mutual legal assistance in such cases most often relate to financial aspects of the crime – such as requests for bank records. In such situations, the fact that the requested State does not require FoMB to be established will be immaterial to its decision to cooperate.

It is relevant to note that practitioners in almost all surveyed countries highlighted both the importance of international legal cooperation in prosecuting high-level smugglers and criminal syndicates, and the difficulties in securing such cooperation. Many countries appear to lack the capacity – and sometimes also the willingness – to engage in cooperation aimed at exposing migrant smugglers and disrupting their operations. This was a problem noted as being of relevance to cooperation in relation to migrant smuggling in general, not in specific relation to FoMB.

### 4.3. Practitioner views on approaches and guidance

Practitioners from all surveyed States were asked to express their views on the value of approaches that include / exclude FoMB as an element of the base smuggling offences. Practitioners were also asked their opinion on possible international guidance on the definition of migrant smuggling; would such guidance be of value to them in their work? What areas / issues could such guidance usefully focus on?

***Policy and practical considerations behind including FoMB:*** Practitioners from the two States that have included FoMB as an element of the base smuggling offences (both major countries of origin / transit for smuggled migrants) were unanimous in their view that the profit / benefit aspect is an essential element of the offence of smuggling in migrants and is central to how the crime is understood and responded to. Both pointed to the national approach as being in full accordance with the approach taken by the Smuggling of Migrants Protocol.

***Policy and practical considerations behind excluding FoMB:*** Practitioners from States that have either excluded FoMB entirely or merely addressed it as an element of an aggravated offence were, almost without exception, fully supportive of their

national approach. In their view, while smuggling is almost invariably motivated by profit States must ensure 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. When considering more practical aspects, practitioners pointed to the obstacles inherent in investigating and prosecuting a crime as complex as migrant smuggling and the heavy evidentiary burden that would result from the inclusion of FoMB as an element of the base offences, especially if prosecutors are required to prove actual benefit, as opposed to *intention* to benefit. The difficulties in securing reliable evidence, particularly from smuggled migrants and in situations where payment for services is brokered or otherwise indirect, were repeatedly highlighted. Omitting the profit element does not operate to prevent this aspect being considered; indeed, it is often highly relevant to understanding what has taken place.

***Accordance with minimum standards of the Protocol:*** Practitioners in States that have included the FoMB element in criminalizing migrant smuggling at the national level consider that their legislation is in full conformity with the Protocol's requirements and that this conformity was indeed the intention of legislators. In contrast, practitioners in some States that have excluded the FoMB element from the base smuggling offence expressed the view that excluding FoMB as an element of the base smuggling offences *exceeds*, rather than falls short of, the international minimum standards set out in the Protocol. Others expressed interest in receiving clarification from the United Nations as to whether the omission is in compliance with the requirements of the Protocol or not.

***International guidance for practitioners:*** In at least one surveyed State, practitioners pointed to the highly political nature of the migrant smuggling crime and the need for individual countries to craft their own national response that addresses both the particularities of the situation experienced by that country as well as the domestic policy choices. In that sense, international guidance may hinder, rather than help. However, most practitioners from most States took a different view; properly crafted guidance that respects differing national approaches while promoting broad commonality between countries on how migrant smuggling is understood and responded to could be extremely useful to those involved in investigating, prosecuting and adjudicating such crimes. It was repeatedly noted that States facing mass irregular arrivals are facing what sometimes appear to be insurmountable obstacles. At best, current approaches target lower level offenders while allowing high-level organizers to continue operating with impunity. Guidance may help to address the many obstacles that such cases present.

However, there was little agreement on the form or substantive content of guidance for practitioners. For some States, it appears that national level guidance (for example on situations that should be prosecuted as smuggling and those that could be prosecuted under other criminal provisions, or indeed made subject to administrative sanction) could make a useful contribution. Other practitioners noted the importance of consistency in national approaches as a reason for considering

international guidance. It was further pointed out that such guidance could also provide the framework within which more detailed and tailored national guidance could be developed. A number of practitioners expressed concern that guidance – whether national or international – could operate to restrict the flexibility that is critical to ensuring an effective criminal justice response to migrant smuggling. In relation to the possible content of any such guidance, suggestions generally correlated with – and reflected a strong preference for – the national approach. It was nevertheless possible to extract a number of common themes that provided the basis for discussion at the Expert Group Meeting. These are reproduced at Annex 1, below.

## PART 5. CONCLUSIONS

*The work undertaken for this Issue Paper, including that of participants at the Expert Group Meeting, supports the following conclusions that relate to the international legal definition of smuggling of migrants in general and the element of the offence “financial or other material benefit” in particular.*

### **The purpose of the Smuggling of Migrants Protocol**

Interpretation and application of the Smuggling of Migrants Protocol should be informed by the stated purpose of that instrument, which is to prevent and combat the smuggling of migrants as defined by Article 3(a), as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

### **The scope of the Smuggling of Migrants Protocol in relation to “financial or other material benefit”**

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

### **Exclusion in cases of those acting without any intention to benefit**

Irrespective of whether or not “financial or other material benefit” is included within national law as an element of smuggling of migrant 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.

### **Recognition of the role of financial or other material benefit in migrant smuggling**

Irrespective of whether or not “financial or other material benefit” is included within national law as an element of smuggling of migrant offences, implementation of the overall criminal justice framework around migrant smuggling should reflect the reality that this is a crime closely connected to “financial or other material benefit” – without adding an unnecessary burden on the prosecution.

### **Importance of national-level guidance**

States should provide guidance on what is included in concepts such as “humanitarian exemption”, where this is relevant. Such guidance should have regard to the purposes and principles of the Protocol.

Where necessary, guidance to criminal justice practitioners on the scope of concepts such as “financial or other material benefit” and “profit”, when there are included in the national legal framework around smuggling of migrants, should have regard to the spirit of the Organized Crime Convention and the Smuggling of Migrants Protocol, including their stated purposes.



## ANNEX 1: Issues for consideration and discussion

The following is a list of questions and issues for consideration that have been raised by the survey and the analysis and were subsequently offered for discussion during the Expert Group Meeting.

### Migrant smuggling as a transnational organized crime perpetrated for financial or other material benefit

#### Questions for consideration:

- According to the *Legislative Guide*, the Protocol aims to “prevent and combat the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration”.<sup>70</sup> *Is this goal sufficiently protected / upheld in the absence of the element “financial or material benefit” in the definition?*
- In the national law of many of the States surveyed, the FoMB element is not included as an element of the smuggling offence. *Does the absence of the FoMB element in national legislative approaches to smuggling of migrants potentially broaden or dilute what is considered “serious” crime, and if so, to what effect? Where there is no definition of migrant smuggling provided in national legislation, does the definition in the Smuggling of Migrants Protocol offer interpretative guidance?*
- The Smuggling of Migrants Protocol sets minimum standards and States are entitled to adopt stricter or more severe measures than those provided for.<sup>71</sup> *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?*

#### Draft principles for discussion:

- Profit / gain / benefit is central to how the crime of smuggling of migrants must be understood and responded to.
- Irrespective of the national approach to FoMB, it is essential for criminal justice agencies to “follow the money”: financial gain is often a strong indicator of organized smuggling and financial investigation is critical to the targeting of organized and high-level offenders.

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<sup>70</sup> *Legislative Guide*, p.349, para. 54.

<sup>71</sup> Organized Crime Convention, article 34(3).

- International legal cooperation, including in relation to financial investigations and asset recovery, is essential to an effective criminal justice response to smuggling of migrants: there is an urgent need to build the political will and technical capacity necessary to enable such cooperation.
- In the absence of a national definition of “smuggling of migrants”, the definition provided in Article 3 of the Smuggling of Migrants Protocol can offer interpretative guidance.

### Exclusion of those acting solely for humanitarian or familial purposes from migrant smuggling offences

#### Questions for consideration:

- According to the *Travaux Préparatoires*, the Protocol did not intend to criminalize activities of close family members or support groups such as religious or non-governmental organizations who do not intend to financially or materially benefit from those activities. However, the legal framework in some States would permit such actions to be criminalized. *Under what circumstances, if any, can such approaches be considered to comply with the Smuggling of Migrants Protocol?*
- *Do smuggling offences that do not require financial or material benefit (or do not establish such a benefit) in order to achieve a smuggling prosecution still fall within the scope of the Smuggling of Migrants Protocol from the perspective of international law and policy? To what extent?*
- One of the purposes of sanctioning migrant smuggling and other offences is to deter future acts of smuggling. *To what extent should the goal (and the reality) of deterrence impact on criminal justice decisions and priorities? For instance, should prosecutions that are seen to offer a deterrent effect take priority over those that can have little or no deterrent effect (for instance, in the case of persons who smuggle their own families out of need, or smuggle others during the one instance of their own smuggling journey?)*

#### Draft principles for discussion:

- National laws / approaches to migrant smuggling should ensure that religious, civil society and other non-state actors acting solely for humanitarian purposes are excluded from the application of smuggling offences, while also ensuring that criminal smugglers cannot use such exclusions as a loophole to escape justice.
- The legal and regulatory framework around migrant smuggling and irregular migration should support and encourage the safe involvement of smuggled migrants in the prosecution of their smugglers.

- States are required to ensure compliance with all existing international legal obligations, including the obligation of *non-refoulement* in application of their legal and regulatory framework around migrant smuggling.
- In determining how to prioritize a given smuggling incident, consideration should be given to the deterrent impact of sanctioning the activity in question, and its linkages with organised crime.

### “Financial or other material benefit” as the purpose element of the migrant smuggling offence

#### Questions for consideration:

- The concept of FoMB in the Protocol’s definition of migrant smuggling constitutes *the mens rea* element of the smuggling offence. *What is the effect of omitting the FoMB element, and of replacing it with alternative mens rea (such as knowledge of the illegality of a migrant’s border crossing)? Do migrant smuggling offences containing alternative elements that were not envisaged by the drafters of the Protocol, still fall within its scope? What is the effect of not explicitly providing for intent to benefit?*
- *Intention to benefit*, rather than actual or realized benefit is the relevant consideration in the Smuggling of Migrants Protocol. *How does this impact on the evidence required to establish the migrant smuggling offence? How does proof of intention compare to alternative mental elements provided domestic legislation?*
- Financial or other material benefit is to be construed broadly – in order to capture benefits such as free passage in exchange for participating in a smuggling venture. *What guidance does the Protocol offer in determining the scope of what can and cannot be captured (e.g. “benefits” that could be considered to be outside the concept as it is used in the Protocol)? And what guidance does the Protocol offer in terms of determining the relevance of different benefits (e.g. in relation to sentencing)?*

#### Draft principles for discussion:

- Where the establishment of a profit / benefit motive is required (either for a base offence or in relation to aggravation), legislation or guidance should be offered on what is captured within this element and what is not captured.
- Where the establishment of a profit / benefit motive is required (either for a base offence or in relation to aggravation), legislation or guidance should further affirm that proof be required in relation to *intent to benefit*, and not actual benefit.

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

## ANNEX 2: Survey Instrument

The “financial or other material benefit” element of the international definition of migrant smuggling in the Smuggling of Migrants Protocol supplementing the UNTOC

### SURVEY INSTRUMENT

Country:	
Interviewees:	
Date / Time / Venue:	

#### PART I: GENERAL

1. Briefly, what is the nature of your work in addressing smuggling of migrants?

#### PART II: LEGISLATIVE APPROACH

2. What is the definition of migrant smuggling in your national law (elements of the offence)?

- *What are the constituent elements?*

3. What is your view of the definition of smuggling of migrants in national legislation?

- *Do you think it is too broad / not broad enough?*
- *Do you think it is a useful tool to prosecute smuggling of migrants?*
- *What are the main problems, if any, with the definition?*
- *Are there specific evidentiary concerns associated with the definition?*
- *Is prosecuting smuggling of migrants difficult? Why?*
- *Do you think there is scope to amend the national legislation in accordance with obligations under the Smuggling of Migrants Protocol?*

4. What role does the “financial or other material benefit” element as defined in Article 3 play in your domestic criminal offences, if any?

- *If the “financial or other material benefit” element MUST be proven:*
- *Is financial benefit defined or quantified? E.g. is a threshold set? Must it amount to profit?*
- *If a threshold of benefit is set, is it objective (fixed) or subjective (e.g. in relation to the smuggler’s situation)?*
- *If the “financial or other material benefit” element must NOT be proven:*
- *What is the mens rea of the offence?*
- *What are the reasons behind the deviation from the Protocol definition? E.g. historical / political?*
- *Was there any significant debate / discussion that lead to the deviation? Continuing debate?*

**5. Do you believe that the presence or absence of the “financial or other material benefit” element in the smuggling definition influences how smuggling is understood? Should it?**

- *Does the presence or absence of the element in your legislation help or hinder your work?*
- *How is this relevant to the understanding of investigators responsible for identifying it?*
- *How is it relevant to the understanding of lawyers defending or prosecuting alleged smugglers?*

**6. Does your system of law (legislation and case law) include reference to the “financial or other material benefit” element in crimes *other* than smuggling?**

- *For instance, is it included in the definition of organized crime?*

### **PART III: “FINANCIAL OR MATERIAL BENEFIT” IN PRACTICE**

**7. Is it possible / feasible to pursue a prosecution for smuggling when the smuggler derives no financial or other material benefit? Is there any policy position on this?**

- *If so, what constituent elements must be established?*
- *If not, how is financial or material benefit established?*

**8. Is there any case law available of prosecutions for smuggling offences in which there was no financial or material benefit? Can you provide it?**

- *What was the response to this outcome?*
- *What was your view of this decision?*

**9. Where the financial or other material benefit element must be established, how is it proven?**

- *Is intent to benefit adequate, or must there be actual financial or material benefit?*
- *How is intent established? Can it be established in the absence of actual benefit?*
- *How much or how little financial or other material benefit is adequate to establish the offence?*

**10. What role does financial or other material benefit play any role in mitigating or aggravating sentences?**

- *How is this proven where FoMB has not been investigated / established as an element of the offence?*

**11. How relevant is the financial or material benefit element in determining either the existence of smuggling or the gravity of the offence, or setting criminal justice priorities? Examples?**

- *How relevant is financial or material benefit in the identification of smuggling offence?*

- *Is the presence of financial or material benefit relevant in setting criminal justice priorities?*

**12. Is the presence / absence of the “financial or material benefit” element ever a barrier to international legal cooperation (mutual legal assistance or extradition)?**

- *For instance, can dual criminality be fulfilled where the other country takes a different approach?*
- *Is MLA / extradition possible in migrant smuggling investigations / prosecutions that do not involve organized crime?*
- *Do you have case examples?*

**13. Is there any correlation between the presence or absence of “financial or material benefit” and the treatment of smuggled migrants?**

- *Is a smuggled migrant who pays smuggling fees treated any differently than a one who does not? (e.g. criminalization, detention, protection)*

## **PART IV: HYPOTHETICALS**

*Consider the following hypotheticals and discuss the role that “financial or material benefit” would play in each of them.*

**14. A man is smuggled into the country and later arranges passage for his family.**

- *Would he and others involved be prosecuted for smuggling?*

**15. A fishing vessel (flagged to State A) rescues a group of migrants in distress. The crew give the migrants food and water and decide to drop them off at the closest port in State A.**

- *Would the crew be liable for prosecution for smuggling?*

**16. A man is being persecuted in Country A and is in fear for his life. He meets a man who makes a living by smuggling people into Country B. The man tells the smuggler that he needs to leave the country, but cannot afford smuggling fees. The smuggler takes pity on him and smuggles him into Country B for free.**

- *What offences, if any, have been committed here under your law?*
- *What would need to be established in order to establish this as a crime of migrant smuggling?*

**17. A man living in Country A wants a wife to cook and clean for him, have sex with him, and bear his children. He pays a marriage broker in his country of birth to find someone who wants to marry him and facilitate her migration. False information is provided on the immigration application, stating that the couple has known each other for some time and have an equal, supportive, loving, and established relationship.**

- *What offences, if any, have been committed here under your law?*
- *Would the benefit the man receives from his wife be considered “financial or other material benefit”?*

- *Do you think this activity should or shouldn't be captured by migrant smuggling legislation?*

**18. A poor young man in Country A needs to find work and hears there are opportunities in Country B. His family finds a smuggler, who offers to waive payment of smuggling fees in exchange for the steering the smuggling vessel into Country B.**

- *What offences, if any, have been committed here under your law?*
- *Would the benefit the smuggler receives be considered "financial or other material benefit"?*
- *Would the answer change, if rather than smuggling drugs, the man's smuggling fees were waived on the condition that he carry drugs into the Country?*

**19. A migrant incurs a transportation debt to be smuggled into another country. He is told that he can pay off the debt by working for the smuggler in the country of destination.**

- *What offences, if any, have been committed here under your law?*
- *Would the labour received by the smuggler be considered "financial or other material benefit"?*
- *On what conditions with this scenario become one of trafficking? Would the nature of the work be relevant here?*

**20. A young woman agrees to provide sexual services for the smuggler *en route*, in lieu of paying smuggling fees, until the point that he delivers her safely to the destination country.**

- *What offences, if any, have been committed here under your law?*
- *Would the sexual services received by the smuggler be considered "financial or other material benefit"?*
- *On what conditions with this scenario be considered one of trafficking?*

## **PART V: FINAL QUESTIONS: GUIDANCE FOR PRACTITIONERS**

**21. What guidance, if any, do you think practitioners should be given on the role of "financial or other material benefit" in understanding smuggling of migrants?**

- *What specific guidance should they be offered on "financial" benefit?*
- *What specific guidance should they be offered on "other material benefit"?*

**22. Are there any other matters relevant to the study that you would like to address?**

\* \* \*

### **ANNEX 3: List of persons consulted, including expert group meeting participants**

Mr. Abdul Rahim bin Abdullah (Malaysia)  
Ms. Aznee Salmie binti Ahmad (Malaysia)  
Ms. Sarah Algner-Abendroth (Germany)  
Mr. Simon Allen (Australia)  
Ms. Malika Amnay (Morocco)  
Mr. Datuk Muhd Khair Razman bin Mohamed Annuar (Malaysia)  
Ms. Simona Ardovino (European Commission)  
Mr. Yudo P. Asruchin (Indonesia)  
Ms. Natalia Aueb-Charles (Australia)  
Mr. Afzainizam bin Abdul Aziz (Malaysia)  
Mr. Rami Badawy (United States of America)  
Mr. Thomas Basioukas (Greece)  
Ms. Susan Benda (United States of America)  
Mr. Paolo Bombaci (Italy)  
Mr. Andrea Bonomo (Italy)  
Mr. Gregory J. Borgstede (United States of America)  
Mr. Tim Brotherton (United Kingdom)  
Mr. Tom Burrows (United States of America)  
Ms. Vanessa Calva (Mexico)  
Mr. Alessandro Carrozzo (Italy)  
Ms. Debra Chan (United Kingdom)  
Mr. Taha Chebbi (Tunisia)  
Mr. Nikolaos Chatzinikolaou (Greece)  
Mr. Jimrey AK Hillary Chukan (Malaysia)  
Mr. Andhika Chrisnayudhanto (Indonesia)  
Mr. Salvatore Ciloni (Italy)  
Ms. Stephanie Macías Cuevas (Mexico)  
Mr. Yvon Dandurand (International Centre for Criminal Law Reform and Criminal Justice Policy)  
Ms. Chloe Davidson (Australia)  
Ms. Amanda Davis (Australia)  
Ms. Anita Dewayani (Indonesia)  
Mr. Alessandro Drago (Italy)  
Mr. Abdul Rasyiddi bin Ab. Drahman (Malaysia)  
Mr. Mourad El Alami (Morocco)  
Mr. Achraf El Malki (Morocco)  
Mr. Travis Emge (United States of America)  
Ms. Denise Fairbrother (United Kingdom)  
Mr. Arne Feickhert (Germany)  
Mr. Calogero Ferrara (Italy)  
Mr. Alfio Gabriele Fragalà (Italy)  
Mr. Said Ftana (Morocco)  
Mr. José Manuel García García (Mexico)  
Mr. Joel Hernández García (Mexico)

Mr. Jesús Serrato García (Mexico)  
Mr. Neal Gardiner (United Kingdom)  
Ms. Norma Aracelí Díaz Godínez (Mexico)  
Ms. Mireya Gomez (Mexico)  
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Ms. Kathryn Haigh (Australia)  
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Ms. Nurhafizah binti Ismail (Malaysia)  
Mr. Frank Jannasch (Germany)  
Ms. Patricia Johnston (Canada)  
Mr. Andreas Karwath (Germany)  
Mr. Martin Keicher (Germany)  
Ms. Fatimah Fadhilah binti Khiruddin (Malaysia)  
Mr. Joe Koehler (United States of America)  
Mr. S J Kumara (Sri Lanka)  
Mr. Puja Laksana (Indonesia)  
Mr. Peter LaPrairie (Canada)  
Mr. Adnen Lassoued (Tunisia)  
Ms. Petra Leister (Germany)  
Mr. Lotfi Lamloum (Tunisia)  
Mr. Anuar bin Malek (Malaysia)  
Mr. Faouzi Masmoudi (Tunisia)  
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Mr. Francesco Mazzotta (Italy)  
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Mr. Kevin Geh Kien Meng (Malaysia)  
Mr. Duncan Moass (United Kingdom)  
Mr. Carmine Mosca (Italy)  
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Mr. Arie Poluzzi (Indonesia)  
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Mr. Chandra Sittangany (Indonesia)  
Mr. Adriano Silvestri (European Union Agency for Fundamental Rights)  
Mr. Ralph Skilton (Canada)  
Ms. Kadri Soova (Platform for International Cooperation on Undocumented Migrants)  
Mr. Rahmat Sori (Indonesia)  
Mr. Ben Spittles (United Kingdom)  
Mr. Andrea Albert Stefanus (Indonesia)  
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Ms. Lisa West (Australia)  
Ms. Nayomi Wickramasekera (Sri Lanka)  
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Ms. Syuhaida binti Abdul Wahab Zen (Malaysia)  
Ms. Miriam Heredia Zertuche (Mexico)  
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